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# Mo. V. Spilton And False Claims Penalties

Law360, New York (January 25, 2011) -- Health care attorneys handling cases under the federal civil False Claims Act have negotiated case settlements based on a multiplier of alleged actual damages to federally funded programs. Double, and in cases of egregious conduct, treble, actual damages may form the basis for compromise, and penalty assessments may not even figure into settlement discussions.

But in cases where the parties litigate a federal FCA action, penalty assessments, starting at $5,000 per claim, are a real concern. And conflicting precedent exists as to whether a litigating defendant can attack the imposition of FCA civil penalty assessments as excessive under the Eighth Amendment to the U.S. Constitution; see e.g. United States v. Cabera-Diaz, 106 F.Supp. 2nd 234 (D.P.R. 2000); United States v. Mackby, 261 F3d 821 (9th Cir. 2001); see also Hays v. Hoffman, 325 F3d 982 (8th Cir), cert denied 124 S. Ct. 277 (2003).

In 2003, the Supreme Court definitively ruled that punitive damage awards in civil tort cases are subject to due process objections under the 14th Amendment, and may be deemed excessive penalties, State Farm Mutual Automobile Insurance v. Campbell, 123 S. Ct. 1513 (2003).

FCA defense practitioners rejoiced, theorizing FCA defendants could reasonably argue that FCA judgments in which penalty awards, combined with multiple damages, resulting in an unspecified ratio to actual damages (such as 10:1) are in fact impermissible excessive penalties. Yet since that 2003 Supreme Court ruling, federal courts have yet to consistently hold that federal FCA penalties are in fact subject to attack as excessive penalties, let alone just where that unconstitutional bright line ratio, is actually set.

In a 2010 federal FCA qui tam action tried to the U.S. District Court for the District of Vermont, Judge William K. Sessions III found the defendant violated the statute by presenting false certifications and accepting federal money in a Section 8 housing program; actual damages totaled $828, trebled damages equaled $2,481, and the potential penalty range ran from $66,000 to $132,000.

Citing to United States v. Bourseau, 531 F.3d 1159, 1173 (9th Cir. 2008), Judge Sessions held that an FCA penalty award violates the Excessive Fines Clause of the Eighth Amendment if it is "grossly disproportional" to the gravity of the offense, and he further found that a penalty between 82 and 162 times the government's actual damages was in fact grossly disproportionate in this case, United States ex rel. Stearns v. Lane, Case No. 2:08-cv-175 (Dist. of VT Sept. 15, 2010).

Since the relator, a tenant in the building, was a participant in the underlying alleged fraud,[1] Judge Sessions declined to apply a multiplier, declined to assess penalties, and further declined to award relator either any share of the recovery or attorney's fees or costs. Judge Sessions simply entered a judgment for single damages against the defendant.

Judge Sessions did not cite to the Seventh Circuit decision in United States v. Rogan, 517 F3d 449 (7th Cir. 2008), holding that "(i)t is far from clear that the Excessive Fines Clause applies to civil actions under the False Claims Act ... (t)he False Claims Act has a penal component, no doubt, see Cook County v. United States ex rel. Chandler, 538 U.S. 119, 130 (2003), but "penal" does not mean "excessive" for judgments about the appropriate punishment for an offense belong in the first instance to the legislature, United States v. Bajakajian, 524 U.S. 321, 336 (1998)."

But while holding the Excessive Fines Clause did not necessarily apply to civil federal FCA actions, the Seventh Circuit noted that the total award of $64 million in Rogan, based on single damages of approximately $17 million, was well within the "single digit" level ratio that, albeit for different purposes, the Supreme Court found acceptable in the State Farm case.

The Deficit Reduction Act of 2005 incentivized states to enact state civil False Claims Acts, mirroring the federal FCA. As of December 2010, 26 states and the District of Columbia had adopted their own state civil FCA statutes with qui tam provisions, to address fraudulent billing in their Medicaid and/or other state programs; many more states have enacted, or are utilizing existing, civil statutes which do not contain qui tam provisions, but like the federal FCA do contain provisions for multiple damage and penalty assessments for submitting false claims to a state and/or Medicaid program.

And now at least one state Supreme Court has weighed in on whether FCA penalties are subject to a due process/excessive penalties attack. And that court, like the Seventh Circuit in Rogan, gave much deference to the legislative determination to include mandatory penalty provisions in the state statute.

