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In False Claims Litigation, Providers Cannot Invoke "No Harm, No Foul"

By: [James P. Holloway](#)

On the basketball court, the conventional wisdom is "no harm, no foul." It is not so in federal court, particularly in litigation involving the False Claims Act (FCA). The FCA allows the imposition of civil monetary penalties, even if the federal government did not sustain any economic injury as the result of a false claim. More specifically, the FCA provides that persons or entities submitting knowingly false claims may be liable for a civil penalty of up to \$11,000 per claim, plus three times the amount of any damages sustained by the federal government. A recent D.C. Circuit decision found that a provider was not liable for FCA treble damages because the government sustained no injury, but noted that the provider still could be held liable for civil penalties.

In *U.S. ex rel. Davis v. District of Columbia*, 679 F.3d 832 (D.C. Cir. 2012), the plaintiff alleged that D.C. Public Schools (DCPS) requested millions of dollars in Medicaid payments for health and transportation services that DCPS provided to special education students, even though DCPS lacked required documentation to support its services. After concluding that the plaintiff's claim was not precluded by the FCA's "public disclosure" bar, the *Davis* court turned to the question of whether the federal government had been harmed by the alleged false claims. The plaintiff asserted that the federal government would not have paid for DCPS's services if it had known that DCPS lacked the required documentation. Thus, according to the plaintiff, the entire amount paid to DCPS constituted "damages" sustained by the federal government.

The D.C. Circuit observed, however, that the plaintiff did not allege that DCPS failed to provide the services for which it billed. Rather, "[t]he sole defect [the plaintiff] claims is the failure to maintain documentation for those services.... Because all agree that the services paid for were provided, the maintenance of documents to prove that they were has no independent monetary value.... The government got what it paid for and there are no damages." Therefore, DCPS's regulatory violation

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could not result in FCA treble damages but, despite the lack of any injury to the federal government, DCPS nonetheless could be liable for the FCA's civil penalty of up to \$11,000 per claim.

It is important for health care providers to recognize that even if false claims cause no injury or only nominal injury to the federal government, providers still face substantial financial exposure under the FCA's penalty provision. A provider can easily submit thousands of Medicare or Medicaid payment requests each year, over the course of many years. If each of those payment requests constituted a knowingly false claim, and the total number of false claims is multiplied by \$11,000, that provider faces devastating financial liability, regardless of whether the federal government suffered any injury from the false claims. A provider making 1,000 false claims could face a potential civil money penalty as high as \$11 million, on top of any damages sustained by the government. It is that financial exposure that lures whistleblowers to file lawsuits under the FCA. That same financial exposure also should alert health care providers to the need for comprehensive and effective compliance programs that reduce the risk of false claims.

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