

Undocumented Medicaid Claims Don't Violate FCA: DC Circ.

By Dietrich Knauth

Law360, New York (May 17, 2012, 8:07 PM ET) -- The D.C. Circuit ruled Tuesday that the District of Columbia did not defraud the federal government when submitting poorly documented Medicaid reimbursement claims, but also loosened its long-standing precedent that relators in False Claims Act suits must notify the government of claims before making any public disclosure.

Relator Michael Davis, alleged that D.C. Public Schools violated the FCA by seeking Medicaid funds for services to special education students without providing needed documentation to back up its claims for payment. Davis' firm Davis & Associates prepared the Medicaid reimbursement claims made by DCPS in the 1990s, and Davis' warnings about documentation led to a 2002 District of Columbia Auditor report disclosing that Medicaid required repayment of \$15 million in reimbursements because of poor documentation.

The D.C. district court had ruled that Davis was barred from bringing his suit by the FCA's public disclosure bar because the auditor report publicized his claims before he brought them to the federal government. While the district court relied on D.C. Circuit precedent, the appeals court reversed Tuesday, saying that the U.S. Supreme Court's 2007 decision *Rockwell International Corp. v. United States* had overruled its precedent.

The public disclosure ruling squares the Davis case with the *Rockwell* decision, as well as a recent amendment to the FCA that clarified that relators can retain standing if they are an original source of reports or have extensive knowledge beyond what had been disclosed.

"Mr. Davis is pleased that the court recognized that he is an original source," Curtis A. Boykin, an attorney for Davis, said.

The D.C. Circuit had continued to impose an implied requirement in the event of a public disclosure - that the relator provide the government with the information upon which his allegations were based not only before filing an action, as the statute's language dictates, but that he do so prior to the public disclosure itself, according to Brian T. McLaughlin of Crowell & Moring LLP's government contracts group. The D.C. Circuit's decision here wipes out that implied requirement, McLaughlin said.

While the D.C. Circuit ruled for Davis on standing, it rejected his theory that all of DCPS' Medicaid funding that didn't comply with documentation requests should be considered damages.

"The purpose of maintaining documentation is to ensure that the government pays only for services actually rendered," the opinion said. "Because all agree that the services paid for were provided, the maintenance of documents to prove that they were has no independent monetary value. This is the rare case in which there is no allegation that what the government received was worth less than what it believed it had purchased."

Davis will seek a rehearing on the issue of damages, Boykin said.

"We take issue with that view," Boykin said. "Mr. Davis' contention is that there was actual damage because the district had to pay back money."

The court's damages ruling builds on precedent in a December 2010 case, *U.S. v. Science Applications International Corp.*, in which the D.C. Circuit rejected the government's argument that SAIC's false certification entitled the government to recover damages equal to the entire amount paid to the contractor.

"The Davis case lends further support and weight to that decision," McLaughlin said. "The value of the services provided to the government has to be considered."

McLaughlin said that the damages decision is important because the government is pursuing more FCA cases in which it advances the theory that damages are equal to the entire contract amount.

The decision does not preclude statutory penalties, but recent cases like *Bunk v. Birkhardt* in Virginia federal court have questioned whether large statutory penalties violate the constitutional ban on excessive fines in cases where actual damages are low or nonexistent.

"That is something that could potentially become an issue in the Davis case," McLaughlin said.

On remand, Boykin said that Davis will continue to pursue statutory penalties under the FCA — worth \$5,500 to \$11,000 per false claim — even if the D.C. Circuit stands by its damages ruling. The number of claims are "enormous," according to Boykin.

"This case has been pending for a long time and we hope for a speedy and just resolution," Boykin said.

Davis is represented by Curtis A. Boykin, Frederick Arnold Douglas and Alex Chintella of Douglas & Boykin PLLC.

The case is *U.S. ex rel. Davis v. District of Columbia*, case number 11-7039, in the U.S. Court of Appeals for the District of Columbia Circuit.

--Editing by Andrew Park.

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