No Third-Party Action for Contribution or Implied Indemnification for Equitable Claims in False Claims Act Case

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In a thoughtful and thorough ruling,[1] Judge John Gleeson of the United States District Court for the Eastern District of New York ruled that a medical doctor who was sued under the False Claims Act (FCA)[2] for submitting allegedly false and fraudulent Medicare Part B claims could not bring a third-party action for common law contribution and indemnification against his Medicare billing companies. The doctor sought contribution and indemnification for his potential liability to the government and the FCA relator for claims of unjust enrichment and payment by mistake of fact.[3] The ruling is significant because of the third-party plaintiff's strategy expressly to decline to seek contribution for the FCA claims, and instead to base the doctor's request for contribution only on the two government common law claims, which are usually afterthoughts in an FCA action and rarely the subject of extensive litigation.

As a result of the third-party plaintiff's novel approach, the court was required to address the nature of the common law claims under New York law and to determine whether loss-sharing could be available for such claims, without having to consider first whether federal law allowed contribution under the FCA. Having determined that New York law did not allow contribution for the equitable claims in an FCA complaint, the court then rendered a ruling of first impression that avoided (1) bringing back into the late stage of an action a defendant affiliated with a settling and released entity, and (2) a government motion for severance of the third-party action. The latter would have presented a difficult choice to the court: either sever the action for separate trial or delay the government's pending case.

The Claims in the Litigation

On June 16, 2004, Elizabeth M. Ryan filed a sealed complaint under the FCA's *qui tam* provisions[4] against several defendants, including Gilbert Lederman, Gilbert Lederman, M.D., P.C., and Philip Jay Silverman, a medical doctor employee of the P.C.[5] Dr. Lederman had been the Director of Radiation Oncology at a local hospital during the relevant period and is the sole owner of the P.C.

On July 31, 2008, the government filed its complaint raising four claims against all defendants except for Dr. Silverman.[6] The first claim, under 31 U.S.C. § 3729(a)(1), alleged that the defendants made or caused to be made false or fraudulent claims for Medicare reimbursement. The second claim alleged the use of false records or statements to get false or fraudulent claims paid, in violation of 31 U.S.C. § 3729(a)(2). The third claim sought restitution for what the government characterized as the defendants' unjust enrichment from having been paid by Medicare for services not covered or reimbursable. The last claim, like the third claim, was a common law equitable claim based on alleged payment by

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mistake of fact due to the defendants' having allegedly submitted claims for non-covered services using the wrong billing code. With respect to the FCA claims, the government requested treble damages, civil monetary penalties, and attorney's fees and costs. The government requested restitution for the equitable causes of action. On October 29, 2008, Lederman answered both the government and the relator's complaints, but did not raise a claim against any of his former billing companies.

The Third-Party Action

After receiving leave of court, on November 1, 2010, Lederman filed and served a third-party complaint against Regency Alliance Services, Inc. and Physicians Management Group (PMG) to bring them into the case as third-party defendants.[7] Neither had been sued in the case. Regency was the billing agent for Lederman and his professional corporation from 1999-2000. PMG had been the Lederman P.C.'s billing agent after 2000. Lederman asserted claims for contribution and indemnification[8] only predicated on potential liability to the government for the equitable claims of unjust enrichment and payment under mistake of fact. Lederman maintained that Regency and PMG, as the coding and billing experts on which he relied, would be liable to him in whole or in part because their alleged negligence or culpable conduct caused injury to the government, if he was found liable to the government on the two common law equitable claims.

Lederman expressly disclaimed seeking loss-allocation of his damages in the event he was found liable for the two counts of alleged FCA violations. He was no doubt aware that there was an issue as to whether contribution or indemnification was available to one found liable under the FCA and that some courts had disallowed contribution.[9] By pegging his claims to the common law theories in the government complaint against him, Lederman apparently wanted to circumvent that issue.

