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***U.S. v. Houser*: Bellwether for Civil FCA Theories in Criminal Prosecutions?**

By Jerry Friedberg and Amanda Touchton – August 14, 2014

In *United States v. Houser*, 2014 WL 2767200 (June 19, 2014), the Eleventh Circuit upheld the defendant's conviction and 20-year sentence for Medicare fraud and tax evasion. The case is noteworthy for the federal government's willingness to devote its resources to prosecuting persons who operate nursing homes that force the residents to live in grossly substandard conditions. The case is equally noteworthy for the severity with which the district court was willing to punish the owner, who received a sentence similar to that imposed on high-level drug dealers. The egregious facts of *Houser* undoubtedly explain both the prosecution and the sentence. Looking beyond these two issues, however, the ruling suggests a potentially far-reaching development: the incorporation of expansive theories of liability derived from civil False Claims Act (FCA) cases into the criminal context.

Courts have interpreted the civil FCA broadly, consistent with its remedial purposes. Two theories of civil liability under the FCA have no direct parallel in common law: (a) worthless services, and (b) implied false certification. A worthless-services claim "asserts that the knowing request of federal reimbursement for a procedure with no medical value violates the Act." *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 702 (2d Cir. 2001); *United States ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F.3d 1048, 1053 (9th Cir. 2001) (worthless-services theory based on "seeking and receiving payment for medically worthless tests"). An implied false certification occurs when an entity has previously undertaken to expressly comply with a law, rule, or regulation, and that obligation is implicated by submitting a claim for payment, even though a certification of compliance is not required as part of the process of submitting the claim. *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010). Prosecutors in some jurisdictions are starting to apply these theories of liability to criminal cases, even though criminal statutes are traditionally interpreted narrowly and implicate due-process concerns not present in traditional FCA civil actions.

The Facts of *Houser*

The *Houser* opinion arose out of one such prosecution. Defendant Houser owned and operated nursing homes that primarily served Medicare or Medicaid patients. He had an extensive history of failing to pay services providers and operating the homes at a substandard rate. As a result of his failure to pay for basic amenities, conditions at the homes that he operated were, according to witnesses, "barbaric" and "uncivilized." For example, one facility had a leaky roof that was so porous that it caused the patients' rooms to flood; another had no heat during the winter and no air conditioning during the summer. Patients and staff reported unsanitary, insect-infested conditions, unclean bathrooms, limited laundry, and no trash services. Patients were not provided

with their prescribed medication, were denied dialysis and other critical treatments or tests, did not receive required rehabilitative and physical therapy, and were not properly fed. Despite Houser's best efforts to cover up the conditions, including firing whistleblowers and making temporary improvements on the eve of government inspections, the state licensing agency closed the facilities. To make matters worse, Houser cheated on his taxes. He failed to pay payroll taxes, despite withholding from his employees, and filed his income tax returns late or not at all.

Houser and his wife were charged with a conspiracy to commit health-care fraud in violation of 18 U.S.C. § 1349, as well as several tax offenses. The indictment alleged that Houser submitted claims that were "false or fraudulent claims" because they sought payment for services that were "worthless." The indictment specifically relied on a Medicare regulation that required nursing homes to maintain the quality of life of each resident, including providing "services and activities to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident in accordance with a plan of care." 42 U.S.C. § 1396r(b)(2)(A); 42 C.F.R. § 483.25.

Houser waived jury, went to trial, and was convicted on all counts. In a lengthy opinion, the trial judge concluded that Houser committed fraud by submitting claims for services that were "either not rendered or were so inadequate or deficient as to constitute worthless services." 2014 WL 2767200, at *9.

What *Houser* Did Not Address

On appeal, Houser argued that the incorporation of a "worthless services" theory from civil FCA cases into the Medicare fraud statute would render the statute "unconstitutionally vague." The Eleventh Circuit rejected this argument on the facts of the case before it. However, the circuit failed to provide any guidance as to when the provision of substandard services could support a criminal conviction under the "worthless services" theory, stating, "We do not believe that Mr. Houser's conviction requires us to draw the proverbial line in the sand for purposes of determining when clearly substandard services become 'worthless.'" Instead, the circuit affirmed the conviction on the ground that the district court had found that some patients went "entirely without necessary services such as physical therapy, medication, dialysis and wound care." The circuit found that, because some services had not been provided at all, it was not necessary to reach the issue of whether due process precludes a conviction for substandard, "worthless services."

The *Houser* court therefore avoided the question of whether substandard services that were actually provided could support a criminal conviction. However, at least one other court has expressly permitted a prosecution based on a substandard-services theory to go forward. In *United States v. Wachter*, 2006 WL 2460790 (E.D. Mo. Aug. 23, 2006), the district court for the Eastern District of Missouri rejected a motion to dismiss a health-care fraud indictment, holding that defendants could be charged with submitting false statements that services had been rendered, when the services provided were so "inadequate, deficient, and substandard" as to be worthless. The *Wachter* court further held that the term "worthless service" was not unconstitutionally vague.

Although in *Houser* the Eleventh Circuit did not expressly adopt the holding of *Wachter*, the crux of the case below was worthless services, and the Eleventh Circuit did not renounce the prosecution's use of this theory in fashioning a criminal health-care-fraud prosecution. The prosecution charged Houser with submitting claims for services "that were worthless in that they were not provided or rendered, were deficient, inadequate, substandard, and . . . failed to meet professionally recognized standards of health care." The district court convicted Houser based in part on this theory, and the Eleventh Circuit affirmed Houser's conviction.

Moreover, the Eleventh Circuit affirmed Houser's conviction based on the failure to perform services that were never separately billed. Nursing facilities are paid on a per diem basis for each Medicare patient, regardless of what particular service is provided on that day. Although Houser failed to provide required services, he did not certify and apparently was not required to certify that any particular service was provided on the day for which the claim for per diem reimbursement was submitted. Nevertheless, the Eleventh Circuit affirmed the conviction based on Houser's failure to provide necessary services. (The court also noted that, on his Medicare enrollment form, Houser certified that he would comply with the Medicare rules and regulations, and those Medicare rules and regulations specify the services that must be offered by nursing homes. However, the court did not rely on Houser's express certification when it analyzed whether Houser's failure to provide required services was sufficient to sustain the conviction.)

The Impact of *Houser*

The *Houser* opinion does not expressly address the extent to which criminal liability can be premised on an implied false certification. However, *Houser* appears to have opened the door for prosecutions based on this theory by holding that a defendant who fails to provide required services can be convicted for submitting invoices for payment even if the defendant never billed for those specific services.

More generally, *Houser* suggests that future cases will test the extent to which theories of liability that have been accepted in civil FCA cases, such as the worthless-services theory and the implied-certification theory, may also form the basis of criminal prosecutions. Future prosecutions are likely to require the resolution of those issues that the *Houser* court declined to expressly address.

Keywords: criminal litigation, health-care fraud, False Claims Act, worthless services, implied false certification

[Jerry Friedberg](#) is a partner and [Amanda Touchton](#) is of counsel with Isaacs, Friedberg & Labaton LLP. (The authors wish to thank [Craig Harbaugh](#) for his contribution to this article.)