American Health Lawyers Association 2002 Year in Review
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Sixth Circuit Applies Reasonable Relevance Test and Compels Compliance with Administrative Subpoena Pursuant to Healthcare Fraud Investigation

A podiatrist was investigated by the FBI and a federal grand jury for allegedly engaging in a kickback arrangement with two medical testing laboratories. The Department of Justice ("DOJ") issued a subpoena pursuant to the DOJ's authority under the Health Insurance Portability and Accountability Act ("HIPAA"), which requires the production of records "which may be relevant to" an investigation into a "federal health care offense." The podiatrist sought to quash the administrative subpoena. The district court denied the podiatrist's motion to quash. The podiatrist appealed.

The Sixth Circuit affirmed, holding that the podiatrist was required to produce the records requested in the administrative subpoena. The court applied the "reasonable relevance test" set forth by the U.S. Supreme Court in _United States v. Powell_, 379 U.S. 48 (1964), which held that an agency need only show that "'the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, and that the information sought is not already within the [agency's] possession, and that the administrative steps required [. . .] have been followed'." The court emphasized that to issue an administrative subpoena, the DOJ need only show relevance, not probable cause. The appeals court also noted that the reasonable relevance test applied to administrative subpoenas regardless of whether they were issued pursuant to a criminal or civil investigation.

Doe v. United States, 253 F.3d 256 (6th Cir. June 14, 2001).

This case is significant because of the Court's interpretation regarding the broad scope of an administrative subpoena issued pursuant to HIPAA.

Tenth Circuit Affirms Convictions of Physicians and Hospital CEO Involved in Kickback Scheme, Finding Lower Court Properly Applied "One Purpose" Standard in Determining Violations of Anti-Kickback Statute and Properly Admitted Statements of Co-Conspirators.

Beginning in 1985, Baptist Medical Center ("Baptist") entered into various contracts with physicians Robert and Ronald LaHue under which Baptist would pay each of the LaHues $75,000 per year. In 1998, the federal government charged Baptist's chief executive office Dan Anderson and the LaHues (collectively "defendants") and others with having violated the Anti-Kickback Statute. A jury convicted defendants and defendants moved for a new trial. The federal district court in Kansas denied the motions. Defendants appealed.

The Tenth Circuit affirmed. First, the appeals court concluded that the lower court had properly instructed the jury to apply a "'one purpose' standard" in reviewing whether defendants had the requisite intent under the Anti-Kickback Statute. The appeals court relied on its recent decision in _United States v. McClatchey_, 217 F.3d 823 (10th Cir. 2000), finding that "'a person who offers or pays remuneration to another person

violates the Act, so long as *one purpose* of the offer or payment is to induce Medicare or Medicaid patient referrals'." In so holding, the appeals court rejected defendants' assertion that the one-purpose application is unconstitutional as applied and thus void for vagueness. The appeals court found no support for defendants' contention that the one-purpose test would make "'virtually every arrangement between a hospital and a physician unlawful, because the hospital executive will always have patient referrals in mind, at least to some degree'." Second, the appeals court found that the trial court had properly admitted documents related to a "lawful common plan" under Red. R. Evid. 801(d)(2)(E), which "excludes from the hearsay prohibition 'statement(s) by a coconspirator of a party during the and in furtherance of the conspiracy'," In so holding, the appeals court agreed with the government, which had argued that Rule 801(d)(2)(E) "contemplates any common plan or enterprise, whether legal or illegal, in which the declarant and … the LaHues jointly participated."

United States v. LaHue, Nos. 99-3344, 99-3347, 99-3352, 2001 WL 708749 (10th Cir. June 18, 2001)

*This case, which arises from the same facts as **U.S. vs. Anderson**, is significant because it reaffirms the Tenth Circuit's broad interpretation of the "one purpose" standard under the Anti-Kickback Statute.*

Ninth Circuit Holds Than Any Kind of Government Investigation Is An "Investigation" Under FCA's Public Disclosure Bar

Abraham Gale filed a qui tam action against Packard-Bell NEC, Inc. ("PBNEC") under the False Claims Act ("FCA"), asserting that the company had "committed fraud by selling computers to the government as new even though they contained used parts." The government declined to intervene in Gale's action but launched criminal and civil investigations into PBNEC's allegedly fraudulent conduct. The government allowed Gale to review documents obtained during at least one of these investigations and also let him review documents in another investigation of Zenith Data Systems, Inc. ("Zenith"). After reading various government documents, Gale learned that Zenith was probably involved in fraud similar to that of PBNEC. Gale filed a separate qui tam action against Zenith. After an evidentiary hearing, the federal district court in California determined that it lacked jurisdiction over Gale's action. Gale appealed.

