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Manage False Claims Risk Before It's Too Late!

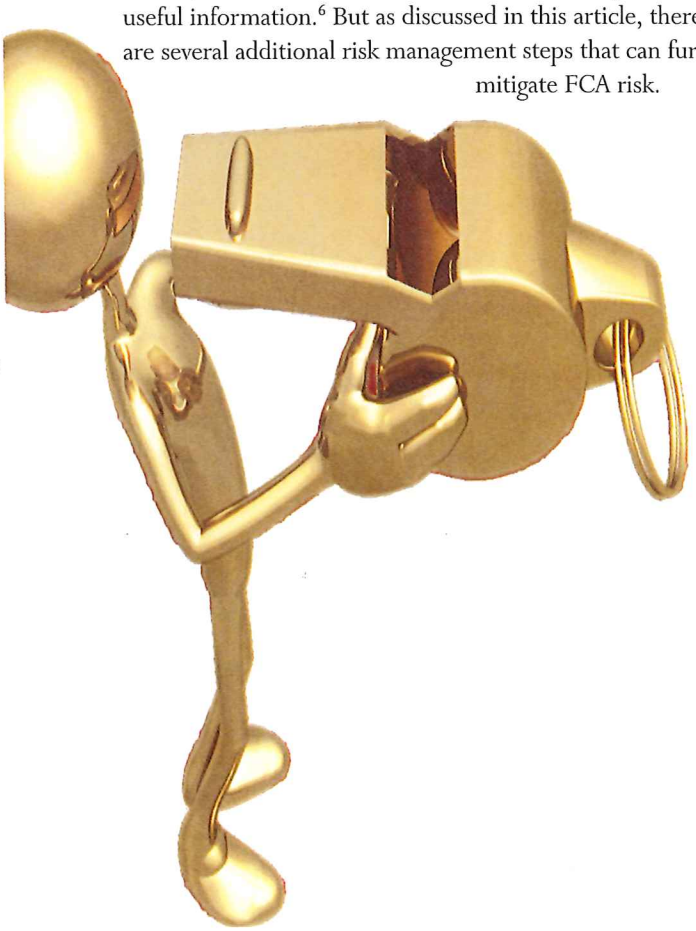
by Matthew Schelp & Lorinda Holloway

Introduction

The onslaught of FCA litigation in the health care industry is unrelenting and most attorneys agree things will only get worse. In 2014 the U.S. Department of Justice (DOJ) recovered a record breaking amount of nearly $6 billion from False Claims Act matters.[1] More than $2.3 billion of this stemmed from health care fraud recoveries and the Obama administration intends to continue FCA enforcement as a top priority for the DOJ.[2]

In 2014 more than 700 false claims actions were filed, with most actions being filed under the Act's whistleblower, or qui tam, provisions that allow whistleblowers to file lawsuits alleging FCA violations on the Government's behalf.[3] The landscape surrounding the qui tam arena has never been more favorable to relators because of a series of record-setting settlements[4] and changes to the FCA that are favorable to whistleblowers.[5]

FCA liability has clearly become a major business threat to health care entities and mitigation of these risks will be a key component of any successful strategy. Implementing a robust health care compliance program sets the foundation, and help in that regard abounds with knowledgeable counsel and consultants and even the Government itself providing useful information.[6] But as discussed in this article, there are several additional risk management steps that can further mitigate FCA risk.



Risks of a FCA Suit and the Procedural Background

First, providers must accept the fact that the risk of becoming an FCA claim target is real. The risk is real in part because the bar for proving an FCA case is relatively low. The FCA imposes civil liability on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," or "knowingly makes, uses or caused to be made or used, a false record or statement material to a false or fraudulent claim."[7] But "knowingly" does not necessarily mean that the provider knew the claim was a lie or that the provider intended to improperly bill or defraud the Government (billing for services not provided, upcoding, illegal kickbacks, and the like).[8] Less obvious conduct can also support an FCA claim. For instance, billing for a product or service that is not supported by documentation as being medically necessary (even if it was in fact medically necessary) can support an FCA claim.

