

Eighth Circuit Determines that Compliance with Reasonable Interpretation of Government Regulation Sufficient to Avoid FCA Liability (Absent a Government Warning to the Contrary)

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by Ben Kappelman

The Centers for Medicare and Medicaid Services (“CMS”) establishes requirements for how medical procedures must be performed for a medical provider to seek payment for those procedures. Seeking payment without properly performing the procedure might expose the provider to alleged liability under the False Claims Act (“FCA”). But what if the requirements for the procedure are ambiguous? Will a provider’s reasonable interpretation of a requirement shield it from FCA liability if it seeks payment for performing the procedure based on its interpretation? Earlier this month, the U.S. Court of Appeals for the Eighth Circuit answered “yes,” provided that the government hasn’t previously warned against the interpretation the provider used.

At issue in *United States ex rel. Donegan v. Anesthesia Associates of Kansas City*, was whether a surgical patient’s “emergence” from anesthesia could occur in the post-anesthesia care unit (“PACU”) or had to occur in the operating room. --- F.3d ----, 2016 WL 4254939 (8th Cir. Aug. 12, 2016). The defendant had billed CMS for the services of anesthesiologists at a billing rate that required the anesthesiologist to be present during emergence. The defendants’ anesthesiologists supervised lower-level providers during various phases of surgery but typically did not observe the patient’s emergence from anesthesia until the patient had reached the PACU. CMS and the Department of Health and Human Services had not defined “emergence,” nor had the professional bodies that establish anesthesia standards of care. Against this backdrop, the defendant had defined “emergence” such that it could occur in the PACU. Experts for both parties, and the court, concluded this definition was objectively reasonable. And no official government warning had cautioned against using this reasonable definition. As a result, the court held the defendant could not be liable under the FCA for submitting claims premised on defining “emergence” to include the anesthesiologist’s assessment of the patient in the PACU.

A medical provider faced with an ambiguous billing regulation might therefore consider the same sources the court did—CMS and DHS or other governmental regulations,

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official interpretations or government warnings about particular interpretations, and standards of care set by relevant professional bodies. If these sources point to an objectively reasonable interpretation of the regulation that the government has not previously rejected, the *Donegan* decision suggests that a provider can apply that definition in its billing practices without contravening the FCA.