The Ninth Circuit affirmed, finding that the lower court lacked jurisdiction over Gale's qui tam action because his claim was based on publicly disclosed information and because he was not an original source of the information. The appeals court observed that the purpose of § 31 U.S.C. 3730(e)(4)(A) "is to prevent someone like Gale, who has information only because he obtained it from the government, from profiting from that information and thereby diminishing the government's recovery from the defrauder." In

order to fulfill Congress' intent, the appeals court concluded that "the term 'investigation' …must encompass any kind of government investigation – civil, criminal, administrative, or any other kind." See 31 U.S.C. § 3730(e)(4)(B). Although noting that it was "undisputed that Gale was the original source of information about alleged fraud at PBNEC, and that Gale's information prompted the government to initiate an investigation into that company," the appeals court emphasized that Gale's information about PBNEC had not included Zenith. The appeals court found that Gale had "played no role whatsoever in any government investigation, and Gale obtained his information about Zenith from the government." Thus, the appeals court determined that Gale's action was barred by § 3730(3)(4)(A).

SEAL 1 v. SEAL A, No. 98-56447, 2001 WL747588 (9th Cir. July 5, 2001).

This case is significant because it imposes limits on a qui tam relator's ability to file an action under the False Claims Act utilizing information about one company that was obtained during a governmental investigation of another company, even though the only "public disclosure" of the information was a single disclosure by the US. Attorney's Office to the qui tam relator.

Third Circuit Says FCA Prohibits Only Fraudulent Claims That Cause Economic Loss to Government and That Claim for Retaliatory Discharge Requires Proof of Employee's Protected Conduct and Employer's Notice of "Distinct Possibility" of FCA Litigation

In 1995, a partner in Wilentz, Goldman & Spitzer ("Firm") asked paralegal Charles Hutchins to investigate certain client bills to determine why the cost of certain computerized research was so high. Hutchins submitted a short memorandum to the partner, stating that "'I was told that the firm has a policy whereby actual Westlaw and LEXIS expenses are multiplied by 1.5 in order to arrive at the amount the client is invoiced for.'" Firm management decided to fire Hutchins. Hutchins later brought a qui tam action against the Firm under the False Claims Act ("FCA"), alleging that the Firm had "submitted fraudulent billing statements to the United States Bankruptcy Court and that the law firm violated the whistleblower provisions" of the FCA.

The federal district court in New Jersey dismissed Hutchins' qui tam action for failure to state a claim and granted summary judgment in favor of the Firm on Hutchins' retaliatory discharge claim. Hutchins appealed. The Third Circuit affirmed, First, the appeals court agreed that Hutchins had failed to state a claim under the FCA because he failed to demonstrate that the federal government had suffered any damages as a result of the allegedly fraudulent billing to the bankruptcy court. See 31 U.S.C. § 3729(a)(1). Next, the appeals court upheld summary judgment in favor of the Firm on Hutchins' retaliatory discharge claim, which Hutchins has brought under the FCA's

whistleblower protection provision, § 3730(h). The appeals court determined (1) that Hutchins had not demonstrated that he had engaged in "'protected conduct'" under the provision and (2) that the Firm had not been on notice of the "'distinct possibility'" of FCA litigation.

Hutchins v. Wilentz, Goldman & Spitzer, 253 F.3d 176 (3d Cir. June 13, 2001)

This case is significant because of the court's determination that proof that the United States suffered damages is a necessary element to a claim under the False Claims Act, and that in order to substantiate a showing of retaliatory discharge claim under the False Claims Act, an employee must prove that an employer has been placed on notice of the possibility that an action under the False Claims act may be filed by the employee.