

NINTH CIRCUIT SHUTS DOWN “OBJECTIVE FALSEHOOD” PLEADING REQUIREMENT UNDER THE FCA

An accepted doctrine of FCA pleading requires whistleblowers or the Government to assert an “objective falsehood” in their complaints. Last week, the Ninth Circuit nixed the requirement.

The Ninth Circuit reversed a district court’s dismissal tied to a failure to plead an objective falsehood under FCA. The Court held that whistleblowers or the Government need not plead an objective falsehood to state a claim under the FCA, opening the door to vague allegations surviving motions to dismiss—and allowing potentially weak and insufficiently specific cases to proceed through litigation.

CASE BACKGROUND

The whistleblower, the former Director of Care Management at the defendant hospital, alleged that defendants falsely certified Medicare patients’ inpatient hospitalizations were medically necessary. She detailed 65 patient admissions that contradicted the defendants’ admission criteria and allegedly lacked sufficient documentation, including patients admitted for:

- Diagnoses ordinarily treated on an outpatient basis with oral antibiotics;
- Septicemia with no evidence of sepsis in their records; and
- Pneumonia or bronchitis with no evidence of such diseases in their medical records.

The whistleblower alleged that in less than two months, defendants submitted \$1,287,701.62 in false claims to Medicare.

The district court dismissed the complaint, holding that a whistleblower must allege that a defendant knowingly made an objectively false representation. Medicare reimburses providers for inpatient hospitalizations only if a physician certifies that the services are required. That determination rests on a physician’s independent medical judgment. Because a physician’s clinical judgment is subjective—and not objectively false—the district court ruled it could not support an FCA action.

THE NINTH CIRCUIT REJECTS OBJECTIVE FALSITY REQUIREMENT

The Ninth Circuit found the lower court’s ruling too narrow. It held that the whistleblower sufficiently alleged facts supporting an inference that physicians’ certifications were false, that they knew they were false and that they did so to leverage higher reimbursement from the inpatient stays.

Explaining that Congress intended the FCA to have a broader definition of “false or fraudulent” than its common-law meaning, the Court reasoned that opinions are not, and have never been, completely insulated from scrutiny. As a result, a subjective opinion may be fraudulent if it is not honestly held or implies the existence of facts that do not exist. But to survive dismissal, these allegations need enough facts to support the implications.

Here, that defendant owners had a financial motive to falsify Medicare claims and pressure doctors to increase inpatient admissions. The whistleblower provided key statistics showing that daily occupancy rates jumped almost 10 percent, increasing Medicare inpatient stays to the highest it has ever been by a significant margin. Finally, rather than general, unspecific schemes, the whistleblower identified 65 admittances that supported an inference of falsity.

Finding the allegations sufficiently pleaded, the Court also found the inpatient certification material to the government’s payment decision. Inpatient admission requires a formal order from a physician with knowledge about the patient’s hospital course, medical plan of care and current condition. Medicare relies on the certification when paying for the more highly reimbursed inpatient stays—and would not pay for them if it knew the patient’s condition did not support an admission. Thus, the Medicare program’s reliance on the false or fraudulent certification in making payments was certainly material.

The Court, therefore, reversed the district court’s dismissal of the plaintiff’s FCA complaint and explicitly held that a plaintiff need not plead

an objective falsehood to state a FCA claim and that a false certification of medical necessity can be material.

PRACTICAL TAKEAWAYS

The Ninth Circuit's rejection of an objective falsity standard raises serious considerations for FCA defendants. While the whistleblower here may have had sufficient information to support her implicit falsity case, it seemingly opens the door for other whistleblowers to bring complaints that contain vague and speculative allegations based on disagreements in clinical judgment—thereby subjecting defendants to prolonged litigation. Additionally, it may also increase the likelihood that some actions could slide into the 'battle of the experts' trap during summary judgment. Rather than relying on strong, objective standards, both sides could find themselves facing opposing expert opinions on the subjective falsity—increasing the likelihood that cases will be forced to trial.

Health care providers should consult closely with their counsel—including addressing issues proactively with their regulatory compliance counsel. Often, the best antidote to vague or unsupported allegations will be well documented medical records and decision making. Sometimes that documentation may successfully, and objectively, counter a whistleblower's claims.

If you have any questions about this article or the issues raised in it, please contact:

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