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## Clinton vows to put fraud fighters on site at carriers

*President's plan could spark an anti-fraud bidding war between the White House and Congress*

The Clinton administration not only wants to increase the number of federal agents who investigate Medicare fraud, it wants to put a Medicare fraud unit in the office of every Medicare contractor in the country.

President Clinton announced that proposal in his national radio address Jan. 22. He said his FY 2001 budget would also fund new technologies to track false claims. While the president's plan lacked specifics, the administration plans to propose a whopping $48 million for Medicare contractors' anti-fraud efforts.

Health Care Financing Administration (HCFA) spokesman **Craig Polaski** says the details of the President's plan will be released along with his budget next month.

Clinton's formula for purging fraud extends well beyond anything contemplated by Congress to date, and raises the specter of a bidding war between the two sides over who can propose a more aggressive plan."

Congress will likely release its own Medicare anti-fraud salvo this week. House Budget Committee spokesman **Terry Holt** says his committee is already preparing a hearing that will address Medicare overpayments.

Holt says the committee will offer up a fairly thorough report about waste and fraud across all categories of government spending that cites "a substantial error rate" in Medicare payments.

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## Basic legal principle knocks down False Claims Act suit

Hillcrest Health Center in Oklahoma City beat back a False Claims Act (FCA) lawsuit earlier this month, using a legal principle designed to protect defendants from repeated litigation over similar issues. U.S. District Judge **Lee West** ruled Jan. 4 that a whistle-blower suit brought by former resident John King should be dismissed because it overlapped with an earlier suit King brought. "There is an ancient legal doctrine called *res judicata* that everyone learns about in the first year of law school that says you can't sue the same party

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## Fresenius tagged with record FCA settlement

Fresenius Medical Care, the world's largest provider of kidney dialysis products and services, entered into the largest health care fraud settlement ever Jan. 19, when it agreed to pay the U.S. government a staggering $486 million to settle an investigation of National Medical Care (NMC), its kidney dialysis subsidiary. The agreement was announced at the U.S. Courthouse in Boston by Department of Health and Human Services Office of Inspector General June Gibbs Brown and Deputy Attorney Eric Holder.

In all, three NMC subsidiaries agreed to plead guilty to three separate conspiracies and hand over a record $101 million in criminal fines. Fresenius also agreed to pay a record $385 million to resolve related civil False Claims Act claims. The whistle blowers in the case will pocket a tidy $65.8 million.

Also as part of the settlement, Fresenius agreed to withdraw approximately $196 million in

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INSIDE:

# Clinton plan

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Several congressional committees have voiced skepticism over the administration's claims regarding the reduction of fraud in the Medicare program. "It is important that Medicare and Medicaid claims are filed and paid correctly," says Holt. "We will look for ways to improve those programs and tighten up the procedures."

Clinton's proposal comes as two new reports cite major inroads in reducing health care fraud.

"Perhaps the most concrete evidence of the success of anti-fraud and oversight efforts is the significant reduction in the error rates in Medicare fee-for-service payments — an overall 45% reduction in improper payments in just two years," the Department of Health and Human Services' Office of Inspector General and U.S. Department of Justice assert in their joint annual report on health care fraud and abuse control programs for FY '99, expected to be formally released shortly.

According to the report, the Health Care Fraud and Abuse Control Program resulted in judgements and settlements totaling $524 million last year. As a result of program activities, the federal government collected $490 million in 1999, while another $4.7 million was recovered as the federal share of Medicaid restitution.

Meanwhile, the HCFA reported last week that its Medicare Integrity Program prevented $5.3 billion in inappropriate payments in the last half of 1998 and the first half of 1999, including provider audits ($1.4 billion) and prepayment activities ($2.6 billion).

The Health Care Fraud and Abuse Control Program report is expected to be published shortly on the OIG's Web site at http://www.hhs.gov/progorg/oig/new.html. ■

# Record settlement

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intradialythic parenteral nutrition (IDPN) therapy claims it currently has on appeal or waiting to be filed with Medicare in return for a $59.1 million payment from the U.S. government.

In its complaint, the government laid out a detailed and calculated effort on the part of NMC to defraud Medicare. IDPN, a nutritional therapy provided intravenously to dialysis patients, was one of NMC's most profitable products, and in some years accounted for virtually all of the company's profits.

Medicare, the principal source of NMC's reimbursement, covered IDPN under the prosthetic device benefit only if the patient suffered from a severe pathology of the alimentary tract that did not allow absorption of sufficient nutrients. It was not covered as supplemental nutrition even if it was prescribed by a physician to treat malnutrition.

According to the government, NMC organized an IDPN Task Force in 1989 to prepare paperwork to bill old, previously unbilled, or denied IDPN claims, even though many of the patients lacked the clinical indications mandated by Medicare. The government charges that when NMC discovered that medical documentation for many patients was lacking, it instructed the Task Force to use "clinical creativity" to prepare the required documentation.

The government alleges that in 1993, NMC directed its IDPN coordinators to use a new sample calculation tool for existing patients. It said NMC would start with the final number desired and then fill in the time estimates needed to reach that number.

The mammoth settlement comes after an exhaustive five-year investigation. As part of the

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agreement, Fresenius, which merged with NMC in 1996, also agreed to the most comprehensive corporate integrity agreement (CIA) ever imposed on a company doing business with the federal health care programs.

The CIA requires Fresenius to conduct mandatory compliance activities, including special audits and training to prevent recurring problems. While these agreements typically run five years, the Fresenius agreement will last for eight years and cover every aspect of the company's future business with the federal health care programs. ■

## New settlement signals future government tactics

The record $486 million settlement between Fresenius Medical Care and the U.S. government may signal health care providers how the government is now pursuing some fraud investigations, says health care attorney **Eugene Tillman** with Reed, Smith, Shaw & McClay in Washington, DC.

