LJN LAW JOURNAL NEWSLETTERS

LJN'S
Business Crimes Bulletin

An ALM Publication

Volume 17, Number 11 • July 2010

Government Overpayment

New Risks, New Exposures

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It is not fraud when the government mistakenly overpays businesses who participate in government programs or otherwise receive federal funds. Of course, it's illegal to make a false statement for the purpose of retaining mistaken payments, and responsible businesses understand that. A false statement made to retain an overpayment is a "reverse false claim" in violation of the False Claims Act (FCA).

Many businesses may not yet realize, however, that the Fraud Enforcement and Recovery Act (FERA), enacted in May, 2009, and the Patient Protection & Affordable Care Act (PPACA), enacted in March, 2010, have profoundly expanded the scope of reverse false claims. Federal prosecutors can now charge a reverse false claim based upon a business's knowing retention of an overpayment even when no affirmative step is taken to hide the overpaid funds. The new legislation creates, in essence, a "passive" reverse false claim. Companies participating in federal programs and their executives may increasingly find themselves under investigation for possible violation of the criminal false claims act and other federal fraud statutes.

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Traditional Criminal Liability for Unreturned Government Funds

As a general matter, the criminal law proscribes conduct; it punishes actors for illegal actions. The law generally does not criminalize the mere failure to report a crime committed by another. Cf. *Marbury v. Brooks*, 20 U.S. 556, 575-576 (1822) ("It may be the duty of a citizen to … proclaim every offence which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man."). Although the federal code recognizes the old English common law offense of "misprision of felony" — the knowing concealment of a felony committed by another — federal courts have construed this statute to require some affirmative act of concealment. 18 U.S.C. § 4; *United States v. Johnson*, 546 F.2d 1225, 1227 (5th Cir. 1977) ("mere failure to report a felony is not sufficient to constitute a violation of 18 U.S.C. § 4").

Likewise, while 18 U.S.C. § 287 criminalizes the making of a false claim for payment to the government, the statute requires presentment of a claim. Department of Justice (DOJ)'s Criminal Resources Manual § 922. Thus federal prosecutors do not bring § 287 charges against businesses for the passive, yet knowing, retention of overpaid federal funds, in the absence of an affirmative and knowing false statement. "The plain purpose of § 287 is to assure the integrity of claims and vouchers submitted to the government." *United States v. Maher*, 582 F.2d 842, 847-848 (4th Cir. 1978).

In the area of health care fraud, however, the government does have a statute at its disposal that appears to target a failure to disclose an overpayment, but it has been little used. For acts involving federal health care programs, 42 U.S.C. § 1320a-7b(a)(3) provides that whoever "having knowledge of the occurrence of any event affecting … his initial or continued right to any such benefit or payment … conceals or fails to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized, shall … be guilty of a felony … " punishable by up to five years' imprisonment. Although this section can be fairly read to criminalize the active concealment of an overpayment of federal funds, the "fails to disclose" language suggests that the knowing failure to refund a federal overpayment could itself create criminal exposure. In practice, however, the government has rarely charged this statute except to prosecute individuals who made claims on a federal health care program while failing to disclose a previous exclusion from participation. *See, e.g., United States v. Burdine*, 2009 U.S. Dist. LEXIS 12042, at *1-2 (W.D. Va. Feb. 18, 2009).

However, a sea change has occurred. First, federal government officials recently have signaled an increased interest in criminally charging individual corporate executives. For instance, the Office of Inspector General's chief counsel, Lew Morris, recently explained that sanctioning individual executives criminally may be necessary to change the behavior of recalcitrant corporations that otherwise see civil false claims recoveries as the cost of doing business. *See* John Wilkerson, "Debarring Execs, Forcing Product Sell-Offs, Axing Exclusivity Eyed By OIG," *Inside CMS*, Vol. 13, No. 8 (4/15/10).

Second, the 2010 proposed amendments and commentary to the organizational Sentencing Guidelines found at Chapter 8 make clear that repayment will count more heavily in assessing corporate "credit" for effective compliance and ethics programs. *See* proposed Commentary at U.S.S.G. § 8B2.1, available at www.ussc.gov.

