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## The False Claims Act and Pharmacies: Why Errant NDCs Are a Bigger Problem Than You May Think

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Pharmacies are an easy FCA target for a simple reason: the evidence lies directly in the claims data. Every Medicare and Medicaid claim requires a National Drug Code that matches exactly what was dispensed. When it doesn't, for what could be various reasons, the government argues that there is a "false" claim. The FCA does not care that the patient received the correct medication. The FCA does not care that a patient paid their copay, or even that the pharmacy was underpaid on a prescription. Worse, pharmacies face potential treble damages and statutory penalties.

The procedural timing of an FCA case presents its own set of challenges. A PBM audit may look back a year or two, depending on circumstances, but an FCA investigation can reach back six years, sometimes ten. Often, pharmacies do not retain or cannot access wholesaler invoices from that long ago, making mounting a viable defense that much more difficult.

The good news is that pharmacies are not without defenses. The FCA requires knowing conduct. This issue in the NDC context is yet to be litigated, but it should be raised if for no other reason than to negotiate a possible settlement. NDC or clerical errors may not reach the level of scienter required for a false claim. Second, if the government paid these claims for years, the materiality defense comes into play. A plausible defense theory is that if the government possessed the pharmacy's invoices, and continued to pay claims under what it deems errant NDC's, the NDC was not material to the government's payment of the claim. If your pharmacy faces a False Claims Act investigation, contact Angelo Cifaldi and Joseph Carlo regarding possible legal representation.

### Attorneys

- Angelo J. Cifaldi
- Joseph Carlo

### Practice

- Pharmacy Law