

## Hospice Insights: The Law and Beyond



### Episode 54: Hospices and The False Claims Act: Proposed Amendment Would Increase Liability Risk

December 15, 2021

#### Meg Pekarske

Hello and welcome to Hospice Insights: The Law and Beyond, where we connect you to what matters in the ever-changing world of hospice and palliative care. Hospices and the False Claims Act. Proposed Amendment False Claims Act would increase liability risk. The False Claims Act is a powerful enforcement tool used to go after those who defraud the government. Unfortunately, the wide net cast by this act can lead to extremely negative consequences for upstanding hospices. In this episode, I speak with Bryan Nowicki, discuss a proposed amendment to the Federal False Claims Act that would widen that net even further and describe the mounting opposition to this legislation. So Bryan, this is like a very timely issue here. So, let's jump in. What's going on with this amendment to the Federal False Claims Act?

#### Bryan Nowicki

An amendment has been proposed and sponsored in a bi-partisan way. It's going through the Senate right now. I don't believe it has a House counterpart. This is really a Senate originating law. And when I say bipartisan, it's starkly bi-partisan. You have people you would never think come together, and they're coming together on this. Dick Durbin and Charles Grassley, the icons of the left and the right. Really, their support for this amendment is protecting taxpayer money.

That's the mantra you get from a lot of people who are really proponents of the False Claims Act as a mechanism to go after the fraudsters out there who are really stealing money from the government based upon false information. There's nothing wrong with that, but as we have observed the False Claims Act is a pretty wide net. In our experience the people who enforce the False Claims Act, they capture a lot of innocence within that net, hospices included. That is very difficult to extricate themselves from, and this new legislation has made that net a bit wider by tweaking with that law.



**Meg Pekarske**

So tell me, the net is already wide. How is it getting wider with this amendment that's being proposed?

**Bryan Nowicki**

Well the False Claims Act, there's a limiting principal that the Supreme Court identified a few years ago, and it's called materiality. What the Supreme Court held is that you may not have full compliance with every single Medicare regulation for example. But just because you're not fully compliant with every single regulation doesn't mean that you're trying to defraud the government. The only regulations that really matter from a payment perspective and therefore from a False Claims Act perspective are the ones that are material to the government. What does the government really want you to do in order to receive a payment from the government? So, a regulation might say you got to dot all your i's. Well okay. I didn't dot an "i". Are you going to deny payment for that? And often times the government will not.

There are insubstantial violations or regulations that do not result in an inappropriate payment. So the government identified that principal and said we're only going to, the False Claims Act is only going to address violations that are material to payment. Now, what this amendment has done is it has identified burdens of proof to demonstrate whether a violation is material or immaterial. Except for whistleblowers in the government it needs to establish immateriality by a preponderance of the evidence. That's the lowest burden of proof. It's like 51% that whistleblowers, they just need to show by a preponderance that a violation is material. To show immateriality which is what the provider would want to show, that compliance with a regulation is immaterial, the provider needs to show that by clear and convincing evidence. That's a heightened burden of proof.

So, what the legislation is doing is it's making it easier for whistleblowers to show materiality, making it more difficult for providers to show immateriality. That's the tweak that is relatively subtle but as a litigator you get experience in court. The burden of proof can be everything about a case. So even adjusting the burden of proof like this can have very serious consequences if providers want to take this position that their violation of a regulation was immaterial.

**Meg Pekarske**

Well, I think you and I were particularly concerned. You talk about "i" dotting, "t" crossing issues, you know, hospice has a lot of them. I mean, more so than I think really any other provider in terms of these six conditions of payment. Like a certification there could be 50 things technically maybe you could do wrong on this form, but should it be the difference in not getting paid or like in election form for someone has to happen to be on care for a year and someone's going to say, well you know you didn't include a full day. It was only a partial day. It was only a partial day or something to say well you know you don't have a valid effective



date if it didn't have the year and you only had the day. Whatever. Is that really, really material to pay then? And so, I was alarmed by this, and I do think there are other folks that are alarmed by this too. I know the American Hospital Association, didn't they write a letter and I think other associations? But I almost feel like it's been sleeping there, and I don't know that it's really gotten the attention that it should by providers' associations. This is bad for providers.

