

Reproduced with permission from BNA's Health Care Fraud Report, 21 HFRA, 1/3/18. Copyright © 2018 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

HCR ManorCare: Making the Hard Call



BY **STEPHEN G. SOZIO**

Veterans of the government's False Claims Act wars were both startled and cheered by the dramatic resolution of the Department of Justice's case against HCR ManorCare, Inc. Startled, because the government's decision to dismiss an FCA case with prejudice—even after a devastating setback—is exceedingly rare. Cheered, because instead of digging in its heels, the government stepped back, reassessed, and decided to drop an untenable case. DOJ's exercise of judgment instead of intransigence is a remarkable development that will give heart to defendants who risk health care Armageddon to stand their ground in the FCA wars.

"I'm appalled, and I'm embarrassed. I'm ashamed that the Justice Department would rely on this kind of nonsense . . . to get involved in a case and cost these defendants millions of dollars in legal fees."

These reported statements by U.S. Magistrate Judge Theresa Carroll Buchanan, herself a former Assistant U.S. Attorney, followed the revelation that the government's expert witness failed to disclose more than 130 pages of handwritten notes. The government's failure to

disclose the notes went to the heart of the matter, because the expert's notes were reported to be inconsistent with her expert opinion.

The remarkable story of this case is that, after the Court expressed such a devastating critique, the government did *not* blindly pursue the case. Here, the system ultimately worked: the company braved the risks and mounted a vigorous defense, the Court did its job in policing discovery, and the government reassessed its own case and made the call to get out.

And that was likely a hard call, because in other cases, government lawyers in the DOJ have uncovered millions of dollars of health care fraud and have obtained results that justly punish the perpetrators. But too often, those successful cases have blinded the government to the fact that the Byzantine regulation of health care in the United States makes it virtually impossible for even a diligent provider to entirely avoid making mistakes—mistakes that plaintiff whistleblowers and their lawyers zealously convert into claims of fraud. When the government decides to intervene and pursue those claims, most defendants question whether it will rationally assess the merits. Facing ruinous judgments and the specter of exclusion from participation in Medicare and Medicaid, few defendants stand and fight, no matter how meritorious their defenses. The government's willingness to make the hard call to dismiss HCR ManorCare changes that calculus.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

Mr. Sozio co-leads Jones Day's Health Care Practice and is the head of litigation for the firm's Cleveland office, where he is based. His practice involves representing businesses, health care organizations, and their employees during investigations by federal and local governmental authorities for potential criminal charges.