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Walking A Fine Line: An Employer's Right To Review Its Employees' Electronic Messages

by Daniel J. McGravey, Esq. and Amy C. Lachowicz, Esq.

The increased use of text messaging and email by employees has risen dramatically, with no end in sight. In the workplace, text messages and emails may be sent by employees using employer-issued computers, BlackBerry devices and cell phones. But what happens when an employee uses these employer-issued devices for personal messages? Does an employer have any right to access and read those messages? When does an employer cross over the line between controlling the use of employer-issued electronic devices and the privacy rights of its employees?

Several recent court decisions have highlighted the fundamental need for employers to have clearly worded policies addressing employee use of work-issued electronic devices. For example, the City of Ontario, CA police department found itself in litigation when it reviewed personal text messages sent to and from a City-issued pager. The police department distributed pagers to its officers so they could quickly respond to emergencies. The City's contract with its service provider set a monthly limit on the number of characters sent or received - - if employees went over this limit, they were charged a fee. One of the officers went significantly over the limit, and the police department elected to examine whether the overage was due to work-related text messages or personal text messages. When the police department obtained a transcript of the officer's messages, it discovered that many of them were sexually explicit, and were sent while the officer was on duty. Because this conduct violated the police department's policies, the officer was disciplined, and later initiated a lawsuit against the department.

The United States Supreme Court held that the officer did not have a right to privacy in this situation. The police department had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, and that the City was not paying for excessive personal communications. Furthermore, the search was reasonable in scope, and not overly intrusive. Finally, and importantly, the Court noted that the City had a policy in place that allowed the City to monitor and log all network activity (including text messages), and that employees should have no expectation of privacy or confidentiality when using those resources. Although this decision involved a public employer, the ramifications and lessons learned extend to private employers as well.

By contrast, the New Jersey Supreme Court ruled in favor of an employee who sent and received email messages on an employer-issued laptop computer. The employee routinely exchanged email messages with her attorney. The employee, however, used a personal, password-protected internet email account. The employee later filed an employment discrimination lawsuit against her employer, and the employer attempted to obtain the emails because they were sent and received on the company-issued computer.

The Court held that the employee had a reasonable expectation of privacy in her private, password protected internet email account, and the act of sending and receiving emails via a company laptop did not eliminate the attorney-client privilege that protected them. The employer had a policy in place that allowed the company to review any messages sent on its media systems - - however, the policy also permitted "occasional personal use" of email. The Court noted that the policy's email provision was not clear because it did not address personal

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Workers' Compensation Fraud: Tilting At Fraud Mills No Longer Quixotic

by Mark Gordon, Esq. and Douglas K. Rosenblum, Esq.

Most employers and their insurers at one time or another have been adversely impacted by the submission of false or fraudulent claims.

Only on rare occasions is the perpetrator caught and successfully prosecuted. Even when the prosecution is successful, more often than not, the perpetrator does not have the financial means to return the funds that were fraudulently extracted from the employer and/or its insurer. In many instances, the employee's medical provider is complicit in the fraudulent conduct. Indeed, it is not uncommon for the medical provider to incentivize the fraudulent conduct.

The major casualty insurers are now targeting medical providers for fraudulent practices. The industry recognizes that a successful prosecution of a medical provider plays an exponentially greater role in the effort to reduce the adverse financial impact of fraud in a given geographical region than the effort of identifying, investigating and prosecuting a claim of fraud against an isolated employee.

Medical Provider Fraud

Traditionally, workers' compensation carriers have significantly underutilized tools to investigate fraud, waste, and abuse. Perceived expense or risk might have deterred carriers, but the resources available and potential benefits are extraordinary.

Larger carriers can service a huge number of claims. By establishing a database of claimant physicians, rudimentary statistical analyses can identify physicians that tend to have a greater number of claims, say, for a geographic area, or higher costs for certain classes of injuries. Of course, no claims are identical, but the submission of high volumes of claims from a practitioner/practice in a given geographical area, compared with those that would be anticipated based upon submissions by other practitioners/practice groups in that same geographical area, should raise concerns. Alternatively, one may see a disproportionate amount of alleged complications and an alleged need for more complex and frequent treatment than would be statistically anticipated. Outlier physicians can consequently be flagged for more comprehensive review and increased scrutiny.

Typically there are multiple types of fraud. A non-exhaustive list of examples of physician-based fraud include 1) the unwitting claimant; 2) the claimant as a willing participant in the fraud from the start; and 3) the provider that persuades the claimant to participate in the fraud.

The first type, the unknowing claimant, treats with the physician-provider and willingly goes back to work. However, the physician bills the workers' compensation carrier for work that he or she did not perform, or upcodes, exaggerating the type of work done. The physician might bill for multiple visits or treatments, when only one might have, in fact, occurred.

The second type, the claimant as willing participant, involves a physician/claimant partnership in defrauding the carrier. A claimant might hear, via word of mouth, that a certain provider "goes easy" on workers' compensation claimants. This reputation for acquiescing in submitting fraudulent claims benefits both the claimant and the physician. The physician understands that the patient desires the benefit of a diagnosis that will keep him/her out of work for an extended period of time, while simultaneously receiving benefits. The patient understands that the doctor desires the benefit of a patient willing to undergo treatment for an extended period of time that is excessive and unwarranted to allow the billing to continue. Whether the two openly discuss their mutual interests or not, they clearly understand the nature of their deceptive relationship.

The third type, the persuaded participant, might be the most nefarious, from the perspective of the medical community. A physician receives a patient in his office and persuades the patient that it is in the patient's best interest to submit a fraudulent claim to the workers' compensation carrier. The patient benefits by receiving a weekly benefit and a financial source of retreatment that may be required. The physician realizes a financial source for his services that otherwise would not be available to him. The workers' compensation carrier unwittingly pays for the services.