The risk is also real because those with knowledge of your practice are incentivized to attack it. The statute allows a private citizen or "relator" to bring, on behalf of the Government, a lawsuit for a violation of the FCA.[9] A successful relator can garner up to 30% of the proceeds of a case and even potentially recover attorney's fees, costs and expenses.[10]

The financial risk presented by an FCA claim is exceedingly high. Not only will a provider likely incur its own fees and costs associated with responding to the matter, but the FCA allows for recovery of triple the actual damages, civil penalties of $5,500 to $11,000 per claim, potential recovery of attorney's fees and costs for a relator, exclusion or debarment from the applicable Government program, and criminal liability. Even when the Government settles an FCA matter, it tends to demand double damages, and if a relator is in the wings, relator's counsel will no doubt be looking to recover fees and costs incurred in researching and filing the qui tam and aiding the Government's investigation.

As a practical matter, a provider's practice may be a target and the provider may not even know it. Qui tam FCA lawsuits are filed under seal for a period of 60 days and shall not be served on a defendant until ordered by the Court.[11] The purpose of the seal period is to allow the Government time to consider whether it wants to intervene and proceed itself with the action.[12] In most cases, the

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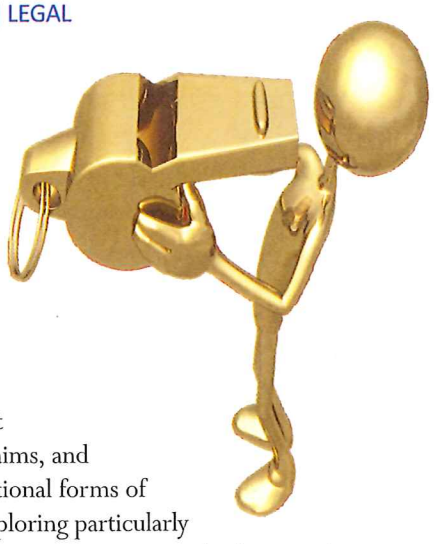

Government cannot make its intervention decision within 60 days and can, "with good cause shown," move the Court for extensions of time "during which the complaint remains under seal."[13] In reality, a lawsuit's seal period can last for months or years while the Government investigates the relator's claims. During the seal period a defendant will not be privy to the actual case filing, but could be subject to Government inquiries related to its investigation of the allegations made in the relator's lawsuit. These Government inquiries are often the only signs available to a defendant that a qui tam threat looms.

Treat Government Inquiries Like A Lawsuit

Government inquiries driven by a qui tam action may take a variety of forms: a search warrant, a subpoena, a Civil Investigative Demand, service of an actual FCA lawsuit or simply contact from the Government lawyer. Regardless of the form it takes, providers are wise to recognize that they are being invited to a party they would rather not attend. But rather than trying to figure out how to get out of it or why the Government is wrong to even consider extending such an invitation, providers should first focus on getting the matter into the process designed to protect them. Contact the practice's carrier (see coverage discussion below) and find a qualified health care lawyer familiar with the particular form that the FCA risk has taken. In other words, providers should treat Government inquiries like a potential or filed malpractice claim. The advocate will want and need your insight and expertise, but the very first step is to get the matter into the right hands for evaluation.

Take Stock of Your Insurance Coverage

Insurance is a traditional risk management tool that should not be overlooked in the FCA context. Insurance does not typically cover fraud or crimes, but neither intent to defraud nor a crime is required to prove an FCA case. Providers should also not assume there is no coverage merely because there may be a fraud aspect to an FCA claim. Some policies such as Errors and Omissions (for professional negligence), Directors and Officers (for "wrongful acts"), and Employment Practices Liability (for employment related issues) can cover FCA investigations and exposure depending on their terms. There are also newer specialty policies sometimes called Specialty Errors and Omissions, Healthcare Regulatory Liability, and Billing Errors and Omissions (which is typically not just for billing errors) that are intended to cover loss from Government investigations, FCA claims, and more. These nontraditional forms of coverage are worth exploring particularly because they may pick up prior acts going back as much as six years.

