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Expert Analysis

The False Claims Act And Corporate Integrity Agreements

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In False Claims Act (FCA) health-care investigations, a frequently asked question, among corporate officers and shareholders alike, is: When will the matter finally be resolved? Time and time again, these cases result in settlements, where the defendant company pays a substantial amount to the government—often without admitting or denying the essential allegations of the case—and agrees to be bound by a corporate integrity agreement (a CIA), all in exchange for the opportunity to announce that it has put the matter behind it.[1] But the finality of these resolutions may be somewhat illusory, as the CIA, entered into to bring the matter to a close, can seed the ground for future FCA investigations.

Until recently, CIAs were seen as contractual obligations between the settling company and the government, typically with the Health and Human Services Office of the Inspector General (OIG), where the company commits to heightened compliance standards.[2] A violation of the agreement—say, the settling company failing to declare certain "reportable events"—would allow the OIG to impose monetary penalties or perhaps even exclude the company from federal health-care programs,[3] but did not appear to open up new lines of attack under the FCA.

Several recent U.S. federal court decisions, however, demonstrate that a company's alleged lack of fidelity to its contractual commitments under a CIA may also support FCA charges. Indeed, these courts have recognized "reverse false claims" actions under the FCA brought by third-party relators, predicated on a company's failure to report and pay penalties arising from its alleged violations of a CIA.

This article examines the recent decisions that recognize potential FCA liability based on an alleged CIA violation, and analyzes them against competing decisions that have dismissed such claims, noting the issues that a company should keep in mind when confronted by the need to enter into a CIA as part of a negotiated settlement.

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Several recent federal court decisions demonstrate that a company's alleged lack of fidelity to its contractual commitments under a corporate integrity agreement may also support False Claims Act charges.

Potential FCA Liability

At least three U.S. federal courts have recognized a source of FCA liability where few defendant companies had thought to look: within the terms of a corporate integrity agreement. The relators in these cases alleged FCA "reverse false claim" violations, whereby liability results when a defendant company avoids the payment of money owed to the government. One element of a "reverse false claim" is that the defendant has sought to "conceal, avoid, or decrease an *obligation* to pay money to the government."[4] "An obligation cannot be merely a potential liability; instead…a defendant must have had a *present duty* to pay money…."[5]

The terms of a standard CIA, however, often require the OIG to determine whether a penalty is appropriate before the offending company is obligated to pay it. Therefore, a central issue before the courts in these recent cases was whether the defendant companies owed an "obligation" to pay the government as required by the FCA, or whether they merely held a "contingent obligation," subject to the OIG's discretion, which would not satisfy the FCA "obligation" requirement.[6]

In July 2015, two former employees/relators in *U.S. ex rel. Boise v. Cephalon* successfully alleged a "reverse false claim" violation against Cephalon, based on its alleged violation of a CIA.[7] The relators pointed to the CIA as establishing Cephalon's "obligation" to pay stipulated penalties after it failed to report an unlawful kickback scheme.[8] The Pennsylvania district court held that Cephalon's contractual responsibility under the CIA to pay stipulated penalties constituted an "obligation" for FCA purposes.[9] The court went on to clarify that the contractual nature of the CIA—despite the particularities of its terms, which afforded the OIG discretion in exacting penalties—was enough to establish an FCA "obligation."[10] Based on this reasoning, the court denied Cephalon's motion to dismiss.

Last fall, another former employee/relator was similarly successful alleging a "reverse false claim" violation against Omnicare, in *Ruscher v. Omnicare*.[11] Years before, Omnicare had entered into a CIA as part of a settlement agreement, whereby it was required to establish a disclosure program and annually certify its compliance with all CIA requirements.[12] Under the CIA, Omnicare's failure to comply with its CIA obligations "may lead to the imposition of [stipulated] monetary penalties."[13] Based on the relator's allegations that Omnicare failed to report an "ongoing illegal kickback scheme," the Texas district court denied defendant's motion to dismiss the complaint.[14] Notably, the court held not only that a "breach of contract can give rise to an 'obligation' under the [FCA],"

but the fact that the OIG exercised discretion in determining whether a stipulated penalty was appropriate did not preclude FCA liability.[15]

Finally, in *U.S. ex rel. Matheny v. Medco Health Solutions*, former employees/relators alleged FCA violations against Medco Health Solutions and related parties (collectively, "Medco").[16] Relators alleged that Medco entered into a CIA with the government requiring it to remit payments lacking documentation or made in error.[17] Medco, however, had allegedly concealed "approximately $69 million in [o]verpayments that, under the CIA, should have been remitted to the government."[18]

The U.S. Court of Appeals for the Eleventh Circuit declined to dismiss the relators' "reverse false claim" allegation, finding that they had "alleged with particularity the existence of an obligation to pay money to the government," as "[a]n express contractual obligation to remit excess government property is a definite and clear obligation for FCA purposes."[19]

The 'Obligation' Question

For these three courts, upholding "reverse" FCA charges based on alleged violations of a CIA involved finding that the company's responsibility under the CIA to pay stipulated penalties constituted a non-contingent "obligation" under the FCA. That finding rests on three propositions: (1) the source of the defendant company's obligation to pay a stipulated penalty (i.e., the CIA) is contractual; (2) the "existence of a contractual obligation to pay does not typically depend upon the timing of the demand for payment;"[20] and (3) therefore it does not matter that the OIG must first determine whether a penalty is appropriate before the defendant company must pay.

According to this view, the court considers neither the specific terms of the contract nor the timing of the payments.[21] This leaves a defendant company with little wiggle room to dismiss "reverse false claim" actions based on alleged violations of a CIA. The breach of the defendant company's obligation is no more "contingent" on the OIG's determination than a typical defendant's breach of contract is "contingent" upon the opposing party's decision to sue.[22] In other words, because of the contractual nature of a CIA, any stipulated penalty therein likely constitutes a non-contingent "obligation" for purposes of an FCA "reverse false claim."

