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ERISA Discretionary Review in the Wake of *MetLife v. Glenn*

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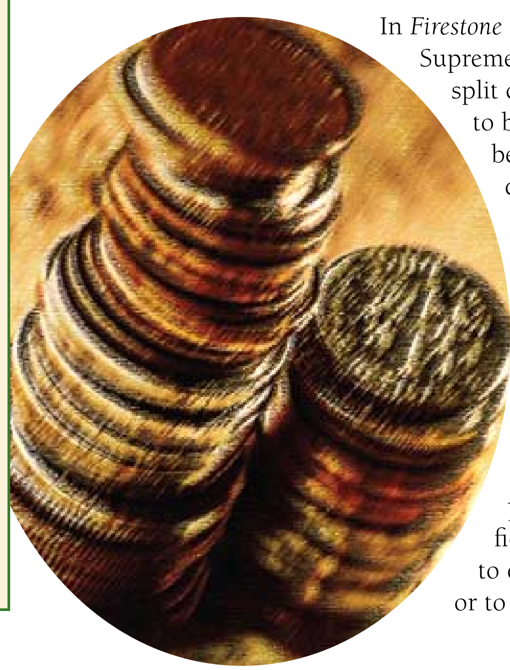
On June 19, 2008, the United States Supreme Court decided *Metropolitan Life Insurance Co. v. Glenn*,[1] revisiting the contentious issue of how to apply the deferential "arbitrary and capricious" standard of review in denial of welfare plan benefits cases under the Employee Retirement Income Security Act of 1974 (ERISA).[2] The United States Congress did not expressly address the standard of review to be applied by a court reviewing a plan's decision to deny a benefits claim when it enacted ERISA over thirty years ago.[3] Consequently, the federal circuits were left to adopt their own approaches to the standard of review question. Over time, a split amongst the federal circuits developed concerning the significance in the standard review process of the so-called structural conflict of interest that exists when an ERISA plan's claims administrator is also the funding source for payment of benefits under the plan. The *Glenn* decision was expected to resolve this circuit split and bring uniformity to a question that has evaded easy resolution for nearly two decades. As discussed below, however, the Court refused to state a uniform rule and seemingly endorsed the fractured and uneven treatment of this issue in the various federal circuits going forward.[4]



In *Firestone Tire & Rubber Co. v. Bruch*,[5] the Supreme Court first addressed a circuit split concerning the standard of review to be applied in ERISA denial of benefits cases. Before the Court decided *Firestone*, the federal circuit courts had established divergent frameworks for deferential review of claim decisions made by structurally conflicted claims administrators.[6] The Supreme Court ruled in *Firestone* that a claim decision "is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."[7]

The False Claims Act Correction Act: Key Provisions and Implications

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In a recent press release, the Department of Justice (DOJ) announced a total recovery of $1.34 billion in fraud settlements and judgments for fiscal year 2008, with $1.12 billion of that total recovered from the healthcare industry.[1] Also prominently noted in the release was the header: "More Than $21 Billion Recovered Since 1986,"[2] the year when Congress—spearheaded by Senator Charles Grassley (R-IA) and Representative Howard Berman (D-CA)—amended and transformed the then-seldom used False Claims Act (FCA) into the primary weapon the government uses today to combat healthcare fraud.

More than twenty years later in 2007, Grassley and Berman, roused by "court decisions [that] threaten to undermine both spirit and intent of the 1986 amendments,"[3] introduced legislation (S. 2041 and H.R. 4854) to further amend the False Claims Act. In an effort to preserve the original intent of the 1986 amendments, the lawmakers drafted the False Claims Act Correction Act[4] (FCACA) to "correct the effect of unduly restrictive judicial opinions . . . and restore the intended incentives for whistleblowers, to act when they discover fraud against the United States government."[5]

As set forth below, the FCACA includes daunting provisions for the healthcare industry, such as imposing false claims liability on entities that merely receive and retain overpayments, and providing additional incentives and protections for qui tam relators. Ultimately, the FCACA exposes all players in the healthcare industry—including managed care plans, providers, facilities, hospitals, and pharmaceutical companies—to increased criminal and civil liability, despite the fact that the healthcare industry already accounts for the lion's share of recoveries, and DOJ's most significant settlements and judgments under the FCA.

Legislative History

In 2007, Grassley and Berman introduced S. 2041 and H.R. 4854 in the Senate and House. During its deliberations, the Senate Judiciary Committee amended S. 2041 to incorporate a series of DOJ recommendations.[6] The House Judiciary Committee approved its version of the legislation without any changes, leaving two versions of the FCACA pending before Congress. Because the House and Senate did not act on these measures before the end of 2008, the legislation will have to be reintroduced during the 111th Congress.

