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Outlook 2024: FCA Cases May Not Always Go It Alone; MA Enforcement Spreads to Providers

By Nina Youngstrom

When Taxpayers Against Fraud (TAF)—a national coalition of whistleblower attorneys—recently changed its name to The Anti-Fraud Coalition, it was more than symbolic. The new name stands for the proposition that False Claims Act (FCA) complaints in 2024 and beyond will increasingly be intertwined with other kinds of cases—from the Securities and Exchange Commission (SEC), Internal Revenue Service (IRS), Federal Trade Commission and Commody Futures Trading Commission (CFTC).

"A lot of financial fraud cases have a False Claims Act component," said Jeb White, president of The Anti-Fraud Coalition. "More law enforcement eyes are looking at fact patterns, and it's more likely these cases will move forward to resolution. This is important in the health care world because of the increased presence of private equity." About 150 members of his organization are now cross-admitted, which converges nicely because like the FCA, the SEC, IRS and CFTC all have whistleblower programs, White noted. This heightens the risk for health care organizations.

The fusion of FCA and financial fraud allegations is one prediction for 2024 in the enforcement arena. Other expectations for the year include the pursuit of fraud related to private equity, COVID-19 relief funds, Medicare Advantage (MA), remote monitoring and labs. Court decisions affecting the outcome of FCA cases also are anticipated.

It will be a busy year, said former federal prosecutor Pam Johnston, with Foley & Lardner LLP in Los Angeles. "I think we're in an upswing period of prosecutions." It started in the second half of 2022, when the U.S. Department of Justice (DOJ) sent people back to working in the office because COVID-19 had died down. "2024 will be like late 2022 and 2023—a lot of subpoenas and civil investigative demands" in kickback cases involving labs and physician arrangements, Johnston said.

And as the year unfolds, it will become clearer how the latest revisions to DOJ's corporate enforcement policy (CEP), which applies to the criminal division, will play out with line prosecutors, said former U.S. Attorney Matthew Krueger, with Foley & Lardner LLP.[1] The CEP gives tangible rewards to companies that come forward and reveal their involvement in possible criminal misconduct. When criminal prosecution is warranted even with self-disclosure, DOJ will recommend a 50% to 75% reduction of the fine range from the U.S. Sentencing Guidelines, except in cases of criminal recidivists. "I'm also curious to see whether" DOJ's civil division and U.S. attorneys' offices will embrace the new mergers and acquisitions safe harbor, Krueger said.[2] To qualify for the safe harbor, companies are required to voluntarily self-disclose to DOJ any criminal wrongdoing they uncover at an acquired entity within six months of the closing date.

"There has always been a huge incentive for companies to cooperate," Johnston said. "What's different is that [Deputy Attorney General] Lisa Monaco and others have tried to make it crystal clear that cooperation will require providing incriminating evidence on insiders."

The Thomas Dissent: What Will it Mean for the FCA?

Meanwhile, the year will bring movement toward resolution of two compelling FCA issues, said attorney Colette Matzzie, with Phillips & Cohen LLP in Washington, D.C. One is the fallout from a dissenting opinion in a 2023 U.S. Supreme Court ruling that could conceivably be an existential threat to the whistleblower aspect of the FCA—although she doubts it.

The Supreme Court ruled 8-1 that DOJ is free to dismiss a whistleblower lawsuit if it has intervened at any stage of the game and articulates a proper basis for dismissal.[3] The case centered on a whistleblower's allegation that a company was helping hospitals bill Medicare for inpatient admissions that should have been outpatient services. After investigating, DOJ dismissed the case and triggered the whistleblower's appeals. The federal district court and U.S. Court of Appeals for the Third Circuit upheld DOJ's decision, which was endorsed by the Supremes.

But in a dissent, Justice Clarence Thomas "raised the question of whether a constitutional challenge might be had to the FCA under Article II" and the appointments clause, Matzzie said.

His dissent has changed the game, with defendants now arguing in FCA cases that the law isn't constitutional, she explained. So far, the government and whistleblowers are winning, and Matzzie is confident their arguments for constitutionality are strong, but now, in every case, this has to be addressed.

Progress is also expected this year on a split among federal courts about the connection between a violation of the Anti-Kickback Statute (AKS) and the FCA. It has its roots in an AKS amendment from the Affordable Care Act (ACA), which declared that all claims "resulting from" AKS violations are false claims. DOJ and whistleblowers take the position that AKS violations taint claims and assume falsity. Some courts, including the U.S. Court of Appeals for the Third Circuit, agree, but other courts, including the U.S. Courts of Appeals for the Sixth and Eighth circuits, insist on "but-for causation," which requires DOJ to prove that kickbacks directly cause the submission of false claims. In other words, without an inducement from a hospital, for example, the physician wouldn't have referred the patient. But-for causation is a harder standard for DOJ and whistleblowers to satisfy than proximate causation.

Now the First Circuit, which accepted an appeal in an FCA case involving Teva Pharmaceuticals, will weigh in on but-for causation, Matzzie said. She hopes it aligns with the Third Circuit, but wherever the chips fall, it would be good for both sides to have a definitive answer. Ultimately, but-for causation "may be winding its way toward the Supreme Court."

