June 30, 2016

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Major Expansion Of False Claims Act

On June 16th, the U.S. Supreme Court, in a unanimous decision in *Universal Health Inc. v. U.S. et al. ex rel. Escobar et al.*, expanded the basis for turning otherwise valid claims for reimbursement into false claims and, therefore, expanded the universe of potential whistleblower lawsuits. It did so by finding that, in some circumstances, an implied false certification can be the basis for False Claims Act liability.

The Theory

Claims for payment from the federal government are wrapped in **specific representations** about the goods or services provided. For example, the use of a CPT code constitutes a representation that the services underlying that code were actually delivered.

The "implied false certification" concept holds that specific representations come bundled with **implied certifications** of certain underlying compliance with statutory, regulatory, or contractual requirements. Under that theory, if a claimant omits to inform the government that it is out of compliance with an underlying requirement, the claim is rendered false.

The Supreme Court endorsed that reasoning, but only to the extent that compliance with the implied underlying statutory, regulatory, or contractual requirement is material to the Government's payment decision.

The Underlying Case

The facts of the case involved a teenage Medicaid patient who received psychiatric care at Arbour Counseling Services, a subsidiary of for-profit hospital chain Universal Health Services. The patient died due to an adverse drug reaction. Upon investigation, it was discovered that Arbour had few physicians or other licensed providers and that unlicensed staff had illegally prescribed the drugs to the patient.

A whistleblower filed an FCA action alleging that Universal Health through Arbour, had violated the FCA by submitting reimbursement claims that made representations about the specific services provided by specific types of professionals, but that failed to disclose serious violations of regulations pertaining to staff qualifications and licensing requirements for these services.

The Holding

The Supreme Court held that the implied certification theory can be a basis for liability, at least where two conditions are satisfied:

1. The claim does not merely request payment, but also makes specific representations about the goods or services provided. [Note: CPT coded claims are such claims.] and

2. Failure to disclose noncompliance wit **material** statutory, regulatory, or contractual requirements makes those representations misleading half-truths.

Materiality Is Key

The Court disagreed with Universal Health's argument that a defendant should face FCA liability only if it fails to disclose the violation of a contracÂtual, statutory, or regulatory provision that the Government expressly designated a condition of payment.

The Court stated that under the FCA, the misrepresentation must be material to the other party's course of action, but that statutory, regulatory, and contractual requirements are not automatically material, even if they are labeled conditions of payment.

Materiality means "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."

In describing examples, the Court stated that proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the government consistently refuses to pay claims based on noncompliance with a particular statutory, regulatory, or contractual requirement. Conversely, if the government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

The Bottom Line For You

1. It's likely that the case will result in more FCA whistleblower actions.

2. CPT coded services *are* specific representations as to the goods/services provided.

3. There are probably thousands of laws and regulations governing the operation of your business, so many that it's probably the case that no single person or even group of persons could list them all for you. Compliance with a subset of those is likely material. Which ones are material in respect of any particular specific representation becomes the treble damages plus $11,000 per claim question.

4. Materiality is a double-edged sword. It unlocks the key to implied false certification for whistleblowers. But the argument over lack of materiality is a defense for targets of this type of FCA case.

5. The best practical advice is to audit your medical group's/business's compliance with the broadest range of underlying regulations and laws. This can be stratified into those categories that are clearly material, those that may be material, and those that are less likely to be material. [Caveat: I have seen state court FCA counterpart cases that have used arcane requirements to deny millions in insurance company payments arcane was seen as material.]

Wisdom. Applied. 90 - Aetna Obtains $37 Million Judgment Against ASC Manager

A Santa Clara County, California jury awarded the insurer Aetna a $37,452,199 judgment in a lawsuit against Bay Area Surgical Management, LLC, a surgery center management company, a number of its managed ASCs, and three of Bay Area's executives.

All Things Personal

Brexit. It's in the news and I've been asked what I think about it at work and over the phone by clients and contacts. Don't worry, this relates to healthcare and to you.

Brexit has everything to do with asserting rights to elected governance and the rejection of the tyranny of â€œrule by regulationâ€ imposed by unelected and unaccountable bureaucrats.

Hmm, unelected and unaccountable bureaucrats. Sound familiar? Take the hundreds of pages of regulatory pronouncements enforcing the federal anti-kickback statute, for instance. Or, the thousands of pages interpreting Stark. Or, the 962 pages of *initial* proposed rule making from CMS on MACRA.

At some point, regulation by an unelected technical class that believes that they know what's best for you, me and the rest of society is going to break.

Until then, you still have to operate your business wisely in a way to take advantage of what's favored by applicable regulations as well as by what falls through the loophole cracks.

But at the same time, unless those in the industry rail against business-killing pronouncements, those doing the regulating will slip from the somewhat rational into the irrational, preventing you from operating in a manner that all sane people knew was reasonable until the lunatics took over the asylum.

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I've spoken at dozens of medical group events, healthcare organization events, large corporate events, university-sponsored events, and private, invitation-only events on topics such as The Impending Death of Hospitals, the strategic use of OIG Advisory Opinions, medical group governance, and succeeding at negotiations. For more information about a custom presentation for you, email my Santa Barbara office staff.

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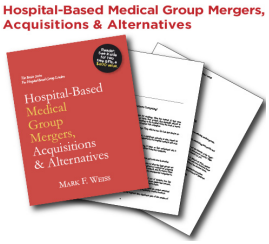

COMPLIMENTARY BOOK DOWNLOAD

Some days, it seems as if everyone, from anesthesia groups to vascular surgery practices, is talking about selling their practice to a larger group, to private equity investors, or to a hospital.

The reality is that some practices can be sold, some can never be sold, and some have nothing to sell.

The reality also is that there are a number of strategic alternatives to a practice sale.

A perfect storm of factors is accelerating the market for hospital-based medical group mergers and acquisitions.

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The healthcare market is changing rapidly, bringing new sets of problems.

How can you find a solution, how can you engage in the right development of strategy, and how can you to plan your, or your groupâ€™s, future without tools to help clarify your thinking?

Directions is a collection of thoughts as thinking tools, each intended to instruct, inform, and even more so, cause you to give pause to instruct and inform yourself.

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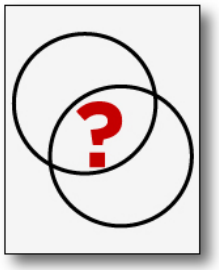

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