An Introduction to the False Claims Act

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If you have a client who does business with the government or receives funds from a government agency or program, including, but not limited to, federal health care programs such as Medicare, federally insured loans and mortgages, agricultural programs, military or other governmental contracts, or disaster assistance, it could currently be a defendant in a lawsuit seeking millions of dollars in penalties without either you or your client having any idea whatsoever about its existence. Furthermore, if your client is unknowingly facing such a suit, it very well may have been initiated by one of your client’s employees or contractors who could still be working for your client and perhaps continuing to gather evidence against your client while the suit remains under seal for months. At some point, your client may learn about the lawsuit when he or she receives a request for information or documents from the government via a Civil Investigative Demand (“CID”), or in some cases, only once the government elects to unseal the complaint. This situation occurs hundreds of times each year to a broad spectrum of businesses ranging from publicly traded, Fortune 500 companies to small, closely held companies or individuals who learn they are a defendant in a lawsuit alleging violations of the False Claims Act. Regardless of the size and sophistication of the defendant, however, any client that learns that it is the defendant in a suit under the False Claims Act likely faces unique challenges and significant exposure. This article provides a brief introduction to the False Claims Act and highlights a few emerging issues and trends in False Claims Act litigation.
History and Significance
The False Claims Act, 31 U.S.C. §§ 3729 - 3733 ("FCA"), was originally enacted in 1863 in response to concerns that suppliers to the Union Army were defrauding the government during the Civil War and imposes liability on persons who knowingly present or cause to be presented false or fraudulent claims for payment to the government. Although the FCA is now over 150 years old, key amendments to the FCA in the False Claims Amendments Act of 1986, the Fraud Enforcement and Recovery Act of 2009, and the Patient Protection and Affordable Care Act of 2010 significantly expanded its scope, and, as a result, the FCA has developed into the leading civil enforcement mechanism against government fraud. As recently confirmed by Principal Deputy Assistant Attorney General Benjamin C. Mizer, head of the Civil Division of the Department of Justice, “The False Claims Act has again proven to be the government’s most effective civil tool to ferret out fraud and return billions [of dollars] to taxpayer-funded programs.”

In the government’s 2015 fiscal year alone, the Department of Justice obtained a staggering $3.58 billion in settlements and judgments from actions brought under the FCA. 2015 marked the sixth consecutive year that recoveries under the FCA exceeded $3 billion, bringing the total amount recovered since 2009 to over $26.6 billion. Consistent with recent years, FCA cases involving federal health care programs, namely Medicare and Medicaid, accounted for the largest share of recoveries. Of the $3.58 billion recovered in 2015, approximately $1.96 billion related to cases involving federal health care programs, and health care related recoveries since 2009 now exceed $16.7 billion.

In the health care context, FCA actions most commonly involve allegations relating to the medical necessity of services, violations of the Anti-Kickback Statute (generally prohibiting the payment of remuneration for referrals), violations of the Stark Law (prohibiting certain physician referrals to entities in which the physician has a financial interest), upcoding or overcharging for goods or services provided, and submitting claims for services that were not rendered. In addition to actions involving the health care industry, the government brought notable actions or obtained sizable recoveries in 2015 in cases involving, for example, the improper origination of mortgages insured by the Federal Housing Administration, government contractors obtaining reimbursement for excessive charges for software and related services by concealing commercial pricing information, fraudulently issuing insurance policies under the Department of Agriculture’s federal crop insurance program, and in a case with Arkansas ties, allegations that a bank’s owner and president made misrepresentations to the U.S. Department of the Treasury to obtain Troubled Asset Relief Program (“TARP”) funds. Thus, although the FCA is perhaps most frequently employed and has gained the most notoriety in the health care industry, any individual or entity that does business with or receives funds from the government is potentially subject to the FCA.

