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The False Claims Act: A Useful Tool in the Fight Against Public Corruption

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The False Claims Act

A Useful Tool in the Fight Against Public Corruption



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Practitioner Toolkit Series



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The False Claims Act:

A Useful Tool in the Fight Against Public Corruption

When most people think of the available tools in the fight against public corruption, they think of the criminal laws and courts, or the oversight provided by government watchdog agencies. The False Claims Act (or FCA) provides another way in which public integrity can be enhanced, and it is a tool that has many advantages. First, the FCA is a civil statute, which means that as compared to criminal litigation, the FCA requires a lower burden of proof, and carries the possibility of a high damages award. Second, the False Claims Act permits citizen watchdogs to bring claims that the government can join, meaning that they are often less resource-intensive.

The purpose of this article is to explain fundamental False Claims Act concepts to enable the uninitiated practitioner to get to the starting line of filing an FCA case.¹ I will describe the Act, generally explain the process of initiating a case, and provide some practitioner tips – for both government lawyers and those representing citizens bringing claims. The purpose of this article is not to provide an explanation of nuanced areas of the False Claims Act law nor to lay out all of the myriad theories under which an FCA case can be brought, but rather to assist practitioners with basic concepts and to supply some strategies for bringing FCA cases.

Appendices:

Appendix 1:

Sample Qui Tam False Claims Act Complaint

Appendix 2:

Sample Complaint – United States of America v. Golden Gate National Senior Care LLC

The False Claims Act

What is a False Claims Act Case?

The first False Claims Act was enacted in 1863 by Congress in response to U.S. Civil War government suppliers to the Union Army who were defrauding the Army with faulty or short-counted goods. Since its initial passage in 1863, it has been revised several times. Twenty-nine states and seven municipalities have enacted False Claims Acts of their own as well.²

The following is a non-exhaustive list of some examples of false claims allegations:

- Billing for goods or services that were never delivered to the government³
- Holding out to the government equipment as operational and tested when in fact it is broken or untested⁴
- Marketing prescription drugs by providing kickbacks when the drugs are ultimately paid for by the government through programs like Medicaid or Medicare⁵
- Billing the government for non-FDA approved drugs or devices⁶
- Performing inappropriate or unnecessary medical procedures in order to increase Medicare or Medicaid reimbursement⁷
- Billing the government for work or tests not performed⁸
- Certifying to the government improperly or untested materials or goods⁹
- Billing the government for premium goods but providing inferior goods¹⁰
- Billing the government for phantom employees and doctored time slips, like charging for employees who were not actually working, or billing for made up hours in order to maximize reimbursements¹¹

- Up-coding employee work, such as billing the government at an iron worker’s pay-rate when work was performed by a laborer¹²
- Being over-paid by the government for sale of a good or service, and then not reporting that overpayment¹³
- Certifying to the government that a contract was performed within certain guidelines (i.e. by minority, woman-owned, or veteran, contractors or sub-contractors) when it was not.¹⁴
- Inflating the alleged costs on a cost-plus contract by not including rebates in the true cost¹⁵

What is the “Claim” in a False Claims Case?

At its most basic, the “claim” in an FCA case is the document which creates the justification for the government to make payment – the demand for money or property made to the government, or, most simply, an invoice or bill for goods or services. When a government contractor or its agent (using the term agent loosely) submits a bill to the government for goods or services which do not meet the standards of the contract under which the goods or services were sold, the contractor has potentially committed a False Claims Act violation and may be liable to the government. As shown by the above examples of FCA cases, a false claim can also be a false certification that work was performed by a certain class of individuals, under certain conditions, or that the goods meet certain standards when they do not.

Basic federal FCA claims are defined as follows: The statute begins, in section 3729(a), by explaining the conduct that creates FCA liability. In very general terms, sections 3729(a)(1)(A) and (B) set forth FCA liability for any person who knowingly submits a false claim to the government or causes another to submit a false claim to the government or knowingly makes a false record or statement to get a false claim paid by the government. Section 3729(a)(1)(G) is known as the reverse false claims section; it provides liability where one acts improperly – not to get money from the government, but to avoid having to pay money to the government. Section 3729(a)(1)(C) creates liability for those who conspire to violate the FCA.

