

HEALTH LAW

Update

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Consultant Liability: The Government Expands the Reach of Culpability for Alleged Healthcare Fraud

April 18, 2008

Two recent settlements involving significant dollar amounts suggest that the federal government is pursuing not only the providers of healthcare services who bill for and receive reimbursement from allegedly false claims but also the consultants who advise those providers. This Health Law Update summarizes the two recent settlements and ties this emerging trend back to earlier policy statements from the government.

Besler & Company

On March 5, 2008, the U.S. Department of Justice (the "DOJ") announced that Philip Besler and his healthcare consulting firm, Besler & Company (collectively referred to herein as "Besler"), had agreed to pay the U.S. Government \$2.875 million to settle claims that the company had advised hospitals and healthcare providers to inflate Medicare charges unlawfully.¹ According to the DOJ and the Office of Inspector General of the Department of Health and Human Services (the "OIG"), Besler's company marketed a proposal to hospitals advising them to increase inpatient and outpatient charges so as to receive greater Medicare outlier payments.² The government asserted that, by inflating charges to Medicare patients as advised by Besler, the hospitals would be eligible to receive outlier payments in excess of their actual costs. As a result

¹ Settlement Agreement among U.S. (acting through the DOJ and on behalf of the OIG), TRICARE Management Activity, Besler & Company, Inc., Philip Besler, and relators James Monahan and Anthony Kite, accessed at <http://pubs.bna.com/NWSSTND/IP/BNA/hlr.nsf/6c92468e8c3b8aec85256b570059a31c/da08f4b66690796d8525740a006e5c41?OpenDocument>.

² Outlier payments are designed to compensate hospitals for cases in which a hospital's costs substantially exceed Medicare reimbursement. To be eligible for an outlier payment, the hospital's cost for a particular discharge must exceed the total Medicare payment for the discharge by an amount called the "outlier threshold." Medicare pays 80% of a hospital's costs that exceed the sum of the payment plus the outlier threshold. In order to calculate the hospital's cost of a particular case, Medicare multiplies the hospital's charge for the case by the hospital's cost-to-charge ratio according to the hospital's most recent cost report.

of Besler's advice according to the DOJ's allegations, several hospitals submitted false claims to the Medicare program from January 2001 through August 2003.

Under the terms of the settlement, Besler (a) submitted a \$2.225 million lump sum payment and (b) agreed to pay an additional \$650,000, plus interest (payable in 12 equal quarterly installments of \$58,438.11). In exchange, two *qui tam* actions filed by two separate relators in 2002 and 2005, alleging that Besler caused excessive outlier payments, would be dismissed with prejudice. The two relators will receive a portion of the settlement amount.

When announcing the settlement, government attorneys hinted at increased scrutiny of third party consultants. Jeffrey S. Bucholtz, Acting Assistant Attorney General for the DOJ's Civil Division, stated that the settlement shows that the DOJ is "prepared to protect the Medicare program by seeking redress not only against health care providers who commit fraud but also against anyone who participates in that fraud."³ Christopher Christie of the U.S. Attorney's Office for the District of New Jersey stated that his office "is committed to preserving the integrity of the Medicare system within New Jersey against anyone who engages in mischarging, including outside consultants."⁴

Maximus, Inc.

The Besler settlement is not the first large settlement involving outside consultants. Fewer than eight months prior to the Besler settlement, the DOJ announced that it had reached a criminal deferred prosecution agreement, civil settlement, and corporate integrity agreement with Maximus, Inc., a reimbursement consultant firm headquartered in Virginia. Maximus had entered into a contract with the District of Columbia's Child and Family Services Agency ("CFSA") pursuant to which Maximus would help CFSA submit claims to Medicaid for target case management services provided by CFSA to foster children. The government alleged that Maximus had caused CFSA to submit Medicaid claims for children for whom CFSA had not provided the covered services. Maximus agreed to pay the government \$30.5 million to settle civil claims against it and entered into a criminal deferred prosecution agreement and a five year corporate integrity agreement.⁵ Notably, the corporate integrity agreement contemplates OIG review of Maximus' contracts and requires Maximus to disseminate review findings to its clients.⁶ Inspector General Daniel Levinson stated that the "unprecedented" corporate integrity

³ *New Jersey Healthcare Consulting Firm to Pay U.S. \$2.875 Million to Resolve Allegations of Medicare Fraud*, U.S. Department of Justice, press release, March 5, 2008, accessed at http://www.usdoj.gov/opa/pr/2008/March/08_civ_173.html.

⁴ *Id.*

⁵ Settlement Agreement among U.S. (acting through the DOJ and on behalf of the OIG), Maximus, Inc. and relator Benjamin Turner, attached as Exhibit 10.1 to the Current Report on Form 8-K of Maximus, Inc., filed on July 25, 2007, accessed at <http://www.sec.gov/Archives/edgar/data/1032220/000115752307007188/0001157523-07-007188-index.htm>.

⁶ See Corporate Integrity Agreement between the Office of Inspector General of the Department of Health and Human Services and Maximus, Inc., attached as Exhibit 10.2 to the Current Report on Form 8-K of Maximus, Inc., filed on July 25, 2007, accessed at <http://www.sec.gov/Archives/edgar/data/1032220/000115752307007188/0001157523-07-007188-index.htm>.

agreement ensures that the Medicaid program "effectively serves vulnerable populations and is not exploited by consulting firms providing suspect reimbursement advice."⁷

2001 Special Advisory Bulletin

Mr. Levison's statements relating to the Maximus settlement reflect the government's concerns that improper actions and advice by consulting firms undermine the integrity of government programs. This concern was expressly articulated in a Special Advisory Bulletin issued by the OIG in June 2001.⁸ In this bulletin, the OIG recognized that while consultants usually play a positive role in the health care system, illegal or improper practices of some consultants pose risk to the consultants as well as their clients. The OIG recommended that providers be wary of consultants who engage in any of the following activities:

- Make illegal or misleading representations, such as claiming special accreditation or official status or using logos of the federal government;
- Promise or guarantee specific results, such as a percentage increase in reimbursement, or a favorable "fair market value" assessment;
- Encourage abusive practices, such as using improper billing codes or adopting unreasonable interpretations of laws and regulations; or
- Discourage a client's compliance efforts.

The OIG cautions that providers must be extremely diligent when hiring consultants since providers remain responsible for ensuring their own compliance with applicable laws and regulations. As stated by the OIG in its 2001 bulletin, "if a consultant's advice seems too good to be true, it probably is."⁹

Conclusion

Consultant liability appears to be an emerging trend that is worth watching. If you have any questions about consultant liability or other questions related to Medicare reimbursement, please call any of the healthcare attorneys listed on the following page.

⁷ *Virginia Company enters into Deferred Prosecution Agreement & Agrees to Pay \$30.5 Million*, U.S. Department of Justice, press release, July 23, 2007, accessed at: http://www.usdoj.gov/opa/pr/2007/July/07_civ_535.html.

⁸ *Practices of Business Consultants*, OIG Special Advisory Bulletin June 2001, accessed at www.oig.hhs.gov/fraud/docs/alertsandbulletins/consultants.pdf.

⁹ *Id.*

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