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Health Law

By: Roger R. Clayton, Mark D. Hansen and Jesse A. Placher
Heyl, Royster, Voelker & Allen

What Every Litigator Needs to Know About the Fraud Enforcement and Recovery Act of 2009

The Fraud Enforcement and Recovery Act of 2009 ("FERA"), Pub.L.No. 111-21, 123 Stat. 1617, will significantly impact the federal False Claims Act ("FCA"), 31 U.S.C. §§3729-3733, which is a mechanism to recover tax funds paid under fraudulent claims. The FERA passed with an overwhelming majority in both the House and Senate before the President signed FERA into law on May 20, 2009. FERA significantly expands FCA liability provisions. FERA also impacts FCA procedural provisions by, among other things, providing for new investigative tools and making it easier for *qui tam* relators to bring and maintain FCA suits on behalf of the government.

The New Expanded Scope of FCA Liability

Under FERA, FCA liability now hinges upon whether the false record or statement was "material" to getting a false claim paid. FERA removed the "intent" requirement associated with getting a false claim paid and now provides for a broader definition of "material" than had generally been adopted by the courts.

FCA liability has also been expanded to include any false claim for government payment regardless of whether the new claim was submitted directly to a government official or employee. FCA liability now attaches if a false claim is presented for payment or approval to any entity.

FERA also expands the scope of the types of claims submitted for payment or approval that trigger FCA liability. The new law recognizes as a claim demands for money or property to which the U.S. government does not even have title. The scope of FCA liability under this standard appears virtually limitless.

Next, FERA defines "obligation," a term that had once been left to the courts for interpretation. The new law imposes an "obligation" to pay or re-pay government funds when there is, among other things, the retention of an overpayment. As will be discussed, this amendment may have a significant impact on Medicare overpayments.

FERA also expands the scope of liability under the conspiracy provisions of the FCA by extending FCA liability to a conspiracy to violate any FCA requirement.

FERA dramatically increases the scope of whistleblower employment discrimination protection by providing an independent federal cause of action for alleged retaliation aimed at employees engaged in efforts to stop an FCA violation.

Finally, FERA includes a new provision imposing mandatory liability for the government's costs associated with recovering penalties and damages from those charged with violating the FCA.

FERA's Impact on FCA Procedural Provisions

FERA allows the government to further delay its decision whether to intervene in a *qui tam* suit. Such delay results in lengthy investigations and litigation, which ultimately increases the costs of litigation and undermines the ability of businesses, including healthcare providers, to defend themselves.

Next, the new law provides that the government may share *any* information with a *qui tam* relator if deemed necessary to the FCA investigation, specifically allowing a relator to obtain information outside his personal knowledge to support a *qui tam* suit. Increased sharing of information for investigative purposes increases the likelihood that those businesses already subject to potential liability under the FCA could be subject to further state or local government investigations and causes of action.

Finally, FERA provides for retroactive application of certain amendments to the FCA, including amendments to the statute of limitations. These retroactive provisions generate constitutionality questions and may allow relators a second chance or additional time to file a claim.

Why FERA Applies to the Healthcare Industry

The primary purpose of FERA is to target potential fraud involving recipients of economic stimulus funds in the financial services industry. But, the new law's changes to the FCA, particularly to the scope of FCA liability, will significantly affect the healthcare industry.

The healthcare industry must take note of the definition of "obligation" as it pertains to retained overpayments from Medicare. FERA only imposes liability for a knowing and improper retention of an overpayment, but it is unclear when FCA liability attaches. Typically, Medicare providers reconcile their accounting at the end of the fiscal year to determine overpayments, if any. Those overpayments are not returned until that time. Legislative history suggests that FERA was not intended to interfere with this process and does not impose liability for a simple, permitted retention of an overpayment. *See* Senate Judiciary Committee Report 111-10, "Fraud Enforcement and Recovery Act of 2009," p. 15 (Mar. 23, 2009). Courts, however, are not bound by legislative history. Accordingly, there is no assurance that courts will agree that the retention of an overpayment permitted by statute will prevent FCA liability.

FERA also affects Medicaid. Although courts generally hold that potential FCA liability extends to Medicaid claims, it has been disputed whether claims to Medicaid satisfy the requirements of an action under the FCA. FERA was intended, at least in part, to dispel that notion. *See* Senate Judiciary Committee Report 111-10, "Fraud Enforcement and Recovery Act of 2009," p. 11 (Mar. 23, 2009). The final version of FERA includes language to clarify that FCA liability extends to all false claims submitted to state-administered Medicaid programs.

Conclusion

Because FERA was originally intended to address fraud in financial institutions, many practitioners did not expect that FERA would affect the healthcare industry. FERA significantly expands the potential scope of liability and provides numerous procedural changes that may increase the number of FCA claims. Thus, defense counsel representing healthcare organizations regarding FCA claims should carefully review FERA and alert their clients to its potential pitfalls.

About the Authors

Roger R. Clayton is a partner in the Peoria office of *Heyl, Royster, Voelker and Allen* where he chairs the firm's healthcare practice group. He also regularly defends physicians and hospitals in medical malpractice litigation. Mr. Clayton is a frequent national speaker on healthcare issues,

medical malpractice and risk prevention. He received his undergraduate degree from Bradley University and law degree from Southern Illinois University in 1978. He is a member of the Illinois Association of Defense Trial Counsel (IDC), the Illinois State Bar Association, past president of the Abraham Lincoln Inn of Court, past President and board member of the Illinois Association of Healthcare Attorneys, and past president and board member of the Illinois Society of Healthcare Risk Management and co-authored the Chapter on Trials in the IICLE Medical Malpractice Handbook.

Mark D. Hansen is a partner in the Peoria office of *Heyl, Royster, Voelker & Allen*. He has been involved in the defense of cases involving catastrophic injury, including the defense of complex cases in the areas of medical malpractice, products liability, and professional liability. Mark has defended doctors, nurses, hospitals, clinics, dentists, and nursing homes in healthcare malpractice cases. He received his undergraduate degree from Northern Illinois University and law degree from University of Illinois College of Law. Mark is a member of the Illinois Association of Defense Trial Counsel and is a co-chair of the Young Lawyers Committee, former ex officio member of the Board of Directors, and has served as chair for various seminars hosted by the IDC. He is also a member of the Illinois Society of Healthcare Risk Management, the Abraham Lincoln American Inn of Court, and the Defense Research Institute.

Jesse A. Placher is a 2007 Fall Associate in the Peoria office of *Heyl, Royster, Voelker & Allen*. He received his undergraduate degree from the University of Virginia in 2004 and law degree from Southern Illinois University in 2007. During law school, he was a member of the SIU Trial Team and was awarded the Order of the Barristers in 2007. Following graduation, he joined the firm's Peoria office in August 2007.

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Illinois Association of Defense Trial Counsel, PO Box 3144, Springfield, IL 62708-3144, 217-585-0991, idc@iadtc.org