

RELATOR'S DAMAGES AND DOCUMENTATION THEORIES REJECTED IN HALIFAX

This week a Court in the Middle District of Florida **dealt a blow** to a whistleblower's allegations of fraud in *U.S. ex rel. Baklid-Kunz v. Halifax Hospital Medical Center* ruling that: (1) the Relator is barred from recovering damages even if it can prove its allegations and (2) the Relator is barred from arguing or presenting evidence regarding her principle theory of alleged fraud. Though trial was set to begin July 8, the Court has discontinued the trial until further notice.

THE DECISION

The Relator claims Halifax violated the False Claims Act by treating patients to its facility, not because the treatment was medically unnecessary, but because Halifax billed for these patients as inpatients rather than outpatients in order to receive a higher reimbursement. In part, the Relator's allegation rests on her contention that these patients' medical chart lacked an admission order.

RELATOR FAILED TO PROPERLY ESTABLISH DAMAGES

The Relator argued that the amount of damages for an individual claim was the total amount paid by the government for an inpatient service, not the difference in reimbursement between an inpatient and outpatient service. The Relator argued that Halifax failed to provide any evidence to support its position that the claims at issue could have been appropriately billed as outpatient services.

Rejecting the Relator's argument, the Court admonished the Relator that the burden rests with her to prove damages, not with the defendant to disprove damages. Further, the Court noted that there are two types of damages cases in FCA jurisprudence: those where the government would never have paid for any service and those where the government would have paid for a lower-priced service. Here the Court found that the allegations presented the latter. Therefore, the proper measure of damages is the difference between a service billed for and the services the government would have actually paid for, as it was "undisputed that Halifax could have legitimately billed Medicare for the services provided to them, so long as it did so at the outpatient rate." (*Halifax* at 8.)

But, because the Relator failed to present any evidence from which a jury could determine this amount of proper damages, Halifax received summary judgment as to any damages sought by the Relator. This took off the table the FCA's treble damages provision, though the defendant could still be found liable and subject to the statutory penalty of up to \$11,000 per fraudulent claim.

RELATOR'S DOCUMENTATION CLAIM BARRED

The Relator's allegation centers on an alleged lack of documentation in the form of a missing admission from each patient's chart. Because there was no admission order, the Relator argued that Halifax should not have billed the services as inpatient services but as outpatient services. Halifax argued, and the Court agreed, that even if true such an allegation is at most a violation of a condition of participation in Medicare - not a condition of payment by Medicare. The Court noted that "an isolated failure to abide by a condition of participation does not necessarily render a claimant ineligible to participate in the Medicare program." (*Halifax* at 9.) Such matters are to be adjudicated, if Medicare chooses, through the administrative remedies available to the government rather than the blunt remedies the FCA provides.

Though the Court left the issue open to reexamination at trial, it ruled that for now the Relator was barred from arguing or presenting any evidence that the lack of an admission order alone was fraudulent.

THE IMPACT

The Court's ruling in *Halifax* significantly restricted the Relator's case and for other health care providers presents welcome interpretations of FCA damages calculations and the important distinction between conditions of payment and conditions of participation. This ruling adds to a **growing body of decisions** that continue to reject relators' attempts to succeed on complaints of regulatory noncompliance rather than complaints of fraudulent behavior.

Should you have any questions regarding the False Claims Act or defense of FCA claims, please contact:

- David B. Honig at dhonig@hallrender.com or (317) 429-1447;
- Drew B. Howk at ahowk@hallrender.com or (317) 429-3607; or

- Your regular Hall Render attorney.