Theory Into Action

Identifying and pursuing medical fraudsters can be an expensive and daunting task. However, there are tools available publically, and especially online, to assist carriers in reducing fraud, waste, and abuse. Carriers, small and large, should have the capacity to view claims data on a macro level: the number of claims, for what services, and to which providers. Outliers should be readily apparent. If they are not, however, comparing macro data to national averages and/or regional averages is very helpful.

The National Health Care Anti-Fraud Association is just one organization that provides such resources to members of the industry. A very helpful publication is MLN Matters, published by the Centers for Medicare and Medicaid Services (CMS). Included in this government publication are coding updates and coding guidance, similar to local coverage determinations. This will assist carriers in assessing whether providers have improperly coded for services rendered. If a carrier does not have the desire or capacity to engage in the above analysis itself, contractors are available to help. A simple online search reveals software packages available to conduct statistical analysis and identify outliers.

Once outliers have been identified, the investigative work begins. If the scheme includes unwitting patients, insurance companies might easily develop their cases by interviewing the patients to verify what services they did or did not receive. One very big red flag for this strategy is communicating with a represented party. Workers' compensation claimants are usually represented by counsel, and insurance carriers and their attorneys should be sensitive to this issue.

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Building On Fraud: Qui Tam Issues In The Construction Industry

by Joseph J. Bosick, Esq., Joseph D. Mancano, Esq., and Grant H. Hackley, Esq.

In 1862, Major Quartermaster Justus McKinstry, a military purchasing officer, was court martialed for, among other things, buying horses for the Army from favored sources at grossly inflated prices, which ultimately benefitted McKinstry and his sources at the expense of the government. President Lincoln dismissed him from the Army. Soon after, responding to the fraud of McKinstry and others, including bullets that had been reportedly sold to the government with sawdust instead of gunpowder, Congress enacted the False Claims Act (FCA), now codified beginning with 31 U.S.C. §3729. Known as "Lincoln's Law," the FCA punished persons who sought financial benefit by, in essence, "ripping off" the government. The original enactment contained a qui tam, or whistleblower, provision, short for "qui tam pro domino rege quam pro se ipso in hac parte sequitur," loosely translated from Latin as "he who brings an action for the king as well as for himself."

Today, the FCA is widely regarded as the most effective tool to combat fraud committed against the federal government, and the penalties are harsh. Since 1986, when Congress beefed up the FCA to address defense industry fraud, more than $22 billion has been recovered by the federal government under the aegis of the FCA. Violators must repay the government three times the amount of the fraud, and they are also liable for civil penalties of $5,500 to $11,000 per false claim. Further, offenders can be disqualified from obtaining future federal and state government contracts. Currently, 28 states have enacted false claims acts. Most of the state acts are modeled after the FCA. In addition, three municipalities, Chicago, New York, and the District of Columbia, have false claims acts. Whistleblowers, also known as "relators," are permitted to file FCA claims on behalf of the government, and they may be entitled to between 15 and 30 percent of the government's recovery in these actions.

The pharmaceutical industry often attracts most of the FCA-related media attention because of the high dollar amount of recent false claims settlements. The construction industry has also become a target for fraud, particularly after the passage of the American Recovery and Reinvestment Act of 2009 (ARRA). Signed into law by President Barack Obama on February 17, 2009, ARRA provided $787 billion to stimulate the economy through various avenues, including construction and infrastructure improvement projects. As you read this, the government is spending that money across the country on projects as diverse as interstate highways and water treatment facilities. An interesting component of the American Recovery and Reinvestment Act was the creation of a website (recovery.gov), which is designed to provide transparency regarding where and how the money is spent. The Recovery Accountability and Transparency Board, established under the Act, has encouraged citizens to report suspected fraud, waste, or abuse. All reports are closely reviewed, and if they warrant investigation, they are referred to the appropriate inspector general. This fraud spotting reporting mechanism is another weapon in the arsenal to combat fraud and waste in the construction industry, and it serves to assist relators in bringing false claims to light.

> The False Claims Act is widely regarded as the most effective tool in combating fraud against the federal government.

Additionally, to strengthen several provisions of the False Claims Act that had been undermined by recent court decisions, on May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act of 2009 (FERA). FERA attempts to ensure that fraud perpetrated against the government by the submission of false claims will be brought to light and punished under the FCA. Another development intended to heighten FCA enforcement has been promulgation of a Contractor Code of Business Ethics and Conduct (2009). Besides requiring government contractors to develop written codes of business ethics and conduct, this regulation requires mandatory disclosure to the government when contractors have credible evidence that an employee, agent, or subcontractor has violated the FCA.

Key Provisions of the False Claims Act

Specifically, the False Claims Act prohibits certain types of fraudulent conduct. This fraud ranges from simple to complex, and can be perpetrated by anyone who submits or causes the submission of a claim to the government knowing that the claim is false, or who recklessly disregards that claim's falseness. The types of fraud most commonly prosecuted in the construction industry are described in Sections 3729(a)(1) and (a)(2) of the FCA. Section (a)(1) prohibits knowingly presenting, or causing to be presented, false claims to the government. Section (a)(2) prohibits using a false record or statement to get a false claim paid.

"Knowingly" means that, with respect to information, a person "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information." 31 U.S.C. §3729(b). Further, intent to defraud is unnecessary. Someone only needs to know that the information is false when it is presented. 31 U.S.C. §3729(b).

A "claim" can include requests for progress payments, final payment, equitable adjustments, or any other type of payment request. Therefore, while the language of the law is clear, the actual conduct prohibited is not so clear.

Types of forbidden conduct run the gamut from obtaining a contract under false pretenses, padding hours, costs, and performing substandard work, to making misrepresentations concerning site conditions or materials and submitting

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FEDERAL PREEMPTION OF FAILURE-TO-WARN CLAIMS AFTER *WYETH V. LEVINE*

by Clem C. Trischler, Esq. and Joshua Siebert, Esq.

In March 2009, the United States Supreme Court issued its decision in *Wyeth v. Levine*. At issue was whether the extensive statutory and regulatory provisions governing the pharmaceutical labeling impliedly preempted state-law failure-to-warn causes of action based upon that labeling.