Allegations Against Private Equity Evolve

In terms of enforcement targets, experts predict private equity will be high on the hit list, but with a better idea of how to frame the allegations. When private equity firms appeared on the radar screen of TAF a decade ago, White said the alleged violations were more blatant. The private equity firms offered sweetheart deals to physicians who were looking to preserve their independence, but they sometimes amounted to kickbacks for referrals, he said. "This is a prime example where you need a whistleblower," White contends. "On the outside, everything is fine, and 98% of the time it is. You need a corporate insider to explain" the 2% of the time it isn't.

Other types of allegations driven by private equity are now showing up, such as private equity firms reducing the nurse-patient ratio to save money that's used to improve compensation, White said. "You're admitting more patients and when you have quotas and standards watered down, you need whistleblowers to shine the light." He said the government is encouraging relators' counsel to come forward with these cases. This may be a growth area for whistleblower cases because investors are parking their money in health care. It's viewed as a safer

return than real estate right now, although that may shift as interest rates drop, White said.

The HHS Office of Inspector General (OIG) briefly touches on private equity in its new *General Compliance Program Guidance*.[4] Private equity and other entrants into health care ownership like Amazon raise questions about "the impact of private ownership on the delivery of care," said former federal prosecutor Anthony Burba, with Barnes & Thornburg LLP in Chicago. "It will be interesting to see if a lot of traditional ownership structures need to be re-evaluated in light of OIG's acknowledgement."

COVID-19 relief and prescription opioid enforcement are top priorities of DOJ's fraud section, which plans to hire 70 more prosecutors to work these cases, Burba said. "I would anticipate this is the year we would start to see a lot of qui tams related to COVID relief fraud start to be unsealed and get a sense of how the civil division of DOJ will handle those cases."

Not Just the Usual MA Fraud Allegations

MA in various ways will have a bullseye on its back this year. For one thing, there will continue to be FCA complaints against MA plans, mostly around inaccurate diagnosis codes that increase reimbursement under the risk-adjustment program, Matzzie said. For example, whistleblower lawsuits are pending against UnitedHealthcare and Kaiser.

"We may also see other kinds of schemes and whistleblowers coming forward" in the MA and commercial payer space, she said. For example, the government requires insurers to spend at least 85% of their premiums on health care (known as the medical loss ratio). "There's a question of whether managed care plans have devoted the appropriate percentage of federal funds to health care versus administrative expenses and if insiders think those numbers have been manipulated; that's an important area for the government to police," Matzzie said.

DOJ and whistleblowers also will increasingly pursue providers for MA-related overpayments, Matzzie predicted. That was the allegation in the settlement with Lincare Inc., an in-home respiratory care company, which agreed to pay $29 million to settle false claims allegations over its billing for oxygen equipment. Lincare allegedly billed Medicare Part B and MA plans for longer than the 36 months allowed.[5] For years, the government left MA overpayments on the table when it went after traditional Medicare overpayments, but that's starting to change, even though the damages aren't as obvious to calculate. But MA enrollment is now 50% of total Medicare enrollment. "DOJ has made it clear that MA overpayments are a component of damages," Matzzie said.

Attorneys also expect enforcers to target remote monitoring. One predictor: DOJ Dec. 18 said BioTelemetry Inc. and its subsidiary, LifeWatch Services Inc., agreed to pay $14.7 million to settle false claims allegations they billed a higher level of remote cardiac monitoring than physicians had intended to order or was medically necessary.[6]

Contact White at jwhite@taf.org, Matzzie at cmatzzie@phillipsandcohen.com, Burba at tony.burba@btlaw.com, Johnston at pjohnston@foley.com and Krueger at mkrueger@foley.com.

1 U.S. Department of Justice, "Criminal Division Corporate Enforcement and Voluntary Self-Disclosure Policy," January 17, 2023, https://bit.ly/3ZQDs8e.
2 Lisa O. Monaco, "Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions," U.S. Department of Justice, Office of Public Affairs, speech, October 4, 2023, https://bit.ly/3thbIxz.
3 Nina Youngstrom, "Supreme Court OKs Leeway for DOJ in Dismissing Whistleblower Cases," *Report on Medicare Compliance* 32, no. 23 (June 26, 2023), https://bit.ly/3tHeMUt.

4 U.S. Department of Health and Human Services, Office of Inspector General, *General Compliance Program Guidance*, November 2023, https://bit.ly/3FREWGe.
5 Nina Youngstrom, "Lincare Pays $29M in FCA Case Over MA, FFS Medicare; Compliance Allegedly Didn't Help," *Report on Medicare Compliance* 32, no. 33 (September 18, 2023), https://bit.ly/41W6Pav.
6 U.S. Department of Justice, Office of Public Affairs, "BioTelemetry and LifeWatch to Pay More than $14.7 Million to Resolve False Claims Act Allegations Relating to Remote Cardiac Monitoring Services," news release, December 18, 2023, https://bit.ly/4aRG8rv.