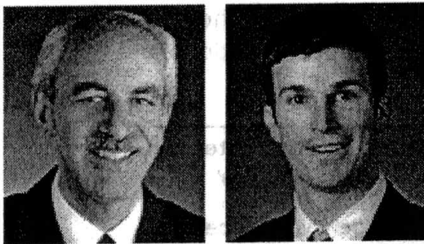
BNA's Health Law Reporter™

Source: Health Law Reporter: News Archive > 2011 > 01/13/2011 > BNA Insights > Fraud & Abuse: Recovery Audit Contractors as Whistleblowers: How Medicare and Medicaid Auditors Can Receive a "Double Kickback" From the Government as Qui Tam Plaintiffs

20 HLR 82

Fraud & Abuse

Recovery Audit Contractors as Whistleblowers: How Medicare and Medicaid Auditors Can Receive a "Double Kickback" From the Government as Qui Tam Plaintiffs



By Joel R. Levin and Charles W. (Chip) Mulaney

Joel R. Levin is a partner in the Chicago office of Perkins Coie, and a member of the firm's Investigations & White Collar Defense group. Charles W. (Chip) Mulaney is an associate in the firm's the product liability and commercial litigation practice groups.

Health care providers have been hit with a staggering number of False Claims Act (FCA) actions based on allegations of fraudulent Medicare and Medicaid billing. [1] In recent years Congress has been expanding the FCA, which allows private plaintiffs to bring "qui tam" suits on behalf of the government and share in the recovery. At the same time, health care providers have seen an expansion in the government's use of private contractors to scrutinize Medicare and Medicaid billing records. Perhaps the most widely known of these are Recovery Audit Contractors (RACs). RACs are private companies the government hires to perform "payment recapture audits" of providers to recoup incorrect government payments on a contingency fee basis. Because of their contingency fee incentive, RACs have an obvious bias towards viewing billing records as incorrect.

[1] In 2010, the federal government recovered over $2.5 billion from health care fraud actions in FCA cases. Press Release, *Department of Justice Recovers $3 Billion in False Claims Cases in Fiscal Year 2010* (Nov. 22, 2010).

The FCA gives RAC employees a reason not only to view billings as incorrect, but also fraudulent. Recent legislation has expanded FCA liability to providers who knowingly retain Medicare or Medicaid overpayments for more than 60 days. Thus RAC employees can "double dip" on their efforts by filing qui tam actions based on overpayments they uncover in the course of an audit. Although it is doubtful Congress intended to give RAC employees this financial self-interest when creating the RAC program, it is nevertheless permitted by FCA case law. The heightened scrutiny imposed by RACs and other government contractors, combined with the lower bar on FCA claims, makes it essential that Medicare and Medicaid participants maintain effective compliance and internal reporting programs to monitor incorrect payments.

How Recovery Audit Contractors Work

RACs are selected by the Centers for Medicare and Medicaid Services (CMS) to audit health care providers in designated regions of the country. RACs typically perform two levels of reviews. "Automated reviews" involve data analysis programs that detect coding errors or patterns in Medicare billings. RAC employees also conduct "complex reviews" by manually reviewing billings deemed suspect. [2] To undertake complex reviews, an RAC can demand medical records from the providers,

and if the RAC does not receive the requested records within forty-five days, it is authorized to make an overpayment determination with respect to the underlying claim. [3] RACs most often identify three types of improper payments: non-covered services (including services deemed not medically necessary), incorrectly coded services, and duplicate services. [4]

---

[2] Andrew Wachler, *et. al.*, *RAC to the Future: What Can Medicare Providers and Suppliers Expect from Recovery Audit Contractors?*, The Health Lawyer, Vol. 21, No. 2, at 3-4 (Dec. 2008).

[3] Andrew B. Wachler, Abby Pendleton, and Jessica Gustafson, *Recovery Audit Contractors and Medicare Audits: What Can Hospitals and Health Systems Expect as the RAC Program Expands Nationwide?*, AHLA Member Briefing at 6 (January 2009).

[4] *Id.* at 5.