Prescription pharmaceuticals come in two forms: "Brand-name" or "pioneer" drugs, to which the manufacturers have exclusive rights; and "generic" versions of pioneer drugs, which generic manufacturers may distribute once the pioneers' exclusivity expires. Generic drugs are subject to streamlined FDA approval, required only to demonstrate bioequivalence to the pioneer and that the generic's labeling is the same as the pioneer's labeling.

Federal preemption, rooted in the Constitution's Supremacy Clause, bars application of state law when: (1) Congress expressly so provides (express preemption); (2) Congress so comprehensively regulates a field that preemptive intent is implied (field preemption); or (3) Conforming with state and federal law is impossible or would frustrate Congress's intent (conflict preemption). Preemption affects not only positive law but also state common law. Thus, when common law supports liability for an act or omission that federal law precludes, the state claim may be preempted.

Levine addressed the labeling for Phenergan, a brand-name, IV-administered drug, which cautioned that inadvertent intra-arterial injection could cause gangrene. The plaintiff contended that the warning should have restricted use to an IV drip, rather than IV push method, because IV push increased the risk of intra-arterial injection. Wyeth sought summary judgment based on preemption and lost.

The Supreme Court granted *certiorari* and held that preemption did not apply to the plaintiff's failure-to-warn claims. The Court focused principally on the FDA's "Changes Being Effected" ("CBE") regulations. Although manufacturers generally may not unilaterally modify their approved labeling, the CBE regulations permit manufacturers to "strengthen" a warning without prior FDA approval.

The Court also emphasized that Congress had never provided for preemption as to pharmaceuticals. Indeed, in 1962, it added a savings clause to the FDCA (Food Drug and Cosmetic Act) specifying that state law would be invalidated only upon "direct and positive conflict" with the FDCA. Moreover, in 1976, Congress added an express preemption provision to the FDCA with respect to medical devices, but not as to pharmaceuticals. In the 1980s, when Congress amended the FDCA to streamline the generic drug approval process, it did not address preemption.

> *Levine* sowed doubt as to cases that found state failure-to-warn claims preempted for generic drugs.

The Court also declined to defer to the contrary regulatory provisions invoked by Wyeth, which suggested that the FDA intended its regulations to have preemptive effect, creating not only a "floor" for the warnings but also a "ceiling." Those statements had not been subject to formal rule-making processes and contradicted prior regulations and Congress's intent. Thus, they were not entitled to deference.

But because *Levine* resolved the preemption question only as to brand-name manufacturers, it left open the question whether the ruling applied to generic manufacturers.

At the district court level, generic manufacturers long have argued that, while the CBE regulations authorize pioneer manufacturers to enhance warnings unilaterally, they do not apply to generics. Manufacturers emphasize their federal obligation to make their labels the "same" as the pioneer's labels. Congress used this sameness to lower the barriers to approval for generics, enhancing choice and reducing costs.

Before *Levine*, lower courts divided on preemption as to generics. Courts finding preemption emphasized that the alternative could require a generic to have the same labeling as its pioneer at the moment of approval, but create a countervailing duty to strengthen that labeling instantaneously upon approval - an inefficient result.

But *Levine* sowed doubt as to cases that found state failure-to-warn claims preempted for generic drugs. After *Levine*, a series of district courts read *Levine* to deny preemption for generics. As of this writing, only one post-*Levine* district court has ruled contrarily.

The Fifth and Eighth Circuit Courts of Appeals recently reached the question, both suggesting that *Levine* denies preemption as to generics. In *Mensing v. Wyeth* (8th Cir. Nov. 27, 2009), the court noted the *Levine* Court's emphasis on the manufacturer's ultimate responsibility for its labeling. The court ruled that, at a minimum, generic manufacturers were required to alert the FDA to any newly identified risk.

Notably, the court did not go as far as *Levine*. Because it deemed generic manufacturers obligated at least to present the FDA with new warning-related information, and because Wyeth had not done so, the court declined to reach preemption.

In *Demahey v. Actavis* (5th Cir. Jan. 8, 2010) however, the court not only echoed the *Mensing* analysis, but appeared to rule that generics shared pioneers' affirmative duty under the CBE regulations to enhance their warning without prior approval.

Thus, in appellate courts, generic pharmaceutical defendants are 0 for 2 in post-*Levine* cases. So what options remain?

The issue is unsettled. The Supreme Court could distinguish Levine from generics and find failure-to-warn

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Corporate Demise And The Search For Deep Pockets: Accountant Liability And The *In Pari Delicto* Defense

by Martha S. Helmreich, Esq.

An *in pari delicto* defense basically says: even if I was bad, you were just as bad, or worse, and therefore you can't sue me for the damages we both helped cause.

The question of whether this defense can be raised is arising more and more when professionals are sued by bankrupt companies for contributing to the bankruptcy. One such case was brought by the Official Committee of Unsecured Creditors of Allegheny Health, Education & Research Foundation ("AHERF") against Coopers and Lybrand, now PricewaterhouseCoopers ("PwC"), no stranger to such suits.

The AHERF Case

In 1998, Pittsburgh-based AHERF, a network of hospitals, medical schools and physician practices, filed for bankruptcy, the largest bankruptcy of its kind at the time, setting off a cascade of litigation against third parties who might be held responsible for the over $1 billion in losses suffered by AHERF's unsecured creditors and others. These targets included certain of AHERF's officers and directors and the firm which had provided it with audit services for a number of years, in particular for fiscal years 1996 and 1997, Coopers and Lybrand, now PwC.

