

Between a Rock and a Hard Place

Limitations on a Health Care Provider's Right to Indemnification When it is Targeted Under the False Claims Act as a Result of the Fraudulent Activities of a Third Party with Which it Contracts or Associates

**By Keely E. Duke
and Andrew M. Hyer**

During lean economic times, payments by Medicare and Medicaid account for an increasingly large share of health care providers' revenue streams. As such, health care providers and the attorneys that represent them need to be especially concerned about activities giving rise to False Claims Act (FCA) liability. Moreover, potential amendments to the FCA that will be favorable to plaintiffs appear to be on the horizon. These and other factors may converge to create a "perfect storm" of FCA liability for many health care providers in the near future. Such liability may often stem from the actions of third parties with which a health care provider contracts or associates. However, the right to indemnification of any kind is extremely limited in relation to FCA cases. Counsel should be aware of the intricacies of indemnity claims relating to FCA actions.

Every hospital, clinic, physicians' group, and other health care provider that bills for services through Medicare, Medicaid, or any other federal health care program should be concerned about potential liability under the federal False Claims Act (FCA), 31 U.S.C. §§ 3729–3732.¹ Under current case law, a health care provider confronts the risk of incurring such onerous liability through the false billings or similar misconduct of a contractor or other party with whom the provider associates; and yet, the health care provider may not have a right to indemnity from such party.

The facts of *Heart Doctors v. Layne*, 2006 WL 2692694 (E.D. Ky. Sept. 13, 2006), illustrate the risk that health care providers currently confront. In this case, a qui tam FCA claim was brought against a physicians' group, Heart Doctors, in relation to fraudulent billing by one of the group's member physicians, Dr. Layne. The allegation was that Dr. Layne was instructing nurses to provide certain chemotherapy procedures without the supervision of a physician and then billing Medicare for the procedures as if a physician had been present. Heart Doctors settled the FCA case for \$434,180 and subsequently brought claims for indemnification against Dr. Layne for the settlement amount, as well as claims for \$124,142 in attorney's fees and costs that Heart Doctors had incurred in defending the FCA case. The court dismissed Heart Doctors' indemnification action on the basis that claims for indemnification for FCA liability are barred as a matter of law.

The *Heart Doctors* case vividly illustrates that questionable or outright fraudulent billing practices by a person or entity with which a hospital, physicians' group, clinic, or similar health care facility contracts or associates may force such a facility to defend itself in costly FCA actions and face potentially stiff penalties. Moreover, as shown by *Heart Doctors*, such a health care facility's ability to obtain indemnification relating to conduct giving rise to FCA liability is potentially extremely restricted. As discussed further below, rulings in cases that address this issue have generally held that, regardless of a contractual indemnification provision between the parties, a claim for indemnification that depends on a finding of liability under the False Claims Act is barred as a matter of law. However, it is less clear whether a claim for indemnification for the attorneys' fees incurred in defending an FCA action is always barred when a party is entitled to such indemnification by contract.

This article provides a brief overview of the provisions of the FCA and shows why now, more than ever, health care providers need to be cognizant of the potential for liability under the FCA. The article also discusses how a hospital, physicians' group, or other health care provider could be held liable under the FCA for the fraudulent conduct of one of its members or a party with which the provider has a contractual agreement—even if the hospital did not actually know about the fraudulent conduct. In addition, the cases that limit a party's right to indemnification relating to FCA liability are discussed. Finally, the article examines the somewhat open issue of whether a party may seek indemnification for the costs and attorneys' fees incurred in defending an FCA claim brought against the health care provider.

The FCA: Now More than Ever a Cause for Concern for Health Care Providers

The key provisions of the False Claims Act provide that a party who “knowingly presents, or causes to be presented” a false or fraudulent claim for “payment or approval” by the federal government is liable for a civil penalty between \$5,500 and \$11,000 for *each* false claim submitted, *plus* three times the government's actual damages. 31 U.S.C. § 3729(a)(1); 20 C.F.R. § 356.3 (2008). Moreover, in an action initiated by a qui tam relator (that is, a whistle-blower), a defendant who is liable under the FCA is required to pay the relator's costs as well as attorneys' fees. 31 U.S.C. § 3730(d)(1),(2).

