CRIMINAL AND CIVIL HEALTH CARE FRAUD CASE PROGRESSION AND MOTION PRACTICE

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I. INTRODUCTION

Health care fraud has been a priority of both state and federal law enforcement in the past several years. During this time, a substantial body of case law has developed related to false claims, kickbacks, and health information, among others. As every case is unique, it is impossible to provide a comprehensive guide on motions practice. This summary article, however, attempts to isolate the most commonly used motions in both civil and criminal health care fraud and abuse matters by outlining the progression of cases.

II. CIVIL LITIGATION AND THE FALSE CLAIMS ACT

Claims brought under the Federal False Claims Act ("FCA")[2] have created one of the fastest growing areas of litigation, due in large part to the government's articulated intent to enforce the statute coupled with its unique *qui tam* enforcement mechanism. Indeed, many states have implemented their own FCA statutes.[3] The result is a quickly growing area of litigation with widespread implications for health care corporations and providers.

The FCA requires proof that the defendant made and presented, or caused to be presented, a false claim, with knowledge that the claim was false.[4] It provides a penalty of $5,500 to $11,000 per claim, plus triple the amount of damages sustained by the government as a result of the false or fraudulent claim.[5] The government may bring a FCA case on its own, or it may intervene in a *qui tam* case brought by a whistleblower.[6] The *qui tam* provisions provide financial incentives to private individuals who sue on the government's behalf as "relators," awarding them fifteen to twenty-five percent of the proceeds of an action in which the government intervenes, and twenty-five to thirty percent of the proceeds of an action in which the government does not intervene.[7]

A. FCA Claims Brought by a Relator

Whether a FCA complaint is filed by the government or a relator has important implications for motions practice. The government may bring a civil case under the FCA without a relator under 18 U.S.C. § 1345 (2000). Further, an action may be brought under § 1345 in two ways: when the government independently files a FCA claim, or when the government files a motion under an already pending *qui tam* claim.

Where a claim is brought by a relator, the claim is filed under seal,[8] under which it remains for a period of at least sixty days.[9] In most cases, the sixty day period is extended numerous times to allow the government an adequate opportunity to evaluate the claim. The statute allows the government to move the court for time extensions, which the government uses to investigate the allegations contained in the relator's complaint.[10] In addition, the allegations are typically reviewed by the criminal division to ascertain if the complaint articulates facts which might be criminal in nature. The action is not served on the defendant until the court orders service. During the sixty day time period, the government may elect to intervene after proper service of the complaint and disclosure material on the Attorney General and local U.S. Attorney.[11] While failure to properly serve may serve as a ground to move to dismiss, most courts are likely to permit proper service so long as it is timely.

Although the government may file extension requests under the statute where they meet the requirements, defense counsel may, in the interim, attempt to negotiate with the government to better understand the allegations against their client. Generally, a defendant cannot file a motion to unseal a *qui tam* action without the support of the government. That is not to say, however, that defendant will not be able to obtain access at least some information by requesting that the government file a motion to unseal for the limited purpose of sharing the allegations with the defendant.

The benefit to the government of unsealing the complaint include allowing it to weigh the strength of its case by giving the defendant an opportunity to respond to the allegations and obtaining the benefit of the defendant's cooperation, including access to witnesses and documents that it might not otherwise know to ask for. The defendant equally benefits by having the opportunity to respond to the allegations, provide information to counter them, and, if necessary, begin to prepare a defense. In addition, it allows the defendant to demonstrate its intent to cooperate with the government or persuade the government that intervention is not warranted given the lack of meritorious claims.