The Committee sued PwC for breach of contract, professional negligence, and aiding and abetting a breach of fiduciary duty, claiming that PwC's audits failed to conform to generally accepted auditing standards ("GAAS"), that it failed to make AHERF adhere to generally accepted accounting principles ("GAAP"), that it failed to report these violations to AHERF's Audit Committee, and that it provided "clean opinions" with respect to AHERF's financial statements which were in fact materially misstated. According to the Committee, PwC did this in collusion with high-level AHERF officers, who wanted to create the impression that AHERF's strategy of creating an integrated health delivery system was successful - when it was not, and that, had PwC performed its audits in compliance with GAAS, then AHERF's trustees and creditors could and would have intervened to put a stop to this ruinous course. In response, PwC asserted if it was guilty of any "bad acts," then AHERF was *in pari delicto* in that its own senior officers had engaged in wrongdoing, including knowingly misstating AHERF's finances in the figures they provided to PwC, and therefore the Committee, standing in the shoes of AHERF, could not recover.

The federal district court agreed with PwC; on appeal, the Third Circuit asked the Pennsylvania Supreme Court for guidance as to when an *in pari delicto* defense could be raised and also as to when the "bad acts" of its agents could be imputed to the corporate plaintiff. [The four opinions involved are reported at 2007 WL 141059 (W.D. Pa.), 2008 WL 389559 (3d Cir.), 989 A.2d 313 (Pa.) and 2010 WL 2134619 (3d Cir., May 28, 2010).]

> The *in pari delicto* doctrine posits that both parties are actively and equally at fault and the court should not intervene in their dispute.

The Imputation Issue

The court posed this question in the context of a non-innocent accounting firm (third party) seeking to invoke the law of imputation to shield itself from liability. The Pennsylvania Supreme Court noted that the answer to the question involved issues of risk allocation and fairness, both to a third party dealing with corporate agents and to the corporation. The Court concluded that the "bad acts" of the corporation's agents should generally be imputed to the corporation, or a successor entity, at least when the corporation has benefited by these acts, e.g. by being able to sell more stock, purchase more assets or show a profit, even if short-term. However, if the third party is not only not innocent but is more than simply negligent and, for example, actively colludes with a corporate agent to further the interests of, or to benefit, the agent at the expense of the corporation, then the interests of both the agent and the third party are adverse to the corporation and imputation should not be permitted.

In *AHERF*, what the corporate officers hoped to gain, according to the Committee, by secretly giving false information to and withholding material information from PwC in the course of its audits of AHERF, was to preserve their own employment and attendant benefits, including bonuses, and add to their reputations. Although PwC contended that the financial statements it submitted also benefitted AHERF by enabling it to continue, at least in the short term, with its acquisition strategy, the Pennsylvania Supreme Court held that where an auditor is supposed to be giving "accurate (or at the very least honest) financial information" to the governing structure of the corporation, and has "not proceeded in material good faith to do so," there can be, as a matter of law, no benefit to the company on which the auditor could structure a defense based on imputing the agents' conduct to their principal.

The *In Pari Delicto* Defense

The *in pari delicto* doctrine posits that both parties are actively and equally at fault and that being so, the court should not intervene in their dispute, or come to the aid of an admitted wrongdoer, at least where, as a matter of public policy, the court decides that the defense should apply. According to the court, the defense is not available where imputation is not available; where, for example, the court finds that the auditor "has not dealt materially in good faith with the client principal," but rather has been part of a "scenario involving secretive collusion between officers and auditors to misstate corporate finances to the corporation's ultimate detriment."

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email accounts, as opposed to work email accounts. The Court stated that it was proper for companies to adopt lawful policies relating to computer use, but in this situation, the public policy interest underlying the attorney-client privilege trumped any policy that the employer might have to access personal, password protected email accounts on the company's email system.

These decisions are instructive for employers. Most importantly, employers should have clearly worded policies related to the use of employer-issued electronic devices and computers. At a minimum, the policy should contain:

• Specific definitions of the work devices and messages that are covered by the policy - - for example, work-issued computers, BlackBerry devices and cell phones;

• A provision addressing whether an employee is permitted to use work devices for personal use; and the extent to which that use is allowed;

• A provision informing employees that the employer may monitor and log all work devices and accounts;

• A provision informing employees that the employer may access and search work devices and accounts, and that employees have no expectation of confidentiality or privacy in messages sent over those devices;

• A provision allowing for disciplinary action if the policy is violated; and

• A form for employees to sign acknowledging receipt of the policy.

Significantly, if an employer conducts a search of its employees' devices or accounts, the search must be motivated by a legitimate, work-related purpose. Unfocused fishing expeditions for undefined information may not survive an employee's challenge and will expose the employer to litigation. Any search should be kept reasonable in scope and may not be any more intrusive than necessary. If there is any question about the purpose and scope of the search, the employer should consult with legal counsel prior to any action. Having clearly defined policies and procedures will define the line between personal and private use of work-issued devices and minimize the employer's exposure to litigation.

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If the potential scheme includes patients as willing participants, interviews will surely prove futile. A well-planned, under-cover investigation might be the next step, with an employee or contractor of the carrier playing the role of a worker injured on the job. Be sure to consult with counsel who is knowledgeable in your jurisdiction before recording any interactions with providers.

Underutilized Litigation Tools

Insurance carriers have many tools in their litigation toolbox to pursue provider fraud. While exercising one's right to file a garden variety, common law fraud action in state court is still an effective weapon to combat provider fraud, legislatures across the country have codified private causes of action tailored to this industry. Statutes vary from state to state, and the payoff can be exponentially higher (both monetarily and systemically) than pursuing claimants.

One need not travel out of the of the Commonwealth of Pennsylvania to find such a remedy. Within the statute criminalizing insurance fraud, 18 Pa.C.S.A. § 4117, there lies buried within a civil cause of action:

An insurer damaged as a result of a violation of this section may sue therefor in any court of competent jurisdiction to recover compensatory damages, which may include reasonable investigation expenses, costs of suit and attorney fees. An insurer may recover treble damages if the court determines that the defendant has engaged in a pattern of violating this section.

18 Pa.C.S.A. §4117(g).

Our neighboring state of New Jersey has a similar provision:

(a) Any insurance company damaged as a result of a violaton of any provision of this act may sue therefor in any court of competent jurisdiction to recover compensatory damages, which shall include reasonable investigation expenses, costs of suit and attorneys fees.

