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Whistleblowers v. fraudsters: False Claims Act being used in health care field

By: David Donovan October 26, 2016

In 2005, Tuomey Healthcare System, a hospital in Sumter, offered orthopedic surgeon Michael Drakeford a pretty sweet deal—for each outpatient procedure Drakeford referred, the hospital would pay him well in excess of fair market value so long as he agreed not to make any referrals to competing locations.

All of the other doctors in Drakeford's position accepted that deal. Drakeford instead opted to notify the federal government, which concluded that Tuomey's contracts violated the Stark Law, which precludes a hospital from billing Medicare for services referred by physicians with whom it has an improper financial relationship.

So Drakeford sued Tuomey under the False Claims Act, a federal law that allows whistleblowers to sue, on behalf of the government, contractors who have defrauded taxpayers, and then share in the proceeds. After a decade-long battle, attorneys for Drakeford and for the government worked together to win a $237 million judgment against Tuomey, the largest judgment ever against a single hospital under the FCA. Tuomey ultimately agreed to pay $72.4 million to resolve all claims, of which Drakeford will collect $18.1 million for exposing the scheme.

The case is illustrative of the significantly increasing activity in FCA litigation in the last decade. In the 10 years from 1996-2005, settlements and judgments under the FCA totaled just over $11.8 billion, but in the last 10 years, that figure nearly tripled to more than $33.2 billion. Practitioners in field credit the jump to more sophisticated pursuit of such cases by increasingly experienced federal prosecutors and whistleblowers' attorneys, and to increased awareness of the law among potential whistleblowers.

These days the lion's share of that money comes from health care providers. Congress was initially motivated to amend the FCA in 1986, reviving the role for whistleblowers and increasing their financial incentives, because of concerns about fraud among defense contractors—the proverbial $300 hammers and $600 toilet seats. But today health care costs constitute a much larger portion of the federal budget, and the majority of both the dollars recovered and cases filed under the FCA are related to health care fraud.

A hard way to make easy money

The linchpin of the FCA is its *qui tam* ("in the name of the king") provision that allows whistleblowers, known as "relators" under the law, to file suit against fraudsters, giving them a powerful incentive to bring misconduct to the government's attention. In the fiscal year 2015 the total amount awarded to relators was just shy of $600 million—the highest figure ever—and, as in Drakeford's case, individual relators can sometimes receive millions of dollars. But attorneys who represent relators say that the experience can take an immense toll on the whistleblowers.

Most relators are or were employees at the companies committing the fraud. Tony Scheer, an attorney with Rawls, Scheer, Foster & Mingo in Charlotte who represents relators, said that while there are a minority of whistleblowers actively looking for wrongdoing to cash in on, the bulk of relators are very reluctant to file a claim. The best relators, Scheer said, are ones who make great efforts to correct the fraud internally before reporting it. Frequently these employees then find themselves subject to retaliation, which often accurately presages the difficult road ahead, he said.

"Being a whistleblower isn't easy. You don't just waltz into an attorney's office, tell them what you know, wait a few months and then collect a check," Scheer said. "There is a lot of work involved, and you have to defend yourself often from being slandered, and you have to wait a very long time to collect even if you've been successful."

False Claims cases tend to be very resource-intensive to pursue because investigators typically have to sift through tens of thousands of line items and emails, so cases can only be profitably pursued when the evidence of intentional or recklessly negligent fraud is strong and the amounts in controversy are quite high. Scheer said that although the

government is successfully clawing back more money than ever, he doesn't think the number of credible and good claims has actually increased all that much.

"At our law firm, we probably turn away 50 people for every call that comes up," Scheer said. "If people think they're going to be a good whistleblower, they probably won't be. The great majority of them, it turns out, probably do not have a credible case."

Like a hurricane blowing into town

The increasing volume of FCA judgments has caused government contractors to sit up and take notice because FCA suits represent an out-of-the-blue and very high-liability litigation risk. Robb Leandro, an attorney with Parker Poe in Raleigh who represents health care providers, started working about five years ago with white-collar defense attorneys at his firm who were experienced in defending against FCA suits against other types of government contractors, but had little experience in health care law.

Leandro said it's rare for companies to find themselves defending against an FCA suit, but the cases are intense when they happen. Contractors who violate the FCA are liable for three times the damages, but the biggest risk for providers is the mandatory penalties for each false claim, which range from $5,500 to $11,000. A home care provider, for instance, could have thousands of line items in controversy.

"When you're providing services five times a week, the penalties for one week of service for one patient could be $50,000, and the allegation may be that you've been doing this wrong for years," Leandro said.

When a relator raises allegations of fraud, the government has the option of pursuing the case, known as "intervening," or declining it. If the government initially declines to intervene, the relator has the option of litigating the case without the government's help. Leandro said that when he first got into the field, convincing the government not to intervene in the lawsuit was tantamount to winning it. That's no longer the case, as relators and their attorneys are now much more willing to press forward with such lawsuits on their own.

Since they resumed in 1987, *qui tam* lawsuits have recovered more than $33.2 billion in settlements and judgments. (That's on top of $15.1 billion recovered from non-*qui tam* cases.) Less than $2.2 billion of that has come from lawsuits where the government declined to intervene. But in fiscal year 2015, such recoveries skyrocketed to more than $1.1 billion—more than was won in all the prior years dating back to the law's amendment. For the first time, recoveries from cases the government declined have approached parity with recoveries from cases where it intervened.

Peering out from the foxhole

From the government's perspective, the False Claims Act has been a very cost-effective way to recover money. Norman Acker, chief of the civil division of the United States Attorney's Office for the Eastern District of North Carolina, said that unless the defendant is simply unable to pay the judgment, they typically recover between two and three times the actual damages to the government, and substantially more than what the cases cost to pursue. (Acker prosecuted the Tuomey case after the U.S. Attorney's Office in South Carolina was recused from it.)

FCA complaints are filed under seal, and the government has a window in which it can investigate allegations before deciding whether to intervene. Although courts have the discretion to allow the government to intervene in a lawsuit at a later date, Acker said that his office tries to make a decision up front about whether it wants to intervene, and to build a case against the defendant independent of the relator's testimony.

"You've got to make sure that you can prove the case ideally without the whistleblower, because the whistleblower is often portrayed as someone who, especially if it's a former employee, is a disgruntled employee," Acker said. "Sometimes that's true and sometimes it's not. Sometimes even when it is true, it doesn't mean that the company hasn't engaged in false claims. Typically, we try to prove the case without even calling the relator to the stand in the litigation."

Attorneys in the relators' bar expressed the view that in earlier eras, federal prosecutors received whistleblowers with a chilly skepticism that deterred relators from coming forward with allegations that could potentially make them permanently unemployable in their vocations. But relations between these ostensible partners have gotten much sunnier in recent years, they report.

"What I think has happened is the government has gotten over an institutional reluctance to work directly with a whistleblower and is much more welcoming and protective of whistleblowers," Scheer said. "And the result has been relators being more successful in helping the government get their money back, and more willing to lift their head above the edge of the foxhole."

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