

## False Alarms

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On May 20, President Obama signed the Fraud Enforcement and Recovery Act of 2009, which includes substantial amendments to the False Claims Act, 31 U.S.C. Sections 3729-3733, for the first time since 1986. These amendments significantly expand the scope of liability for individuals and entities that receive government funds, including health care providers and suppliers receiving federal funds through Medicare or Medicaid. The amendments also institute a number of important procedural changes in the False Claims Act.

Health care fraud cases constitute the most prevalent category of False Claims Act actions and have generated approximately two-thirds of all federal recoveries under it. It is very important for all health care providers and suppliers to become familiar with the new provisions in the Fraud Enforcement and Recovery Act and to evaluate the new risks posed by the legislation.

Since 1986, the False Claims Act has served as the government's principal tool to combat fraud perpetrated on the federal treasury. Until the amendments, the False Claims Act imposed liability for the knowing presentation to the federal government of false or fraudulent claims, the use of false statements to get false claims paid or a conspiracy to get false claims paid. It also imposed liability for "reverse" false claims, i.e., the knowing use of false statements to conceal, avoid or decrease an obligation to pay money to the government. Lawsuits to enforce the statute could be asserted directly by the Department of Justice or by private citizens known as *qui tam* plaintiffs or "relators," who stand to receive a 15 to 30 percent share in any recovery by the government.

Significantly for health care providers and suppliers, the amendments expand the reverse false claims provision of the False Claims Act. Before the Fraud Enforcement and Recovery Act, the reverse false claims provision imposed liability on a person who knowingly made, used or caused to be made or used, "a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the [g]overnment." Courts had construed the term "obligation" fairly narrowly, holding that it did not encompass, for example, contingent duties to pay potential fines or penalties, but only fixed obligations.

The amendments extend the reverse false claims provision in several ways. First, they broaden the standard for liability by eliminating the need for a false record or statement. Instead, liability can be imposed where a person "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." It is not clear what the word "improperly" is intended to encompass or how it will be interpreted, but it appears likely that it is intended to serve as an analog to the word "false" in the other sections of the statute.

Second, the amendments include a definition of "obligation" that likely expands the types of duties that are actionable: "The term 'obligation' means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment."

This definition of "obligation" does not explain what constitutes an "established"