(b) A successful claimant under subsection (a) shall recover treble damages if the court determines that the defendant has engaged in a pattern of violating this act.

N.J.S.A. 17:33A-7.

Fear not if you find yourself in a jurisdiction without such a statute. Most states that do not have such laws, such as New York, have Insurance Frauds Bureaus or Insurance Fraud Task Forces designed to supplement law enforcement resources to target provider fraud. New York's Insurance Fraud Bureau was established in 1981 with the mission "to effectively detect, investigate and prevent insurance fraud and to refer for prosecution persons who commit acts of insurance fraud." New York accomplishes this by working in eight specialized units, one being devoted solely to investigating policyholders, doctors, and other healthcare professionals who submit inflated bills or bills for services that were not rendered. Not only does the Bureau have the capacity to refer offenders for criminal prosecution, but it has the ability to levy civil penalties of up to $5,000, plus the value of the claim, against any person who submits a fraudulent insurance claim.

The Future

By using data mining and other investigative strategies described above, and by investing in a proactive litigation strategy, carriers can develop a well-oiled machine to identify outlier physicians who defraud the system through one of the three schemes. Shutting down one fraudulent medical provider can eliminate the same amount of fraud perpetrated by dozens of fraudulent workers' compensation claimants. Further, a carrier may have the statutory ability to recoup its investigative and litigation fees under these statutes, along with the potential for treble damages. In an era of increased scrutiny on healthcare providers and insurance, affirmative litigation strategies using these statutes and tools will prove to be not just a possibility, but an inevitable certainty.

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inflated requests for equitable adjustment. *See, e.g., Daewoo Engineering and Construction Co. v. United States*, 73 Fed. Cl. 547 (Fed. Cl. 2006). Not only the prime contractor presenting the claim to the government may be held liable, but also a subcontractor on a large project that submits an inflated bid or false claim to the prime or general contractor may be held liable even if that subcontractor, or architect or any other party submitting a claim, deals directly with the federal government. Indeed the False Claims Act assigns liability whenever a person knowingly submits a false claim to obtain money or property whenever the government provides funding.

False Claims in the Construction Industry

False claims liability often occurs in collusive bidding schemes, kickbacks, and filing of false certifications of compliance. Collusive bidding is a practice in which several contractors work in concert to ensure a high bid price for the winning bidder. Collusive bidding practices by competitors, or bid-rigging, also violates section 1 of the Sherman Antitrust Act. Such practices might involve a bonus or loser's fee as part of an arrangement in which the winning bidder will hire the loser to perform a part of the contract. The loser's fee is rolled into the bid price and inflates the amount of government money spent on the project.

When funds for projects have multiple sources, it is often difficult to track how government dollars have been spent. The courts have tackled this tracking problem, particularly in circumstances in which local money and federal dollars have been intertwined in a particular project. The U.S. Supreme Court stated in a 1943 case that the collusive bidding scheme did not expire with the execution of the contract. Its taint entered into every swollen estimate that was the basic cause for payment of every dollar paid by the government. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 543-44 (1943).

Kickback schemes have also been found to impose liability under the False Claims Act. A prime example involved a case in which an Amtrak project manager suggested that an asbestos remediator subcontractor inflate its bid to incorporate a kickback to the project manager, which was referred to as a "consultant fee." *United States v. Safe Environment Corp.,* 2002 WL 976033 (N.D. Ill. 2002). The subcontractor submitted the inflated final invoice, with the "consultant fee" included, to Amtrak. On discovery of the kickback scheme, the project manager was criminally convicted, and the subcontractor was found liable under the FCA for submitting a false claim.

Another forbidden practice punishable under the FCA is false certification. False certifications submitted during the course of a bidding process, such as certification that a contractor has met contractually mandated, disadvantaged-business enterprise utilization when it has not, are also sufficient to impose FCA liability. *United States ex rel. Stierli v. Shasta Services, Inc.*, 440 F. Supp. 2d 1108 (E.D. Cal. 2006).

False claims liability often occurs in collusive bidding schemes, kickbacks, and filing of false certifications of compliance.

Other false certifications of compliance that may implicate FCA liability include representations concerning timely payment to subcontractors for the purpose of obtaining progress payments, as in *Lamb Engineering & Construction Co. v. United States*, 58 Fed. Cl. 106 (Fed. Cl. 2003), certifications regarding minority-owned businesses, as in *United States ex rel. King v. F.E. Moran, Inc.*, 2002 WL 2003219 (N.D. Ill. 2002), wage compliance certifications, and quality of project materials certifications, as in *Allen v. Beta Construction*, 309 F. Supp. 2d 42 (D.D.C. 2004).

Perhaps the most famous example of false claims liability in the construction industry involved Boston's Central Artery Tunnel Project, also known as "The Big Dig." This huge construction project exceeded its schedule by many years and also exceeded its budget. Defects in slurry walls caused flooding of the tunnel roadways on several occasions, and a defective ceiling collapsed, causing the death of a young woman. Both Massachusetts, under that state's version of a False Claims Act, and the federal government, under the federal FCA, brought a false claims case against Bechtel-Parsons Brinckerhoff, the joint management firm and main contractor on the project. Bechtel-Parsons Brinckerhoff, which designed and oversaw construction of the multi-billion dollar project for more than 20 years, allegedly failed to properly oversee subcontractors that were overcharging based on employee classifications and using inadequate materials for the construction. The case against Bechtel-Parsons Brinckerhoff eventually settled for $407 million, including settlement of the alleged false claims related to ceiling compliance certification, failure to properly oversee slurry wall construction, and claims related to subcontractor overbilling. Claims against other contractors on the project have allowed the state and the U.S. government to recover over $500 million to date.

