PUBLICATION

Worthless Services Investigations and Settlements: The Enforcement Trend Continues [Ober|Kaler]

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In recent years, state and federal governments have shown their willingness to criminally pursue skilled nursing home owners and operators for allegedly administering "worthless" or substandard quality of care to their residents.

On September 17, 2014, U. S. Department of Justice (DOJ) Assistant Attorney General Leslie Caldwell publicly announced a new DOJ policy regarding all new *qui tam* complaints. Effective immediately, DOJ's civil and criminal prosecutors would simultaneously review all new *qui tam* complaints filed to evaluate whether parallel investigations are appropriate.[1]

Thereafter, several government authorities have continued to endorse the "materially substandard" or "worthless" services theories of prosecution by pursuing enforcement actions against long-term care operators and facilities.

United States v. ARBA Group, CF Watsonville East, et al.

On August 29, 2014, the United States filed a civil complaint against ARBA Group, CF Watsonville East, LLC, CF Watsonville West, LLC, and Country Villa Health Service Corporation, dba Country Villa Health Services, to recover damages and civil penalties under the federal False Claims Act (FCA). The complaint alleges that between 2007 and 2012, the defendants, who own, operate and/or manage two California nursing home facilities, defrauded Medicare and Medicaid (Medi-Cal) by submitting claims for "non-existent," "grossly inadequate, materially substandard and/or worthless services" provident to the residents. Specifically, the complaint alleges that residents were "persistently and severely" overmedicated, which caused significant medical conditions, including infection, malnutrition, falls, fractures, and, in some cases, premature death. In addition, according to the complaint, pharmacists notified several top-level officials employed by the defendants about their overmedication concerns. The complaint further alleges that these top-level officials had received notice of lawsuits filed by the residents as well as complaints from state regulators. Despite this notice, the defendants purportedly allowed the practices to continue unabated.

As of the date of this writing, the defendants have not yet filed a response to the complaint. The case is set for a Case Management Conference on May 7, 2015.

United States ex rel. Lovvorn v. Extendicare Health Services, Inc.

More recently, on October 10, 2014, SNF operator Extendicare Heath Services and its subsidiary, Progressive Step Corporation (a therapy rehabilitation provider) entered into a $38 million settlement agreement with the federal government and eight states to resolve allegations that the entities violated the FCA and several states' false claims statutes. The settlement resolved allegations that, between 2007 and 2013, Extendicare submitted or caused to be submitted false claims for payment to Medicare and Medicaid for materially substandard and/or worthless skilled nursing services, and for services that failed to meet certain regulatory standard of care requirements. For example, in 33 of its skilled nursing facilities, Extendicare: (a) failed to have a sufficient

number of skilled staff to adequately care for residents; (b) failed to appropriately administer medications to some of its residents to avoid medication errors; and (c) failed to follow appropriate fall protocols. The settlement also resolved allegations that, at 33 skilled nursing facilities, Extendicare and Progressive Step billed Medicare for unreasonable and medically unnecessary rehabilitation services, especially during the patients' assessment reference periods, so that Medicare paid for patients at the highest Resource Utilization Group (RUG) levels.

The relators who initiated the *qui tam* actions received approximately $2 million.

Extendicare also entered into a five-year Corporate Integrity Agreement with HHS-OIG, whereby it agreed to revise its compliance program to include the development and implementation a quality-of-care review program.

United States ex rel. Absher et al. v. Momence Meadows Nursing Center, Inc.

On August 20, 2014, the Seventh Circuit issued its decision in a *qui tam* action brought by former clinical staff at Momence Meadows Nursing Center.[2] The relators alleged that the care provided to the facility's residents was so deficient that it was worthless, and thereby false, under the False Claims Act. The government intervened in the action, and the case proceeded to trial in federal court. After deliberating, the jury found that Momence submitted more than 1,700 false claims, and awarded compensatory damages of approximately $3 million. The district court entered judgment for the United States in the amount of $9,091,227, thereby trebling the damages award.

On appeal, the Seventh Circuit vacated the award, finding that the relators had failed to meet their evidentiary burden to establish that the services rendered were worthless. The court did not, however, invalidate the worthless services theory of liability, but, rather, found that in order to prevail under this theory, the moving party bears the burden of establishing that “the performance of the service [is] so deficient that for all practical purposes it is the equivalent of no performance at all.” (citation omitted). The court opined:

It 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.”[3]

Ober | Kaler Comments

In light of Assistant Attorney General Caldwell's remarks, all health care providers are now on notice that more parallel (civil and criminal) prosecutions will likely occur. To prepare for this new reality, skilled nursing facilities would be well advised to redouble efforts to maintain adequate and highly skilled staff who are particularly attuned to residents' medication needs. Failure to do so increases the likelihood that the government could prevail in a worthless services prosecution against your facility.

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1 *See* Remarks by Assistant Attorney General Caldwell at the Taxpayers Against Fraud Education Fund Conference, http://www.justice.gov/criminal/pr/speeches/2014/crm.

2 *U.S. ex rel. Absher et al. v. Momence Meadows Nursing Center, Inc.*, 764 F.3d 699 (7th Cir. 2014).

3 Absher, 764 F.3d at 710.