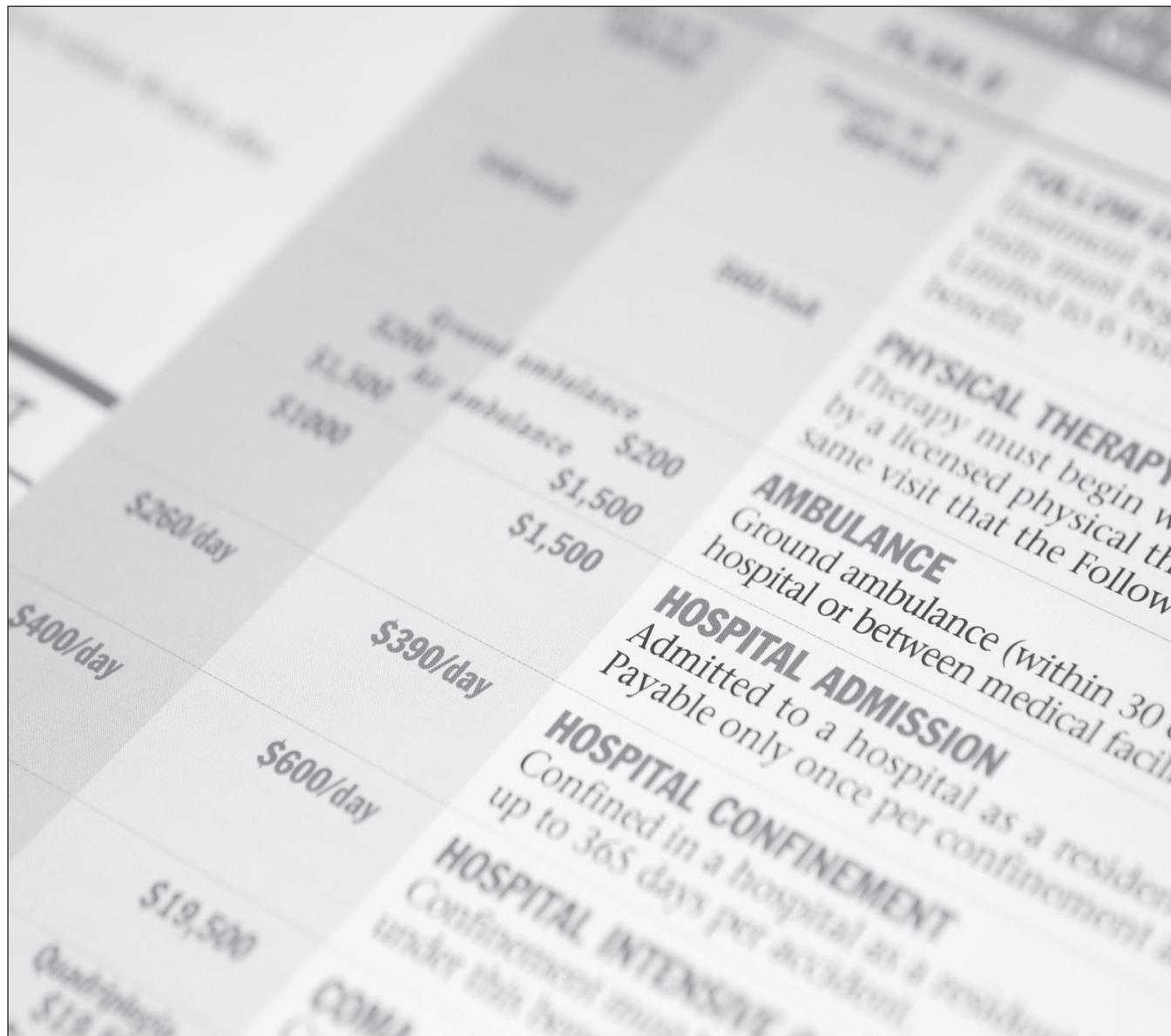
duty, but the legislative history of the Fraud Enforcement and Recovery Act is clear that Congress did not intend "contingent" duties, such as duties to pay potential penalties and fines, to fall within the definition of actionable duties. The definition of "obligation" includes duties that arise from a broad number of sources, including obligations arising from regulations published in the Federal Register and the Code of Federal Regulations. The legislative history, however, clarifies that duties created by rules not published in the Federal Register do not fall within the definition of "obligation."

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Probably most important for the health care industry, the definition of "obligation" also specifies that the "retention of any overpayment" can serve as the basis for reverse false claims liability if it is done knowingly and improperly, or if an overpayment is knowingly concealed. The legislative history of this controversial provision indicates that liability should not be imposed for retention of overpayments pending return through normal processes, including Medicare, Medicaid, contract, grant and other reconciliation processes. Rather, the False Claims Act would require proof of a knowing false record or statement, knowing concealment or knowing and improper acts to avoid or decrease an obligation to pay money to the government.

Thus, liability should not attach if a person fails to immediately return an overpayment from the federal government and, instead, takes steps to return the overpayment through an applicable reconciliation process (such as a statutory, regulatory, contractual, judicial or similar process). But liability would attach if a person falsifies information during a reconciliation period or otherwise acts knowingly and improperly to avoid repayment. Troublingly, the legislative history seems to suggest, albeit unclearly, that the failure to return an overpayment during an administrative or judicial appeal might be actionable under the False Claims Act. Because of the broad and unclear scope of this overpayment provision, all health care companies should examine their processes for identifying and reconciling overpayments.

The amendments also significantly expand the scope of "direct" liability under the False Claims Act, by providing that liability attaches not only to claims presented directly to the United States, but also to claims presented to entities administering government funds. This change addresses several recent court decisions that had suggested that the False Claims Act did not impose liability unless claims were directly "presented" to the United States. The issue came to a head in the Supreme Court's decision in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), which



held that claims presented to intermediaries rather than the government were actionable only if the presenter intended that its false statements be used to get the government to pay the false claims.

