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Overpayment or reverse false claim? How to recognize the difference

by Jonathan A. Porter

Healthcare compliance is anything but straightforward. There are hundreds of national coverage determinations and over a thousand local coverage determinations that cross jurisdictions and topics, and those determinations are at times less than clear. There are statutes, regulations, and advisory opinions that approve of some financial relationships impacting healthcare and disapprove of others but also stay silent as to a host of issues that affect the modern practice of medicine. And not to mention, circuit splits galore. The healthcare compliance landscape shifts constantly, like tectonic plates set atop the spinning teacups at Disney World.

Sitting in those teacups, mistakes happen. Healthcare providers make claims to federal payers that are later called into question by learning additional facts or legal requirements. When those situations arise, at what point does overpayment arise? And, most critically, at what point does an overpayment become a violation of the reverse false claim prong of the False Claims Act (FCA)?

Everyone in healthcare compliance needs to know where that line is because crossing it creates a world of treble damages, civil penalties, and whistleblowers.

But, unfortunately for everyone, that line is less than crystal clear. This article attempts to clarify the line as best we can, given the current legal landscape and offers some advice on what to do when you find yourself close to the line.

Because the teacups will continue to spin.

The reverse false claim theory and history, in a nutshell

The original prohibition under the FCA—a prohibition that remains the government's primary focus when investigating false claims—is that people and companies cannot submit to the government claims they know to be improper.[1] Submitting claims to the government for payment that the submitter knows to be wrong means the submitter is not just liable for the amount wrongfully paid, but for three times that amount, plus civil penalties for every false claim.[2]

As government claims got more complex, fact patterns arose that sounded like fraud but were not technically violations of the core prohibition in the FCA of making claims known to be false at the time of the claim. By the 1980s, some courts were locked in a dispute over whether efforts to wrongfully avoid making required payments to the government constituted a false claim under the FCA. Amid those disputes, Congress in 1986 stepped in to create a new false claims theory, and starting in 1986, those who took steps to avoid repaying funds were liable under the FCA.[3] And the reverse false claim prong was born.

The 1986 version of the reverse false claim prong in time was also controversial, and so in 2009, Congress amended its language to expressly include liability for knowingly and improperly avoiding or decreasing an obligation to pay or transmit money to the government.[4] Thus, today's reverse false claims prong exists as the last of seven ways to violate the FCA,[5] right beneath the sixth way, which deals with pledges to buy property from a member of the armed forces who may not lawfully make such a pledge.[6]

The prohibition—now commonly known as the reverse false claim prong or theory today—reads as:

> [A]ny person who [. . .] knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, is liable to the United States Government [. . .][7]

Stated in a reorganized way, to violate the reverse false claims prong of the FCA, there must be (1) an obligation to pay the government money or property; (2) a false record or statement that is material to that obligation or concealment or an improper avoidance or decreasing of that obligation; and (3) knowledge.

While this theory makes sense in black-and-white cases, its application to the far more common gray-area cases has caused considerable confusion in the years since the 2009 amendments.

The critical turning point in the analysis of when potential overpayments become reverse false claims lies in the definition of "obligation" in the FCA. Without an obligation to pay the government, liability under the reverse false claims prong does not exist. What exactly constitutes an obligation to pay the government?

The term's definition in the FCA is, of course, the starting point for such analysis. The FCA defines obligation as "an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or the retention of any overpayment [. . .]"[8]

This definition helps make clear that *unestablished* duties do not constitute an obligation but being left silent is what exactly makes a duty to pay an "established" one.

The confusion has played out in the courts in recent years; it will be explained in the next section, following a summation of what Congress actually intended the reverse false claims prong of the FCA to reach.

