

False Claims Act Litigation

INTRODUCTION

As rampant fraud and abuse arose in the 2000s, the Federal Government began to expand existing federal laws, and enact new laws, to increase incentives and provide powerful tools to aid potential whistleblowers. In its simplest form whistleblowing is the disclosure by a person, usually an employee in a government agency or private enterprise, to the public or to those in authority of mismanagement, corruption, illegality, or some other wrongdoing.¹ There are several laws, both state and federal, that provide either private causes of action, legal protection and remedies, or some combination of both for whistleblowers.

However, no current whistleblower law currently matches the power and efficacy of the False Claims Act (FCA) when it comes to combating government fraud. What makes the FCA such a potent weapon for whistleblowers? Without a doubt, the strength of the FCA lies in the statute's qui tam and damages provisions. The fiscal year ending September 30, 2015, was the fourth year running where the Department of Justice has recovered more than \$3.5 billion in cases under the FCA.² This brings total recoveries from January 2009 to the end of the fiscal year to \$26.4 billion.³

The majority of the FCA recoveries in 2015 were related to health care fraud, totaling \$1.9 billion.⁴ Of the \$26.4 billion recovered since January 2009, \$16.5 billion was from health care fraud. Health care is not the only area the FCA has been used in prosecuting fraud. In

¹ See, West's Encyclopedia of American Law, 2nd Ed. Jeffrey Lehman and Shirelle Phelps (2005).

² See, Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department recovered over \$3.5 Billion from False Claims Act Cases in fiscal year 2015 (December 3, 2015).

³ Id.

⁴ Id.

2015, \$1.1 billion of the recoveries was from government contracts, and \$365 million was from housing and mortgage fraud.⁵

The first section of this article provides a historical primer of the False Claims Act (“FCA”), examines the 1986 amendments to the FCA (the provisions that governed FCA litigation for over two decades) and discusses recent amendments to the FCA intended to strengthen the statute. Second, the article will discuss the FCA’s qui tam provisions and practical considerations for qui tam relators. The final section will address common issues of concern with FCA litigation and common theories of liability.

I. History of the False Claims Act

A. Enactment of False Claims Act and the 1943 Amendments

The False Claims Act (“FCA”), 31 U.S.C. §§3729-3730, was enacted by Congress in 1863 at the request of President Abraham Lincoln, in an effort to combat profiteering by Union Army suppliers.⁶ The Act provided both civil and criminal penalties for fraudulent claims submitted to the United States.⁷ Initially known as the “Informer’s Act,” the FCA was designed to combat defense procurement fraud by providing to any private citizen the right to file a civil action against anyone who submitted a false claim for payment to the United States Government.⁸ Under the original FCA, the private citizen (“relator”) acted essentially as a private attorney general by bringing a civil suit and was rewarded by receiving fifty percent of all moneys recovered in the lawsuit.⁹

These civil suits were known by the Latin phrase “qui tam pro domino rege quam pro si ipso in hac parte sequitur,” which translated into English means he “who sues on behalf of the

⁵ Id.

⁶ See, Act of Mar. 2, 1863, ch. 67, § 1, 12 Stat. 696-697 (1863) (current version at 31 U.S.C. §§ 3729-3733).

⁷ Id.

⁸ See, United States ex rel. Graber v. City of New York, 8 F.Supp. 2d 343, 352 (S.D.N.Y. 1998).

⁹ See, Act of Mar. 2, 1863, ch. 67, §§ 1, 3, 6, 12 Stat. 696-698 (1863).

King as well as for himself.”¹⁰ The purpose of the *qui tam* provision of the FCA, originally and now, is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward.¹¹ The language of the original FCA permitted the relator to initiate suit even though that private individual contributed nothing to the exposure of the fraud alleged.¹² That right remained intact until the FCA was amended. During the 1930s relators could, and routinely did, file FCA suits without having any independent knowledge of the fraudulent acts. In some instances, relators filed civil *qui tam* suits that were based on allegations copied from criminal indictments.¹³

In response to what it deemed an abuse of the statute, Congress amended the FCA in 1943.¹⁴ The 1943 Amendments made two substantial changes to the FCA. First, Congress incorporated a broad jurisdictional bar against *qui tam* lawsuits “whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States or any agency, officer or employee thereof, at the time such suit was brought.”¹⁵ This change had a dramatic effect on civil FCA lawsuits because it barred *qui tam* suits if any government employee had received any tip or information about the fraud.

Likewise, *qui tam* suits were barred if any information about the fraud was contained in any government file, even if the government was unaware of the matter and even if the relator was the source of the government’s knowledge.¹⁶ Second, the 1943 amendment reduced the *qui tam* relator’s share of the recovered proceeds from 50% to between 10% and 25%; thereby

¹⁰ Black’s Law Dictionary Law Dictionary 867 (6th ed. 1991).

¹¹ See, United States ex rel. Williams v. NEC Corporation, 931 F.2d 1493, 1497 (11th Cir. 1991).

¹² See supra note 13.

¹³ Id. See also United States ex rel. Marcus v. Hess, 317 U.S. 537, 545-48, 63 S.Ct. 379, 384-86, 87 L.Ed. 443 (1943).

