Litigation Issues

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Non-Compete Agreements

- Considerations center on reasonableness
  - Protectable interest/legitimate business interest
  - Scope of restricted activities
  - Geographic scope
- Irreparable harm/inadequate remedy at law
- Physician Non-Competes
  - Clarify restriction on ownership vs. practice of medicine
- Enforcement Always Questionable

Prompt Payment/Claims Administration

- Examples
  - United Healthcare Settlement
  - Pacificare Investigation
- Most states have laws that include requirements for prompt payment of claims and claims administration

Reimbursement Disputes

- In- versus Out-of-Network
- United Health Ingenix Settlement
- Balance Billing Issues

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- Preemption Issues
- Impact on Payor-Provider Disputes
- Recent Cases

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Medicare Developments

- In 2007, as required by the Deficit Reduction Act (DRA) (2005), the Centers for Medicare and Medicaid (CMS) identified medical errors, "never events", that it deemed to be reasonably preventable, with the goal of halting payments to hospitals servicing patients with these conditions
- As of Oct. 1 of 2008, if the condition is not present upon admission, but is acquired during the hospital stay, Medicare will no longer pay the additional cost of hospitalization, nor will the hospital be allowed to require that the patient be responsible for the cost

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Class Actions

- Increase in Filings
- Payor/Provider Cases

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False Claims Act

- The False Claims Act ("FCA") creates liability for persons or entities who submit claims and receive payment from the federal government improperly
- The FCA applies in the health care context, particularly with regards to Medicare claims
- FCA claims are on behalf of the federal government but can be brought by members of the public, known as Relators
- Several states have similar laws

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31 U.S.C. § 3729(a)

- The FCA provides for liability in several situations, including where:

  (1) In general.— Subject to paragraph (2), any person who—

  (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

  (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

  (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
- This list is non-exclusive and there are other types of violations that are referenced in the FCA

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31 U.S.C. § 3729(b)

(1) the terms "knowing" and "knowingly"—

(A) mean that a person, with respect to information—

(i) has actual knowledge of the information;

(ii) acts in deliberate ignorance of the truth or falsity of the information; or

(iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud;

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Whistleblowers

- Individuals, such as employees, former employees, contractors or patients may file an action on behalf of the United States Government.
- The lawsuits must initially be filed under seal to permit the Government an opportunity to determine whether to intervene.
- Regardless of whether the Government intervenes, the Relator may proceed with the lawsuit.
  - The Relator is entitled to a portion of any recovery regardless of whether the Government intervenes.
  - This provides Relators with a motivation to bring FCA lawsuits.

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Potential Liability

- Under the FCA, liability for claims arising before September 29, 1999 is a civil penalty ranging from a minimum of $5,000 to a maximum of $10,000 per claim, plus treble damages (based upon the value of the claim).
- For claims arising after September 29, 1999, liability is a civil penalty ranging from a minimum of $5,500 to a maximum of $11,000 per claim, plus treble damages (based upon the value of the claim).

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Rising Importance of the FCA

- Recent amendments through the Fraud Enforcement and Recovery Act of 2009 and the Patient Protection and Affordable Care Act of 2010
  - First FCA amendments in several years and help to support whistleblower actions
- The Department of Justice has requested a large increase in its fiscal year 2011 budget to protect the United States' interest, including the pursuit of financial fraud
  - The increase includes additional funds for economic fraud enforcement and the investigation and litigation of health care fraud cases
- There has been a substantial increase in FCA filings in recent years

Contracting Disputes

- Existing Contract
- Negotiation Process

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