Although the FCA requires “knowing” presentment of a false claim, the statute specifically provides that “no proof of specific intent to defraud is required” and broadly defines the terms “knowing” and “knowingly” to include (1) “actual knowledge,” (2) “acts in deliberate ignorance of the truth or falsity of the information,” or (3) “acts in reckless disregard of the truth or falsity of the information.” 31 U.S.C. § 3729(b). As such, even if management of a health care facility does not actually know that its employees, associates, or independent contractors are submitting false or fraudulent claims to Medicaid or Medicare, the facility can still be held liable under the FCA if it acts in “deliberate ignorance” of or in “reckless disregard” for the fraudulent conduct.

FCA actions against health care providers commonly revolve around allegations of billing for services not actually provided, billing for services not provided in conformity with Medicare or Medicaid regulations and policies, and “up coding” (falsely coding services so that the provider is reimbursed at a higher rate than the one to which the provider is entitled). Considering the state of the economy in recent months, health care providers are expected to continue experiencing sharp declines in the number of patients seeking discretionary treatments, such as bariatric and knee replacement surgeries, which require large out-of-pocket expenses for the patient.² As a result, an increasingly high proportion of health care providers' revenue is expected to come from services billed to Medicare and Medicaid. With other revenue streams being restricted during these lean economic times, unscrupulous health care providers may be tempted to engage in questionable billing practices that result in the submission of false or fraudulent claims to the government.

Moreover, in 2007, both the Senate and the House Judiciary Committees considered bills that would make very significant amendments to the False Claims Act, making its provisions significantly more favorable to the government and qui tam plaintiffs.³ Among these proposed amendments were changes to the way FCA damages are calculated, changes in the wording of the statute of limitations that are more favorable to plaintiffs, the addition of separate liability for the government's costs of pursuing a civil FCA action, and the elimination of the public disclosure/original source bar to qui tam actions.⁴ These amendments were not enacted, but similar legislation is expected to be introduced in the future. All these proposed amendments would increase a health care provider's potential liability under the FCA and also increase a whistle-blower's incentive and ability to pursue a qui tam action against a health care provider.

In sum, the False Claims Act imposes stiff penalties and casts a broad net as a result of the way the act defines fraudulent conduct. Combined with the potential for even greater liability under proposed amendments, liability under the FCA should be cause for concern for all health care providers who participate in federal programs.

Potential FCA Liability Arising from the Conduct of Individuals or Entities with Which a Health Care Facility Contracts or Otherwise Associates

Even if the management of a hospital or clinic is unaware of false or fraudulent claims being submitted to Medicare or Medicaid, it still could be the target of an FCA suit because of the actions of third parties with which the facility contracts or associates. Knowledge is imputed under the FCA when a party acts in “reckless disregard” or “deliberate ignorance.”

Courts recognize that “‘innocent mistakes’ and ‘negligence’ are not offenses under the [FCA].” *Wang v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992). However, it is also clear that “[p]rotection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law. Participants in the Medicare program have a duty to familiarize themselves with the legal requirements for payment.” *United States v. Mackby*, 261 F.3d 821, 828 (9th Cir. 2001) (citing *Heckler v. Cmty. Health Servs. of Crawford County Inc.*, 467 U.S. 51, 63–64 (1984)) (internal quotation omitted).

Accordingly, even in the absence of knowing intent to defraud the government—or even in the absence of knowing that one of its contractors is defrauding the government—a health care facility is potentially liable under the FCA. Moreover, even if a health care facility is ultimately not deemed to have the requisite “knowledge” of the fraudulent conduct of a practitioner with which it contracts or associates, the cost and burden of defending an FCA action are sufficient reasons for concern.

There are a number of situations in which a hospital or clinic could find itself the target of an FCA action because of the conduct of a third party. For example in *Heart Doctors*, a physicians’ group was forced to defend itself in an FCA action based on the allegation that only one of its member physicians had fraudulently billed Medicare for certain chemotherapy services. *Heart Doctors*, 2006 WL 2692694, *2–4. Similarly, if a hospital contracts with a third party to provide rehabilitative therapy services (that is, physical, occupational, and speech therapy) that are then billed to Medicare or Medicaid through the hospital, the hospital could be targeted in an FCA action based on allegations that the independent contractor improperly billed the government for certain therapy services. In addition, when a health care facility outsources billing or other services to a third-party vendor, the facility could potentially be liable under the FCA for the misconduct or errors of the third-party vendor.