Legislative history: The intent behind "an obligation to pay" as a trigger to FCA liability

The lack of clarity on when obligations and duties become "established" was, to some extent, intentional by Congress. An early draft of the 2009 amendment included language that opened the FCA liability door in cases of "contingent or potential duties," which was rejected by Congress in outlining the final language.[9] In rejecting contingent or potential duties, then-U.S. Senator Jon Kyl, R–AZ, spoke on the Senate floor that Congress must keep in mind that whistleblowers may "not always exercise the same good judgment that the Government usually does."[10] Accordingly, Senator Kyl strongly advocated for language that only applied to established duties constituting obligations leading to potential reverse false claims rather than potential ones: "Obviously, we don't want the Government or anyone else suing under the FCA to treble and enforce a fine before the duty to pay that fine has been formally established."[11] Senator Kyl, the author of the amendment to the definition of "obligation" that remains the current definition in the FCA, also noted that under his definition, "no obligation arises if the defendant is pursuing some type of administrative, judicial, or other process for reconciliation of alleged overpayments."[12]

Interwoven with the FCA definition is the 60-day rule, created by Congress as part of the Affordable Care Act (ACA) the year following the 2009 amendment. The 60-day rule requires those who receive an overpayment from the Medicare or Medicaid programs to report and return the overpaid funds within 60 days of identification of the overpayment.[13] The statute defines the word "overpayment" to mean "any funds that a person receives or retains under subchapter XVIII or XIX to which the person, after applicable reconciliation, is not entitled under such subchapter."[14] The statute also expressly stated that complying with the 60-day rule is an "obligation" as defined in the FCA.[15]

Rulemaking: Turning muddy water into . . . more muddy water

The issue with both the FCA's definition of an obligation and the ACA's definition of an overpayment is, again, that it ignores the vast amount of gray area involved in discerning whether an obligation or overpayment actually exists. Perhaps sensing that uncertainty, the Centers for Medicare & Medicaid Services (CMS) promulgated regulations in 2016 that sought to clarify the inquiry, declaring:

> A person has identified an overpayment when the person has, or should have through the exercise of reasonable diligence, determined that the person has received an overpayment and quantified the amount of the overpayment. A person should have determined that the person received an overpayment and quantified the amount of the overpayment if the person fails to exercise reasonable diligence and the person in fact received an overpayment.[16]

Thus, the current state of the law requires providers to exercise reasonable diligence in determining whether an overpayment exists. The issue with this regulation, though, is twofold. First, it is unclear whether exercising reasonable diligence means a logistical or procedural effort that, if undertaken, would definitely result in the identification of an overpayment or an analytical effort that invites the second-guessing of a conclusion that an overpayment does not exist. In other words, returning to the conundrum of black-and-white overpayments versus gray-area ones, does the reasonable-diligence requirement apply only to black-and-white overpayments under the theory that a provider ought to catch the clear overpayments, or does it also apply to gray-area cases of potential overpayments, under the theory that if the provider had undertaken a qualitatively better analysis of the issue at hand, a reasonable provider would have concluded that the claim was improper?

And, if the latter, then the second issue is that such a regulation stands in stark contrast to the legislative history of when the definition of "obligation" was set by Congress, where the author of the definition was clear to exclude "potential" duties.

CMS commentary issued in the course of promulgating its reasonable-diligence standard for identifying overpayments suggests a view of an effort-based process, suggesting that perhaps only black-and-white cases of overpayment are subject to the rule.[17] For example, CMS noted that some commenters implied that they were undertaking no compliance measures and thus would never be on notice of overpayments, and CMS responded that such an approach would constitute a failure to exercise reasonable diligence.[18] And, when asked for a definition of "reasonable diligence" or an example of what would constitute a reasonably diligent approach to identify overpayments, CMS declined to offer additional guidance, simply noting instead, "We believe that the concept of ‘reasonableness’ is fact-dependent.”[19]

Therefore, the regulatory structure as it currently stands arguably only applies to claims that are plainly improper and would be identified as plainly improper under a reasonably diligent compliance plan that reviews claims. This seems to cover plain errors that should have been discovered following claims but seems not to cover instances of gray-area coverage determinations where the provider, in good faith, believes the claims to be proper.

However, to add to the confusion for healthcare providers, CMS has previewed to reverse course from prior rulemaking and abandon its “reasonable diligence” standard in favor of FCA’s “knowingly” standard.[20] If implemented, it will be critical to see whether CMS would seek to apply the “reckless disregard” standard to just the diligence to be undertaken to ascertain black-and-white false claims, or if it opens the door to questioning gray-area false claims as well.

To make matters more complicated: Case law!

