

2009 False Claims Act Amendments: Implications for the Healthcare Community (Procedural Provisions)

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The False Claims Act

- 31 U.S.C. § 3729 *et seq.*
- Enacted in 1863; amended 1945, 1986 and 2009
- Submitting or causing submission of “false claims”
- Making “false statements” to get or keep government money
- Treble damages plus penalty of \$5,500 to \$11,000 per claim
- Whistleblower rewards and protections

Qui tam Lawsuits

- Private person (a “relator”) can bring a FCA lawsuit on behalf of the United States
- Filed under seal
- After investigation, DOJ can intervene; allow relator to go forward alone; or (rarely) dismiss
- If case is successful, relator can claim attorneys fees plus a share of the recovery
 - 25-30% if the government declines to intervene
 - 15-25% if the government intervenes

2009 False Claims Act Amendments Relevant Legislative History

- Senate Report 111-10 (March 23, 2009)
- Senate Report 110-507 (specifically referenced at fn 2, p. 10 of S. Rep. 111-10, which accompanied S. 2041, the False Claims Amendments bill from 2008 which never was enacted)

More Money For Enforcement

- \$75 million for the FBI
- \$90 million for United States Attorney's Offices and DOJ
- \$30 million for Postal Inspectors
- \$30 million for HUD-OIG
- \$20 million for Secret Service.

Today's Discussion

How amendments will impact investigating, prosecuting and resolving false claims act matters

Specific Topics For Discussion

- Downstream liability for subcontractors
- Expanded Reverse False Claims
- Expanded statute of limitations
- Retroactivity of amendments
- Expanded protection of relators
- Service of *qui tam* complaints on states
- Delegating authority to issue Civil Investigative Demands
- Sharing information with relators and state agencies

TOPIC 1: Downstream Liability for Subcontractors

- Prior law: FCA did not apply to downstream recipients of federal money
- FCA liability limited to claims made “to the government” and false statements designed to obtain money “from the government”
 - FCA did *not* cover claims to federal grantees, such as Amtrak. *U.S. ex rel. Totten v. Bombardier* (D.C. Cir. 2005)
- “false statements” were covered only if defendant intended the government to rely on them. FCA was limited to false claims that are potentially reviewable by the “Government itself.”
 - *Allison Engine Co. v. U.S. ex rel. Sanders* (S. Ct. 2008)

FERA Imposes Liability on Many Downstream Recipients of Federal Funds

- FERA removes requirement that false claim be “presented to” the federal government
 - FCA exposure if the money sought from a contractor or grantee is to be used “on the Government’s behalf or to advance a Government program or interest”
 - Arguably now covers many private transactions involving federal money in some way

FERA Deleted Presentment Language

Any person who knowingly presents, or causes to be presented [, to an officer or employee of the United States Government or a member of the Armed Forces of the United States] a false or fraudulent claim for payment or approval. . . is liable [under the FCA].

FERA Requires Only an Intent to Obtain Government Money

- Extends liability to false statements made to get a false claim paid, regardless of whether defendant intended government to rely on the claim
 - Arguably extends FCA to false statement made to private parties, if federal funds are involved

FERA Amends False Statement Provision

Any person who knowingly makes, uses or causes to be made or used a false record or statement **material to [to get] a false or fraudulent claim [paid or approved by the Government]** . . . (is liable under the FCA).

FERA Expands FCA to Claims Submitted on Contractors, Grantees, or Other Recipients

- 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.

Pleading Downstream Liability

- The money or property for which the claim was submitted was to be spent or used on the Government's behalf, or
- The money or property for which the claim was submitted was to be spent or used to advance a Government program or interest, and

Pleading Downstream Liability (cont'd)

- (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

Pleading Downstream Liability (cont'd)

- Plead how and why the money was to be spent or used on the Government's behalf:
 - Contract language
 - Grant language
 - Medicaid state plan language
 - Audit/evaluation language
 - Express agent or representative language
 - Legislative purpose language
 - Regulation preamble language
 - Presidential signing language
 - Congressional Record statements

Pleading Downstream Liability (cont'd)

- Plead how the money or property for which the claim was submitted was to be spent or used to advance a Government program or interest; or,

- Plead that the United States Government—
 - will provide or has provided any portion of the money or property requested or demanded; or
 - will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Consequences Of These Amendments Are Unclear

Defense Version

- FERA does not specify the degree of connection required between federal funds and a “false claim”
- The statute does not define “advanc[ing] a Government program or interest”
- The law does not specify who receives recovery
 - Government brings the lawsuit
 - But grantee may have suffered the loss
- Hard to predict how far the FCA will supplant existing fraud and contract law between private parties

Consequences Of These Amendments Are Unclear

Relator/Government Version

- FERA specifies the degree of connection required between federal funds and a "false claim:" *"to be spent or used on the Government's behalf or to advance a Government program or interest"*
- Intended to be broad; recognizes explosive growth of government contracting, grants-TARP funds, Iraq spending
- The existing case law specifies who receives recovery
 - Government brings the lawsuit, recovers its losses and full penalties
 - Grantee/contractor/state still has own remedies
- The FCA will not supplant existing fraud and contract law between private parties

