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Ninth Circuit Requires Documented Protested Costs or Risk False Claims Liability

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In *U.S. v. Borseau*, the Court of Appeals for the Ninth Circuit recently upheld False Claims Act (FCA) liability for a Provider that failed to properly document disputed items on cost reports. The *Borseau* case serves as a cautionary tale for providers, especially since the new Provider Reimbursement Review Board (PRRB) rules are likely to increase the number of cost reports filed under protest.

The *Borseau* Court upheld a district court decision finding a Medicare Provider liable under the FCA for false expenses submitted on Medicare cost reports. In addition to various other improper claims, the Provider submitted cost reports claiming interest expenses and bankruptcy legal fees. The Provider had been advised by its cost report preparers that the expenses would not be allowable because, among other reasons, the interest was never paid to the lender, and the legal fees were not related to the Provider's furnishing of patient care. Nevertheless, the Provider claimed the expenses and noted, in a cover letter accompanying the cost report, that it was claiming the expenses. The Court of Appeals ruled that the letter did not suffice to provide FCA protection.

The *Borseau* Court upheld the district court's determination that the interest and legal fees were not properly submitted, concluding that the Provider did not comply with documentation requirements for claiming disputed items for reimbursement. The Court ruled that, although the Provider noted in cover letters that it was submitting interest and legal fees under dispute, it did not footnote the disputed costs or provide work papers supporting the calculation of the disputed costs, as required by the regulation and the PRM.

Ober|Kaler's Comments: The imposition of FCA liability for a provider's failure adequately to document disputed items is particularly notable at this time, given that the number of cost reports filed under protest may well increase. Beginning with cost-reporting periods ending on or after December 31, 2008, the new PRRB rules require providers to follow specific procedures for filing a cost report under protest in order to establish PRRB jurisdiction. These rules should be followed not only to ensure that the issue is properly appealed but also to protect providers against possible FCA liability.

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