1. Receipt of Subpoena and Motion to Quash

From a health care provider's perspective, FCA cases often begin upon receipt of an administrative subpoena or a request letter from the U.S. Attorney's Office or Civil Section of the U.S. Department of Justice. Possible subpoenas include an Administrative or Civil Investigatory Demand from the Office of the Inspector General of the U.S. Department of Health and Human Services ("OIG-HHS"), [12] subpoenas served under the Health Insurance Portability and Accountability Act ("HIPAA"),[13] or a grand jury subpoena if the allegations and disclosure materials raise criminal concerns.[14]

The first step upon receipt of subpoena is to determine the extent of the government's interest in your client. Whether your client is a defendant in a FCA case or a third party to an action will influence how you decide to proceed.

In the end, however, where a subpoena is procedurally flawed of overly burdensome, the defense could attempt to negotiate the terms of the subpoena with the issuing agency. If such attempts fail and the subpoena is flawed in some manner, the defense should consider filing a motion to quash the subpoena, the process for which remains unchanged whether litigating in the health care, or any other, arena. In some instances, simply informing the government of the flaws and articulating a reasonable alternative could lead the government to file an action to compel. Each subpoena is factually unique and, therefore, the appropriate challenge will depend on the contents of the subpoena. It is important to remember that until formal proceedings are initiated to challenge the subpoena, compliance is otherwise required.

Finally, it is important to note that the subpoena process is especially important in *qui tam* actions, because it is the defense's first chance to review the information being sought and, accordingly, try to ascertain the allegations contained in the complaint.

2. Intervention and the Motion to Dismiss

The government's investigation of the allegations in the *qui tam* complaint are aimed at determining whether it should: (1) intervene in one or more the counts in the complaint; (2) settle the pending action with the defendant before deciding whether to intervene; (3) decline to intervene; allowing the relator to prosecute the case on the government's behalf; or (4) move to dismiss the relator's complaint because it is without merit, or before it conflicts with the government's statutory or policy interests.[15] The decision to intervene is not one the government makes lightly. Indeed, according to the Department of Justice, fewer than twenty-five percent of *qui tam* actions result in the government intervening on any one count.[16]

If the government intervenes, it will file a Notice of Intervention, setting forth the claims to which it is intervening, and a motion to unseal the *Qui Tam* complaint. All other documents remain under seal.[17] The Department may add allegations to the *qui tam* complaint or, more commonly, file its own complaint in the action. In so doing, it will not only submit its own factual statement or relief sought, it will often assert new and different claims based upon facts discovered during its review.[18]

Motions to dismiss are the best way for defense counsel to counter the government's allegations. Recently, some commonly pleaded grounds in support of a motion to dismiss in a FCA case include: failure to plead fraud with particularity, failure to plead falsity and failure to plead facts supporting materiality. These motions are often most effective in qui tam actions where the government has declined intervention, because the complaints are often inadequate. However, it is important to note that, again, these motions depend on the allegations of the case.

Federal Rule of Civil Procedure 9(b) requires "all averments of fraud…be stated with particularity." Courts have interpreted this to mean that a complaint must allege the details of the allegedly fraudulent acts, including when they occurred and who engaged in them.[19] In a FCA context, this would require the complaint alleges the "time, place and contents of the false representations and what was obtained or given up thereby…." In short, "[c]onclusory allegations that a defendant's conduct was fraudulent and deceptive are not sufficient to satisfy the rule."[20] In large measure, such motions result in courts allowing the plaintiff to amend the complaint. Thus, the defense should consider whether other flaws in the pleading might weigh in favor of allowing the operative pleading to stand until such time as a motion for summary judgment might be filed. In addition, the limitations period may run of certain unpleaded claims while the case is moving forward, and allowing an amended complaint may be an invitation to expand the scope of the claims.

Defense counsel should also consider filing a motion to dismiss under Fed. R. Civ. Pro. 12 (b)(6) (for failure to state a claim), on the grounds that the defendant did not present a claim for payment, or that the claim was not false. This is an important consideration where the defendant is charged with a novel theory of FCA liability.[21]

In addition to these more commonly filed motions, recent areas of increasing interest include motions to dismiss filed challenging the "materiality" of the alleged false claims and motions to dismiss on the grounds that the complaint did not allege that the defendant health care providers "presented" claims to the federal government for payment.

