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Caveat Emptor: Private Equity Firms Are Increasingly Vulnerable to Qui Tam Lawsuits

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The U.S. Department of Justice (DOJ) has settled six *qui tam* lawsuits brought in various jurisdictions by whistleblowers against a private equity firm and its portfolio healthcare companies. A group of diagnostic testing companies and the private equity firm, which held a minority investment interest in the parent, settled claims that they violated the False Claims Act (FCA) and the federal Anti-Kickback Statute (AKS). On July 21, 2021, the DOJ announced that the government settled FCA claims against the Alliance Family of Companies, LLC (Alliance), a national electroencephalography (EEG) diagnostic testing company, and Ancor Holdings LP (Ancor), the private equity firm that invested in Alliance. Alliance agreed to pay $13.5 million and Ancor agreed to pay $1.8 million to settle the FCA lawsuits. The Relators will receive approximately $2.3 million of the settlement proceeds.

The whistleblowers' *qui tam* complaints alleged that Alliance violated the AKS by providing EEG interpretive reports to non-neurologist physicians who referred patients to Alliance to enable them to bill government healthcare programs for services they did not provide. Alliance reportedly paid independent contractor neurologists to interpret EEG tests, and it provided those interpretive reports to the referring physicians to enable them to bill for

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the professional interpretation of the tests. The DOJ contended that the provision of the interpretive reports allowed the referring physicians to bill for the study, induced the physicians to refer the tests to Alliance, and constituted remuneration in exchange for the referral, a violation of the AKS. The submissions of claims by Alliance and by the referring physicians were deemed by DOJ to constitute false claims in violation of the FCA.

The DOJ also contended that Ancor caused Alliance to submit false claims to governmental programs. It based its position on the grounds that Ancor, through its due diligence prior to the purchase of Alliance, learned about the alleged conduct and had the ability to remedy the conduct after the closing of the transaction. After the purchase, Ancor became a minority shareholder of Alliance, received two seats on its Board of Directors, and executed a Management Services Agreement with Alliance pursuant to which Ancor received monthly fees from Alliance to provide management services. The DOJ contended that Ancor caused false claims to be submitted to governmental healthcare programs for payment when it allowed the alleged conduct to continue during the period July 1, 2017 through January 1, 2020. In the Settlement Agreement, Alliance and Ancor denied that they were involved in any misconduct and denied that they submitted or caused the submission of false claims.

Takeaways

So, in light of the Alliance/Ancor and other recent *qui tam* cases, private equity firms that direct or manage the operations of their portfolio healthcare companies are at increasing risk of being named in FCA cases or in enforcement actions by the DOJ. The Office of Inspector General has emphasized the importance of Board involvement in and oversight of the provider company's compliance program. In that way, the Board is ultimately responsible for ensuring the company's compliance. In addition, holding the executives of a company individually and personally liable for violations of the FCA and the AKS was outlined in the DOJ Memorandum "Individual Accountability for Corporate Wrongdoing" authored in September of 2015 by Deputy Attorney General Sally Q. Yates. Moreover, the U.S. Sentencing Guidelines heavily emphasize board involvement in an entity's compliance program and an ethical corporate culture from the top down. Of course, the specific facts and circumstances of private equity involvement in the oversight of the portfolio company will be crucial.

The second takeaway is that private equity firms that invest in healthcare companies should continue to conduct robust diligence, including compliance risk assessments. It is important that private equity firms identify and evaluate the current status of a target's compliance posture before finalizing a transaction. In the current enforcement culture, the *Alliance* case suggests that private equity firms that gain knowledge of compliance issues during the diligence process and are in a position to effectuate remediation post-closing but fail to do so will have greater risk exposure to *qui tam* lawsuits and enforcement actions.
