HLB
Hooper, Lundy & Bookman, PC
HEALTH CARE LAWYERS & ADVISORS

HEALTH LAW PERSPECTIVES

Newsletter | Volume 17 | No. 4

May 2015

Precious Murchison Gittens Joins Hooper, Lundy & Bookman:Former Federal Prosecutor Joins Firm at Critical Time For Providers

HLB is pleased to announce that former federal prosecutor Precious Gittens has joined the firm as a partner in the firm's Washington, D.C. Office.

Most recently a shareholder at Greenberg Taurig's Washington, D.C. office, and a former Assistant U.S. Attorney for the U.S. Attorney's Office of the District of Columbia, Ms. Gittens brings with her 14 years of experience in litigating both sides of criminal, regulatory, and administrative law issues.

In November 2014, Ms. Gittens was recognized by *The National Law Journal and Legal Times* as a 2014 Washington D.C. Rising Star.

She continues her teaching with Harvard Law School, where she serves as faculty of the Trial Advocacy Workshop. In addition, she is an instructor with the National Institute of Trial Advocacy.

"We are pleased to have Precious Gittens join our team of health law experts specializing in complex federal health law representation," said HLB Managing Partner Robert Lundy. "Precious' expertise in litigation, audits and investigations is especially vital now, given the myriad issues under increased government scrutiny."

Ms. Gittens regularly advises clients regarding criminal, civil, OIG, and congressional investigations. She has handled significant litigation involving the False Claims Act, health care fraud, contract and regulatory disputes, as well as business torts.

"With increasing government scrutiny of health care providers and suppliers on both the criminal and civil sides, the experience that Precious brings as a former Assistant U.S. Attorney and seasoned litigator in private practice, is vital to our national client base," said HLB Washington, D.C. Office Managing Partner Robert Roth. "Precious will help assure that we are able to continue serving our growing national practice with the unparalleled health law expertise that is a hallmark of our firm."

"Indeed, now that the Justice Department has declared its intent to initiate criminal review of false claims actions filed by whistleblowers, Precious' experience and excellent relationship with the Justice Department will enhance our ability to protect our clients," added HLB Attorney Patric Hooper, who leads the defense of various ongoing fraud investigations and cases.

Ms. Gittens is a 2001 graduate of Georgetown Uni-

In This Issue

versity Law Center and a 1998 magna cum laude graduate of Howard University.

She is admitted to practice in the District of Columbia, Maryland and in the U.S. Court of Appeals for the District of Columbia Circuit, the U.S. District Court for the District of Columbia, the U. S. District Court for the District of *Maryland and the U.S. Supreme Court.*

She can be reached at 202.580.7703 or pmgittens@health-law.com.

False Claims Act Lawsuits Brought by Whistleblowers to be Reviewed by DOJ's Criminal Division

By Patric Hooper and Precious Murchison Gittens

Federal and State False Claims Acts lawsuits are the primary anti-fraud enforcement tool used by the government in the health care industry. While civil in nature, liability sums assessed in False Claim Act (FCA) lawsuits may feel very punitive to defendants due to the treble damages and civil penalties provisions of the FCA. In FY 2014, the federal government collected $2.3 billion from FCA health care cases.

The overwhelming majority of the sums collected ($2.22 billion) came from FCA qui tam actions. Under the *qui tam* provisions of the FCA, private parties (whistleblowers) may initiate actions on behalf of the government and the private party, (the "relator") may participate handsomely in any recovery. The number of such whistleblower actions is on the rise. Of the FCA actions filed in FY 2014, 469 of the 500 health care related cases were initiated as qui tam actions by whistleblowers.

In a September 17, 2014, speech given at a "Taxpayers Against Fraud Education Fund Conference," Leslie Caldwell, Assistant Attorney General, announced that the Criminal Division of the Department of Justice ("DOJ") will be "stepping up" its analysis of FCA *qui tam* cases to look for potential criminal prosecution. Ms. Caldwell characterized DOJ's Criminal Division as having "unique" expertise and "unparalleled" experience in prosecuting financial fraud cases that it will bring to bear on such cases. This increased scrutiny will likely be coordinated with the Medicare Fraud Strike Force, which has been operating since 2007. The Strike Force is a coordinated team of investigators from DOJ, Health and Human Services (HHS) and state and local law enforcement agencies "dedicated to fighting Medicare Fraud."