The growth of case law on the issue of presentment is fairly recent and worth considering. In *U.S. ex rel. Totten v. Bombardier Corp.*, a divided D.C. Circuit Court of Appeals affirmed the dismiss of a qui tam complaint on the grounds that presentment of alleged false claims to a federal grantee, rather than a federal officer or employer, did not satisfy the FCA's presentment requirement.[22] While a motion for rehearing was pending in *Totten* (which, incidentally, was ultimately denied), the Northern District of Alabama came to a similar conclusion in *U.S. ex rel. Atkins v. McInteer*, again holding that the complaint in that matter did not sufficiently allege that the defendant health care providers "presented" false claims where they made claims to Alabama's Medicaid office.[23] Thus, where the allegations against your client do not involve direct presentment of claims to a federal officer or employer, defense counsel should consider a motion to dismiss for failure to show "presentment" of the claim. DOJ has taken a strong position against the *Totten* type arguments and is likely to escalate their attention to these issues.

3. **Discovery**

FCA discovery will proceed as it would in any other matter: document requests and interrogatories, depositions and requests for admissions will occur as normal. However, of particular concern to defense counsel is the effects HIPAA's "privacy rules" have had on discovery in health care litigation. 42 U.S.C. § 1320d-6, enacted under Subtitle F, Title II of HIPAA, titled "Administrative Simplification," protects "individually identifiable health information" and sets penalties for the wrongful disclosure of such health information at $50,000 to $250,000 in fines and one to ten years in prison.[24]

Notably, the privacy rules allow entities to disclose protected health information without written authorization in the context of judicial and administrative proceedings and for law enforcement purposes.[25] Accordingly, disclosure is permitted in response to a "subpoena, discovery request, or other lawful process" if "the covered entity receive satisfactory assurance …that reasonable efforts have been made by such party to endure that the individuals who is the subject of the protected health information that has been requested has been given notice of the request," or the entity "received satisfactory assurance that reasonable efforts have been made…to secure a qualified protective order."[26]

Understandably, HIPAA has changed the way litigants share and maintain health care information during litigation. Particularly, in FCA disputes, where one party requests health care information, it is not uncommon for the respondent party to argue (whether by motion to quash a subpoena or otherwise) that it is unable to produce the requested information because it is protected by HIPAA, and under in many instances, under state law, as well. Again, the outcome

of such motions will depend both on the facts of the case and the jurisdiction in which the court is located.

4. Preparation for Trial

While only a small percentage of case go to trial, particularly where corporate defendants are involved, in the event that a case does go to trial, defense counsel should seek to limit evidence introduced against their client through the use of pre-trial motions in limine (which have especially far-reaching consequences in criminal matters, discussed supra).

III. DEFENDING HEALTH CARE FRAUD PROSECUTIONS

The government has several weapons with which it is able to prosecute health care fraud and abuse criminally, including the Anti-Kickback,[27] Medicare and Medicaid fraud,[28] the mail and wire fraud,[29] conspiracy,[30] false statements[31] and obstruction of justice statutes.[32] Much the same as with civil litigation, a criminal matter will begin, from the defendant's perspective, when it is served with a subpoena or contacted by the government seeking an interview. A defendant may also become aware of an impending criminal action upon execution of search warrants or subpoenas to related third parties.

A. Grand Jury Proceedings

Grand juries provide prosecutors two distinct advantages: (1) the secrecy of the matters before it; and (2) the permissible breadth of a grand jury investigation.[33] As to the former, of particular importance is the fact that defense attorneys are not granted access as to the nature of the proceeding. For this reason, it is particularly important that defense counsel attempt to identify the extent of the government's interest in their client (whether a target, subject or witness).[34] With regard to the second, "the grand jury can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."[35] A grand jury may compel production of evidence or testimony of witnesses as it feels appropriate. Notably, while Fed. R. Crim. Pro. 17(c) provides defendants the opportunity to quash or modify a grand jury subpoena if compliance would be "unreasonable or oppressive," the Supreme Court has interpreted this provision to favor the government.[36] Thus, it is difficult to successfully challenge a grand jury subpoena on their breadth or relevancy.

