

Justice Reins In False Claims Investigations

Jun 01 2000

Practice Area: Health Law

Acting on concerns of the health care industry, Congress instructed the General Accounting Office ("GAO") in 1999 to investigate enforcement tactics of the Department of Justice ("DOJ") under the federal False Claims Act. In particular, Congress directed the GAO to monitor DOJ's compliance with DOJ's own "Guidance on the Use of the False Claims Act in Civil Health Care Matters," which emphasizes the fair and responsible use of the act in health care investigations. In its most recent report on the subject, issued 3/31/2000, the GAO reported on DOJ's progress in rectifying these abuses.

The DOJ Guidance

The False Claims Act ("FCA") imposes civil liability on anyone who "knowingly" presents false or fraudulent claims for payment to the United States. The hospital industry has alleged that the DOJ has been unfair and overzealous in its application of the FCA, particularly in connection with national health care investigations such as the PATH audits and "Operation Bad Bundle."

The DOJ Guidance, first issued in June of 1998, prohibited DOJ attorneys and U.S. Attorneys from alleging violations of the FCA unless the facts sufficiently established that a claimant knowingly submitted a false claim. The Guidance specified steps that those attorneys had to take to verify that the allegations were supported. For national initiatives, U.S. Attorneys were instructed to offer the provider an opportunity to discuss potential violations before the U.S. Attorney issued a specific demand for payment. The Guidance also required the establishment of working groups to provide guidance and oversight to DOJ and U.S. Attorneys participating in such initiatives.

Early Abuses by U.S. Attorneys

GAO has monitored DOJ's progress in implementing the Guidance. In 1999, GAO concluded that DOJ's process for assessing compliance with the Guidance appeared "superficial," that the U.S. Attorneys' Offices were slow in incorporating the Guidance into their ongoing investigations, and that many ongoing false claims investigations failed to comply with Guidance requirements.

Reports issued by GAO in 1999 documented numerous specific abuses at certain U.S. Attorneys' Offices. These abuses included sending threatening letters to hospitals, or demanding that hospitals engage in expensive and time-consuming self-audits, even though the government lacked sufficient evidence of an FCA violation. In many instances, the U.S. Attorney took such actions without determining whether the pervasiveness and magnitude of any apparent errors were sufficient to warrant allegations of FCA violations, or without first obtaining evidence that hospitals had submitted the alleged false claims knowingly. At one office, hospitals were targeted for investigation based on their volume of Medicare billings, rather than on the basis of evidence that they actually had unbundled laboratory claims. Another office opened so many investigations that the caseload strained resources of the office, and it was unable to obtain the evidence needed to establish FCA violations because of these resource constraints.

DOJ's Grades Improve

GAO's March 2000 report shows that DOJ is improving its oversight of U.S. Attorneys' Offices, and that the individual U.S. Attorneys' Offices have made progress in addressing the major shortcomings noted in prior GAO reports. DOJ has revised its process for assessing compliance with the FCA Guidance, including the utilization of a new pre-evaluation process to help evaluators prepare for their onsite reviews, as well as revising and expanding the interview questionnaire used during the compliance assessment. In addition, DOJ recently began requiring annual compliance reviews by U.S. Attorneys' Offices that participate in national initiatives. These compliance reviews are to be conducted by an Assistant U.S. Attorney who is not assigned to the national initiative cases. The offices are also required to certify annually their compliance with the Guidance. Finally, DOJ has expanded the role of its internal working groups to include responsibility for monitoring compliance with the Guidance.

GAO also concluded that individual offices have made strides in addressing abuses in FCA investigation and enforcement. A significant number of FCA investigations have been dropped altogether based upon the lack of sufficient evidence of FCA violations. Some offices no longer require hospitals to conduct self-audits. In many instances where overpayments were identified, the offices have simply asked the hospitals to repay the overpayments with interest rather than pursue them as FCA violations. DOJ is actually reopening some investigations with the intent to issue refunds for the amount of FCA damages that were previously assessed.

Conclusion

GAO's most recent report indicates that the DOJ is curbing abuses in the investigation and enforcement of potential FCA violations. Nevertheless, FCA's penalty provisions provide powerful settlement leverage, which U.S. Attorneys may find difficult to resist. Hospitals facing false claims allegations should verify and insist that U.S. Attorneys conform in all respects to DOJ's internal policies in connection with any ongoing investigation.

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