All in all, hospitals, physicians’ groups, clinics, and other health care providers need to be aware that the False Claims Act defines “knowledge” very broadly and that Medicare and Medicaid regulations impose duties on such

service providers to assure that only proper claims are submitted to the government for payment. As a result, these health care facilities stand out as potential targets of FCA actions relating to the conduct of third parties with which they contract and associate. In an effort to address these and other risks—such as vicarious liability for tort-based claims—it is commonplace for contracts in the health care setting to contain indemnification clauses.⁵ However, as discussed below, the effectiveness of such clauses when it comes to liability under the FCA is limited.

Limitations on an FCA Defendant’s Right to Indemnification

Even though a hospital or other health care provider faces significant potential liability under the FCA for the conduct of those with which it contracts or associates, the provider may find itself without any recourse against such parties for FCA liability, even when the facility has a contractual right to indemnification. A number of federal courts have held that there is no right to indemnification or contribution for FCA liability from a co-defendant or another third party if that claim is dependent on a finding of FCA liability by the indemnitee.

The rule barring indemnification for FCA liability was initially set forth by the Ninth Circuit in 1991 in *Mortgages Inc. v. U.S. District Court of the District of Nevada*, 934 F.2d 209 (9th Cir. 1991), a case that involved a lending company (Mortgages Inc.) that prepared mortgage applications for federal loans insured by the U.S. Department of Housing and Urban Development. Some of the applications allegedly contained false or misleading statements, and Mortgages Inc. brought a qui tam FCA action against the applicants who had provided false information. The FCA defendants then filed third-party complaints against Mortgages Inc., alleging numerous state law claims, including breach of contract. Mortgages Inc. filed a motion to dismiss the third-party complaint, which the district court denied.

The Ninth Circuit Court of Appeals reversed the district court’s decision, holding that counterclaims for indemnification are barred under the FCA. The *Mortgages* court reasoned that Congress had not created a right to indemnification or contribution when it enacted the FCA and that no such right exists under federal common law. Accordingly, the court held that there is no right to indemnity or contribution for FCA liability as follows: “Because there is no basis in the FCA or federal common law to provide a right to contribution or indemnity in an FCA action, we conclude that there can be no right to assert state law counterclaims that, if prevailed on, would clearly end in the same result.” *Id.* at 214. Thus, the *Mortgages* court held that state law counterclaims for breach of contract are barred if they will have the effect of indemnifying a party for its FCA liability.

Although *Mortgages* specifically dealt with counterclaims, a number of subsequent decisions have applied the analysis in *Mortgages* to hold that cross-claims and other third-party claims by an FCA defendant for indemnification for FCA liability are similarly barred. See, e.g., *United States ex rel. Public Integrity v. Therapeutic Technology Inc.* 895 F. Supp. 294, 295–297 (S.D. Ala. 1995) (citing *Mortgages* in declining

to exercise supplemental jurisdiction over FCA defendants' third-party claims on the basis that FCA defendants have no right to bring claims to offset their liability); *United States ex rel. Stephens v. R.D. Prabhu*, No. CV-S-92-653-LDG (LRL), 1994 WL 761237 (D. Nev. Dec. 14, 1994) (citing *Mortgages* in dismissing FCA defendants' third-party claims that would have the effect of offsetting their FCA liability).

Moreover, although the Ninth Circuit appears to be the only federal circuit in which an appellate court has squarely addressed this issue, district courts from a number of other federal circuits have cited and followed the Ninth Circuit's approach. See, e.g., *United States ex rel. Miller v. Bill Harbert Int'l Constr.*, 505 F. Supp. 2d 20, 25–26 (D.D.C. 2007) (citing *Mortgages* and noting that “[t]he unavailability of contribution and indemnification for a defendant under the False Claims Act now seems beyond peradventure”); *Heart Doctors*, 2006 WL 2692694, *2 (noting that “[t]he Sixth Circuit has not addressed the issue of whether a defendant in an FCA action may seek indemnification from a third party” and adopting the approach taken in *Mortgages*).

Two years after the *Mortgages* decision, in *United States ex rel. Madden v. General Dynamics Corporation*, 4 F.3d 827 (9th Cir. 1993), the Ninth Circuit clarified that the rule against indemnification for FCA liability as set forth in *Mortgages* does not bar all counterclaims or cross-claims in FCA cases. Rather, such claims are permitted if they are for “independent damages” that “are not dependent on a *qui tam* defendant's liability.” *Id.* at 831.

