

Sixth Circuit: Timing of Physician Certification for In-Home Care Remains Material After Escobar

July 10, 2018 – FCA Now

by Ben Kappelman

A divided panel of the U.S. Court of Appeals for the Sixth Circuit again revived an FCA suit against home-health services providers premised on the providers' alleged improper procurement of physician medical necessity certifications supporting Medicare claims. In *United States v. Brookdale Senior Living Communities, Inc.*, --- F.3d ---, 2018 WL 2770598 (6th Cir. June 11, 2018), a nurse alleged she was hired by several related companies that operate senior communities, assisted living facilities, and home health care providers. She claimed these providers sought to enroll as many of their assisted living facility residents in home health care services as possible but failed to keep up with submitting Medicare claims for those services. The nurse asserted she was hired to help clear a backlog of unsubmitted Medicare claims for which the providers had not compiled the appropriate documentation.

One document she said was frequently missing was a physician's certification that the services delivered were medically necessary. Federal regulations require that these physician certifications "be obtained at the time the plan of care is established or as soon thereafter as possible and must be signed and dated by the physician who establishes the plan." 42 C.F.R. § 424.22(a)(2). The nurse accused the providers of failing to comply with this timing requirement and instead submitting claims without a certification or paying physicians to review outstanding claims and sign certifications long after the care occurred.

This dispute has stretched over several years. The nurse filed her case in 2012. After the United States declined to intervene in 2014, the providers successfully moved to dismiss, but the Sixth Circuit reversed in 2016 before the Supreme Court's decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, which clarified the materiality element of an FCA claim. In its 2016 decision, the Sixth Circuit held that submitting a Medicare claim based on a late physician certification is false if the length of the delay is not justified by the reasons the home-health agency provides for it. Following remand, the district court dismissed the nurse's complaint again, concluding she failed to adequately plead materiality. She appealed.

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To create FCA liability, a defendant's false statement to the government that the defendant complied with a statutory, regulatory, or contractual requirement must be material to the government's decision to pay the claim the statement supports. In *Escobar*, the Supreme Court called this materiality requirement "demanding" and necessitating a "holistic" analysis, factors relevant to which include (1) whether the government expressly identified the requirement as a condition of payment, (2) whether the government consistently refuses to pay claims based on non-compliance with the requirement, and (3) whether the noncompliance is minor or goes "to the very essence of the bargain." These factors are neither exhaustive nor dispositive.

The Sixth Circuit first held that compliance with the timing requirement for physician certifications was a condition of payment. The court held 42 C.F.R. § 409.41(b) expressly identifies the physician certification as a condition for payment by referencing 42 C.F.R. § 424.22. The preface to § 424.22 provides: "Medicare Part A or Part B pays for home health services only if a physician certifies and recertifies the content specified in paragraphs (a)(1) and (b)(2) of this section, as appropriate." The court rejected the providers' argument that because the timing requirement appears in paragraph (a)(2)—not (a)(1) or (b)(2)—it was not a condition of payment. The court reasoned that the use of the word "certifies" in the preface to § 424.22 requires defining "certification" by reference to all of paragraph (a), including the timing requirement in paragraph (a)(2).

The Sixth Circuit then held the nurse did not need to allege in her complaint that the government had previously rejected Medicare claims that lacked a physician's certification. The court determined that the government's response to similar claims was not relevant because the nurse alleged that the government did not know that the providers' claims were false. The court also held that the timing requirement went to the essence of the government's bargain for home health services. It cited administrative guidance from HHS referencing the importance of the timing requirement in deterring fraud. Finally, the court held the nurse's allegations that she and others raised concerns about the providers' practices, but that those concerns were dismissed, were sufficient to plead scienter.

In a long and detailed opinion, Circuit Judge David W. McKeague dissented from the majority's conclusion. He argued the nurse should have been required to provide more detail about how and why the providers' delay in obtaining the physician certifications deceived the government. He highlighted the practical problem for providers created by the Sixth Circuit's 2016 decision that a physician certification can create FCA liability if the length of the delay is not justified by the reasons the home-health agency provides for it. According to Judge McKeague, the standard forms submitted during the Medicare claims process do not explicitly call for information about when the physician certification was signed. Providers are merely required to warrant that they have the physician certification on file. Thus, a provider is not prompted to explain the reasons why a certification was late, or even indicate that it was late at all.

At least two lessons can be drawn from the Sixth Circuit's decision. First, providers should take a broad view when reading regulations to determine if compliance with a requirement is a condition of payment. To borrow a phrase from the majority, "overly crabbed" interpretations of regulations are unlikely to be successful. Second, providers

cannot rely on Medicare claims submission forms to ensure they have met all the requirements for submitting a claim. They need to understand the claim-submission requirements adopted through administrative guidance and court decisions in their jurisdiction and disclose required information whether or not called for explicitly in a Medicare form.

The case is far from over—the nurse must now actually prove the allegations in her complaint. But the providers will at minimum face the typically expensive consequence of defending themselves against FCA claims. And if unsuccessful, they may face the draconian penalties for FCA violations. These risks should encourage all providers to proceed with caution when managing physician certifications and other Medicare claims compliance issues.