Boston's Central Artery Tunnel Project involved two simple, straightforward claims: certifying payment of apprentice workers at higher than normal journeyman rates and overbilling the time spent on a project. Complex false claims, however, were involved in the Daewoo Engineering & Construction Company case. Daewoo bid on, and won, a United States Corps of Engineers contract to construct a 53-mile road around the Pacific island nation of Palau, not only because of Daewoo's impressive qualifications and history, but also because its bid amount was significantly lower than the next lowest bid. Daewoo immediately ran into trouble completing the project in three years as planned, purportedly because of adverse weather conditions, difficulty in compacting the local soil, and the logistics of dealing with the lush, jungle environment. However, it became clear in subsequent litigation that Daewoo had originally bid low on the project with the intent of making up the difference with requests for equitable adjustments.

After beginning the work, Daewoo submitted an equitable adjustment request of $64 million, 86 percent of its original bid price on the entire project. When the government denied the claim, Daewoo sued. After the company presented its case, the government filed

Continued on page 8

claims against Daewoo under the False Claims Act and asserted other fraud claims. The court hearing the case found that Daewoo had deliberately underbid the contract, obtaining the contract under false pretenses. The court also found that $50 million of the $64 million claim for equitable adjustment was fraudulent because it had been submitted with the intent to "get the government's attention."

The court awarded a $10,000 civil penalty to the government against Daewoo for filing the false claim, awarded $50 million to the government under another fraud-prevention law, and also identified 762 other instances in which Daewoo had made false claims or relied on false records, including its own soil compaction studies and overstatements that misrepresented the cost of at least 700 pieces of equipment. Without deciding, the court suggested that the $10,000 penalty then in place for violations of the FCA for each of the 762 separate instances, or $7,620,000, might be appropriate as an additional penalty under the FCA's statutory scheme.

Whistleblower Claims

Construction companies need to be aware that one of their own employees can file a False Claims Act claim. A private person, commonly known as a whistleblower or relator, who is aware of potential misconduct can file a False Claims Act claim. This relator normally seeks the assistance of an attorney to file a claim. The reason is that a private individual does not have the necessary knowledge and expertise to file a civil action for a false claim and successfully prosecute this type of action on behalf of the government. When a claim is initially filed in court, it is filed under seal, meaning that the alleged wrongdoer and the public are not, at the outset, informed that a lawsuit has been initiated. The government then has a 60-day window to review the claim and determine whether to intervene. This period of secrecy may be extended for good cause, and often is, while the government investigates. Intervention by the government limits a relator's ability to guide a case. On the other hand, the government's intervention provides significant additional resources to investigate and prosecute the whistleblower's case.

If a case is ultimately successful and the government recovers, a court will review the degree of assistance provided by a relator and will determine the relator's share of the recovery based on that assistance. Typically, the more work the government has to do to prove a case, the less the share of the recovery the relator will receive.

Generally, to bring an FCA claim, the wrongdoing must not have been previously publicly disclosed prior to filing the claim. Public disclosure of the fraudulent claim may bar proceeding against a wrongdoer. Further, a relator's claim will not usually succeed if another relator has already filed the same or a related claim.

Construction companies need to be aware that one of their own employees can file a False Claims Act claim.

A relator is protected by the provisions of the False Claims Act from retaliation for bringing false claims to light. 31 U.S.C. §3730(h). Penalties for violating the non-retaliation provision of the FCA include reinstatement, double back pay, and reasonable attorney's fees.

Procedures That Limit Construction Companies' Exposure

Given the large monetary exposure of a construction company that is accused of violating the False Claims Act, it is important to take extra precautions in projects involving a governmental entity. A construction company can take the following actions when working on a government-funded project to minimize its exposure to a claim under the FCA:

• Implement a written code of business ethics and conduct.

• Periodically review the contract, specifications, and other contract documents to make sure that the company is in compliance.

• Make certain that certifications, such as timely payment to subcontractors, quality of materials, and employee classifications are accurate and complete.

• Assign individual responsibility for certifications.

• Make sure that the company has internal controls set forth in a written procedure that assure that management will "sign off" before a certification or compliance is issued.

• Whenever a certification of compliance is issued, follow the internal control procedures before issuing the certification.

• Periodically perform internal investigations to forestall the risk of false claims.

• Periodically perform a fraud-risk assessment.

• Evaluate controls designed to prevent or detect fraud, including management override of controls.

• Periodically review billing procedures.

Conclusion

Penalties under the False Claims Act far exceed the cost of investigating and establishing appropriate procedures. Consequently, prudent construction companies will take preemptive measures to reduce the probability of becoming involved in a False Claims Act prosecution. Instituting appropriate safeguards in projects involving government funding pays off because the False Claims Act levels the playing field, severely penalizing companies that don't play by the rules.

For more information, please contact Joseph J. Bosick at (412) 263-2000 or via e-mail at JJB@PIETRAGALLO.com, Joseph D. Mancano at (215) 320-6200 or via e-mail at JDM@PIETRAGALLO.com, or Grant H. Hackley at (412) 263-2000 or GHH@PIETRAGALLO.com

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Federal Preemption of Failure-To-Warn Claims continued from page 4

claims preempted by the FDCA because FDA regulations differ as to generics; and Congress's intent to streamline generic drug approval contraindicates the imposition of state-specific duties on manufacturers. Conversely, the Court might feel restricted by *Levine's* premises regarding manufacturers' responsibility for their warnings, and Congress's failure to preempt state claims when it had the chance.

Attorneys wrestling with this issue have raised too many arguments to enumerate here. Notably, in *Levine*, pioneer variations of common generic arguments were not only rejected but treated somewhat derisively. Thus, it is most prudent to focus on arguments the *Levine* Court did *not* reject, such as those regarding Congress's desire to facilitate generic drug approval and the FDA's serial injunctions that generic manufacturers not vary their label from the pioneer's. *Mensing* and *Demahey* also offer guidance. Both cases found that generic manufacturers at least have a duty to present concerns to the FDA, and to seek approval of enhanced warnings or guidance as to other actions.

