PUBLICATION

The Pitfalls of Settling Qui Tam Lawsuits [Ober|Kaler]

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In a recent federal court case, the federal government and the State of California successfully enforced an oral settlement agreement of a *qui tam* lawsuit against a health care provider. *United States v. North East Medical Services, Inc.*, No. 10-cv-1904, 2015 BL 8148 (N.D. Cal. Jan. 13, 2015). The court decision highlights the complexity of settling qui tam litigation and the importance of assuring a comprehensive and fair settlement of all disputes among the parties.

The case involved a *qui tam* lawsuit filed under the False Claims Act (FCA) by whistleblowers asserting that the defendant knowingly underreported its revenue received from Medicaid managed care plans in order to obtain falsely inflated payments from California's Medicaid program. Both the State of California and the federal government intervened in the case.

During the course of the litigation, the parties agreed to mediation with a United States Magistrate Judge. Eventually, the parties reached an oral settlement agreement in open court, the terms of which were discussed and accepted "on the record" by the federal government, the State of California, the whistleblowers, and the defendant provider. The settlement involved the payment of an undisclosed sum by the defendant, the dismissal of the *qui tam* lawsuit and a related case the provider filed against the State of California, an audit of the provider by the State's Medicaid program, and the use of the Justice Department's "standard" written settlement agreement for *qui tam* cases. The oral settlement agreement did not resolve any of the whistleblowers' claims as to which the federal government and State of California did not intervene, nor did the oral settlement resolve the whistleblowers' claim for attorneys' fees.

The oral settlement agreement was contingent on the United States and the State of California obtaining official approval of the agreement, and that contingency was later satisfied. In addition, the oral settlement agreement was contingent on the provider's "resolution of its federal administrative remedies…." That contingency led to further disputes among the parties.

Following the parties' oral acceptance of the settlement in open court, the parties attempted to prepare a written agreement that reflected the terms of the settlement. That effort stalled when the defendant provider refused to sign the federal government's standard *qui tam* settlement agreement. The provider argued that it was not required to sign the written settlement agreement because it did not include a "comprehensive release from HHS." Therefore, according to the provider, the contingency in the oral settlement for the provider's "resolution of its federal administrative remedies" was not satisfied. The government entities then asked the court to enforce the terms of the oral settlement agreement. The court enforced the parties' oral agreement, concluding that there was an agreement on the essential terms of the settlement and that an oral agreement in open court is binding, even if the parties contemplated that the agreement would later be reduced to writing. Accordingly, the provider was forced to accept a settlement that ultimately did not include the comprehensive release it desired.

The *North East Medical* case serves as an important reminder that any settlement of *qui tam* litigation must be handled with great care. That case involved the complex and competing interests of the federal government, a state government agency, whistleblowers and the provider. In most cases, the use of a comprehensive written settlement agreement (as opposed to an oral agreement in court) is essential. Among other considerations, a provider contemplating the settlement of a *qui tam* lawsuit should use a written settlement agreement that:

- Specifies the terms of any payment
- Specifies the terms for dismissal of the litigation
- Specifies the handling of litigation costs and attorneys' fees
- Specifies the scope of the release given to the provider by all pertinent federal and state regulatory agencies, as well as the whistleblower
- Specifies the terms under which the provider can conduct business with the government going forward, including the potential use of a corporate integrity agreement
- Specifies the terms for maintaining the confidentiality of the agreement
- Specifies any contingencies to the settlement, and
- Includes all parties with claims against the provider

It is important that health care providers fully understand all the ramifications of accepting, or not accepting, a settlement agreement so they can make an informed decision as to whether a settlement is in their best interests.