¹⁴ See supra note 13.

¹⁵ 31 U.S.C. § 232 (c) (Supp. III 1943). 57 Stat. 608 (1943).

¹⁶ Id.

creating less of an incentive for individuals to report government fraud.¹⁷ The 1943 Amendments weakened the FCA to such an extent that, from a practical standpoint, meaningful qui tam suits ceased to exist for the next forty-three years.

B. The 1986 Amendments to the FCA

In the 1980s, in response to the Cold War, U.S. defense spending soared. As defense spending increased, highly-publicized fraud involving defense industry contractors also increased. These incidents caused Congress to reassess the FCA's utility in combating fraud. Consequently, in 1986 Congress once again amended the FCA. Under the 1986 Amendments, liability under the FCA is established pursuant to one of seven subsections of the FCA found in §§ 3729(a)(1) through (a)(7).¹⁸ To state a claim under the FCA, a relator must allege that the defendant:

1. Knowingly presented or caused to be presented a false or fraudulent claim for payment or approval to an officer or employee of the United States Government or a member of the Armed Forces of the United States (31 U.S.C. §3729 (a)(1)); or
2. Knowingly made, used or caused to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government (31 U.S.C. §3729 (a)(2));
or
3. Conspired to defraud the Government by getting a false or fraudulent claim allowed or paid (31 U.S.C. §3729 (a)(3)); or
4. Had possession, custody or control of property, or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the

¹⁷ *Id.*

¹⁸ Four of the seven subsections are commonly pleaded in FCA litigation (e.g. §§ 3729(a)(1), (a)(2), (a)(3) and (a)(7)) but three subsections are rarely invoked (e.g. (§§ 3729(a)(4)(a)(5), and (a)(6)).

property, delivered or causes to be delivered, less property than the amount for which the defendant received a certificate or receipt (31 U.S.C. §3729 (a)(4)); or

5. Authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, made or delivered the receipt without completely knowing that the information on the receipt is true (31 U.S.C. §3729 (a)(5)); or
6. Knowingly bought or received as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property(31 U.S.C. §3729 (a)(6)); or
7. Knowingly made, used, or caused 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 (31 U.S.C. §3729 (a)(7));.

Sections 3729 (a)(1), (a)(2), (a)(3) and (a)(7) – commonly referred to as a “reverse false claim” – are the most frequently used FCA claims. The foregoing FCA claims require proof of three common elements that must be proven in order to establish a violation of the FCA:

- (1) a “claim” must be presented to the Government by the defendant, or the defendant must “cause” a third party to submit a “claim”;
- (2) the claim must be made “knowingly” and
- (3) the claim must be “false” or “fraudulent.”¹⁹

In addition to these three common elements, some courts require that the claim must (4) be material (although this is not specifically mandated by the statute)²⁰ and that the claim (5)

¹⁹ 31 U.S.C. § 3729(a) (2006).

²⁰ Gregory Booker, *The False Claims Act: Congress Giveth and Congress Taketh Away*, 25 *Hamline L. Rev.* 373, 392 (2002).

caused resulting damage to the Government.²¹ Also, while the 1986 Amendments eliminated many of the barriers erected by the 1943 provisions, some of the 1986 provisions raised new issues (i.e. the “public disclosure” and “original source” rules) for qui tam relators.

(a) Definition of “Claim”

The FCA contains a broad definition of what constitutes a claim. Section 3729(c) provides:

For purposes of this section, “claim” includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Consequently, under the FCA, a claim encompasses virtually all demands or requests that cause the disbursement of federal funds whether the demand or request is on the government directly or is made on some other recipient of government funds.²² Essentially, any action by a claimant that causes the government to pay out money it is not obligated to pay, or any action which intentionally deprives the government of money it is lawfully due, are properly deemed a “claim” by the FCA.²³ However, the FCA explicitly states that it does not apply to tax claims under the Internal Revenue Code.²⁴

(b) Made “Knowingly”

The pre-1986 version of the FCA made it clear that a person was liable of an FCA violation if he or she knowingly intended to defraud the Government.²⁵ However, a split in the Circuit Courts emerged over the requisite degree of knowledge necessary to prove an FCA violation. Some courts held that “knowingly” did not rise to the level of a specific intent to

²¹ J. Androphy & M. Corroero, Whistleblower and Federal Qui Tam Litigation-Suing the Corporation for Fraud, 45 S. TEX. L. REV. 23 (2003).

²² See, United States v. Neifert-White Co., 390 U.S. 228, 233 (1968).

²³ Id.

²⁴ 31 U.S.C. § 3729(d) (2006).

²⁵ See 31 U.S.C. § 3729(1)-(3) (1982).

defraud.²⁶ On the other hand, other courts held that the FCA’s “knowingly” requirement did mandate a specific intent to defraud.²⁷ The 1986 amendments to the FCA resolved the split among the Circuit Courts. Under the 1986 amendments, §3729(b) clearly states that “no proof of specific intent to defraud is required” to prove a violation.²⁸ Instead, a defendant will be liable if the relator proves that the defendant “knowingly” submitted a false claim.

