The False Claims Act

A Primer

By Tina Cundari and Fred Hanna

Everyone has heard of a whistleblower. Fewer are familiar with the term "relator" or "qui tam." Attorneys handling False Claims Act (FCA) cases need to be familiar with these terms—and a lot more. The Department of Justice recently announced that 543 FCA settlements and judgments took place in 2023, with over $2.68 billion recovered, making last year the most active year in the FCA's history.[1] This article provides a primer on the basics of the False Claims Act for attorneys handling their first case and experienced practitioners who want a refresher.

What is the False Claims Act?

Overview

The False Claims Act is a federal statute that imposes civil liability on persons who submit false claims to the government for payment. 31 U.S.C. §§ 3729 - 3733. The Act itself is not very long, and it is helpful to have a printed version of the Act available for easy reference. As its name suggests, the Act focuses on the submission of a claim—that is, a request for payment submitted to the United States government. When an individual or business "knowingly" submits a "false" claim to the government, the Act imposes liability.

The False Claims Act has a long history. Congress enacted the Act in 1863, during the Civil War, after learning that federal funds had been spent on "decrepit horses and mules, weapons that would not fire, rancid rations and phantom supplies."[2] To aid in the recovery of losses sustained due to fraud, Congress drafted the Act expansively "to reach all types of fraud, without qualification, that might result in financial loss to the government."[3] Congress has amended the Act throughout its history to address restrictive court interpretations of the statute and help stimulate FCA recoveries.

Notably, FCA actions may be brought by the government itself or by an individual acting on behalf of the government. In the latter situation, the individual is referred to as the "relator" or, more colloquially, the "whistleblower." Actions brought by a relator are known as "qui tam" actions.[4] Despite the relator's presence, the United States is the real party in interest in a qui tam suit. The caption typically reads "United States ex rel. [Relator] v. [Defendant(s)]." As discussed below, the United States may decide to intervene or not to intervene in a case brought by a relator.

The damages recoverable under the Act are significant. The Act imposes treble damages and a civil penalty of up to $10,000 per violation, as adjusted by the Federal Civil Penalties Inflation Adjustment Act.[5] Courts often measure damages as the difference between what the government paid and what it would have paid had the defendant's claim been truthful and accurate.[6] The civil penalty provision applies to each false claim submitted by the defendant.

The "relator's share" of proceeds in a successful FCA case varies depending on whether the government intervenes. In cases where

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the government intervenes, the relator is typically entitled to 15% to 25% of any judgment or settlement.[7] When the government does not intervene, the relator's share is between 25% and 30%.[8] Courts have identified several factors to consider in determining the relator's share, but the final amount is typically decided through negotiations between the relator and the government.

To combat fraud committed upon state and local governments, most states have enacted their own false claims acts. South Carolina's false claims act is codified at S.C. Code Ann. § 43-7-60. South Carolina's act makes it unlawful for medical providers to "knowingly and willfully" submit false claims to "a state or federal agency which administers or assists in the administration of the state's medical assistance or Medicaid program."[9] Unlike the FCA and most other states' false claims acts, the South Carolina act does not include a qui tam provision; only the South Carolina Attorney General may bring an action to recover damages. Earlier this year, a state senator proposed a new false claims act that would allow individuals to bring qui tam lawsuits on behalf of the state.[10] The bill did not make it through the Senate Judiciary Committee by the time session ended, and the future of the proposed South Carolina false claims act remains uncertain.

The Law

To state a claim under the Act, a plaintiff must prove four elements: (1) there was a false statement or fraudulent course of conduct; (2) made or carried out with the requisite scienter; (3) that was material and (4) that caused the government to pay out money or to forfeit moneys due.[11]

A bit on each of these elements. For purposes of the FCA, a false statement is an "objective falsehood."[12] However, for the second element, which deals with the defendant's mental state, the analysis is entirely subjective. A plaintiff satisfies this element by showing the defendant "knowingly" presented a false claim.[13] However, the term knowingly has a special meaning under the Act: it includes (i) actual knowledge of the falsity of the information, (ii) deliberate ignorance of the falsity of the information and (iii) reckless disregard of the falsity of the information.[14]

As for the remaining elements, the Act defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[15] In other words, a statement is material if it could influence the government's decision to pay the claim. The last element is self-explanatory but important because the Act is limited to requests for payment from the government.

