

The False Claims Act: New Fangs For an Old Law

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In 1863, Congress enacted the False Claims Act (FCA) as a response to abuses by private supply contractors during the Civil War. Although the statute has been in effect for almost 150 years, its modern use stems from changes in 1986 that put teeth in its provisions by broadening its reach. Since then, plaintiffs have used the FCA to reach an ever-wider scope of activity by companies in contract parity with the federal government.

Recently, Congress has fashioned those teeth into fangs by removing restrictions that limited the scope of private persons who could act as FCA plaintiffs, expanding the range of conduct that can form the basis of a false claim allegation and paring back previously available defenses created by years of court decisions. A parallel criminal provision, 18 U.S.C. 287, can render some false claims felony violations; thus, the basis for an FCA claim can also spur criminal investigations of violations alleged in civil pleadings.

The FCA allows private citizens, known formally as "relators" but commonly as whistleblowers, to bring qui tam suits on behalf of the government and receive a portion of the government's recovery. Since 1986, the government has recovered more than \$24 billion in FCA suits; in fiscal year 2009, recoveries totaled \$2.4 billion. Qui tam suits initiated by relators accounted for \$2 billion of those 2009 recoveries, and successful relators received more than \$255 million. Additional resources and continued congressional support ensure that the FCA will still be aggressively enforced, and companies dealing with the

government, even indirectly, should give careful consideration to its expanded reach and more limited defenses.

In general, the FCA prohibits any person or entity from "knowingly present[ing], or caus[ing] to be presented, a false or fraudulent claim for payment or approval," 31 U.S.C. 3729(a)(1)(A), or "knowingly mak[ing], us[ing], or caus[ing] to be made or used, a false record or statement material to a false or fraudulent claim," 31 U.S.C. 3729 (a)(1)(B) (tax obligations are excluded). Whistleblowers can file FCA suits in the name of the government, after which the Department of Justice (DOJ) has 60 days to decide whether to intervene and join the suit; decline to intervene but allow the whistleblower to proceed; or intervene and dismiss the suit (government practice is not to exercise this option). The statute provides for civil fines for each false claim and treble damages.

In May 2009, President Obama signed the Fraud Enforcement Recovery Act (FERA), which made several material changes to the FCA. One major change was a new definition of a "claim" within the ambit of the FCA. A claim now includes "any request or demand...for money or property and *whether or not the United States has title to the money or property*, that is presented to an officer, employee, or agent of the United States; *or is made to a contractor, grantee, or other recipient.*" 31 U.S.C. 3729(b)(2) (emphasis added). The amendments, emphasized above, curtailed previously available defenses. Courts had determined that the statute applied only to a false claim



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made with the intent that the government itself would “rely on that false statement as a condition of payment,” *Allison Engine Co. v. U.S. ex rel. Sanders*, 128 S. Ct. 2123, 2128 (2008), and only to funds owned by the US government, not those merely administered by it. *U.S. ex rel. DRC Inc. v. Custer Battles LLC*, 376 F. Supp. 2d 617, 636-41 (E.D. Va. 2006); see also *U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 492-96 (D.C. Cir. 2004).

The FERA also expanded FCA liability to cover claims that result in the knowing retention of an overpayment, conduct not previously proscribed by the statute. Prior to the FERA, the FCA did not prohibit retention of an overpayment if the initial claim was not knowingly false. See S. Rep. No. 111-10, at 13-14 (2009) (discussing how the prior version did not bar the retention of an overpayment if it resulted from inaccurate cost estimates calculated during the contracting process). The amended statute imposes liability for such retention by prohibiting a defendant from “knowingly conceal[ing] or knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money or property to the Government,” 31 U.S.C. 3729(a)(1)(G), and defining an obligation to include “an established duty...arising...from the retention of any overpayment.” 31 U.S.C. 3729(b)(3).

In addition, the FERA allowed the attorney general to delegate his authority to issue civil investigative demands (CIDs), which provide the government with the power to request documents, testimony and interrogatory responses in FCA cases. After a whistleblower files an FCA complaint, but before the government must decide whether to intervene, the DOJ can issue CIDs to gather information. Attorney General Eric Holder Jr. delegated this power to the assistant attorney general for the Civil Division, who redelegate it to all 93 US attorneys. In a November 2009 press conference, Civil Division Assistant Attorney General Tony West indicated that the increased use of CIDs will allow the DOJ to increase its FCA case flow and accelerate the recovery of fraudulently-obtained tax dollars.

Health Care Legislation

The comprehensive health care legislation signed in March of this year, the Patient Protection and Affordable Care Act, also made changes to the FCA, amending the public disclosure bar—which generally prohibited claims based on publicly available information—and narrowing the potential defenses it provides. 31 U.S.C. 3730(e)(4).

First, the government now has discretion over whether an FCA suit is dismissed under the public-disclosure bar. Under the prior statutory language, if an FCA suit was based on already publicly disclosed facts, the public-disclosure bar deprived courts of jurisdiction. The amendment removed the absolute jurisdictional bar, and the statute allows for dismissal provided that the government does not oppose.

Second, fraud disclosed in private suits will not trigger the public-disclosure bar. The statute now requires that the government be a party in a criminal, civil or administrative hearing for the hearing to constitute a public disclosure. As a result, qui tam relators will be able to bring FCA suits more readily by using information already disclosed, for example, in hearings between private parties.

Third, information disclosed in state proceedings or reports will not trigger the public-disclosure bar. The amendment resolved a federal circuit split over whether fraud disclosed in a state report, hearing, audit or investigation constituted a public disclosure that barred an FCA suit. Fraud disclosed in such state proceedings can form the basis for a qui tam relator suit.

Fourth, the public-disclosure bar does not apply to a case in which the qui tam relator is an “original source” of the fraud allegation. The amendment changed the qualifications for an “original source” by removing the prior requirement that an original source have “direct and independent knowledge” of the fraud; an original source needs only “independent” knowledge. In addition, the amendment will likely lead to litigation over new statutory language that also avoids the bar if the original source has information that “materially adds to the publicly disclosed allegations or transactions.”

After the 1986 amendments, FCA enforcement expanded as DOJ aggressively pursued cases. The \$2.4 billion recovered in 2009, including the “largest health care fraud settlement in the history of the [DOJ]” resulting in a \$1 billion civil FCA fine imposed on Pfizer Inc. and its subsidiary, represented the second-highest total amount recovered in the FCA’s history. Press Release, US Dep’t of Justice, Justice Department Announces Largest Health Care Fraud Settlement in Its History (Sept. 2, 2009). Moreover, the FERA authorized \$500 million in funding for fraud enforcement for 2010 and 2011. While actual increases have been less, additional resources are being made available. That fact, the recent amendments and

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Congress' history of support for and expansion of the FCA, along with the government's increased scrutiny of companies as a result of the financial meltdown and the effort to curb health care fraud, all portend increasing enforcement of the statute. Companies involved in contract relations with the government or otherwise receiving government funds can expect to see potential FCA actions and potential liabilities on the docket of issues that need risk-management attention in 2010 and beyond. Coupled with the potential for companion criminal inquiries in egregious cases, the most recent changes in the FCA strongly suggest that such companies proactively manage the risk of FCA liability.

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