The term “knowingly” is defined as (1) actual knowledge of the false information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information.²⁹ While a relator can establish liability under the FCA by proving deliberate ignorance or reckless disregard for the truth of claims, negligence or an innocent mistake are not sufficient.³⁰ This is a much easier burden than having to prove the defendant actually intended to submit a false claim under the FCA.

(c) Must be “False” or “Fraudulent”

Unlike the terms “claim” and “knowingly,” the terms “false” and “fraudulent” were not defined by Congress in the FCA. Courts have held that the essence of a fraudulent claim is one that is based on a lie.³¹ The withholding of information critical to the government’s decision to pay is the essence of a false claim.³² Also, Courts have held that by adding the connector “or,” a relator does not have to prove a claim is both false and fraudulent.³³ The most common examples of false claims are claims for goods or services not provided. False claims can also arise from goods or services provided in violation of contract terms, specifications, statutes, or regulations.

²⁶ See, United States v. Hughes, 585 F.2d 284, 286-88 (7th Cir. 1978).

²⁷ See, United States v. Mead, 426 F.2d 118, 122-23 (9th Cir. 1970).

²⁸ 31 U.S.C. § 3729(b) (2006).

²⁹ Id.

³⁰ See, United States ex rel. Farmer v. City of Houston, 523 F.3d 333, 338 (5th Cir. 2008); See also Androphy & Corerro, *supra* note 22, at 36-37.

³¹ See, Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1478-79 (9th Cir. 1991).

³² See Dr. C. Pacini & M. Hood, *The Role of Qui Tam Actions Under The False Claims Act in Preventing and Deterring Fraud Against Government*, 15 U. Miami Bus. L. Rev. 273 (2007).

³³ Id.

A government contractor or vendor may defeat a finding of falsity, however, when a contract or regulation is subject to more than one reasonable interpretation.

(d) Materiality

The 1986 amendments of the FCA did not contain language that indicated a false or fraudulent claim had to be “material” in order to impose liability. Despite this fact, several courts have held that a relator must also prove materiality. This requirement is largely due to the absence of a definition for the terms “false or fraudulent.”³⁴ For example, many courts have defined a “false claim” as common law fraud.³⁵ Thus, as the reasoning goes, because materiality is required to prove common law fraud the same element is a requirement under the FCA. From a practical matter, an attorney should be prepared to establish materiality. First, it will certainly be a consideration by a jury in determining how much in damages it should award. Second, as will be discussed *infra*, the materiality requirement has been expressly added via recent amendments to the FCA when it comes to proving claims under §§3729 (a)(2) and (a)(7).³⁶

(e) Causation and Damages

When a person “presents, or causes to be presented, a false or fraudulent claim to the U.S. government for approval,” the causation element under the FCA is satisfied.³⁷ The FCA applies to any person who knowingly assisted in causing the government to pay claims that are grounded in fraud, without regard to whether that person had direct contractual relations with the government. The FCA allows for significant civil monetary damages to be awarded against a defendant who submits a fraudulent claim to the government.³⁸ Violators are liable for a civil

³⁴ See, *supra*, note 21.

³⁵ See, United States ex rel. Wilkins v. North American Construction Corporation, 101 F.Supp. 2d 500 (S.D. Tex. 2000).

³⁶ These provisions have been re-designated pursuant to recent FCA Amendments.

³⁷ See Androphy & Corerro, *supra* note 22, at 35-36.

³⁸ See United States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943).

penalty of 5,500 to \$11,000 per claim plus three times the government's damage.³⁹ The courts disagree, however, as to whether the relator must prove injury or damages as an element of a FCA violation.⁴⁰

(f) Public Disclosures

As a result of the 1986 amendments, the FCA was enlarged to allow a relator to file a qui tam suit based on information that the government already had in its possession in certain circumstances. As a compromise between the original enactment and the 1943 amendment, the 1986 amendment by Congress created a jurisdictional bar to a relator bringing an action "based upon" "publicly disclosed" information. This rule does not apply if the relator is the "original source" of the information.⁴¹ To bring the suit, the disclosed information must reveal allegations of fraud or of a fraudulent nature regarding the transactions involved. Disclosure of general subject matter relating to the fraudulent conduct is insufficient.⁴²

The FCA specifically limits prohibited "public disclosures" to those disclosures made in criminal, civil, or administrative hearing, in a congressional, administrative, or General Accounting Office report, or from the news media.⁴³ The majority of courts have held that this is an exhaustive list. However, some courts are split over how these categories are defined. Courts that construe these terms narrowly are more likely to limit the circumstances in which the jurisdictional bar will apply.⁴⁴

³⁹ See, 31 U.S.C. § 3729(b) (2006) wherein the FCA states that a penalty of \$5,000 to \$10,000 per claim may be recovered; but see also Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s)(2), 110 Stat. 1321-358, 373 (1996) indicating that the Department of Justice increased the penalty amount by 10 percent to adjust for inflation.

⁴⁰ See Pacini & M. Hood, *supra* 33 at 297.

⁴¹ 31 U.S.C. §3730(e) (2006).

⁴² *Id.*

⁴³ 31 U.S.C. §3730(e)(4)(A) (2006).

