2015 Multimillion-Dollar Settlements Showcase Protection of Whistleblowers

By Stephen Danz

In 2015, California accounted for approximately 25 percent of all health care related False Claim Act (FCA) cases. From the ones unsealed, the average settlement amount recorded is approximately $6 million per case. The following article will briefly cover California's FCA, laws protecting whistleblowers and recent cases from 2015 exemplifying the types of health care-related complaints brought by whistleblower litigants or qui tam relators. . With increasing and frequent monetary awards, relators are emboldened to continue reporting their employer's misdeeds and indirectly save the taxpayers millions of dollars that would otherwise illegally end up with corrupt companies.

Laws & Protections

California Department of Justice's Office of the Attorney General has an FCA Unit that enforces the FCA and prosecutes FCA violations. Notably, the individual who brings the FCA qui tam action must do so with enough specifics or a court will dismiss the case. To show that an organization committed FCA violations, a relator must prove each of the following three elements by a preponderance of the evidence. First, the relator must prove the defendant made a claim or a statement to get the government to pay money on a claim. Second, the claim or statement was false or fraudulent. Finally, the defendant knew that the claim or statement was false or fraudulent. The defendant must have intentionally tried to cheat the government. In a landmark case, a court used the test of whether a claim was underpinned by fraud rather than merely being false (*City of Pomona v. Superior Court*, 89 Cal. App. 4th 793, 802 (2001)). Finally, as of this writing, the California FCA has an additional administrative hurdle requiring government employees to exhaust internal reporting procedures before filing a qui tam action (although, this burden is no longer required in claims involving MediCal).

To support the FCA, California has several laws that protect whistleblowers that go further than their federal counterparts. In fact, Labor Code Section 1102.5 prohibits retaliation against employees who "blow the whistle" by notifying a government agency or who refuse to participate in activity that would violate any laws or regulations in the workplace. This law was greatly expanded in the past year by extending protection to employees who report suspected behavior internally to a person with authority over the employee or to another employee with the authority to investigate, discover or correct the reported activity. There are also specific laws that prohibit retaliation against employees who report to a government entity any fraudulent billing improperly submitted to the government for reimbursement (Government Code Section 12653 et al.).

Most importantly, within the health care industry, California law prohibits retaliation against patients, physicians, nurses and medical staff who inform the government or its agencies on patient care issues at a health care facility. (Health and Safety Code Section 1278.5.) California's Whistleblower Protection Act specifically protects state employees against retribution from reporting waste, fraud, abuse of authority or violation of law. (Government Code Sections 8547-8547.12.)

Most Notable California Cases of 2015

In March, several Orange County surgery centers settled for $71 million after allegations that the clinics entered into a scheme where beneficiaries underwent unnecessary medical procedures in return for receiving free cosmetic surgeries. The clinics also billed the cosmetic surgeries, such as liposuction and breast augmentation as medically necessary procedures.

In June, a large skilled nursing facility (SNF) chain named, Hebrew Homes Health Network, reached a $17 million settlement with the government when the former CFO alleged that the SNF paid kickbacks to several individuals for hiring sham medical directors. The scheme involved the employment of several physicians as medical directors where they barely performed medical director duties. Instead, these physicians referred Medicare and MediCal patients to the SNFs. Some additional laws implicated in this case were the Anti-Kickback Statute and Stark Law.

In October, Millennium Health of San Diego settled FCA allegations by agreeing to pay $256 million to the federal government. The whistleblower allegations in-

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cluded claims that Millennium billed Medicare and MediCal for medically unnecessary urine, drug and genetic testing, provided physicians free urine drug test cups and had standing orders to physicians to authorize excessive tests. As a result, the whistleblowers net around $30 million in recovery.

Another recent case against a SNF chain in California, Ensign, Inc., resulted in the SNF operating company settling with the Department of Justice for $48 million for submitting false billing to Medicare where the underlying therapies were not medically necessary. Specifically, the complaint alleged that the SNFs inflated billing, such as speech, occupational and physical therapy for services that were not medically necessary or even provided altogether. These types of upcoding patterns have faced increased scrutiny by Medicare contractors who are entrusted in reviewing, auditing and reporting the practices by SNFs.

Conclusion

The FCA is one of the government's primary tools to combat fraud, waste and abuse in the Medicare and MediCal programs. A violation may subject the wrongdoer to substantial penalties per violation, plus treble damages sustained by the government. California's FCA is modeled after the federal FCA. Often, the defendants settle with the government and submit to the monitoring of their care through a comprehensive compliance program called a Corporate Integrity Agreement (CIA). These CIAs are listed on the Office of Inspector General website.

The aforementioned settlements and CIAs will certainly pave the way for other health care practitioners, contractors, entities and employees to report unlawful activities, inappropriate medical care or improper submissions of claims for government reimbursement. Moreover, the clarified and improved whistleblower protections will embolden relators to bring forth their claims. Increased reporting of whistleblowing is a welcomed change and one that should continue to flourish under a system of accountability, compliance and transparency.