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Jury Sides with Defendant in Whistleblower's Suit Alleging Defendant "Caused" False Claims [Ober|Kaler]

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Abbott Laboratories recently won a jury verdict in a high profile qui tam lawsuit alleging that Abbott "caused" health providers to submit false Medicare payment claims for off-label use of biliary stents. *U.S. ex rel. Colquitt v. Abbott Laboratories*, No. 3:06-cv-01769 (N.D. Tex.).

The verdict is noteworthy for several reasons. First, it is important for providers to recognize that liability under the False Claims Act (FCA) is not limited to entities that present false payment claims to the government. Entities that do not bill government health care programs still may be liable under the FCA if they knowingly "cause" other entities to present false claims to such programs. In the Abbott trial, the court instructed the jury that:

Defendants may be found to have "caused" the presentment, or submission, of a claim for Medicare reimbursement if the actions of Defendants were (1) a substantial factor in inducing providers to submit claims to Medicare for reimbursement, and (2) if the submission of those claims for reimbursement was reasonably foreseeable or anticipated as a natural consequence of Defendants' conduct.

For each disputed claim for payment, you cannot find Defendants "caused" a medical provider to submit a false or fraudulent claim unless Defendants "caused," as defined in the immediately preceding paragraph, an actual provider to submit a false or fraudulent claim. Defendants' actions need not be the only cause for the payment of the false claim.

The whistleblower alleged Abbott caused false claims by providing reimbursement guidance to providers that included instructions regarding which CPT codes to use when seeking reimbursement from government health care programs. The whistleblower asserted that Abbott's reimbursement guides suggested to providers that they use CPT codes associated with vascular stents to obtain payment for biliary stents, which allegedly were not FDA-approved and therefore were not covered by government health care programs. The jury rejected the whistleblower's allegation that Abbott caused false claims.

Prior to the trial, Abbott had filed motions with the court, attacking the validity of the whistleblower's theory that Abbott had caused false claims. The court rejected Abbott's motions, concluding that the issue should be resolved by the jury. Undeterred, Abbott proceeded to defend itself at trial. When the time came for the whistleblower to prove his case at trial, he was unable to convince the jury that Abbott had knowingly caused providers to submit false claims to the government. The Abbott verdict demonstrates that there may be a large gulf between alleging false claims and proving false claims. While courts may appear increasingly lenient in allowing FCA cases to proceed to trial, providers still may succeed in defending against bogus false claim allegations at trial.

Of course, it is preferable to avoid FCA litigation altogether. Health care entities that do not submit payment claims directly to government health care programs should evaluate their interaction with providers that do submit payment claims. There are several important questions to ask.

- Are you providing reimbursement guidance to providers that bill government health care programs?

- If so, is that guidance accurate and complete?
- Are you periodically reviewing the guidance you provide to assure that it remains accurate and complete?
- Are you providing guidance according to an approved written format?
- Are you taking steps to prevent your representatives from offering oral guidance that deviates from the written guidance?
- Have you evaluated whether the business advantages of assisting customers with reimbursement issues justify the risk of potential FCA liability for “causing” false claims?

These important questions should be discussed with your legal counsel to reduce your risk of FCA liability.