TOPIC 2: Expanded “Reverse False Claims”

- FCA has long applied to fraudulently failing to return money from the federal government
- Previously, FCA liability premised on false statements or other affirmative fraudulent acts
- FERA expands “reverse false claims” liability
 - False records and statements made to grantees and contractors now covered
 - “Improperly” retaining overpayments violates FCA even when no false statement or record is used

Under FERA, Defendant violates FCA if it:

- “knowingly conceals or knowingly and improperly avoids or decreases an *obligation* to pay or transmit money or property to the Government” 31 U.S.C. 3729(a)(1)(G)

“Obligation”

- “‘obligation’ means 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.” 31 U.S.C. 3729(b)(3)

FERA Expands “Reverse False Claims” To Liabilities That Are Not “Fixed”

- A duty to repay the government need not be fixed for FCA liability to attach
 - Nursing home penalties? Environmental violations?
- Accelerates the point at which recipients of federal funds must decide if a repayment is due
 - For example, interim payments under Medicare
- Combined with “reckless disregard” standard, this amendment could spawn numerous suits
 - Will turn on meaning of “improperly” retaining overpayments

Effect on Compliance Programs

- Conceals or knowingly and improperly avoids or decreases an “obligation” to pay”
- At what point in compliance process does discovery of an overpayment become “conceals”
- Willful ignorance? Effect of mandatory compliance programs? Effect of Corporate Integrity Agreement?

Effect on Lawyers

- Conceals or knowingly and improperly avoids or decreases an “obligation” to pay
- What about “conceals” under the attorney-client privilege and other protections?
- What about “knowing” under the attorney-client privilege and other protections?
- Recent litigation against in-house counsel for certifications allegedly contrary to their knowledge

Will Amendments Sweep In Other Failures to Repay?

- Cost reports and related certifications
- Long term care credit balance quarterly reports
- Medicare participating provider agreements
- Federal employee benefits -- contractor certificate of accurate pricing
- Cases against MCOs and providers
- Exposure of those who sign those certifications, whether counsel, compliance officers, management

Will Amendments Sweep In Other Potential Concealments?

- Medicare Advantage / Part D certifications including:
 - Enrollment and Payment Data
 - Risk Adjustment Data
 - Prescription Drug Event
 - Medicaid MCOs
 - Encounter Data

- Medicare as Secondary payor – Part A providers
 - Obtaining billing information prior to providing hospital services.
 - Submitting MSP information to the intermediary using condition and occurrence codes
 - At what point does billing to or retention of Medicare SP payment become “concealing or knowingly and improperly avoiding or decreasing an “obligation” to pay?

TOPIC 3: Expanded Statute of Limitations

- New language provides that when the Government intervenes in a *qui tam* case, it may file its own complaint or amend the relator's complaint "to clarify or add detail to the claims" in which it is intervening and also "to add any additional claims with respect to which the Government contends it is entitled to relief." 31 U.S.C. §3731(c).
 - FCA claims
 - Common law claims
- Codifies existing practice.

- “For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action” so long as the government claim “arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.” 31 U.S.C. §3731(c).
- Overrules *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263, 268 (2d Cir. 2006).

TOPIC 4: Retroactivity of the Amendments

- Most of the amendments apply to suits based on conduct occurring on or after May 20, 2009
- Removal of the presentment requirement applies retroactively to cases pending as of two days before the Supreme Court announced its decision in *Allison Engine*
- The relation-back provisions also apply retroactively to all cases pending on May 20, 2009
- Retroactivity could resurrect previously concluded lawsuits
- Retroactive implementation could create a constitutional issue given the punitive nature of the FCA

TOPIC 5: Expanded Whistleblower Protections

- Defines “retaliation” as conduct directed not only against employees, but also against contractors and agents
- Eliminates requirement of employment relationship

TOPIC 6: Service of *Qui Tam* Complaints on States

- With respect to any State or local government that is named as a co-plaintiff, with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action. 31 U.S.C. §3732(c)

TOPIC 7: Delegating Authority to Issue Civil Investigative Demands

- Attorney General now can delegate the authority to issue CIDs. 31 U.S.C. §3733(a)(1).
- Key uses
 - Documents
 - Interrogatories
 - Oral testimony

TOPIC 8: Sharing Information with Relators

- “Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation.” 31 U.S.C. §3733(a)(1).

TOPIC 8: Sharing Information with State Agencies

- Custodian can provide information gathered “for official use.”
- “Official use” now defined: “any use consistent with the law, and the regulations and policies of the Department of Justice, including” communications with a Federal, state or local government agency or their contractor, in furtherand of DOJ investigation/prosecution; depositions; interviews of relators and other witnesses; communications with counsel of other parties. 31 U.S.C. §3733(k)(8).