A "House of Cards": DOJ Drops Out of ManorCare FCA Case After Judge Excludes Expert Witness

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The Department of Justice (DOJ) filed a motion on November 17, 2017 to voluntarily dismiss its False Claims Act (FCA) case against HCR ManorCare, Inc. (ManorCare).[1] Despite a years-long investigation, coupled with nearly three years of litigation following its December 2014 motion to intervene, the government moved to dismiss the case with prejudice after the district court excluded the report and testimony of DOJ's key expert witness, Rebecca Clearwater.

I. DOJ's Claims Against ManorCare

DOJ filed its complaint against ManorCare, the nation's second-largest operator of skilled nursing and assisted living facilities, in April 2015, alleging that ManorCare directors had instituted a culture of encouraging employees to provide medically unnecessary skilled rehabilitation therapy services.[2] According to DOJ, ManorCare intended for its therapists to deliver the highest level of therapy, "without regard to its patients' actual conditions or needs," so that ManorCare could bill for skilled rehabilitation therapy services at Medicare's highest rate of reimbursement.[3]

To prove its case, DOJ utilized statistical sampling, a method often used by the government in large-scale FCA cases dealing with high volumes of claims. Sampling typically involves coordination with an expert statistician who evaluates a sample of claims, determines the "error rate," and then extrapolates the error rate across a broad universe of claims, in an attempt to avoid a claim-by-claim review of each and every potentially false claim. Thus, in *ManorCare*, the government coordinated with experts to extract a sample of 180 ManorCare rehab patients. It then relied on a "medical review expert," Rebecca Clearwater (along with her team of nurses), to analyze the sample and provide an expert report and testimony as to the medical necessity of each sampled claim. Using the "error rate" asserted by Ms. Clearwater, the government's "extrapolation experts," Ms. Bogan and Mr. Edwards, then attempted to extrapolate Ms. Clearwater's determinations across the entire universe of claims, resulting in an asserted damage calculation of over $500 million.

II. The Questionable Credentials of DOJ's Expert Witness

After reviewing Ms. Clearwater's expert report and deposing her, the ManorCare defendants filed a pre-trial motion on September 17, 2017 to exclude Ms. Clearwater's expert report, and to prevent her from testifying at trial.[4] In its brief, ManorCare noted that "DOJ has *no* fact evidence connected to any of the patients in its sample" and that of the "thousands of clinicians" who treated the 180 patients in the sample, DOJ had not identified a single clinician or employee who would testify, nor a single document that would prove, that medically unnecessary services had been performed.[5] Thus, ManorCare argued, "DOJ's entire case is dependent on the admissibility of subjective opinions of a single person, Rebecca Clearwater, about whether or not rehabilitation services provided by certain [ManorCare] facilitates to 180 sample patients were reasonable and necessary

1 United States' Motion to Dismiss, U.S. ex rel. Ribik v. HCR ManorCare, Inc., No. 1:09-cv-0013 (Nov. 17, 2017).
2 United States' Consolidated Complaint in Intervention, U.S. ex rel. Ribik v. HCR ManorCare, Inc., No. 1:09-cv-0013 (Apr. 10, 2015).
3 *Id.*
4 Defendants' Motion in Limine to Exclude the Expert Report and Testimony of Rebecca Clearwater, U.S. ex rel. Ribik v. HCR ManorCare, Inc., No. 1:09-cv-0013 (Sept. 17, 2017).
5 Memorandum in Support of Defendants' Motion in Limine to Exclude the Expert Report and Testimony of Rebecca Clearwater at 7, U.S. ex rel. Ribik v. HCR ManorCare, Inc., No. 1:09-cv-0013 (Sept. 17, 2017) (emphasis in original).

as required by law."[6]

ManorCare then attacked Ms. Clearwater's credentials as a "medical review expert" capable of providing reliable testimony with regard to the medical necessity of skilled rehabilitation services. First, ManorCare noted that as an employee of AdvanceMed, a Zone Program Integrity Contractor (ZPIC) that contracts with Medicare to conduct fraud and abuse audits, Ms. Clearwater does not even work in AdvanceMed's Medical Review department.[7] Second, although Ms. Clearwater is a licensed physical therapist, she has not practiced physical therapy for over 24 years, had never worked in a rehab facility like those operated by ManorCare, and had never practiced under the current Medicare reimbursement system.[8] Additionally, argued ManorCare, Ms. Clearwater "purports to make clinical decisions about whether occupational therapy (OT) and speech language pathology (SLP) services were reasonable and necessary," despite lacking any formal training in either profession.[9]

