

## Health Care MVP: Akin Gump's Robert Salcido

By Rachel Slajda

*Law360, New York (December 11, 2012, 2:12 PM ET)* -- Robert Salcido of Akin Gump Strauss Hauer & Feld LLP represented a nationwide nursing home company in an \$895 million False Claims Act case that went to trial — a rarity in itself — and won, earning him a spot among Law360's Health Care MVPs.

Salcido represented GGNSC Holdings LLC, which does business as Golden Living and has more than 300 skilled nursing homes nationwide, against the U.S. Department of Justice's claims that Golden Living and a medical equipment supplier had violated the Anti-Kickback Statute and, therefore, the FCA.

The DOJ claimed that Golden Living had “dangled” a future contract in order to induce the supplier to lower its bid, and that the supplier's bid was below the fair market value of its services. The government argued that the promise of a future contract qualified as remuneration under the kickback law. It asked the court for up to \$895 million in treble damages and civil penalties for the alleged false claims, which it said totaled \$27 million, according to court documents.

But Salcido argued, and the court agreed, that the contract negotiations were done in good faith, with no knowing intent to violate the Anti-Kickback Statute. Because the statute requires intent for a violation, and the FCA claims depended on the anti-kickback violation, the Mississippi federal court hearing the case ruled in favor of Golden Living and the supplier in September.

The court even called elements of the government's argument illogical, noting that the contract that was supposedly the inducement for a lower bid was awarded before the final bids were entered.

“It is extraordinarily rare that any large health care entity ever litigates an FCA case against the government. The industry standard is to settle at a premium over and above what the case is worth,” Salcido said.

That's because the government can seek treble damages and massive civil penalties if it wins at trial and, even worse, could exclude the company from participating in Medicare — a death sentence for most health care companies.

“The government, it appeared, had fundamentally misunderstood the facts behind the arrangement. It contended that the contractual relationship ... was priced below fair market value when it was clear that the contractual price was the result of competitive bidding,” Salcido said. “We thought, and the court found, that it was unassailable that the parties were operating in good faith.”

Because the companies had substantial evidence that they had undergone fair negotiations with no illegal intent, he said, “There was no point in settling at a premium.”

The case was also significant in that it set a legal precedent, finding that FCA claims that depend on the Anti-Kickback Statute also depend on the statute's higher standard for intent, he said.

“The court ultimately held that one health care entity coveting the business of another isn't in itself a violation of [the] Anti-Kickback Statute. If parties contract with each other in good faith, even if you could quibble about the fair market value, the government has to show that the parties intended to engage in wrongful conduct. If that's not shown, there's no violation,” he said.

Salcido has been working almost exclusively on the FCA for about 25 years, first at the DOJ from 1988 to 1993, and then in private practice. He didn't expect his life to take such a trajectory when, fresh out of law school, he decided to work in the DOJ's civil fraud section.

“Being politically a liberal, I had a conception that I didn't want to put people in jail, but it would be interesting and even enjoyable to prosecute companies that allegedly civilly defrauded the government,” he said. “I could have never imagined that I would spend the next 25 years working nearly exclusively on the False Claims Act.”

New challenges have arisen for Salcido over the past several years, as the government has become increasingly aggressive about not only bringing FCA claims but pursuing them to trial.

“That poses a horrible decision on the defendant: Settle at a premium ... or, alternatively, are you willing to put the government to the test of proving its case, knowing that judges and juries aren't always infallible. And that's a huge dilemma to confront,” he said.

“The other challenge is, frequently, the government can litigate with a blank check. You're up against an entity, the most powerful and wealthy entity on the face of the planet,” he said. “That is a daunting challenge from a defense standpoint.”

--Editing by John Quinn.

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