PUBLICATION

False Claims Act Liability Without Submitting False Claims? Yes, That's a Thing

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Most health care providers recognize that submitting a knowingly false claim to a federally funded health care program violates the False Claims Act (FCA). However, it is less well known that indirectly "causing" someone else to submit a false claim also may violate the FCA. A California federal court recently considered a case in which whistleblowers alleged that a manufacturer of urine drug testing (UDT) equipment used in physician offices was liable under the FCA for causing physicians to submit false laboratory testing claims to the Medicare and Medicaid programs. Although the whistleblowers' original complaint was dismissed on procedural grounds, the whistleblowers were allowed to file a revised complaint, so the case serves as an important reminder that even providers that do not submit payment claims may face FCA liability based on their interaction with providers that do submit claims to government health care programs.

A provider violates the FCA if it "knowingly presents, or *causes* to be presented, a false or fraudulent claim for payment or approval."[1] While the law has been on the books a long time, whistleblowers recently have been increasingly relying on the "causes to be presented" provision. That provision, by creating liability when a defendant knowingly causes someone else to submit a false claim, allows whistleblowers and the government to expand the range of providers that could be held responsible for false claims. It exposes providers to even greater risk because the FCA does not require a provider to have actual knowledge that it is causing someone else to submit a false claim; FCA liability may be triggered if a provider causes a false claim through "deliberate ignorance" or "reckless disregard."

In the California case, the whistleblowers alleged that the defendants manufactured UDT equipment designed to perform only simple "qualitative" drug testing in a physician office, but the defendants deceptively marketed the equipment as capable of performing complex "quantitative" drug testing. The government pays significantly higher reimbursement for complex lab testing. Although the defendants did not submit payment claims to Medicare and Medicaid, they allegedly instructed physicians regarding the CPT codes for complex lab testing that could be used in conjunction with defendants' UDT equipment to maximize reimbursement for the physicians that actually submitted the payment claims. Such instructions allegedly were provided by the defendants through written brochures and coding consultants. The court dismissed the complaint because the whistleblowers did not specify sufficient details regarding the manner in which the defendants' marketing caused physicians to submit false claims, but the court also allowed the whistleblowers to file an amended complaint to fix that defect.

There are no clear lines regarding what activities will or will not be deemed to cause false claims, but providers should be wary of the following activities which have the potential to implicate the FCA if they lead to the submission of false claims:

- giving incorrect billing or coding advice, instructions or training to other providers that submit claims to government health care programs;
- giving incorrect clinical information regarding a patient that other providers will use to submit claims to government health care programs;

- creating inaccurate documents that other providers will use to submit claims to government health care programs;

- deceptively marketing products and services that other providers will bill to government health care programs; and

- paying or accepting improper remuneration with other providers that submit claims to government health care programs.

There may be FCA liability if a provider *knowingly* causes another entity to submit a false claim. Because the FCA broadly defines *knowingly*, providers need to consider whether they knew or should have known that their activities were leading another entity to submit false claims to a government health care program. As part of a comprehensive compliance program, providers should evaluate whether their interaction with other providers could lead to an allegation that they are causing false claims in violation of the FCA.

[1] 31 U.S.C. § 3729(a)(1)(A) (emphasis added). Causing the submission of a false claim is only one of several activities prohibited by the FCA.