Although other private contractors are utilized to administer Medicare and Medicaid programs and monitor fraud, [5] RACs are the only contractors tasked with collecting overpayments on a contingency fee basis. [6] Thus, they have an incentive to identify billings as incorrect even where there is room for reasonable disagreement. [7] Health care providers often disagree with RAC determinations and appeal RAC overpayment decisions. [8]

---

[5] Other private contractors include Medicare Administrative Contractors, Medicaid Integrity Contractors (MICs), Quality Improvement Organizations, and Zone Program Integrity Contractors (ZPICs). ZPICs perform benefit integrity functions which include fraud detection. Although these auditors do not have the same "double contingency fee incentive" as RACs, they too could serve as qui tam plaintiffs for the reasons discussed in this article.

[6] Of the four Medicare RACs currently operating, the average contingency fee rate is 10.86%. Department of Health and Human Services, Medicaid Program; Recovery Audit Contractors, Proposed Rule, CMS-6034-P at 15.

[7] In a 2007 poll, less than 3/4 of Medicare provider respondents stated that they believed that RACs were correctly applying Medicare policies while conducting reviews. Wachler, *et. al.*, *RAC to the Future* at 4

[8] James Carroll, *CMS Update Indicates High Provider Success Rate for Appealing Denials*, Health Leaders Media (June 25, 2010).

If an RAC auditor suspects fraudulent billing in the course of an audit, they can make a referral to federal authorities. RACs receive fraud detection training and are required to report to state and federal enforcement agencies whenever they have "reasonable grounds to believe that fraud or criminal activity has occurred." [9] CMS requires RACs to receive mandatory training on the identification and referral of fraud and has set up a fraud referral tracking system. [10] As a result of a RAC referral, the U.S. Attorney's Office for the Western District of New York recently began an investigation of at least 24 health systems. [11] Like the Medicare RAC program, the Medicaid RACs are required to make referrals to law enforcement.

---

[9] 75 Fed. Reg. 69,037 (Nov. 10, 2010).

[10] Daniel R. Levinson, Department of Health and Human Services Office of Inspector General, *Recovery Audit Contractors' Fraud Referrals*, OEI-03-09-00130 (February 2010).

[11] *Increased False Claims Act (FCA) Exposure May Result from Expanded Use of Billing and Coding Audits*, Health Capital Topics, Vol. 3, Issue 4 (April 2010).

History of the Program

The RAC program was first authorized by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003. A "demonstration" program was implemented in 2005 in California, Florida, and New York, the three states with the highest Medicare expenditures. Over the course of the three-year demonstration, RACs collected over $1.03 billion in improper payouts, with a net savings of $693.6 million for Medicare. [12]

---

[12] Wachler, *et al.*, *supra* note 2 at 2.

The Medicare RAC program became permanent under Section 302 of the Tax Relief and Health Care Act of 2006, which required the expansion of the program to all 50 states by 2010. [13] In 2008, CMS chose four RAC vendors for the permanent program and divided their oversight into four regions of the country. [14] In 2009 alone, these contractors identified $54 billion in overpayments. [15] In March of 2010, President Obama issued a presidential memorandum directing the use of RACs at a number of federal agencies, including HHS. Just two weeks later, Obama signed the Patient Protection and Affordable Care Act (PPACA), which expanded the RAC program to Medicare Parts C and D as well as to Medicaid. [16] PPACA requires each state Medicaid program to contract with auditors by December 31, 2010, and to fully implement their systems by April 1, 2011.

---

[13] The Tax Relief and Health Care Act of 2006, P.L. 109-432 §302(a), Social Security Act §1893(h).

[14] Those contractors announced in 2008 Diversified Collection Services Inc. of Livermore, California, CGI Technologies and Solutions Inc. of Fairfax, VA, Connolly Consulting Associates Inc. of Wilton, CT, and Health DataInsights of Las Vegas, Nevada.

[15] Anne Sharamitaro and Rachel Seiler, *Increased False Claims Act (FCA) Exposure Investigation May Result from Expanded Use of Billing and Coding Audits*, Health Care Topics, Vol. 3, Issue 4 (April 2010).

[16] 42 U.S.C. §§1396a(a)(42)(B) and 1395ddd(h).

