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Medicare Compliance

Courts Side With Relators in Big Cases, but Some Get Slapped Back

Whistleblowers keep coming in droves, but the Department of Justice is waiting longer to intervene in their False Claims Act lawsuits, a former U.S. attorney says. That doesn't mean prosecutors won't step in and bring their considerable resources to bear. Sometimes they are watching and waiting to see how the case unfolds.

"There are so many cases now in U.S. attorneys' offices around the country, there is a trend for the government to 'not intervene at this time' — that's how they put it to the court," said Anne Tompkins, the former U.S. Attorney for the Western District of North Carolina, at a July 27 webinar sponsored by the Health Care Compliance Association. "The case is later unsealed, and the government intervenes at that point." Health care organizations shouldn't read too much into the late entry, she said. "The fact the government doesn't intervene early is not indicative of whether they will or will not get into the game later," said Tompkins, who is with Cadwalader, Wickersham & Taft in Charlotte, N.C. Sometimes it's a function of the prosecutor's workload, but often "the government wants to see where the case goes."

And cases are going to some interesting places. Whistleblowers in recent false claims lawsuits have pushed the envelope in some ways, and often they prevail in court (see chart, below) — but not always.

"Several recent rulings touch on the potential liabilities and risks" under the False Claims Act, said Brian McGovern, with Cadwalader, Wickersham & Taft in New York City.

Whistleblowers who helped themselves to a home health agency's documents in violation of company policy and its confidentiality agreement are able to use them in a False Claims Act case against the home health agency, the U.S. District Court for the Northern District of Illinois ruled on June 23 in *Shmushkovich v. Home Bound Healthcare Inc.* (No. 12 C 2924). The relators had copied and kept company files that were in personal computers and used them to support the false claims lawsuit, said former federal prosecutor Adam Lurie, with Cadwalader, Wickersham & Taft in Washington, D.C. The home health agency argued the relators could obtain them only through discovery. "The question for the court was whether the documents were admissible," Lurie said. "Can they support a false claims case even though they were taken in violation of company policy and confidentiality agreements, or should the documents be held ineligible to support the claim?"

The court, which ruled that the whistleblowers could hang onto documents that were "reasonably related" to the false clams allegations in light of the public policy benefit of whistleblower actions, noted the False Claims Act considers the "need for relators to produce and obtain confidential corporate documents," Lurie said. "It's a concerning result because many companies probably have similar policies and require documents to be kept confidential to protect company secrets but also to protect against those sorts of actions," he says. "The court in this case didn't criticize the practice of having confidentiality agreements or company policies. It more attacks whether those policies and procedures could preclude" documents' use in a false claims lawsuit.

The theory of implied certification continues to split federal appeals courts, with the most recent decision a win for the government and whistleblower. Implied certification is the notion that False Claims Act liability may be triggered when a claim or invoice is submitted to the government because submission implies compliance with applicable laws and regulations.

"It's one of the hottest theories in the False Claims Act," Tompkins said.

In a January decision in a non-health care case, the U.S. Court of Appeals for the Fourth Circuit adopted implied certification, she said. The case, *United States ex rel. Badr v. Triple Canopy, Inc.* (No. 13-2101), involved a private security company hired by the government to provide security at a U.S. military base. When employees did not pass marksmanship courses, the security company, Triple Canopy, allegedly told an employee to falsify marksmanship scorecards, Tompkins said. The employee filed a false claims lawsuit against Triple Canopy, which argued that it had not filed a false claim for payment. At most there was a breached contract, the defendant contended. The appeals court found in favor of the whistleblower.

"The Fourth Circuit said even though the contract didn't condition payment on compliance with weapons

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certification, it was material," she said, so it is a false claim, not a breach of contract, lawsuit. "It's an important case," Tompkins said. The Fourth Circuit joined the appeals courts for the Ninth, Tenth and District of Columbia Circuits "in explicitly adopting implied certification," she said, while the Fifth and Seventh Circuits have rejected it in favor of the breach of contract argument. "This sets up a circuit split for potentially the Supreme Court to weigh in," she said. It also was significant to the Fourth Circuit that the Department of Justice intervened in this case. "It gave the case additional gravitas," she said.