Regency's Motion to Dismiss

On February 25, 2011, Regency moved to dismiss or, in the alternative, for summary judgment against Lederman's third-party action. Regency argued, among other points, that Lederman could not obtain contribution for his alleged culpable conduct in violating the FCA, and that his third-party action sought to circumvent the policy-based rule against contribution claims in FCA cases. Regency urged the court to rule that (1) because Regency's affiliated hospital had settled the case, Regency could not be sued under New York General Obligations Law § 15-108,[10] and that (2) because Regency and Lederman were not joint tortfeasors, contribution was unavailable. Moreover, Regency renewed its request for the court to deny leave to file the third-party action based on timeliness and prejudice, under Rule 14 of the Federal Rules of Civil Procedure.

The Court's Ruling

On April 21, 2011, the court directed the parties to address at oral argument "whether contribution and common law indemnity can ever be available to a defendant held liable under a theory of unjust enrichment or payment by mistake."[11] Regency argued that contribution and indemnification are not available to a defendant found liable for unjust enrichment and payment by mistake.[12] As a matter of law, the court concluded that neither contribution nor common law indemnity was available to shift part or all of Lederman's potential liability to Regency in the event he is held liable for the two non-FCA claims in the government complaint. The court noted that both unjust enrichment and payment by mistake are equitable claims under New York law, predicated upon the principle that one who mistakenly makes a payment to another while falsely believing he is indebted to the other person creates a quasi-contractual relationship pursuant to which the recipient of the funds has an obligation to repay the money.

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The elements of the claims are similar. For a mistaken payment, the required elements are (1) plaintiff paid under a mistaken apprehension of fact, (2) defendant received a benefit from this payment, and (3) equity compels restitution by defendant to plaintiff. For unjust enrichment, plaintiff must prove that (1) defendant was enriched, (2) by plaintiff conferring a benefit on defendant, and (3) equity demands that defendant not be permitted to keep what plaintiff conferred. In either case, the court concluded, the government is seeking what is rightfully its funds and equity demands that defendant not be allowed to retain it and must therefore make restitution.

Accordingly, the court held that to prevail at trial the government need not prove that Lederman "engaged in wrongdoing or breached a duty."[13] The court may compel a payee to repay a mistaken payment, the court held, even if the payor acted with negligence or the payment was caused by the wrongdoing of another party. Equity will also consider the changed position, if any, of the defendant before compelling repayment. To defeat the claims, therefore, Lederman may establish (1) that he changed his position to his detriment in reliance upon the government's mistake, which would make it unfair to him to require refund of the payment, or (2) that he in fact did not receive the mistaken payments from the government, in which case equity should not compel him to make restitution.

Using these legal standards to assess the government's equitable claims, the court then examined Lederman's third-party action against the billing companies for contribution and indemnification.

The Contribution Claim

The court held that the statutory contribution doctrine is based on the unfairness of having one of several jointly and severally liable defendants bear a disproportionate or the entire share of the liability. The court concluded that the language of the New York statute providing for contribution only applies to tort liability. While the statutory contribution doctrine has been expanded in New York through common law development and broadened to include claims against third-party defendants who could not have been directly liable to plaintiff, or even claims where third-party defendants owed no duty to plaintiff, the court held that the underlying principle of New York law has remained consistent and rendered contribution applicable only to tort actions for personal injury, injury to property, or wrongful death. The court emphasized that the third-party plaintiff faced liability in tort to plaintiff and the third-party defendant owed plaintiff an independent obligation to prevent foreseeable harm, even in the cases where the liability of the third party defendant has been broadened.

The common law claims against Lederman, the court reiterated, are based in restitution or quasi-contract, and thus would not expose him to liability for more than his fair share of liability. In any case, these claims are clearly not tort claims, and under well-established New York law are not subject to the statutory or common law right of contribution.

The Indemnification Claim

While implied indemnity and contribution are fundamentally distinct, and in some cases indemnity may be available where contribution is not, the court held that on the facts and legal theories before him indemnity was also not applicable. The court ruled that indemnity is used to restore equity when one party through operation of law is subject to liability for another's fault. But the legal theories advanced against Lederman, the court held, do not require the government to establish fault or prove the breach of any duty by Lederman or Regency. Indeed, whether Regency breached a duty owed to the government by Lederman and assumed by Regency was irrelevant to the government's case for unjust enrichment and payment by mistake.

