GreenPoint Legal

DEFENDING THE FCA CASE

For the five-year period ending 2013, the U.S. Department of Justice recovered more than $17 billion in revenue by way of judgments and settlements collected under the False Claims Act (FCA). Close to 90 percent of the cases were brought under its *qui tam* or "whistleblower" provision, by which citizens brought suit on behalf of the government. Now, defendant corporations are taking steps to defend themselves when charged with overbilling or other false claims allegedly related to their U.S. government vending contracts.

A Burgeoning Area of Law

Courts have interpreted the grounds for bringing an FCA case to be just about any violation of a rule or provision upon which the government's obligation to pay was conditioned. This has resulted in a susceptibility of vendors to fall prey to FCA missteps. Adding to the problem is the reward system under which a contractor's employee may file the suit on the government's behalf — and then reap a generous reward based on the amount recovered. Whistleblower litigation has risen significantly because of the expanded scope of FCA applicability and method of prosecution.

Health-Care Industry Irony

Although the FCA pertains to any vendor doing business with the government, the industries traditionally most affected have been defense contractors and health-care providers. Until recently, health-care vendors had been stymied in their defense of such cases because in order to counter the allegations of whistleblowers, a company was faced with the risk of violating HIPAA (the Health Insurance Portability and Accountability Act of 1996) provisions, which regulate disclosure of confidential patient health-care information.

Employer Counterclaims

In addition to statutory amendments providing some relief, recent case law has bolstered the vendor's defense arsenal. In the case of *U.S. ex rel. Wildhirt v. AARS Forever, Inc.*, a group of employees filed suit against a provider of home health-care services. The "relators" (those who filed the *ex rel* suit against the vendor) made three mistakes: (a) They never informed the employer of the practices that they deemed to be problematic before bringing such harmful disclosures to the VA; (b) they based support for their claim on confidential material spirited out of the employer's control without permission; and (c) they brought their *qui tam* case even though they lacked firsthand knowledge of the matters complained of — a required element of such cases. As a result, the court denied the relators' motion to dismiss the provider's counterclaims.

Solid NDAs

To avail themselves of confidentiality defenses and counterclaims, employers need to have on file signed nondisclosure and confidentiality agreements to ensure that private company material does not leave the control of the employer and to prevent its use against the employer in any future qui tam litigation.

CONTACT US

DAVID T. KINNEAR
O: 212.913.0500 x565
M: 917.886.3222
E: DAVID.KINNEAR@GREENPOINTGLOBAL.COM

WILLIAM H. ANDERSON, ESQ
O: 212.913.0500 x586
M: 914.672.4975
E: WILLIAM.ANDERSON@GREENPOINTGLOBAL.COM

PETER K. OVERZAT, ESQ
O: 212.913.0500 x557
M: 917.807.1321
E: PETER.OVERZAT@GREENPOINTGLOBAL.COM

WWW.GREENPOINTLEGAL.COM