FCA Basics
The FCA generally imposes liability for knowingly presenting a false or fraudulent claim to the government for payment or knowingly making a false record or statement material to a false or fraudulent claim. In addition, the FCA imposes liability for what is often referred to as a "reverse false claim" when an individual or company improperly avoids having to pay money back to the government. “Claim” is broadly defined under the FCA to include any request for money or property that is presented to the government or to any contractor, grantee, or other recipient if the money is to be spent on the government’s behalf and the government provides any portion of the money requested. In effect, any person or business receiving funds that may be traced to the government is potentially subject to FCA liability. Finally, perhaps the most important element of a FCA claim is knowledge; in order for a false claim to give rise to FCA liability, the person must have submitted the claim with the requisite knowledge of its falsity. “Knowingly” is defined as: (i) actual knowledge, (ii) deliberate ignorance of the truth or falsity of the information, or (iii) reckless disregard of the truth or falsity of the information.

The potential financial exposure for violations of the FCA is enormous. The FCA not only imposes a civil penalty between $5,500 to $11,000 for each false claim submitted, but also imposes mandatory treble damages. For health care providers or others that may regularly submit a considerable number of small claims, the civil penalties can easily exceed the actual damages, even when trebled. As a result, the damages that a defendant may face in an FCA case can be astronomical. Furthermore, health care providers faced with potential FCA liability also may be subject to exclusion from participation in federal health care programs by the U.S. Department of Health & Human Services, Office of Inspector General (“HHS OIG”). FCA claims may be asserted by both the Department of Justice and private individuals. FCA claims asserted by private individuals, referred to as relators, are known as qui tam actions. In qui tam cases, relators stand in the shoes of the government and assert claims for FCA violations in the name of and on behalf of the government. Procedurally, relators file a complaint under seal and must provide a copy of the complaint as well as “written disclosures of substantially all material evidence and information the [relator] possesses” to the government. The Department of Justice then has 60 days to investigate and determine whether to intervene in the case, but extensions to this 60-day deadline may be obtained for “good cause.” After the government conducts its investigation, the government has the option to: (i) intervene in the case and assume control over the suit, or (ii) decline to intervene and allow the relator to continue to pursue his or her claims. During the time the government is determining whether to intervene, the complaint remains under seal and “shall not be served on the defendant.”

The potential to obtain extraordinary damages incentivizes private individuals to bring cases under the FCA’s qui tam provisions, and the number of qui tam cases filed each year remains at all-time highs. If the government elects to intervene in a qui tam action, the relator is entitled to receive at least 15% and up to 25% of the recovery. In the event the government elects not to intervene, the relator’s reward is between 25% and 30% of the recovery. In addition, if the relator prevails, she is entitled to recover her reasonable expenses incurred in bringing the qui tam action, including attorneys’ fees and costs. During the government’s 2015 fiscal year, relators filed 632 new qui tam lawsuits and received nearly $598 million as their share of the proceeds from recoveries. Notably, $334.6 million of the $598 million received by relators in 2015 was obtained in cases in which the government declined intervention. As is evident, FCA qui tam cases can be very lucrative for relators, as well as their attorneys, which will almost certainly continue to fuel future qui tam case filings.

Primary Statutory Defenses
Two notable statutory defenses to FCA claims are the public disclosure bar and the first-to-file bar. The public disclosure bar generally provides that a qui tam action must be dismissed if “substantially the same allegations or transactions” as alleged in the qui tam complaint were previously disclosed to the public,
unless the relator qualifies as an “original source.”31 “Original source”32 is defined as an individual who has “knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action.”33

The Eighth Circuit has taken a rather broad interpretation of what constitutes a public disclosure and has held that a response to a Freedom of Information Act request, even if not publicly disseminated, constituted a public disclosure.34 Other courts, however, have taken a more narrow view of the public disclosure bar and have required that the disclosure actually have been made public through “some affirmative act of disclosure to the public outside the government.”35 Thus, as with a number of matters involving the FCA, it is important to review jurisdiction-specific precedent in evaluating the public disclosure bar as a potential defense to FCA claims.

