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Unique Areas Of Risk In Ill.'s ICFPA

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Introduction

Over the past decade, efforts to enforce healthcare fraud have been bolstered significantly with increased state and federal funding along with an arsenal of new investigative tools. The Patient Protection and Affordable Care Act ("PPACA") alone provides an additional $350 million over ten years to help fight healthcare fraud.[i] Less publicized legislation has also been enacted to offer more options and incentives for those with knowledge of fraud; enabling such individuals to more frequently initiate litigation and share in the monetary damages of successful cases. For example, while the risk of private "whistleblowers" has long existed in the healthcare industry, the Illinois Insurance Claims Fraud Prevention Act ("ICFPA" or the "Act") expands those risks in a way that is gaining attention in Illinois and across the country. Most notably, the statute pertains to private insurance claims, rather than only those claims involving government funds. It also presents the State of Illinois with an additional avenue for pursuing monetary penalties at a time when its fiscal affairs are in a state of crisis. This article addresses the key risks and implications of the Illinois statute along with recent trends in enforcement.

i. White House, One Year Later: What Would Have Happened if Congress Repealed the Affordable Care Act (2012),

Overview of the Illinois Insurance Claims Fraud Protection Act

The ICFPA is, in many ways, modeled after the Federal False Claims Act ("FCA").[ii] To fully understand the unique implications of the ICFPA, it is worthwhile to revisit the FCA, which establishes civil and criminal liability for knowingly presenting false claims to the government. FCA liability may also be incurred for causing a party to make false claims. In the healthcare industry, this is most relevant when claims are made to the government for payment through Medicare, Medicaid or other government programs. The FCA contains a whistleblower or qui tam provision which allows for sharing up to 30% of recoveries with parties who bring action on the government's behalf. As a result, the FCA provides significant incentives for a variety of whistleblowers ranging from well-intentioned citizens to opportunistic bounty hunters. While the healthcare industry has grown accustomed to risks associated with the FCA, the ICFPA presents vast new challenges for the industry. Most notably, the ICFPA adds certain risk exposure for private insurance claims rather than solely for government claims.

The ICFPA makes it unlawful to pay kickbacks, in cash or in kind, in order to procure patients where claims will be presented to an insurer for payment. This anti-kickback provision is comparable in many respects to the Federal Anti-Kickback Statute ("AKS"). In addition to its prohibition on such kickbacks, the ICFPA also provides that violators of Section 17-10.5 of the Illinois Criminal Code shall be subject to the ICFPA's penalties. Amongst other prohibitions, Section 17-10.5 bars insurance fraud, including knowingly presenting or causing to be presented false claims on any policy of insurance.[iii] Thus, the Act proscribes certain conduct in connection with private insurers that is proscribed by the FCA and AKS in connection with government programs. Put another way, the ICFPA creates the potential for FCA and AKS style liability in connection with private insurance claims.

There are a variety of penalties that may be imposed upon violators of the ICFPA. The statute provides for the imposition of civil penalties of between $5,000 and $10,000, plus a penalty of up to three times (treble) the value of each claim. Claims under the ICFPA can be brought by either the State's Attorney or by the Attorney General (the "State"). Claims may also be brought by other interested persons, including insurers. Thus, a whistleblower may pursue claims under the ICFPA with such claims being brought on behalf of the State. In the event that such a qui tam claim is filed, the complaint is to remain under seal for 60 days. The State has the ability to intervene during that time period and to request extensions, if necessary.

The State has the discretion to control the litigation by taking it over, dismissing the claims, or obtaining a settlement. Yet even if the State declines to intervene, the whistleblower may still proceed with his or her claims. The whistleblower is also entitled to a portion of any recovery that is obtained. If the State proceeds with the action, the whistleblower is entitled to receive not less than 30% of the proceeds of the action and not less than 40% if the State declines intervention.

Unique Areas of Risk

As you can see, several unique risks are presented by the ICFPA. Chief among them are the following:

- Anti-Kickback liability and certain aspects of FCA liability now exist for both government and private payor claims arising in Illinois;
- The Act offers fewer safe harbor exemptions than the Federal AKS and FCA;
- Limited case law and sealed complaints limit knowledge of the statute's implementation;
- Treble damages and mandatory penalties dramatically swell the size of whistleblower bounties; and
- The Act offers additional alternatives for plaintiffs seeking recoveries.

As noted above, the ICFPA creates the potential for FCA and AKS style liability in connection with private insurance claims. In addition to this expanded liability, the ICFPA also offers fewer safe harbor exemptions than Federal AKS and FCA statutes. Consider that the Department of Health and Human Services, Office of the Inspector General takes 28 pages in the Federal Register to describe the various payment and business practices that, although they potentially implicate the Federal AKS, are not treated as offenses under the statute. The ICFPA makes only one reference to excluded activity. This comparison illustrates the potentially narrower scope of the Act's safe harbors.

Another unique risk of the Illinois statute is limited case law regarding implementation by the Courts. Filed under seal, these suits may proceed for years without the defendant's knowledge. A timely example of this issue is the civil action of Omnicare, which includes alleged kickback activity and violations of ICFPA.[iv] The alleged conduct in the complaint occurred in 2004, after which the case was filed in 2007, unsealed in 2010, and is currently scheduled for a jury trial in August 2013.

