

# HEALTH CARE FRAUD

## Expert Analysis

### Recent Amendments Significantly Enhance the Power and Reach of the False Claims Act

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In 1986 the False Claims Act<sup>1</sup> was amended to increase damages available to the United States under the original FCA and to add a whistle-blower provision (known as *qui tam*). These two changes revived a statute that was enacted in 1863 to provide for restitution to the government for numerous instances of defense contractor fraud against the Union Army during the Civil War.

From 2006 through 2009, the government recovered over \$6.6 billion under the FCA. States have been encouraged to enact their own false-claims laws. To date, at least 29 states have enacted such statutes.

Insurance companies have also seen the effectiveness of the FCA and have successfully encouraged legislatures to enact insurance-related false-claims laws in numerous states. These statutes essentially mirror the FCA provisions.

In response to some court decisions that narrowed the breadth of the FCA and to address other issues that have arisen under the FCA, Congress recently enacted two laws to amend and clarify provisions of the FCA. These statutes have expanded the power of *qui tam* relators (whistle-blowers) and the government in using the FCA as a powerful weapon.

The Fraud Enforcement and Recovery Act,<sup>2</sup> enacted May 20, 2009, and the Patient Protection and Affordable Care Act,<sup>3</sup> enacted March 23, 2010, have broadened governmental power and made it easier for the government and *qui tam* relators to successfully prosecute FCA claims.

This article will briefly address the FCA as amended in 1986. It will then review the changes fostered by FERA and PPACA. Although the focus will be on health care, any company or person who deals with the government, government grants, government contracts or government programs needs to be aware of these changes.

#### THE 1986 FCA

Although the FCA was enacted in 1863 to address congressional concerns about numerous instances of defense contractor fraud during the Civil War, it was largely ignored for over 100 years. In 1986 Congress made changes in the FCA that

provided for treble damages and a \$5,000 to \$10,000 fine (now \$5,500 to \$11,000) for each false statement. Any company or individual who submits invoices to the government could face draconian damages because, in addition to the treble damages, each submission to the government could result in a mandatory \$5,500 to \$11,000 penalty.

In the health care arena, health care providers submit thousands of line item requests for payment. Each of these submissions could be considered a false claim under the statute. These potential damages provide the government with incredible leverage over health care providers that are forced to address these possible damages and face the possibility of exclusion from federal programs.

Although there are both civil and criminal FCAs (18 U.S.C. § 287), this article will focus on the civil False Claims Act. However, where fraud allegations are involved, U.S. attorneys' offices will routinely assign a criminal and a civil assistant U.S. attorney to the parallel government investigation. These parallel criminal/civil proceedings make defense of these matters complicated and fraught with peril.

### ELEMENTS OF 1986 FCA CLAIM

The 1986 version of the FCA imposes liability on any person who

- "Knowingly" presents or causes to be presented to an officer of the U.S. government a false or fraudulent claim for payment or approval; or
- Knowingly makes, uses, or causes to be made or used a false record or statement to get a false or fraudulent claim paid or approved by the government.<sup>4</sup>

There are a number of other provisions under the 1986 FCA that went largely unused by relators and the government. This article will not address those other provisions of the statute.

The government must prove that the claim was submitted to the government for approval of payment and that the claim was false. The most significant aspect of the FCA is the knowledge provision. The statute states that a defendant must act "knowingly." A person acts knowingly if he or she has "actual knowledge or acts in deliberate ignorance of the truth or falsity of the information or acts in reckless disregard of the truth or falsity of the information."<sup>5</sup>

The "reckless disregard" standard is invariably used by the relator/government as the basis to establish that a defendant had the requisite knowledge under the FCA. FCA claims often articulate that a medical provider sought payment for services that were not provided, upcoded or not provided as described in the invoice.

The relator/government will contend that even if the error was the result of negligence, the repeated nature of the submissions was the result of "reckless disregard or deliberate ignorance." Therefore, a scenario can easily be envisioned where a billing clerk or some other low-level employee makes repeated mistakes that are not detected by the entity. Under the lower threshold definition of "knowingly," the relator/government will contend that this failure to uncover the mistake was "reckless disregard" or "deliberate ignorance."

