

## QUI TAM QUARTERLY

### STRATEGIES FOR AVOIDING THE "BATTLE OF THE EXPERTS" IN FALSE CLAIMS ACT CASES BASED ON MEDICAL NECESSITY

Date: 8 July 2020

By: Thomas C. Ryan, David C. Rybicki, Jennifer M. Maloney, Cheryl E. Choice

Medical necessity cases continue to be a focal point for False Claims Act (FCA) investigations and lawsuits. With this focus comes an age-old problem for health care providers and entities defending these actions: the so-called "Battle of the Experts." In these types of cases, the U.S. Department of Justice (DOJ) and/or a relator challenge a diagnosing doctor's opinion that a procedure or service was medically necessary. As a result, the complaint alleges that the follow-on reimbursement claim submitted to the applicable federal health care program was "false" for the purposes of the FCA. A successful defense in these cases may ultimately hinge simply on whether the jury believes (or likes) the plaintiff's or the defendant's testifying expert more.

The time and expense to reach that point—and the accompanying litigation costs—usually leave most FCA defendants with little option but to settle medical necessity cases regardless of the merits of the underlying allegations. This issue of K&L Gates' Qui Tam Quarterly examines two recent federal circuit court decisions analyzing the critical litigation issue in these Battle of the Expert cases: whether a plaintiff's expert's testimony that the diagnosing doctor's medical opinion was wrong is sufficient to create a question of fact as to whether the underlying claim was "false" for FCA purposes. This article offers practical tips to proactively address—and, ideally, to avoid—the Battle of the Experts that results from medical necessity claims.

[Download the Newsletter](#)

#### ABOUT QUI TAM QUARTERLY

Qui Tam Quarterly is a quarterly publication authored by members of the health care fraud and abuse team highlighting emerging and pressing issues in health care fraud and abuse, including litigation and governmental investigations involving the False Claims Act, the Stark Law, the Anti-Kickback Statute, and other health care fraud related statutes.

Members of our team are regular contributors to Triage: Rapid Legal Lessons for Busy Health Care Professionals, a podcast created by K&L Gates to inform our clients and friends of the firm about the latest developments in health law. Subscribe to Triage through iTunes or Google Play.

## KEY CONTACTS



**THOMAS C. RYAN**  
PARTNER  
PITTSBURGH  
+1.412.355.8335  
THOMAS.RYAN@KLGATES.COM



**DAVID C. RYBICKI**  
PARTNER  
WASHINGTON DC  
+1.202.778.9370  
DAVID.RYBICKI@KLGATES.COM



**JENNIFER M. MALONEY**  
ASSOCIATE  
PITTSBURGH  
+1.412.355.6324  
JEN.MALONEY@KLGATES.COM



**CHERYL E. CHOICE**  
ASSOCIATE  
PITTSBURGH  
+1.412.355.8903  
CHERYL.CHOICE@KLGATES.COM

---

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.