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Appeals Court Restores Big FCA Verdict; SNFs Hit With \$255M in Whistleblower-Only Case

By Nina Youngstrom

A federal appeals court has reinstated a huge jury award in a False Claims Act (FCA) case against a Florida skilled nursing facility (SNF) management company that was pursued by a whistleblower after the Department of Justice (DOJ) declined to intervene.

In a June 25 ruling,^[1] the U.S. Court of Appeals for the 11th Circuit reversed in part a federal district court decision to set aside the jury verdict against CMC II and related entities. The 11th Circuit ruled the district court was wrong to throw out Medicare-related fraud claims about upcoding and ramping, although the Medicaid fraud claims about plans of care are history. The case turned partly on the materiality of the claims, which has become a litmus test of FCA violations since the landmark 2016 U.S. Supreme Court decision in *United States ex rel. Escobar v. Universal Health Services, Inc.*^[2]

“In light of our reversal on the Medicare claims, we remand with instructions for the district court to reinstate the jury’s verdict in favor of the relator [i.e., whistleblower], the United States, and the State of Florida and against the defendants on the Medicare claims in the amount of \$85,137,095, and to enter judgment on those claims after applying trebling and statutory penalties,” the appeals court said. That adds up to about \$255 million. In pursuing this long-running case, the whistleblower was partly funded by an outside investor, which the court said didn’t jeopardize her standing because the investment was so small (less than 4%).

“I expect you will see more of these cases in coming years,” said former federal prosecutor Robert Trusiak, an attorney in Buffalo, New York. In March, DOJ announced a national initiative^[3] to crack down on nursing homes that provide grossly substandard care, which will be “exacerbated by COVID-19,” he said. The whistleblower’s victory in the CMC II case also will encourage attorneys to pursue FCA cases against nursing homes and other health care organizations with or without DOJ, especially if they have funding from private litigation partners, Trusiak said. “Success breeds imitation.”

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