As with any insurance policy, the details matter. Key definitions in the FCA context include "claim," "loss," "covered defense expenses," and "insured." Fraud exclusions are common but can often be negotiated to apply only in the event of a final, non-appealable adjudication. Other exclusions such as for intentional acts, gross negligence, illegal profit, billing errors, and contractual liability must also be evaluated. Depending on your state's insurance laws, the goal is often to find just one covered claim because that can trigger a duty to pay for the defense of all claims.

Providers are wise to consult both an insurance broker who specializes in health care and a lawyer familiar with FCA issues, and to inventory policies annually to look for coverage gaps as the practice or related business grows or changes. Also, be aware of how all of the policies work in relation to one another because some policies are not triggered if other insurance is available.

Use the Right Kind of Indemnity Provisions in Contracts

Another tool for managing FCA risk is having the right kind of indemnity provisions in contracts with vendors, consultants, and business partners who create or expand FCA exposure. Indemnity simply shifts loss from one party to another. Generally speaking, the right to indemnity must come from a statute, common law, or a contract. The FCA itself does not provide indemnity rights because public policy is against allowing an FCA-liable person to shift responsibility to another, which is why courts tend not to recognize common law claims for FCA indemnity either.[14] This policy makes sense, especially in terms of possible counterclaims against a whistleblower. After all, the Government wants to encourage not discourage whistleblowers.[15]

This leaves contractual indemnity. To date, no court has held that the FCA bars a party from trying to enforce a contractual indemnity claim. Case law provides guidance on how to improve the chances of an indemnity claim in the FCA context, such as:[16]

- *do* hinge indemnity on incurring loss, costs, and fees incurred as a result of the business partner's breach of:
  - warranty that it will comply with all applicable regulatory requirements;
  - representation that it will advise of regulatory non-compliance; and
  - the duty of reasonable care in the course of its business (negligence); and[17]
- do *not* hinge indemnity on FCA liability (even though this seems counterintuitive[18]).

When seeking indemnity, highlight factual allegations that are not raised in the FCA case. It is also critical to ensure there is no finding or admission of FCA liability in the FCA case. Additionally, any FCA settlement agreement should state that it is:

- only for the settling parties' benefit;
- not admissible to show fault or facts; and
- not a release of claims against others.

Seeking indemnity from others that created or enhanced your FCA exposure may not make you whole, but it can potentially help backfill the financial hole that FCA matters tend to create.

Keep up With Changes to the FCA, Including the 60-Day Rule

Another risk management step to take is to keep up generally with changes to the FCA and the decisions interpreting it, whether through journals or continuing education. For instance, many providers are aware that the Affordable Care Act created FCA liability for individuals who retain overpayment for longer than 60 days after it is identified.[19] Overpayments retained after the 60-day window closes are then considered "obligations" under the FCA, entitling the Government or qui tam relators to pursue civil penalties.[20] As with any FCA liability, penalties can include $11,000 per false claim submitted and three times the amount of damages the Government sustains because of the act.[21]

This important change to the FCA presented a natural and critical question—when is an overpayment considered to be "identified" and therefore when does the 60 days begin to run? These ACA-imposed provisions are just now being tested for the first time in a qui tam case filed against New York City's Mount Sinai Health System. A United States District Court in New York rejected Mount Sinai's request to dismiss the Government's case against it for violating the 60-day rule.[22] Many speculated that the Court would accept the defendant's argument that "identified" means "classified with certainty," but the Court sided with the Government and concluded that "identification" of any overpayment occurs when "a person is put on notice that a certain claim may have been overpaid."[23]

This decision begins to bring daunting clarity to the 60-day rule and demonstrates that strict standards are being used to interpret this potential area of FCA liability. To properly mitigate FCA liability, healthcare providers must carefully deal with allegations of overpayment of certain claims and must be on high alert for the timely return of overpayments. The broader risk management point is that providers are wise to generally keep up with changes to the FCA and the decisions interpreting it.