### PROCEDURE UNDER THE 1986 FCA

With the addition of the *qui tam*/whistle-blower provision in 1986, the FCA enables individual "attorneys general" to sue "for the person and for the United States government." The motivation behind the whistle-blower provision is to en-

courage individuals to locate fraud upon the government and report that fraud to the government.

Under FCA procedure, a private *qui tam* relator files a complaint with a U.S. attorney. That complaint remains under seal for 60 days while the government decides whether to intervene in the action. In practice, the 60-day period is invariably extended for various time periods while the government investigates the relator's allegations.

If the government decides to intervene, it takes over the prosecution of the case. If the government chooses not to intervene, the relator is left to prosecute the alleged FCA violation with his or her own resources. However, the prosecution is always in the "name" of the government, and therefore, the government remains a party to the lawsuit and receives notice of all activity in the case. Any successful recovery goes to the government, with the relator receiving his or her percentage of the recovery.

The United States can choose to intervene at any time during the course of the FCA investigation and prosecution. In practice, counsel for relators continually update the assistant U.S. attorney in the hopes of enticing the government to take over a non-intervened action.

The 1986 FCA provides huge rewards for *qui tam* relators. If the government chooses to intervene, the *qui tam* relator can receive between 15 percent and 25 percent of the eventual civil settlement or judgment. If the government does not intervene, the relator is entitled to 25 percent to 30 percent of recovery.<sup>6</sup>

Since the damages can escalate quickly, the government has tremendous power in forcing settlement on defendants. As defendants are faced with treble damages and \$11,000 per false claim, enormous settlements are commonplace. A medical device company recently settled for \$875 million in a criminal/civil case. The civil aspect of the case involved a nearly \$600 million settlement. The relator's share was \$95 million.<sup>7</sup> In addition to a percent-age of the recovery, relators are entitled to reasonable attorney fees and costs.

In practice, the astounding financial rewards available to relators have spawned a large national relators' counsel bar. Attorneys representing relators enter into agreements with relators for contingency fees in addition to "reasonable attorney fees and costs."

### **PUBLIC DISCLOSURE PROHIBITION**

The 1986 FCA sought to prohibit "parasitic" lawsuits where whistle-blowers located publicly available information and tried to piggyback that information by filing FCA claims based on the publicly disclosed information.

The 1986 FCA provided that:

No court shall have jurisdiction over an action under this section based upon public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, *unless* the action is brought by the attorney general or the person bringing the action is an original source of the information.<sup>8</sup>

The 1986 FCA defined "*original source*" as a person who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the government before filing the action. Courts reacted

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unfavorably to “parasitic” filings by relators. In numerous cases, courts sought to limit recoveries by *qui tam* relators who had obtained information that was, arguably, publicly disclosed.<sup>9</sup>

### INTERPRETATION OF 1986 FCA

Several cases severely restricted the breadth of the FCA’s reach. The Supreme Court, in *Allison Engine Co. v. United States ex rel. Sanders*, addressed a split in the circuits and held that Section (1) of the FCA imposed liability only for a claim directly presented to the government and that Section (2) applied to claims presented to intermediaries only if the presenting party intended that its false statement was made “to get” the government to pay the false claims.<sup>10</sup>

### FERA to the rescue

Congress enacted the Fraud Enforcement and Recovery Act in 2009 ostensibly to address problems concerning fraudulent conduct at financial institutions and by recipients of TARP and economic stimulus funds. However, in practice, FERA has been an effective tool against health care providers, defense contractors and anyone else who has direct or indirect dealings with the government.

Congress rejected the *Allison Engine* decision and, in response, enacted FERA, removing the word “to get” and “getting” from subsections (a)(2) and (a)(3) of the FCA so that, under the FERA amendment, FCA liability exists for anyone who:

- Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; or
- Knowingly makes, uses or causes to be made or used, a false record or statement material to a false or fraudulent claim.<sup>11</sup>

FERA expanded the definition of “claim” under the 1986 FCA as interpreted in the *Allison Engine* decision. The claim previously had to be presented to the United States.