According to Tillman, the first set of issues surrounds false documentation to support medical necessity. "What is interesting here is that you had a long-standing issue about whether the intradialythic parenteral nutrition coverage criteria are too restrictive or whether the durable medical equipment regional carriers are interpreting them too narrowly."

Tillman says there have been numerous denials and appeals, but that this case extends well beyond those cases. "What is alleged here," he explains, "is manufacturing medical necessity documentation, including information that was false and known to be false."

The second area Tillman highlights involves intradialythic parenteral nutrition (IDPN) administration kits. He says disputes frequently surface over whether a carrier is properly interpreting the law and guidance or is being unduly restrictive. "At the root of the allegation is basically not a statute and not a regulation, but a directive from a carrier," asserts Tillman.

He suggests that even when providers are dealing with directives they must be cautious. "The fact that it involves a carrier guideline is not going to immunize you from potential liability, including criminal liability."

Tillman also points to the government's interpretation of IDPN bag hanging fees. He says it has been debated for years whether bag hanging fees are appropriate. But he says in this case the government is focusing on what they consider a manipulation of numbers. "The underlying issue here that is raised in the context of a conspiracy charge is whether the payment of a bag hanging fee to a dialysis provider is a kickback in order to induce the dialysis provider to use the IDPN company that is offering the bag hanging fee."

"What is interesting is the government comes very close to acknowledging that a payment [from] an IDPN supplier to a dialysis facility would be proper so long as it is based on the actual cost that the dialysis facility incurred in supporting the delivery of the IDPN," he adds. ■

## FCA defense

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repeatedly over the same general set of facts once there has been a final judgement," explains health care attorney **Jesse Witten**, who helped defend Hillcrest. Witten, of the Washington, DC office of Jones Day, says this marks the third reported case in which this defense has been used successfully in a false claims action, but probably not the last.

King initially filed an employment action that claimed he was fired because he refused to take part in fraud. That case was settled in January 1999 and the parties entered into a voluntary dismissal. He later filed a FCA lawsuit that alleged that Hillcrest engaged in eight fraudulent schemes that included false claims for medical procedures, treatments, and prescriptions.

Judge West noted that the FCA specifically bars all *qui tam* suits based on publicly disclosed information unless the person bringing the action is an "original source" of the information. West found that King had alleged sufficient "direct and independent knowledge" about all but one of the alleged schemes.

However, West ruled that King should have brought one lawsuit that made all of those

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allegations because many of the witnesses, documents, facts, and legal issues would be the same. "Indeed, all events described in the two lawsuits involve the same individuals and the evidence presented in both lawsuits would substantially overlap," asserted Judge West. ■

## DOJ raises stakes in FCA suits, states may follow suit

The stakes for False Claims Act actions just got higher. "For those defendants in civil False Claims Act (FCA) cases who believe that the civil penalties provisions are excessive and extortionist, their concerns should increase," warns health care attorney **John Boese** of Fried, Frank, Harris, Shriver & Jacobson in Washington, DC.

In what he calls a "little known and virtually ignored announcement" last year, the U.S. Department of Justice (DOJ) increased FCA civil penalties by 10%, to a minimum of $5,500 and a maximum of $11,000 for each false claim. The rule is already in effect.

Under the Debt Collection Act, federal agencies are required to make inflationary adjustments up to 10% to civil monetary penalties within the agency's jurisdiction every four years. "Interestingly, DOJ did not publish these changes in the *Federal Register* for notice and comment before they became effective," notes Boese. He says the apparent reason is that the increases were mandated by Congress.

"While few, if any, FCA cases have yet been filed [under the new provisions], defendants are virtually certain to challenge the increase in penalty amounts when those cases do get litigated," he adds. ■

## How to reduce threat of collective bargaining

When the National Labor Relations Board (NLRB) overturned a 23-year-old precedent last month that prohibited interns and residents at private hospitals from organizing and bargaining collectively, it opened the floodgates for residents at private hospitals to exercise that option.

Residents at one hospital already have. Boston Medical Center became the first private hospital in the country to face a federally sanctioned union of interns and residents when those factions voted 177-1 to unionize Dec. 21. **Thomas Smith**, managing partner with the Boston office of Jackson Lewis, says it is not likely to be the last hospital affected.

Smith says the NLRB has given hospitals a wake-up call to take action now to avoid the pressures of intervention by outside organizations. But he adds that hospitals can take specific proactive steps to avoid the pressures of intervention by outside organizations.

For example, Smith says hospitals can educate medical staff executives and program directors on their legal rights and restrictions with respect to union organizing by staff physicians and interns.

He says they should also consider establishing a policy on unionization that clearly delineates the hospital's position and the reasoning behind it.

Among the other steps Smith recommends:

- In cases where joint residency programs exist, evaluate the terms and conditions of those programs and the potential for finding a joint employer status, including collective bargaining obligations.
- Conduct an internal vulnerability audit to identify legitimate concerns and issues among salaried physicians and interns and assess the effectiveness of existing communications vehicles.
- Encourage participation by physicians on governing committees and emphasize the importance of having a voice on operational, financial, and patient care issues.
- Conduct training for physicians on the financial implications of operational and patient care issues and their connection to the hospital's long-term viability.

Smith says private hospitals should also consider giving interns and residents managerial prerogatives consistent with the standards set by the American College of Graduate Medical Education, including the authority to determine work schedules and assignments, resolve grievances, recommend and administer discipline, review work performance, and grant time off. ■