Published in Pain Medicine News
October 2014

BUNDLED BILLING OR BUNGLED BILLING?

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Bundled billing: the combination of multiple entities' fees into a single price. What could be wrong with that? A lot, depending on who is doing the bundling. And, in some cases, depending on *why* they're doing it.

History

The concept of bundled billing came out of the hospital world: In order to market for a discrete service, for example, a certain surgical procedure, the hospital sought to have all, or at least some, of the physician providers involved in that procedure agree with the hospital on a fixed price for their services. Those prices were then added, together with the hospital's fixed price for its fee, into the bundle.

The idea was to present a coordinated, discounted, competitive price for the bundled procedure or service.

As the hospital-based providers most certainly involved in all surgical procedures, the anesthesia group's fees were, and are, a key component in hospital-centered bundled billing.

Metastatic Change

Although that hospital-centered business practice has continued, and although even in the hospital context bundling poses significant compliance questions, the original notion of bundled billing, a competitive edge passed through to the customer, has metastasized into a tool used by surgeons and other referring physicians outside of the hospital setting to extract kickbacks from anesthesia providers. This type of metastasized bundling appears to be on the rise as an alternative to the "company model" set up that has attracted regulatory notoriety. (See, e.g., "The Company Model: Is Taking Less Money To Work at a Surgicenter Worth Jail Time?" *Anesthesiology News*, February 2014, and "OIG Opinion Adds Clarity to Illegality of Company Model," *Anesthesiology News*, January 2011.)

As a quick refresher, in the company model arrangement, either the ambulatory surgery center controlled by referring physicians or the referring physicians themselves set up a separate anesthesia company to employ the anesthesiologists and nurse anesthetists working at the facility. The owners extract a portion of the profits from the anesthesia service.

In the bundled billing scenario, instead of forcing the anesthesia providers into an employment or subcontract relationship via a company model entity, those with control of the referrals demand that the anesthesia providers enter into what they will call a "bundled billing" arrangement with the referral source. This sort of bundling can be misused to shift a portion of the anesthesia fee into the pocket of the bundler:

- The bundler collects a larger anesthesia fee from the payor or patient and retains the difference after paying you your agreed-to discounted amount; or

- The bundler uses the discounted anesthesia fee to enable it to collect its full, or less-discounted, facility fee, professional fee or both.

Either way, the bundler has now achieved an economic advantage at your expense.

For example, a plastic surgeon providing purely cosmetic procedures at her solely owned surgery center demands that you "bundle" your fees, at a substantially reduced rate, with her fees and her facility's fees for purposes of providing all-inclusive pricing to patients. The plastic surgeon will collect the bundled, all-inclusive fee from her patients and pass along your discounted portion upon collection.

Compliance Quagmire

The federal Anti-Kickback Statute (the "AKS") is designed to prohibit payments to physicians and other providers that are made in order to induce the referral of patients whose care is paid for by federally funded health care programs.

The AKS is a criminal statute and intent is required, but that intent can be inferred from the circumstances and many seemingly appropriate arrangements are, upon examination, viewed by the enforcers, the Office of Inspector General (OIG), as highly suspect.

The states have AKS-counterpart statutes, some of which approach the issue from the same angle as the AKS but may not make any distinction between the source of the patient's funding, and others that approach the issue from the angle of "fee-splitting," the sharing of a physician's fee with certain third parties under certain circumstances.

A bundling arrangement that results in the transfer of the referral receiving physician's fee to the referral source may implicate the AKS and similar state statutes. Additionally, even arrangements that involve no transfer of wealth from the receiving physician to the person or entity coordinating the bundling may trigger a state's fee-splitting prohibitions and its corporate practice of medicine prohibitions.

Depending on the nature of the services provided, it is possible that the arrangement violates the Stark law, the federal "self-referral" prohibition that applies to any physician who makes referrals to those with whom the physician has a direct or indirect ownership or investment interest, or a compensation arrangement. Stark is a "strict liability" statute that imposes civil not criminal penalties, although the severity of the penalties makes it a distinction without much difference.

The states, too, have counterpart self-referral statutes that, depending again on the nature of the services involved, might be triggered.

And last, but by no means least, violations of Stark and of the AKS lead to federal False Claims Act liability (commonly spoken of as "whistleblower actions"), in which violators stand liable to regurgitate reimbursement, plus treble damages, and up to $11,000 per claim.

Conclusion

In terms of intent, all may be above board in connection with a bundling relationship. Or, it could be a poorly designed substitute for a direct kickback, or an alternative to a kickback-infested company model scheme. No matter which—innocent or deceitful, intent or no intent—bundling arrangements implicate a number of federal and state compliance laws.

Tread carefully before entering into one of these questionable relationships.

On the other hand, if you have already become involved in one without considering the risks, it's essential that you engage in a thorough evaluation immediately.

In the out-of-hospital context, bundled billing is often bungled billing.

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