

## CLIENT ALERT

### WINNING A FALSE CLAIMS ACT CASE AGAINST THE GOVERNMENT

The federal False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, is the government's primary weapon to combat fraud. It empowers the federal government and private citizens to file actions against those alleged to have "knowingly submitted false or fraudulent claims" to the government. If successful, the government obtains treble damages and civil penalties of between \$5,500 and \$11,000 for each violation. Since Congress amended the FCA in 1986, the Department of Justice has recovered more than \$15 billion under the law.

As a result of the government's power and leverage to extract substantial settlements, companies frequently elect to settle an FCA action rather than contest the government's claims. Recently, one brave physician, Dr. R.D. Prabhu, and his medical practice decided to fight the government's weak FCA allegations and, represented by Akin Gump, won. His action is a testament to how companies can undertake discovery and develop defenses that have the maximum potential to result in an FCA victory.

#### ***UNITED STATES V. PRABHU***

Dr. Prabhu's experiences with the government were similar to those that many in the healthcare industry confront. The government presented him with audit findings indicating that he billed for higher reimbursed services than his peers and, without any additional evidence of misconduct, demanded a substantial repayment. When Dr. Prabhu simply questioned the audit findings, the government, without further discussion or advance notice, filed an FCA action.

In its complaint, the government alleged that Dr. Prabhu and his medical practice knowingly submitted false claims to the government by billing for simple pulmonary stress tests (monitored exercise in a structured setting to evaluate the patient's condition) when performed as part of a pulmonary rehabilitation program. Specifically, the government contended that during the relevant time period, pulmonary rehabilitation, which consists of physical exercises by the patient to increase the functional capacity of the patient's lungs, was *not* a covered benefit under Medicare and that defendant therefore sought to obtain payment for a non-covered service (pulmonary rehabilitation) by billing for a covered service (a simple stress test).

Further, the government contended that Dr. Prabhu did not appropriately bill for a simple stress test because a physician could only bill for this test if he performed a pre- and post-exercise spirometry and also prepared a written physician report interpreting the results of these services.

Finally, the government contended that Dr. Prabhu failed to properly document the medical necessity of services to some of his patients. If the government had prevailed on the allegations in its complaint, it would have obtained a judgment of more than \$22 million because of the FCA's treble damages and civil penalties provision.

### **THE GOVERNMENT'S LACK OF A PRE-SUIT INVESTIGATION**

The government, in its rush to file a complaint and increase its settlement leverage, failed to conduct an adequate pre-suit investigation, which, if performed, would have disclosed that its case lacked merit.

For example, if the government had studied the regulatory history regarding the provision of pulmonary rehabilitation, it would have learned that for a substantial time period governing the complaint, pulmonary rehabilitation was indeed a covered service and, even when the Centers for Medicare and Medicaid Services ("CMS") announced that it would not cover pulmonary rehabilitation, CMS promptly created new codes to cover the component parts of a pulmonary rehabilitation program. Moreover, if the government had studied the regulatory history regarding the provision of simple stress tests (including reading the *CPT Assistant*, the American Medical Association's official publication for CPT coding issues and guidance), it would have learned that the provision of a pre- and post-exercise spirometry was not required to bill for a simple stress test. Indeed, even the government's own expert disagreed with the government's interpretation that the billing code required a pre- and post-exercise spirometry.

Further, if the government had studied the Medicare rules regarding the documentation of physician services, it would have learned that no rule existed that prescribed the precise form in which a physician must document the interpretation of a simple stress test. Additionally, if the government had conducted interviews prior to the lawsuit, it would have learned that Dr. Prabhu and his staff had consulted with its Medicare carrier on multiple occasions regarding how to bill for the component parts of a pulmonary rehabilitation program and had followed the instructions they received from the carrier.

Finally, as to its medical necessity claim, if the government had interviewed medical experts, it would have learned that experts substantially disagree regarding how the service should be documented in the medical record.

### **LESSONS LEARNED**

While Dr. Prabhu confronted a situation many in the health care field face—alleged violation of the FCA based upon highly suspect evidence—the result he received, complete vindication, is uncommon. Frequently, the high costs associated with successfully rebutting the government's claims exceed the amount needed to settle the government's allegations, and thus defendants are not prone to litigate. However, for those who are inclined to fight the government's contentions, Dr. Prabhu's case provides a blueprint for how to effectively do so.

To mount a successful defense, a defendant must be prepared to attack the government's central claim that defendant submitted "false" claims and that defendant "knew" the claims to be false.

As to the "falsity" element, as Judge Jones found in the *Prabhu* case, a claim is not false if it conforms to the rules and regulations governing the provision of the service. *See United States v. R.D. Prabhu*, 442 F. Supp. 2d 1008, 1026 (D. Nev. 2006). A claim is also not false if reasonable experts can disagree regarding whether the claim is true or false—that is, a claim must be "objectively" false. *Id.*

Thus, as a first step, a defendant should conduct a detailed review of the regulatory history underlying the claim in dispute. In Dr. Prabhu's case, that review revealed that the regulatory guidance refuted the government's claim. The

government contended that a simple stress test required the provision of a pre- and post-exercise spirometry. The *CPT Assistant* had specifically addressed that question and stated that no such requirement existed. Thus, far from being fraud, the defendant's underlying claim conformed to the rules underlying the billing code. Indeed, the government was caught in the embarrassing situation that even its own expert, a professor at Duke Medical School, disagreed with its interpretation of the billing code. *Id.* at 1028.