⁴⁴ See e.g., *United States ex rel. Williams v. NEC Corporation*, 931 F.2d 1493, 1497 (11th Cir. 1991).

It is important to remember that the mere existence of a “public disclosure” does not bar the litigation. Rather, the jurisdictional bar is only triggered when the FCA lawsuit is “based upon” the public disclosure. The vague nature of this term has caused a split in authority concerning its meaning and application. Some courts, such as the Fourth and Seventh Circuits, have held that a qui tam lawsuit prohibited only if the lawsuit was actually “derived from” a public disclosure.⁴⁵ On the other hand, the Eleventh Circuit held that “based upon” means “supported by” or “substantially similar to.”⁴⁶ The latter interpretation is more restrictive and would likely prohibit a FCA suit if there is any identity between the relator’s suit and the public disclosure.

(g) Original source

Under the 1986 Amendments, even if the FCA suit was based upon a public disclosure, a relator can still recover if he or she is an “original source” of the publicly disclosed information. The 1986 Amendments defined “original source” as follows:

For purposes of this paragraph, ‘original source’ means an individual 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 an action under this section which is based on the information.⁴⁷

Proof of “direct and independent knowledge” has to be determined on a case-by-case basis depending upon the facts. Generally speaking, however, if a relator can show that he has firsthand knowledge of the alleged fraud and that he obtained this knowledge through his own efforts, he will likely be able to establish the “direct knowledge” requirement. As will be discussed *infra*, the definition of “original source” has been substantially altered by the latest amendments to the FCA in 2010.

⁴⁵ See e.g., *United States v. Bank of Farmington*, 166 F.3d 853, 863-64 (7th Cir. 1999).

⁴⁶ See e.g., *United States ex rel. Cooper v. Blue Cross & Blue Shield of Florida, Inc.*, 19 F.3d 562, 567-68 n.10 (11th Cir. 1994).

⁴⁷ 31 U.S.C. §3730(e)(4)(B) (2006).

(h) Intent

Following the enactment of the 1986 Amendments, a split emerged among the Circuit Courts of Appeals regarding the intent requirement applicable to §§3729(a)(2) and (3) claims. For example, since §3729(a)(2) prohibited the making or use of “a false record or statement *to get* a false or fraudulent claim paid or approved,” some courts reasoned that the relator must prove that the defendant intended the Government itself pay the claim.⁴⁸ On the other hand, some courts held that §§3729 (a)(2) and (3) could be established by proving that the defendant intended to cause a claim to be paid by a private entity using Government funds.⁴⁹

In 2008, the U.S. Supreme Court weighed in on the subject in *Allison Engine Co., v. United States ex rel Sanders*.⁵⁰ The facts of the case were straightforward. The Navy contracted with two shipyards to build destroyers, each of which needed generator sets for electrical power.⁵¹ The shipyards subcontracted with Allison Engine Company, Inc., which in turn, subcontracted with two other subcontractors to do work associated with the generator sets.⁵² The subcontracts required that each generator set be accompanied by a certificate of conformance (COC) certifying that the unit was manufactured according to Navy specifications.⁵³ Former employees of one of the subcontractors brought an FCA action.

The relators argued that the subcontractors knowingly submitted invoices to the shipyards for work which did not meet the Navy requirements and that the contractors had issued false COCs representing that they had met the requisite specifications.⁵⁴ In addition to the false COCs, the relators introduced evidence that the defendants presented invoices for payment to the

⁴⁸ See, *United States ex rel Totten v. Bombardier Corp.*, 380 F.3d 488 (C.A.D.C. 2004), cert denied, 544 U.S. 103, 125 S.Ct. 2257, 161 L.Ed.2d 1059 (2005).

⁴⁹ See, *United States ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610 (2006).

⁵⁰ 553 U.S. 662, 128 S.Ct. 2133, 170 L.Ed2d. 1030 (2008).

⁵¹ *Allison Engine Co.*, 553 U.S. at 665-66.

⁵² *Id.*

⁵³ *Id.* at 666.

⁵⁴ *Id.* at 666-67.

shipyards. The relators did not, however, provide evidence of the invoices that the shipyards presented to the Navy.⁵⁵ Writing for a unanimous Court, Justice Alito held: [A] subcontractor violates §3729 (a)(2) if the subcontractor submits a false statement to the prime contractor intending for the statement to be used by the prime contractor *to get* the Government to pay its claim.⁵⁶ The Supreme Court’s decision in *Allison Engine*, essentially made it far more difficult to prove FCA claims against subcontractors, vendors and/or suppliers. However, due to Congressional action, the effects of the *Allison Engine* decision were short lived.

C. Fraud Enforcement and Recovery Act of 2009

On May 20, 2009, the Fraud Enforcement and Recovery Act of 2009 (“FERA”) was signed into law by President Barack Obama.⁵⁷ One of Congress’ motives passing FERA was to deter the potential fraud by entities and institutions that received Troubled Asset Relief Program (“TARP”) funds. Another motive of Congress was to overturn the limitations on the scope of the FCA established by the Supreme Court in the *Allison Engine* decision. Consequently, Congress greatly expanded the liability provisions of the FCA through the passage of FERA.