Thus, it can be argued that generic manufacturers *at most* can be required to bring labeling concerns to the FDA's attention and seek guidance. Even if manufacturers bear responsibility for their labeling, the FDA remains the ultimate arbiter of labeling content. Once a manufacturer puts the FDA on "inquiry notice," it has no obvious option but to await FDA action - or inaction.

This approach was vindicated before *Levine.* Specifically, courts found claims alleging failure to warn of suicidality risks associated with an antidepressant medication to be preempted. The risks had been considered and rejected by the FDA; manufacturers could not be liable for failing to warn of risks that the FDA specifically had determined did not require warnings.

In such a situation, when the FDA affirmatively rejects a change, the manufacturer simply cannot comply both with its state-law obligation to enhance its warnings and its duty to adhere to the FDA's express determinations regarding what warnings should be provided - a classic conflict preemption scenario. Courts have found preemption under those circumstances in the past, and nothing in *Levine* or post-*Levine* decisional law precludes preemption under those circumstances.

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Corporate Demise and the Search for Deep Pockets continued from page 5

The Pennsylvania Supreme Court cautioned that an *in pari delicto* defense, because it is at odds with the objectives of traditional liability schemes including fair compensation and deterrence of wrong-doing, will not be available in "garden-variety contract and tort claims" against auditors, and that its availability may also depend on the level of review undertaken by the auditor. The Court noted as well that "in a responsible policy-setting decision," courts will need to take into account the impact on the profession as a whole of what appears to be the growing prevalence of malpractice claims against auditors in the corporate insolvency setting with their corresponding litigation burdens.

Left unresolved in the *AHERF* decisions is whether an *in pari delicto* defense can be raised if the plaintiff is suing on behalf of a corporation but does not "stand in the shoes" of the corporation, e.g., a receiver; whether to recognize an "innocent decision-maker" exception to imputation; and whether, if the corporate agent is a "sole actor" or the "alter ego of the corporation," imputation must necessarily result.

The Lesson of the AHERF Decisions

Both the Third Circuit's and the Pennsylvania Supreme Court's decisions in the *AHERF* case indicate that those courts are mindful of the important, indeed crucial, services provided by independent auditors in a corporate setting in, among other things, providing a check against potential management abuses, and of the downsides created by allowing a plethora of malpractice claims to go forward, with resultant verdicts in the hundreds of millions of dollars, which application of an *in pari delicto* defense, through imputation, would prevent. The bar for overcoming the defense, as set in these decisions, is relatively high and the defense remains a strong one, at least in Pennsylvania - unlike New Jersey where negligence in failing to uncover fraud alone may be sufficient to bar the defense. But, in Pennsylvania, where an auditor has contributed to a corporation's misconduct through the kind of collusive failure to deal in good faith conduct at issue in *AHERF* - the fact of which is to be determined on remand - the defense will not be available. As a general matter, therefore, auditing firms, particularly those employed by, or considering being employed by, corporations whose demise would create large-scale losses and the possibility of large-size claims against potential deep pockets should take care in their approach to assignments, be sure they are following GAAS, be clear what their scope of work is, and maintain their independence.

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RECENT SUCCESSES

$6.35 Million Settlement in Whistleblower Case: Marc S. Raspanti and **Michael A. Morse** represented a qui tam whistleblower in a $6.35 million settlement against Robert Wood Johnson University Hospital Hamilton. The whistleblower lawsuits filed against the Hamilton, NJ facility alleged that the hospital fraudulently inflated its charges to Medicare patients to obtain higher reimbursements from the federal health care program.

WBE Certification: Andrea M. Bartko assisted a large, national company in obtaining official certification as a women-owned business (WBE). This nationwide certification will allow the client to more fully participate in markets where customers who contract with federal and state government organizations are required to utilize such certified businesses for outside vendor work.

Successful Judgment: Louis C. Long represented the Pennsylvania Defense Institute in a case before the Superior Court of Pennsylvania. The Superior Court reversed a summary judgment and, in doing so, the Superior Court specifically relied upon an argument advanced in the amicus brief. The case involved an important issue of first impression regarding the coordination of underinsured motorist arbitration and motor vehicle accident litigation.

Compulsory Nonsuit: Tyler J. Smith argued to the Court of Common Pleas of Washington County, PA, where during cross-examination, the plaintiff's expert equivocated on the issue of causation against his client, a general surgeon. Therefore, the Court agreed that plaintiff did not meet her burden of proof and granted the request for a compulsory nonsuit at the close of the plaintiff's case.

Breach of Fiduciary Duties Claim: Robert R. Leight obtained a favorable decision for a registered investment advisor on a breach of fiduciary duties claim owed to an investor in connection with three hedge funds that were feeders to the Madoff scheme. A substantial award was made against the remaining parties.

Fraud Lawsuit: Joseph J. Bosick and **David P. Franklin** filed a fraud action on behalf of a business client relating to a Joint Venture involving sophisticated software. The Defendants in the action filed Preliminary Objections asserting that the case should be transferred to Arbitration because of the existence of an Arbitration Clause in the Joint Venture Agreement. After briefing and oral argument, the Trial Court denied the Preliminary Objections and found in favor of the plaintiff. The matter is now on appeal to the Superior Court of Pennsylvania.

Summary Judgment: Rochelle L. Brightwell and **Jennifer R. Russell** prevailed on behalf of an employer in a wrongful discharge case on appeal before the Supreme Court of West Virginia. The Supreme Court affirmed the Circuit Court's entry of summary judgment in favor of the employer and rejected the terminated employee's argument that a new public policy exception to the at-will employment doctrine should be created where an employee has reported alleged criminal misconduct by a principal of a privately-owned company.

Age Discrimination/Harassment Case: Jennifer R. Russell prepared a motion to dismiss and brief on behalf of an employer in a case in which an employee alleged a claim of age discrimination/harassment under the Age Discrimination in Employment Act (ADEA). The motion to dismiss, which was based upon the fact that the plaintiff had not sufficiently set forth her claims under new standards of pleading in federal court, was granted.