B. Indictment

Rule 7(c) of the Federal Rules of Criminal Procedure provides that the indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense

charged. Accordingly, an indictment is deemed sufficient if it: (1) states the elements of the offense charged; (2) fairly informs the defendant of the nature of the charge so that a defense may be prepared; and (3) enables the defendant to plead an acquittal or conviction as a bar against future prosecutions for the same offense. Upon receiving an indictment, defense counsel will want to assess whether the indictment is sufficient and, if not, whether filing a motion to dismiss the indictment is appropriate. Generally, the grounds for filing such a motion are that the crimes alleged do not exist based on the facts included in the indictment. Or that the prosecution has failed to articulate the elements necessary to support the crime charged.

C. Motions for Temporary Restraining Order and Preliminary Injunction

Typically, upon the inception of a claim where the government believes that the defendant may attempt to spend or hide the funds that it alleges were falsely acquired, the government will file motions for preliminary injunction and a temporary restraining order ("TRO") with its complaint in an effort to freeze the defendant's assets. In short, 18 U.S.C. § 1345 empowers the government to freeze the assets of a criminal suspect.[37] The TRO hearing is conducted ex parte and the motion is commonly granted where the government articulates probable cause to believe that a crime as been committed. Thereafter, the judge has ten days to hear the preliminary injunction motion. These motions have potentially far reaching consequences for defendants, among other things limiting their ability to conduct business, as well as to retain counsel.

D. Motions for Bond

There are two considerations when arguing for or against bond: (1) whether the defendant is a flight risk; and/or (2) whether the defendant is a danger to the community. In health care and white collar cases, the defendant's risk of flight is a primary consideration, and may be tied to where the defendant has money located and connections to foreign countries. If the defendant has large sums of money in foreign countries and strong family ties to those countries, the government may seek Pretrial Detention.

E. Pre-Trial Preparation

1. Required Government Disclosures and Motions to Dismiss

Under Federal Rule of Criminal Procedure 16, the government must, at the defendant's request, disclosure "the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial."[38] This applies equally to written or

recorded statements,[39] and to statements made by the representative of an organizational defendant that would bind the entity.[40] Furthermore, under the same rule, and upon a defendant's request, "the Government must furnish the defendant with a copy of the defendant's prior criminal record that is within the Government's possession, custody, or control if the attorney for the Government knows—or through due diligence could know—that the record exists."[41]

Similarly, at the defendant's request, the government must also allow the defendant to inspect and copy items: (1) material to preparing the defense; (2) the government intends to use the item in its case-in-chief at trial; or (3) obtained from or belonging to the defendant.[42] It must also disclose the results of any tests the defendant has been subjected to if: (1) the item is within the government's possession, custody, or control; (2) the attorney for the government knows—or through due diligence could know—that the item exists; and (3) the item is material to preparing the defense or the government intends to use the item in its case-in chief at trial.[43]

Case law also provides the basis for necessary government disclosures. For example, under the Supreme Court's holding in *Giglio v. United States*, the government is obligated to disclose potential impeachment information.[44] Furthermore, under *Brady v. Maryland*, the government's suppression of evidence favorable to the accused violates due process where the evidence is material to either guilt or punishment.[45]

The government's failure to abide by these disclosure requirements will prejudice the defenses case. Importantly, it may also fall under the category of prosecutorial misconduct. In instances of prosecutorial misconduct, it is imperative that defense counsel not overlook filing a motion to dismiss.