The *Madden* case involved a *qui tam* FCA action in which the relator, Madden, alleged that General Dynamics had made misrepresentations to the U.S. Navy concerning the testing and development of a particular missile system. In answering Madden's complaint, General Dynamics asserted eight state law counterclaims “substantively” similar to those brought in *Mortgages*. The district court relied on the *Mortgages* ruling and dismissed all the counterclaims brought by General Dynamics. The Ninth Circuit reversed the decision, distinguishing *Mortgages* as follows:

In the instant case, the counterclaims filed by General Dynamics were substantively similar to those raised in *Mortgages*. However, rather than seeking indemnification and/or contribution, General Dynamics sought “independent damages.” The district court did not think this difference was significant. It concluded that counterclaims for independent damages are impermissible under *Mortgages* because they have the practical effect of providing a defendant the opportunity to offset its liability by recovering damages from *qui tam* plaintiffs.

We disagree. The decision in *Mortgages* is designed to prevent *qui tam* defendants from offsetting their liability. Counterclaims for indemnification or contribution by definition *only* have the effect of offsetting liability. Counterclaims for independent damages are distinguishable, however, because they are not dependent on a *qui tam* defendant's liability.

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Id. at 830–831. Thus, the *Madden* court clarified that, even though claims may be “substantively similar” with regard to the state law theory under which they are brought, a claim that “*only* ha[s] the effect of offsetting liability” is barred under the FCA. *Id.* However, if the claim seeks “independent damages,” then the claim is not barred under the False Claims Act. Accordingly, under *Madden*, the relief that a counterclaimant or cross-claimant seeks in its pleadings determines whether or not the claim is barred; a claim that seeks only to offset liability is clearly barred. Consistent with *Madden*, several district courts have held that certain counterclaims or cross-claims in FCA actions are “independent” and thus not barred under *Mortgages*.⁶

One federal district court more recently provided an in-depth discussion clarifying the effect of the holdings in *Mortgages* and *Madden*:

[T]here are two ways in which an FCA defendant's counterclaim may seek “independent damages” and thus be permissible. The use of the word “independent” has led to some confusion, and courts would be better served to describe the permissible claims as “not dependent on the fact of FCA liability.” In short form, claims by an FCA defendant have been properly permitted where the success of the FCA defendant's claim does not *require* a finding that the defendant is liable in the FCA case.

The first and most obvious of the two categories is where the conduct at issue is distinct from the conduct underlying the FCA case. This can be so even where there is a close nexus between the facts, so long as there is a clear distinction between the facts supporting liability against [the] relator and the facts supporting liability against the FCA defendant. . . .

The second category of permissible claims by an FCA defendant is where the defendant's claim, though bound up in the facts of the FCA case, can only prevail if the defendant is found not liable in the FCA case. This is where the word “independent” has sewn confusion. These claims are actually quite dependent, but they depend on a finding that the FCA de-

fendant is not liable, whereas the impermissible class of claims depend on the FCA defendant being found liable. The FCA defendant thus has a cause of action for damage to him independent of his FCA liability. These claims have surfaced in the form of libel, defamation, malicious prosecution, and abuse of process claims that succeed upon a finding that the relator's accusations were untrue. Once the question of FCA liability has been determined in the defendant's favor, there is less of the risk, envisioned by *Mortgages* and other cases, of deterring would-be relators, and no risk that a wrongdoer will be allowed to shift its costs. *The simple rule that emerges from these cases is therefore that a claim by an FCA defendant which requires for its success a finding that the FCA defendant is liable is the kind of claim barred by the FCA.*

United States ex rel. Miller v. Bill Harbert Int'l Const. Inc., 505 F. Supp. 2d 20, 27–28 (D.D.C. 2007) (emphasis added). Accordingly, if the success of a claim for indemnification is independent of FCA liability by the indemnitee, such a claim is permissible. However, regardless of whether a claim for indemnification is brought through a counterclaim, a cross-claim, a third-party claim, or a separate action, under these cases, the claim is barred if its success requires a finding of FCA liability by the party seeking indemnification.

