An Unapologetically Inconsistent Enforcement Regime

Author : Zack Buck

Date : March 24, 2022

Jacob Elberg, *Health Care Fraud Means Never Having to Say You're Sorry*, 96 **Wash. L. Rev.** 371 (2021).

Fraud is a major problem in American health care. It costs American taxpayers and patients from about $70 to $234 billion annually, which accounts for between three and ten percent of total health spending in the United States. It is an area that would be benefited by serious legal scholarly focus and inquiry, and well served by well-supported and implementable policy suggestions based on empirical data. Professor Jacob Elberg, through his serious and important work in this space, has provided just that in his most recently-published piece *Health Care Fraud Means Never Having to Say You're Sorry*. Here, Elberg again shows why he is a leading voice in health care fraud and abuse scholarship.

The piece focuses on the civil federal False Claims Act (FCA), a major tool for the federal government that imposes major civil penalties against health care fraud defendants. As has been argued before, use of the FCA and its draconian penalties overwhelmingly leads to settlement, which—without courts' review of the government's theory of liability—can stunt the development of the FCA itself. In addition to the lack of meaningful judicial review in these matters, defendants often deny any wrongdoing as they settle FCA allegations, leaving the public and other defendants in the dark about whether the allegations had merit or drew a settlement simply because of expediency or the risk or cost of litigation. As Professor Elberg says, this has "fueled a cost-of-doing-business narrative in which health care entities are required periodically to pay inconsequential settlements to the government regardless of their conduct."

The basis of Professor Elberg's article is a review of 195 settlements that resolve FCA allegations between early 2018 and the spring of 2020, and he examines them specifically for whether the FCA defendants publicly admitted responsibility for the government's loss. Professor Elberg finds that 92 percent of settlements did not include defendants' acceptance of responsibility, and that 37 percent of defendants actively denied responsibility. Relatedly, he powerfully asks why the Department of Justice (DOJ) does not require defendants to admit responsibility as part of a health care settlement, especially because it requires admissions in virtually all cases in which it settles *criminal* claims.

In addition to noting the inconsistency in the DOJ's current practice between civil and criminal resolutions, Professor Elberg also observes (1) recent changes to the DOJ's FCA policy that seem to indicate that it will reward an acceptance of responsibility, (2) the history and development of the Security and Exchange Commission's (SEC)'s admission standard (which requires admissions in some cases), and (3) other enforcement goals that seem to be undermined by the DOJ's failure to require an admission of responsibility. In so doing, Professor Elberg shines a light—through his collection and presentation of hard data—on an area of legal enforcement that suffers from glaring inconsistencies.

Most importantly, Professor Elberg is concerned about kind of behavior the enforcement regime is incentivizing. Indeed, he argues that not requiring an admission of wrongdoing could hamper the DOJ's main goals, like deterring bad behavior, incentivizing cooperation, and rewarding a culture of compliance in the industry. Given the lack of credit they receive for an admission of responsibility, this could prompt even more health care industry defendants to refuse to cooperate with investigations or to invest in compliance programs altogether, as Elberg observes.

Professor Elberg powerfully identifies some barriers to the DOJ in requiring the admission of responsibility, from a concern over resources to increased litigation risk, and also makes a persuasive case for how the DOJ may want to take a nuanced or targeted approach to requiring settlement admissions. Indeed, one may wonder if, from a fairness

perspective, it makes sense to require settling defendants to admit responsibility absent proof at trial, but that question does not detract from Professor Elberg's main goal, which is injecting some order and consistency into a mysterious enforcement regime that seems to currently lack it.

Ultimately, Professor Elberg is concerned that the DOJ's enforcement regime may be at risk of losing legitimacy because of how the settlement-dependent mechanism is deployed and how its cases are settled. His findings seem to suggest, as he argues, that the "DOJ pursues, illegitimately, weak cases it cannot prove at trial" and it "lends credence to the widespread belief that civil health care fraud settlements simply do not signal wrongdoing." Given the scourge of health care fraud and abuse on this country's health care system, that is a powerful and damning concern, and raises even deeper questions about faith in a fair enforcement mechanism and the rule of law itself.

Cite as: Zack Buck, *An Unapologetically Inconsistent Enforcement Regime*, JOTWELL (March 24, 2022) (reviewing Jacob Elberg, *Health Care Fraud Means Never Having to Say You're Sorry*, 96 **Wash. L. Rev.** 371 (2021)), https://health.jotwell.com/an-unapologetically-inconsistent-enforcement-regime/.