According to the court, all the government needed to prove was that Lederman received "an unearned

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benefit that should be restored."[14] If Lederman did not receive such benefit or if repayment would have been inequitable, there would have been no basis of liability to the government. On that basis, Lederman's claim for indemnification against Regency on the ground that he unfairly faced liability to the government was in fact a defense to the government's equitable claims. Accordingly, Lederman would be unable to make out a claim for implied indemnity against Regency if he was unable to prove that defense at trial against the government.

Timeliness of Third-Party Complaint

In the alternative, the court exercised its considerable discretion under Rule 14(a) of the Federal Rules of Civil Procedure to grant Regency's motion to vacate the order allowing leave to file the third-party action and deny Lederman the right to assert a third-party complaint. The court held that Lederman did not offer a reasonable explanation for his two-year delay in asserting the third-party complaint, and that his explanation could not justify imposing the delay on the government that would be occasioned by the introduction of additional parties in the case. The court also noted that at oral argument the government had expressed its intent to make a severance motion if the third-party complaint were upheld to have those claims tried separately. Such a motion would present him, the court concluded, with the unattractive choices of either delaying discovery by and against Regency or holding two trials. Accordingly, the court ruled that even if Lederman had valid claims for contribution and indemnification, it would grant Regency's motion to vacate its October 8, 2010 order granting Lederman leave to file his third-party action and strike the third-party claims for untimely filing. The court found that the claims were meritless and concluded that adjudicating them on their merits caused no undue delay, and for that reason, dismissed them for failure to state a claim.

Analysis of Ruling

In addition to the substantive decision of first impression, the sequence of the presentment of the issue of whether or not contribution is available in FCA cases makes the court's ruling all the more important. A negative ruling on that issue makes it easier for the court to hold that its decision cannot be circumvented by seeking contribution for the common law equitable claims. An affirmative ruling on the FCA claims effectively moots the issue for the equitable claims because defendants would much rather seek contribution for the FCA treble-damages-plus-penalty claims than for the equitable restitution claims, even if they could obtain contribution for these latter claims.

Ultimately, if the Supreme Court were to find no federal right to contribution in FCA actions,[15] an interesting issue could develop because common law third-party contribution and indemnification claims are governed by, or at least incorporate, state substantive law as rules of decision. Where the governing state law permits a third-party action or cross-claim for contribution or indemnification, a conflict could arise in some cases. The ideal resolution of the conflict may well be to create a uniform federal common law rule barring equitable contribution or indemnification entirely in FCA cases. After all, the government's common law equitable claims are governed by federal common law; thus, the third-party action should not be governed by a different body of law. Such a uniform rule would presumably still allow contribution or indemnification based on an independent basis such as a contractual claim for indemnification. Parties that are potential subjects of FCA claims would therefore do well to include an indemnification provision in their contracts with third parties (such as billing companies, billing experts or consultants).

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In the Second Circuit, district courts have ruled against contribution claims relating to both the FCA and the common law claims. If and when the issue is presented to the Second Circuit Court of Appeals, the court will have to consider the merits of having one rule of decision apply to the statutory FCA, the government equitable claims, and the third-party common law claims. Depending on the state law that applies to the third-party action, differing substantive rules would permit both the government and FCA defendants to shift, or prevent the shifting of, some or all of the FCA damages to others, including settling defendants.[16] As the government argued in the *Ryan* case, such shifting of FCA damages to others would complicate a government FCA action by bringing into that action on claims for contribution other parties not sued by the government. Had the court ruled in favor of Lederman, the government would have been faced in the future with the choice of (1) either foregoing raising the common law claims in an FCA complaint, or (2) risking further complication of its suit in jurisdictions accepting a rule allowing contribution for the third-party claim. In making the charging decision, the government would have to base its choice on handicapping the outcome of its severance motion if third-party actions or cross-claims for contribution were raised.