But not all courts share this opinion. Last year, in *U.S. ex rel. Booker v. Pfizer*, the Massachusetts district court dismissed a "reverse false claim" suit based on Pfizer's alleged violations of a CIA.[23] Unlike the other courts, the Booker court found that the specific terms of the CIA and the timing of the penalties do matter.[24] The court focused on the fact that, under the terms of the CIA, defendant Pfizer's "failure to comply '*may* lead to the imposition' of the stipulated penalties if the OIG 'determin[es] that stipulated penalties are appropriate."[25]

Based on this reading of the contractual terms, the court reasoned that "any obligation to pay did not arise merely upon the occasion of reportable events….The obligation to pay would only arise upon the OIG's decision to assess stipulated penalties."[26] Thus, according to *Booker*, the mere fact that the source of a defendant company's penalties is contractual does not end the analysis: The court may still look at the terms of the agreement and the timing of the payments.

Avoiding FCA Liability

A company's ability to dismiss allegations of FCA violations premised upon a breach of a CIA obligation will depend largely on which analysis is applied—the Booker analysis, which looks at the terms of the CIA, or the Cephalon analysis, which does not. Under the Booker analysis, a company will do well to negotiate terms that emphasize the discretionary aspect of the stipulated penalties. If the penalties are imposed only after the OIG deems them appropriate—i.e., if they are contingent on governmental discretion—then they will likely not satisfy the "obligation" element under the FCA. This is clearly the friendlier analysis for a company looking to avoid subsequent FCA charges upon an alleged breach of its CIA.

A company's ability to dismiss allegations of False Claims Act violations premised upon a breach of a corporate integrity agreement obligation will depend largely on which analysis is applied—the Booker analysis, which looks at the terms of the agreement, or the Cephalon analysis, which does not.

Dismissing FCA allegations in jurisdictions that apply the Cephalon analysis will be more difficult, but even though the Cephalon court dismissed the argument that a CIA's stipulated penalties are merely "contingent obligations," it left the door open to another argument. A defendant company may still argue that payment of a stipulated penalty is not a contractual "obligation" under the FCA.[27]

A contractual obligation—in addition to being non-contingent—is one that arises "out of an economic relationship between the government and the defendant…under which the government provides some *benefit* to the defendant" in exchange for an *expected payment*.[28] Therefore, a defendant company may argue (1) that being spared a monetary penalty does not constitute a proper "benefit," or (2) that a stipulated penalty does not constitute an "expected payment" to the government. These arguments were not considered by the Cephalon court, and represent another avenue to explore in contesting a CIA-based "reverse" FCA allegation.

1. A CIA is typically part of a settlement agreement between the government and a company "seeking to resolve civil and administrative health care fraud cases…." See *Public Citizen v. U.S. Dep't of Health & Human Servs.* (*Public Citizen I*), 975 F.Supp.2d 81, 88 (D.D.C.2013). Under a CIA, a settling company may be subject to heightened corporate governance guidelines and ethics compliance programs. See *In re Abbott Depakote S'holder Derivative Litig.*, 909 F.Supp.2d 984, 991 (N.D. Ill. 2012).
2. "In return for these benefits, under the CIA, the compan[y] must agree to enhanced compliance measures, subject to auditing by an outside independent party and monitoring by the OIG." *Public Citizen I*, 975 F.Supp.2d at 88.
3. A CIA allows a settling company to "avoid costly exclusion from participation in Federal health care programs." Id.
4. To establish a reverse false claim, a relator must prove: (1) a false record or statement; (2) the defendant's knowledge of the falsity; (3) that the defendant made, used, or causes to be made or used a false statement or record; (4) for the purpose to conceal, avoid, or decrease an obligation to pay money to the government; and (5) the materiality of the misrepresentation. See 31 U.S.C. §3729(a)(7) (emphasis added).
5. *United States v. Q Int'l Courier*, 131 F.3d 770, 773 (8th Cir. 1997) (emphasis added).
6. See *Am. Textile Mfrs. Inst. v. The Ltd., Inc.*, 190 F.3d 729, 738 (6th Cir. 1999) ("A defendant does not execute a reverse false claim by engaging in behavior that might or might not result in the creation of an obligation….Contingent obligations—those that will arise only after the exercise of discretion by government actors—are not contemplated by the statute.").
7. No. CIV.A. 08-287, 2015 WL 4461793 (E.D. Pa. July 21, 2015).
8. Id. at *1.
9. Id. at *14.
10. Id. at *11.
11. No. 4:08-CV-3396, 2014 WL 4388726 (S.D. Tex. Sept. 5, 2014).
12. Id. at *1.
13. Id. at *2.
14. Id. *2-7.
15. Id. at *5.
16. 671 F.3d 1217 (11th Cir. 2012).
17. Id. at 1220-21.
18. Id.
19. Id. at 1223.
20. *Cephalon*, 2015 WL 4461793 at *11.
21. Id.; see also *U.S. ex rel Huangyan Imp. & Exp. Corp. v. Nature's Farm Products,* 370 F.Supp.2d 993, 1000 (N.D. Cal. 2005).
22. *Cephalon*, 2015 WL 4461793 at *11.
23. 9 F.Supp.3d 34 (D. Mass. 2014).
24. Id. at 49-50.
25. Id. at 49 (emphasis added).
26. Id. at 50.
27. *Cephalon*, 2015 WL 4461793 at * 8.
28. *U.S. ex rel. Branch Consultants v. Allstate*, 668 F.Supp.2d 780, 811-12 (E.D. La. 2009) (emphasis added).