



# Swafford v. Borgess Medical Center, 24 Fed.Appx. 491 (6th Cir. 2001)

Topics Covered: False Claims Act, Fraud and Abuse

**Outcome: Very Favorable**

## Issue

The issue in this case was whether physicians could be held liable for a violation of the False Claims Act (FCA) under a theory of “false implied certification.”

## AMA Interest

The AMA believes that FCA liability should require a violation of definite and understandable laws.

## Case Summary

Plaintiff Swafford was a registered vascular technologist employed in defendant Borgess Medical Center’s vascular ultrasound department. Plaintiff analyzed the results, through videotape, of venous ultrasound studies ordered by defendant physicians for patients with suspected deep vein thrombosis. Plaintiff performed the ultrasound tests, examined the data for five risk factors identified by the physicians, and indicated on a worksheet the presence or absence of the risk factors. The physicians reviewed the worksheets and prepared a final report, setting forth findings and conclusions.

Plaintiff filed a *qui tam* lawsuit, which the government declined to join. Plaintiff alleged that the defendant physicians billed Medicare for conducting venous ultrasound tests although, in fact, they did not provide those services. Plaintiff insisted that the doctors did not really interpret the test results, as the physicians represented to Medicare, but rather plagiarized the worksheets prepared by plaintiff and other technicians and submitted them as “interpretations.” Plaintiff further alleged that Borgess Medical Center was aware of these practices and conspired with the physicians.

The district court granted defendants summary judgment. It ruled that plaintiff failed to demonstrate that the claims submitted were, in fact, false. The HCFA Provider Guidelines do not include a billing code for venous ultrasound studies, so the physicians had to exercise their professional judgment in choosing the most appropriate billing code. The defendants had sufficient information to form a professional opinion regarding the test results. The court also found that the defendants’ readings of the test results were within the standard of care and therefore constituted a proper submission. Further, insufficient evidence existed to suggest that defendants possessed the requisite *scienter* to render them liable under the False Claims Act. The plaintiffs appealed to the Sixth Circuit.

On December 21, 2001, the Sixth Circuit affirmed. Swafford petitioned the Supreme Court for certiorari, but the Court denied that request on May 28, 2002.

### **Litigation Center Involvement**

The Litigation Center, along with the Michigan State Medical Society filed an *amicus* brief in support of the defendants.

United States Court of Appeals for the Sixth Circuit brief