Against this uncertainty over whether the 60-day rule’s regulations on reasonable diligence allow for the government (and whistleblowers) to second-guess providers’ coverage determinations, the case law on the reverse false claims prong of the FCA creates an entirely unique set of oddities for compliance professionals to keep in mind. In a nutshell, the state of the case law is that while many courts rubber-stamp reverse false claims theories, the courts that closely scrutinize the language of the reverse false claims prong often do not allow reverse false claims cases to move forward.[21]

Some federal courts reviewing complaints that include reverse false claim counts along with regular allegations of FCA violations take a simple approach of believing that keeping the proceeds of knowing false claims automatically constitutes a violation of the reverse false claims prong. In one recent example, in the case of *United States ex rel. Berkley v. Ocean State, LLC*, a host of corporate defendants were accused by a whistleblower of improperly obtaining Paycheck Protection Program (PPP) funds in the midst of the COVID-19 pandemic.[22] Included in the whistleblower’s complaint was a count of violating the reverse false claim prong of the FCA, alleging that retaining the improperly obtained funds caused injury to the United States.[23] The defendants generally moved to dismiss but did not contain argument specific to the reverse false claim count,[24] and the court in turn upheld the reverse false claim count with minimal analysis:

> Mr. Berkley contends that Defendants violated the second part of [31 U.S.C. § 3729(a)(1)(G)]. He alleges they knowingly retained an overpayment because [defendants] were not entitled to the PPP loans. The Court finds that these allegations are sufficient to survive the Defendants’ motion to dismiss.[25]

Other courts, however—in the face of particularized scrutiny by the defense—are much more analytical about exactly what is required to violate the reverse false claim prong, and those courts often dismiss reverse false claims theories.

For example, there is a growing body of case law that states that reverse false claim counts that merely “mirror . . . false claims [allegations] under [31 U.S.C.] § 3729(a)(1)(A) and 3729(a)(1)(B)”[26] are legally insufficient and must be dismissed. In a case from two years ago, the Second Circuit considered whether a qui tam that alleges false claims that were presented knowingly at the time of the claim could also maintain an independent count under a reverse false claims theory in the absence of additional, independent allegations relating to attempts to conceal the overpayment.[27] The Second Circuit held that “redundant” allegations are “not actionable under subsection (a)(1)(G)" of the FCA because "a reverse false claim cannot turn on the same conduct underlying a traditional false claim."[28] "Concluding otherwise would mean that 'any time a defendant violated sub-sections (a)(1)(A) or (B) and received payment, the defendant would also necessarily violate sub-section (G) if it failed to repay to the Government the fraudulently-obtained payments.'"[29] Other courts have agreed with the Second Circuit's conclusions, holding that Congress could not have intended to provide redundancy.[30]

Another body of case law has taken the view that may seem incompatible with the previously discussed line of cases, but it actually makes equal sense. That body of law says that reverse false claims theories that lack knowing false claims on the front end cannot proceed. For example, in one Ninth Circuit case, the court affirmed summary judgment for a defendant accused by a whistleblower of committing fraud. The Ninth Circuit held that since the defendant submitted no false claims, there could also be no reverse false claims because "[t]he 'reverse false claims' provision does not eliminate or supplant the [FCA]'s false claim requirement."[31] The court held that because the whistleblower's "cause of action for submitting false or fraudulent claims for payment fails as a matter of law, so too does his 'reverse false claims' cause of action."[32] Other circuits have come to the same conclusion in the absence of knowing false claims and dismissed reverse false claims counts.[33]

These lines of cases reflect the simple truth that the reverse false claims prong of the FCA is not a catch-all provision but one intended to capture specific efforts to avoid existing obligations to pay the government money.

The case law is full of examples that fit squarely within the type of facts that Congress sought to make illegal through the passage of the reverse false claim prong. For instance, one Third Circuit case gave the green light to reverse false claim theories where an importer was alleged to have concealed facts in order to avoid paying the government money owed.[34] Another example is where a defense contractor knowingly misidentified parts belonging to the government that the contractor was obligated to return, in an alleged effort to deceive the government, a fact pattern that the Eleventh Circuit held fit with the requirements of the reverse false claim prong of the FCA.[35] A third example is from the healthcare field, in which a healthcare provider under a corporate integrity agreement was alleged to have created a computer program that automatically concealed certain data about the practice to avoid overpayments being detected.[36] The reverse false claims counts were deemed by the court to pass scrutiny because they were efforts to conceal overpayments that were independent of false claims.[37]

These examples show that the reverse false claims prong means what the statute says: it is reserved for specific instances where someone owes money or property to the government; wrongful steps are taken to trick the government, or steps are taken to conceal overpayments as a process independent from the making of false claims. But absent those affirmative additional steps, the reverse false claims prong is not treated as a catch-all provision, sweeping in all potential or contingent overpayments.

