New Frontiers in False Claims Act Litigation

Liability for Fraud Related to "Health Benefit Exchanges" Under the Patient Protection and Affordable Care Act of 2010

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A central component of the health care reform legislation enacted in 2010 is the requirement that each State establish an "American Health Benefits Exchange" ("Exchange") by January 1, 2014. *See* the Patient Protection and Affordable Care Act, March 23, 2010 ("PPACA"), Pub. L. 111-148, Sections 1311-1313, 1321, codified at 42 U.S.C. §§ 18031, 18041 (colloquially known as "ObamaCare"); http://obamacarefacts.com/obamacare-health-insurance-exchange.php. In very basic terms, a Health Insurance Exchange (as they are now known, with the acronymn HIX) are state-regulated entities from which certain individuals will be eligible to purchase health insurance that is subsidized by the federal government. The concept is that these Exchanges will offer consumers more choices and bargaining power while allowing private insurance companies to compete for the business; in other words, a competitive marketplace The government will subsidize insurance premiums for individuals with income up to 400% of the poverty line, as well as single adults. The subsidy will be provided as an advanceable, refundable tax credit, and is based on a formula and the type of plan chosen. Recognizing the potential for fraud, Congress took steps to ensure federal False Claims Act liability to fraud involving any federal monies in the Exchanges, and enacted enhanced damages/ penalties provisions.

The Exchanges must be operational by January 1, 2014, with federal funding for annual grants to help the States establish such Exchanges. When PPACA was enacted in March, 2010, only a few State run health insurance exchanges across the country were operational; among them were the Massachusetts Connector, the Utah Health Exchange, and HealthPass, a New York-based, non-profit exchange.While Obamacare calls on the States to create or join exchanges, the federal government may step in for States that aren't ready or refuse to do so (fewer than 20 states are projected to have exchanges by Oct. 1, 2013, when they go online for uninsured people to shop for coverage for 2014, according to the Henry J. Kaiser Family Foundation http://statehealthfacts.kff.org/comparemaptable.jsp?ind=962&cat=17http://www.huffingtonpost.com/2012/11/15/health-insurance-exchange-deadline_n_2140454.html. *See also* http://statereforum.org/where-states-stand-on-exchanges; http://statereforum.org/exchange-governance-chart. The Exchanges must be self-sustaining beginning on January 1, 2015, and to do so, may charge assessments or user fees to participating health insurance issuers, or to otherwise generate funding, to support operations.

Congress included a number of provisions in PPACA designed to ensure the "financial integrity" of the Exchanges. *See* PPACA Section 1313, codified at 42 U.S.C. § 18033. One of these provisions is section 18033(6) which extends federal False Claims Act liability to the Exchanges *with enhanced damages or penalties exposure*. This section provides:

> (6) Application of the false claims act.—
>
> > (A) In general.--**Payments made by, through, or in connection with an Exchange** are subject to the False Claims Act (31 U.S.C. 3729 et seq.) if those payments Include **any Federal funds**. Compliance with the requirements of this Act concerning eligibility for a health insurance issuer to participate in the Exchange

> shall be a **material condition of an issuer's entitlement to receive payments**, including payments of premium tax credits and cost-sharing reductions, through the Exchange.
>
> (B) **Damages**<<NOTE: Penalty.>> .--**Notwithstanding paragraph (1) of section 3729(a) of title 31**, United States Code, and subject to paragraph (2) of such section, the civil penalty assessed under the False Claims Act on any person found liable under such Act as described in subparagraph (A) shall be increased by **not less than 3 times and not more than 6 times the amount of damages** which the Government sustains because of the act of that person.

(emphasis added).

Through subparagraph (A), Congress sought to ensure that PPACA would not fall victim to strained court interpretations of the FCA that had limited its usefulness and caused Congress to enact corrective amendments in 2009 (through The Fraud Enforcement and Recovery Act of 2009 --"FERA") and 2010 (through other sections of PPACA).[1]

Through subparagraph (B), Congress added an enhanced recovery for the United States *over and above* the standard FCA recovery of treble damages and a civil penalty of between $5,500-$11,000 per violation (i.e. false claim). Now, on top of that would be *added* a penalty of not less than 3 times and not more than 6 times the amount of the Government's damages. In other words, the Government's potential recovery could be FCA treble damages, plus the FCA $5,500-$11,000 penalties *plus the FCA/PPACA penalty of an amount equal to 3-6 times the Government's single damages.* This would mean the maximum recovery could reach 9 times the

[1] For example, in FERA, Congress amended the FCA to correct the Supreme Court's decision in *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008). *See* S. Rep. No. 111-10 (March 23, 2009) at 11-13. In PPACA, Congress amended the Medicare Medicaid Anti-Kickback Act ("AKS") to clarify that a claim that includes items or services resulting from a violation of the AKS is a false or fraudulent claim within the meaning of the FCA; it did so in response to one or more district court opinions that had constrained the applicability of the FCA to kickback tainted claims.

damages plus the $5,500-$11,000 penalties per false claim or violation. Congress' hope was that an enhanced damages and penalty provision would act as a further deterrent to potential wrongdoers.

If past is prologue, it is safe to predict that the Exchanges will be fertile ground for fraud given: the wide ranging functions and responsibilities of the Exchanges; the number of individuals they will be serving; the number of health insurance plans and brokers who will be vying for business; the sheer magnitude of the federal money in play; the history of health care fraud scams; and the government's constant lack of adequate enforcement resources. For example, health insurers may misrepresent their qualifications and eligibility to participate in an Exchange, but nevertheless receive federal subsidies, or insurers may seek to enroll individuals who do not meet the income guidelines and thus are not eligible to receive subsidies.

It is also safe to predict that given the broad language and scope of the section applying the FCA to Exchanges, there will be fertile ground for vigilant whistleblowers and their lawyers to bring valuable information to the government and make such information the subject of FCA *qui tam* lawsuits. Such vigilance will be much needed in order to help keep down the costs of health care and health care reform.