



HEALTH CARE LAW ALERT

Growing Trend: Whistleblowers Must Prove More Than Just Regulatory Noncompliance

In a False Claims Act case decided in July 2014, a federal district court in the Middle District of Florida held that a whistleblower could not recover damages even if she could prove her factual allegations. The court also prohibited the whistleblower from arguing that the facts as alleged constituted fraud. *U.S. ex rel. Baklid-Kunz v. Halifax Hospital Medical Center*, 2014 WL 2968251 (M.D.Fla).

The basis for the court's decision was that (1) the whistleblower had failed to provide sufficient evidence from which a jury could determine the appropriate amount of damages; and (2) the whistleblower's factual allegations, even if true, amounted only to a violation of the Medicare conditions of participation, not the Medicare conditions of payment.

The whistleblower had alleged that Halifax Hospital Medical Center admitted patients for whom inpatient admissions were not medically necessary, then billed Medicare on an inpatient basis for the services provided to those patients. If the same services had been provided and billed on an outpatient basis, the payment rate for each service would have been lower. The whistleblower contended that the total amount of each inpatient claim submitted to Medicare constituted the damages sustained by the federal government. The hospital argued that the damages consisted only of the amount by which the inpatient rates exceeded the outpatient rates for the same services. The whistleblower countered that the hospital had failed to produce evidence that it could have properly billed the services on an outpatient basis.

The court noted that the burden of proof regarding damages was on the whistleblower, not the defendant. Additionally, the parties did not dispute that the hospital could have properly billed Medicare for the services provided had it used the outpatient rate. Therefore, even if the whistleblower could prove that the hospital had improperly admitted patients, the proper measure of damages would be the difference between the inpatient and outpatient rates for each service. Because the whistleblower failed to provide evidence from which a jury could calculate that amount, the court ruled that she could not recover damages.

The basis for the false claims allegation was the whistleblower's contention that due to the lack of an admission order in each patient's medical record, the services should have been billed as outpatient services instead of inpatient services.

The hospital argued that the requirement for an admission order qualifies solely as a Medicare condition of participation, not as a condition of payment. The crux of the argument was that violation of a condition of payment can result in Medicare denying payment for that claim. In contrast, violation of a condition of participation can result in a provider's exclusion from participating in Medicare. Whether or not exclusion is warranted is an administrative determination that falls to Medicare. The hospital argued that failure to comply with a condition of participation is not relevant to the issue of a specific claim's falsity. Siding with the hospital, the court stated that "an isolated failure to abide by a condition of participation does not necessarily render a claimant ineligible to participate in the Medicare program." Therefore, the court prohibited the whistleblower from arguing that a claim is fraudulent on the sole basis of a lack of an admission order.

Certainly, full compliance with the Medicare regulations is the only iron-clad protection against False Claims Act liability. However, the *Halifax* case shows that some courts may balk at exposing providers to the treble damages permitted under the False Claims Act solely for violating a Medicare condition of participation.

If you have any questions or would like more information on the issues discussed in this communication, please contact any of the following Hancock Estabrook attorneys:

Laurel E. Baum	315.565.4504	lbaum@hancocklaw.com
Jennifer R. Bolster	315.565.4506	jbolster@hancocklaw.com
Raymond R. D'Agostino	315.565.4518	rdagostino@hancocklaw.com
Catherine A. Diviney	315.565.4520	cdiviney@hancocklaw.com
Meghan S. Gaffey	315.565.4523	mgaffey@hancocklaw.com
Marguerite A. Massett	315.565.4537	mmassett@hancocklaw.com
Mary M. Miner	315.565.4542	mminer@hancocklaw.com

This communication is for informational purposes and is not intended as legal advice.