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Client Alert

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Alleged Poor Quality Landing Providers in the Poor House: Fraud Cases Based on Quality Allegations See Resurgence

Since around 1996, the government and aggressive whistleblowers have been attempting to use the False Claims Act (the "FCA") to pursue fraud claims against nursing homes based on alleged poor quality of care. The theory employed is that care can reach a blurry point where it is so bad as to be totally "worthless." These quality of care cases initially met with mixed results. In fact, it was one area where the nursing homes held the stronger position, arguing that the FCA was not intended and should not be used as a blunt tool to federalize malpractice actions against nursing homes. The majority of courts endorsed this view, and long-term care providers found at least some solace. Unfortunately, the landscape has recently been changing.

Over the last several months, there have been a series of FCA quality of care indictments, verdicts, and settlements that could be the siren for more attention to these quality cases. For example, in a criminal case out of Georgia, for the first time, the government used the worthless services theory to obtain a conviction against a former operator of three nursing homes where care was allegedly deplorable. In United States v. Houser, the government alleged and the court found that a "long-term pattern and practice of conditions at Defendant's nursing home were so poor, including food shortages bordering on starvation, leaking roofs, virtually no nursing or housekeeping supplies, poor sanitary conditions, major staff shortages, and safety concerns, that, in essence any services that Defendant actually provided were of no value to the residents." Adhering to the maxim that bad facts make bad law, the Judge hearing the case determined that the worthless services theory was viable, leading to a conviction and sentence of twenty years for the operator and an order for over $6 million in restitution to Medicare and Medicaid and another $872,000 to the IRS.

While in an entirely different posture than the Houser criminal action, two Golden Living facilities in Georgia recently settled an FCA whistleblower suit alleging "worthless" wound care services for nursing home residents. Highlighting the prospect that anyone can become a whistleblower, the case was filed by one of the home's medical directors, Dr. Joseph Micca. While not admitting fault, the facilities agreed to pay $613,300 to settle the allegations, and they entered into a five-year Corporate Integrity Agreement (CIA) with HHS covering six Atlanta area facilities. In line with most quality of care CIAs, the facilities will be required to hire and pay for an independent monitor to

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oversee quality issues at the six homes.

More recently, on February 11, 2013, a jury hammered an Illinois nursing home and its individual owner in Illinois for almost $28 million in damages, imposing $9 million for allegedly "worthless" services, $19 million for alleged false claims, and another $400,000 in retaliation damages for the two former employees turned whistleblowers. The two whistleblowers were a former registered nurse and a practical nurse who worked at the facility, Momence Meadows Nursing Center, Inc., through the early to mid-2000s. Their allegations echoed many of the same allegations that providers typically see in their standard medical liability actions – residents laying in urine and feces, lack of care and food, lack of medications, wounds, and skin disorders. The federal trial court did little to narrow the claims before they reached the jury, and the verdict form indicates that the jury was clearly upset at the facility and its owner, imposing the maximum penalties from the available ranges in each category.

Finally, in FCA case against a Villaspring Health Care Center in Erlanger, Kentucky, the government recently announced a settlement with the facility and its affiliate, Carespring Health Management, Inc. Among other things, the lawsuit contended that the facility delivered "worthless services" to certain residents. The court determined that the facilities actions fell within an "admittedly grey area." Unfortunately, instead of fulfilling its gatekeeping role of what should fall under the FCA, the court allowed the quality of care allegations to move forward. After over a year of continued litigation, the parties settled the case, with Villaspring agreeing to pay $350,000 and to implement measures over three years to improve quality of care. Notably, the facility did not enter into an onerous CIA with the government.

The import of these verdicts and settlements is clear: the government and whistleblowers are continuing to stretch the reach of the FCA to attempt to include quality of care issues that have traditionally been handled through the survey process or private lawsuits. While the Houser case is an extreme example that most legitimate operators do not need to fear, the government is continuing to push for liability in the "admittedly grey area" and to push the "blurry line" toward increased nursing home liability. In the face of these efforts, providers should continue their focus on quality, not only to avoid liability, but also to maximize reimbursement as the government continues its transition toward value based purchasing models.

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