Wrongful Conduct, Materiality, and the FCA

The U.S. Supreme Court has clarified that liability under Sections 3729(a)(2) and 3792(a)(3) of the FCA requires that false statements be “material” to the government’s decision to pay the claim.

Under the statute, material means “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”¹⁶ A representation need not be express to be material. According to a theory of False Claims Act liability commonly referred to as “implied false certification,” when a defendant submits a claim, it impliedly certifies compliance with all conditions of payment. At least in certain circumstances, the implied false certification theory can be a basis for liability. Specifically, liability can attach when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant’s noncompliance with a statutory, regulatory, or contractual requirement. In these circumstances, liability may attach if the omission renders the express representations misleading.

What is the Liability for Violation of an FCA?

Liability under the FCA is high. Under federal law, one who is liable must pay a civil penalty of between \$5,500 and \$11,000 for each false claim and treble the amount of the government’s damages. Where a person who has violated the FCA reports the violation to the government under certain conditions, the FCA provides that the person shall be liable for not less than double damages instead. Penalty and damage provisions in most States are similar.

Who May File a False Claims Case?

While the government may file a False Claims Act case on its own behalf, one of the major differences between the FCA and other types of lawsuits is that FCA suits permit private persons to file suit for violations of the FCA on

behalf of the government victim. Indeed, more FCA cases are filed by individuals than those filed by the government.

FCA cases filed by individuals are known as qui tam (pronounced “key tom”) actions and enable individuals who assist in the government’s prosecution to receive part of the recovery. Its name is an abbreviation of the Latin phrase “qui tam pro domino rege quam pro se ipso in hac parte sequitur,” meaning “[he] who sues in this matter for the king as well as for himself.” The person bringing this type of action is referred to as a “relator.”

Relators are force multipliers. The use of relators puts eyes and ears on the factory floors and in the boardrooms of every government contractor. FCA financial incentives encourage relators to come forward with information about fraud against the government where otherwise there would be no incentive to do so. Relators who reveal false claims to the government stand to receive substantial rewards.

The government may ultimately decide to decline to intervene, in which case the relator is entitled to proceed with the case and prosecute it in the shoes of the government. Non-intervened cases, however, have a much lower probability of prevailing. Generally, relators are in favor of government intervention and prosecution because of the resources of the government compared to the typical plaintiff’s firm, as well as the less direct benefit of obtaining the government’s imprimatur on a case.

It is also possible for the government and the relator to combine forces in prosecuting the case. Finally, the government might decline to prosecute a False Claims Act case, and this might well be for a number of reasons aside from the quality of the case.

The Process of Filing a False Claim Act Case

How Are FCA Cases Brought?

With a qui tam action, the relator, who must be represented by counsel, files a complaint, under seal, in court in the venue of her choosing and, at the same time, serves the Attorney General, or whomever is designated to prosecute such actions under the particular statute. Also served upon the prosecuting agency is all relevant evidence collected by the relator in anticipation of and in support of the complaint. Attached as Appendices A and B are two sample FCA complaints.

A relator serves the sealed complaint on the Attorney General (and not the defendant) so that the government may decide whether to intervene in a suit, that is, take the place of the qui tam plaintiff and assume primary responsibility for prosecuting the case. The government also has the discretion to regulate the participation of the qui tam plaintiff, who still remains a party to the action. In practice, the government often continues to rely on the assistance and resources of qui tam counsel, for example, to review and analyze documents produced by the defendant, hire experts, and to confer with the relator.¹⁷

Sealing

While the government is deciding whether or not to intervene, the matter must remain under seal. Maintaining the seal is the responsibility of the government. The initial seal under the federal statute is sixty days, but this is usually extended upon the application of the prosecuting agency. The prosecuting agency uses this time to review the complaint, the material submitted with it, and to interview the relator if necessary and appropriate.

