New Frontiers in Whistleblower Litigation

Overpayments and PPACA: retention of overpayments now results in False Claims Act exposure

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WRONGFUL RETENTION OF GOVERNMENT MONEY OR PROPERTY

As part of the 1986 amendments to the federal False Claims Act ("FCA"), Congress added a new liability provision. *See* 31 U.S.C. § 3729(a)(1), now codified as amended at section 3729(a)(1)(G). While the existing liability provisions of the FCA focused on a false or fraudulent effort *to obtain money from* the United States, this provision was designed to make it clear that the FCA also imposes liability where a person is similarly seeking *to avoid a payment to* the United States, a so-called "reverse false claim". Under the 1986 amendment, liability attached to:

> [any person who] knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.

Id. (emphasis added). Despite the intent of Congress, this provision of the FCA proved of limited usefulness to the Department of Justice. In particular, many courts confined the term "obligation" to a fixed liquidated obligation, others read into the statute a requirement that a claim be "presented", and the statutory requirement of a "false record or statement" limited the scope of the provision.

In 2009, Congress amended the FCA again, and included an amendment to the reverse false claims provision. *See* The Fraud Enforcement and Recovery Act of 2009 ("FERA"). The new provision imposes liability on any person who:

> knowingly makes, uses, or causes to be made or used, a false record or statement, material to an obligation to pay or transmit money or property to the Government, *or* knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

(emphasis added).

Through the FERA amendments, Congress:

- Removed the statutory requirement that the false statements or representations must be affirmatively made to conceal, avoid or decrease money or property owed to the government. Rather the focus is on whether the false record or statement is "material" to an obligation.

- Defined "obligation" to pay as "an established duty, whether or not fixed, arising from an express or implied contractual, grantor-guarantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, *or from the retention of any overpayment*."[1] (emphasis added).

- Defined "material" to mean "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[2]

These amendments add some needed clarity, but key questions still remain as to *when* does the person "*know*" they have an "*obligation*" to "*pay or transmit* money or property?" The meaning of "knowing" under the FCA is well-settled and contained in Section 3729(b)(1):

> (1) The terms "knowing" and "knowingly" mean that a person, with respect to information—(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information; and require no proof of specific intent to defraud.

But the question of "knowledge" particularly in a corporate setting, and the question of what one must know and when to trigger an obligation, can present challenges. For example, in many government contracts, in health care, in defense, and in procurement, there are progress payments, interim payments, and/or reconciliation processes. At

[1] *See* 31 U.S.C. § 3729(b)(3). According to the Senate Report, it "does not intend this language to create liability for a simple retention of an overpayment permitted by a statutory or regulatory process for reconciliation, provided the receipt of the overpayment is not based upon any willful act of a receipt to increase the payments from the government when the recipient is not entitled to such government money or property." S. Rep. 111-10 at 15 (2009).

[2] 31 U.S.C. § 3729(b)(4). This definition is consistent with the prevailing judicial interpretation of the term "material".

what point on the spectrum, does knowledge crystallize into an "obligation to pay or transmit money or property"?

Congress attempted to answer these questions in the Patient Protection and Affordable Care Act, March 23, 2010 ("PPACA"), Pub. L. 111-148 (Mar. 23, 2010). However, this legislation applies only in the health care context;[3] it does not apply to the myriad other types of government programs, including defense and procurement. In PPACA, Congress defines "*overpayment*", *when* to return, and *when* one has knowingly *retained* an overpayment.

- Overpayments, Section 1128J9(d): As noted above, FERA added "retention of any overpayment" to the FCA definition of "obligation". Section 6402(a) of PPACA adds a new section 1128J(d) to the Social Security Act to address what constitutes an overpayment under the FCA *in the health care program context.* It defines "overpayment" as "any funds that a person receives or retains…to which the person, *after applicable reconciliation*, is not entitled…." (emphasis added).

- Reporting the overpayment, Section 1128J9(d): "By the later of …60 days after the date on which the overpayment was identified…or the date any corresponding cost report is due, if applicable."

- "Retaining" an Overpayment, Section 1128J9(d): Congress tied retention to the term "obligation" under FCA, as amended by FERA: "Any overpayment retained by a person after the deadline for reporting and returning the overpayment…is an obligation (as defined [in the FCA])."

The combination of the 2009 amendments to the FERA and PPACA should make it easier for the Department of Justice and whistleblowers to successfully pursue health care fraud that takes the form of withholding or retaining money that is due to the government. These changes are especially important given the vast sums of money the government is spending on programs such as Medicare and Medicaid, and the expanded

[3] PPACA defines "person," to mean "a provider of services, supplier, medicaid managed care organization…Medicare Advantage organization…or PDP sponsor…Such term does not include a beneficiary.

role of managed care companies and Medicare Part D providers. Companies may need to enhance procedures for identifying and reporting overpayments in a timely fashion, or if they fail to do so, consider making a voluntary disclosure of the issue to the Department of Justice under the FCA, 31 U.S.C. § 3729(a)(2), and minimizing their damage.[4]

[4] This section provides that a person who makes a full voluntary disclosure about a violation of the FCA "within 30 days after the date on which the defendant first obtained the information", fully cooperates with the government investigation of the same, and is not already the subject of a criminal prosecution, civil action, or administrative action, and is not aware of any investigation into the violation, may have their exposure reduced to no less than two times the damages. The Office of Inspector General of the Department of Health and Human Services has a voluntary disclosure program.