FERA amends the FCA’s requirement that the creation of false statements or records be used “to get” a false claim paid by “the Government.” The new FERA amendment eliminates the old “intent” requirement found in *Allison Engine*. Now, FCA liability regarding false statements or records is based upon whether the false statement or record was “material” to getting a false claim paid or approved.⁵⁸ Under the FERA amendments to the FCA, the liability provisions of

⁵⁵ *Id.* at 667.

⁵⁶ *Id.* at 671-72.

⁵⁷ Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 617.

⁵⁸ See, 31 U.S.C. § 3729(a)(1)(B) (2009).

the FCA remain categorically the same, but have been renumbered and expanded to cover additional conduct.⁵⁹ The new FERA amendment extends FCA liability to any person who:

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement *material* to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A),(B), (C), (D), (E), (F), or (G).

... or

(G) 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.*⁶⁰

D. Patient Protection and Affordable Care Act

On March 23, 2010, the Patient Protection and Affordable Care Act (also known as the health reform bill or “PPACA”) was signed into law by President Barack Obama.⁶¹ Like FERA, the PPACA expands and strengthens the FCA. First, the PPACA substantially alters the “public disclosure” bar by allowing the DOJ to make the decision on whether a court can dismiss a FCA case that is based on a public disclosure.⁶² Additionally, the PPACA also re-defined what constitutes publicly disclosed information to bar only those suits based on disclosures from federal sources or the news media. Specifically, the FCA will not bar a claim unless

⁵⁹ See, 31 U.S.C. §§ 3729-3733 (2009).

⁶⁰ 31 U.S.C. §§ 3729(a)(1)(A)-(C) and (G) (2009).

⁶¹ See, Patient Protection and Affordable Care Act, Pub.L.111-148, 124 Stat. 119.

⁶² See, Patient Protection and Affordable Care Act, H.R. 3590 §1303 (j)(2).

“substantially the same allegations or transactions were publicly disclosed” in: (1) a Federal criminal, civil, or administrative hearing in which the government or its agent was a part,” (2) “a congressional, [GAO], or other Federal report, hearing, audit, or investigation,” or (3) “from the news media.”⁶³ Consequently, PPACA now allows relators to bring qui tam claims based on information derived from state and local government sources.

Secondly, the PPACA expands the scope of the “original source” exception to the public disclosure bar. Prior to the PPACA, qui tam relators could file FCA claims based on publicly disclosed information only if the relator had disclosed the information to the government before filing suit and only if the relator had “direct and independent knowledge” of the information at issue.⁶⁴ Under the new amendment, an original source is now someone who has “knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions.”⁶⁵ Thus, the relators allegations can now be based on secondhand information, so long as those allegations add to the information that has already been publicly disclosed.

Next, the PPACA clarifies an amendment made by FERA. As noted, one of the FERA amendments broadened the “reverse false claim” provision of the FCA to include someone who “...knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government.”⁶⁶ FERA then defined the term “obligation” to mean, among other things, “retention of any overpayments.”⁶⁷ The PPACA clarified exactly how long a provider had to return an overpayment once it was discovered. Under the PPACA,

⁶³ See, Patient Protection and Affordable Care Act, H.R. 3590 §1303 (j)(2).

⁶⁴ Id.

⁶⁵ 31 U.S.C. §3730(e)(4)(B)(2010).

⁶⁶ 31 U.S.C. §3730(a)(1)(G)(2009).

⁶⁷ 31 U.S.C. §3729(b)(3)(2009).

overpayments under Medicare and Medicaid must be reported and returned within 60 days of discovery or returned on the date any corresponding cost report is due, if applicable.⁶⁸

Lastly, the PPACA also cleared up any ambiguity concerning whether the Anti-Kickback Statute could form the basis of a FCA claim. Section 6402(f)(1) of the PPACA establishes that claims submitted in violation of the AKS automatically constitute false claims for purposes of the FCA. In addition, § 6402(f)(2) of the PPACA amends the AKS to state that “a person need not have actual knowledge ... or specific intent to commit a violation” of the AKS. Thus, providers will not be able to defend a FCA claim by arguing a lack of intent with a respect to the underlying AKS violation.

II. The FCA’s Qui Tam Provisions and Procedures for Filing a Claim

An FCA claim can be brought by the government directly or by the relator pursuant to the FCA’s qui tam provisions.⁶⁹ In the case of qui tam relators, the FCA requires a relator to follow special filing procedures in initiating a qui tam lawsuit. Prior to filing a qui tam suit, a relator must prepare and serve a copy of the complaint and a written disclosure of substantially all material evidence within his possession on the U.S. Attorney General, not the defendant.⁷⁰ Next, the relator must file the complaint in camera and under seal. The complaint will remain under seal for at least 60 days so that the government can decide whether to intervene.⁷¹ Failure to file the complaint under seal and provide the written disclosure statement may result in the lawsuit being dismissed.⁷²

⁶⁸ See, 42 U.S.C. §1320A-7k(d)(2).

⁶⁹ 31 U.S.C. §3730(a) and (b) (2009).

⁷⁰ *Id.* at §3730 (b)(2).

