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The Worthless Services Theory of FCA Liability: The Fine Line Between FCA Liability and the Federalization of Medical Malpractice

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When Congress passed the False Claims Act (FCA) in 1863, it was intended to "aid in the effort to root out fraud against the government."[1] Since that time, and, in particular, since the passage of several major amendments in 1986 and 2009, the FCA has become one of the federal government's most powerful tools; not just in combating "fraud" as commonly understood in both general and legal parlance, but also in punishing non-compliance with the complex regulatory scheme that governs Medicare and Medicaid. In 2013 alone, U.S. Department of Justice (DOJ) collected close to $4 billion in FCA settlements and judgments, the vast majority of which came in health care-related cases.[2]

One theory that the government frequently relies on in FCA cases, particularly in the health care setting, is the "worthless services" theory of liability. According to DOJ, "a 'worthless services' theory under the FCA is simply 'an allegation that a claim is factually false because it seeks reimbursement for a service not provided.'"[3] Although the government has succeeded in collecting millions of dollars in settlements under this

theory of liability, the government has not always succeeded in arguing for liability under this theory when forced to do so in court, particularly when it attempts to premise an FCA case on allegations of substandard medical care. Many commentators, as well as several U.S. Circuit Courts, have expressed concern over the government's attempt to use the FCA as a tool to pursue matters that, for all intents and purposes, amount to little more than medical malpractice actions.

Most recently, in *U.S. ex rel. Absher v. Momence Meadows Nursing Center*, the Seventh Circuit reversed a jury verdict against FCA defendants, rejecting the district court's jury instruction regarding worthless services and holding that "[s]ervices that are 'worth less' are not 'worthless.'"[4] This article briefly discusses the worthless services theory of FCA liability generally, and what federal courts throughout the United States have said about the controversial theory.

An Overview of the Worthless Services Theory

As DOJ discussed in its amicus brief in the *Absher* case, the worthless services theory of FCA liability finds its roots in the early days of the FCA, during the Civil War era, when unscrupulous contractors passed off imitation goods to the government, such as sand for sugar and rye for coffee.[5] Unlike the typical FCA case based on a provider's alleged non-compliance with regulations, worthless services cases are premised on allegations that the provider "charged the government for something of value that it knowingly did not provide."[6] However, at least according to DOJ, FCA liability for worthless services does not require proof that a provider submitted a claim or claims for phantom services. Instead, DOJ argues that FCA liability attaches "when a defendant knowingly charges the government for materially deficient goods or services. Whether the deficient goods or services provided have any residual economic value in their own right is of no legal consequence."[7]

Worthless Services FCA Cases

In several recent cases, the government and/or FCA qui tam relators succeeded in surviving dismissal in FCA cases based, at least in part, on a worthless services theory of liability. One of the most recent examples is *United States v. Associates in Eye Care, P.S.C., et al.*[8] In that case, the United States brought an FCA action against an optometrist and his employer in the Eastern District of Kentucky alleging, among other things, that the optometrist provided eye examinations to nursing home residents that were unnecessary and, in some cases, "so cursory that they were worthless."[9] The defendants in *Associates in Eye Care* moved to dismiss the government's complaint and argued, in part, that the government's worthless services theory was not a viable basis for FCA liability.[10] Rejecting the defendants' arguments and denying their motion to dismiss, the court in *Associates in Eye Care* noted that the government's worthless services theory was premised on the assumption that, given the high

number of patients for which the optometrist billed in a particular day, the doctor "must have spent less than four minutes with each patient on that day, which would have resulted in very superficial, or worthless, examinations."[11] The court held that those allegations clearly met the requisite pleading standards and that, at the motion-to-dismiss stage, the government did not need to prove that all of the claims at issue were actually worthless, so long as it pled those claims with sufficient detail.[12]

In another nursing home case from the Eastern District of Kentucky, *United States v. Villaspring Health Care Center, Inc.*, the United States pursued a worthless services claim against a nursing home and the nursing home's chief executive officer.[13] The government's complaint in *Villaspring* alleged, in relevant part, that the defendants submitted claims for care to nursing home residents that "was either non-existent or so inadequate to be worthless."[14] Denying the defendants' motion to dismiss, the court in *Villaspring* held that "[i]t is not necessary to show that the services were completely lacking; rather, it is also sufficient to show that 'patients were not provided the quality of care' which meets the statutory standard."[15]

Blurring the Lines Between Worthless Services and Medical Malpractice

Although the government has had some success in pursuing worthless services claims under the FCA, it has not always succeeded in doing so, particularly where it attempts to punish substandard care (as opposed to completely worthless or non-existent care) under the FCA. In *Chesbrough v. VPA, P.C.*, for example, the Sixth Circuit affirmed dismissal of an FCA complaint premised on a worthless services theory.[16] The complaint in *Chesbrough* alleged that the defendant violated the FCA by submitting claims for radiology studies that were "suboptimal," of poor quality, or failed to meet standards of care.[17]

