

# Health Law Alert

A report  
for clients  
and friends  
of the firm      November 2001

## Justice Department Continues Expansive Enforcement of False Claims Act

*Accountants and consultants increasingly likely to be pulled into the path of Justice Department enforcement*

The United States Justice Department recently announced a \$9 million settlement in a lawsuit brought under the False Claims Act ("FCA") against KPMG Peat Marwick. KPMG was the accounting firm that prepared Medicare and Medicaid cost reports for, and provided reimbursement advice to, several hospitals once operated by Basic American Medical, Inc. and Columbia Hospital Corporation (now known as HCA, Inc.).

### Background

The lawsuit had been initiated by a "whistleblower," a former reimbursement supervisor for Columbia Hospital Corporation. The Justice Department later intervened in the proceeding. The Government alleged that KPMG knowingly assisted the hospitals to submit false Medicare and Medicaid cost reports seeking reimbursement for items that were ineligible for Medicare or Medicaid payment. According to the Justice Department, at the same time that KPMG prepared the cost reports actually submitted to the Medicare and Medicaid programs, it also prepared alternate cost reports (omitting the ineligible costs), which were not submitted or disclosed to the Government, but which would have been used in the event that certain costs were disallowed. Furthermore, KPMG allegedly recommended that funds should be set aside by the hospitals in the event that the Government sought to recoup overpayments. KPMG did not seek or receive any federal funds on its own behalf. Nonetheless, the Justice Department alleged that KPMG was liable under the FCA because it assisted others to submit false claims for Medicare and Medicaid payment.

### FCA Enforcement

The vast majority of FCA lawsuits are directed against government contractors that actually request and receive federal funds. The FCA does create liability for those that knowingly "cause" others to submit false claims, but historically the Government has rarely prosecuted FCA cases in which a defendant allegedly caused another person or company to submit a false claim.

When such cases have been litigated, courts have indicated that the Government must prove that the defendant caused a false claim by demonstrating that the defendant knowingly and actively facilitated the submission of a false claim by another party. This standard could be met, for example, by showing that the defendant intentionally directed or controlled another party's submission of a false claim or by showing that the defendant provided false information to an unsuspecting party, with knowledge that the information would, in turn, be passed on to the Government. In many cases, however, it is difficult for the Government to make this showing. The Government must not only prove that a false claim was made, but also, must prove that the defendant was an accomplice who knowingly assisted the party making the claim. It is usually easier to prove a case against the contractor that actually presented the claim for payment to the Government.

Out-of-court settlements permit the Justice Department to avoid the need for proving in court that a defendant caused another entity to submit a false claim. By using the threat of prolonged litigation and raising the specter of Medicare and Medicaid program exclusion, or debarment from other government programs, the Justice Department is able to settle cases in which it asserts that someone "caused" the submission of a false claim, without having that theory tested in a court. This is but one example of the manner in which the Justice Department's FCA enforcement powers have gone unchecked.

### Conclusion

Until the FCA or the Justice Department's FCA enforcement policies are modified, health care providers and consultants, as well as companies providing advice to any government contractor, must take note of the Justice Department's FCA activity. Several recent cases indicate

that the Government is moving to expand the scope of the FCA to reach entities more remotely connected to the submission of false claims. Companies providing assistance or counseling to government contractors can no longer afford to believe that the only negative consequence of their bad advice will be the Government's disallowance of their clients' claims. Those that support a government contractor's questionable claim for payment may themselves become a Government target. A consultant's limitation of liability in a letter of engagement with a client certainly will not preclude the Government from taking action against the consultant. Any company assisting government contractors should promptly undertake a review of its business practices to minimize the risk that it will be branded as an accomplice to the submission of false claims.

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NEW YORK LOS ANGELES  
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NEWARK PARIS

### Health Law Alert

Proskauer's Health Care Department includes over 30 attorneys with significant and diverse health care experience. The following individuals serve as contact persons and would welcome any questions you might have.

**Mark J. Biros**

202.778.1104 - [mbiros@proskauer.com](mailto:mbiros@proskauer.com)

**Joseph E. Casson**

202.778.1111 - [jcasson@proskauer.com](mailto:jcasson@proskauer.com)

**Malcolm J. Harkins, III**

202.778.1103 - [mharkins@proskauer.com](mailto:mharkins@proskauer.com)

**James P. Holloway**

202.778.1124 - [jholloway@proskauer.com](mailto:jholloway@proskauer.com)

You may also contact any other member of Proskauer's Health Care Department in:

**New York  
Washington**

**212.969.3000  
202.416.6800**

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