# PUBLICATION

## Worthless Services: Giving Nothing Can Cost You a Lot Under the False Claims Act [Ober|Kaler]

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**Numerous courts have recognized that knowingly billing the federal government for "worthless services" may be a violation of the False Claims Act (FCA). Recently, an Illinois nursing home learned how costly worthless services can be. In *U.S. ex rel. Absher v. Momence Meadows Nursing Center, Inc.*, No. 04-2289 (C.D. Ill.), a jury found the provider liable for approximately $28 million for violations of the FCA and a parallel Illinois statute. The jury found that the government sustained damages of slightly more than $3 million. However, as a result of the FCA's generous recovery provisions, the nursing home's financial liability was many multiples greater than the amount of damages sustained by the government. The $3 million in damages were trebled to $9 million. Furthermore, the jury found that the nursing home submitted 1,729 false claims and, with a civil penalty of $11,000 per claim, the total civil penalties amounted to approximately $19 million, on top of the $9 million in treble damages.**

The court's instructions to the jury before it began deliberations highlight the peril for health care providers facing a jury trial on a worthless services claim. The court informed the jury that worthless services are "services that are so inadequate, deficient, and substandard, or so completely lacking in value or utility to a nursing facility patient, that a reasonable person would understand that any services provided were worthless. Services can be worthless, and the claims for those services can, for that reason, be false, even if the nursing facility in fact provided some services to the patient. To find the services worthless, you do not need to find that the patient received no services at all."

The court further instructed the jury that services could be "worthless" in the following ways:

- Failure to provide adequate staffing
- Failure to provide proper equipment maintenance
- Failure to provide adequate supplies and equipment
- Failure to provide adequate decubitus ulcer care
- Failure to maintain adequate control of infectious pests
- Failure to maintain proper control of residents' trust funds
- Providing a dysfunctional governing body

When a jury is presented with inflammatory evidence at trial regarding substandard health care services, and then is asked to make a subjective judgment regarding the value of those services, a defendant provider faces an uphill fight. The provider faces an additional significant challenge because the provider may be found liable even if it did not have actual knowledge that its services were worthless. Under the FCA, a provider is deemed to have "knowledge" of worthless services if it has demonstrated "deliberate ignorance" or "reckless disregard" regarding its deficient services. Failing to address quality-of-care complaints from patients, employees or regulators would be an example of deliberate ignorance. Neglecting to monitor the quality of one's services would be an example of reckless disregard. Thus, a provider must demonstrate that it did not know, and it had no basis to know, that its care was worthless — or, preferably, demonstrate that its care was not worthless.

The successful defense of a worthless services case will likely depend on the provider proving that, before the incidents in question at the trial, the provider had an effective quality assurance (QA) program in place to

detect and correct substandard care. A provider's use of an effective QA program helps to refute allegations that the provider exhibited deliberate ignorance or reckless disregard for the quality of its services. The design of an effective QA program should meet accepted industry standards, and also should be tailored to meet the circumstances of each provider. Providers should ensure that a sufficient number of objective and measurable quality indicators have been established. Moreover, providers should regularly measure their performance against those indicators, and correct substandard care by implementing an effective action plan. An effective QA plan will go a long way to avoid the delivery of worthless services. Moreover, to the extent a provider's services are ever considered to be worthless, an effective QA program allows the provider to demonstrate that it did not deliver worthless services knowingly.

Providers may expect to see more worthless-service litigation in the future. Unlike medical malpractice or wrongful-death cases against providers, which may be filed only by injured parties, worthless-service claims under the FCA may be brought by anyone, regardless of whether they were injured by the provider. In addition, the person filing a worthless-service claim is eligible to receive a generous share of any settlement or award in the case — sometimes amounting to multi-million dollar payments. Large verdicts, like the one in the recent Illinois case, will surely encourage others to file worthless service lawsuits.