2. **Motions to Sever**

As the defense prepares their case for trial, certain other motions should be considered. For example, where there are multiple defendants in the same case, and one defendant, in order to defend him or herself, would have to present evidence that would otherwise implicate a co-defendant, it may be appropriate for the court to sever the case and try the defendants separately.[46] Accordingly, defense counsel should timely file motions to sever under *Bruton* which, in sum, apply to confessions and admissions of co-conspirators.

3. Motions to Exclude and Limit Evidence

Should a case go to trial, counsel should consider motions in limine and motions to exclude evidence wherever appropriate in an effort to narrow the field of evidence, given the important sentencing implications evidence introduced at trial has for clients.

F. Motions at Trial

The trial motions available in the context of a health care fraud case are identical to those available in any other case. These include: (1) motion for directed verdict, where the government has failed to prove an element of the offense; (2) motions challenging jury instructions; (3) motions for reconsideration; and (4) motions related to affirmative defenses. Regarding the last point, it is particularly important for defense counsel to note that there are notice requirements for affirmative defenses, including the assertion of an alibi, insanity and incompetency defenses.

IV. CONCLUSION

Health care fraud and abuse is a rapidly expanding field of government enforcement litigation. The above is meant to provide a foundation for thinking about your motions practice as this evolving area of the law continues to develop.

ENDNOTES

1. Mr. Ogrosky and Ms. Silverstein express their gratitude to Michelle Rogers, an associate in the Washington Office of Skadden, Arps, Slate, Meagher & Flom LLP, for her assistance in the preparation of this article.

2. 31 U.S.C. § 3729, et seq. (2000).

3. California, Delaware, the District of Columbia, Florida, Hawaii, Illinois, Louisiana, Massachusetts, Nevada, New Hampshire, New Mexico, Tennessee, Texas and Virginia all have FCA statutes comparable to the federal statute. Additionally, Arkansas, Colorado, Michigan, Montana, Nebraska, North Carolina, Oklahoma, Utah and Washington have state measures designed to combat false claims, though not modeled after the federal FCA. Skadden, Arps, Slate, Meagher & Flom LLP, Recent Trends and Developments in Federal, State, and Municipal False Claims Act Litigation, June 10, 2005, at § 2, 13-14.

4. 31 U.S.C. § 3729 (a).

5. Id. See also False Claims Act Cases: Government Intervention In Qui Tam (Whistleblower) Suits, DOJ, available at http://www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf (last visited March 13, 2006).

6. 31 U.S.C. § 3730 (b) (2000).

7. Id. at (d) (1) and (d) (2).

8. In addition to the complaint filed with the court, the relator must also serve the Department of Justice with a "disclosure statement" containing "substantially all the evidence in the possession of the relator about the allegations set forth in the complaint." False Claims Act Cases: Government Intervention In Qui Tam (Whistleblower) Suits, Department of Justice, available at http://www.usdoj.gov/usao/pae/ Documents/fcaprocess2.pdf (last visited March 13, 2006). The disclosure statement is not filed with the court and it is not provided to the defendant. Id.

9. 31 U.S.C. § 3730 (b).

10. Id.

11. Id.

12. 42 C.F.R. § 1006.1(a) (2004). The OIG-HHS has the authority to investigate civil and criminal allegations, and its subpoena power applies in both arenas.

13. Pub. L. No. 104-191, 110 Stat. 1936 (1996). HIPAA created 18 U.S.C. § 3486 (2000), which specifically authorizes the use of Administrative Subpoenas in the investigation of "a Federal health care offense." 18 U.S.C. § 3486(a) (1) (A) (i) (I) (2000). "Investigative demands differ from inspector general subpoenas in that the scope of the latter are limited to the statutory authority of the specific inspector general and civil investigations, whereas investigative demands can be directed more broadly to various public and private victims and must involve criminal investigations." U.S. Attorney's Criminal Resource Manual, Department of Justice, available at http://www.usdoj.gov/usao/eousa/ foia_reading_room/usam/title9/44mcrm.htm (last visited March 15, 2006).