As of September 2014, DOJ's Criminal Division Fraud Section assigned more than 40 prosecutors to health care fraud cases and the number is growing rapidly since the lifting of a government wide hiring freeze. Ms. Caldwell describes the Fraud Section as "the largest and most prolific unit of criminal prosecutors dedicated solely to health care fraud in the Country."

So-called "parallel" (simultaneous criminal and civil) investigations are not new to the health care industry. Indeed, Ms. Caldwell referred to DOJ's "wealth of experience in successfully bringing parallel investigations." Ms. Caldwell promised the audience that her office would now be "redoubl[ing] [its] efforts to work alongside" qui tam relators and their counsel.

In addition to having to be concerned about ongoing criminal investigations arising out of an FCA *qui tam* action, defendants in the health care industry must also be aware of simultaneous investigations by federal and state administrative agencies, such as the HHS Office of Inspector General (OIG). Understanding the respective roles and powers of these different enforcement agencies is critical to responding effectively to, and defending, FCA matters.

Thorny legal and practical issues abound in parallel government investigations. For example, while DOJ Civil attorneys and the OIG typically confine their information gathering during the investigation stage of a case to subpoenas, criminal investigative demands and informal interviews, criminal prosecutors may seek information from a target of a criminal investigation and others through grand jury subpoenas, search warrants and wire-tapping. Additionally, criminal prosecutors may freeze assets during the investigation, thereby impeding a defendant's ability to prepare a legal defense.

HLB Briefs

Robert Roth, Managing Partner of HLB's Washington, D.C. Office, has been recognized as a Washington, D.C. SuperLawyer. SuperLawyers are chosen regionally through a process that includes peer nominations and evaluations and independent research.

However, there are important limits on such procedures and on the ability of the Criminal and Civil Divisions of DOJ to share the resulting information. Investigations are supposed to be truly parallel and not improperly intertwined. In *United States v. Scrushy*, 366 F. Supp. 2d 1134, 1139-40 (N.D. Ala. 2005), a high profile health care fraud case of ten years ago, a federal court rebuked DOJ for mixing a criminal investigation with an allegedly parallel investigation of the same defendant by the Securities Exchange Commission.

Moreover, the government ordinarily must inform defendants and their counsel in FCA matters of the pendency of a criminal investigation if DOJ Civil Division attorneys intend to query the defendants. This allows a defendant to consider asserting Fifth Amendment rights. Yet, the assertion of Fifth Amendment rights, itself, could prove to be problematical in a pending FCA case since adverse inferences may be drawn in the FCA case from a defendant's refusal to testify relying on the Fifth Amendment because of a pending criminal investigation.

Of course, the government also may not leverage a civil settlement of an FCA case with the threat of a criminal prosecution. However, the lure of obtaining relief from the enormous pressure of future or pending criminal charges can cause persons to "cooperate voluntarily" with the government not only in criminal prosecutions but also in related FCA cases.

FCA defendants must carefully consider how they wish to proceed when they are confronted by parallel criminal and civil investigations. Under some circumstances, defendants might ask the government or the court to stay all civil proceedings pending the outcome of any criminal investigation. Yet, in other situations, FCA defendants might choose to go forward with the civil matter, especially if they are confident about the strength of their defense, since a lingering criminal investigation may have a devastating impact on a defendant's reputation. If so, DOJ's civil division might ask the court in the civil FCA case to stay all further proceedings, which is precisely what DOJ is doing in a high profile FCA case our office is currently handling.

