Omnicare Decision Demonstrates that Relators Cannot Rely on Ambiguous Evidence of Intent to Survive Summary Judgment, and Should Exercise Caution

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On September 3, the U.S. District Court for the Southern District of Texas granted summary judgment in favor of Omnicare in United States ex rel. Ruscher v. Omnicare, Inc., and in doing so, made clear that in order to get to a jury, relators must come forth with evidence of intent that is more than merely ambiguous.

The relator alleged that Omnicare violated the False Claims Act (FCA) by writing off debt owed by skilled nursing facilities (SNFs) in exchange for referrals to Omnicare’s pharmacy business, in violation of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b)(2) (AKS). An AKS violation requires a showing that the defendant intended to induce referrals, and the court’s opinion centered on that issue. Omnicare argued that the write-offs were not done in order to induce referrals, but instead were the resolution of legitimate billing disputes with the SNFs.

The court reviewed in detail the evidence the relator claimed supported her allegations of fraudulent intent, many of which were e-mails from Omnicare personnel. For example, one e-mail, concerning one of the eight SNFs at issue, stated that “it behooves [Omnicare] to get [the billing dispute with Avamere] resolved ASAP” because “Avamere has indicated that they will not consider renewal with Omnicare unless this billing reconciliation is complete and they will not pay us either.” The court held that while the e-mail reflected a desire to quickly resolve the billing dispute “to preserve the parties’ business relationship,” it did not evidence an intent to forgive a debt in order to induce referrals.

Another e-mail stated, “I cannot assure Omnicare that we will win the Seacrest business if we reach agreement [on accounts receivable negotiations] but I can assure that we will not win Seacrest if we fail to reach compromise...” While the court observed that this was among the e-mails “coming closest to creating a question of material fact,” the court nonetheless held that it and others could not “be read to suggest a bad purpose, as opposed to an honest, if business-minded, desire to maintain good customer relationships.”

Among other arguments, relator also alleged that prompt-pay discounts that Omnicare had negotiated with many of its customers, including those whose payments had been late in the past, were evidence of fraudulent intent. The court rejected this argument because “a customer would be entitled to take the discounts only for future, timely payments. This seems to the court to be a completely reasonable effort to reduce Omnicare’s future collections costs by encouraging previously delinquent customers to make timely payments.”

In the end, the court held:

In order to reach a jury, an accusation of a multimillion-dollar fraud must be supported by more
than a few ambiguous e-mails. An accusation of fraud should be made cautiously, and only when there is evidence to support it.

*Omnicare* is a somewhat lengthy decision and it covers more than the issues set forth above. But the court’s willingness to dig into the evidence and grant summary judgment on the question of intent is a clear win for FCA defendants, and particularly FCA defendants facing claims predicated on alleged AKS violations. It is particularly noteworthy in an era where these cases typically involve massive document productions of hundreds of thousands, and sometimes millions of e-mails. Relators routinely isolate a needle from the massive e-mail haystack, ascribe to it a purportedly nefarious meaning even if a benign explanation is equally plausible, and hope that it will allow them to get past summary judgment and force a favorable and lucrative settlement. *Omnicare* stands as a check on this approach.

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