HEALTHCARE WHISTLEBLOWERS

HOW THE GOVERNMENT USES THE FCA'S *QUI TAM* PROVISIONS TO ROOT OUT CORRUPTION FROM WITHIN

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Whistleblowers, and the protections they receive, are one of the primary tools the government has historically relied upon to address fraud with respect to federal programs. Healthcare providers, insurers, suppliers, and others can find themselves the subject, or target, of an investigation stemming from suspected violations of the False Claims Act (FCA), particularly from its *qui tam,* or whistleblower, provisions. In 2018, the Department of Justice (DOJ) reported that recoveries under the FCA totaled $2.8 billion, of which $2.5 billion was attributable to the healthcare industry.[1] DOJ noted it was the ninth consecutive year that civil healthcare fraud settlements and judgments have exceeded $2 billion.[2] Over the years, DOJ has increased their enforcement activity in the healthcare space, changing the landscape and nature of civil and criminal charges facing industry actors.

What is the FCA?

First enacted in 1863 in response to concerns Union Army soldiers received fraudulent goods during the Civil War, the FCA prohibits a person from knowingly submitting, or causing to be submitted, a false claim to the government. With respect to healthcare, violations of the FCA vary from failure to document patient care, off-label promotion, unnecessary medical services, to excessive billing charges and other claims. Generally, FCA healthcare violations implicate the following provisions: (1) knowingly presenting or causing to be presented a false or fraudulent claim for payment or approval;[3] (2) knowingly making, using, or causing to be made a false record or statement in order to get a false claim paid or approved;[4] (3) conspiring to commit a violation of the FCA;[5] or (4) knowingly concealing, or knowingly and improperly avoiding or decreasing an obligation to pay (known as the "reverse false claim").[6]

In 1986, Congress amended the FCA to clarify that neither actual knowledge of fraud, nor an intent to defraud, need be proven. The definition of "knowledge" remains unchanged. The statute clarifies that defendant has knowledge if he (1) has actual knowledge of the information; (2) acts in deliberate ignorance of its truth or falsity; or (3) acts in reckless disregard of its truth or falsity.[7] The FCA's statute of limitations requires commencement of a lawsuit within (1) six years of the false claim violation; or (2) three years of when the responsible government official knew, or should have known, the material facts; either way, it must be filed within ten years after the actual date of violation.[8]

The FCA is a powerful tool, largely due to the significant damages provisions. Violations of the FCA can result in treble damages, as well as a mandatory penalty of $11,181 - $22,363 per false claim.[9] The FCA defines a "claim" as a demand for money or property made directly to the government or to a contractor, grantee, etc., if the government provides any of the money demanded. Whether the FCA suit is initiated by the government or by the *qui tam* realtor, the liability, damages, and penalties provisions remain the same. Defendants are also liable for attorneys' fees and litigation costs.

What Are the FCA's *Qui* Tam Provisions?

The FCA allows private persons to sue for violations of the FCA and share in a portion of proceeds returned to the federal treasury.[10] Such lawsuits are known as "*qui tam*" actions, and the person bringing the action is referred to as a "relator," or, colloquially, "whistleblower." The relator must file a complaint and a written disclosure detailing all relevant information. The complaint is then sealed for months or years while the government investigates the allegations. Eventually, the government must notify the court that it is either intervening, or declining to pursue the action. If the government declines to intervene, the relator can proceed with the action independently. Relators are incentivized to bring *qui tam* actions because they are awarded a share of any recovery that is made against a defendant. If the government intervenes, the relator is entitled to receive between 15 and 25 percent of the amount recovered by the government. If the government declines to intervene and the suit still proceeds, the relator's share increases to 25 to 30 percent.[11] There are also robust protections under the FCA designed to prevent whistleblowers from being retaliated, harassed, or discriminated based on their conduct.[12]

Recent DOJ Guidance

On May 7, 2019, DOJ announced new guidelines for cooperation credit in FCA cases.[13] The guidelines are meant to incentivize companies to voluntarily disclose misconduct and cooperate. DOJ explains that "proactive, timely, and voluntary self-disclosure" about misconduct will receive credit.[14] Voluntary self-disclosure of additional misconduct discovered during a company's own internal investigation is also eligible for cooperation credit.[15] The guidelines also provide a non-comprehensive, non-mandatory list of activities DOJ might consider when evaluating a party's cooperation. In addition to voluntary disclosure, the government may consider: (1) whether the party's assistance was timely and voluntary; (2) whether the testimony or information provided is truthful, complete, and reliable; (3) the "nature and extent" of the party's assistance; and (4) the "significant and usefulness of the cooperation to the government."[16] The maximum credit a party may earn "may not exceed an amount that would result in the government receiving less than full compensation for the losses caused

by the defendant's misconduct (including the government's damages, lost interest, costs of investigation, and relator [whistleblower] share)."[17] Partial credit is available for parties that provide "meaningful" assistance to the government's investigation.[18]

Additional DOJ guidance was provided by "the Granston Memo," a 2018 memorandum issued by DOJ senior officials indicating a shift in its FCA enforcement strategy.[19] The Granston Memo encourages prosecutors to dismiss weak FCA cases to advance the government's interests, preserve limited resources, and avoid potentially adverse precedent. The Memo suggests seven non-exhaustive factors government attorneys should consider in deciding whether or not to seek dismissal of a *qui tam* filing: (1) curbing meritless *quit tams;* (2) preventing parasitic or opportunistic *qui tam* actions; (3) preventing interference with agency policies and programs; (4) controlling litigation brought on behalf of the US; (5) safeguarding classified information and national security interests; (6) preserving government resources; and (7) addressing egregious procedural errors.[20] DOJ recently clarified that the use of its dismissal authority is largely used to "reign in overreach in whistleblower litigation."[21]

