

EIGHTH CIRCUIT: REGULATORY NONCOMPLIANCE DOES NOT VIOLATE FCA

The Eighth Circuit's **recent decision** adds to a growing body of case law rejecting FCA relator allegations of regulatory noncompliance as the basis for FCA claims. It reinforces the position that when health care providers reasonably interpret complicated and confusing billing guidelines and regulations, they cannot violate the FCA.

The Case

The defendant, Mayo Clinic, has a practice of taking, preserving and interpreting two sets of pathological slides for each surgery: a frozen slide and a "permanent" slide. The frozen slide is interpreted during the surgery, while the permanent slide is interpreted after the surgery. For the frozen slide, it prepares a written pathology report that is updated only when review of the permanent slide requires an amendment. However, where no amendment is required, Mayo prepares no additional report. Mayo submits claims for reimbursement for both of these slides. Medicare reimbursement guidelines incorporate the CPT definition of pathological services and require for billing: (1) the taking of the sample; (2) examination of the sample; and (3) "reporting," that is further defined as "the work product of a physician's interpretation."

The Court Upholds Dismissal of Relators' Allegations

Relators (former patients) alleged that Mayo knowingly submitted false claims when it ignored the requirement of a report by failing to submit a written report for each slide. Relators argued that a separate, written report was required for each permanent slide, relying in part upon the College of American Pathologists guidelines.

Mayo responded that a reasonable interpretation of "reporting" in the CPT guide permits its practice of including necessary amendments in the patient chart rather than redundant reports of results that had first been reported upon the review of a frozen slide.

The Court found Mayo's interpretation not only reasonable, but accurate and held that relators failed to allege violations of the FCA. First, there was no explicit requirement in any Medicare guideline (including the CPT code descriptions adopted by Medicare) requiring a separate, written report. Second, the CPT guide routinely requires explicitly "written reports" for other procedures and thus had it intended a written report for the review of these pathology slides, it would have so stated. Third, the only evidence that relators submitted in support of the requirement for a separate written report was not evidence from Medicare or its contractors but "relators' own interpretation of general authorities," and thus was insufficient to state a claim.

The Impact

The Eighth Circuit noted that when relators fail to point to a "clear requirement" by Medicare supporting their theory of alleged FCA violations, they have simply "pleaded a claim of regulatory noncompliance." Regulatory noncompliance fails to state a claim under the FCA. Additionally, the Eighth Circuit reiterated that when relators and defendants interpret guidelines and regulations differently, defendants have not knowingly violated the FCA if their "interpretation of the applicable law is a reasonable interpretation."

This case has important implications for parties defending against FCA allegations apart from the legal bases for the Court's decision. The Eighth Circuit's decision upheld a trial court's grant of defendant's motion to dismiss. Procedurally, these motions come early in litigation and often before significant discovery or motion practice occur. Therefore, if a motion to dismiss is granted, it can save significant time and resources for FCA defendants.

Should you have any questions regarding FCA defense or this article, please contact:

- David B. Honig at dhonig@hallrender.com or (317) 429-1447;
- Drew B. Howk at ahowk@hallrender.com or (317) 429-3607; or
- Your regular Hall Render attorney.

