

False Claims Act Liability – It's a Material World

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About a year ago, I wrote in these pages (May-June 2015 *Worcester Medicine*, page 21) about a federal court case in which False Claims Act liability was based upon a provider's failure in a claim for payment to disclose non-compliance with regulatory requirements that are material to the payer's decision to pay a claim. At that time, I asked, "How can providers know what's material to a government payer's decision to pay a claim?" Now that the United States Supreme Court has taken up this case, providers have more tools at hand to resist arguments that a non-disclosed violation was "material" to the payment decision and, thus, can form the basis for FCA liability.

As described last year, the Escobar case involved failures to disclose that providers rendering services to a MassHealth beneficiary were unlicensed or were inadequately supervised. Even though the licensure and supervision regulations were not designated explicitly as "conditions to payment," the First Circuit Court of Appeals ruled that compliance with those regulations was a "material precondition of payment." Thus, misrepresentation by failing to disclose non-compliance with them can give rise to FCA liability. Other federal courts took different approaches. One Circuit Court ruled that failure to disclose non-compliance is not enough – the provider has to expressly or affirmatively state a falsehood. Other courts determined that the failure to disclose had to concern a requirement that was expressly designated as a condition of payment. Given the diversity of these decisions, the Supreme Court decided to hear the case, and on June 16, 2016, issued a unanimous decision.

The Court rejected the two extreme approaches to this question offered by the parties. On the one hand, Universal Health Services wanted the Court to rule that a provider could face FCA liability for not disclosing non-compliance with a regulatory requirement only if that requirement is expressly made a condition of payment by the government payer. The Court rejected this position, in part by reasonably pointing out that it is too narrow: What if the provider was violating a condition of participation in the Medicare or Medicaid program, rather than a condition of payment under those programs? Shouldn't lack of eligibility to participate in the government program that pays claims be a necessary prerequisite that is material to that program's decision whether to pay claims submitted by that provider?

The Court also rejected the government's claim that any violation of a statute, regulation or contractual provision is material if the defendant knows that the government would be entitled to refuse payment were it aware of the violation. The Court found this construction to be too broad. What if the government routinely paid claims despite such violations? What if the government decided all claims for payment contained an implied

certification that the provider complied with the entirety of the U.S. Code and Code of Federal Regulations? The Court declined to "adopt such an extraordinarily expansive view of liability" under the FCA.

Instead, the Court sought to strike a middle ground, in which a failure to disclose non-compliance in a claim for payment can give rise to FCA liability if two tests are met: first, that the claim makes specific representations about the goods or services provided; and second, that the failure to disclose that non-compliance is "material" to a government payment decision in the sense that the provider knew or had reason to know that the government payer attaches importance to the specific matter that is being misrepresented in determining the payer's course of action. Since payment claims commonly contain specific representations about the providers and the services they provide (for example, in the Escobar matter, claims contained misrepresentations that services were rendered by licensed social workers), the first part of that test will usually be met.

It is with respect to the second part of the test, that concerning "materiality," that this decision has special significance. Because the FCA is not a "vehicle for punishing garden-variety breaches of contract or regulatory violations," this materiality standard is "demanding." It is not enough that the government labels compliance with a particular requirement as a condition of payment, though such labeling is relevant to a determination of materiality. It is also not enough that the government could choose not to pay the claim had it known about the non-compliance. If the provider can prove that the government paid a particular claim even though it knew about the non-compliance with a particular requirement, or if the provider can prove that the government commonly pays a type of claim despite knowledge of the non-compliance, that is strong evidence that the requirement is not material. Finally, the non-compliance is not material if it is minor or insubstantial.

What this decision does is identify ways in which providers can challenge the blanket claim of the government (or of a *qui tam* relator) that the provider's failure to disclose some form of non-compliance makes an associated claim for payment "fraudulent" under the FCA. The provider could seek to show a pattern of governmental acquiescence in paying claims submitted by providers the government knows are not in compliance with some requirement. The provider could seek to characterize the non-compliance as "garden variety" or insubstantial. The provider could point to the fact that the requirement is not explicitly made a condition of payment as evidence that the requirement is not considered "material" to the government agency's payment decision. At the same time, the decision removes from the provider's hands the argument that only non-disclosure of violations of requirements expressly made conditions of payment can lead to FCA liability.

The practical result of the decision is that providers will more likely and more vigorously contest allegations of FCA liability based on failure to disclose non-compliance with legal or contractual requirements. This will likely result in more and longer litigation, as providers seek to discover information along the lines indicated in the Supreme Court's decision that shows the non-compliance is not "material" to the governmental payer.

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