The Fraud Enforcement and Recovery Act amends the False Claims Act to remove the language on which the *Allison Engine* decision rested and specifies that liability would attach to any claim submitted to intermediaries "if the money or property is to be spent or used on the government's behalf or to advance a government program or interest." This amendment is particularly significant for health care providers and suppliers that receive Medicare funds through intermediaries, carriers or Medicare Administrative Contractors or Medicaid funds through the states.

Before the amendments, virtually all courts agreed that the False Claims Act incorporated a "materiality" requirement — that is, a false or fraudulent statement must be "material" to the government payment decision. The amendments may cast doubt on this conclusion because they add an explicit "materiality" requirement in the "false statements" and "reverse false claims" subsections of the False Claims Act, but not in the other subsections. Nonetheless, courts may still conclude that some implicit standard of "relevance" is still inherent in the phrase "false or fraudulent claim" found in both of the direct false claims provisions. Judicial developments in this area could prove very important in coming years.

In addition, the amendments resolve a judicial debate over whether materiality under the False Claims Act should be determined subjectively, i.e., by establishing if the actual decision-maker in a given case was induced by the false statement to pay a claim, or objectively, i.e., by reference to a hypothetical, neutral decision-maker. The amendments codify the objective standard by defining "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."

Before the amendments, the conspiracy provision of the statute was confusingly drafted and did not encompass a conspiracy to violate the reverse false claim provision. The amendments simplify the conspiracy provision and provides that any conspiracy to violate the other False Claims Act liability provisions is actionable.

The Fraud Enforcement and Recovery Act also amends the False Claims Act's anti-retaliation provision in a number of ways. First, it permits persons other than employees to sue for retaliation-including any "employee, contractor, or agent." Second, it permits plaintiffs to sue for "lawful acts" done "in furtherance of other efforts to stop 1 or more violations of this subchapter."

It is unclear how this vague language is to be interpreted, but it is certain that *qui tam* lawyers will assert that the language is intended as an expansion of the type of protected conduct that can serve as the basis for liability. Companies should examine their labor and employment practices to analyze whether this new liability standard necessitates any changes.

The amendments also make important changes to procedural aspects of the False Claims Act. Since 1986, the False Claims Act has included provisions that permit the attorney general to issue civil investigative demands to investigate fraud allegations before filing a False Claims Act action or joining a *qui tam* action. These are very powerful investigative tools that include not only document requests, but also interrogatories and depositions. These tools, however, were infrequently used because the civil investigative demand authority was non-delegable.

The amendments now will allow the attorney general to delegate the authority to issue these demands. It is very likely that the Justice Department will use these demands — and in particular the ability to take pre-intervention depositions — in many cases. Furthermore, the amendments specify that "any information obtained by the attorney general or a designee ... may be shared with any *qui tam* relator" if deemed neces-

sary to the investigation. The amendments also provide that any information obtained through a civil investigative demand can be used in any subsequent investigation or proceeding-including witness interviews, summary judgment motions, trial and a broad variety of other uses. In fact, government information obtained through the demands can be freely shared with a relator and used by the relator even where the government declines to intervene.

In practice, the expanded use of civil investigative demands has the potential to complicate the defense of False Claims Act cases and investigations dramatically. These provisions afford the Justice Department — and, indirectly, relators — the ability to conduct one-way discovery very early in an investigation.

The Fraud Enforcement and Recovery Act also specifies that where the government intervenes in a *qui tam* action, claims asserted in its complaint in intervention will relate back to the date of the original action. This provision overrules certain decisions that had held the government's claims do not relate back to the time of a relator's filing, because the defendant is deprived of adequate notice.

Moreover, the amendments specify that the seal governing *qui tam* actions does not preclude the federal government or relators from freely sharing the complaint, other pleadings or the *qui tam* disclosure statement with state or local investigating authorities that are named as co-plaintiffs along with the federal government.

These new amendments represent major changes to the False Claims Act that will affect all health care companies and other companies doing business with the United States.

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