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Special Report

Privilege Traps in False Claims Act Litigation

by LORINDA HOLLOWAY

Federal False Claims Act cases are tough on defendants and their lawyers. The stakes are always high with the risk of treble damages, significant penalties per claim and the imposition of relator attorney fees. And the government and the whistleblowers are just getting warmed up, particularly in health care fraud FCA cases.

According to an October 2014 Congressional Budget Office report, "How Initiatives to Reduce Fraud in Federal Health Care Programs Affect the Budget," the amount of fraudulent payments recovered in Medicare, Medicaid, and CHIP alone during 2013 is more than $4 billion. The CBO is even bragging, saying that on the basis of the number of prosecutions and settlements in recent years, the whistleblower provisions of the FCA seem to be "particularly successful" in uncovering health care fraud and returning significant amounts of money to the U.S. Treasury and state governments.

In this aggressive FCA environment, the last thing practitioners need is a privilege headache, but a few rulings this year sent some lawyers running for the medicine cabinet. The rulings were not in Texas or the U.S. Court of Appeals for the Fifth Circuit, but they are important to Texas practitioners because of the traction they could potentially gain in an ever-evolving area of the law and because they serve as valuable reminders that the attorney-client privilege is not impenetrable and that practitioners can play a vital role in reducing the clients' privilege risks.

In August of this year, the U.S. District Court for the Middle District of Georgia Columbus Division in *United States ex rel. Barker v. Columbus Regional Healthcare System* ordered an FCA defendant to produce attorney-client privileged communications to the whistleblower, finding that the defendant impliedly waived privilege by pleading that it did not knowingly violate the FCA and indicating that it would offer evidence at trial that it had a good faith belief that its conduct was lawful.

The FCA claims in the case were based upon contracts that purportedly violated Anti-Kickback and Stark Law and induced other providers to refer patients to the defendant. In rendering its ruling, the court acknowledged that the defendant was not asserting an advice of counsel defense or contending that particular legal advice was the basis for its good-faith belief that its transactions were lawful.

Nevertheless, relying on a 1994 U.S. Court of Appeals for the Eleventh Circuit case, the court reasoned that the defendant's affirmative assertion of good faith belief that its conduct was lawful injected the issue of its knowledge of the law, waiving the attorney-client privilege. Importantly, the court stated that merely denying the allegation of wrongful intent would not have triggered an implied waiver.

The Georgia district court is certainly not the first find implied waiver when the defendant alleges it had a good faith belief that its conduct was lawful, but this recent decision serves as a reminder to FCA practitioners and their clients that pleading the client's state of mind beyond just denying allegations of wrongful intent may unintentionally trigger a privilege migraine. To best serve the client and reduce risk all the way around, practitioners would be wise to fully discuss and decide the pleading strategy with the client in light of the risks.

The other 2014 decision that had FCA practitioners popping aspirin was the U.S.

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District Court for the District of Columbia's decision in *US ex rel. Barko v. Halliburton Co.* The court rejected the defendants' argument that the attorney-client privilege protected documents prepared during an internal investigation. The company code of conduct set out the process by which tips concerning potentially improper conduct would be handled. It stated that relevant employees would be interviewed and the investigation would conclude with a report.

The *Barko* court acknowledged that *Upjohn Co. v. United States* established that corporations are entitled to the attorney-client privilege, but it nevertheless concluded that the investigation was conducted pursuant to the company's code of conduct policy and regulations—a routine business practice. The court further concluded that an *Upjohn* investigation only occurs after internal legal counsel confers with outside legal counsel. The court also seemed to penalize the defendants because nonlawyers conducted the interviews and did not inform employees that their interviews were for the purpose of obtaining legal advice.

To relief of FCA defense practitioners everywhere, the Court of Appeals for the D.C. Circuit reversed *Barko* three months later in *In re Kellogg Brown & Root, Inc.*, reiterating that the privilege is "the oldest of the privileges for confidential communications known to the common law" and that protected communications include not just the giving of advice but also communications to the attorney that enable the attorney to render that advice. The D.C. Circuit further held that in-house counsel status does not dilute the privilege, and it did not matter that non-attorneys conducted the interviews because an attorney may use agents to conduct investigations. The D.C. Circuit also rejected the notion that magic words must be used to trigger privilege. Importantly, the Circuit court ruled that so long as one significant purpose of the investigation was to obtain legal advice, then the privilege may apply. It need not be the only purpose of the investigation for the privilege to apply, as the lower court had erroneously held.

While the D.C. Circuit rescued the day, the *Barko* decision nonetheless reminds FCA practitioners and their clients that framing communications and being clear about the purpose of those communications necessary for the rendering of legal advice can play an important role when those communications are challenged. With such framing and clarity the district court just might have reached a different conclusion, saving everyone on the defense side from the privilege headache that ensued.

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