

PUBLICATION

\$325 Million Qui Tam Reveals Growing Focus on EHR Incentive Payments

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A recently unsealed qui tam action further demonstrates the growing focus on the propriety of incentive payments made under Medicare and Medicaid's Electronic Health Records (EHR) Incentive Programs. Health care providers must remain diligent in evaluating and accurately reporting their compliance with all meaningful use criteria and in ensuring timely responses to requests for records.

On November 21, 2017, the United States District Court for the Northern District of Indiana unsealed a qui tam complaint against more than 60 Indiana hospitals and alleging false claims in an aggregate amount of nearly \$325 million. The relators, who are medical malpractice attorneys, allege that the facilities submitted false claims for EHR incentive payments by reporting inaccurate data in their meaningful use attestations. In particular, the relators claim that the hospitals did not accurately report data regarding the core measure addressing timely responses to requests for medical records. The relators compare their personal experiences requesting records in medical malpractice cases with the data allegedly reported in the facilities' meaningful use attestations. The relators also claim that a national "release of information" provider overcharged patients for copies of their medical records. The complaint fails to distinguish between first- and third-party requests for information. The use of an outside vendor to provide the records was also a point of concern in the complaint.

Although the government declined to intervene, the complaint demonstrates the creativity on the part of plaintiffs' attorneys who are utilizing meaningful use and HIPAA obligations as a sword. Earlier this year, EHR vendor eClinicalWorks (eCW) paid \$155 million to resolve a qui tam action involving allegations that it falsely obtained certification for its EHR system and that its software did not accurately record user interactions, did not reliably record diagnostic imaging orders, did not reliably perform drug interaction checks and failed to satisfy data portability requirements. The recently unsealed complaint in the Indiana action shows the potential for whistleblower suits directly against health care providers with respect to attestations of meaningful use criteria that are less related to patient safety and care than those at issue in the eCW complaint.

As previously discussed in a Baker Ober Health Law Group [alert](#), the OIG estimates that CMS made more than \$729 million in inappropriate payments to eligible professionals under the EHR incentive programs between May 2011 and June 2014. In light of the intensifying focus on the propriety of EHR incentive payments, providers must carefully analyze their compliance with all meaningful use criteria.

Finally, this case also serves as a reminder to providers of the importance of ensuring that individuals are provided appropriate access to their protected health information under state and federal law and that charges fit within the articulated standard. Health care providers should review their policies and procedures regarding requests for access to medical records to ensure that their documentation is in line with the requirements for both first- and third-party requests for records.

If you have any questions regarding the content of this alert, please contact [Alisa Chestler](#), [Andrew Droke](#), or any member of the [Baker Ober Health Law Group](#).