⁷¹ *Id.*

⁷² See, Foster v. Savannah Communication, 140 Fed.Appx. 905, 908 (11th Cir. 2005).

The defendant is not served with the Complaint until the government decides whether to intervene and the court orders service.⁷³ The relator must deliver a copy of the summons and complaint to the United States Attorney for the district where the action is brought and send a copy of the summons and complaint by registered or certified mail to the Attorney General of the United States in Washington, D.C.⁷⁴

Upon the expiration of the sixty-day period during which the complaint is sealed, the Government has five basic options on how to proceed. The Government can request an extension of the time period to continue its investigation; intervene and take over the prosecution of the FCA suit; decline to intervene and permit the relator to prosecute the FCA suit; move to dismiss the suit; or attempt to settle the suit prior to formal intervention or declination.⁷⁵ Even if the Government declines to intervene initially, it may intervene at a later date upon a showing of good cause. If the Government intervenes in the qui tam action, it is responsible for prosecuting the lawsuit.⁷⁶

Also, when it intervenes, the Government can settle the action even if the relator objects provided that the relator is given a hearing to express his or her concerns and the court finds that the settlement is fair.⁷⁷ If the Government intervenes in the qui tam action, the relator is entitled to receive between 15 to 30 percent of the amount recovered in the qui tam lawsuit.⁷⁸ However, if the Government declines intervention, the relator's share is increased to an amount of 25 to 30

⁷³ See, 31 U.S.C. §3730 (b)(2).

⁷⁴ Id.

⁷⁵ See, 31 U.S.C. §3730(b)(3); 31 U.S.C. §3730(b)(4)(A)(B); and 31 U.S.C. §3730(c)(2)(A) and(B).

⁷⁶ 31 U.S.C. § 3730(c)(1).

⁷⁷ 31 U.S.C. §3730(c)(2) (B).

⁷⁸ 31 U.S.C. §3730(d)(1).

percent.⁷⁹ If the qui tam lawsuit is successful, the relator is also entitled to recover attorney's fees and expenses from the defendant.⁸⁰

In addition to affording the Government an opportunity to investigate the claim prior to being able to proceed with litigation, the qui tam relator must also file his or her suit within the time prescribed by the statute of limitations. With respect to the statute of limitations, the FCA states in §3731(b):

A civil action under 3730 may not be brought –

- (1) more than 6 years after the date on which the violation of section 3729 is committed, or
- (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.⁸¹

As noted above, both the qui tam relator and the Government must file a FCA claim within 6 years of the FCA violation regardless of who (relator or Government) initiates the lawsuit. The statute seems to suggest that lawsuits commenced by the Government, and only those initiated by the Government, can receive an additional 3 year tolling period if circumstances are warranted.

III. Common Areas of Concern and Theories of Liability

A. Common FCA Issues

(a) Criminal prosecution.

Filing a civil qui tam lawsuit may have risks for the relator that should be explored by the attorney and prospective plaintiff. For example, if the aspiring relator personally participated in the actions or misconduct that is the basis of the fraud, that person could be in jeopardy of being

⁷⁹ 31 U.S.C. §3730(d)(1).

⁸⁰ 31 U.S.C. § 3730 (d)(1) and (2).

⁸¹ 31 U.S.C. § 3731(b).

prosecuted for a crime.⁸² If the relator participated in the crime, filing a qui tam case will likely not provide him with protection from criminal prosecution.

In fact, the filing the lawsuit could make the Government aware of an indictable offense that might otherwise have gone undetected. Additionally, a relator convicted of a crime related to the underlying fraudulent activity cannot recover under a civil qui tam suit.⁸³ Qui tam relators who are not convicted but are the masterminds of the fraudulent claims can recover an award but these relators are generally limited in the amount they can recover.⁸⁴ A lawyer thinking of filing a qui tam suit under the FCA should carefully examine the possibility of criminal liability before proceeding.

(b) Retaliatory discharge claim.

If the relator is a current employee of the Defendant there are obviously concerns regarding whether the relator's employment would be jeopardized by informing the Government of the Defendant's fraudulent activities. To address this concern, the 1986 amendments to the FCA included provisions protecting whistleblowers from adverse employment actions or discrimination by their employers.

An FCA retaliatory discharge claim can be filed when an employer discharges, demotes, suspends, harasses, or otherwise discriminates against the employee with respect to her employment. Under §3730(h) of the FCA, the employer may be liable for two times the amount of back pay, interest, and special damages.⁸⁵ Section 3730(h) also includes reinstatement to the same seniority status for employees that establish retaliation under the FCA.⁸⁶ Whistleblower protection is available to any employee who participates in the qui tam action on behalf of the

⁸² See Pacini & M. Hood, *supra* 33 at 287.

⁸³ 31 U.S.C. §3730(d)(3).

⁸⁴ *Id.*

⁸⁵ See, 31 U.S.C. §3730(h).

⁸⁶ *Id.*

government or relator.⁸⁷ An employer may be liable for a whistleblower retaliation claim even if the fraud allegation underlying the qui tam action is shown to be without merit.

