PUBLICATION

Provider Waives Attorney-Client Privilege in Qui Tam Case by Asserting Compliance with Law [Ober|Kaler]

2014: Issue 21

A federal district court recently rejected a health care provider's claim of attorney-client privilege and ordered the provider to produce written communications with its lawyers regarding the provider's compliance with the anti-kickback statute (AKS) and the Stark Law. *Barker ex rel. United States v. Columbia Regional Healthcare System, Inc.*, No. 4:12-cv-108, 2014 BL 240067 (M.D. Ga. Aug. 29, 2014). The court decision serves as an important cautionary tale for any provider defending against allegations of AKS or Stark Law violations.

The case involved a *qui tam* lawsuit filed under the False Claims Act (FCA) by a whistleblower asserting that the defendants' payment claims to federal health care programs violated the FCA because they involved services allegedly rendered in violation of the AKS and Stark Law. One of the defendants, Columbia Regional Healthcare System (CRHS), asserted during the course of the litigation that it believed the transactions between it and other health care entities complied with applicable law and that it did not knowingly violate the law. Based on those circumstances, the court ruled that CRHS "implicitly" waived its attorney-client privilege regarding communications with its lawyers respecting the validity of the transactions.

Significantly, CRHS had disclaimed any reliance on an "advice of counsel" defense and had disclaimed any intent to offer the opinions of its counsel as evidence in the case. Nonetheless, relying on a federal appeals court decision, the district court ruled that CRHS "injected its belief as to the lawfulness of its conduct into the case and waived its attorney-client privilege as to communications relating to the legality of the transactions that form the basis of Plaintiff's claims." *Barker*, 2014 BL 240067 at * 3, citing *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1419 (11th Cir. 1994).

The *Barker* court noted a critical distinction between a defendant denying liability for a plaintiff's claim and a defendant affirmatively asserting a belief that its conduct was lawful. Simply denying liability does not result in a waiver of privileges, but affirmatively asserting a belief that one's conduct was lawful may implicitly waive the attorney-client privilege.

The notion that the attorney-client privilege may be implicitly waived is not groundbreaking. For example, when a provider defends itself by asserting it acted on the advice of legal counsel, the provider has opened the door to an inquiry regarding the legal advice received by the provider. However, it may be more surprising to learn that the attorney-client privilege could be waived when a provider asserts its belief that it complied with the law. When an organization is charged with, or being investigated for, an AKS, Stark or other violation, a common, instinctive response is to assert compliance with the law, but providers may need to rethink such a response.

The *Barker* decision has important implications for any health care provider defending itself against alleged regulatory violations in either litigation or a government investigation. Providers may certainly deny violations of law, but they should not affirmatively assert a belief that they complied with the AKS, the Stark Law or other laws without carefully evaluating the potential risk of waiving legal privileges that would otherwise apply to communications with their lawyers seeking legal advice to comply with the law. It remains to be seen whether other courts will follow the lead of the *Barker* decision, but it is fair to assume that other whistleblowers and regulators may attempt to use the court ruling to access communications between providers and their lawyers

regarding compliance with the AKS, the Stark Law and other regulatory requirements. The *Barker* case should lead providers to proceed with caution and to consult with their legal counsel before responding to any allegation of misconduct.