

## Insurance Fraud and the False Claims Act

I received a request to accept an unusually large fee reduction yesterday. The attorney explained the facts surrounding the request but the one that stood out as strange was the refusal of the treating physical therapy office to make any compromise on the outstanding balance. The outstanding balance represented the insurance copays (short for copayments) that remained after the insurance carrier paid their contracted responsibility. The representative of the physical therapy practice stated *“The plan had a set copay of \$70 as established by the insurance company. I am unable to negotiate his balance because of that fact. As I am sure you are aware, that would be insurance fraud (False Claims Act). Therefore, the total amount due is not negotiable”*. I was familiar with the False Claims Act and I knew that interpretation was incorrect. So, I decided to dig in deeper and share my findings with you so that you too don't have to subject your clients to this type of misrepresentation.

The False Claims Act, or "FCA," provides a way for the **government** to recover money when someone submits or causes to be submitted false or fraudulent claims for payment to the **government**, including the **Medicare and Medicaid** programs. As it relates to co-pays, the government considers ***ROUTINE*** waiver of copays to be illegal and can result in criminal and civil penalties. In other words, if a provider has an office policy, published or not, not to bill for deductibles or copays, then they would be in violation of the FCA. The logic is that if a bill for services is \$100 and the copay of 20% is routinely written off as an office policy, then the actual bill was really only \$80. The government considers routine waivers to be insurance fraud.

**So, here is point one: It is only a violation of the federal FCA if the provider routinely waives the copayment of their government policy insured patients. (Medicare and Medicaid). This federal law does not apply to non-government issued policies.**

So, what about private, non-government, commercial insurances? Are they subject to the FCA? The answer is no BUT the carrier's agreements with participating providers almost always contains language that prohibits the routine waiver of deductibles or copayments. Those of us who have been practicing long enough remember the days of NOOPE (no-out-of-pocket-expense) programs. These programs were offered by providers as an incentive to entice patients to their practices. The insurance industry quickly addressed this by adding language to their contracts to prevent providers from misrepresenting their bills. In their participating provider contracts, doctors will agree to bill their patients for their portion of the contracted fee and their deductibles. However, that does not mean they are unable to make reasonable accommodations for patients on a case-by-case basis taking into consideration their unique circumstances. It certainly is not a violation of law and specifically not the FCA.

It should be noted that providers can only do so much to collect deductibles and co-pays. They routinely write off balances as bad debt or make fee compromises under special circumstances including on FCA covered cases. Providers need to demonstrate that they made an effort to collect the fees and that may include sending letters, making calls or texts, sending out to collection agencies AND documenting efforts to contact the attorney's office regarding the outstanding balances. So long as there is an effort and an individualized agreement is made (like an attorney fee negotiation), it would not violate the providers agreements.

In Connecticut we have our own law. The Connecticut whistleblower law, called the Connecticut False Claims Act, it is a statute based on the federal False Claims Act that allows whistleblowers to file "qui tam" lawsuits if they know of persons or entities who knowingly submit false claims to **Medicaid and other Connecticut health and human services programs**. Since this does not expand the Federal law or apply to non-government related policies, it does not add any limitations on what a provider can do for a patient on a case-by case basis.

**Point two: The FCA Law and most individual carrier contracts do not specifically prohibit making financial accommodations for patients based upon their individual circumstances, so long as it is not a standing policy of the practice.**

In the case from yesterday, the patient was not insured by Medicare or Medicaid. So, the FCA would not apply. Therefore, the physical therapy practice's representative was incorrect to say it would be a violation of the FCA and insurance fraud. The patient had a commercial policy that may contain language regarding the waiver of deductible and copays. However, it would not be a violation of federal or state law.

Here are several points the attorney could have made to the physical therapist:

1. The FCA does not apply to this client because it is not a government related policy
2. The reduction does not represent the policy of the provider's office and therefore would not be insurance fraud.
3. The attorney was not requesting a 100% waiver of the copay. Rather, he was proposing a proportional reduction of all outstanding bills. That is a reasonable accommodation.
4. The financial circumstances surrounding the settlement (attorney costs, attorney contingency fee, other provider's bills, etc) represent a financial hardship for the patient/client justifying the fee reduction.
5. Documentation of the provider's efforts over the course of care and up until the time of settlement demonstrate that significant efforts were made to collect the outstanding balances and that a reasonable compromise at that point was justified.



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**A MEDICAL-LEGAL NEWSLETTER FOR PERSONAL INJURY ATTORNEYS BY DR. STEVEN W. SHAW**

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Hopefully, this information will be helpful for you when dealing with providers who knowingly or unknowingly make false or misleading representations about their inability to compromise. I welcome any comments. I can be reached via email at [Dr.Shaw@shawchiropractic.com](mailto:Dr.Shaw@shawchiropractic.com).