The court in *Chesbrough* held that for a claim to be false or fraudulent under a worthless services theory, the services must have been "so deficient that for all practical purposes it is the equivalent of no performance at all."[18] The court drew a distinction between an allegation of substandard care (which, it held, is not actionable under the FCA) and an allegation of completely worthless care (which, it held, is actionable): "If VPA sought reimbursement for services that it knew were not just of poor quality but had *no* medical value, then it would have effectively submitted claims for services that were not actually provided."[19] Finding that the qui tam complaint failed to sufficiently allege presentment of a claim for a service with no medical value, the court affirmed dismissal of the complaint.[20]

Similarly, in *Mikes v. Straus*, the Second Circuit affirmed summary judgment in favor of FCA defendants on a worthless services claim.[21] The relator in *Mikes* alleged that the

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defendants violated the FCA by submitting claims for spirometry services that were allegedly substandard due to the defendants' failure to calibrate the spirometers.[22] The Second Circuit held that the relator could not present sufficient evidence that the defendants knowingly submitted claims for worthless services and that the defendants "proffered ample evidence . . . supporting their contention that they held a good faith belief that their spirometry tests were of medical value."[23] Although contained in its discussion of the relator's implied certification theory, the court in *Mikes* held that "permitting qui tam plaintiffs to assert that defendants' quality of care failed to meet medical standards would promote federalization of medical malpractice, as the federal government or the qui tam relator would replace the aggrieved patient as plaintiff."[24] "Beyond that," the court observed, "the courts are not the best forum to resolve medical issues concerning levels of care. State, local or private medical agencies, boards and societies are better suited to monitor quality of care issues."[25]

The most recent blow to a worthless services claim is the Seventh Circuit's decision in *Absher*, where FCA relators brought a worthless services claim against a nursing home and won a jury verdict in their favor.[26] The district court instructed the jury that "[s]ervices can be worthless, and the claims for those services can, for that reason be false, even if the nursing facility in fact provided some services to the patient. To find the services worthless, you do not need to find that the patient received no services at all."[27] The district court provided the jury with an example: "if Uncle Sam paid [the defendant] 200 bucks and they only got $120 worth of value, [then] [the defendant] defrauded them of $80 worth of services."[28]

On appeal, the Seventh Circuit held that the jury instruction was incorrect and that to violate the FCA under a worthless services theory, the services must have been so deficient that they were, for all intents and purposes, non-existent.[29] The court held that "[i]t is not enough to offer evidence that the defendant provided services that are worth some amount less than the services paid for. That is, a 'diminished value' of services theory does not satisfy this standard. Services that are 'worth less' are not 'worthless.'"[30] The court concluded that because the relators failed to offer evidence that the defendants' services were truly or effectively "worthless," the jury verdict was not supported.[31] Although it did not have to reach the issue, the Seventh Circuit left open the possibility that it might, in a future case, completely reject the worthless services theory.[32]

Conclusion

Although the worthless services theory is generally considered a viable theory of FCA liability, most courts are reluctant to find liability under the theory unless it is shown that the services billed for are truly, or effectively, worthless. By drawing a careful, albeit often blurry, distinction between truly worthless services and services that, at worst, fell below the standard of care, federal courts have pushed back on the federal government's attempt to subject an arguably run-of-the-mill medical malpractice claim to the tremendous liability imposed under the FCA.

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1 *Erickson ex rel. U.S. v. Amer. Inst. of Biological Sciences*, 716 F. Supp. 908, 915 (E.D. Va. 1989).
2 U.S. Dept. of Justice, Civil Division, *Fraud Statistics—Overview* (Dec. 23, 2013), *available at* www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.
3 Brief for the United States of America as Amicus Curiae Supporting Appellee/Cross-Appellants at 19, *United States of America ex rel. Absher et al. v. Momence Meadows Nursing Center, Inc. et al.*, 2014 WL 4092258 (7th Cir. Aug. 20, 2014) (Nos. 13-1886 & 13-1936).
4 *Absher*, 2014 WL 4092258, at * 7.
5 Brief for the United States at 20, *Absher* (quoting *United States ex rel. Newsham v. Lockheed Missiles and Space Co.*, 722 F. Supp. 607, 609 (N.D. Cal. 1989)).
6 *Id.* at 19.
7 *Id.* at 22-23.
8 No. 3:13-cv-27, 2014 WL 414231 (E.D. Ky. Feb. 4, 2014).
9 *Id.* at *1.
10 *Id.* at *6.
11 *Id.* at *7.
12 *Id. Associates in Eye Care* is currently set for a March 2015 jury trial.
13 No. 3:11-cv-43, 2011 WL 6337455 (E.D. Ky. Dec. 19, 2011).
14 *Id.* at *1.
15 *Id.* at * 5 (quoting *United States v. NHC Healthcare Corp.*, 115 F. Supp. 2d 1149, 1153 (W.D.Mo. 2000)).
16 655 F.3d 461 (6th Cir. 2011).
17 *Id.* at 464-67.
18 *Id.* at 468 (quoting *Mikes v. Straus*, 274, F.3d 687, 702-03 (2d Cir. 2001)).
19 *Id.* (emphasis in original).
20 *Id.* at 472-73.
21 274 F.3d 687 (2d Cir. 2001).
22 *Id.* at 693.
23 *Id.* at 703-04.
24 *Id.* at 700.
25 *Id.*
26 2014 WL 4092258 at *1.
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.* at *8.
32 *Id.*