

Can a Surgeons Questionable Medical Judgment Support a False Claims Case?

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Courts have often deferred to a doctor's medical judgement in dismissing accusations of [False Claims Act](#) liability.

However, the U.S. Tenth Circuit Court of Appeals recently ruled that a physician's poor medical judgment can result in liability under the act.

In [Polukoff v. St. Mark's Hospital](#), a whistleblower alleged that a surgeon performed unnecessary heart surgeries, while certifying to Medicare that the procedures were in fact "medically necessary." A U.S. district court had dismissed the whistleblower's complaint, noting that Medicare has not issued national coverage guidelines on the medical necessity of a patent foramen ovale (PFO) closure, which repairs a small hole in the heart to prevent strokes.

The district court concluded that a mere difference of opinion about medical necessity, without more, is not enough to show "falsity." The district court also rejected the whistleblower's reliance on the physician's failure to follow American Heart Association guidelines, which question the efficacy of the procedure for patients with no history of prior strokes.

Although the U.S. government initially chose not to intervene in the case, it submitted an amicus brief on appeal in support of the whistleblower's false claims case. The brief argued that for a claim to be reimbursable, it must meet the government's definition of medically necessary as found in the Medicare Program Integrity Manual. This requires that the procedure be safe and effective, not experimental and not in excess of the patient's medical needs.

The Tenth Circuit agreed. It held that a doctor's certification to the government that a procedure is medically necessary is "false" under the FCA if facts are alleged to establish that this is "objectively false" despite the physician's own medical judgment. Here, the whistleblower alleged that the physician performed an unusually high number of PFO closures contrary to industry and hospital guidelines, and then misrepresented the necessity for these procedures in the patients' medical records to increase his Medicare payments. The court also kept two hospitals in the lawsuit for joining with the physician in submitting false claims. The whistleblower's complaint alleged that the hospitals acted with falsity or reckless disregard in billing Medicare for surgeries after the physician's medical judgment had been questioned (and reprimanded) by the medical staff of one of the hospitals.

While it is clear that the physician's misconduct here represents the extreme case, hospitals and providers should not assume that a physician's medical judgment will shield them from false claims liability. In matters

where a physician's medical judgment has been challenged or questioned, providers should review any related medical claims for deficiencies and possible FCA liability.

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