

District of New Jersey Rules Prescription Drug Events Tainted By Alleged Kickback Schemes Constitute False Claims

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by Alan J. Iverson

A federal judge recently ruled that submission of electronic data to the government can, under appropriate circumstances, give rise to liability under the False Claims Act. In *U.S. ex rel. Marc Silver et al. v. Omnicare Inc. et al.*, 1:11-cv-01326 (D.N.J. Apr. 13, 2021), U.S. District Court Judge Noel C. Hillman granted a relator's motion to amend his complaint to assert FCA claims premised on the submission of patient prescription data to state and federal agencies administering Medicaid and Medicare reimbursements. Order, ECF No. 544.

According to the amendments, the lawsuit arose out of an alleged “swapping” scheme. See *generally* Fourth Amend. Compl. (“Amended Complaint”), ECF No. 548. Defendants, providers of pharmacy services to nursing homes, allegedly offered commercially unreasonable prices to nursing homes for their Medicare Part A patients’ prescription drugs in exchange for the opportunity to provide the same drugs—at significantly higher cost—to the nursing homes’ Medicaid and Medicare Part D patients. *Id.* ¶¶ 4-8. Relator alleged that defendants’ conduct was an illegal “swapping” arrangement prohibited by the Anti-Kickback Statute, among other laws. *Id.*

The “swapping” scheme framed the alleged false claims. The Amended Complaint alleged that when defendants dispensed drugs to Medicare Part D beneficiaries, they submitted claims to those beneficiaries’ Part D Plan Sponsors. *Id.* ¶¶ 59-87. Defendants also certified that (1) they knew their claims would be used to seek federal funds and (2) they had complied with applicable laws. *Id.* The Part D Plan Sponsors then allegedly used defendants’ claims to notify CMS that prescriptions had been dispensed by submitting a document known as a “prescription drug event” (“PDE”). *Id.* CMS relied on those PDEs to reimburse the Part D Plan Sponsors, which reimbursed the defendants. *Id.* Medicaid has a similar reimbursement structure involving state agencies. *Id.* ¶ 244.

Against that alleged factual backdrop, the defendants argued Relator’s amendments were futile and his motion to amend should be denied because Relator could not prove that defendants presented a claim, let alone a false claim. The court disagreed, issuing

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an Opinion that found the PDEs were “claims for payment” under the False Claims Act. Order at 17-20. The court began by observing that other courts had concluded that PDEs “clearly” were claims for payment because they were the “only record . . . that triggers CMS’s payment obligation” for reimbursement of Medicare Part D patients’ prescriptions drugs. *Id.* at 18 (citations omitted). The court concluded that the same analysis applied to data submissions to state agencies in connection with Medicaid reimbursement. *Id.* at 19-20.

Next, the court ruled that PDEs allegedly tainted by kickbacks were “false” claims that could give rise to liability under the False Claims Act. *Id.* at 20-23. The court rejected the defendants’ argument that the PDEs were not “false” because they contained accurate information regarding the underlying drug prescriptions. *Id.* at 22-23. The court observed that “[a] claim is ‘legally false’ when the claimant misrepresents that he or she has complied with ‘statutory, regulatory, or contractual requirement[s].’” *Id.* at 20 (citation omitted). Since Relator alleged that the defendants had made that representation—while simultaneously participating in an allegedly illegal “swapping” scheme—Relator sufficiently alleged the PDEs were “false” claims under the FCA. *Id.* at 23.

The case serves as a reminder of the often contentious battles between parties in FCA litigation over whether claims for payment have truly been presented and, if so, whether such claims are indeed false. Moreover, the Opinion emphasizes that the submission of records and data—like PDEs—may constitute claims even if they are not labeled as such, and, according to the court, claims tainted by kickback schemes can be false.