III. A "House of Cards"

At an October 27, 2017 hearing on ManorCare's motion for sanctions, Magistrate Judge Theresa C. Buchanan of the Eastern District of Virginia more than agreed with ManorCare's assessment of Ms. Clearwater's credentials, stating that she believed the case "was a huge waste of money" and should never have been brought.[10] Concluding that "Clearwater's entire report must be stricken and that she must not be allowed to testify because of her utter lack of credibility," Judge Buchanan further noted that "the Government's case here was . . . [a] house of cards that was resting on Ms. Clearwater's testimony."[11] Additionally, Judge Buchanan admonished the government (and Ms. Clearwater) for failing to identify, disclose, and produce 131 pages of Ms. Clearwater's handwritten notes, and approximately 5,000 pages of electronic notes from Ms. Clearwater and her nurse reviewers, pertaining to at least 101 of the patients in the sample until after the parties had exchanged expert reports and deposed expert witnesses.[12] Finding it "inconceivable and incredible that Ms. Clearwater wouldn't remember making 131 pages of patient notes, handwritten notes," Judge Buchanan awarded ManorCare attorney's fees and costs for bringing its motion for sanctions, and suggested that ManorCare could potentially obtain attorney's fees and costs for the preparation for Ms. Clearwater's deposition (and the deposition itself).[13]

Initially, DOJ indicated that it would appeal Judge Buchanan's order. However, on November 6, 2017, District Judge Claude M. Hilton granted ManorCare's motion to exclude Ms. Clearwater's expert report and testimony.[14] The court found that "Rebecca Clearwater does not have the expertise to testify as to the reasonableness and necessity of the medical treatment the [ManorCare] patients received. Her qualifications, at best, would allow her only to testify as to obvious mistakes in the billing."[15] Judge Hilton further noted that Ms. Clearwater was not licensed as a medical doctor, an OT, or an SLP, and that she did not personally examine any of the ManorCare patients[16]. As such, the court found Ms. Clearwater "simply not qualified" to provide this type of expert analysis.[17] The court further excluded the reports and testimony of the extrapolation experts, Ms. Bogan and Mr. Edwards; given that the extrapolation experts based their testimony on Ms. Clearwater's now-excluded report and testimony, the court held that Bogan and Edwards' "basis for postulation is gone."[18]

Presumably due to the district court's dismissal of its key expert witness, DOJ announced its intention to voluntarily

6 *Id.*
7 *Id.* at 9.
8 *Id.* at 10.
9 *Id.*
10 Transcript of Motion Hearing at 36, U.S. ex rel. Ribik v. HCR ManorCare, Inc., No. 1:09-cv-0013 (Oct. 27, 2017).
11 *Id.* ("I have looked at this stuff, and I'm appalled, I'm embarrassed, I'm ashamed that the Department of Justice would rely on this kind of nonsense by a nurse reviewer to get involved in a *qui tam* case and cost these defendants millions of dollars in legal fees").
12 *Id.* at 33-37.
13 *Id.*
14 Order Granting Defendants' Motion in Limine to Exclude the Report and Testimony of Rebecca Clearwater, U.S. ex rel. Ribik v. HCR ManorCare, Inc., No. 1:09-cv-0013 (Nov. 6, 2017).
15 *Id.* at 2.
16 *Id.*
17 *Id.*
18 *Id.*

dismiss in a November 8, 2017 joint filing.[19] The government filed its Motion to Dismiss (with prejudice) on November 17, 2017, and Judge Hilton entered the final order on November 27.[20]

IV. AGG Analysis

DOJ's decision to officially drop the *ManorCare* case represents a significant defeat for the government, marking an abrupt end to years of time-consuming and expensive investigation and litigation in a case that has been closely followed by healthcare providers and healthcare attorneys alike. The case also represents a significant victory, not only for ManorCare and other long-term care providers, but for all providers whose medical decision-making may be subjected to government inquiry or scrutiny. As other courts have held, in proving falsity under the FCA, the government must demonstrate something more than a mere difference of medical opinion between its own expert and the defendant's expert as to the medical necessity of a particular service. *ManorCare*, however, goes one step further, offering potential factors in determining whether the government's expert is qualified to provide her medical opinion in the first place.

Moreover, *ManorCare* sheds light on the sometimes shaky expert evidence upon which DOJ often builds its medical-necessity driven FCA cases. In such cases, where the government's attempted use of statistical sampling and extrapolation experts to bypass claim-by-claim determinations of actual falsity has become the norm, the government often seeks to prove liability and/or damages by relying on a "medical review expert," such as Ms. Clearwater, to review a sample of claims and provide subjective, retrospective medical necessity analysis. Where that medical review expert lacks the expertise to conduct such a review, the government's case starts to fall apart – the "error rate" becomes meritless, the extrapolation becomes useless, and the government's "house of cards" comes crumbling down.

19 United States and ManorCare's Joint Motion to Continue Summary Judgment Hearing and Stay All Deadlines at 2, U.S. ex rel. Ribik v. HCR ManorCare, Inc., No. 1:09-cv-0013 (Nov. 8, 2017) ("The United States has advised Defendants of its intent to move to dismiss this case with prejudice").
20 Order Granting United States' Motion to Dismiss, U.S. ex rel. Ribik v. HCR ManorCare, Inc., No. 1:09-cv-0013 (Nov. 27, 2017).

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