Moreover, it appears that courts apply this same rule to bar indemnity claims for amounts paid to settle FCA claims. For example, in *Cell Therapeutics v. The Lash Group*, 2008 WL 2489931 (W.D. Wash. June 19, 2008), Cell Therapeutics Inc., a pharmaceutical company, settled an FCA action against it alleging false statements regarding Medicare reimbursement for “off-label” (that is, not approved by the Food and Drug Administration) uses of a drug the company manufactured. Cell Therapeutics then brought claims against the Lash Group, the reimbursement expert with which Cell Therapeutics had a contract, for indemnification of the \$10.5 million Cell Therapeutics had paid to settle the FCA claim. The court held that Cell Therapeutics' claim for indemnification of the settlement amount was barred under *Mortgages* and *Madden*. *Id.* at *2–4. See also *Heart Doctors*, 2006 WL 2692694, *2–3 (similarly holding that a claim for indemnification of the amount paid in settling an FCA case is barred under *Mortgages*). However, as discussed below, it is less clear whether indemnification claims against an

FCA co-defendant for the attorneys' fees incurred in defending an FCA action are similarly barred.

Open Question of Whether a Health Care Facility Has a Right to Indemnification for Attorneys' Fees Incurred in Defending an FCA Case

Regardless of whether the FCA defendant is actually liable under the False Claims Act, the health care provider is likely to incur substantial fees in defending itself against the claim. Does the FCA defendant have any rights to recover those fees? If the FCA defendant is successful in its defense, absent substantially unjustified or clearly frivolous conduct by the government or a relator, the provider will not be able to recover its attorney's fees from the government or relator.⁷ However, when the FCA claim against a health care facility is based on an allegation of the defendant's “knowledge” of another party's false billings or similar fraudulent conduct, or the claim otherwise arises from another party's misconduct, the health care facility may have indemnification rights for attorney's fees from such a party.

The general rule barring indemnification for FCA liability, as one court summarized it, is the “simple rule” that “a claim by an FCA defendant which requires for its success a finding that the FCA defendant is liable is the kind of claim barred by the FCA.” *Miller*, 505 F. Supp. 2d at 27–28. The cost of defending an FCA claim, however, is not necessarily dependent on a finding of FCA liability, because the FCA defendant will incur those costs in any event once the suit is commenced. Thus, an indemnity claim for those defense costs may be distinguished from the indemnity claims barred by this rule. Accordingly, the rationale of the line of cases setting forth the rule against indemnification for FCA liability does not necessarily foreclose a claim for attorneys' fees in an FCA case as damages for breach of a contractual obligation independent of the alleged FCA liability.

As briefly explained above, in the *Heart Doctors* case, the court cited *Mortgages* as well as *Madden* in dismissing the claims of a physicians' group, Heart Doctors, against Dr. Layne, one of the group's member physicians, to recover the amount that Heart Doctors had paid to settle the FCA case and the attorneys' fees the group had incurred as a result of Dr. Layne's misconduct. In all likelihood, Heart Doctors would have incurred attorneys' fees defending the



FCA case regardless of whether the group had settled the case, had been found liable under the FCA, or had received a judgment in the group's favor.

As such, because it is likely that Heart Doctors would have incurred attorneys' fees regardless of the outcome of the case, one could argue that the claim to recover attorneys' fees cannot fairly be characterized as "dependent" on a finding of FCA liability. The *Madden* court made it clear that FCA-related claims for indemnification are barred under *Mortgages* only if the claims are "dependent on a *qui tam* defendant's liability." Nonetheless, the *Heart Doctors* court relied on *Mortgages* and *Madden* in holding that Heart Doctors' claim to recover attorneys' fees from Dr. Layne was barred as a matter of law. Therefore, under the rationale in the *Heart Doctors* ruling, it appears that, when a party either settles an FCA case or is found liable under the FCA, the costs and attorneys' fees incurred in defending the suit are *deemed* dependent on FCA liability—even though such costs and fees would have been incurred regardless of the outcome of the case, and thus are not *actually* dependent on a finding of FCA liability.

On the other hand, an FCA case outside of the health care setting, *United States ex rel. Watkins v. AIT Worldwide Logistics*, 441 F. Supp. 2d 762 (E.D. Va. 2006), suggests that the conclusion reached by the *Heart Doctors* court may not be the conclusion reached in every instance. In *Watkins*, AIT, a shipping company, entered into a contract with another company, Air Cargo, under which Air Cargo agreed to sell AIT's freight transportation services in a particular geographical area. The contract between AIT and Air Cargo contained indemnification and arbitration provisions. Pursuant to this contract, Air Cargo sold AIT's transportation services to the U.S. Navy. Subsequently, *Watkins* brought a *qui tam* FCA action against both Air Cargo and AIT, alleging that both companies had violated the FCA by overcharging the Navy for freight services.