In addition, qui tam relators seeking to file a retaliation claim now have the benefit of an important new amendment. The retaliation provisions of the FCA were amended by the Dodd-Frank Wall Street and Consumer Protection Act. Specifically, under §1079(b)(1)(c) of the Dodd-Frank Act qui tam relators now have up to three (3) years to file a retaliatory discharge lawsuit. Also, §1079(b)(1)(c) broadens the scope of activity protected from retaliation as well as the class of persons protected by the FCA's retaliation provisions.

(c) Rule 9(b), Fed.R.Civ.P.

Because FCA suits are civil actions based on fraud, relators are subject to the pleading requirements of the Federal Rules of Civil Procedure 9(b) which states, in pertinent part that “the circumstances constituting fraud or mistake shall be stated with particularity.” Most courts strictly apply Rule 9(b) to FCA qui tam complaints.⁸⁸ Rule 9(b) requires a complaint to specify the time, place, persons involved, and the fraudulent nature of the alleged acts. Essentially, qui tam relators must state “who, what, when, where, and how” with respect to fraudulent claims actually submitted to the government.

B. Theories of Liability⁸⁹

(a) Fraudulent Billing for Medicare/Healthcare Treatment

As mentioned above, in fiscal year 2015, the DOJ recovered \$3.5 billion in FCA settlements and judgments. This amount included \$1.9 billion in health care fraud. There are several areas within the medicare/healthcare treatment arena which FCA qui tam cases arise.

⁸⁷ *Id.*

⁸⁸ See, e.g., *United States ex rel. McCoy v. California Med. Review*, 723 F.Supp. 1363 (N.D. Cal. 1989).

⁸⁹ Although the FCA originally involved fraud in the defense contractor industry, there are numerous theories of liability under the FCA and the following list of theories is by no means exhaustive.

(1) **Claims For Services Not Actually Performed:** The simplest FCA claims arise when a medical provider bills for services that were not provided. This usually occurs when the provider performs one procedure, yet bills for other procedures that could be related to the procedure performed, but were not actually performed.

(2) **Claims for Services Not Medically Necessary:** Medical providers are routinely required to certify to the Government that services provided to a patient (e.g. tests, therapy, etc.) are medically necessary and that the patient met the requisite criteria for receiving the service. The certification to the government typically takes place when the provider submits a Certificate of Medical Necessity (“CMS”) to the government.

(3) **Claims Misrepresenting the Provider of Services:** When a medical provider misrepresents the qualifications of the person that provides medical services to patients, a FCA violation may occur. Often these FCA claims arise where a provider represents to the Government that someone eligible to receive Medicare reimbursement provided a service, when in reality the service was provided by someone not eligible to receive reimbursement. Examples of this behavior could be a Doctor instructing a nurse to provide a service but then insisting that the nurse bill medicare using the Doctor’s provider identification number (PIN).

(4) **Upcoding for Services and/or Goods:** Billing for a service not provided or products not delivered as billed.

(5) **Unbundling Services:** In the healthcare industry it is common for certain procedures and services that are automatically performed as a group or set to be billed as a single service. Unbundling occurs when medical providers are reimbursed for bundled services. Then, in addition to what they have already billed the government, the provider pulls out a service or

services from the bundled group and submits another claim to the Government. Essentially, the medical provider is paid multiple times for a service that was only provided once.

(6) **False Cost Reports:** Medicare Part A providers such as hospitals, nursing homes, and home health facilities routinely have to submit cost reports submitted by medical providers to Medicare. Typically, these cost reports require the providers to certify that the medical provider is in compliance with all federal laws that are required for reimbursement. Examples of false cost reports that result in FCA claims are: inflating the costs of patient care; reporting costs of non-covered services; seeking reimbursement for costs that are not related to patient care; improperly manipulating statistics; and seeking reimbursement for costs related to non-Medicare patients.

(b) **The Stark Act:** The Stark Act, 42 U.S.C. §1395 prohibits a physician or immediate family member from referring a patient to any provider that provided designated health services (“DHS”) if the physician or immediate family member has a direct or indirect financial relationship with the provider. A financial relationship is defined as any compensation arrangement between the physician and the provider. In the event that a referral is made and a financial relationship exists, the provider cannot submit a claim to Medicare for the DHS provided unless the financial relationship falls under a statutory or regulatory exception. A Stark Act violation can result in FCA liability.

(c) **Anti-Kickback Statute:** The Anti-Kickback Statute (“AKS”), 42 U.S.C. § 1320a- 7b(b), prohibits, among other things, paying kickbacks to induce referrals for services paid for under Federal healthcare programs. The AKS arose out of Congressional concern that payoffs to those who can influence healthcare decisions corrupt professional healthcare decision-making. These actions could result in Federal funds being diverted to pay for goods and services

that are medically unnecessary, of poor quality, or even harmful to a vulnerable patient population. In pertinent part, the statute states:

(b) Illegal remuneration

* * *

(2) whoever knowingly and willfully offers or pays any - remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person -

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) to purchase, lease, order or arrange for or recommend purchasing, leasing or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program, shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.⁹⁰

Violation of the statute can also subject the perpetrator to exclusion from participation in Federal health care programs and civil monetary penalties of up to \$550,000 per violation and up to three times the amount of remuneration paid.⁹¹ Even prior to the PPACA amendment mentioned above, the majority of Federal Courts held that a violation of the AKS gave rise to a FCA violation.⁹²

(d) Off Label Drug Marketing: The Federal Drug Administration (“FDA”) is required by law to approve all prescription drugs sold in the United States. Once an application for approval has been made, the FDA reviews a drug’s safety and effectiveness. Thereafter, the FDA will approve the drug for the treatment of particular illnesses or diseases. Once it has been

⁹⁰ 42 U.S.C. § 1320a-7b(b)(2).

