

The Federal False Claims Act - Violations of Conditions of Payment or Conditions of Participation?

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With the increase of Qui Tam lawsuits alleging violations of the federal False Claims Act ("FCA"), it is important to understand that FCA liability maybe predicated on whether the alleged wrongful act violated a condition of payment or a condition of participation. False claims can generally be categorized into two broad types of actionable false claims, those that are factually false and those that are legally false. Factually false claims are those that are false for any number of reasons including the provider submitted an incorrect description of the services, the claim was billed using the wrong provider or the services were never provided at all. Legally false claims are not false on their face. Instead, the claim is false because the provider falsely certified that it is in compliance with certain statutory or regulatory provisions at the time it submitted the claim. Legally false claims are sometimes referred to as "false certification" claims. Increasingly, FCA suits in the health care context involve false certification claims.

The success or failure of a FCA suit based on false certification claims will depend on whether the underlying violations are violations of conditions of payment or conditions of participation. The distinction between a condition of payment and a condition of participation is particularly important because of the damages available under the FCA. These damages include treble damages, so once the trier of fact determines the amount of damages, the judge must then triple the amount. In addition to treble damages, a provider may be subject to civil monetary penalties ranging from \$5,500 to \$11,000 per claim. Finally, the relator's lawyer is also entitled to a recovery of reasonable attorney's fees.

Because of the possibility of large recoveries under the FCA, relators attempt to expand the FCA to enforce violations of rules and regulations that are only remotely related to the payment of claims. The amount at stake in these cases often hinge on the distinction between conditions of payment and conditions of participation.

As all healthcare providers understand, they are regulated by a myriad of complicated laws and regulations. Many of these rules relate to the quality of care rendered to patients or are rules that providers must meet in order to participate in the Medicare and Medicaid programs. These types of rules are generally considered conditions of participation. If the condition or requirement that has not been satisfied relates to a condition of participation in a federal health care program a claim may still be eligible for payment even if a provider is out of compliance with one or more conditions of participation. If conditions of participation are not met, various administrative sanctions are generally available to the government, including imposing a corrective action plan, monetary sanctions,

increased reporting requirements, and even exclusion from the federal health care program. Because exclusion is relatively rare, a number of courts have recognized that it would be both inappropriate and premature for the government to refuse to pay otherwise appropriate claims on the basis that the provider failed to fulfill all conditions of participation.

In contrast, conditions of payment are requirements that must be satisfied before the government will pay a claim. Failure to comply with a condition of payment can result in the denial of the claim. If payment has already been made then the amount paid maybe considered an overpayment which must be refunded or recouped. Failure to comply with a condition of payment properly forms the basis for a FCA suit under the theory that payment would not have been made on the claim absent compliance with the condition of payment. Therefore, if the false certification clearly relates to a condition of payment, the courts generally have found that the claim satisfies the “falsity” element of the FCA and all of the FCA damages are available.

Determining whether a condition is one of participation or payment is not always easy. Generally, the closer the regulation is connected to the government’s payment to the provider, the more likely a court will consider the regulation a condition of payment. On the other hand, if the condition relates more to the quality of care or enrollment in the federal healthcare benefit program the more likely the court will consider the regulation a condition of participation.

Because so much is at risk in FCA litigation, the distinction between conditions of participation and conditions of payment is a critical issue. For example, a recent case was settled for \$1 million when many valued the damages in excess of \$200 million because the judge determined the underlying violations were violations of a condition of participation, not a condition of payment. Thus, if the FCA lawsuit involves allegations of false certification Healthcare providers and their counsel should carefully analyze the alleged violations to determine whether they are violations of conditions of participation or conditions of payment.

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