In addition to the public disclosure bar, the first-to-file bar provides that “[w]hen a person brings an action . . . no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.”36 Last year, the United States Supreme Court resolved a circuit split involving whether the first-to-file bar applies only where the first-filed action remains open and thus “pending” or whether it continues to apply even after the first-filed action has been dismissed.37 In Kellogg Brown & Root Servs., Inc. v. U.S. ex rel. Carter, the Supreme Court held that “a qui tam suit under the FCA ceases to be ‘pending’ once it is dismissed.”38 Thus, an earlier-filed suit only serves as a defense to a later action under the first-to-file bar until the earlier suit is dismissed.

Developing Issues

While a number of developing issues will impact the government’s future enforcement efforts under the FCA, two important subjects that are currently at the forefront of FCA litigation are additional focus on individual liability and the implied certification theory of FCA liability. On September 9, 2015, Sally Quillian Yates, Department of Justice, Deputy Attorney General, issued a memorandum entitled “Individual Accountability for Corporate Wrongdoing,” now commonly known as the “Yates Memo,” that outlines six key steps intended to increase the focus on individual accountability during investigations into corporate misconduct.39 These key steps are:

1. To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.
2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.
3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.
4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.
5. Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.
6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual’s ability to pay.

The Yates Memo’s clarity with regard to the government’s priority in holding individuals responsible will undoubtedly impact the manner in which FCA cases are pursued by the government. As Deputy Attorney General Yates noted in a May 10, 2016, speech, “[o]ur goal is to get to the bottom of who did what and if there are culpable individuals, hold them accountable.”40

In addition to the increased focus on individual accountability, another important development FCA observers are closely monitoring involves the so-called implied certification theory of FCA liability. Under this theory, a claim may be considered false under the FCA if the defendant submitted claims for payment while in violation of an underlying rule or regulation, even if the rule violation was not an express condition for payment, but was merely a condition for participation in the federal program.

To resolve a circuit split, the United States Supreme Court recently addressed the viability of the implied certification theory of FCA liability in Universal Health Services, Inc. v. U.S. ex rel. Escobar.41 In Escobar, the Supreme Court held that FCA liability may attach on the basis of the implied certification theory under certain circumstances.42 Specifically, the Court found that the implied certification theory may serve as a basis for FCA liability where: (i) “the claim does not merely request payment, but also makes specific representations about the goods or services provided,” and (ii) “the defendant’s failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.”43 Application of these requirements will undoubtedly require highly fact intensive inquiries, and as a result of the Court’s decision to not set forth bright-line restrictions on the limits of the implied certification theory, it appears unlikely that Esobar will significantly reduce the scope of FCA liability for companies that do business with the government.

Although Arkansas has seen a relatively small number of FCA lawsuits compared to certain other states, Arkansas businesses are certainly not immune to such actions as evidenced by various recently publicized FCA settlements involving Arkansas companies and individuals. Additional FCA actions targeting businesses in Arkansas should be expected, and companies transacting business with the government should be vigilant in attempting to limit their potential exposure. Among other things, businesses should constantly evaluate their current compliance policies and should ensure their policies and practices are regularly updated to remain current with evolving legal standards. Although there is no completely fail-safe method for avoiding FCA allegations, companies can effectively limit their potential FCA liability by making compliance a top priority.

Endnotes

7. Id.
8. Id.
11. Press Release, Department of Justice, First Tennessee Bank N.A. Agrees to Pay $212.5 Million to Resolve False Claims Act Liability Arising from FHA-Insured Mortgage Lending (June 1, 2015) (avail-


21. Id.
28. 31 U.S.C. § 3730(d)(1) and (2).
30. Id.
32. The definition for “original source” was significantly altered by the Patient Protection and Affordable Care Act of 2010 (“PPACA”). For purposes of this article, only the post-PPACA version of the FCA is discussed.
38. Id.
42. Id. at 2001.
43. Id.