FERA now defines the term “claim” to mean:

Any request or demand, whether under a contract or otherwise, for money or property that (i) is presented to an officer, employee, or agent of the United States; or (ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the government’s behalf or to advance a government program or interest, and if the United States government (I) provides or has provided any portion of the money or property requested or demanded; or (II) will reimburse such *contractor, grantee, or other recipient* for any portion of the money or property which is requested or demanded.<sup>12</sup>

The expansion of the term “claim” broadened the definition under the FCA from the various court interpretations of the 1986 FCA. Under the FCA, as amended at 31 U.S.C. § 3729(b)(2)(A)(ii), false claims can now be made to “a contractor, grantee, or other recipient, if the money or property is to be spent or used on the government’s behalf or to advance a government program or interest.”

This appears to mean that a false submission to a contractor, grantee or other individual involved in any program in which the government’s money or interest is involved can result in a false claim. Obviously, aggressive relator counsel will attempt

to expand this provision as broadly as possible. Case law will further interpret the language in this new definition.

### CONGRESS' ATTEMPT TO MAKE FERA RETROACTIVE

FERA was enacted May 20, 2009, and Congress made that the effective date for enforcement of the law, except that:

Subparagraph (B) of Section 3729(a)(1) ... shall take effect as if enacted on June 7, 2008, and apply to all *claims* under the False Claims Act (31 U.S.C. 3729 *et seq.*) that are pending on or after that date.<sup>13</sup>

The *Allison Engine* case was decided June 9, 2008, and Congress clearly rejected the Supreme Court's narrow interpretation of the FCA. Congress apparently attempted to overrule that decision and make the statute retroactive to two days before the opinion in *Allison Engine* was issued. However, poor drafting seems to have thwarted this government effort.

The retroactivity provision in FERA applies to all "claims" pending under the FCA as of June 7, 2008. The FCA defines "claims" as requests for payment. Congress apparently intended to use the term "cases," which would refer to lawsuits pending on that date. However, use of the term "claim," which is clearly defined in the FCA, seems to have resulted in Congress making its retroactivity attempt ineffective.

Indeed, on remand in *Allison Engine*, the District Court specifically found that the term "claim" was defined in the FCA and that the "claims" in *Allison Engine* were submitted a number of years before the lawsuit was filed.<sup>14</sup> Therefore, those "claims" were not pending June 7, 2008, and FERA did not apply.

Significantly, the *Allison Engine* trial court also analyzed the FCA/FERA under the *ex post facto* clause of the Constitution and found that, because the FCA is a punitive statute, it would violate *ex post facto* to retroactively apply FERA. The District Court, therefore, found that FERA did not apply and that, even if it did, it could not be applied retroactively because it would violate the *ex post facto* clause of the Constitution.

### 'REVERSE FALSE CLAIM' AND OVERPAYMENT LIABILITY

The 1986 FCA provided liability for anyone who knowingly makes, uses or causes to be made or used a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the government.<sup>15</sup> This "reverse false claim" provision was rarely used under the 1986 FCA.

The FERA amendments significantly broadened this provision. Under FERA, a reverse false claim is made when someone:

Knowingly makes, uses, or causes to be made or used a false record or statement *material* to an obligation to pay or transmit money or property to the government, or *knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government.*<sup>16</sup>

FERA then defines the term "obligation" to mean:

An established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, *from statute or regulation, or from the retention of any overpayment.*<sup>17</sup>

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This extension of the FCA is a very significant change. Under FERA, FCA liability exists if a person conceals or knowingly and improperly avoids or decreases an obligation. The statute defines obligation as including retention of an overpayment. Therefore, under FERA, the government will contend that, if a medical provider retains an overpayment to which it is not entitled, such retention is a false statement. This change may result in liability under FERA without any specific submission to government.