The court avoided the dilemma that a severance motion would have presented for the court in *Ryan* and the difficult choice a contrary ruling would have presented to the government in future FCA cases. Since Lederman had declined to seek contribution for the FCA claims, the court was not required to rule on that novel issue in the Second Circuit. The court concluded that the claims did not allow for contribution under New York law. As a result, the possible circumvention of a policy-based rule denying contribution in FCA cases while allowing it for the common law claims was also avoided.

The court's dismissal of the third-party action shows how important it is to focus on the often-neglected equitable claims for unjust enrichment and mistaken payment in FCA cases. These two common law claims are almost always joined in a government complaint raising statutory FCA claims, and, except to prevent government recovery for identical damages under both eth FCA and the common law,[17] are rarely the subject of litigation or separate analytical discussion in the case law. The third-party litigation in *Ryan* demonstrates how these "sideshow" claims can become the proverbial tail wagging the dog.

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1 Memorandum and Order, *United States ex rel. Ryan v. Staten Island Univ. Hosp.*, No. 04-CV-2483, 2011 BL 128244 (E.D.N.Y. May 13, 2011).

2 31 U.S.C. §§ 3729-3733 *et seq*.

3 The procedural posture of the case should be irrelevant to the substantive ruling. There is therefore no reason to suppose that Judge Gleeson's ruling would not apply to a cross-claim made against another defendant, and every reason to conclude that the ruling would have been the same in that procedural posture.

4 31 U.S.C. § 3730(b).

5 Complaint, *United States ex rel. Ryan v. Staten Island Univ. Hosp.*, No. 04-CV-2483 (E.D.N.Y. June 16, 2004).

6 All claims by the relator against Silverman were dismissed without prejudice on April 14, 2009. On September 10, 2008, the hospital had settled all claims with

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the government and relator against itself and its affiliated entities and received a full and complete release.

7 PMG, although apparently served with process, did not appear and respond to the third-party action. Upon application of Lederman, the Clerk of the Court on April 11, 2011 granted a default against PMG. In the Memorandum and Order, Judge Gleeson also dismissed the action against PMG, having concluded based on the submissions of Regency that Lederman is not entitled to relief on his claims. Memorandum and Order at 19-20.

8 On consent, a contractual indemnification claim by Lederman was dismissed. Memorandum and Order at 8.

9 In the Second Circuit, it is an open question whether there can be third-party actions or cross-claims against co-parties for contribution and indemnification for defendants held liable under the FCA, although district courts have barred such claims. *United States v. Hero*, 1981 U.S. Dist. LEXIS 180919, at *10 n.6 (S.D.N.Y. July 27, 1981). Counterclaims by defendants against the relator are frequently denied. *Mortgages, Inc. v. U.S. District Court for the District of Nevada (Las Vegas)*, 934 F.2d 209, 214 (9th Cir. 1991); *United States ex rel. Mikes v. Straus*, 931 F. Supp. 248, 261-62 (S.D.N.Y. 1996), *aff'd on other grounds*, 274 F.3d 687 (2d Cir. 2001). Elsewhere, some courts have held that, for policy reasons, such equitable doctrines are not applicable to FCA cross-claims. *Israel Discount Bank Ltd. v. Entin*, 951 F.2d 311, 315 n.9 (11th Cir. 1992) (*dictum*); *United States v. Dynamics Research Corp.*, 441 F. Supp. 2d 259, 268-69 (D. Mass. 2006). In some circumstances, the Ninth Circuit allows third-party actions raising claims for loss-allocation against third-parties for FCA violations. *Cell Therapeutics Inc. v. Lash Group Inc.,* 586 F.3d 1204, 2010 BL 1905 at 12 and n.7 (9th Cir. Jan. 6, 2010).

10 The court's decision did not address this issue.

11 Memorandum and Order at 7-8.

12 *Id*.

13 Memorandum and Order at 10.

14 Memorandum and Order at 16.

15 The statute itself is silent on the issue.

16 This would clearly create a strong disincentive to early settlement by some defendants.

17 *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc*., 505 F. Supp. 2d 20, 23-24 (D.D.C. 2007).

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