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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.