Section 6402(d) of the Patient Protection and Affordable Care Act further addresses the retention of overpayments and provides:

Any overpayment retained by a person after the deadline for reporting and returning the overpayment under paragraph (2) is an obligation for purposes of [the FCA].<sup>18</sup>

Overpayment means:

Any funds that a person receives or retains under Medicare or Medicaid to which the person, after applicable reconciliation, is not entitled under such title.<sup>19</sup>

Section 2 makes the deadline for reporting and returning overpayments the later of “(A) the date which is 60 days after the date on which the overpayment was identified; or (B) the date any corresponding cost report is due, if applicable.”<sup>20</sup>

This provision of PPACA puts a definitive 60-day deadline on any retention of an overpayment. The statute also makes clear that, where reconciliations under a federal program, including end-of-year cost reports, are involved, that later date is the date that an overpayment must be identified and returned.

These developments under FERA and PPACA mandate that anyone who receives federal funds must carefully review and reconcile receipt of those funds because the knowing and improper retention of mistaken overpayments can result in draconian remedies under the FCA.

The expansion of the FCA makes corporate compliance programs a business necessity. Corporations are encouraged to carefully review all their dealings with the government. An effective compliance program addresses not only the specific uncovering of improper conduct within a company, but also the establishment of checks-and-balancing procedures so that the irregularities can be identified. Although beyond the scope of this article, medical providers without compliance programs should carefully consider establishing an effective program as soon as possible.

#### **PUBLIC DISCLOSURE PROHIBITION AND ‘ORIGINAL SOURCE’ REQUIREMENT**

As stated above, the 1986 version of the FCA limited jurisdiction to *qui tam* relators who had not obtained their information from public sources, unless they were the original source of the information.

Under PPACA, the public disclosure prohibition under the FCA is further limited so that the government can make more effective use of *qui tam* relators. Specifically, courts had interpreted the public disclosure prohibition to extend to numerous proceedings, including state court or state administrative proceedings. PPACA limits relators if the disclosure was in a federal, criminal, civil or administrative hearing in which the government was a party.

Under the 1986 FCA, the court's "jurisdiction" was removed in cases unless the relator was an original source of publicly disclosed information. PPACA makes the public disclosure prohibition non-jurisdictional, and the public disclosure bar is ineffective if the government opposes the dismissal. The practical effect of these changes is to allow what were previously considered parasitic *qui tam* claims to proceed as long as the government chooses to pursue the claim.

FERA also changed the definition of "original source":

An individual who either (1) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the government before filing an action under this section.<sup>21</sup>

This new definition allows relators who "materially add" to the publicly disclosed transaction to proceed with FCA claims, which would not have been the case under the 1986 FCA.

### RETALIATION CLAIMS

The 1986 FCA protects any "employee":

Who is discharged, demoted, suspended, threatened, harassed or in any manner discriminated against in terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under the FCA.<sup>22</sup>

These protections have been greatly expanded under FERA. The statute now protects employees, contractors, agents or associated others from being discharged, demoted, suspended, threatened, harassed or in any manner discriminated against because of the lawful acts or other efforts to stop violations of the FCA.<sup>23</sup> Obviously, adding contractors or agents to the class of protected individuals will increase the number of possible *qui tam* relators under the statute.

### PROCEDURAL CHANGES UNDER FERA

Under FERA, the government can now file its own FCA complaint or amend the relator's complaint to clarify or add detail and to add other claims. Significantly, for statute-of-limitation purposes, any government pleading relates back to the filing date of the original complaint to the extent the claim arises from the conduct, transactions or occurrences set forth, or attempted to be set forth, in the prior complaint.<sup>24</sup>

This "relation back" can have a significant impact. FERA allows relation back for the original complaint and claims "attempted" to be set forth in the prior complaint. Often the government will file an FCA claim that, in addition to the original complaint, alleges other legal or equitable claims, including unjust enrichment, payment by mistake or breach of contract.

The traditional state court claims usually have a much shorter statute of limitations than the six years generally applied in the FCA setting. Therefore, this statute now revives a state state court claim and allows the government to pursue that claim along with an FCA claim.

In fact, a defendant could successfully defend against an FCA claim because the government was unable to prove knowledge and intent or some other element of the FCA, but the government could still recover all money sought because of unjust enrichment, payment by mistake or other equitable theory concerning the money sought by the government.

