

The Federal Government, the Opioid Crisis, the False Claims Act and You

Here's some timely advice for this hot-button topic.



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The Department of Justice (“DOJ”) recently created the PIL Task Force. For those of you who are unfamiliar with the pantheon of federal acronyms, it stands for the Prescription Interdiction and Litigation Task Force. One of its targets is you, the individual prescriber!

Let's backtrack for a minute. The DOJ has stated that up to 80% of heroin addicts started with prescription opioids. As podiatrists, some of those opioids are prescribed by us. Most of the prescriptions are post-operative, but some are for chronic pedal pain.

The taskforce makes full use of software that tracks unusual prescription patterns. Yes, we are back to that bell-shaped curve. Your prac-

tice can be prescribing opioids in a perfectly legitimate fashion and you can still be investigated by the DOJ if your prescribing habits fall outside that bell-shaped curve.

after healthcare providers. Its roots go back to the American Civil War. Various producers of equipment and uniforms were defrauding the Federal Government. Troops were receiving

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As fraud is involved in unnecessary opioid prescriptions, the False Claims Act is a uniquely good fit to go after the “bad guys”. Also known as the FCA (yes, yet another acronym), this tool that the DOA loves to use is uniquely effective in going

guns that did not properly shoot and clothes that fell apart upon use. The government prosecuted those who were committing fraud against it.

Fast forward to today. Every time a provider submits any form or

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report to a federally funded program (read Medicare and Tricare for starters), the provider is subject to the False Claims Act. The FCA has two tracks, the civil track and the criminal track. Both are very serious, but only the criminal track involves potentially winding up behind bars.

It is a serious mistake to think that the civil track means only that you must pay back money. Yes, money penalties in the civil track are usually two times the amount of defrauded money. Remember, this is a federal case, so state laws limiting a lookback to two years or so do not apply. Federal fraud has a five-year statute of limitations. Additionally, if the government decides you are perpetrating a “continuous

New Programs

Fraud and Abuse Detection Unit—a data analytics program to identify evidence of overprescribing and opioid-related healthcare fraud—DOJ has engaged in extensive enforcement activity over the past year, including prosecutions against several individuals (including physicians). The creation of the PIL Task Force further reinforces the importance of organizations ensuring that their compliance programs’ risk assessment, auditing, and monitoring functions take into account the organizations’ opioid prescription issues and practices. •

The law is such that if you should have known your opioid prescriptions were predicated on fraud, that is enough! Where do you begin to protect yourself? Have an up-to-date compliance plan. Use it! That is al-

up-to-date, or is it merely a “copy and paste” version taken from the initial visit?

Chart entries should be like snowflakes—all different. They must reflect the unique quality of that visit. Why did the patient come to your office that day? Has the prescription of opioids allowed the patient to function in some way that she/he couldn’t before the prescription? Has a lower dose been tried? Have alternate treatments been attempted? Were non-opioid analgesics used? How many blocks can the patient walk with the opioid prescription as compared

to without? This is the level that your chart must cover. This will also help you defend podiatric malpractice litigation as well as private insurance audits. It will also assist in defending state licensing board investigations.

If you have taken away nothing else from this article, please make note that:

1) You must improve the level of your medical records; that means the quality of the content, not the length of your note.

2) Involve an experienced health law attorney early in the process. **PM**

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criminal enterprise”, they can go back much further. A podiatrist who violates the FCA can face civil penalties of between \$10,957 and \$21,916 per violation!

If the DOJ determines that you have, say, 2,000 fraudulent claims, by extrapolation of a percentage of your claims in the last five years, the federal government will also claim that you owe the amount that was fraudulently billed times two or three. The numbers quickly become unpayable. Because of this, most of these cases tend to be settled. Most, if not all settlements, involve admissions of wrongdoing. This may affect your participation in various government programs and private insurance companies. Be prepared for a state licensing board investigation.

How does one defend these allegations? For starters, proving that you had no intent to defraud anyone. That is not as easy as it sounds.

most always enough to get you into the civil column of the FCA, away from criminal prosecution. Of course, if you are having your records and bills self-audited on a regular basis, you are much less likely to run afoul of the FCA.

Best Defense

Your single best defense is the medical record you keep for all your patients. Saying you do not have the time to maintain an accurate and complete chart on your patient is not an acceptable defense. Your chart should state why you are prescribing the opioid in the way you are prescribing the opioid for that patient. Were you trying to wean your patient? Did you refer the patient to a pain control clinic? Did you start a course of physical therapy? Did you perform tests to determine the etiology of the pain? Is your patient history accurate and



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