Knowing the line is essential

Understanding when questions about prior claims become established overpayments is critically essential. Whistleblowers are pushing theories that invite courts to second-guess determinations on the correctness of claims and are having some success when not challenged on the law. This is why knowing the line and having the right arguments ready (through counsel) to push back against allegations of reverse false claims violations is incredibly important. And, of crucial significance, remember that CMS has been clear that not having a compliance program is essentially an admission that the provider is not being reasonably diligent, at least in CMS's eyes. And so, *some* compliance processes need to be taken to ensure that claims are being checked.

This issue is becoming more vital, as cases are occurring now where traditional violations of the FCA should be dismissed, but reverse false claims theories are tougher calls.[38] This is why providers alleged to violate the reverse false claims prong of the FCA need to retain experienced counsel who know to attack the reverse false claims issues separately from standard FCA violations in order to get those dismissed or limited. That may end up being a key development in these cases.

Takeaways

- The reverse false claim prong of the False Claims Act (FCA) is an increasingly utilized legal theory in complaints filed by the government and whistleblowers.
- The reverse false claim prong of the FCA became law to address specific scenarios of government contractors avoiding repayment obligations and was intended not to apply to potential liability.
- In the cases asserting reverse false claim liability for potential obligations, courts have taken different approaches and arrived at different results.
- For the most part, courts undertaking rigorous statutory interpretation have stopped reverse false claims theories from going forward absent actual fraud or actual attempts to conceal established debt.
- The Centers for Medicare & Medicaid Services seeks to change its regulations relating to the 60-day rule, which would alter the analysis and potentially apply to liability providers who are argued to have recklessly disregarded.

131 U.S.C. § 3729(a)(1)(A).
231 U.S.C. § 3729(a)(1)(A).
3*See* H.R. Rep. No. 99–660, at 20.
4*See* S. Rep. 111–10, at 4.
531 U.S.C. § 3729(a)(1)(G).
631 U.S.C. § 3729(a)(1)(F).
731 U.S.C. § 3729(a)(1)(G).
831 U.S.C. § 3729(b)(3).
9 155 Cong. Rec. S4539 (daily ed. Apr. 22, 2009) (statement of Sen. Jon Kyl).
10 155 Cong. Rec. S4539 (daily ed. Apr. 22, 2009) (statement of Sen. Jon Kyl).
11 155 Cong. Rec. S4539 (daily ed. Apr. 22, 2009) (statement of Sen. Jon Kyl).
12 155 Cong. Rec. S4539 (daily ed. Apr. 22, 2009) (statement of Sen. Jon Kyl).
1342 U.S.C. § 1320a–7k(d)(1) & (2).
1442 U.S.C. § 1320a–7k(d)(4)(B).
15*See* 42 U.S.C. § 1320a–7k(d)(3).
1642 C.F.R. § 401.305(a)(2).
17 81 Fed. Reg. 7,653.
18 81 Fed. Reg. at 7,661.
19 81 Fed. Reg. at 7,662.
20*See* 87 Fed. Reg. 79,452, 79,559 (Dec. 27, 2022).
21*See, e.g.*, United States ex rel. Berkley v. Ocean State, LLC, No. CV 20-538-JJM-PAS, 2023 WL 3203641, at *7 (D.R.I. May 2, 2023) ("Mr. Berkley contends that Defendants violated the second part of [31 U.S.C. § 3729(a)(1)(G)]. He alleges that because [defendants] were not entitled to the PPP loans, they knowingly retained an overpayment. The Court finds that these allegations are sufficient to survive Defendants' motion to dismiss.")

(internal citations omitted).

