

203 - Dealing with a Worthless Services Allegation

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Disclaimer

THIS MATERIAL IS INTENDED TO BE
EDUCATIONAL AND DOES NOT CONSTITUTE
LEGAL ADVICE

Objectives

- Understand the factors to consider in moving forward with Settlement vs. Litigation
- Know the In's and Out's of negotiating a Settlement & Quality of Care CIA
- Learn how to live life with a Quality of Care monitor

Worthless - Having no real value or use

Valueless ▪ Poor Quality ▪ Inferior

Second Rate ▪ Third Rate ▪ Low-Grade

Cheap ▪ Shoddy ▪ Tawdry ▪ Useless ▪ Of No Use

Ineffective ▪ Ineffectually Pointless ▪ Inadequate

Deficient ▪ Meaningless ▪ Empty ▪ Hollow

Trifling ▪ Inconsequential ▪ Lame ▪ Pathetic

Recent Cases: Federal False Claims Act
31 U.S.C. §§ 3729-3733

- ***U.S. ex rel. Absher Mormence Meadows Nursing Center*** – 7th Circuit vacated a \$9 million dollar award finding that relators failed to establish that services rendered were worthless. The court did not invalidate the worthless services theory. The court found that in order to prevail, the relator/govt. must establish services are so deficient that they amounted to no services at all. Worth less is not worthless.

Continued...

- ***U.S. ex rel. Academy Health Center v. Hyperion***
– *Ongoing*
- ***Villaspring Health Care Center*** – \$350,000 settlement and independent consultant
- ***U.S. v. Houser*** – Criminal
- ***U.S. v. ARBA Group, CF Watsonville East, et al.***
– 3.8 million and 5 year Quality Care CIA
- ***U.S. ex rel. Lovvorn v. Extendicare Health Services*** - \$38 million settlement and 5 year Quality Care CIA

U.S. v. Foundation Health Services

- Worthless Services
 - Alleged 90 million in damages
 - Settled prior to litigation for \$750,000
 - Ability to Pay Global Settlement
 - 3 of 9 homes targeted
 - Statistical sampling
 - 5 year Quality Care CIA with monitor

OIG Subpoena

Your subpoena will likely cover requests for everything from medical records to the kitchen sink- or at least you will feel that way....



OIG Subpoena

- › All policies & procedures, guidelines, training materials, memoranda, correspondence, emails & other documents that govern, describe or otherwise relate to operations...
- › Salaries, compensation and/or bonus systems
- › Marketing
- › Surveys mock or otherwise
- › Quality Indicators/Quality Measures
- › Complaints/Grievances
- › Satisfaction surveys

continued...

- › RUG categories
- › Acquisition of Medicare or Medicaid numbers, 855s, etc.
- › Review Committees – any and all
- › Corporate overhead and structure, leases, etc.
- › Job descriptions, employee and contract employee files
- › Manuals
- › Compliance Programs and hotline reports
- › Incident/Accident reports
- › Color copies of time sheets, etc.
- › Budgets – staffing, equipment, etc.

Look at case early on...

- Charting parties
- Staffing
- Surveys
- Anti - Kickback violations
- Diversion of funds
- Improper RUG coding
- Resident harm and complaints
- Therapy
- Medical Director
- Hospice

Contact appropriate parties

- OIG
- DOJ
- State MFCU
- State AUSA
- Relator Counsel

Assess Quality of Care

- QA / Regulatory Expert
- Financial Expert
- Statistical Sampling Expert
- Cost Report Expert

Yates Memo: You're Fired!

- Sept. 9, 2015: Individual Accountability for Corporate Wrong Doing
- 6 key steps to pursue individual corporate wrong doing
 - Tell all the facts relating to individuals
 - Focus on the individual from beginning
 - Criminal and civil attorneys should work together
 - Do not release individuals from civil or criminal liability when resolving a matter with a corporation
 - Do not resolve corporate matter without clear plan to resolve individual case(s)
 - Look at individual regardless of ability to pay (civil)

Cost Analysis - Stop Litigation Early

- Cost of litigating
- Settlement
- Ability to pay



Litigation

- Motion to Dismiss
- Discovery
- Summary Judgment
- Trial



Settlement

- DOJ - \$ and Scope of Release
- OIG – CIA
- Relator – Attorney fees
 - Right to object



Ability to Pay

- Corporate
- Individual



Signed under the penalty of perjury!

CIA

- Must be able to live with the terms of the CIA
- Cost
- Insurance
- Monitor / IRO
- Cannot put expenses on cost report
- Policies and procedures
- Reporting

Quality of Care CIA

- About a dozen implemented with 5 active
- OIG website:
<https://oig.hhs.gov/compliance/corporate-integrity-agreements/quality-of-care.asp>
 - CF Watsonville East, LLC and CF Watsonville West, LLC
 - Extendicare Health Services, Inc.
 - Foundation Health Services, Inc.
 - Parkland Health and Hospital System
 - GGNSC Holdings LLC

DOJ Obtains more than \$4.7 billion in settlements and judgments from civil cases involving fraud and false claims against the Government in fiscal year ending September 30, 2016

- \$2.5 billion came from the health care industry and reflects only federal losses
- 7th consecutive year that DOJ's civil health care fraud recoveries have exceeded \$2 billion
- 19.3 billion in health care fraud since January 2009 to end of fiscal year 2016.

Future of Worthless Service FCA Case

- Elder Justice Task Force
- Plaintiffs
- Whistle blowers
- Med-Mal Crisis
- Courts

So What Can You Expect from a Monitor?

- A written agreement
- A five year relationship
- Routine Visits to “Monitor”
 - Routine Reporting

A written agreement

- The written agreement coincides with your CIA and which outlines specific duties the Monitor must perform.

Routine Visits to “Monitor”

- Visits are usually quarterly and will feel much like a regular survey by your State Department of Health. A report will be generated by the Monitors and your company must address how the company will implement the monitor’s recommendations or explain why the company feels it is not appropriate to implement a recommendation.

Routine Reporting



- Your CIA will require an Implementation Report and Annual Reports. Additionally, you will be required to send monthly reports to your Monitor. At the discretion of the monitor, additional reporting may be required.

Relationships

- Work to establish a good working relationship with your monitors!
- You got 'em- You must deal with them.
- LISTEN & LEARN!
- Try not to become defensive or adversarial
- Monitors, like surveyors, must find something to point out to validate their jobs. Accept it!
- Remain professional and leave personal feelings aside.

Summary

- No company is immune!
- Follow the RULES!
- Work to ensure you have a fully functioning Corporate Compliance Committee and strive in all sincerity for full compliance with regulations.
- Work to have good survey outcomes
- Work to have employee & customer satisfaction
- DOCUMENT!

QUESTIONS



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