

False Claims Act Practice:
It Ain't the Same Since It All Changed
Real World Update

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Discussion Agenda

- Enforcement Landscape
- Amended FCA: A Powerful Enforcement Tool
- Expanded use of Civil Investigative Demands and the Impact on Navigating a FCA Investigation
- Managing the Modern FCA Investigation

Enforcement Landscape

- The focus of FCA enforcement is on the healthcare industry
 - highly regulated industry leaves lots of room for error and abuse
 - spending on federally funded healthcare programs is in the spotlight – appropriate use of taxpayer dollars for health care expenditures is of unprecedented concern to the public
- Parallel proceedings common

Enforcement Landscape

- FCA Amendments are under judicial review, DOJ implementation, and relator and defense evaluation
- Procedural changes affect investigation and litigation processes
- Substantive changes impact exercise of prosecutorial discretion, as well as relator and defense strategies
- Substantive changes also affect corporate risk assessments, compliance activities, and legal obligations for certain matters (e.g., overpayments)

Enforcement Landscape

- Since 1986 FCA Amendments, over 12,000 FCA cases have been filed; the majority have been qui tams
- Over \$30,315,560,124 in FCA recoveries since 1986; over \$20,998,474,205 of that figure recovered in cases where the Department of Health and Human Services was the primary client agency
- Approximately 1/3 of total FCA recoveries realized since 2009

Evolution of the FCA

- Originally passed in 1863; Civil War provision designed to provide the government with authority to recover financial losses incurred when useless and sometimes dangerous goods were sold to the Union Army
- A civil statute, but is the origin of criminal and administrative fraud investigations and prosecutions under DOJ parallel proceedings
- 1943 Amendments narrowed scope of *qui tam* provision by expanding public disclosure bar
- FCA fell into relative disuse until 1986

Evolution of FCA

- 1986 Amendments breath new life into FCA enforcement:
 - Amended definition of knowingly, negating prior judicial decisions that had interpreted FCA to require specific intent
 - Increased penalties for FCA violation
 - Increased relator's share of recoveries
 - Narrowed public disclosure bar
 - Introduced CIDs, at the time non-delegable authority reserved for AG
 - Provided for a cause of action for retaliation against whistleblowers
 - Extended SOL

Evolution of FCA: FERA (2009)

- FERA further expanded enforcement authority under FCA
 - Extended scope of reverse false claims (improper avoidance is enough; affirmative false statements not required)
 - Definition of claim expanded. New definition of obligation giving rise to liability.
 - Defendant does not need to have intended for government to pay the claim directly for liability to attach. No presentment requirement.
 - Added materiality requirement for false statements and reverse false claims
 - Expanded scope of conspiracy to cover all substantive violations of FCA
 - Expanded use of CIDs by permitting AG to delegate CID authority to other DOJ officials

Evolution of FCA: PPACA (2010)

- Narrowed public disclosure bar – Public disclosure does not preclude action where whistleblower has independent knowledge that materially adds to the publicly disclosed allegations; public disclosure for purposes of statute is one made in federal context
- AKS violation establishes falsity of a claim for purposes of FCA liability

FCA: A Powerful Enforcement Tool

- The FCA prohibits a person from
 - knowingly presenting, or causing to present, a false or fraudulent claim for payment to the United States government;
 - making or using a false record or statement material to a false or fraudulent claim;
 - conspiring to commit a violation of the 31 U.S.C. 3729;
 - having possession of money or property used or to be used, by the government, and knowingly delivering less than all of that money or property to the government;
 - intentionally defrauding the government by submitting a claim without completely knowing that the information contained on the claim is true;
 - buying or receiving as a pledge of an obligation or debt, public property from an employee of the government or member of the Armed Forces, who is not legally authorized to sell or pledge the property;
 - knowingly making, using, or causing to be made or used, a statement material to an obligation to pay or transmit money or property to the government, or knowingly concealing or improperly avoiding a decrease in an obligation to pay or transmit money or property to the government (a so called “reverse false claim”).

