Health Law Daily Wrap Up, QUI TAM (WHISTLEBLOWER SUITS)—D.D.C.: Relator may proceed with qui tam action against Boston Heart Diagnostics, (Jun. 14, 2017)

Health Law Daily Wrap Up

By Robert Margolis, J.D.

A relator may proceed with one of two federal False Claim Act (FCA) causes of action against Boston Heart Diagnostics Corporation (Boston Heart), a federal district court in Washington, D.C., held. The court denied Boston Heart's motion to dismiss the relator's claim that Boston Heart knowingly submitted false claims that certain cardiovascular tests it performs for patients covered by Medicaid and Medicare are medically necessary. It granted the motion as to the relator's claim that by failing to report its alleged fraud and failing to repay overpayments it received, Boston Heart violated the "reverse false claims" provision of the FCA (U.S. ex rel. Groat v. Boston Heart Diagnostics Corp., June 9, 2017, Walton, R.).

The relator, a doctor and the National Medical Director of Women's Health and Genetics at health insurance company United Healthcare (United), alleged that Boston Heart, a clinical laboratory in Framingham, Massachusetts, which provides cardiovascular diagnostic testing, violated FCA and analog state false claims statutes by performing tests that were not medically necessary and billing for them. The relator examined United data regarding Boston Heart lab tests in 2013 and determined that Boston Heart submitted more than $369,000 in claims to United alone for certain medically unnecessary tests on behalf of patients insured under both Medicare and Medicaid, as well as other unnecessary tests for similar patients. United offers Medicare and Medicaid insurance coverage, as well as employer-sponsored and individual coverage. Boston Heart filed a motion to dismiss all the relator's claims, asserting that her complaint was deficient in several respects.

**False Claims Act.** The relator brought a "presentment claim" under the False Claims Act, alleging that Boston Heart knowingly presented false claims for payment or approval by the government. Boston Heart challenged the sufficiency of her allegations as to each element of the claim, but the court rejected every one of Boston Heart's arguments. The court found that the relator sufficiently alleged that Boston Heart submitted claims to the government, when she alleged claims submitted to United Health with respect to insureds under both Medicare and Medicaid. This "corroborated" her allegation that Boston Heart submitted claims to the government by providing a "concrete example" of representative claims submitted to United for Medicare and Medicaid patients, the court held. She also sufficiently alleged that the claims Boston Heart submitted were false, in that Boston Heart certified the medical necessity of tests that the relator alleged were not medically necessary. Whether the tests in fact were medically necessary raised a question of fact that the court would not address on a motion to dismiss. Finally, the court agreed with the relator that she pled Boston Heart's knowledge that its tests were unnecessary by alleging that Boston Heart engaged in a "systematic and fraudulent scheme."

**Reverse false claims.** The relator also brought a claim under the FCA's "reverse false claims" provision, alleging that Boston Heart (1) failed to report the overpayments to it from the unnecessary tests, and (2) failed to repay the overpayments. The court ordered this claim dismissed, finding that the relator did not plead any monetary obligation that Boston Heart owes to the government that is separate from its "concealment of [its] allegedly fraudulent activity." The court agreed with prior precedent holding this insufficient to state a reverse false claim.

**State law claims.** Because both parties agreed that any count found deficient under the federal statute is similarly deficient under the analog state statutes, the court dismissed all state law reverse false claims.

The case is No. 15-487.
Attorneys: Jennifer A. Short, U.S. Attorney's Office, for the United States. Hope Schwarz Foster (Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.) for Boston Heart Diagnostics Corp.

Companies: Boston Heart Diagnostics; United Healthcare