Similarly, regarding the FCA's objective falsity test, a defendant should carefully prepare for the deposition of the person who reviewed the defendant's health care claims on behalf of the government. As most coding specialists will reluctantly agree, coding is much more art than science. Thus, defense counsel's task is to identify inconsistencies in the methodology the government coder uses. Once inconsistent applications are identified, it is easy to obtain the concession by the government's witness that, on many claims, reasonable experts can disagree. With that established, the government's fraud claim evaporates. *See id.* at 1030 ("the Government's interpretation of the code has shifted dramatically during the course of this litigation and its own agents concur that the code is mired in ambiguity and confusion").

As to the FCA's knowledge element, as Judge Jones found in *Prabhu*, the FCA does not extend to honest mistakes, but only to "lies." *See* 442 F. Supp. at 1028-29. Thus, courts have found that the FCA's knowledge element does not apply when a defendant in good faith follows or relies upon the government's instructions in submitting the claim or when a defendant's conduct is consistent with a reasonable interpretation of ambiguous regulatory guidance.

To demonstrate defendant's good-faith understanding of the government's rules, a defendant should carefully review all communications the defendant had with CMS or the government's fiscal agent regarding the claim. One reason that Dr. Prabhu prevailed in his case is that he and his medical staff had an extended dialogue with the carrier regarding the billing code in dispute. *Id.* at 1030 ("The Government has similarly failed to prove knowledge as well, because Dr. Prabhu complied with Government instructions regarding the claims. As the uniform and undisputed sworn testimony of Dr. Prabhu's staff in the record states, the carrier was fully aware of Dr. Prabhu's billing practice and, indeed, even advised that he bill for the test.").

To demonstrate the underlying ambiguity of the billing code, a defendant should evaluate the extent to which the government had previously promulgated a clear rule, regulation or standard regarding the code that supports its litigation-driven interpretation of it. *See id.* at 1029 (rejecting government's interpretation of code because "the Government never published a rule supporting its interpretation"). Moreover, as to the government's medical necessity claims, a defendant prevails if it demonstrates that in light of the lack of clear guidance, reasonable experts may disagree. *Id.* at 1034 ("The only factual issue that has been raised in relation to the medical necessity issue is how the need for services should have been documented. Because those rules are ambiguous—compare Ms. Grider's opinion with Drs. Stewart, Osei and Manaker—there cannot be any FCA liability as a matter of law.").

## CONCLUSION

Defendants frequently settle FCA litigation because of the leverage the government has over them, not because of the strength of the government's case. However, if a defendant pushes the government to prove its case, the government will typically confront difficulty articulating why any claim is "false" and identifying any evidence that demonstrates that the defendant "knew" the claim to be false.

To successfully rebut the government’s case, a company should conduct a regulatory history of the claim in dispute, question the government witnesses who have previously reviewed defendant’s claims, inspect all communications to the fiscal agent related to the code, and interview experts who use the code on a daily basis.

This type of review will frequently reveal that the government cannot demonstrate that the claim is “false” in the first instance or that the company acted in “reckless disregard” or “deliberate ignorance” of the truth or falsity of the claim. Thus, defendants should be aware that they can, like Dr. Prabhu, take on the government and win.<sup>1</sup>

## CONTACT INFORMATION

If you have questions about this Alert or about other FCA issues, please contact:

Robert S. Salcido.....	202.887.4095 .....	rsalcido@akingump.com.....	Washington, D.C.
Donald B. Craven.....	202.887.4081 .....	dcraven@akingump.com.....	Washington, D.C.
Scott M. Heimberg.....	202.887.4085 .....	sheimberg@akingump.com.....	Washington, D.C.
Robert H. Hotz Jr.....	212.872.1028 .....	rhotz@akingump.com .....	New York
Paul W. Killian .....	202.887.4031 .....	pkillian@akingump.com .....	Washington, D.C.
Torsten M. Kracht .....	202.887.4252 .....	tkracht@akingump.com .....	Washington, D.C.
Mark J. MacDougall.....	202.887.4510 .....	mmacdougall@akingump.com.....	Washington, D.C.
Jerry E. Rothrock .....	202.887.4018 .....	jrothrock@akingump.com.....	Washington, D.C.
Richard B. Zabel .....	212.872.8060 .....	rzabel@akingump.com.....	New York
David M. Zensky.....	212.872.1075 .....	dzensky@akingump.com .....	New York

Austin	Brussels	Dallas	Dubai	Houston	London	Los Angeles	Moscow
New York	Philadelphia	San Antonio	San Francisco	Silicon Valley	Taipei	Washington, D.C.	

<sup>1</sup> Akin Gump FCA victories span across industries. For example, in a recent qui tam FCA action for alleged undermeasurement and underpayment of natural gas royalties to the federal government, Akin Gump attorneys similarly obtained the dismissal of the lawsuit.