14. 31 U.S.C. § 3733 (2000), another provision related to the FCA, gives the Attorney General administrative subpoena power in FCA cases.

15. See False Claims Act Cases: Government Intervention In Qui Tam (Whistleblower) Suits, Department of Justice, available at http://www.usdoj.gov/usao/pae/ Documents/fcaprocess2.pdf (last visited March 13, 2006).

16. Id.

17. Id.

18. Id.

19. See *Durham v. Business Mgmt. Assocs.*, 847 F.2d 1505, 1511 (11th Cir. 1988); Graham & Witten, Pre-trial Motions Practice in False Claims Act Litigation Against HealthCare Providers, American Bar Association, Health Law Section, Nov. 19-20, 1998 [hereinafter "Graham & Witten"] (describing the particularity requirement).

20. See id., citing *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 549 (8th Cir. 1997) (quoting *Commercial Property Invs., Inc. v. Quality Inns Int'l, Inc.*, 61 F.3d 639, 644 (8th Cir. 1995). See also *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1385 (D.C. Cir. 1981) (stating that to satisfy Rule 9(b), the complaint must allege the time, place and content of the alleged false claims, why the alleged claims were false, and what the claims were used to obtain).

21. See Graham & Witten (describing the effectiveness of a "falsity" claim as the basis for a Motion to Dismiss).

22. *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004).

23. *U.S. ex rel. Atkins v. McInteer*, 345 F. Supp. 2d 1302 (N.D. Ala. 2004).

24. 42 U.S.C. § 1320d-6 (2000).

25. 45 C.F.R. § 164.512(e) & (f) (2004).

26. 45 C.F.R. § 164.512(e) (1) & (2).

27. 42 U.S.C. § 1320a-7b (b) (2000).

28. 42 U.S.C. § 1320a-7b (a) (1) (2000).

29. Respectively, 18 U.S.C. §§ 1341 & 1343 (2000). See also 18 U.S.C. § 1346 (2000) (extending the scope of the federal mail and wire fraud statutes to protect the provision of "honest services").

30. 18 U.S.C. § 371 (2000).

31. 18 U.S.C. § 1001 (2000).

32. See, e.g., 18 U.S.C. §§ 1503, 1505, 1512, 1519 & 1520 (2000).

33. Fabrikant, Kalb, Hopson, Bucy, Health Care Fraud Enforcement and Compliance, Law Journal Press, at 6-0 [hereinafter "Health Care Fraud"].

34. See Section I. A. 1., discussed supra.

35. *United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950). See also Health Care Fraud at 6-10 (discussing the wide scope of grand jury investigations).

36. "[A] grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance." *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 301 (1991).

37. Specifically, it enabled the Attorney General to obtain an injunction or restraining order to prevent disposition of "property obtained as a result of… a Federal health care offense or property which is traceable to such violation." 18 U.S.C. § 1345 (a)(2) (2000). A "federal health care offense" is defined as a violation of or a criminal conspiracy to violate a list of criminal health-care fraud related statutes. 18 U.S.C. § 24 (2000).

38. Fed. R. Crim. Pro. 16 (a)(1)(A).

39. Fed. R. Crim. Pro. 16 (a)(1)(B).

40. Fed. R. Crim. Pro. 16 (a)(1)(C).

41. Fed. R. Crim. Pro. 16 (a)(1)(D).

42. Fed. R. Crim. Pro. 16 (a)(1)(E).

43. Fed. R. Crim. Pro. 16 (a)(1)(F).

44. *Giglio v. United States*, 405 U.S. 150 (1972).

45. *Brady v. Maryland*, 373 US 83 (1963).

46. See *Bruton v. United States*, 391 US 123 (1968) (holding that the introduction of a codefendant's statements against his codefendant during a joint trial was constitutional).