Finally, practitioners should know that the heightened pleading requirements of Rule 9(b) apply to FCA cases. Accordingly, a relator must, "at a minimum, describe the time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby."[16]

What are the various types of cases?

Because many medical services are paid for through federal healthcare programs such as Medicare and Medicaid, health care fraud is a consistently hot area. Common health care fraud cases involve billing for unnecessary medical services and testing, double billing for services and billing for services in violation of contractual or regulatory requirements.

The COVID-19 outbreak has also given rise to "pandemic fraud" cases, *i.e.*, cases involving improper claims for reimbursement relating to COVID-19 services and improper payments under the Paycheck Protection Program ("PPP").

Defense contractor fraud and cases related to the opioid crisis have also been recent areas of focus.

How do these cases begin?

Whistleblower Complaint

The most common way for an FCA case to begin is through a relator's filing of a complaint under seal in federal court. After the complaint is filed, a copy of the complaint, along with a written disclosure containing substantially all material evidence and information the relator possesses, is served on the U.S. Attorney's Office in South Carolina and the Attorney General of the United States in Washington, D.C.[17]

Depending on the allegations, the Department of Justice may decide to participate in the investigation, in which case the matter will be "jointly handled" by the department and the U.S. Attorney's Office. However, the vast majority of cases are delegated to the U.S. Attorney's Office for handling. In either instance, an Assistant United States Attorney (AUSA) from the Civil Division in South Carolina will be assigned to the case.

By statute, the complaint remains under seal for at least 60 days and is not served on the defendant until ordered by the Court.[18] During this 60-day period, the government evaluates whether to intervene and take over the prosecution. As a practical matter, 60 days is not enough time to make this decision, so the government often seeks extensions from the court, asking that the case remain under seal while the investigation continues. Although investigations can last a year or more, in recent years, the district courts have begun requiring more detailed extension requests from the government. This approach aims to expedite the investigation and prompt the government to make intervention decisions sooner.

The government's intervention decision is based on a variety of factors, including the strength of the case, the availability of government resources and the current administration's areas of focus. The fact that the government declines to intervene does not mean the case is without merit. Indeed, there are many cases across the country in which the government declined to intervene, and a significant settlement amount was reached.

If the government intervenes, the seal will be lifted, and the

government will have primary responsibility for prosecuting the case. The relator may continue as a party to the action, but the relator's participation may be limited by the court.[19]

Government-Initiated

An FCA case may originate through the investigative work of a federal agency or the U.S. Attorney's Office itself. Federal authorities have several investigative tools at their disposal to mine financial data and identify areas of potential fraud.

When the government initiates an investigation, it generally seeks to resolve the matter with the alleged wrongdoer. Although the threat of civil penalties and treble damages is on the table for negotiations, a resolution often involves disgorgement of improperly obtained funds and administrative sanctions, such as debarment or suspension of business activities. If a resolution cannot be reached, the government will file a complaint and the case will proceed like any other case filed in federal court.

A Tip from the Public

An FCA case may begin through a tip from the public. Members of the public may contact the U.S. Attorney's Office to report fraudulent activity. Depending on the allegations, the U.S. Attorney's Office may initiate an investigation. If the alleged wrongdoing is substantiated, and the matter cannot be resolved pre-suit, the government will file a complaint and the case will proceed as usual.

How do these cases proceed?

Discovery

The discovery or investigative phase is typically the most time-intensive part of the case. Investigations may last for several months, and sometimes 2-3 years, depending on the complexity of the case and the number of witnesses and documents involved.

The primary investigative tool used by the government is a Civil Investigative Demand or "CID." 31 U.S.C. § 3733. As the name implies, a CID is a demand, as opposed to a request. The Chief of the Civil Division reviews and signs off on all CIDs issued by the U.S. Attorney's Office. The CID describes the nature of the alleged illegal conduct and the applicable provision of law alleged to be violated. Like a subpoena, a CID may require the production of documents, answers to written interrogatories or oral testimony. Although a powerful investigative tool, keep in mind that a CID may be challenged.[20] As for document requests, it is important to understand the scope of the demand and to ensure your client fully discloses the information requested. As for oral testimony, the most important thing to advise your client is to tell the truth. Unlike ordinary civil cases, failing to tell the truth to the government could lead to consequences beyond simply losing the case. It could result in criminal action.