In all events, sealing serves to protect, for as long as possible, the identity of the relator who may be a current employee of the alleged fraudster and to provide the government with time to review the complaint and gather its

own evidence. It is during this time that the prosecuting agency makes its decision whether or not to intervene in the action, that is, take over the prosecution of the matter, as discussed further below.

During the pendency of the sealing of the matter, the government must file any applications to extend the sealing. For the government attorney, it is wise to provide the reviewing judge with some level of detail about the ongoing investigation that necessitates continuing the sealing, to make clear that the case is moving along and is not stagnant.

Drafting the Complaint: FCAs Sound in Fraud

The Federal Rules of Civil Procedure Rule 9(b) pleading requirements for fraud claims apply to FCA cases.¹⁸ To satisfy the fraud pleading requirements in an FCA complaint (as with any fraud complaint) the complaint must (1) specify the statements that the plaintiff contends were fraudulent; (2) identify the speaker; (3) state where and when the statements were made; and (4) explain why the statements were fraudulent.¹⁹

“You may be better off in a ‘first to file’ battle if your client’s complaint has facts, defendants, or locations...that are not included in competing complaints.”

A second factor to bear in mind in drafting the qui tam whistleblower complaint is the possibility that other related complaints have been filed already or may be filed in the future. Under federal law, once one person files a qui tam lawsuit, no other person may file “a related action based on the facts underlying the pending action.” Section 3730(b)(5). Unfortunately, a qui tam attorney evaluating a whistleblower case has no way of ascertaining if a “related action” is pending under seal. You may be better off in a “first to file” battle if your client’s complaint has facts, defendants, or locations in which the fraud was committed, and particular types of fraudulent schemes and causes of actions under state False Claims Acts, that are not included in the competing complaints. As a result, a more, rather than less, detailed complaint makes sense.

Practitioner Pointers in False Claims Act Cases

One of the reasons the False Claims Act is a powerful tool is that it includes strong incentives for both relators and the government to utilize it. Below I provide practice pointers, both for attorneys for relators who might want to bring FCA cases, and for government attorneys who will be reviewing these relator complaints to decide whether to intervene in the FCA case.

What Are the Financial Incentives for Relators if Their Case Prevails?

A relator is entitled to different recoveries depending on how the case plays out. Under the federal statute, if the government intervenes in the qui tam action -- that is, assumes responsibility for prosecuting the case -- the relator is entitled to receive between fifteen and twenty-five percent of the amount recovered by the government.

If the government declines to intervene in the action, and relator’s counsel proceeds against the defendant, the relator’s share is increased to twenty-five to thirty percent. The relator’s share is paid to the relator by the government out of the payment received by the government from the defendant. If a qui tam action goes to trial and is successful, the relator is also entitled to legal fees and other expenses of the action from the defendant. State and municipal award schemes are similar.

How Long Is the Time Period For Filing a False Claims Act Case?

Under federal law, the False Claims Act statute of limitations is six years from the date of the violation or three years after the government knows or should have known about the violation, but in no event longer than ten years after the violation.

What Kind of Case is a Good Qui Tam Case?

The key to filing a successful qui tam case is to identify a case in which the government is likely to intervene. Obviously, as described further below, government counsel are looking for meritorious cases, and will appreciate a thorough investigation, a persuasive complaint, and an organized presentation of the evidence when evaluating the matter.

Where Should the Case Be Filed?

A qui tam attorney's decision on where to file the whistleblower lawsuit can have a profound impact on the ultimate outcome of the case. Under the broad venue provisions of the False Claims Act, a qui tam action "may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred." Section 3732(a).

A major deciding factor in where the case is filed is whose money is alleged to have been fraudulently disbursed. If it is federal dollars, federal court has jurisdiction. If federal and state dollars are both in play, as in, for example, a large government construction project, the case might proceed in either federal or state court. If only state dollars were defrauded, obviously jurisdiction lies in the state court, assuming the state in question has an applicable false claims statute.

“Not all prosecuting agencies have the same expertise or willingness to take on all types of FCA cases.”