Because of circumstances somewhat unique to health care, important constitutional and other legal issues have yet to be decided by the courts with respect to parallel investigations. For example, where the reputations of doctors and other health care providers can be irreparably harmed by the publication of a criminal investigation, due process of the law would seemingly require that FCA defendants be given a prompt opportunity to contest adverse allegations in the FCA matter notwithstanding DOJ's attempt to delay the FCA proceedings while the criminal investigation is proceeding. This is especially so where substantial adverse "collateral consequences" arise due to the investigation. These may include the suspension of a provider's contracts with health care insurers and government payers and even the cancellation of a defendant's banking privileges, which has actually occurred in the current case we are handling, mentioned above.

In sum, the DOJ Criminal Division's recently announced increased involvement in FCA cases triggers important strategy issues regarding the defense of FCA cases and parallel criminal investigations. DOJ's intensified scrutiny necessarily requires the active involvement of defense counsel who are not only experienced in criminal and civil fraud matters, but also are experienced in the complex regulatory matrix of the health care system. Indeed, generally speaking, the more complicated the underlying health care issues, the less likely DOJ's Criminal Division will want to pursue criminal charges.

For additional information, please contact Patric Hooper in Los Angeles at 310.551.8111; Precious Murchison Gittens in Washington, D.C. at 202.580.7700, Mark Reagan in San Francisco at 415.875.8500; or Mark Johnson in San Diego at 619.744.7300.

U.S. Supreme Court To Hear Case Addressing ERISA Provider Recoupment Requests

The United States Supreme Court recently decided to hear a case that may have important implications for health care providers facing recoupment requests from ERISA plans.

Numerous ERISA plans and administrators, like United, Aetna, Cigna, and Blue Cross, are currently pursuing recoupment actions against providers, seeking to recoup alleged overpayments to providers for a variety of reasons, including, but not limited to, the waiver of co-payments. By granting Certiorari in *Robert Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, Case Number 14-723, the Court will clarify whether the plans can seek such recoupment against a provider's general assets if the funds are already spent.

Currently there is a split among circuit courts as to the recoupment of funds under ERISA Section 502(a)(3), which allows a plan to seek an equitable lien as appropriate equitable relief under ERISA. In *Montanile*, the Supreme Court is being asked to address whether a plan may enforce an equitable lien against a defendant's general assets, if specifically identified funds are no longer

available. Five Circuit Court of Appeals have adopted the view that a plan pursuing an equitable lien under Section 502(a)(3) can assert such a claim even if the specifically identified funds have not been set aside. Two Circuits, including the Ninth Circuit in *Bilyeu v. Morgan Stanley*, 683 F.3d 1083 (9th Cir. 2012), have ruled that possession of the actual funds received or strict tracing to those funds is required for an equitable lien under Section 502(a)(3).

The facts in *Montanile* are as follows: Robert Montanile was ordered to reimburse more than $120,000 to The Board of Trustees of the National Elevator Industry Health Benefit Plan (the Benefit Plan) for medical benefits that had been paid on behalf of Montanile following an accident in which a drunk driver ran a stop sign and slammed into his vehicle. After Montanile reached a $500,000 settlement with the driver, the Benefit Plan demanded, pursuant to the summary plan documents, repayment for the medical expenses paid even though he had spent much of the settlement money on legal fees and caring for himself. When negotiations fell through, the Benefit Plan filed an ERISA suit to enforce its reimbursement provision.

In November 2014, the Eleventh Circuit upheld a district judge's order awarding the Benefit Plan summary judgment in the amount of $121,044.02. In doing so, the Eleventh Circuit ruled that the Benefit Plan's summary plan documents gave it a first-priority right to reimbursement. Therefore, the Benefit Plan's equitable lien against the settlement funds attached as soon as Montanile entered into the settlement and before Montanile had spent any of the funds.

At issue before the Supreme Court in *Montanile* will be interpretation of the statutory language of Section 502(a)(3), which authorizes a fiduciary to pursue a civil action to recover "appropriate equitable relief." This language has resulted in several decisions by the Supreme Court. A brief summary of those cases provides enlightenment into the potential significance of the Court granting Certiorari in the Montanile case.