### CIVIL INVESTIGATIVE DEMANDS

The 1986 FCA allowed use of civil investigative demands to obtain documents, interrogatories or sworn depositions during the course of a government investigation if authorized by the attorney general. FERA allows the attorney general to delegate the authority to issue CIDs. This delegation should make investigation by the government during the time that the *qui tam* relator's complaint is under seal much easier.

The government can force individuals to submit to a sworn deposition. Obviously, when fraud is involved, this can have serious implications for people who may have individual liability and need to assert their Fifth Amendment privilege. The government can use that Fifth Amendment assertion in a civil setting to establish the company's liability for wrongdoing.

It is unclear how this delegation will play out. It may, in fact, work to the benefit of health care providers because the use of sworn depositions may result in fewer "ambush" interviews at company employees' homes by federal agents.

### CONCLUSION

This article has merely touched on some of the general themes of the FCA and the significant changes under FERA and PPACA. Since 1986, significant case law has developed in which courts have interpreted the FCA, and, because cases still involve conduct occurring before 2009, the 1986 statute and its interpretations remain very important.

Case law interpreting the 1986 FCA amendments is voluminous and beyond the scope of this article. However, it is clear that the government sees the FCA as a weapon to combat what it perceives as government fraud. These new amendments should capture the attention of every person and company that has any relationship with the United States.

### NOTES

<sup>1</sup> 31 U.S.C. § 3729-3733.

<sup>2</sup> Pub. L. 111-21.

<sup>3</sup> Pub. L. 111-148.

<sup>4</sup> 31 U.S.C. §§ 3729(a)(1) and (2) (1986).

<sup>5</sup> 31 U.S.C. § 3729(b)(1986).

<sup>6</sup> 31 U.S.C. §§ 3730(d)(1) and (2) (1986).

<sup>7</sup> Other recent large settlements include two involving a large, for-profit hospital chain for \$840 million and \$631 million, out of which the relator received \$151 million. A large pharmaceutical company settled for \$600 million, and a provider of kidney dialysis products and services settled for \$486 million, with the relator receiving \$65 million.

<sup>8</sup> 31 U.S.C. § 3730(e)(4)(A) (1986) (emphasis added).

<sup>9</sup> *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007); *United States v. Emergency Med. Assocs. of Ill.*, 436 F.3d 726 (7th Cir. 2006); *United States ex rel. Feingold v. AdminaStar Fed.*, 324 F.3d 492 (7th Cir. 2003); *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992); *United States ex rel. Kirk v. Schindler Elevator Corp.*, 606 F. Supp. 2d 448 (S.D.N.Y. 2009); *In re Natural Gas Royalties*

*Qui Tam Litig.*, 467 F. Supp. 2d 1117 (D. Wyo. 2006); *United States ex rel. Swan v. Covenant Care*, 279 F. Supp. 2d 1212 (E.D. Cal. 2002).

- <sup>10</sup> *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008).
- <sup>11</sup> 31 U.S.C. §§ 3729(a)(1)(A) and (B) (2009).
- <sup>12</sup> 31 U.S.C. § 3729(b)(2)(A) (2009) (emphasis added).
- <sup>13</sup> Pub. L. 111-21 (emphasis added).
- <sup>14</sup> *United States ex rel. Sanders v. Allison Engine Co.*, No. 95-CV-00970 (S.D. Ohio).
- <sup>15</sup> 31 U.S.C. § 3729(a)(7) (1986).
- <sup>16</sup> 31 U.S.C. § 3729(a)(1)(G) (2009) (emphasis added).
- <sup>17</sup> 31 U.S.C. § 3729(b)(3) (2009) (emphasis added).
- <sup>18</sup> 42 U.S.C. § 1320a-7k(d)(3).
- <sup>19</sup> 42 U.S.C. § 1320a-7k(d)(4)(B).
- <sup>20</sup> 42 U.S.C. § 1320a-7k(d)(2).
- <sup>21</sup> 31 U.S.C. § 3730(e)(4)(b) (2009).
- <sup>22</sup> 31 U.S.C. § 3730(h) (1986).
- <sup>23</sup> 31 U.S.C. § 3730(h)(1) (2009).
- <sup>24</sup> 31 U.S.C. § 3731(e) (2009).



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