Opening the Door to Qui Tam Suits by RAC Employees

While the federal government was expanding its use of RACs, it was also expanding the scope of the FCA. The Fraud Enforcement Recovery Act of 2009 amended the FCA so that the knowing retention of an overpayment may be a basis for liability under the statute, regardless of the cause of the overpayment. [17] PPACA further clarifies that Medicare and Medicaid participants have the obligation to report and repay any overpayment within 60 days after the overpayment is identified or the date the corresponding cost report is due, whichever is later. [18] If they fail to do so, providers can face liability under the FCA.

---

[17] 31 U.S.C. §3729(b)(3).

[18] Pub. L. No. 111-148, §6402(d).

Because the very purpose of payment recapture audits is to detect overpayment, this amendment makes it likely that RACs will identify billing practices that later become the basis for allegations in a qui tam action. RACs regularly communicate with providers about bills they review, so those communications may be relied on to allege a "knowing" retention of an overpayment. Thus, RACs are not only motivated to identify payments as incorrectly coded or not medically necessary to earn a contingency fee on the overpayment recovery, but they are also have a personal incentive to view overpayments as fraudulent in the hope of recovering an award in a qui tam suit. The FCA provides for treble damages, statutory fines, and an award up to 30% of the recovery, so an auditor can get a significant "bonus" by filing a qui tam suit.

Though it might appear to be a conflict of interest to allow auditors to profit from their work through qui tam claims, the law does not preclude them from doing so. The FCA states that "any person" may bring a qui tam action. Although the typical whistleblower is an employee of the entity perpetrating the alleged fraud, courts have ruled that government employees may serve as qui tam plaintiffs, even if they already had a job duty to report the fraud at issue. [19] The same result would apply to a RAC employee, who, as a government contractor, is one step removed from the government. In addition, RAC employees seem more likely than government employees to file suit because a "contingency fee mentality" is an inherent part of the RAC program. In other words, it does not take a leap of the imagination for an auditor to contemplate a "bonus" contingency fee through a qui tam suit, especially given the publicity surrounding recent high whistleblower awards. [20]

---

[19] *See, e.g., U.S. Ex. rel Holmes v. Consumer Ins. Group*, 318 F.3d 1199, 1214 (10th Cir 2003); *Ex. Rel Burns v. A.D. Roe Co.*, 186 F.3d 717, 722 (6th Cir. 1999); *U.S. ex rel Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991).

[20] *See* Gardiner Harris and Duff Wilson, *Glaxo to Pay $750 Million for Sale of Bad Products*, New York Times (Oct. 16, 2010) (reporting a $96 million whistleblower award).

The Public Disclosure Bar is Unlikely to Preclude Suits by Auditors

A commonly used defense in qui tam actions is the "public disclosure bar," which precludes claims based on facts that were publicly disclosed in, *inter alia*, a "[f]ederal report, hearing, audit, or investigation." [21] Although RACs are required to disclose suspected fraud to the government when it is identified during an audit, a qui tam suit based on that same information would not necessarily be precluded by this defense. Courts have held that information is not "publicly disclosed" under the statute if "the communication does not release the information into the public domain such that is accessible to the general population." [22] Because RAC audit results are not usually published in government reports or disseminated to the general public, it is unlikely that allegations in a suit stemming from an audit will be considered "publicly disclosed" under the statute.

[21] 31 U.S.C. §3730(4)(A).

[22] *United States v. Kerr-McGee Oil & Gas Corp.*, 540 F.3d 1180, 1184 (10th Cir. 2008); *U.S. ex. rel Feldman v. Van Gorp.*, 674 F. Supp. 475, 482 (S.D.N.Y. 2009).

In addition, the public disclosure bar was amended by PPACA and is now significantly weaker. Under the old statute, courts did not have jurisdiction over qui tam suits if relators brought them "based upon" publicly disclosed information unless the relator was "the original source" of the information, had "direct and independent knowledge" of the fraud, and timely reported it to the government. [23] PPACA narrowed the "based upon" standard and now the relator's action must consist of "substantially the same allegations or transactions" as the publicly disclosed information to be subject to the bar. Even if that is the case, under PPACA the relator can satisfy the original source exception so long as he or she reports information to the government that is "independent of and materially adds to" the information already publicly disclosed before filing suit. [24] In most cases, a whistleblower will be able to make a plausible argument to invoke the original source exception, especially if he or she were privy to the auditing process that uncovered the alleged fraud in the first place.