Brought on behalf of the United States and the States of Illinois and Florida, the Omnicare case alleges violations of Federal AKS and FCA and the ICFPA along with various other state violations. This highlights the reality of healthcare fraud allegations in today's enforcement-hungry environment: a single act may invoke liability under multiple jurisdictions and statutes. As a result, whistleblowers and the government now have more options with which to bring suit and they increasingly pursue these options concurrently. The landscape of enforcement is constantly expanding and plaintiffs continue to test the limits of these statutes in an effort to both penalize improper conduct and pursue sizeable whistleblower bounties.

ii. 740 Ill. Comp. St. 92/1 et seq.
iii. 720 Ill. Comp. St. 5/17-10.5.
iv. United States, et al. v. Omnicare Inc., et al., No. 07-cv-05777 (N.D. Ill filed Oct. 11, 2007).

Trends in Enforcement

There is an increased emphasis on fraud enforcement throughout the United States. This trend is perhaps best demonstrated by the volume of claims brought under the FCA. For instance, 647 qui tam lawsuits were filed nationwide in 2012, a 71% increase from 2008.[v] Many theorize that this increase is based in part on the harsh economy and increased whistleblower incentives, but there are other contributing factors. The Fraud Enforcement and Recovery Act of 2009 and the Patient Protection and Affordable Care Act of 2010 both amended the FCA in ways that expanded the scope of liability and encouraged litigation.

Along with the increased volume of qui tam filings, the Federal Government (the "Government") has steadily increased its budgetary requests and allocations in connection with combating healthcare fraud. In fiscal 2013, the Department of Justice requested approximately $300 million in connection with fighting healthcare fraud, which represents a significant increase over prior years.[vi] These funds are being requested both to enable additional investigations and to support intervention in an increasing number of qui tam cases. The Government is reaping a substantial return on its investment, recovering approximately $4.9 billion in fiscal 2012 in settlements and judgments from civil cases involving allegations of fraud against the Government.[vii] These trends in enforcement arise primarily in the context of the FCA, but they have a direct application to other laws, such as the ICFPA. Increased economic hardship has likely contributed to the increase in FCA whistleblowers and we expect a similar response from ICFPA whistleblowers.

While there has seemingly been limited activity under the ICFPA to date, the Act poses substantial risk to the healthcare industry. Since actions under the ICFPA are filed under seal, there are significant obstacles to adopting a wait-and-see approach. Intervention decisions can often take well over a year and may take several years, resulting in the risk of mounting violations while an action may already have been commenced under seal. This concern reinforces the need for providers and healthcare companies conducting business in Illinois to be vigilant and to emphasize a proactive approach to compliance. Specifically, they should address the provisions of the ICFPA (as well as other federal and state statutes, such as the FCA, the AKS, and the Illinois False Claims Act) and should include a formal compliance plan and training, periodic retraining, provisions to facilitate internal whistleblowing, and guidelines for conducting internal investigations.

National Implications

While the ICFPA is an Illinois statute, it has potential ramifications that extend beyond the borders of Illinois. Companies that are based outside of Illinois while conducting business in the State face potential liability under the Act. In the civil case of MIDI, claims were brought against a Virginia-based defendant operating MRI facilities and radiology centers in Illinois.[viii] These claims included alleged violations of the ICFPA and resulted in a settlement of $1.2 million although there was no admission of liability.

The Government has reaped substantial economic rewards from its increased focus on fraud enforcement, and states have begun to take notice. As Illinois continues to encounter a budget crisis, statutes such as the ICFPA provide an opportunity to obtain substantial economic recoveries. The Illinois Government may begin pursuing or intervening in more whistleblower actions in order to maximize its recoveries. Other states have also enacted statutes that crack down on fraudulent activity in connection with insurance claims. For example, New Jersey and California have enacted Insurance Fraud Prevention Acts.[ix] The trend towards amplified healthcare fraud enforcement will likely lead an increasing number of states to enact similar statutes in an effort to both deter fraud and to obtain additional financial recoveries.

Finally, insurers may also seek to pursue more claims under the Act. This can occur in light of the unique incentive that exists when pursuing a claim under the Act (even if it is the minority proportion of a total recovery) may exceed the potential recovery from a more conventional approach.

Conclusions

The IFPCA exposes the healthcare industry to a vast array of unique risks including, most notably, the potential for FCA and AKS style liability in connection with private insurance claims. Given the Government's heightened focus on enforcement and the expanded incentives for whistleblowers, increased filings under the IFPCA appear to be more likely in the future. Proactive steps should be taken to address these risks by developing compliance plans, implementing training programs, and actively investigating and resolving potential issues.

v. U.S. Department of Justice, Fraud Statistics – Overview (2012), http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.
vi. U.S. Dept. of Justice, U.S. Department of Justice Overview (2012),
vii. Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012 (Dec. 4, 2012), http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html.
viii. Illinois ex rel. Donaldson v. MIDI LLC, No. 06-ch-02513 (Ill. Cir. Ct. Cook Cnty filed Feb. 7, 2006).
ix. N.J. Stat. Ann. §17:33A- (West 1983); Cal. Ins. Code §1871.7 (West 2010).

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**This article was previously published in Law360*

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