

PRIVILEGED COMPLIANCE INVESTIGATIONS: A STRATEGY FOR AVOIDING RETAINED OVERPAYMENT FCA ACTIONS

EXECUTIVE SUMMARY

Health care providers can significantly manage the risk posed by retained overpayments under the False Claims Act ("FCA") by requesting counsel to conduct appropriate compliance investigations rather than performing the investigations internally.

Last week, the first federal appellate court decision determined that when such investigations are conducted by counsel, they are protected by the attorney-client privilege. On the same day this opinion was issued, the Department of Justice ("DOJ") announced that it was intervening in a False Claims Act *qui tam* action based upon a health care system's retention of overpayments and its failure to pay identified overpayments within 60 days.

Read together, these FCA actions highlight the importance of the involvement of counsel in compliance investigations.

RETAINED OVERPAYMENTS

The FCA was amended in 2009 by the Fraud Enforcement and Recovery Act to add a new class of liability under the FCA: reverse false claims. As amended, liability for reverse false claims attaches when a health care provider or government contractor identifies an overpayment by the government and improperly avoids repayment of that claim. In 2010, the FCA was again amended, this time by the Affordable Care Act ("ACA"), to require repayment of identified overpayments within 60 days. Until last Friday, June 27, the government had not yet showed its hand on how it would pursue reverse false claims in FCA litigation.

THE TEST CASE

In 2010, a large system of health care providers that includes medical centers in New York was informed by the State of New York that it had wrongly received payment from New York Medicaid as a secondary payor. The system and its providers engaged in an internal compliance investigation, and during the course of that investigation ending in February 2011, the DOJ alleges that it identified 900 individual overpayments.

Under the FCA as amended by the ACA, once a health care provider or government contractor identifies an overpayment, it has 60 days to reimburse the government for the overpayment amount. However, as put forth in its *Complaint-in-Intervention*, the DOJ alleges that the health care system failed to reimburse the identified overpayments within 60 days and instead repaid the government over the course of the next two years in "small batches."

An employee who took part in the internal compliance investigation was the whistleblower in this action and filed the complaint under seal. On Friday, June 28, 2014, the DOJ intervened in the matter, making this a key test case for the government and for health care providers on the manner in which the DOJ intends to pursue reverse false claims actions.

What is most striking about the DOJ's decision to intervene in this case is that it sends a clear signal that the government intends to strictly enforce the 60-day period for repayment, even when a health care provider or government contractor has fully repaid identified overpayments outside of that 60-day window.

PRIVILEGED INVESTIGATIONS

On the same day of the DOJ's announcement, the Court of Appeals for the District of Columbia issued a highly anticipated decision finding that compliance investigations conducted by counsel may be protected by the attorney-client privilege and therefore cannot be compelled during litigation.

The District Court's opinion in *In re: Kellogg Brown & Root, Inc. et al.* overruled a lower court's determination that such compliance investigations are not protected by the privilege because they serve a business purpose rather than a legal purpose. Though the decision is limited to the D.C. Circuit, it is an opinion that noted similar lower court decisions outside of its circuit and forcefully rejected the rationale that those courts had used.

In a powerful reminder of the importance of the attorney-client privilege in our judicial system, the D.C. Circuit rejected the "false dichotomy" that lower courts created when attempting to classify compliance investigations as serving either a business purpose or a legal purpose. The Court noted that such investigations ultimately serve both and that:

So long as obtaining and providing legal advice was one of the significant purposes of the internal investigation, the attorney-client privilege applies, even if there were also other purposes for the investigation. (**Kellogg** at 8.)

The Court concluded by recognizing the cost of enforcing a privilege will mean that plaintiffs are not entitled to compliance investigation files and communications but that cost is accepted in order to "encourage the full and frank communication between attorneys and their clients." (**Kellogg** at 18.)

PRACTICAL TAKEAWAYS

From the DOJ's intervention, we have learned that the government intends to hold health care providers accountable for repayment of identified overpayments within the 60-day window provided under the FCA. A health care provider conducting its own investigation triggers that clock for each overpaid claim it identifies. However, the D.C. Circuit's decision rearticulating the strength of the attorney-client privilege presents a way for health care providers to mitigate their risk exposure for such overpayments.

A provider that engaged outside counsel to conduct compliance reviews in order to determine whether or not overpayments had been received could more efficiently manage the timeline for repayments within the 60-day period. Counsel for a provider or contractor could conduct its investigation independently of the provider, thereby not triggering the knowledge of the overpayment by the provider until the investigation had been completed and a repayment plan had been prepared by counsel and presented to the client.

The benefits of a strategy are two-fold. First, it ensures compliance with complex regulations and statutes in a professional and organized manner that manages the repayment period under the FCA, limiting any potential legal exposure. Second, if a claim were to be brought against the provider or contractor, ensuring the full and early involvement of counsel would allow the best possible defense for ensuring the confidentiality of the investigation.

The future of reverse false claim allegations will be largely formed by the arguments made in cases like the DOJ's recent intervention action. But health care providers and government contractors need not wait to plan strong compliance strategies.

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