In *Mertens v. Hewitt*, 508 U.S. 248 (1993), the Court interpreted the meaning of the words "appropriate equitable relief" and held that Congress intended the phrase to refer only to "those categories of relief that were typically available in equity." In 2002, the Court decided *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002), in which a plan that had paid the medical bills of an injured participant sought "reimbursement" after the participant received a monetary settlement from the responsible tortfeasor. The proceeds were deposited directly into a special needs trust, which was not a party to the litigation and, for that reason, the *Knudson* Court held that the fiduciary had no recourse against the participant personally.

In 2006, the Court decided *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), which involved the same factual scenario as Knudson but with one key difference -- the funds sought by the fiduciary were segregated by agreement pending the resolution of litigation. The defendants argued that the "reimbursement" was not available as an equitable lien by agreement because such a contractual remedy was not typically available in courts of equity. The Supreme Court disagreed. The *Sereboff* Court did not, however, overrule *Knudson*. Because the settlement funds in *Sereboff* were being held in escrow pending resolution of the dispute, the Court reasoned that the equitable lien was being attached to specifically identified funds and not from the defendants' general assets.

In the wake of *Mertens*, *Knudson*, and *Sereboff*, recoupment litigation by ERISA fiduciaries turns on the question of whether a plan may enforce an equitable lien against a defendant's general assets when specifically identified funds are no longer in his possession. The Supreme Court's holding in *Montanile* may clarify whether plans will be foreclosed from seeking recoupment against funds received by health care providers that are put into the providers' general operating funds.

For additional information, please contact Daron Tooch, Glenn Solomon or Michael Houske in Los Angeles at 310.551.8111.

CALENDAR

May 7

Webinar: Hooper, Lundy & Bookman Presents: *Privacy Breaches: How to Prepare and Respond.* Stephen Phillips and Paul Smith present. For additional information and registration, go to www.health-law.com/newsroom-events-56.html

May 8

SCARHM 35th Annual Educational Conference, Rancho Mirage
Steve Lipton and Nina Adatia Marsden present *Legislative Update – "Patches, Shreds and Sticky-Notes".*

May 20, 21

44th Annual CAMSS Educational Forum, Universal City, CA
Jennifer Hansen and Katherine Dru present *Privileging for New or Novel Procedures or Treatments*; Ross Campbell and Ruby Wood present *Complying with Reporting Requirements, Responding to Subpoenas and Sharing Peer Review Information.*

CHA Announces New Edition of Hospital Compliance Manual

The California Hospital Association (CHA) has just released the 2015, 6th Edition of the California Hospital Compliance Manual.

New to the 2015 edition are detailed explanations of state law regarding hospital financial assistance policies required by SB 1276 and IRS regulations that impact not-for-profit hospitals released on Dec. 31, 2014.

CHA's compliance manual is the only publication written for hospital compliance officers that integrates California with federal law regarding high-risk compliance areas.

Written by Hooper, Lundy & Bookman, PC, attorneys and CHA, the manual focuses on key components of an effective compliance program. The manual features nearly 700 pages of content including 16 chapters, a model hospital compliance plan, numerous compliance forms and appendixes, and an index.

The Manual includes the following Chapters:

- Hospital Compliance Plans
- Governing Boards
- Federal and State False Claims Acts
- Submission of Accurate Claims Information
- Proper Cost Reporting Practices
- Physician Self-Referral Laws
- Federal and State Anti-Kickback Laws
- Financial Assistance Policies — NEW chapter includes federal regulations
- Issues for Tax-Exempt Hospitals
- Fundamentals of Hospital Licensing and Certification
- Screening for Excluded Providers and Suppliers
- Hospital Signage Requirements
- Patient Safety Organizations
- Other Laws
- Repayment and Self-Disclosure
- Responding to Government Audits and Investigations

To order the new manual or for more information, see www.calhospital.org/compliance.

HLB
HOOPER, LUNDY & BOOKMAN, PC
HEALTH CARE LAWYERS & ADVISORS
1875 Century Park East, Suite 1600
Los Angeles, California 90067-2799