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NEWSLETTER

FCA Successor Liability: Taking Lessons From a Recently Unsealed Complaint

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When contemplating an acquisition, companies rely upon the due diligence process to discover the target's potential liabilities, such as False Claims Act (FCA) liability, so they can proceed accordingly. This may involve walking away from the acquisition or structuring the transaction to account for the potential liability. Sometimes potential FCA violations are not uncovered during the due diligence process, or even worse, are concealed by the seller. In these cases, the purchaser should have a clear understanding of the principles of successor liability under the FCA. A recently unsealed FCA complaint in the Southern District of Florida implicates successor liability issues and can provide lessons for companies in such a position.

The *Halickman* Case

In *United States ex rel. CLJ v. Halickman*, the relator, a limited liability company, alleges that it purchased the defendant's membership interest in an internal and family medical practice named Family Practice & Internal Medicine of the Palm Beaches, LLC (FPIM). The relator alleges that during negotiations, the defendant, Dr. Halickman, presented business records that demonstrated gross revenue of nearly two million dollars. Immediately after the purchase, however, a different picture apparently emerged. The relator alleges that after reviewing the billing records, it discovered the actual gross revenue of FPIM was less than one million dollars. The relator alleges that it then found a wide range of persistent fraudulent practices within the company. The relator alleges that FPIM's books reflected that Dr. Halickman billed for 35-40 patients a day, despite collecting benefits under a disability policy that limited him to working 20 hours a week. Additionally, physician assistants and nurse practitioners allegedly billed their patient visits under Dr. Halickman's name in

order to maximize Medicare reimbursement claims. The relator also alleges that Dr. Halickman billed for services supposedly rendered on days he was not in the office. Finally, the relator alleges that Dr. Halickman defrauded it into purchasing FPIM. The U.S. Government moved to extend the seal period several times but ultimately declined to intervene. At this time, the relator appears to have not yet served the complaint on the defendant.

Successor Liability and the FCA

If a purchaser learns that its new acquisition may have violated the FCA, as the relator alleges in *Halickman*, the purchaser should have a clear understanding of its potential liability under principles of successor liability. Successor liability varies depending on whether the acquisition is in the form of an asset purchase or in the form of a stock purchase.

The general rule is that in an asset purchase, the purchaser does not acquire the seller's liabilities. However, successor liability is an equitable doctrine that provides an exception to this general rule. The FCA does not specifically address successor liability, so most jurisdictions look to state law to determine whether to apply successor liability (although some jurisdictions apply federal common law). Regardless of whether state law or federal common law applies, the principles of successor liability are generally the same and focus largely on whether the successor entity can be deemed a continuation of the predecessor entity. To determine whether a successor entity is a continuation of the predecessor entity, courts typically consider such factors as whether the employees are the same, whether the entity retains the same facilities, name, and operations, and whether the successor entity holds itself out as a continuation of the predecessor entity. This is a fact-intensive inquiry.

In contrast, for stock purchases, the target entity retains its liabilities. This is the case even if the purchaser hires new employees, replaces leadership teams, or takes other actions to change the operations of the acquired entity.

Lessons from *Halickman*

In *Halickman*, the relator purchased Dr. Halickman's membership interest in FPIM, which suggests that FPIM likely retained any liability from activity prior to the acquisition. The relator even acknowledges that FPIM "fraudulently submitted" more than one million dollars in false claims. What makes the *Halickman* case so interesting is that the relator responded to its discovery of FPIM's potential FCA violations by bringing an FCA suit. Presumably, the *Halickman* relator made the determination that the benefits of filing suit as a relator outweighed publicly alleging FCA violations against its new acquisition. While many companies in the *Halickman* relator's position may not choose to file suit because of the publicity implications, the *Halickman* case does provide some considerations for companies who discover potential FCA violations in a newly acquired entity.

One of the most important things a purchaser should do upon discovering potential FCA violations is to ensure that the questionable activity is stopped. For instance, in *Halickman,* the relator alleges that FPIM billed and coded patients improperly both before and after the execution of the purchase agreement. Thus, even if the

FPIM acquisition was an asset purchase and there was no successor liability, the new entity likely would still have had FCA liability due to ongoing violations.

The purchaser should also evaluate whether any remedial actions are necessary. This could include personnel actions or targeted reimbursements to the U.S. Government or other affected parties (*i.e.*, prime contractors). A company should consider whether and to whom to report potential FCA violations. Does the newly acquired entity have any contractual, statutory, or regulatory disclosure obligations and do the potential FCA violations trigger such obligations? Notwithstanding any explicit disclosure obligations, the purchaser should determine whether disclosure should otherwise be made to the U.S. Government. In *Halickman*, it is unclear whether any remedial actions were taken or what disclosures were made. Of course, the filing of the *qui tam* complaint served as notice to the Government.

As *Halickman* shows, determining how to proceed after learning of potential FCA violations in a new acquisition can be complicated—especially as these decisions are being made while the purchaser is likely weighing the availability of any contractual or legal remedies against the seller. Companies in these positions should tread carefully to ensure any potential FCA liability is limited.