Where you do have a choice of venue, however, there are other factors to consider. There are ninety-three U.S. Attorney's Offices, twenty-nine state agencies (usually state Attorneys General), and seven municipalities (usually city or county attorneys) with the power to prosecute FCAs. To effectively bring an FCA case, one must have expertise in both FCA practice and the subject matter of the underlying allegation (construction fraud, military defense contracting, or healthcare fraud, for example). Not all prosecuting agencies have the same expertise or willingness to take on all types of FCA cases. Thus, venue is an important initial consideration for a practitioner considering filing a False Claims Act case, since depending on the facts one may be able to choose from many different prosecuting authorities.

Moreover, consider how familiar your court of choice is with False Claims Act cases. For most local state courts, an FCA case is a rarity, and courthouse staff may be unfamiliar with, in particular, the sealing procedures of these type of cases. As an experiment to gauge the familiarity with FCA procedures of a large state court -- the New York State Supreme Court for New York County, which is the state court of general jurisdiction for Manhattan -- I made some phone calls to the court, and can report that it took multiple calls to find someone who was at all familiar with the sealing procedure for FCA cases. This is not a deal-breaker, of course; difficulties in getting cases filed is an obstacle that can be overcome. Nevertheless, it is something to consider if you have choices with respect to venue. Finally, different prosecuting authorities may have different expertise in particular areas of relevance to the False Claims Act (like defense contracting, or Medicaid/Medicare reimbursement), or some special interest in pursuing particular kinds of cases. In addition, different offices might have varying monetary thresholds for bringing fraud cases that would affect whether they will be willing to intervene in the relator's case.

Should Relators' Counsel Engage the Government Early?

Government lawyers differ on this point, but it may be advantageous for a relator's attorney to contact the prosecuting agency in the chosen venue before filing the complaint. This would enable a relator's counsel to gain some insight into the agency's risk tolerance and wherewithal for his particular case. For example, counsel may think that the obvious choice is his local United States District Court and its U.S. Attorney, but may learn that it will not work for his particular case because that office lacks manpower or resources, or your case does not meet the office's monetary thresholds. By finding this out before filing, counsel will be able to explore bringing the action in another federal district, in the state court, or in a municipality.

Moreover, if you approach the government before filing, this may allow you to identify weaknesses and fill gaps in the case before filing, but of course it goes without saying that you should not waste the government's time expecting to spitball un-developed case theories. Indeed, by the time you approach the government, it is probably wise to have a draft complaint ready so that you can discuss your case in detail. Most prosecutorial authorities have on their websites information about whom to contact in connection with False Claims Act matters.

Dealings between Relator Counsel and the Government

If you are relator counsel, your dealings with the government lawyer must be guided by a rule of utmost candor. You must know the strengths and weaknesses of your case when you present it. You should be open about any weaknesses in your evidence, and identify any troubling legal issues, such as attorney-client privilege issues in evidence you collected, that have arisen during the course of your investigation.

What Does the Government Look for in an FCA Case?

A government attorney's deciding factors are basically the same as those used by any attorney assessing the merits of a case. In assessing a potential case, the government asks, what harm did the government suffer? What was the nature of the wrongdoing? Is the wrongdoing of a type that has led to successful FCA cases in the past?

The government lawyer will assess the relator's evidence. Likely, the government will want to interview the relator personally in connection with the evidence review. The government lawyer will also consult with the agency implicated by the FCA claim – for example, if the claim involves nonperformance of a contract, the government lawyer will consult with the relevant contracting agency. The government also will sometimes consult with other subject matter experts, particularly in some of the arcane areas covered by the FCA.

Conclusion

The False Claims Act can be a powerful tool in the fight for public integrity, and, despite a reputation for being somewhat daunting, is actually fairly straightforward. I encourage anyone interested in utilizing the FCA to take a closer look and think about whether it might be the right course for you to pursue.

Endnotes

¹ 31 U.S.C. §§ 3729 – 3733.

² States with False Claims Acts are listed here. Those with asterisks are limited to Medicaid or Medicare: California, Colorado*, Connecticut*, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana*, Maryland*, Massachusetts, Michigan*, Minnesota, Montana, Nevada, New Hampshire*, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas*, Vermont, Virginia, and Washington State*. Municipalities with FCAs are as follows: Broward County, Florida; Chicago, Illinois; Allegheny County, Pennsylvania; District of Columbia; Miami-Dade County, Florida; New York, New York; and Philadelphia, Pennsylvania.

