Seventh Circuit Tosses False Claims Act Verdict Based on "Worthless Services" Theory of Liability

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In a sweeping decision, the Seventh Circuit tossed out a False Claims Act (FCA) verdict against a nursing home, holding that the relators "failed to offer evidence establishing that [the nursing home's] services were truly or effectively 'worthless.' " *United States ex rel. Vanessa Absher, et al. v. Momence Meadows Nursing Center, Inc. and Jacob Graff*, Case No. 13-1886, at 19 (Aug. 20, 2014). The verdict had been part of a protracted battle that included an individual owner as a defendant.

"Services that are 'worth less' are not 'worthless.' "

In the underlying litigation, two *qui tam* relators alleged that, during their employment at the facility, they uncovered evidence that the facility submitted claims to Medicare and Medicaid that were false under the worthless services theory for FCA liability. Under the worthless services theory, a provider's claims are held to be fraudulent because, though the provider did provide services, the services were so deficient that they were the equivalent of no service at all. The jury in the district court issued a $9 million verdict after being instructed that "[t]o find the services worthless, you need not to find that the patient received no services at all." *Id.* at 17. As an example, the jury instructions read, "if Uncle Sam paid Momence 200 bucks and they only got $120 worth of value, [then] Momence defrauded them of $80 worth of services." *Id.*

On appeal, the Seventh Circuit rejected this "diminished value" of services theory, noting that "[s]ervices that are 'worth less' are not 'worthless.' " *Id.* at 18. The Court observed that the facility had been surveyed 117 times during the period covered by the relators' complaint and concluded:

> [T]he relators failed to offer evidence establishing that Momence's services were truly or effectively "worthless." Indeed, any such claim would be absurd in light of the undisputed fact that Momence was allowed to continue operating and rendering services of some value despite regular visits by government surveyors. The surveyors would certainly have noticed if Momence was providing no or effectively no care to its residents.

Id. at pg. 19 (emphasis added).

Although the Second, Sixth, Eighth, and Ninth Circuits have recognized the "worthless services" as a separate theory of FCA liability, the Seventh Circuit in *Momence* declined to address the validity of the worthless services theory. Nevertheless, the decision is beneficial to providers in that it establishes a high evidentiary burden for proving worthless services under the FCA. To argue a worthless services theory, "[i]t is not enough to offer evidence that the defendant provided services that are worth some amount less than the services paid for." *Id.* at 18. If the Seventh Circuit's opinion is widely embraced, *qui tam* relators and the government will have a heavy burden in arguing for the worthless services theory for FCA liability.

False Certification

The court also quickly rejected the relators' false certification theory. Under the false certification theory, a claim is false when a provider certifies compliance with a statute or regulation as a condition to payment. This can be a false certification of compliance with a contract term,

specification, statute or regulation where payment is conditioned on that certification. Under the implied false certification theory, the act of submitting a claim itself implies compliance with a regulation or statute that expressly states the provider must comply to get paid. The certification is not on the claim form.

The court rejected the express certification argument because "the relators…failed to offer evidence establishing that even a *roughly approximate* number of forms contained false certifications. *Id.* at 26. It gave the relators' implied certification theory similar treatment, stating:

> The relators also appear to argue that compliance with the various regulations was a condition of payment because Momence's failure to comply could result in its termination from the Medicare and Medicaid programs and, consequently, the facility would receive no future payments…. [U]nder the relators' theory, even a single regulatory violation would be a condition of any and all payments subsequently received by the facility inasmuch as the regulators could terminate the facility for practically any deficiency. See 42 C.F.R. § 488.408(b). Such a result would be ***absurd***.

Id. at 22-23 (emphasis added). The Seventh Circuit is arguably recognizing the materiality requirement for FCA liability under the implied certifications theory that many courts have noted. *See, e.g., U.S. ex rel. Hutcheson v. Blackstone Medical*, 647 F.3d 377 (1st Cir. 2011) (holding that "the text of the FCA and our case law make clear that liability cannot arise under the FCA unless…the claim's defect is material"); *U.S. ex rel. Wilkins v. N. Amer. Construction Corp.*, 173 F. Supp. 2d 601, 624 (S.D. Tex. 2001) ("A natural reading of the term "false or fraudulent claim" is consistent with the implied materiality requirement that the courts have consistently recognized. By requiring a claim that is false or fraudulent, rather than a claim that contains false or fraudulent statements, the FCA implicitly requires statements or conduct that are material to the person's entitlement to the money or property claimed before liability arises.").

Liability for the Governing Body

Though *Momence* is, overall, a victory for providers facing *qui tam* litigation, providers should take warning from some of the court's dicta, including that on liability for the governing body. CMS regulations require facilities to have a governing body that appoints the administrator and establishes policies to ensure compliance with the regulations. 42 C.F.R. § 483.75(d). In the recitation of facts, the court discussed the fact that the individual owner comprised the "governing body," coming to a rather quick and concerning conclusion:

> Jacob Graff, Momence's president and part owner, was the "designated person[] functioning as Momence's governing body." *See* 42 C.F.R. § 483.75(d); A-913. Thus, he was legally responsible "for establishing and implementing policies regarding the management and operation of the facility." 42 C.F.R. § 483.75(d). *Momence*, at 3.

Though a state court has previously held that an individual who serves on a governing body may be held directly liable for actions taken in his or her official capacity, this is the first time a federal appellate court has referenced the possibility of such liability. *See Canavan v. National Healthcare Corporation*, 889 So.2d 825 (Fla.2d DCA 2004). Nursing homes should consider the possibility of direct liability for individual governing body members when considering governing body structural issues.

Conclusion

While Seventh Circuit *en banc* rehearing is possible, the present indication is that after *Momence*, it will be much more difficult for relators to successfully bring *qui tam* lawsuits against providers in the Seventh Circuit for standard deficiencies and minor regulatory violations. Given the high burden of proving that services were truly worthless, it will be difficult for the worthless services theory to take root in the Seventh Circuit.

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