Upon investigating the FCA claims, AIT discovered that Air Cargo had been breaching its contract with AIT by changing the prices charged to AIT's customers without entering an explanation for the change into AIT's computer system, as required under the contract. While the FCA action was pending, AIT initiated arbitration proceedings against Air Cargo alleging breach of contract. During arbitration proceedings, despite Air Cargo's argument that federal case law prohibits an FCA defendant from seeking indemnification for its FCA liability from an FCA co-defendant, the arbitrator held that Air Cargo had breached its contract with AIT, that AIT was incurring attorney's fees defending the FCA case as a consequence of Air Cargo's breach of contract, and that Air Cargo was thus required to indemnify AIT for these attorney's fees. Air Cargo then appealed the arbitrator's conclusion in federal district court.

The *Watkins* court upheld the arbitrator's decision under the extremely lenient standard under which arbitration proceedings are judicially reviewed,⁸ explaining as follows:

Since AIT's liability under the FCA was not a question before the arbitrator, he proceeded to interpret the parties' Agreement under the law of contracts. He

concluded that the applicable indemnity clause does not exclude indemnity in case of certain types of lawsuits. It only requires that the expenses and damages arise from the other party's actions. Finding that the government's FCA allegations against AIT arose from Air Cargo's actions in failing to enter explanations for price changes in AIT's computer system, the arbitrator determined that AIT can seek recovery for any reasonable fees derived therefrom.

Id. at 768 (internal citations and quotations omitted). Considering the leniency of the standard of review applicable to arbitration proceedings, the holding alone in *Watkins* is likely to be of little precedential value under other circumstances. However, the *Watkins* decision articulates a logically sound rationale for why an FCA defendant has a right to indemnification for attorney's fees incurred in defending an FCA action on the basis that such fees are damages arising from a breach of contract.

As is illustrated by the *Heart Doctors* case as well as the other cases discussed above, courts are not likely to allow a health care facility to recover attorneys' fees incurred defending an FCA action from a co-defendant on the basis that the co-defendant is somehow more culpable under the FCA. Considering *Watkins*, however, such a health care facility could potentially argue that it is entitled to such fees as consequential damages of the other party's violation of some contractual obligation or duty—the violation of which is established based on contract law, independent of FCA liability. This argument should be particularly persuasive when the health care facility secures a dismissal or defense judgment, but the co-defendant is found liable under the FCA. As a practical matter, however, the argument is unlikely to be accepted by a court when the health care facility is found liable under the FCA. In those circumstances, the defense costs are likely to be treated as simply part of the cost of FCA liability that may not be indemnified by or offset to another party.

The closer question, however, is whether under current case law a court could be persuaded to allow recovery of attorneys' fees incurred by an FCA defendant, based on breach of contract or contract indemnification theories, from a co-defendant when the case is resolved by a settlement without admission of any liability by the FCA defendant. Going back to the *Heart Doctors* case, the upshot of *Watkins* is that the physicians' group, Heart Doctors, may have had a valid basis for recovering the attorney's fees the group incurred in the FCA case by establishing that, regardless of whether Dr. Layne's conduct had violated the FCA, the fees Heart Doctors had incurred in defending the FCA case were the result of Dr. Layne's violation of some contractual provision between the parties. Such an argument may be especially persuasive in courts outside of the Ninth Circuit, where the holdings in *Mortgages* and *Madden* are not mandatory authority.

Nevertheless, because the *Watkins* case involved the award of attorney's fees by an arbitrator, it is impossible to know whether a court would uphold such an award under a more stringent standard of review. Accordingly, the

right to indemnity from a co-defendant for attorneys' fees incurred in defending an FCA action remains somewhat of an open issue—especially when the party settles the FCA case without admitting liability.

