Insights Conversations: How Government Health Care Investigations May Be Shifting

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The Department of Justice (DOJ) has long had the advantage when investigating False Claims Act (FCA) cases against health care companies. However, recent changes in the courts, including a unanimous U.S. Supreme Court decision, seem likely to shift the ground rules for how these investigations are carried out. Skadden partner Mike Loucks and counsel Alexandra Gorman discuss the current state of health care enforcement of fraud allegations.

Typically, FCA investigations of health care companies have favored the government. Can you explain how the process has worked historically?

Mike: FCA investigations unfolded fairly predictably for more than 25 years: A whistleblower filed a lawsuit under seal, prompting the government to investigate and determine whether or not to intervene in the case. The DOJ often sought to extend the seal beyond the original 60 days, a request the courts generally granted. This allowed the investigation to continue for years and delayed any related civil action, which would have afforded defense counsel additional rights, such as discovery. At some point, the corporation's concern about the impact of the investigation on its customer base and its mounting legal bills led to settlement discussions with the government.

In these situations, the government held the advantage for several reasons. For starters, unlike in a typical civil case, the DOJ had no duty to disclose to the defense the evidence it collected in the course of its investigation. Federal courts routinely extended the seal in the underlying whistleblower suit, which meant the government could spend years collecting evidence in support of its theory of the case, and often the DOJ refused to engage in settlement discussions until it had done just that.

Alex: The threat of being excluded from federally funded programs by the Office of Inspector General (OIG) also lurked over the company. OIG is required to exclude from these programs companies that are convicted of certain criminal offenses, but it also has the discretion to exclude others on a broader range of grounds. Any settlement negotiation with the DOJ required keeping a close watch on how the OIG might react, but no one who ever settled with the government was subsequently excluded by OIG.

What recent developments have the potential to shift the balance of power?

Mike: Increasingly, courts are scrutinizing DOJ requests for seal extensions and at times denying them after one year. A shorter seal period means the government has to decide sooner, and with less information, whether and when to intervene in a case. Complicating matters for the criminal lawyers is the fact that less time means the government's civil lawyers also will feel pressure to move quickly. It's not impossible that criminal lawyers for the government could find themselves conducting a grand jury investigation at the same time a civil lawsuit is pending concerning the same underlying allegations.

Alex: With seal extensions no longer guaranteed, the government is limited in its ability to conduct thorough discovery in secret. Importantly, although the government's civil attorneys have the same power as federal criminal attorneys in grand jury investigations to require witnesses to testify and produce documents, that civil power can only be harnessed while the case is under seal. The Federal Rules of Civil Procedure apply once a case is unsealed, and that limits the discovery for all parties.

Mike: It is too soon to tell how far the tables have turned, but the days when courts easily approved seal extension requests are likely gone. Without the luxury of time, the government may need to move more quickly, armed with only a fraction of the informa-

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tion it once had ample time to uncover. The pressure to unseal actions earlier may lead the government's civil team to no longer defer to the criminal investigation, and government counsel may increasingly demand quicker document productions and earlier witness examinations. Facing too many cases and not enough time, government lawyers may start to select fewer cases, pursue them at an earlier stage and abandon the rest for *qui tam* counsel to litigate.

The Supreme Court's recent decision in *Universal Health Servs., Inc. v. U.S. ex rel. Escobar* changes the materiality requirement. What impact will that case have on future FCA cases?

Alex: For a company to have FCA liability, a claim (or a document supporting a claim) must contain a false statement or have omitted a material fact. Before *Escobar*, many federal courts gauged materiality by whether the false statement or omitted fact had the potential to influence the government's funding decision based on the U.S. Court of Appeals for the 4th Circuit's *Harrison v. Westinghouse* decision. In June 2016, the Supreme Court unanimously ruled in *Escobar* that materiality is measured by whether the government would in fact not have paid the claim if it had been aware of the allegedly omitted or false information. Under this measure, the government's actual conduct becomes pertinent to the question of materiality; internal government communications and documents relating to the issue, such as employee emails and text messages, suddenly may be open to discovery.

Mike: It will be interesting to see just how much of an impact the *Escobar* ruling has. Ultimately, it depends on how the lower courts apply the ruling, but government counsel may opt not to pursue a case where proof of materiality would open up an agency's files to electronic discovery and public disclosure.

Between *Escobar* and the tightened time frames during which the government can operate with its claim under seal, it seems likely that the government will pursue fewer FCA cases overall.

While it is unclear how great the shift will be, what is evident is that investigations will not continue to follow the same trajectory they had until recently. Shortened seal periods and *Escobar* are just two of several factors that will impact the direction that investigations will take, and only time will tell whether those factors favor the DOJ or companies.

This article was adapted from the August 3, 2016, Forbes *article "Are the Tables Turning Against the Government in Healthcare Fraud Probes?"*