⁹¹ 42 U.S.C. § 1320a-7(b)(7); 42 U.S.C. § 1320a-7a(a)(7).

⁹² This was so because as a condition of participation in the Medicare Program, the defendant has agreed to abide by all Medicare Statutes and Regulations; this would include abiding by the AKS.

approved for a particular illness, the manufacturer must market the drug for only that use. However, in an effort to increase revenues and profits, some drug manufacturers will market or promote a drug for a use that the FDA has not approved. If the Medicare program pays for these non-approved uses, a FCA claim may arise.

(e) **Defense and Homeland Security Contracts:** The United States spends approximately \$600 billion per year in national defense. Fraud by defense contractors and contractors involved with homeland security continues to be one of the most important areas of FCA litigation. Although there are an infinite amount of theories in schemes involved with this kind of fraud, some common FCA theories in this area are:

(1) **Product Substitution.** Defense and security contracts routinely require contractors to use products or parts of a particular quality or type. Further, some contracts require that parts be made in the United States or made by American Companies. When contractors substitute products or parts of that are substandard or made of inferior quality, a FCA violation can occur. Likewise, if a contractor uses parts from foreign sources without obtaining the Government's permission, the contractor may be liable under the FCA.

(2) **Mischarging and Cross-Charging.** Both mischarging and cross-charging are common types of fraud. Mischarging, as the name suggests, occurs when the contractor submits bills to the Government that contain false charges. This type of fraud includes instances where a contractor inflates its bill to the Government by charging for labor, parts or other costs that are more than the costs actually incurred by the contractor. Cross-charging occurs when a contractor charges work performed on one contract to a different contract. Common occurrences of cross-charging occurs when the contractor shifts expenses and costs (e.g. overhead) from one contract to another in order to increase profits.

(3) **Failure to Test or Inspect.** Government contracts in the defense and homeland security sphere often require the contractor to perform tests or inspections on a product to ensure that the product functions properly. Failure to perform tests or inspections that are called for by the contract, or called for by government regulations, can result in a FCA violation.

(4) **Substandard Products or Services/Failure to Adhere to Specifications.** Equipment, machinery, weapons and other products usually have to meet the design specifications incorporated into military contracts. The knowing submission of these items that do not meet military specifications could result in a FCA violation. Likewise, when a contractor knew or should have known, that equipment, machinery, weapons and/or a product was worthless or would not perform as promised but delivers the items to the Government anyway, the contractor violates the FCA.

(5) **General Procurement.** Any false certification that items furnished under a contract with the government are of a quality specified in the contract or a certification that the items conform with contract requirements is a FCA violation.

(6) **Violations of the Truth-In-Negotiations Act (“TINA”).** Because of the complex and specialized nature of weapons systems and certain equipment used by the U.S. Military, the Government often has no choice but to purchase weapons and equipment from a single supplier. The inherent problem in this circumstance is that the Government has no real way of knowing if it is paying a fair price since there is no competitive bidding process for the contracts. To alleviate this problem, the TINA requires contractors to disclose all relevant information about its costs information. Contractors who inflate their costs and expenses may be found liable for FCA violations.

CONCLUSION

Unlike many other cases, the investigation of a qui tam lawsuit must be done both efficiently and quickly. Plaintiff's counsel will serve their clients well if they ask and have answered the following questions in determining whether the relator has a viable qui tam lawsuit:

1. Who made a false statement to the government for the purposes of getting a claim paid, or for purposes of avoiding paying money owed to the government? To whom? When, where and how?
2. How does your potential client know this (i.e. is he or she an "original source" as defined by the FCA or is his knowledge based on publicly disclosed information)?
3. Who else has knowledge of the information your client possesses?
4. Are there any documents that refer to or support the alleged fraudulent conduct? If so, where are these documents?
5. What government funds are involved?
6. Are there any government regulations related to the disbursement of these funds?
7. Did the defendant violate these regulations?
8. Did your client plan or initiate the false claim? If so, is this client likely to receive the zero to ten percent recovery amount, if at all? Plaintiff's counsel should do a criminal background check.
9. What is the client's motivation or rationale for being a whistleblower in this instance and has the client ever been a whistleblower before?
10. Was the client involved in presenting the false claims and/or the fraudulent conduct at issue?

11. How was the government harmed by the false claims? Did the government experience a small loss, large loss or no actual loss at all?
12. If the client is an employee of the defendant, what is the client's background and history with this or any other employers? Has the client signed any contracts or agreements while employed or contracted with the defendant that may affect his or her ability to bring the qui tam suit?
13. Does the client allege that he or she has been retaliated against because of acts done in furtherance of the FCA?