PIETRAGALLO ADDS THREE NEW ASSOCIATES

Timothy J. Lyon has joined the firm as an associate in the product liability group. Prior to joining the firm, Mr. Lyon was a law clerk to the Honorable Joseph F. Weis, Jr., of the United States Court of Appeals for the Third Circuit. Mr. Lyon has also served in the Allegheny County District Attorney's Office.

Brett C. Shear joined the firm as an associate in the commercial litigation group. He has experience in the areas of professional liability, construction, bond law, business torts, insurance, collections, premises liability and personal injury. Mr. Shear has also served as a legal intern for several community law clinics where he assisted low-income taxpayers with various legal matters.

Ethan J. Barlieb has joined Pietragallo's commercial litigation and white collar criminal defense practice groups. Prior to joining the firm, Mr. Barlieb served as a judicial law clerk where his duties included managing dockets of numerous civil cases, conducting legal research, preparing judicial opinions/bench memoranda for a wide range of criminal and civil matters, including supression and sentencing issues, civil rights and tort and commercial disputes.

ATTORNEYS IN THE NEWS

William Pietragallo, II (Business Litigation)**, Mark Gordon** (Business Litigation), **Joseph J. Bosick** (Civil Litigation Defense) **Marc S. Raspanti** (Criminal Defense: White Collar), **Gaetan J. Alfano** (Business Litigation), **Joseph D. Mancano** (Criminal Defense: White Collar)**, Kevin E. Raphael** (Health Care), **Anthony J. Basinski** (Business Litigation)**, Pamela G. Cochenour** (Employment Litigation: Defense)**, Gayle L. Godfrey** (Personal Injury Defense: Medical Malpractice)**, P. Brennan Hart** (Civil Litigation Defense)**, Francis E. Pipak** (Workers' Compensation), **Clem C. Trischler** (Personal Injury Defense: Products), and **Paul K. Vey** (Health Care) have been selected as 2010 Pennsylvania Super Lawyers.

Michael A. Morse (Criminal Defense: White Collar), **Daniel J. McGravey** (Employment Litigation: Defense)**, Christopher A. Iacono** (Criminal Defense: White Collar), **Amy C. Lachowicz** (Business Litigation), **Douglas K. Rosenblum** (Criminal Defense: White Collar)**, Kathryn M. Kenyon** (Health Care), and **James F. Marrion** (Business Litigation) were selected as 2010 Pennsylvania Rising Stars.

Mark Gordon chaired the American Cancer Society's 2nd Annual Premier Golf Outing honoring Arnold Palmer.

James W. Kraus was appointed as co-chair of the ABA Criminal Justice Section White Collar Crime Committee Mid-Atlantic Region Subcommittee.

Gaetan J. Alfano was re-elected as vice chairman of the Delaware River Joint Tollbridge Commission.

Bryan S. Neft received the Nora Barry Fischer Award for 2010, which serves to recognize an attorney within the firm who has given back to the legal profession and the community at large.

Northwest Victims Services presented **Pietragallo** with the 2010 Community Service Award for the firm's demonstration of long standing commitment and dedication to the advancement of NVS and community goals.

Marc S. Raspanti was reappointed as a member of the Pennsylvania Commission on Sentencing by Governor Edward G. Rendell.

Kevin E. Raphael was appointed as a Hearing Committee Member Serving the Disciplinary Board of the Supreme Court of Pennsylvania for a three-year term.

P. Brennan Hart was elected to the Judiciary Committee of the Allegheny County Bar Association.

Douglas K. Rosenblum was appointed as a member of the Steering Committee for the Philadelphia Young Lawyers' Division of the ABA White Collar Crime Committee.

Christopher A. Iacono was appointed co-chair of the Mid-Atlantic Chapter of the ABA's Criminal Justice Section White Collar Committee Young Lawyers' Division.

Marc S. Raspanti was appointed as co-chair of the ABA Criminal Justice Section White Collar Crime Committee Qui Tam Subcommittee.

Kathryn M. Kenyon, Alka A. Patel, Michael A. Morse and **Douglas K. Rosenblum** are being honored as 2010 Lawyers on the Fast Track.

UPCOMING EVENTS

September 23, 2010, Champion, PA - **Tyler J. Smith** will present on issues concerning the Patient Protection Affordable Act and issues surrounding compliance, safety, quality assurance, malpractice and licensing at the Annual Multidisciplinary Aging Conference.

September 27, 2010, Baltimore, MD - **Marc S. Rasparti** will present on "The Truth about False Claims Post-US ex rel Hopper vs Solvay Pharmaceuticals" at the Fraud and Compliance Forum sponsored by the Health Care Compliance Association and the American Health Lawyers Association.

September 29, 2010, Philadelphia, PA - **Divya Wallace** and **Amy C. Lachowicz** will present on "Social Networking Sites: A Hotbed of Liability for Employers," at the BNA Audioconference.

October 27-29, 2010, Fort Lauderdale, FL - **Tyler J. Smith** is presenting on "Malpractice Safety and Management" at the 2nd OR Excellence Seminar.

October 16, 2010, Pittsburgh, PA - **Mark Gordon** will be speaking on behalf of the firm at the "First Annual Making Strides Against Breast Cancer" event hosted by the American Cancer Society.

October 19, 2010, Philadelphia, PA - **Marc S. Raspanti** and **Michael A. Morse** will present on, "The 10 Things You Want to Know About Whistleblower Suits But Were Afraid to Ask" at the Pennsylvania Bar Institute's A Day on Health Law.

October 19, 2010, Philadelphia, PA - **Kevin E. Raphael** will present on, "Crimes and Misdemeanors: Hot Topics in Contracting and Litigation With Private Health Insurance Companies" at the Pennsylvania Bar Institute's A Day on Health Law.

October 28, 2010, Pittsburgh, PA - The firm's Pittsburgh office will host a White Collar CLE on environmental crimes.

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ATTORNEYS AT LAW

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