

Jun-03-2003 11:04am From-Charles E Grassley

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United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

June 3, 2003

VIA FACSIMILE: (202) 514-4482

ORIGINAL BY U.S. MAIL

The Honorable John Ashcroft
 Attorney General
 Department of Justice
 950 Pennsylvania Avenue, NW
 Washington, DC 20530

The Honorable Tommy G. Thompson
 Secretary
 Department of Health & Human Services
 200 Independence Avenue, SW
 Washington, DC 20201

Dear Attorney General Ashcroft and Secretary Thompson:

The Senate Finance Committee (Committee) maintains exclusive jurisdiction over federal health care programs in the United States Senate. As you are both aware, the Committee has been investigating the underlying basis for the settlement reached between HCA, Inc. (HCA) and the United States Department of Justice (DOJ) pursuant to Congress's inherent constitutional prerogative to investigate, as well as, the Committee's statutory duty to engage in continuous oversight of the application, administration, and execution of the laws within its jurisdiction,

On May 23, 2003, Committee investigators met with DOJ representatives regarding, among other subjects, the portion of the HCA settlement applicable to HCA's administrative liability to the Centers for Medicare & Medicaid Services (CMS), Department of Health & Human Services (HHS). During the meeting, Committee investigators verbally requested a copy of a letter from CMS to DOJ that was a primary topic of discussion. The letter, which purportedly provided CMS's factual and statistical justification for its recommended settlement with HCA, was delivered to DOJ sometime during the early spring of 2002 and was approximately 14 or 15 pages in length. DOJ representatives denied this verbal request claiming attorney-client, work product, and deliberative process privileges (CMS-HHS has also asserted such claims of privilege previously).

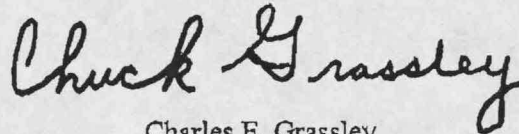
In light of my constitutional and statutory responsibilities as Chairman of this Committee, I cannot accept DOJ's verbal claims of privilege in this instance. Therefore, the Committee requests immediate delivery, by facsimile or by hand, of the aforementioned letter to the Committee's office by noon tomorrow. In the event you will not provide the letter, please notify me immediately and provide the Committee with a detailed memorandum explaining the legal basis for not complying with the Committee's request by June 6, 2003.

Attorney General Ashcroft & Secretary Thompson
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The Committee began this investigation over a year ago because of my concern for properly enforcing the False Claims Act and for maintaining the integrity of the Medicare Trust Funds. I will not relent on this matter until I am satisfied that the Committee has fulfilled its constitutional and statutory responsibilities.

Thank you for your immediate attention to this request - I am certain we can resolve this matter quickly and in a mutually satisfactory manner. Please fax the letter to (202) 224-2131 or deliver it to Hart 203, Senate Office Building. Your staff may contact Emilia DiSanto or Dan Donovan, at (202) 224-4515, if necessary.

Sincerely,

A handwritten signature in cursive script that reads "Chuck Grassley". The signature is written in dark ink and is positioned above the printed name and title.

Charles E. Grassley
Chairman

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Draft June 4, 2003

The Honorable Charles E. Grassley
Chairman
Committee on Finance
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This responds to your letter, dated June 3, 2003, which requested a copy of a letter from the Centers for Medicare and Medicaid Services (CMS), Department of Health and Human Services (HHS) to the Department of Justice (DOJ) regarding a proposed settlement of administrative overpayment overpayment and underpayment claims by and against HCA. This administrative settlement is one component of a global settlement with HCA, including False Claims Act claims, which has been announced by both parties as an agreement in principle although details and precise document language are still under negotiation.

The Department appreciates the Committee's oversight interest in the HCA administrative settlement, and we want to accommodate your need for information about the Department's decision to approve the settlement negotiated by CMS staff. Accordingly, we provided a comprehensive briefing on May 23rd. In response to Committee staff interests, the briefing focused primarily on our analysis of the administrative overpayment claims settlement. The Committee has thus received a full summary of the reasons for this Department's actions regarding the settlement. We also understand that your staff soon will be briefed by CMS representatives, which may provide the most helpful information about their reasons for proposing the administrative settlement.

Our concerns about providing the requested letter pertain primarily to the risk of chilling the candid exchange of views during our decisionmaking on litigation and other matters. The Department has substantial confidentiality interests in the analysis and recommendations of any client agency regarding a proposed settlement. We want to encourage agencies to be complete and forthright in setting forth their analyses of the strengths and weaknesses of a potential case, addressing the legal and evidentiary issues in a written format than can be effectively used within the Department. If client agencies expect that their contributions to the settlement decisionmaking process will be disclosed to and dissected by Congress, then the free and candid flow of views and recommendations from the agencies would certainly be jeopardized. The Supreme Court has recognized the legitimacy of this "chilling effect" concern: "Human experience teaches that those who expect public dissemination of their remarks may well temper

candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process that "the importance of this confidentiality is too plain to require further discussion." *Id.*

The "chilling effect" concern exists regardless of whether or not the matter that is the subject of a settlement recommendation letter is pending at the time the disclosure is requested, because the concern is with the inhibiting effect on people writing such letters in the future. However, there is an additional concern where, as here, disclosure is sought before the details of the settlement have been finalized, namely that disclosure could jeopardize the Government's successful resolution of the matter.

We are also concerned about the likely impact of disclosure of a settlement recommendation letter on pending and future litigation involving similar issues against other parties. For instance, the law may be uncertain, and assessments of litigation risk may depend on the forum in which the case may be litigated. Documents of this type discuss such litigation risk assessment and other negotiation or litigation strategy in the case under consideration for settlement, but those concerns and assessments, if disclosed, could be generally applicable to other pending or future cases. Thus, and disclosure could thus compromise the Government's handling of both pending and future litigation.

Our briefing to Committee staff, which included information about our analysis of CMS's reasoning as well as the bases for our approval decision, avoided this chilling effect and focused on the particular facets of the settlement of most interest to your staff. Such an accommodation, which protects the confidentiality of the client agency's deliberative work product, will encourage agencies to continue their provision of candid views, which is critical to our evaluation of such settlements and our conduct of related litigation.

I hope that this information is helpful and that you will understand our position in this matter. Please do not hesitate to contact me if you would like additional information.

Sincerely,

William E. Moschella
Assistant Attorney General

cc: The Honorable Max Baucus
Ranking Minority Member

We would appreciate