Conclusion

Reimbursements from federal health care programs are likely to continue to account for an increasing proportion of health care providers' revenue streams. Moreover, significant amendments to the False Claims Act that are highly favorable to plaintiffs appear to be on the horizon. These and other factors may converge to create a "perfect storm" of FCA liability for health care providers in the near future. Health care facilities and the attorneys who represent them need to be cognizant that potential liability may stem from the questionable or outright fraudulent billing activities of persons and entities with whom the facilities contract or associate. If a health care facility is the target of an FCA action primarily as a result of the conduct of a more culpable third party, under current law the facility may have no right to indemnification for FCA liability from that third party. Despite this potential for health care facilities to be figuratively stuck between a rock and a hard place when targeted in such FCA actions, counsel should be aware of potential arguments that—at least under certain circumstances—the claims for contractual indemnification of attorneys' fees incurred in defending an FCA action should not be barred under the decisions rendered in *Mortgages*, *Madden*, and similar cases. **TFL**

Keely E. Duke is a shareholder with Hall, Farley, Oberrecht & Blanton, P.A., in Boise, Idaho. She specializes in defending a wide range of clients in the health care field, including hospitals, physicians, and other health care service providers in False Claims Act actions, medical malpractice actions, and employment law actions. She can be contacted at ked@ballfarley.com or (208) 395-8500. Andrew M. Hyer is an associate attorney at the same firm; his practice focuses on health care fraud defense and civil litigation. He can be contacted at amb@ballfarley.com or (208) 395-8500.



Endnotes

¹Many states also have statutes dealing with false claims with provisions similar to the federal False Claims Act that may be at issue with regard to programs involving state government funding. This article, however, relates only to issues surrounding the federal False Claims Act.

²See Reed Abelson, *Hospitals See Drop in Paying Patients*, NY TIMES, NOV. 6, 2008.

³See False Claims Act Correction Act of 2007, S. 2041 and Substitution S. 2041, 110th Cong. (2007); False Claims Act Correction Act of 2007, H.R. 4854, 110th Cong. (2007).

⁴*Id.* A detailed explanation of these and other amend-

ments proposed by these bills is beyond the scope of this article. For such an explanation, see John T. Boese, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 1.08 (3d ed., 2007).

⁵For a discussion of some of the issues raised by seeking indemnification or contribution for tort-based liability, see generally Richard Jones, *Pitfalls of Hospitals Seeking Indemnification or Contribution from Hospital Based Physicians as a Result of "Vicarious Liability Claims" Against the Hospital*, 4 ABA HEALTH eSOURCE (March 2008), www.abanet.org/health/esource/Volume4/07/jones.html.

⁶See, for example, *United States ex rel. Scott v. Metropolitan Health Corp.*, 2005 WL 3434830 (W.D. Mich. Dec. 13, 2005) (holding that a counterclaim against a successful relator alleging serious litigation abuses was independent and thus not barred); *United States ex rel. Grandeau v. Cancer Treatment Centers of America*, 2005 WL 300414, (N.D. Ill. Feb. 4, 2005) (holding that a counterclaim against relator for breach of fiduciary duty was independent and not barred where the relator was an employee of the defendant, was served with a subpoena as the defendant's agent, and failed to deliver the subpoena).

⁷In a case where the government has not intervened, a prevailing FCA defendant may recover attorney's fees from the relator only if the relator's claim "was clearly frivolous, clearly vexatious, or brought primarily for the purposes of harassment." 31 U.S.C. § 3730(d)(4). In a case where the government has intervened, a prevailing FCA defendant may not recover attorney's fees from the relator. In such a situation, individuals and certain small to mid-sized entities that prevail as FCA defendants may recover attorney's fees from the government only under the Equal Access to Justice Act and only if the court finds that the government was not "substantially justified" in taking its position against the defendant. See U.S.C. § 2412(d). Courts have explained this "substantially justified" requirement as follows: "Substantially justified does not mean 'justified to a high degree,' but rather 'justified in substance or in the main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Put another way, substantially justified means there is a dispute over which 'reasonable minds' could differ." See *League of Women Voters of Cal. v. FCC*, 798 F.2d 1255, 1260 (9th Cir.1986); *Gonzalez v. Free Speech Coalition*, 408 F.3d 613, 618 (9th Cir. 2005). Accordingly, even if a defendant prevails in an FCA action brought against it, absent frivolous conduct by the relator or the government, it is likely that such a defendant will not be able to recover attorneys' fees from the relator or the government.

⁸Under the Federal Arbitration Act, a court may vacate a decision in arbitration proceedings "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). In order to have an arbitration award vacated under this standard, a party "is required to show that the arbitrators were aware of the law, understood it correctly, found it applicable to the case before them, and yet chose to ignore it in propounding their decision." *Remmey v. PaineWebber Inc.*, 32 F.3d 143, 146 (4th Cir. 1994) (quoted in *Watkins*, 441 F. Supp. 2d at 766).