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Inside the False Claims Act: A General Counsel's View From Both Sides of the Table

By Steven S. Reed, Esq.

Certain words in health care will stop any general counsel (GC) in their tracks. Sentinel events such as a wrongful death, traumatic injury, life care plan and wrong-site surgery come to mind. However, without sounding crass, mistakes happen even with the best care. The damage can be managed, and usually, there is insurance. However, notice of a False Claims Act (FCA) suit strikes a different kind of fear: the federal government on the outside, a whistleblower on the inside, exponential damages and penalties, criminal charges and, if that's not enough, exclusion from Medicare or Medicaid, which is the corporate death knell for a health care company.This writing delves into the lifecycle of FCA litigation from the GC's perspective and whether it matters if the Department of Justice (DOJ) intervenes.

The False Claims Act: Yesterday's Law, Today's Challenge

For background, the FCA is a federal law that imposes liability on individuals and companies that knowingly defraud government programs. President Abraham Lincoln enacted the law in 1863 to combat fraud by contractors against the Union Army during the Civil War. Amended over the years to incentivize whistleblowers, the DOJ continues to employ the FCA, 31 U.S.C. §§ 3729-3733, and annually lists its trophies in the billions of dollars.

Suit may be brought by the federal government or a private citizen (a whistleblower, who is called a relator under the FCA) in a qui tam. The suit is filed under seal in federal court, which allows the government to investigate confidentially and decide if it wants to intervene and take over the suit.

When a GC learns of an FCA suit, the burning question is whether the government intervened or declined. In the past, declination would have been grounds for a sigh of relief, if not a whispered celebration. As discussed later, the stats are no longer so comforting.

Understanding Liability, Exposure and Internal Risk

To violate the FCA, a person doesn't need to have specific intent to defraud; deliberate ignorance or reckless disregard of the truth is enough. For the GC, this is one of the more difficult concepts to convey to even the most conscientious operators.

Beyond intent, multiple sit-downs are required to explain the FCA's treble damages and mandated penalties of $14,000 to $28,000 per claim, especially after the provider has submitted thousands or tens of thousands of claims over a short period of time, let alone over the six-year statute of limitations period. Also, short of complicated insurance discussions in London or Bermuda, there is likely no coverage for fraud.

Investigation, Counsel and Early Case Strategy

While it is unsettling, the GC must ensure none of the operators engaged in intentional fraud under the FCA's criminal provision. Eventually, the GC will set a reserve and appear before the Audit Committee to discuss the potential monetary damages, materiality and possible exclusion. Presenting to the Board can be stressful, but a respectful relationship between the GC and a seasoned audit chair is like a symphony.

Because of the FCA's risks, counsel steeled in FCA litigation is a requirement, followed by a comprehensive internal investigation. The GC must stay closely informed of the investigation (without any improper influence) in real time rather than wait on a final report.

The GC will have some potential defenses because not all FCA cases will survive a motion to dismiss. Were the claims knowingly false or the result of honest billing errors? Were they material to the government's decision to pay? Was the alleged fraud plead with sufficient particularity, which is not a given in a FCA suit? Was the information previously reported to constitute a public disclosure bar? What about the statute of limitations?

Trial or Settlement: The GC's Balancing Act

If the case proceeds, the GC must decide whether to have a mock trial. If so, the GC should attend with razor focus. Small nuances can affect the decision whether to try or settle the case, and this decision sits solely in the GC's lap, not with outside counsel. The GC should also attend some court proceedings to get a read on the judge and on outside counsel in the courtroom. The stakes are too high to leave anything to chance.

Mediation is essential in litigation, just as off-ramps are in any dispute. A calm and confident demeanor by counsel and the GC can be the difference in terms of whether or not a difficult case settles. Mediation prep does not begin on the day of or just before mediation—opposing counsel will meet your reputation well before the first hello. The hardest case I ever settled involved persuading opposing counsel to meet with me after my counsel laughed at him—years earlier.

If mediation is unsuccessful, all is not lost. Multiple mediations are increasingly common. In fact, the GC may strategically schedule one early to test the case before the parties harden their positions and legal spending races out of control. Many variables affect the timing of the mediation, including the investigation, the mock trial, opposing counsel, the judge and, of course, king cash.

Preparing for High-Stakes Litigation

As we approach the end of the FCA litigation cycle, it is time for another difficult decision—whether to add "bet the company" counsel to the litigation team. This is extremely sensitive, but it must be explored because of the grave FCA risks. It is not a bad reflection on the current team as lawyers have different skill sets. When adding trial counsel, my preference was to do so prior to the final mediation, and I wanted their appearances formally noted—messages matter. However, I preferred not to have them at the mediation, as I wanted to send a different message: New trial counsel was home preparing for trial while I was at the mediation in good faith.

Many years later, if the suit has not settled, buckle everyone up for the risk of a career—an FCA trial followed by a certain appeal.

The New Reality: Declinations No Longer Mean Relief

As stated at the beginning, a burning question in FCA cases was whether the DOJ intervened to take over the suit. Having prosecuted FCA cases as a U.S. attorney and defended them as a GC, I began sensing a change: More FCA cases are surviving the government's declination. The DOJ's settlement stats seem to confirm my intuition.

Recoveries/ Term	Recoveries/ U.S. Intervened	U.S. Declined	% of Recoveries Total	U.S. Declined
Obama I	$10.3 billion	$407.7 million	$10.7 billion	3.8%
Obama II	$12.0 billion	$920.3 million	$12.9 billion	7.1%
Trump I	$8.0 billion	$1.3 billion	$9.3 billion	14%
Biden	$6.2 billion	$2.4 billion	$8.6 billion	28%

Only about 4% of the FCA recoveries in the first Obama administration occurred when the DOJ declined. The percent of recoveries despite DOJ declination doubled under each successive president to a whopping 28% under the Biden administration.

The Evolving Landscape

In sum, the days of the GC's quiet celebration if the DOJ declined to intervene in the FCA suit are long past. High-powered FCA trial firms are all too happy to fill in for the government—for a handsome fee, of course. However, the GC can, and must, counter with good options of their own.

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