In State of Missouri v. Spilton, No. SC 90586, 6/29/2010, the Missouri Supreme Court addressed constitutional claims challenging a summary judgment award under the state's civil Medicaid False Claims statute.[2]

That statute mandates "knowing" violators of the statute be assessed treble the government program damages and a civil penalty "of not less than $5,000 and not more than $10,000 for each separate act" in violation of the statute, Section 191.905.12 R.S. Mo. Knowing, as with the federal FCA, is defined as acting with actual knowledge, deliberate ignorance or reckless disregard, in presenting false claims.

Spilton was a licensed clinical social worker and Missouri state Medicaid provider, under investigation by the Missouri Medicaid Fraud Control Unit (MFCU) for submitting false or fraudulent claims to the state Medicaid program. During the course of the investigation, Spilton was interviewed by MFCU investigators. Spilton ultimately wrote out a statement, admitting she submitted Medicaid claims for services she did not provide, and created false patient records to support the billed claims.

MFCU attorneys brought a civil action under the Missouri State Medicaid False Claims Act, alleging 325 Medicaid claims Spilton submitted were false under the state FCA. The state then moved for summary judgment, which Spilton opposed, arguing there existed a genuine issue of material fact as to whether she acted "knowingly"; she also attacked the constitutionality of the penalty provisions of the Missouri FCA statute.

In support of summary judgment, the state produced affidavits from the investigators and documentary evidence; Stilton asserted her Fifth Amendment privilege against self incrimination and presented no evidence on the substance of the allegations, but rested on her objections.

The trial court held there were no issues of material fact, granted summary judgment, and

awarded actual damages on the proffered claims of $45,385; trebled damages of $136,155; and the minimum civil penalty of $1,625,000: i.e. on summary judgment, the court awarded the state FCA penalties in excess of 35 times the single damages award.

Spilton appealed, claiming there was a genuine issue of material fact as to her state of mind in "knowingly" submitting false claims, and that the Missouri FCA, in authorizing a penalty award amounting to an excessive fine, violated the due process clauses of the Missouri and U.S. Constitutions. Because the constitutionality of a state statute was at issue, the case bypassed the Missouri Court of Appeals and was transferred to the state Supreme Court.

The Missouri Supreme Court spent more time on the first argument, detailing the material facts proffered by the state to prove Spilton "knowingly" submitted false claims. The court noted that Spilton exercised her constitutional right to remain silent, but as a result she failed to demonstrate to the trial court any genuine issue of material fact to preclude summary judgment.

To dispose of the constitutional argument, the Missouri Supreme Court used similar reasoning as the Seventh Circuit in Rogan, without citing the Rogan case. The court acknowledged that the Missouri Constitution and Eighth Amendment to the U.S. Constitution prohibit excessive fines, but went on to hold:

"(T)he Missouri General Assembly has always had wide latitude to decide the severity of civil penalties for violations of the law. ... Statutory civil penalties are different than jury-imposed punitive damages because statutes define, in advance, the prohibited conduct and … the legislatively prescribed penalty. ... Civil fines within statutory limits will not be considered excessive, as a matter of law, when the statute authorizing the punishment is valid and the punishment imposed is within the range prescribed by the legislature." Missouri Supreme Court No. SC 90586, 6/29/2010, p.13-14.

The court did go on to address the actual amount of the penalty imposed, but stated: "(w)hen a litigant receives the lowest possible penalty proscribed by a statutory range, as Spilton did, the penalty is not excessive. ... This court is unpersuaded that the $5,000-per-violation penalty assessed against Spilton is so grossly excessive as to shock the conscience." Id, page 15.

Clearly, the Missouri Supreme Court gave deference to the state legislature's determination to include a mandatory penalty provision in its civil false claims statute. The existence of a statutory basis for the penalty award distinguishes a state, or federal, FCA case from the 2003 State Farm ruling. And, as a result of the DRA incentive, every state enacting a civil FCA statute is including mandatory penalty provisions in the statute.

Especially with the expansion of false claims statutes and enforcement to the state arenas, practitioners defending FCA cases must bear in mind that these penalty provisions are not merely theoretical in nature. Whether litigating, or settling, state FCA cases, federal and state government attorneys may be emboldened to address the imposition of multiple damages and penalties.

--By Ellyn L. Sternfield, Mintz Levin Cohn Ferris Glovsky & Popeo PC

*Ellyn Sternfield (ELSternfield@Mintz.com) is of counsel in Mintz Levin's Washington, D.C., office in the firm's health law section.*



[1] The United States did not intervene in the case.

[2] Section 191.900 et seq. RS Mo.