FCA: A Powerful Enforcement Tool

- Civil preponderance of the evidence standard
- No specific intent requirement; reckless disregard or deliberate ignorance is enough
 - FCA liability does not attach to innocent mistake or negligence
- Claim exists for purposes of FCA where a request or demand for payment, whether under a contract or otherwise, is made to another, 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 (1) the government provides or has provided any portion of the money or property requested or demanded, or (2) will reimburse the contractor, grantee, or other recipient for any portion of the property that is requested or demanded
- Direct presentment not required

FCA: A Powerful Enforcement Tool

- ‘Obligation’ defined broadly and captures any established duty, fixed 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”
- Improper not defined; must look to definition of obligation for purposes of reverse false claims
- A statement is material if it has “a natural tendency to influence,” or is “capable of influencing,” the payment or receipt of government money or property

FCA: A Powerful Enforcement Tool

- Who may be liable:
 - Individuals, corporations, non-profit associations, professional societies, and local governments
- Who may bring an action:
 - DOJ (Civil Fraud Section; AUSA offices)
 - Private individuals, subject to public disclosure bar

FCA: A Powerful Enforcement Tool

- Since 1986, over 7,843 *qui tam* actions filed under the False Claims Act. Private citizen suits.
- Complaint initially filed under seal
- Government has 60 days to make a decide whether to intervene; extensions are frequent practice
- If government intervenes, it takes primary responsibility for pursuing the action; relator is permitted to continue as a party to the action, the relator's role is statutorily limited

Expanded Use of CIDs

- CID permits government to obtain extensive FCA disclosure prior to filing a complaint or intervening
- Through CID, the AG may compel
 - the production of documentary materials,
 - written responses to interrogatories relating to the documentary material, and
 - oral testimony (under oath) concerning the documentary material or information requested
- Authority to issue CIDs delegated to USAO as of March 24, 2010

Expanded Use of CIDs

31 U.S.C. § 3733

- CID recipient generally has 20 days to respond to a request for documents and interrogatories
- CIDs must generally provide a minimum of 7 days notice for oral testimony
- Contempt of court for failure to comply with a CID

Expanded Use of CIDs

- CIDs designate FCA custodian to receive and assume responsibility for produced materials
 - Where a FCA custodian fails to perform any required duty under the statute, any person in compliance with the demand (or, where the demand is for the product of discovery, the person from whom such discover was obtained) may file a petition for an order requiring the performance of the custodian's required duties

Expanded Use of CIDs

- Materials produced generally may not be made available to any individual other than the FCA investigator and are FOIA exempt
- However, materials may be made available
 - to Congress or any agency of the United States for use by such agency in furtherance of statutory responsibilities
 - to the Department of Justice, for any proceeding in which the DOJ has been designated to appear
 - where a third party makes an express demand for such materials and consent is given by the person who produced them

Expanded Use of CIDs

- AG may file a petition for an order of enforcement in the district court
- Recipient may file a petition to modify or set aside the demand
 - Petition generally must be filed within 20 days of the date of service of the CID (if not, within time span specified in CID)
 - Petition must specify each ground upon which petitioner relies in seeking relief; petition for relief may be based upon any failure of the demand to comply with statutory requirements, or upon any constitutional or other legal right or privilege
 - Where a petition is challenging a specific demand for product of discovery, the petition must be filed in the district court for the judicial district where the proceeding during which the discovery was obtained is or was last pending.
 - During the pendency of petition to modify or set aside CID, court may stay the running of the time allowed for compliance with the demand; the petitioner must timely comply, however, with any portions of the demand that are not challenged

Expanded Use of CIDs

- Since delegation of authority to USAO, reportedly over 500 issued.
- Document requests.
- Interrogatories.
- Depositions.
- Federal Rules of Civil Discovery.
- ESI Issues.

CID Response

- Assessing CID and response-how different from regular subpoena?
- Negotiating the CID and production schedule
- Assuring confidentiality of competitive or sensitive materials from “sharing” with external parties (relators).
- ‘Defending’ and preparing for CID demands for oral testimony
 - Relatively liberal rules governing transcript errata
 - Attendance of counsel
 - Separate counsel for individuals
 - 5th amendment issues
- Alternatives to a protracted investigation

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