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IN THIS ISSUE

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"Objection, Privilege": Protecting the Attorney-Client Relationship amidst the Shifting Sands of False Claims Act Jurisprudence

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"Men must turn square corners when they deal with the Government."[1]
– Justice Oliver Wendell Holmes, Jr.

With the Government's prosecution of False Claims Act ("FCA") and Contract Disputes Act ("CDA") violations on the rise, it is vitally important for outside and inside counsel to consider the role that legal advice plays in the daily business activities of clients. Legal advice used by the client in furtherance of violation of a crime is generally not privileged. In addition, both in-house and outside counsel need to avoid assisting in the commission of a crime or fraud through their roles as counsel, in that the consequences could include direct criminal and civil liability for the involved lawyer.

The Relevant Statutes

Government contractors and others may be prosecuted for false claims under the civil FCA, 31 U.S.C. §3729(a)(1)-(7), or the criminal false claims statute, 18 U.S.C. §287. The civil and criminal statutes have different burdens of proof and elements making the civil FCA the weapon of choice for most federal false claims cases.

The civil FCA imposes civil liability on a person for any of the following (among others):

- knowingly submitting or causing another to submit a false claim for payment from the government;
- making false records or statements to support a false claim;
- engaging in a conspiracy to obtain payment through a false claim; or

- making false records or statements to avoid a repayment obligation to the government ("reverse false claim").

Civil FCA penalties include $5,500 and $11,000 per false claim, treble damages, and costs. The civil FCA provides incentives for qui tam suits by so-called "relators" (i.e., "whistleblowers") by promising them a reward ranging from 15 to 25 percent of any recovery from the violator. This encourages suits, thereby increasing government contractors' potential exposure.

The criminal false claims statute imposes severe penalties, including imprisonment, on an individual or corporation that knowingly makes a false, fictitious or fraudulent claim. It requires a heightened showing of "scienter"; that is, that the violator knowingly and intentionally made the false claim with the intent to defraud (a specific intent crime). By contrast, the civil FCA provides for liability where the violator acted in "deliberate ignorance" or "reckless disregard" of the falsity.

In addition to FCA liability, government contractors submitting a certified claim under the Contract Disputes Act (CDA) are also subject to the CDA's anti-fraud provision, 41 U.S.C. §7103 (c), which provides that a contractor that bases its CDA claim on a fraudulent statement owes the Government "an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim." The government's use of the FCA and the CDA together serves as a powerful deterrent to the submission of false claims by federal contractors. The case of *Daewoo Engineering and Construction v. U.S.*[2] is a cautionary tale of a contractor that submitted a claim which the Court of Federal claims later held unsupportable and fraudulent, resulting in $10,000 in civil FCA liability… and an additional amount exceeding $50 million in CDA liability.

Crime Fraud Exception in the FCA and CDA Contexts

The crime-fraud exception to the attorney-client privilege is not a waiver of the attorney-client privilege; it is an exception which makes communications between attorney and client subject to disclosure (in discovery, for example), when the party seeking disclosure satisfies a prima facie burden. The showing consists of two prongs: first, that the client solicited the targeted communications while engaged in

the commission of a crime or fraud, and second, that the client solicited the lawyer's communications "in furtherance" of committing that crime or fraud.

The crime-fraud exception poses a particular threat to government contractor clients because the definition of what constitutes a fraudulent claim is evolving and imprecise. For example, the Fraud Enforcement Recovery Act of 2009 ("FERA") overturned case law requiring that the government prove specific intent to defraud in order for the Government to make out a civil FCA violation Likewise, Daewoo represents a watershed in the CDA context making it difficult to predict what types of fraud the government will allege to recover CDA damages. The state of flux in interpreting the applicability of the CDA and FCA to certain claims and statements means that the premise for applying the crime-fraud exception will continue to evolve.

Direct FCA Liability

Another issue that counsel for government contractor clients may encounter is that an attorney's participation in certain contract administration on behalf of the client may expose the attorney to direct FCA liability. Though cases against government contracts attorneys are rare, this remains a risk. For example, in *U.S. v. Entin*,[3] the U.S. District Court for the Southern District of Florida found that a government contractor and its outside counsel violated the FCA when they conspired to submit false representations to the SBA to obtain a Small Business Investment Corporation ("SIBC") license. The Court found that the lawyer violated the FCA by being "an active participant in the [submissions to SBA];" because "most of the documentation submitted to the SBA . . . were [sic] prepared in [his] office," and he otherwise knew that the statements his client submitted to SBA were false.[4]

Especially fraught with risk is the role of in-house counsel who assumes contract administration duties for contracting companies. Under the "Responsible Corporate Officer" doctrine, also known as the Park doctrine,[5] in-house counsel may be held personally liable for the client's statutory violations, even if the in-house counsel lacks actual knowledge of the violation, on the theory that responsible corporate officers have a positive duty to prevent statutory violations from occurring. The Park doctrine arose in the context of prosecution under the federal Food Drug and Cosmetic Act (FDCA); however, the Justice Department has expanded its

applicability to prosecutions for other crimes involving public programs or welfare such as financial fraud and health care fraud.

A 2010 decision in the U.S. District Court for the District of Maryland demonstrates some of the risks to corporate counsel under both the FCA and the crime-fraud exception. In *U.S. v. Lauren Stevens*[6], Ms. Stevens, vice president and general counsel for a major pharmaceutical company, was indicted for FCA violations she allegedly committed during an FDA investigation of the company. During the course of her prosecution, she was ordered to produce documents between her and the client which the court deemed non-privileged on the basis of the crime-fraud exception. These documents were used against her as evidence of her own guilt. Ultimately, the U.S. District Court for the District of Maryland acquitted Ms. Stevens of all counts and held that the documents never should have been excluded from the privilege in the first place. However, the case shows how a lawyer dutifully executing her duties to her client may nonetheless place herself at risk for federal prosecution or cause an unwanted disclosure of privileged documents.

Conclusion

Government contractors should consider the crime-fraud exception and its implications on their relationships with their lawyers. Failing to do so could result in an unwanted disclosure of attorney-client communications, or, in the most extreme cases, could expose in-house lawyers to FCA liability, placing both lawyer and client in the crosshairs of the FCA's enforcement provisions

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ENDNOTES

[1] Rock Island, Arkansas & Louisiana RR v. U.S., 254 U.S. 141, 143 (1920).
[2] Daewoo Engineering and Constr. v. U.S., 557 F.3d 1332 (Fed. Cir. 2009), cert. denied, 130 S. Ct. 490 (2009).
[3] U.S. v. Entin, 750 F. Supp. 512 (S.D. Fla. 1990).
[4] 750 F. Supp. At 515.
[5] See U.S. v. Park, 421 U.S. 658 (1975).
[6] U.S. v. Stevens, Criminal Action No. RWT-10-694 (D. Md. 2010).