22 *See* United States ex rel. Berkley v. Ocean State, LLC, No. 1:20-cv-538, Doc. 28 (D.R.I. Oct. 28, 2022) (amended complaint).

23 United States ex rel. Berkley v. Ocean State, LLC, at 53–54.

24 *See* United States ex rel. Berkley v. Ocean State, LLC, Doc. 29 (Nov. 18, 2022).

25 United States ex rel. Berkley v. Ocean State, LLC, Doc. 33, 2023 WL 3203641, at *7 (D.R.I. May 2, 2023) (internal citations omitted).

26 United States ex rel. Foreman v. AECOM et al., 19 F.4th 85, 120 (2d Cir. 2021).

27 United States ex rel. Foreman v. AECOM et al., 19 F.4th 85 at 119–20.

28 United States ex rel. Foreman v. AECOM et al., 19 F.4th 85 at 119, 120.

29 United States ex rel. Foreman v. AECOM et al., 19 F.4th 85 at 120 (quoting United States v. Mount Sinai Hosp., 256 F.Supp.3d 443, 458 (S.D.N.Y. 2017).

30 *See, e.g.*, Pencheng Si v. Laogai Rsch. Found, 71 F.Supp.3d 73, 97 (D.D.C. 2014) ("But by this logic, just about any traditional false statement or presentment action would give rise to a reverse false claim action; after all, presumably any false statement actionable under § 3729(a)(1)(A) or 3729(a)(1)(B) could theoretically trigger an obligation to repay the fraudulently obtained money."); United States ex rel. Thomas v. Siemens AG, 708 F.Supp.2d 505, 514 (E.D. Pa. 2010) ("Congress' purpose in enacting subsection (a)(7) was to ensure that one who makes a false statement in order to avoid paying money owed the government would be equally liable under the [False Claims] Act as if he had submitted a false claim to receive money. Its purpose was not to provide a redundant basis to state a false statement claim under subsection (a)(2).") (internal punctuation omitted).

31 United States ex rel. Kelly v. Serco, Inc., 846 F.3d 325, 336 (9th Cir. 2017) (quoting United States ex rel. Cafasso v. General Dynamics et al., 637 F.3d 1047, 1056 (9th Cir. 2011)).

32 United States ex rel. Kelly v. Serco, Inc., 846 F.3d 325, 336 (9th Cir. 2017) (quoting United States ex rel. Cafasso v. General Dynamics et al., 637 F.3d 1047, 1056 (9th Cir. 2011)).

33 *See, e.g.*, United States ex rel. Olson v. Fairview Health Servs. of Minn., 831 F.3d 1063 (8th Cir. 2016) ("If there is no allegation of fraudulent conduct under the FCA, then there can be no reverse liability under § 3729(a)(1)(G).").

34 United States ex rel. Customs Fraud Investigations, LLC v. Victaulic Co., 839 F.3d 242, 256 (3d Cir. 2016).

35 United States v. Pemco Aeroplex, Inc., 195 F.3d 1234 (11th Cir. 1999).

36 United States ex rel. Saldivar v. Fresenius Med. Care Holdings, Inc., Case No. 1:10-cv-1614 (N.D. Ga.).

37 United States ex rel. Saldivar v. Fresenius Med. Care Holdings, Inc., 906 F.Supp.2d 1264, 1272–73 (N.D. Ga. 2012). The case was eventually dismissed on public-disclosure-bar grounds, but the reverse false claims analysis at the trial court remains sound. *See* United States ex rel. Saldivar v. Fresenius Med. Care Holdings, Inc., 841 F.3d 927 (11th Cir. 2016).

38 For example, in the context of Medicare Advantage plans that conduct "one-way" looks to add diagnosis codes, the government has alleged that discovery of unsupported diagnosis codes that result in additional money may result in reverse false claims. This is because the unsupported diagnosis codes were not knowingly false at the time of submission, but later determined to be false, thus triggering an obligation under the reverse false claims prong. These cases continue to be litigated. *See generally,* Jonathan A. Porter, "DOJ Continues Enforcement Efforts Against Provider-Owned Managed Care Plans," *Healthcare Law Insights*, August 15, 2023, https://www.healthcarelawinsights.com/2023/08/doj-continues-enforcement-efforts-against-provider-owned-managed-care-plans/.