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Medical Judgment Not Valid False Claims Defense, Court Says
From Health Care on Bloomberg Law
By Matt Phifer

Health-care providers and doctors can't hide behind medical judgment as a defense in false claims actions, according to a federal appeals court.

The court found that medical judgment couldn't be used at the summary judgment stage as a defense in a false claims action against a health-care provider that allegedly billed for medically unnecessary treatments. Now multiple medical facilities will have to face allegations, brought by a fellow doctor, that they submitted false claims for unnecessary heart procedures performed by one of their doctors.

The July 9 decision by the U.S. Court of Appeals for the Tenth Circuit is a stark warning to providers that they must take their compliance obligations seriously. That includes making sure their doctors are performing medical procedures that are truly necessary, based in part on an assessment of whether they are doing so in a way that is on par with their peers.

Rand Nolen, of Fleming, Nolen & Jez LLP in Houston, and one of the attorneys representing the whistleblowing physician, told Bloomberg Law the appeals court decision will benefit other whistleblowers in addition to his client.

"It's going to allow us in this case to go forward and it also tells whistleblowers that if they see unnecessary medical procedures that don't have any basis in medicine being performed and the provider is submitting bills to Medicare or the federal government, regardless of the program, that the whistleblower can stand up and bring that to the attention of the federal government," Nolen said.

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Poking Healthy Hearts

Dr. Gerald Polukoff brought the case alleging that Dr. Sherman Sorensen was performing unnecessary heart surgeries, even poking holes in healthy hearts just to patch up the holes. Sorensen's cardiovascular group provided services for Intermountain Medical Center and St. Mark's Hospital in Salt Lake City, Utah.

Polukoff alleged the medical centers violated the False Claims Act when they described Sorensen's surgeries as medically reasonable and necessary when they filed their claims for Medicare reimbursement. HCA, the Tennessee-based company that owns St. Mark's succeeded in having allegations against it dismissed, so the case was moved to Utah because all the remaining defendants, including St. Mark's Hospital, were located in that state.

Judge Jill Parrish of the U.S. District Court for the District of Utah granted a motion to dismiss the action in 2016, ruling that decisions based on medical judgments couldn't be considered false under the False Claims Act.

The appeals court overturned the district court decision, finding it is possible for a medical judgment to be false or fraudulent.

Ominous Sign for Providers

The appeals court's decision to find a claim based on an inappropriate exercise of medical judgment can be considered false under the FCA puts providers on notice that this liability theory is not going away.

"For providers, this is somewhat of an ominous development," Jason Mehta, a partner at Bradley Arant Boult Cummings LLP in Tampa, who defends businesses in whistleblower actions, told Bloomberg Law. "The fact the Tenth Circuit is expressly reviving a case that at its core is about medical necessity and judgment is potentially ominous for providers."

Mehta said the decision could allow more whistleblowers to at least reach discovery. He also cited as significant the government's decision to express interest in the case at the appeals court level despite declining to intervene at the federal trial court level.

"Where the DOJ has either intervened or filed statements of interest, courts are much more accommodating to those relators," Mehta told Bloomberg Law. "Now more than ever, relators counsel need to get the buy-in of the DOJ."

Medical Judgment Falsity

The appeals court reasoned that the False Claims Act should be read broadly, citing U.S. v. Neifert-White Co., in which the Supreme Court said the FCA "was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." The court also cited the First Circuit's U.S. ex rel. Loughren v. Unum Grp. decision, which found an allegedly false statement that is a speaker's opinion can still give rise to liability under the FCA.

Finally, the appeals court cited U.S. ex rel. Riley v. St. Luke's Episcopal Hosp. out of the 5th Circuit, which found claims for unnecessary medical treatment are actionable under the FCA.

The court concluded that a doctor's certification that a procedure was "reasonable and necessary" is false if the procedure doesn't meet the government's definition of what is reasonable and necessary that is found in the Medicare Program Integrity Manual. Among the requirements is that the procedure is safe and effective; not experimental or investigational; and appropriate, including in duration and frequency.

Brian Markovitz, an attorney at Joseph, Greenwald & Laake P.A. in Greenbelt, Md., who represents whistleblowers, told Bloomberg Law he thought the court wrote a good common sense opinion and did a good job of describing a false claim.

“Just leaving it up to somebody’s judgment is a bad idea,” he said. “First of all, it lets people lie and insulates them from inappropriate and bad behavior, he added. “They could always claim medical judgment,” Markovitz told Bloomberg Law.

He said a bright line rule that allowed medical necessity as a defense could “lead to all sorts of ills.”

Review of Peers

A major part of the case involved the statistical comparison of the number of procedures Sorensen performed versus his peers. The complaint explained that one of the specific heart procedures in question was performed only 37 times by the Cleveland Clinic in 2010, while billing records showed Sorenson allegedly claimed to have performed 861 that same year.

“I think it’s important for providers and employers to track this line of case law and if medical judgment becomes grounds for an implied False Claims Act action, then you really need to consider whether you need to monitor data to identify and investigate outliers,” William Conaboy Jr. of Buchanan Ingersoll & Rooney P.C. in Philadelphia, who represents health-care providers and is a member of a Bloomberg Law advisory board, told Bloomberg Law.

Nolen said he is feeling confident about his client’s case. “Extraordinarily good,” Nolen responded when asked how he felt moving to the next stage of the case.

“Prior to filing this case we had done a large amount of investigation. There are at least ten or more witnesses who will support the relator’s claims in this case and we feel very good.”

The case will now go back to the district court for further proceedings.

The attorneys for St. Mark’s Hospital didn’t respond to Bloomberg Law’s request for comment.

Fleming, Nolen & Jez L.L.P. in Houston and Goldstein & Russell in Bethesda, Md., represent Polukoff. Latham & Watkins in Washington, San Diego, and Nashville; and Waller Lansden Dortch & Davis L.L.P. in Nashville represent St. Mark's Hospital. Manning Curtis Bradshaw & Beddnar in Salt Lake City; McDermott Will & Emery in Washington and Chicago; and Polsinelli in Chicago represent Intermountain Healthcare. Holland & Hart in Salt Lake City and Denver represent Sorensen and Sorensen Cardiovascular Group.

The case is United States ex rel. Polukoff v. St. Mark's Hosp., 2018 BL 241604, 10th Cir., No. 17-4014, 7/9/18.