



Supervision by Unapproved Physicians Sufficient to Find Violation of False Claims Act

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The U.S. District Court for the Middle District of Tennessee recently held that a leading diagnostic testing firm (the Center) was liable under the False Claims Act (FCA) for failing to comply with Medicare's direct physician supervision requirement at several of its independent diagnostic testing facilities (IDTFs) in Nashville. The court granted summary judgment to the federal government in the case—a whistleblower action initiated by a former employee of the company.

According to the court, the governing regulation expressly required a supervising physician to “evidence proficiency in the performance and interpretation of each type of diagnostic procedure performed by the IDTF” under criteria established by the Medicare carrier. In this case, the carrier required IDTFs to have Medicare-approved physicians on hand to supervise diagnostic tests. The court focused on the fact that in many instances the supervising physician had not been approved by the carrier or Medicare. Therefore, the Center violated the FCA.

The Center's IDTFs had conducted diagnostic tests using contrast that were supervised by physicians who were otherwise competent to do so but who had not been approved by Medicare and, in some instances, who were supervised by nonphysician staff members of the Center. The court rejected the Center's argument that it did not violate any statute or regulation and, therefore, did not violate the FCA. According to the court, a statement or omission on CMS enrollment forms, as well as responses or omissions relating to specifications set by the carrier, could form the basis of FCA liability. Here, the court concluded that statements on the Center's completed CMS enrollment application resulted in the contract in which the company certified or agreed that testing at its IDTF would be provided in accord with applicable regulations. The court further concluded that a requirement of a Medicare-approved physician for these tests was also a specification and, by the language of the regulation, a condition for Medicare's payment of tests by an IDTF.

The court ultimately awarded \$11,110,662 in treble damages and civil penalties, approximately eight times the amount of actual damages. Upon reconsideration, the court held that this was not grossly disproportionate to the gravity of the offense.

This case is currently on appeal. Among the issues to be decided is whether or not the district court erred in ruling on summary judgment that the Center knowingly submitted false claims when it billed for tests that were medically necessary and properly performed, but which were not directly supervised by a board-certified radiologist or carrier-approved physician. It will be interesting to see where the appellate court goes with this appeal in light of the recent amendments to the FCA.



While the appeal is pending, health care providers would be wise to review the supervision requirements of any outpatient diagnostic procedures they perform, review their carrier's proficiency criteria, and ensure that the physicians who are supervising these tests are, in fact, approved by their carrier.

Click here to read an article regarding the [Fraud Enforcement and Regulation Act and the recent amendments to the False Claims Act](#) that the White Collar Crime and Internal Investigations Group at Hinshaw & Culbertson LLP Published.

[U.S. ex rel. Hobbs v. Medquest Associates, Inc., Case No. 3:06-cv-01169 2011 WL 3703762 \(M.D. Tenn. Aug. 23, 2011\)](#)

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