

## Seventh Circuit Declines to Adopt “Worthless Services” FCA Theory

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In a time of increased scrutiny by the federal government in weeding out and eliminating fraud in Medicare and Medicaid billing, most courts are still hesitant to find nursing homes liable for fraud solely on the basis of billing for poor care. In *United States ex rel. Absher, et al. v. Momence Meadows Nursing Center, Inc.*, an Illinois nursing home was successful in appealing the jury’s verdict in favor of two former nurse relators on their federal False Claims Act (“FCA”) claims against a nursing home and its owner. In overturning the verdict, the Seventh

Circuit rejected FCA liability based on the “worthless services” theory, and held that even if such a theory was viable, the relators would have had to show that the services were more than just substandard and non-compliant, but rather that they were truly or effectively not provided at all.

### **The “Worthless Services” Theory**

The FCA was enacted to enhance the government’s ability to identify and recover monies lost due to fraud. The FCA has been enforced by plaintiffs

against healthcare providers who falsify their claims for payment (ex. double billing, upcoding) through “false certification” theories of FCA liability. Recently, plaintiffs have attempted to expand the FCA’s reach by claiming liability against providers who bill for substandard care under the “worthless services” theory.

Under the “worthless services” theory, plaintiffs argue that billing for poor care is essentially the same as billing for no care. While this theory has been adopted by few circuits, even where recognized, the courts have required more than a mere showing of poor care, but rather that the services were entirely devoid of value or that the facility “utterly failed” to provide any services. *U.S. ex rel. New Mexico v. Deming Hosp. Corp.* (D.N.M., Nov. 21, 2013, CV 11-0566 WPL/CG) 2013 WL 7046410. In *Momence*, the Seventh Circuit joined the majority of circuits in declining to adopt the “worthless services” theory and requiring more than evidence of non-compliant care.

### **Background of Momence Case**

Two former nurse employees,

Absher and Mitchell, claimed to have uncovered evidence that the facility knowingly submitted thousands of false claims. The relators also brought retaliation claims alleging that they were dismissed for reporting the fraud. At trial (the government did not intervene), the relators provided evidence of Momence's poor care (including problems related to infection and pest control, pressure sore management, accident prevention, facility cleanliness) and that supervisors directed employees not to chart certain conditions, and engage in other activities, in an effort to conceal Momence's poor care from government regulators. The jury awarded the United States over \$3 million in compensatory damages and \$19 million in fines on the FCA claims. The compensatory damages were trebled to over \$9 million and the relators received \$150,000 and \$262,320, respectively, on their retaliation claims. Both sides appealed.

### **Seventh Circuit Decision**

On appeal, the Seventh Circuit disagreed with the trial court, ruled that the claims all failed as a matter

of law, vacated the trial court's ruling and remanded with directions that judgment be entered for defendants.

### **The "Worthless Services" Claim**

The Seventh Circuit declined to recognize the "worthless services" theory, stating that even if it did, "the relators failed to offer evidence establishing that Momence's services were truly or effectively "worthless" and "[i]t is not enough to offer evidence that the defendant provided services that are worth some amount less than the services paid for. That is, a 'diminished value' of services theory does not satisfy this standard."

Further, the Seventh Circuit noted that a finding of worthless services would be "absurd in light of the undisputed fact that Momence was allowed to continue operating and rendering services of some value despite regular visits by government surveyors." The Seventh Circuit remarked that Absher's mother was a prior resident and that Absher thought the care was good. Because no reasonable jury could have found that the facility provided truly or effectively worthless services, the

court found that the "worthless services" theory could not have supported the jury's verdict.

### **Significance of Momence**

The Momence case is the latest decision reflecting the reluctance of most courts to police the quality of healthcare services through the "worthless services" theory. The Momence case is significant because the Seventh Circuit found a lack of evidence demonstrating that Momence's services were "worthless" *despite* the fact that there was overwhelming, undisputed evidence that Momence's care was horrible and "woefully inadequate." In doing so, the Seventh Circuit made it clear that "worthless services" had to be essentially zero services. Given that nursing homes provide a multitude of services, from nursing care to room and board, the trend of decisions suggests that it will be very difficult for a plaintiff to prevail on a worthless services theory of recovery, standing alone, unless the evidence establishes that no services were rendered.

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