

PUBLICATION

Government Fails to Prove Alleged Kickback Scheme Violates False Claims Act [Ober|Kaler]

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When the U.S Justice Department alleges a violation of the False Claims Act (FCA), some health care providers conclude that they must reach a settlement with the government because they cannot win — or cannot afford to win — in court. In some cases, a settlement is indeed the prudent course to control liability, minimize adverse publicity, and/or reduce litigation costs. However, the Justice Department's recent loss at the trial of an FCA case demonstrates that when the government is forced to back up its allegations with proof, providers may be successful in defending against FCA allegations.

In *U.S. ex rel. Jamison v. McKesson Corp.*, ___ F. Supp. 2d ___, 2012 WL 4499136 (N.D. Miss. Sept. 28, 2012), the government alleged that nursing homes and DMEPOS entities violated the FCA in connection with claims for Medicare payment that violated the Anti-kickback Statute (AKS). More specifically, the government alleged that in 2002, a lucrative contract to provide general medical supplies to the Beverly Enterprises nursing home chain was expiring. According to the government, a Beverly subsidiary “dangled” the prospect of awarding the expiring medical supply contract to another entity — a McKesson subsidiary — in order to induce McKesson to offer contract billing services for enteral products to Beverly at below-fair-market value. Similarly, the government alleged that McKesson offered the billing services at a discount in an attempt to win the Beverly medical supply contract. Furthermore, the government alleged that Beverly later “carved out” enteral supply distribution from its general medical supply contract in order to induce McKesson to provide Beverly with billing services at below-fair-market value, and the McKesson subsidiary offered the billing services at a discount in an attempt to obtain Beverly's business.

Following a bench trial, the court awarded judgment in favor of the defendants. The court concluded that the government failed to establish a violation of the AKS. Because the government's FCA allegations were based on alleged violations of the AKS, the government's inability to establish a kickback violation doomed its FCA case.

First, the court concluded that the “Government failed to prove that Defendants violated the AKS by offering or paying any remuneration to induce referrals.” The evidence at trial demonstrated that Beverly renewed the expiring medical supply contract with the same vendor, rather than awarding it to McKesson. Moreover, the evidence demonstrated that McKesson knew that Beverly's medical supply contract already was “off the table” at the time it submitted its final bid to provide contract billing services. Thus, the general medical supply contract could not have been used as an inducement for any kickback. Furthermore, the evidence demonstrated that the later “carving out” of enteral supplies from the general medical supply contract did not result in a discounted price for contract billing services. McKesson's bid to provide contract billing services was comparable to, or higher than, bids from other vendors. Thus, the government did not establish that McKesson was offering billing services below fair market value. While the government contended that McKesson's objective was to obtain Beverly's medical supply business, the court noted that “in order to violate the AKS, it is not enough to covet the business of another, there must actually be some bad intent to violate the law.”

In addition to the lack of any remuneration to induce referrals, the court concluded that “the Government has failed to show Defendants had knowledge or acted willfully such that liability under the AKS would attach.” The government presented evidence that McKesson's financial analysis of its proposed transaction with Beverly

was, in some respects, incorrect or inconsistent, but the government failed to demonstrate that McKesson deliberately manipulated its financial analysis or offered pricing below fair market value. Likewise, the government failed to prove that Beverly was aware of McKesson's profitability analysis for providing contract billing services and, therefore, Beverly could not know whether McKesson was offering billing services below fair market value.

The outcome of the trial reveals that the government cannot always back up its false claim allegations when forced to prove its case at trial. While the prospect of defending against false claim or kickback allegations at trial may be unappealing for many providers, in some cases it is a viable option. At a minimum, when providers negotiate with the government to settle false claim allegations, it is useful to remember that the government faces the risk of loss at trial and this reality may be used by providers to negotiate for a more advantageous settlement.