Third, and as explained below, by providing an increased ability to prosecute civil "passive" reverse false claims, the FERA and PPACA statutes may likewise encourage creative criminal prosecutors to charge this type of false claim under § 1320a-7b(a)(3) or even the misprision of felony statute.

Increased Liability For Retaining Overpayments

Prior to FERA, courts interpreting the "reverse false claims" section of the FCA (31 U.S.C. § 3729(a)(7)) had generally required some affirmative fraudulent statement or act to establish liability. FERA expanded the FCA by creating liability for anyone who "knowingly and improperly avoids" an obligation to pay money owed to the government. § 3729(a)(1)(G). Thus, potential exposure now exists for the knowing retention of overpayments even in the absence of an affirmative wrongful act. Until the terms "improperly" and "avoids" are further defined by the courts, merely doing nothing while knowingly in possession of a federal overpayment appears to be an actionable false claim.

This new development may have far-reaching and unintended consequences. Many businesses and contractors, particularly in the health care field, deal with federal overpayments by creating "credit balances." These credit balances are essentially accounting parking spots for federal money pending reconciliations that periodically resolve any pending over- and underpayments that develop from time to time in connection with government contracts or federal projects. In most instances, these credit balance accounts are clearly labeled as government funds and are segregated from the business's other capital and operating accounts. The recent FERA amendments appear to create a real risk that conventional credit balances that are used to hold federal funds while awaiting reconciliation, audit, or internal investigation to determine if there was an actual overpayment, could be viewed differently by the government employing 20/20 hindsight. Specifically, an otherwise innocent overpayment that is not immediately refunded to the government but is held for administrative reasons, or even held during an audit or internal investigation concerning that payment, could now morph into a "false claim" actionable under the newly amended FCA, creating exposure for treble damages out of thin air.

The PPACA builds upon FERA's expanded reverse false claims liability by mandating that all Medicaid or Medicare overpayments be reported and returned to the government within either 60 days of discovering the overpayment or the date on which the corresponding cost report is due, whichever is later. P.L. 111-148, § 6402(d). Read in tandem, FERA and PPACA create potential federal false claims act exposure — complete with treble damages — for a health care organization that merely fails to report and return a Medicaid/Medicare overpayment within 60 days. Outside this 60-day window, the government has not yet given any clear guidance on how much time a business or government contractor will have before triggering FCA exposure.

Parallel Criminal Investigations And Prosecutions

FERA authorized a half billion dollars to be spent on government enforcement actions over the next two years ($330 million to DOJ alone). With the passive reverse false claim added to the arsenal of civil qui tam plaintiffs, a corresponding surge of whistleblower actions alleging this type of claim is to be expected. This is especially so, given FERA's expansion of anti-retaliation protections to include not just employees, but third party "contractor" and "agent" whistleblowers too. 31 U.S.C. § 3730(h)(1). Such a surge will generate parallel civil and criminal false-claims and fraud investigations.

The DOJ's criminal division routinely reviews qui tam lawsuits to screen for any potential criminal activity or charges, so a secondary effect of the expected increase in whistleblower lawsuits is a corresponding increase in criminal fraud investigations. Given the government's newfound focus on prosecuting executives, aggressive criminal prosecutors may be motivated to find new and creative ways to bring retention of overpayments within the purview of existing criminal statutes, perhaps using theories of reckless disregard, § 1320a-7b(a)(3), or even misprision of felony. Businesses which receive federal funds would be wise to re-evaluate their policies for monitoring, holding and reporting overpayments from the government.of inconsistent data preservation and collection methods.

Conclusion

Legal IT departments are subject to a great deal of training in their own tools, techniques and procedures. However, this knowledge does not necessarily apply the same way when it comes to completing a defensible collection of ESI for e-discovery purposes. However, by educating themselves about ESI collection techniques and by working closely with the outside and/or inside counsel to get the attorneys' perspective on the importance of the possible evidence, then legal IT can be more nimble and avoid the pitfalls of self-collection in order to produce data that is pristine and useful at the same time.

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