Assuming the House and Senate reconsider this legislation, it is difficult to predict what a final bill will look like. However, the bipartisan sponsorship of S. 2041 by Senate Judiciary Chairman Patrick Leahy (D-VT) and Judiciary Committee Member Grassley, the sponsorship of H.R. 2854 by Berman in the House Judiciary Committee, and the Senate Judiciary Committee's recent revision of S. 2041 to embrace many of the DOJ's concerns may indicate that many of the provisions included in the different bills could eventually become law.

Key Provisions in the Senate and House Versions of the FCACA

The Presentment Requirement

The Senate and House bills would both eliminate the FCA's current presentment provision that requires a false claim be presented directly to an officer or employee of the United States. The House bill would redefine the presentment requirement by attaching liability when a false claim is knowingly made to obtain "government money or property," regardless of whether the wrongdoer deals directly with the government. As defined, "government money or property" would include money that the United States provides to "anyone" if it is to be spent "on the Government's behalf" or "to advance a Government program," as well as money or property that the United States holds in trust or administers for any administrative beneficiary. The Senate bill would redefine the term "claim" to expressly include claims presented to a government contractor or grantee when the contractor or grantee pays the claim with funds that the government provided, or for which the government will provide reimbursement.

These changes could open a floodgate of FCA lawsuits—as whistleblowers could file actions based on alleged claims made to anyone who receives federal dollars, a government subsidy, or even healthcare benefits—regardless of whether the transaction involves federal funds. Furthermore, under the redefined presentment requirement, persons or entities that submit claims for payment to private or nonprofit organizations that receive federal grants or monies could be liable under the Act, regardless of whether the claims are at all related to government works or government programs. For example, health providers could be at risk of false claims liability when they submit false claims to commercial health plans that are also Medicare Advantage organizations.

Retention of Overpayments

Both the Senate and House bills would impose liability on any person who retains government overpayments. The House bill would add false claims liability to any person "who has possession, custody, or control of Government money or property and, intending to . . . retain a known overpayment . . . fails to deliver or return . . . less money or property than the amount due or owed." The Senate bill would add a new definition of the term "obligation": a fixed or contingent duty "arising from . . . the retention of any overpayment."

The unprecedented addition of liability for retention of overpayments, particularly as proposed in the House bill, could impose false claims liability to entities that knowingly possess government money that is overpaid, regardless of who is responsible for the error and, ironically, regardless of whether any claim has been submitted to the government. Of particular concern is potential liability for plans and providers that retain overpayments during the oft-lengthy reconciliation processes or audits common to federal healthcare programs such as Medicare and Medicaid. For example, healthcare facilities that mistakenly receive overpayments may be considered to have "knowingly" received federal funds that could subject them to FCA liability under the proposed legislation.

First to File

The House bill also would permit a person other than the government to join or intervene in a pending qui tam action with the consent of the person that brought the action. This revision would replace the current FCA requirement that "no person other than the Government may intervene or bring a related action based on the facts underlying [a] pending [qui tam] action."[7]

This provision could encourage unqualified whistleblowers who fail to satisfy the statutory relator requirements or who are otherwise barred from bringing a qui tam action to circumvent those requirements by adding a third-party whistleblower who would meet the requirements, thereby reviving the otherwise flawed action. Under the current FCA, a putative whistleblower that based his allegations on publicly disclosed information would likely not satisfy the jurisdictional requirements necessary to establish relator status and would be barred from bringing his claim. Under the proposed first-to-file rule, the unqualified relator could add a qualified person to intervene, saving his otherwise faulty qui tam claims from dismissal. Furthermore, putative whistleblowers could be encouraged to delay reporting fraud in order to increase their share of the recovery—an effect that is directly contrary to the fundamental purposes of the FCA.

Alternate Remedy Expanded

Currently, the FCA provides that if the government elects to pursue its claim through an "alternate remedy," the whistleblower will have the same rights in that proceeding as he or she would have if the FCA case had proceeded.[8] The FCA defines "alternate remedy" to mean remedies available to the government, including any administrative proceeding to determine a civil money penalty.[9] The House bill, however, would expand "alternate remedy" to include anything of value, including in-kind goods or services that the government receives from the defendant in return for releasing FCA claims, or declining to intervene or investigate them, and anything of value received by the government based on the claims alleged by the whistleblower if the whistleblower subsequently prevails on the claims.

Expansion of the alternate remedy definition could permit a whistleblower to assert entitlement to a share of any settlement, even if the government had declined to intervene and instead settled with the defendant on a non-fraud basis. In cases involving Medicare and Medicaid, the broadened definition could feasibly allow a whistleblower to seek a monetary recovery based on a defendant's entry into a Corporate Integrity Agreement (CIA) as a means of settling with the government, as a CIA is of "value" to the government. Furthermore, the expanded definition could be interpreted to include criminal proceedings that arise out of a qui tam action and could feasibly authorize the whistleblower to participate in the criminal proceedings.