**Bryan Nowicki**

Right. There is a letter that has been delivered to Senator Durbin, Senator Grassley in opposition to this legislation making a number of the points that I just described about this unfair burden shifting. It's a letter in the initial draft. I think the most recognizable name on it is probably the American Hospital Association. There may be other 20 or 30 other organizations. I would expect for as significant as this legislation is that there are 200 to 300 organizations out there opposing this, because this could really change the way the False Claims Act is enforced, and to the detriment of providers, making it more difficult. And it's not only with that shifting of the burden or raising the bar for providers.

The source of information about materiality is often the government because what you're doing is you're looking at when has government paid despite a violation? Because if they're paying despite a violation, and you have evidence of that, then that's good evidence that it's an immaterial violation. One other provision of this amendment is it allows the government to raise defenses to discovery requests that are directed at it to get exactly that kind of information. So, in litigation, a lot of times you're seeing documents, not just from other parties but from third parties who are not part of the litigation. So the False Claims Act suit, as a provider, you'd be subpoenaing the government to say, I want all of your information about how often you paid or not paid based upon this violation. And now this amendment arms the government with the ability to come back with objections based upon proportionality and undue burden and maybe shift the cost under the provider. Very much a disincentive to getting that information.

So the bars been lifted and it's going to be harder to gather the evidence to satisfy that heightened standard. And so again, from the provider's side of this, it seems to us to make sense that the opposition to this hopefully will snowball and become more aggressive and these amendments won't pass as written.

**Meg Pekarske**

And Bryan, it's been moving through committee and as you said with bipartisan support there and it doesn't die at the end of 2021, because I think based on the congressional calendar it would be live for a whole another year. And so this could potentially gain momentum as you said, and given that everyone wants to be "against fraud," you know it's easier to lend support and oh we passed some legislation because we all feel like



there's a lot of stalemate going on.

So I think it's something that folks should watch, and, Bryan, we can probably link to the podcast notes a link to the bill so people could if they're interested follow that as well as the American Hospital Association letter.

**Bryan Nowicki**

Yes absolutely. Then you can kind of see what the bill does. The press release issued by the senators and then the letter from the AHA. And you can see that context and, you know, if there's an opportunity to join in the effort, you'll have what you need to get involved.

**Meg Pekarske**

And I think for hospices in particular because so much of the False Claim Act activity and sort of the case law being made is being made in the hospice arena. This is not, you know, sometime to say 'oh this doesn't really impact me,' because I think hospices in addition to all of their audit activity are subject to a lot of False Claim Act and whistleblower activity. And so this really does affect our industry pretty tremendously if it went through.

So I think people should reach out to their state and national associations and, you know, kind of rally around and make sure that legislators understand the other side of this; especially about how the materiality plays out in hospice with all of this "i" dotting and "t" crossing stuff that you can somehow say is material. And we can all say like, 'oh the government's not really going to go after.' There's been no year on the end of, you know, an election, but I mean if it gets the principle of this matter, and I think you and I have seen sometimes silly things that get more traction than they really should. Because as you said Bryan, things could get down to well, what's the burden of proof and how can I disprove that it's immaterial? I mean, you can't just say that's silly.

**Bryan Nowicki**

Yes, and anytime you're incentivizing people to bring these kinds of suits because you're making it easier for them to do that, oftentimes it's just being at the very introductory level of an investigation is punishment in and of itself. You get investigated by the government based upon the False Claims Act case, it's not even a lawsuit yet. But you're talking about months and months and tens of hundreds of thousands of dollars just fighting off that investigation. So it's not as if you have to wait for court to feel the effects of this. This kind of opens the gates a bit more to embroil people in the preliminary side of this, which is also very burdensome to provide it.

**Meg Pekarske**

Yes, absolutely. Thanks for bringing this issue to the forefront. But I hope it draws attention to this because people have a lot to focus on these days. But I think this is really important and an opportunity for folks to bind together on something. So we'll have those links in our podcast notes. As



always, Bryan, thanks a lot for your insights and your time.

**Bryan Nowicki**

Yes, thank you, Meg.

**Meg Pekarske**

Well, that's it for today's episode of Hospice Insights: The Law and Beyond. Thank you for joining the conversation. To subscribe to our podcasts, visit our website at [huschblackwell.com](http://huschblackwell.com) or sign up wherever you get your podcasts. Until next time, may the wind be at your back.

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