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The Trebling Effect of (Some) False Claims Act Trials

March 30, 2023

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There are multiple components to the risk defendants must consider when faced with going to trial for a matter involving the False Claims Act (FCA). Setting aside the incalculable impact that litigation can have on business operations, the statute itself anticipates repayment of the proven overpayment, treble damages, and exposure to a civil statutory penalty equal to a range between \$13,508 and \$27,018 per false claim. Combined, the trebling effect of a jury award plus the draconian statutory penalties in FCA matters could create an existential crisis for a defendant that opts to take an FCA matter to trial and then loses.

This is the reality for a medical company in Minnesota. In *United States of America, ex rel. Kipp Fesenmaier v. The Cameron-Ehlen Group, Inc., Db a Precision Lens, and Paul Ehlen*, Civ. No. 13-3003, the government alleged that an ophthalmology distributor and its founder violated the FCA by providing kickbacks to physicians in the form of travel and entertainment activities, encouraging the use of the company's ophthalmic supplies and equipment. These offers of payment and incentives, according to a Minnesota jury, violated the Anti-Kickback Statute and material conditions of participation in federal health care programs. A jury found the defendants to have submitted false claims for payment to Medicare, Medicaid, and other

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federally funded health care programs. Ultimately, on February 27, 2023, a jury found that this conduct led to the submission of **64,575** false claims to the government.

As for the final judgment award, on March 17, 2023, the U.S. Department of Justice (DOJ) requested that the court enter judgment in excess of \$489 million. The DOJ's damages request is comprised of three components:

1. The jury found an overpayment of \$43,694,641.71.
2. The FCA enables prosecutors to seek treble damages of the overpayment amount, resulting in damages in the amount of \$131,083,925.13.
3. Finally, the FCA statutory penalty provision, according to the DOJ, **mandates** an additional civil penalty range on a per claim basis. The range amount differs based on when the claims were submitted. The civil damages award is a function of the per claim penalty multiplied by the number of claims. Here, the DOJ requested civil penalties of \$358,445,780.

Altogether, the DOJ has asked the District Court to enter judgment in the amount of **\$489,529,705.13**.

The defendants disagreed. On March 24, 2023, the defendants argued that that jury's overpayment finding was flatly wrong. The defendants contended that most claims at issue involved overpayments as low as \$1.00 per claim. Yet, on an aggregated basis, the jury found the total overpayment to have exceeded \$43 million. Potential arithmetic errors aside, the defendants challenged the DOJ's position that it is mandatory for the court to (a) treble a damages award or (b) assess statutory penalties. The defendants predictably argued that the magnitude of the award sought by the DOJ here ultimately would violate the Eighth Amendment's Excessive Fines Clause.

Few FCA cases proceed to trial precisely because of the sheer magnitude of a potential loss. Pre-trial settlements often exclude the punitive effect of treble damages or statutory penalties, chilling a defendant's desire to challenge the proof in a FCA case before a jury. Yet, robust court application of the Eighth Amendment in matters such as this could begin to encourage providers to challenge prosecutorial overreach. At a minimum, at this stage, this case highlights the importance for healthcare providers of maintaining robust compliance programs and to engage actively with experienced FCA defense counsel when confronted with fraud and abuse concerns.

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