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Hot Issues Alerts – Law Firms

Protect Your Company Against False Claims Act Lawsuits

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Despite the economic crisis that is plaguing corporate America, the United States government continues to earn significant revenues from prosecuting False Claims Act or Qui Tam litigation. According to a report prepared by the United States Government Accountability Office (GAO), from 1987 through 2005, the government secured over $15 billion in judgments and settlements; and in 2007 and 2008 alone these prosecutions brought in over $1.4 billion per year.[1] It should come as no surprise, therefore, that the government intends to expand its prosecutorial activities in combating fraud, and businesses should actively seek to minimize their exposure to such costly and time-consuming litigation.

What Is The False Claims Act (FCA)?

First passed in 1863 during the Civil War to punish widespread corruption and fraud in the sale of supplies and provisions to the Union government, this law was rarely used until it was amended in 1986 by Congress to expand its reach.[2] Under the FCA any person who "knowingly" submits or causes another to submit false claims or records for payment of government funds is liable for significant damages and penalties.[3] From 1987 through 2005, there have been 8,869 FCA cases of which approximately 79 percent were health care and procurement fraud cases.[4] In addition to the FCA, many states have passed their own false claims acts. As a result, a company which has a presence in more than one state can find itself in multi-state litigation.

How Does Filing A Claim Under The FCA work?

In the majority of cases, a person known as a "qui tam relator" or "whistleblower" files the claim in federal court under court seal (for 60 days, but possibly more) and other than the Department of Justice (DOJ), and possibly other federal fraud units, no one knows about the case, not even the entity being accused of fraud. The DOJ, on behalf of the government, decides whether or not to intervene (intervention occurs in about a quarter to a third of cases). If it chooses to intervene, the DOJ will be responsible for prosecuting the case (and decide how to involve the relator going forward); if it chooses not to intervene, the relator may continue prose-

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cuting the case (however, the government still has the right to intervene upon a showing of "good cause").

Who Are These Whistleblowers And What Incentive Do They Have To File?

Any person who has "knowledge" about the claim may file it. Oftentimes it is filed by a disgruntled former employee. The FCA protects whistleblowers who are terminated, demoted, suspended, or harassed for taking action and provides for remedies.[5] The incentive is simple. If the case is successful, the whistleblower receives a share of the recovery – between 15-25 percent if the government intervenes and between 25-30 percent if the government declines to intervene.[6] Recoveries (and the whistleblower's share) tend to be higher in health care fraud cases and in cases where the DOJ intervenes.

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What Impact Can Such Litigation Have On Your Company?

First, the potential damages can be enormous. For example, some of the largest recoveries included $900 million against Tenet Healthcare; over $700 million against The Healthcare Company; $400 million against Abbott Labs; and over $300 million against Bristol Meyers Squibb. From 1987 through 2005, the mean recovery was $10,028,482 and median recovery $784,597.[7] Second, the costs of litigation and the amount of time your company will have to dedicate to defending the lawsuit can be substantial. According to the GAO Report, cases which involved DOJ intervention lasted between 4 months to 187 months with a median of 38 months.[8]

What Healthcare Entities Are Being Prosecuted Under The FCA?

Hospitals, nursing homes, durable medical equipment manufacturers and retailers, pharmaceutical companies and various other health care entities have very high exposure. However, physicians are also targets and cases involving allegations of substandard quality of care are being litigated with increasing frequency. For example, in the landmark case of *United States ex rel. Mikes v. Straus*, we successfully defended three physicians in FCA litigation filed by a disgruntled former employee who claimed that the defendant physicians committed fraud because they failed to follow a medical society's recommendation when performing a medical procedure.[9] The employee claimed that by failing to follow the recommendation, the tests were "worthless" and that by "knowingly" submitting the claims for reimbursement, the defendants were committing fraud. This case is noteworthy not only because the Courts (the Southern District of New York and, on appeal, the Second Circuit) rejected her allegations, but also because we were able to use the FCA to recover attorneys' fees by proving that some of the plaintiff's claims were clearly frivolous, vexatious and brought with the primary intent to harass.

What Can Your Company Do To Reduce The Risk Of Such Lawsuits?

Creating a compliance program is vital. Better to hear about problems – real or perceived – early on as opposed to after the FCA complaint is filed. Your program should encourage employees to come forward with their concerns, without any fear of retaliation. Show your employees that you take their concerns seriously and inform them that you will let them know what you find after you investigate the matter. Make sure you comply with your program; simply preparing a program on paper is not enough and if corrective action is warranted then take it.

If an employee leaves, whether voluntarily or involuntarily, conduct a detailed exit interview. Ask the employee if they had any concerns, memorialize the conversation, and have the employee sign the document memorializing the meeting acknowledging the accuracy of the document.

Make sure your severance agreements require the employees to report any wrongdoing and, if there is none, to represent that they are not aware of any. This way, if former employees become whistleblowers, you can attack their credibility by demonstrating that they failed to disclose any concerns relating to fraud at the time of termination. The agreements should further require that in the event a former employee does bring an FCA claim against your company and the government declines to intervene, the whistleblower will discontinue the lawsuit. Moreover, if the complaint involves allegations that the whistleblower failed to bring to the company's attention, the whistleblower should not be able to retain any recovery, and if the whistleblower is not successful in prosecuting the claim, the employee should forfeit and return all severance back to your company. These provisions must be carefully crafted or a court might hold them to be unenforceable on public policy grounds.

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Conclusion

The Obama administration and Congress are expected to make it easier for whistleblowers to bring False Claims Act actions and will instruct the various governmental agencies to intensify their efforts in this area. Any entity involved in healthcare should assume that it is a potential target for a qui tam action and should follow the adage that the "best defense is a good offense" by taking certain measures that could reduce exposure.

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1 *United States Government Accountability Office, Washington DC, GAO-06-320R (False Claims Act); Information on False Claims Act Litigation: Briefing for Congressional Requesters, December 15, 2005 ("GAO Report"), p. 5; and The Bureau of National Affairs, Inc. Health Law Reporter, Vol. 18, No. 1, January 8, 2009, p. 8.*

2 *132 Cong. Rec. 22,335 (1986).*

3 *31 U.S.C. §§ 3729-3733.*

4 *GAO Report, p. 11.*

5 *31 U.S.C. § 3730(h).*

6 *31 U.S.C. §§ 3730(d)(1)and (2).*

7 *GAO Report, p. 31.*

8 *GAO Report, p. 12.*

9 *274 F.3d 687 (2d Cir. 2001).*