Conclusion

FCA liability has become a major business threat to healthcare providers and mitigation of these risks is key to any successful strategy. Applying a few risk management techniques to FCA risks can help: treat all Government inquiries like lawsuits, meaning get them into the hands of counsel and carrier; revisit insurance coverage; use the right kind of indemnity provisions in contracts with those that present or increase FCA risk; be mindful of the 60-day clock that may be ticking with regard to alleged overpayments; and pay attention through journals and continuing education to changes to the FCA and the decisions interpreting it.

Finally, remember the basics of FCA risk management—work with knowledgeable and experienced attorneys and consultants to create a compliance and ethics program. In other words, develop policies and procedures within your practice to foster a compliance culture. This can be a helpful barrier to a successful false claims case and discourage the Government from intervening in a whistle blower action.

References

1. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014 (Nov. 20, 2014), available at http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014.
2. Id.
3. Id.
4. See e.g. United States ex rel. Baklid-Kunz v. Halifax Hospital Medical Center, et al., No. 09-cv-1002 (M.D. Fla. Mar. 10, 2014).
5. See Whistleblower Protection Act of 2012 amending 5 U.S.C. §2302.
6. http://oig.hhs.gov/compliance/provider-compliance-training/index.asp.
7. 31 U.S.C. §3729(a)(1).
8. See 31 U.S.C. §3729(b).
9. 31 U.S.C. §3730(b).
10. 31 U.S.C. §3730(d).
11. 31 U.S. C. §3730(b)(2).
12. Id.
13. 31 U.S. C. §3730(b)(3).
14. See, e.g., Mortgages, Inc. v. US Dist. Ct., 934 F.2d 209 (9th Cir. 1991) (per

curium); U.S. ex rel. Battiata v. Puchalski, 906 F.Supp.2d 451 (D. S.C. 2012). In U.S. ex rel. Madden v. General Dynamics Corp., 4 F.3d 827 (9th Cir. 1993), the Ninth Circuit revisited common law indemnity in the FCA context, concluding a defendant can bring such counterclaims for damages independent of FCA liability, but the court did not explain what damages would qualify as independent damages.

15. To those who argue that whistleblowers with unclean hands should not be protected from claims for indemnity when he/she participated in the conduct at issue, courts explain that the FCA addresses this scenario by reducing whistleblower awards when they were a part of the problematic conduct. See Mortgages, 934 F.2d at 213.

16. See, e.g., Cell Therapeutics, Inc. v. Lash Group, Inc., 586 F.3d 1204 (9th Cir. 2009); U.S. ex rel. Wildhirt v. AARS Forever, Inc., No. 09 C 1215, 2013 WL 5304092 (N.D. Ill. Sept. 19, 2013).

17. For good measure, include indemnity for fees, costs, and expenses incurred in seeking to enforce the indemnity should that become necessary. The noted warranty and representation should be included in the terms of the agreement.

18. Remember, the Government wants to encourage not discourage whistleblowers so allowing an FCA defendant to blatantly shift blame to another goes against public policy and is not something courts will enforce. The reality is that a properly worded indemnity provision can potentially help defray costs incurred in defending an FCA matter without on its face looking like that is what it is accomplishing.

19. 42 U.S.C. §1320a-7k (d)(2).

20. 42 U.S.C. §1320a-7k (d)(3).

21. 31 U.S.C. §3729(a).

22. State of New York, ex. Rel. Robert P. Kane v. Healthfirst, Inc. et al., Civil Action No. 1:11-2325(ER) (S.D.N.Y. Aug. 4, 2015).

23. Id.

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