Commercial Insurers Hitting More and More Behavioral Providers with Audits, Repayment Requests

Partner Zachary Rothenberg was interviewed by Behavioral Health Business to discuss the growing risk private payers are posing for behavioral health providers.

From the Article:

> As government enforcement action in behavioral health heats up, providers who work with commercial insurers may think the clear. But that's not the case.
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> Private payers can pose just as big of a threat and financial burden for behavioral health providers. And in fact, that risk is according to lawyers who work in the behavioral health care space.
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> While commercial insurers don't have the FCA at their disposal, they have other tools. As of late, audits and retrospective are among their most commonly used, according to Zachary Rothenberg, a partner at Nelson Hardiman LLP.
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> "In the past year or so, it has really heated up and become a bigger and bigger part of my practice," Zachary Rothenberg, at Nelson Hardiman LLP, told BHB. "I'm dealing with these retrospective reviews all the time."
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> Based in California, Nelson Hardiman is a specialty healthcare law firm that serves clients across the U.S. Behavioral hea of its main focuses, especially for Rothenberg, who said he spends about 25% of his time working with behavioral health p on commercial audit issues specifically.
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> It usually works like this: An insurance company will request a sample set of documents from a provider. After reviewing th documents, the insurer will tell the provider that it has been billing incorrectly. Then, the payer often extrapolates those fin asks for repayments.
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> "It's often millions of dollars," Rothenberg said. "And that obviously is a huge stressor for clients, which are not always ma businesses. They are sometimes mom-and-pop operations being asked to refund all of the money they've ever received f particular payer."
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> Rothenberg frequently works with clients to help negotiate those repayments down, but the amount is always substantial, providers want to continue working with said insurer, denying the repayment request altogether isn't really an option.
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> "If [providers] don't agree and they don't write that check, they will remain flagged with the payer," Rothenberg said. "They basically never get paid for treating that payer's members."
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> In an industry marked by slim margins and small businesses, that kind of financial strain can ruin providers. In fact, in the since Rothenberg began to notice an uptick in commercial insurers auditing behavioral health providers, he said he's watc providers go out of business. However, he stopped short of attributing closures solely to these recoupments.
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> "Whether you can tie it directly and exclusively to these retrospective reviews, as opposed to the pandemic or other issues know," he said. "What I can tell you, though, is that it has been awfully painful, and the reviews certainly contributed to fina hardship for these businesses."
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> Rothenberg isn't the only lawyer to take notice of the commercial insurance audit trend. Polsinelli shareholder Asher Funk

it's becoming increasingly common for commercial payers to take issues with claims they've already paid.

"A classic example of this is the Florida model, where treatment providers put together an outpatient [offering] and a hous component to create something like residential care," Funk said. "Payers paid for the outpatient level of care and were co enough to pay that lower reimbursement rate for a period of time. Then they turn back and say, … 'That looked a lot more residential care. … Please send us back all of that money.'"

Meanwhile, Rothenberg said he's seen retrospective reviews fall into a number of categories. Those include step-down bi issues similar to the one Funk described, in which providers bill insurers for a less expensive, lower level of care; admissio related to initial intake, assessments, individualized treatment plans and care acuity; services-related issues, which freque on oversight by licensed clinicians and non-evidence-based care; and documentation issues like missing hours and notes have enough detail.

Protections for providers
In light of this trend, the obvious question becomes: How can providers protect themselves?

First and foremost, compliance planning is key. Providers should commit time, money and people toward preparing and implementing their compliance plan, which could have the seven elements outlined by the Office of Inspector General (OI Health and Human Services (HHS).

Those include policies and procedures; a compliance infrastructure; effective education and training; effective communica effective auditing and monitoring; effective investigation into violations; and a consistent disciplinary process.

It's not enough to just have the plan, though. Providers also have to put it into practice.

"I would really encourage providers to do regular audits of their own paperwork," Rothenberg said.

Additionally, he recommends providers proactively check with payers to make sure the payers approve of the provider's p offerings. Plus, he says folks should prepare for the worst case scenario, rather than looking for loopholes.

"You've got to go into it thinking, 'I'm going to do this the right way no matter what, and if I can't … then I just won't do that business,'" he said. "That's as opposed to, 'I'm going to move forward in this line of business one way or another, and if I take my chances, I'll take my chances. That's what gets people into trouble."

Still, even providers with robust compliance programs can fall victim to audits from commercial insurers. And if that happe time to call a lawyer.

Full Article

"Once a provider is in the zone of scrutiny or having one of these issues, they benefit from engaging competent counsel to the best case they can and provide the best protection," Funk said. "Just because allegations were made doesn't mean th true."

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