[23] 31 U.S.C. §3730(e)(4); *see also Battle v. Bd. or Regents for Georgia*, 468 F.3d 755, 763 (11th Cir. 2006).

[24] *U.S. ex rel Ondis v. City of Woonsocket*, 587 F.3d 49, 57-59 (1st Cir. 2009).

Other PPACA amendments further weakened the public disclosure bar. The bar is no longer a jurisdictional requirement but instead is merely an affirmative defense, so the defendant and not the plaintiff will have the burden of proof. Therefore, it will be more difficult to invoke the bar at the outset of litigation before the time and cost of discovery are expended. In addition, the government may be heard on the application of the bar and the court may decline to dismiss the action if the DOJ opposes dismissal. This is another way the government can wield substantial influence in a qui tam action, in addition to exercising its right to join and prosecute the suit. [25]

[25] When a qui tam suit is filed, it remains under seal for at least 60 days while the DOJ investigates the claim and decides whether it wants to intervene. 31 U.S.C. §3730(b). The DOJ usually has the time period extended by months or even years.

RAC Employees as Relators From a Policy Perspective.

The purpose of the FCA was to provide a contingent fee incentive for knowledgeable individuals to come forward and report abuse. [26] RAC auditors are already paid on a contingency fee basis to recover overpayments and report abuse, so they do not need this incentive. There is also a significant downside if auditors can reap a qui tam award based on the same incorrect payments they were paid to identify in the first place, because RAC auditors must regularly work with providers to identify and resolve overpayment issues. [27] If auditors are also on the lookout for a potential qui tam claim, their relationship with providers would become more hostile as they will be tempted to view innocent overbillings as not only incorrect, but fraudulent. The appropriate way for RACs to handle suspected fraud is to report it to CMS so that it or the HHS Office of Inspector General (OIG) can make a more objective assessment of the suspected fraud.

[26] *United States ex. rel. Fine v. Sandia Corp.*, 70 F.3d 568, 572 (10th Cir. 1995) ("Congress instituted the *qui tam* provisions of the FCA to encourage private citizens to expose fraud

that the government itself cannot easily uncover.").

[27] As one court put it in a case where a government employee brought a qui tam suit, "permitting former government employees to bring *qui tam* actions based upon information they discovered on the job would allow them to be paid twice for the same work. That is not what Congress had in mind." *U.S. ex rel. LeBlanc v. Raytheon Co., Inc.*, 729 F. Supp. 170, 176 (D. Mass. 1990)

In a similar context, the government has recognized that those involved in monitoring fraud should be encouraged to report it up the chain of command rather than run to the courthouse. The Dodd-Frank Act, which was enacted in 2010 to regulate the financial industry, contains its own whistleblower provision under which the Securities and Exchange Commission (SEC) will pay awards to individuals who report securities law violations to it. The SEC recently issued a proposed rule implementing this whistleblower provision, which excludes outside auditors from whistleblower awards. [28] The SEC reasoned that because outside audits by independent public accountants are already required under its rules, and because those auditors have an independent duty to report noncompliance or illegal acts, they would not be contributing the "independent knowledge" sought by the whistleblower provision. [29]

[28] *See* Proposed Rule 21F-4(b), 75 Fed. Reg. 70488, 70493 (Nov. 17, 2010)

[29] *Id.*

With the Dodd-Frank Act, the SEC has expressed a clear policy against whistleblower awards to outside auditors with responsibility for detecting the fraud. Yet the FCA currently allows any employee of a health care auditor to become a qui tam plaintiff. Moreover, even if CMS wanted RACs to prohibit their employees from filing qui tam actions based on billings they access through their job duties, it could not require them to do so. The FCA's retaliation provision prohibits anyone from penalizing an "employee, contractor, or agent" for filing a qui tam action, so RACs could not prohibit employees from becoming whistleblowers. [30] Thus, the FCA itself would have to be amended to prohibit government-hired auditors from filing FCA claims based on information discovered in the course of their job duties. [31] This seems unlikely, as Congress has been expanding, rather than narrowing, the FCA since 1986.

