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After Self-Disclosure, Hospital Settles Case Over Provider-Based Billing

By Nina Youngstrom

Provider-based billing is at the heart of a false claims settlement with a Texas hospital, underscoring the importance of reporting the accurate modifier—PO or PN—especially now that CMS has a window into their use with a new edit.

Horizon Medical Center of Denton has agreed to pay $14.197 million to settle allegations it violated the False Claims Act (FCA) in connection with Medicare overpayments for outpatient surgeries at three off-campus provider-based departments (PBDs) and physician financial arrangements that didn't comply with the Stark Law, the U.S. Attorney's Office for the Northern District of Texas said Nov. 4.[1] The settlement stemmed from Horizon's self-disclosure to the U.S. attorney's office, which gave the hospital a break under the U.S. Department of Justice's (DOJ) voluntary self-disclosure policy.

According to the settlement, Horizon, a long-term care hospital, didn't report modifier PN or location address on Medicare claims for outpatient surgeries performed at three non-excepted PBDs between Dec. 27, 2019, and Feb. 9, 2024.[2] Because three of Horizon's surgery centers weren't PBDs before Nov. 2, 2015, when Congress changed the billing rules in Sec. 603 of the Bipartisan Budget Act of 2015, they're only entitled to a reduced fee under the outpatient prospective payment system (OPPS). Off-campus, non-excepted PBDs (that aren't dedicated emergency departments) must report services with modifier PN.

The settlement underscores the risks hospitals face with PBD compliance, said attorney Larry Vernaglia, with Foley & Lardner LLP. For example, PBDs that relocated or expanded and lost their eligibility for 100% OPPS billing are vulnerable if they put PO modifiers on claims, although Vernaglia thinks CMS has gone too far with its restrictions on relocation.

The benefits of self-disclosure also are cited in the settlement. For example, the hospital was transparent about the dollar impact of failing to use the PN modifier, said attorney Anthony Burba, a former prosecutor in the DOJ Criminal Division's fraud unit. "It continues to reinforce that DOJ considers this to be an important activity for compliance programs to engage in," said Burba, with Barnes & Thornburg LLP. But he said DOJ missed an opportunity to hammer home the benefits of self-disclosure by not revealing the delta between payments for services with and without the PN modifier. "What the DOJ civil division believes is a generous reduction may not be felt that way by the company itself."

CMS Edit May Surface PBD Billing Errors

In March 2024, Horizon self-disclosed to DOJ that it didn't put the PN modifier and location address on Medicare claims for surgery to convey that services were performed at a non-excepted off-campus PBDs, the settlement states. Claims with the PN modifier generate 40% of the OPPS payment rate, while claims with the PO modifier for services provided by excepted PBDs trigger the full OPPS payment rate.

Medicare uses validation edits to help ensure they pay off-campus PBDs accurately.[3] The edits reject Medicare claims for services provided at off-campus PBDs if their addresses on claims aren't a perfect match with their addresses on 855A enrollment forms or if hospitals with multiple service locations don't report the correct place of service. CMS updated information about automated oversight of PBDs and practice addresses in a Nov. 8 Medicare transmittal (12955).[4]

Horizon also self-disclosed problematic physician agreements. They were "hospital Department Management Agreements at each of the Surgery Centers by which Horizon contracted with certain third-party management companies that were affiliated with physicians performing procedures at the Surgery Centers" and operating lease agreements at two of the surgery centers by which Horizon contracted for leasing certain equipment from companies owned directly or indirectly by a physician doing procedures at the surgery centers, according to the settlement.

The agreements allegedly didn't satisfy a Stark exception. Horizon denied FCA liability.

DOJ credited Horizon under its FCA guidelines for taking into account disclosure, cooperation and remediation. For example, Horizon gave DOJ an analysis from an outside expert on how the missing PN modifier affected payers financially. "Subsequently, Horizon provided detailed information from this independent third-party expert to the Department of Justice—including extensive backup data—and permitted individuals from the Department of Justice to question such expert at length," according to the settlement. Also, until the self-disclosure, the government was unaware of the conduct around PN modifier and physician agreements.

Relocation of PBDs May Be Ripe for Challenge

Although Vernaglia doesn't see "wholesale failure" to include modifier PN, PBDs struggle with relocation. When hospitals relocate PBDs, they lose the pre-Nov. 2, 2015, protection of Sec. 603. But Vernaglia thinks CMS went too far in interpreting the relocation aspect of Sec. 603. "It's ripe for challenge" under *Loper Bright Enterprises v. Raimondo*, the June decision from the U.S. Supreme Court overturning Chevron deference. "There's nothing in the statute that gave them the authority to impose site neutrality for services that were in facilities that predated the 2015 deadline," Vernaglia contends. "And the relocation and expansion prohibitions are similarly infirmed under the Loper Bright holding." In *Loper Bright*, the Supreme Court ruled that "The Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous."

The rewards of self-disclosure generally depend on how forthcoming and diligent the disclosing organization is, Burba said. It seems like Horizon provided "a pretty extraordinary level of information and transparency," he noted. But it would be helpful to know how much the hospital gained through self-disclosure aside from the FCA release. While the DOJ Criminal Division identified penalty reductions for self-disclosure in its corporate enforcement policy, the civil division doesn't spell them out, he noted.

Burba said it would be easier to convince clients to self-disclose if he could say something like this about his previous experiences: "I have a client who did X, it would have resulted in a False Claims Act settlement of Y and because of a self-disclosure, they got damages of Z." Those metrics help clients better grasp the advantages of self-disclosure, but the civil division doesn't "highlight the amount of cooperation credit granted in the press release and provides no guidance on what cooperation credit looks like in its self-disclosure guidance," Burba said.

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1 U.S. Department of Justice, U.S. Attorney's Office for the District of Northern Texas, "North Texas Medical Center Pays $14.2 Million to Resolve Potential False Claims Act Liability for Self-Reported Violations of Medicare Regs, Stark Law," news release, November 4, 2024, https://bit.ly/3YPFEwR.
2 Settlement agreement, United States v. Corinth Investor Holdings LLC, https://bit.ly/48RTXFL.
3 Centers for Medicare & Medicaid Services, "Activation of Validation Edits for Providers with Multiple Service Locations," MLN Matters Number: SE19007 Revised, December 7, 2023, https://go.cms.gov/3uZOsoD.
4 Centers for Medicare & Medicaid Services, "Implementation CR - To Send Provider-Based Practice Location Types to the Fiscal Intermediary Shared System (FISS) on Provider Enrollment Chain & Ownership System (PECOS) Extract Files and for FISS to Process so Medicare Administrative Contractors (MACs) Do Not Have to Check Manually for These Locations," Pub. 100-20 One-Time Notification, Change Request 13,783, November 8, 2024, https://bit.ly/3UM1no3.