Using these factors, DOJ has recently dismissed several *qui tam* actions. In August 2018, DOJ successfully moved to dismiss a *qui tam* action involving allegations that a university unlawfully overcharged federal payors for tuition and fees, by arguing that further litigation would "unnecessarily expend the limited resources" of the government.[22] In October 2018, prosecutors moved to dismiss a *qui tam* action claiming a nuclear energy innovation company failed to disclose critical information when filing for a patent. Rather than declining to intervene, which DOJ might have previously done, rather than take an affirmative position, DOJ argued that "the benefits of terminating the suit outweigh[ed] any benefits of allowing it to go forward."[23] There is a circuit split about whether the government's dismissal right is reviewable if the relator can show that the dismissal is fraudulent, arbitrary and capricious, or illegal,[24] or whether the government has an "unfettered right to dismiss" FCA actions.[25] Resolving the split may clarify the extent to which DOJ's more aggressive approach in dismissing, or declining to pursue *qui tam* claims, can stand, but, based on the amount of money the government can recoup from healthcare industry violation, expect increased prosecutions based on *qui tam* claims DOJ views as worthy.

[1] Press Release, Department of Justice, "Justice Department Recovers Over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018" (December 21, 2018), available at https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018.
[2] *Id.*
[3] 31 U.S.C. § 3729(a)(1)(A).
[4] 31 U.S.C. § 3729(a)(1)(B).
[5] 31 U.S.C. § 3729(a)(1)(C).
[6] 31 U.S.C. § 3729(a)(1)(G). The Affordable Care Act of 2010 established the deadline for reporting and returning an overpayment is the later of either 60 days after an overpayment has been identified or the date of a corresponding cost report. However, the CMS Overpayment Rule was vacated in 2018 (see Sec. II.2).
[7] 31 U.S.C. § 3279(b)(1).
[8] 31 U.S.C. § 3731(b). On May 13, 2019, the U.S. Supreme Court clarified that when whistleblowers file suit and the government does not intervene, the complaint can be filed up to ten years after the violation, provided that it is still within three years of when the government obtained (or should have obtained) knowledge of the material facts. *Cochise Consultancy Inc. et al. v. U.S. ex rel. Hunt*, 587 US __ (2019), case number 18-315 ("The relator in a nonintervened suit is not 'the official of the United States' whose knowledge triggers §3731(b)(2)'s 3-year limitations period.").
[9] In January 2018, the Department of Justice increased FCA penalties to $11,181 to $22,363. The penalty amount has been adjusted at various times and the current amount is a significant increase from the original statutory range of $5,000 - $10,000.
[10] 31 U.S.C. § 3730 (b)(1).
[11] § 3730(d).
[12] 31 U.S.C. § 3730(h)(1).
[13] U.S. Department of Justice, Press Release, "Department of Justice Issues Guidance on False Claims Act Matters and Updates Justice Manual" (May 7, 2019), available at https://www.justice.gov/opa/pr/department-justice-issues-guidance-false-claims-act-matters-and-updates-justice-manual.
[14] Justice Manual Section 4-4.112, "Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims," available at https://www.justice.gov/jm/justice-manual (last updated April 2018).
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] U.S. Department of Justice, Civil Division, "Memorandum: Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)" (January 10, 2018).
[20] *Id.*
[21] U.S. Department of Justice, Press Release, "Deputy Associate Attorney General Stephen Cox Gives Remarks to the Cleveland, Tennessee, Rotary Club" (March 12, 2019), available at https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-gives-remarks-cleveland-tennessee-rotary.
[22] *United States ex rel. Stovall v. Webster University*, C/A No. 3:15-cv-03530-DCC (D.S.C. Aug. 8, 2018).
[23] *United States ex rel. Toomer v. TerraPower, LLC*, No. 4:20116cv00226 (D. Idaho Oct. 10, 2018).
[24] The *Sequoia* standard, set forth in *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998), is followed by: *Ridenour v. Kaiser-Hill Co.*, 397 F.3d 925, 936, 940 (10th Cir. 2005), *United States v. EMD Serono, Inc.*, 370 F. Supp. 3d 483 (E.D. Pa. 2019), and United States ex rel. CIMZNHCA, LLC v. UCB, Inc., No. 17-CV-765-SMY-MAB, 2019 WL 1598109 (S.D. Ill. Apr. 15, 2019).
[25] *Swift v. United States*, 318 F.2d 250, 252-53 (D.C. Cir. 2003) (rejecting the *Sequoia* standard and finding that government dismissals are unreviewable except in cases of fraud). The *Swift* standard is recognized by: *United States ex. rel. Davis v. Hennepin County,* No. 18-CV-01551(ECT/HB), 2019 WL 608848 (D. Minn. Feb. 13, 2019), *United States ex rel. Sibley v. Delta Reg'l Med. Ctr.*, No. 17-CV-000053-GHDRP, 2019 WL 1305069 (N.D. Miss. Mar. 21, 2019), and *United States ex rel. De Sessa v. Dallas Cty. Hosp. Dist.,* No. 3:17-CV-1782-K, 2019 WL 2225072 (N.D. Tex. May 23, 2019).

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