LAREDO & SMITH
In Brief

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Healthcare Providers Still At Risk Despite Recent "Worthless Services" Ruling

While healthcare providers may have felt some relief after a recent U.S. Court of Appeals decision regarding "worthless services," this ruling does not eliminate the risk associated with such claims. In *United States ex rel. Absher, et al. v. Momence Meadows Nursing Center, Inc.*, 764 F. 3d 699 (7th Cir. 2014), the Court overturned a $9 million verdict awarded to two whistleblowers under the federal False Claims Act (FCA). The Court rejected the plaintiffs' "worthless services" theory—the argument that services provided by a healthcare provider were so substandard as to be "worthless"—and also found that the plaintiffs had failed to quantify the number of "false" claims allegedly submitted to regulators. Although the Seventh Circuit's decision is welcome news to healthcare providers, *Absher* leaves plenty of room for lawyers and clients seeking to bring claims under the FCA.

Under the FCA, 31 U.S.C. § 3729, et seq., whistleblowers or "relators" can sue healthcare providers on behalf of the United States government alleging that they submitted false claims to the government and were reimbursed by federal healthcare programs (i.e. Medicare, Medicaid). Depending on whether the government takes over the litigation, the FCA provides that successful relators will receive 15%-30% of any recovery, which is subject to trebling and other penalties. From 2001 through early 2014, the FCA has netted the government and relators over $13 billion, mostly from pharmaceutical companies.

Although the Seventh Circuit specifically refused to recognize "worthless services" as a basis for FCA liability—holding that such services would have to be 100% worthless and not just substandard—healthcare providers should remain concerned. The Second, Sixth, Eighth and Ninth Circuits have accepted the "worthless services" argument, at least in principle, and it is unclear what the First, Third and other undecided circuits might do when faced with the issue. Second, as even the Seventh Circuit recognized, relators can still base FCA liability on an "express" or "implied" false certification theory by approximating the number of false claims submitted to the government, or by showing that federal reimbursement was conditioned on the facility being in compliance with Medicare or Medicaid regulations.

Instead of relying on *Absher,* or hoping for the best, healthcare providers—particularly when dealing with thorny compliance issues (e.g., "notices" of correction, etc.)—should consider bringing in outside help, including experienced counsel where appropriate. An experienced compliance attorney can:

- Conduct a "top-down" risk assessment
- Review and test the facility's policies, procedures and controls
- Provide specific written recommendations under "privilege"
- Help develop a positive compliance narrative where necessary
- Interface with regulators as appropriate.

By taking such steps, healthcare providers will go far in preventing successful FCA claims.

In the Field

SJC Appoints Smith to Voir Dire Committee

The Massachusetts Supreme Judicial Court appointed Partner Mark Smith to the Court's Committee on Juror Voir Dire. The committee was established to examine issues relating to juror selection for Massachusetts courts and to implement procedures for allowing attorney conducted voir dire in the Superior Courts throughout Massachusetts.

Confidentiality Article Selected for "Best of" Section

The American Bar Association Solo, Small Firm and General Practice Division's magazine, GPSolo, featured the article "Is Confidentiality Really Forever?" by Partner Marc Laredo and Anne Klinefelter, associate professor and director of the law library at the University of North Carolina. The article was part of its "The Best of ABA Sections," a compilation in its September/October issue of some of the best articles published by the ABA's sections, forums, and divisions. This article was originally published in the spring in Litigation, the journal of the ABA's litigation section.

Sierra Speaks at Roger Williams

Partner José Sierra spoke at the Roger Williams University Law School on October 22 as part of a panel on Careers in Regulatory Compliance.

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