Public Disclosure Bar

The Senate and House bills both would nearly eliminate the public disclosure bar, permitting dismissal of claims only if "all the essential elements" of the whistleblower's allegations are "based exclusively on the public disclosure." Just as importantly, the public disclosure bar no longer would be jurisdictional and FCA defendants would be unable to move to dismiss or raise the bar as a defense; only the government would have the sole authority to dismiss the case, even if it did not intervene. This action would eliminate one of the most useful protections in the defense bar's arsenal and allow whistleblowers to file lawsuits based on any information already in the public domain. It is unclear what incentive, if any, the DOJ would have to seek dismissal of a qui tam action in which it chooses not to intervene.

Elimination of the 10% Cap for Certain Whistleblowers

The two pieces of legislation, if enacted, likewise would eliminate the current 10% cap on recoveries for whistleblowers who planned or initiated the fraud, or whose suit is based on certain types of public disclosures. The bills would lift the recovery cap and give the court full discretion to determine the appropriate share of the recovery for whistleblowers.

Coupled with the proposed public disclosure bar, this provision could permit whistleblowers to bring and profit from actions based entirely on information revealed to them by the government, including government auditors or investigators who have information not yet in the public record.

Extended Statute of Limitations

The Senate and House proposals provide for a single, ten-year statute of limitations, adding four years to the current statute of limitations. The bills also clarify that the government's intervention "relates back" to the date when the whistleblower's complaint was filed, a direct response to the Second Circuit's decision in *United States v. Baylor University Medical Center*,[10] which held that the government's statute of limitations is tolled only when it files its complaint-in-intervention. The extended statute of limitations would apply to current actions, which would add additional FCA exposure to current defendants previously under the impression that older claims are not actionable.

Pleading Standard

Under the House proposal, a whistleblower would not be required to identify specific claims arising from a course of misconduct, as long as the complaint provides a reasonable indication that FCA violations likely occurred and provides notice sufficient to permit the government to investigate and the defendant to defend. This revision would essentially eviscerate the current requirement that

FCA whistleblowers must plead fraud with particularity as required under Rule 9(b) of the Federal Rules of Civil Procedure. Exemption from a particularity requirement would likely cause problems in discovery, as neither the parties nor the court would be on notice of information that formed the basis of the whistleblower's claims.

Waiver of Claims

The House and Senate bills would prohibit any waiver or release of a claim unless it is part of a court-approved settlement, overruling a growing number of judicial decisions that have upheld employee settlement and release agreements that waive the employee's rights to an FCA action. The Senate bill also includes added language excluding from the prohibition any agreements between the government and the whistleblower, an exclusion that would allow the relator to settle his or her claims in return for a share of the recovery.

Government Employees as Whistleblowers

The two proposals would permit government employees—both current and former—to bring qui tam suits in certain situations. The Senate bill includes defined procedures that a qualifying government employee whistleblower (i.e., non-attorney, non-auditor, and non-government investigator) must follow and grants the government the right to dismiss the whistleblower for failiure to follow the procedures.

This provision would appear to promote conflicts of interest among government employees, who should be required to report fraud upon the government without seeking personal financial gain. Government employees could also have an incentive to focus on matters that would appear to lead to lucrative recoveries for themselves and to the detriment of other official duties.

Retroactive Application

Implicating Constitutional, due process, and notice concerns, the Senate and House bills both include language making the FCACA's changes retroactive for cases already filed, i.e., retroactive to either the plaintiff's complaint or, in the case of intervention, the date of the original qui tam complaint.

Conclusion

The FCACA proposals pending before the House and Senate include troublesome provisions for all healthcare industry participants. In the likely event that some version of the pending legislation becomes law, health plan counsel would be remiss not to anticipate and recognize possible areas of exposure and opportunity that the FCACA would afford. Federal healthcare program managed care plans may find themselves defending novel theories of FCA violations. At the same time, such plans may also find that as newly defined government contractors, actionable false claims are submitted to them by both network and non-network providers. Accordingly, health plan counsel would be wise to monitor Congressional consideration of the FCACA and if necessary, advise their clients to optimize their operations to minimize the risk of FCA liability and maximize the opportunity to identify and remedy billing fraud.

1 Press Release, Department of Justice, More Than $1 Billion Recovered by Justice Department in Fraud and False Claims in Fiscal Year 2008 (Nov. 10, 2008).

2 *Id.*

3 153 Cong. Rec. S11506 (statements on introduced bills and joint resolutions, Sept. 12, 2007) (statement of Sen.Grassley).

4 False Claims Act Correction Act of 2008, S. 2041, 110th Cong. (2d Sess. 2008); False Claims Act Correction Act of 2007, H.R. 4854, 110th Cong. (1st Sess. 2007).

5 153 Cong. Rec. E2658 (extension of remarks, Dec. 19, 2007) (statement of Rep. Berman).

6 S. Rep. No. 110-507, at 12.

7 31 U.S.C. 3730(a)(5)(1986).

8 31 U.S.C. 3730(c)(5) (1986).

9 *Id.*

10 469 F.3d 263 (2d Cir. 2006).

Many, Many Thanks . . .

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