Court Disqualified Whistleblower

Elsewhere, a false claims case against Quest Diagnostics was dismissed because one of the whistleblowers had served as in-house counsel for the defendant, Lurie said. The U.S. Court of Appeals for the Second Circuit disqualified the whistleblower in the lawsuit because of his in-house counsel position. "Those are people who arguably know potentially the most embarrassing, incriminating information, and in this case, the in-house lawyer used that knowledge to try to bring a false claims case against his employer," Lurie said. "The second circuit said no, you can't do that." In the decision, *United States ex rel. Fair Laboratory Practices Assocs. v. Quest Diagnostics* (1:05-cv-05393-RPP), Lurie said the court found that the False Claims Act "does not trump an attorney's duty of confidentiality."

And of course there is the July 2 decision upholding the $237 million Stark and false claims verdict in the Tuomey Healthcare System case (see box, p. 5). The U.S. Court of Appeals for the Fourth Circuit upheld both the May 8, 2013, verdict by a jury, which found the health care system violated the Stark law and therefore the FCA, and the resulting order by the U.S. District Court for South Carolina to pay more than $237 million to the government *(RMC 7/13/15, p. 5)*. At issue were part-time employment contracts Tuomey had negotiated with 19 area physicians to retain outpatient business for the hospital. The whistleblower, physician Michael Drakeford, refused to enter into an agreement with Tuomey because he believed the compensation violated Stark *(RMC 10/7/13, p. 1)*.

Fourth Circuit Rejected Argument

The Fourth Circuit rejected Tuomey's argument that it relied on advice of counsel. The court said that "you can't shop for legal opinions and ignore opinions that question the legality of an arrangement," McGovern said. The case, which focused on physician compensation, "is a perfect storm of the many risks and perils of operating in today's environment," he said, and found that the Sumter, S.C., health system "shopped for legal opinions approving of the contracts, while ignoring negative assessments."

Examples of Recent Major Judgments and Settlements

Judgments

Tuomey Healthcare System (July 2, 2015)

◆ Fourth Circuit affirmed the District of South Carolina's $237 million judgment against a hospital for 21,730 Medicare false claims and part-time contracts with physicians in violation of the Stark law.

◆ $120 million in treble damages, $117 million in civil penalties — largest fine ever against a community hospital.

Ishtiaq Malik M.D., P.C. and Advanced Nuclear Diagnostics (July 30, 2013)

◆ D.C. District Court entered judgment for more than $17 million against a physician and his companies for submitting false nuclear cardiology claims to Medicare, Medicaid, and other state and federal health programs.

◆ $17 million includes treble damages and penalties for FCA violations.

Settlements

DaVita Healthcare Partners, Inc. (June 24, 2015)

◆ $450 million settlement to resolve FCA allegations that DaVita created unnecessary waste in administering drugs to dialysis patients.

◆ $525 million under treble damages, $138.4 million in civil penalties, and $19 million in attorney's fees and costs.

Community Health Systems Inc. (Aug. 4, 2014)

◆ $98.15 million settlement to resolve FCA allegations with the largest operator of acute care hospitals for falsely billing outpatient services as inpatient and for violations of the Stark Law.

Omnicare Inc. (June 25, 2014)

◆ $124 million settlement to resolve FCA and Anti-Kickback Statute allegations that Omnicare gave kickbacks to SNFs and submitted additional Medicare and Medicaid claims.

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There have also been more decisions addressing the use of statistical sampling and extrapolation by relators in false claims lawsuits. Not all have gotten their way, McGovern noted, but a growing number of federal courts have let whistleblowers "rely on statistical sampling to establish not merely damages, but also liability in FCA cases involving large numbers of claims." One case is *United States ex rel. Ruckh v. Genoa Healthcare*, LLC (No. 8:11-cv-1303). In granting the whistleblower's request to submit an expert report on statistical sampling and extrapolation for the purpose of estimating overpayments, the court concluded there is "no universal ban" on sampling in *qui tam* lawsuits, McGovern said. Moving ahead without extrapolation would suck up all the court's time. So far, the Department of Justice has not intervened in this case.

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