³ See *United States v. Spectrum, Inc.*, 47 F.Supp. 3d 81 (U.S.D.C. 2014) (In a motion for summary judgment, finding in part for the government that defendant violated the FCA where defendant charged government for un-rendered services.).

⁴ See *United States ex rel. Compton v. Midwest Specialties, Inc.*, 142 F.3d 296 (6th Cir. 1998) (Defendant violated FCA where it supplied government with untested brake-shoe kits in violation of contract and rejecting defense that defendant had a subjective belief that delivered materials were just as good.).

⁵ See *United States ex rel. Westmoreland v. Amgen, Inc.*, 738 F. Supp.2d 267 (D. Mass. 2010) (kickbacks).

⁶ See *In re Cardiac Devices Qui Tam Litig.*, 221 F.R.D. 318 (D. Conn. 2004) (Relator alleges that hospitals billed government and received payment for services provided to patients in clinical trials involving non-FDA approved cardiac devices.).

⁷ See *United States ex rel. Westmoreland v. Amgen, Inc.*, 738 F. Supp.2d 267 (D. Mass. 2010) (Allegation that drug manufacturers and healthcare networks encouraged providers to claim Medicare reimbursement for dosages of a drug that were medically unnecessary or never administered, and that companies induced providers with kickbacks, all of which led to the submission of false claims.).

⁸ See *United States v. Stevens*, 605 F. Supp. 2d. 863 (W.D. Ky. 2008) (Billing the government for one test when an entirely different test was actually administered).

⁹ See *BMY Combat Systems Division of Harsco Corp. v. United States*, 38 Fed. Cl. 109 (1997) (Contractor fails to disclose that testing was not performed, and invoice contained an implied certification for FCA purposes.).

¹⁰ See *Henry v. United States*, 424 F.2d 677 (5th Cir. 1970) (Supplier billed for pine oil disinfectant but provided an inferior product.).

¹¹ See *United States ex rel. Dyson v. Amerigroup, Inc.*, No. Civ. A. H-03-4223, 2005 WL 2467689 (S.D. Tex. Oct. 6, 2005) (Whistleblower fired for speaking out about a blank time sheet submitted on behalf of non-existent employee.).

¹² See *United States and State of Minnesota ex rel. Julie Scharber, Kirsten Hahn, Barbara Shoemaker, and Melissa Farr v. Golden Gate National Senior Care LLC, doing business as "Golden Living Center-Twin Rivers et al.*, 135 F. Supp. 3d 944 (D. Minn. 2015) (upcoding).

¹³ See *United States ex rel. Saldívar v. Fresenius Med. Care Holdings, Inc.*, 906 F. Supp. 2d 1264 (N.D. Ga. 2012) (Dialysis provider allegedly billed the government for excess doses of medication that it received for free, received reimbursement from government, and failed to disclose overpayment.).

¹⁴ See *United States ex rel. McGee v. IBM Corp.*, 81 F. Supp. 3d 643 (N.D. Ill. 2015) (Relator alleges that computer company reported that work was performed by minority or woman-owned business sub-contractor when it was not.).

¹⁵ See *United States ex rel. Vincent A. DiMezza, Jr. v. The Boeing Company*, No. 2-10-cv-000634 (E.D. Pa. 2010) (Allegation that aircraft company inflated costs on a cost-plus contract.).

¹⁶ Section 3729(b)(4); *Universal Health Services, Inc. v. United States and Massachusetts, ex rel. Julio Escobar and Carmen Correa*, ___ U.S. ___, 136 S. Ct. 1989 (June 16, 2016).

¹⁷ If the case is being brought directly by the government without a relator, of course, the government would file the complaint itself in the appropriate court when it was ready to do so.

¹⁸ *United States ex rel. Ladas v. Exelis, Inc.*, 824 F.3d 16, 21 (2d Cir. 2016).

¹⁹ *Ladas*, 824 F.3d at 20.