[30] 31 U.S.C. §3730(h). RACs could require employees to waive their right to sue for retaliation, but it is questionable whether such a provision would be enforceable as against public policy. Courts have already held that an employee cannot release his or her right to file a qui tam suit, and that reasoning could be extended to retaliation rights as well. *See* Todd P. Hotopulos and Graham W. Askew, *Having Your Cake and Eating it Too: The (Un) enforceability of Releases on Future Qui Tam Claims*, 1 J. Health Health & Life Sci. L. 145 (2008).

[31] Some have advocated that the FCA statutory scheme prohibits government employees from bringing qui tam suits and cases coming to the contrary were wrongly decided. Patrick Hannifin, *Qui Tam Suits By Federal Government Employees Based on Government Information*, Pub Cont. L. J. 556, 615-16 (1991). Although a full analysis of the FCA statutory scheme is beyond the scope of this article, the same argument could be extended to RAC auditors, who could arguably be deemed excluded from serving as relators because they receive their information as "agents" of the government, (and therefore part of the government), rather than as "private persons" as contemplated by the qui tam provision. *Id.*

CMS could help prevent whistleblower claims by offering RACs and their employees incentives to report suspected fraud instead of filing suit. For example, CMS is already encouraging State Medicaid Fraud Control Units to enter "Memoranda of Understanding" with RACs so that RACs can earn a share of an overpayment or restitution recovered by the government at the close of a civil or criminal proceeding. [32] If auditors are given a timely bonus for referring suspected fraud, they may be less eager to profit from qui tam suits.

[32] 75 Fed. Reg. 69,037, 69042 (Nov. 10, 2010).

Conclusion: How Health Care Providers Prevent FCA Actions

In anticipation of an expanded mandatory RAC program and the potential for civil and criminal anti-fraud enforcement, health care providers must maintain effective compliance and prevention programs to detect incorrect billings or overpayments. An investment now in compliance staff and efficient billing software may be worth the future time and money saved dealing with RAC audits down the road. Providers must be diligent about returning all overpayments detected to avoid liability under the FCA for a knowing retention of an overpayment. [33] Providers should also give their employees incentives to report billing discrepancies internally so that problems can be resolved before a "pattern" emerges that could later bring FCA exposure.

---

[33] Section 6402(a) of the PPACA provides for a 60-day deadline to report and return any overpayment to the Secretary, the State, or the intermediary, carrier or contractor as appropriate.

But even the best compliance program may not prevent a RAC from identifying incorrect payments that could form the basis of FCA allegations. For this reason, providers should be proactive in responding to RAC concerns. For instance, a billing record request by a RAC may be a sign that its data analysis has detected a red flag. At that point providers should utilize a compliance officer who can review the requested records internally, but should also be careful to avoid creating a non-privileged paper trail that could be later subpoenaed by law enforcement or subject to discovery in a qui tam action. In cases where the provider disagrees with the RAC determination, providers should be proactive in communicating with federal or state authorities in addition to appealing the determination. Prompt disclosure of the alleged fraud may dissuade the government from joining a qui tam action and may help establish a public disclosure bar down the road. [34] But because it appears likely that health care providers will face qui tam suits by RAC employees so long as the program is in place, measures must be taken to prevent such actions and manage them when they arise.

---

[34] The OIG has implemented Self Disclosure Protocol whereby providers can voluntarily disclose self-discovered evidence of potential fraud in an attempt to avoid the costs and disruptions of a Government-directed investigation or civil or administrative litigation. Before doing so, a provider is expected to conduct a thorough internal investigation. 63 Fed. Reg. 58,399, 58,400 (Oct. 30, 1998).

Contact us at http://www.bna.com/contact/index.html or call 1-800-372-1033

ISSN 1521-5350

Copyright © 2011, The Bureau of National Affairs, Inc.. Reproduction or redistribution, in whole or in part, and in any form, without express written permission, is prohibited except as permitted by the BNA Copyright Policy. http://www.bna.com/corp/index.html#V