Parallel Proceedings

Although a qui tam case is a

civil action, any qui tam complaint filed in South Carolina will be shared with the Criminal Division in the U.S. Attorney's Office, which will conduct its own review of the allegations. This may result in "parallel proceedings" taking place, with both civil and criminal investigations occurring concurrently. How will you know whether a criminal investigation is underway? You won't, unless the Civil Division AUSA handling the case tells you, or someone from the Criminal Division contacts you. Think twice before asking the Civil Division AUSA whether a criminal investigation has been initiated. You don't want to inadvertently suggest that criminal issues are at play.

Meetings with the Government

At some point, you will want to ask for an in-person meeting with the lead AUSA on the case to explain your client's position, and to see what you can learn about the government's view of the case. The AUSA may initiate this meeting, or you may do so. These meetings often involve the use of a PowerPoint presentation. Such a presentation is a great way to guide the conversation and to highlight key documents and facts. Cases typically involve several meetings and a lot of discussion before a settlement is reached, or a decision is made about how the case will proceed. If an agreement cannot be reached, the case will proceed to trial like any other case.

How do these cases end?

The vast majority of FCA cases settle. When a case settles prior to the seal being lifted, the seal will be lifted so that the settlement can be noted on the record, along with a copy of the settlement agreement. Remember that regardless of the stage of the case, and even if the United States has declined to intervene, the United States must consent to the settlement.[21] The case was, after all, brought in the name of the United States and continues in the name of the United States regardless of the intervention decision. If the case does not settle, the seal will be lifted and the case will proceed to trial.

The authors are aware of only one qui tam case that has gone to trial in South Carolina. The case is *United States ex rel. Lutz v. BlueWave Healthcare Consultants, Inc.*, No. 9:14-cv-00230-RMG. Filed in 2014 and tried in 2018, the case involved allegations that the defendants paid illegal commissions to induce physicians to order medically unnecessary blood tests. After 12 days of trial, the jury returned a verdict in favor of the government. Following the verdict, the court entered a judgment in the amount of $114 million. The defendants appealed, and the Fourth Circuit affirmed. *United States ex rel. Lutz v. Mallory*, 988 F.3d 730 (4th Cir. 2021).[22]

How might you become involved in one of these cases?

Your involvement in a qui tam case will likely depend on whether your practice is primarily plaintiff- or defense-oriented. Most relators' counsel market themselves as such and are contacted directly by the whistleblower or receive a referral from another lawyer. If you primarily represent defendants, you may be contacted by a company or individual who has been served with a CID. As with any other case, you will need to meet with your client and learn as much as you can about their role in the matter under investigation. Keep in mind that your client may be named as a defendant in the case or may simply be a fact witness.

If you represent a defendant (or a witness), you will not know at the onset whether a qui tam complaint has been filed because of the seal period. The only way to know whether a complaint has been filed is to ask the AUSA handling the case. Even if you ask, the AUSA may not tell you, and often does not, at least at the beginning of the investigation. The reasons for this vary depending on the individual circumstances of each case.

First Steps

It is essential to develop a good working relationship with the AUSA assigned to the case. After filing and serving the government with the complaint, relator's counsel may want to call the U.S. Attorney's Office and ask who has been assigned to the case. If your client was served with a CID, the lead AUSA's name will appear on the CID. Regardless of how you get involved, it is a good idea to call the AUSA as soon as possible to introduce yourself and tell them whom you represent. Let them know they can call you with questions. Be honest in your communications. Build credibility. This will be crucial for purposes of settlement and, for relators, may impact the amount of the relator's share.

A Matter of Etiquette

If you have a personal or professional relationship with the U.S. Attorney or the Civil Chief, it may be tempting to call them to discuss the case, to gain an advantage for your client. Before doing so, notify the lead AUSA assigned to the case. This is a matter of professional courtesy and avoids the element of surprise for the AUSA. Also note that when the U.S. Attorney gets that call, the first thing she is likely to do is speak with the lead AUSA, who is the person in the office who knows the most about the case. Also, the U.S. Attorney will likely defer to the AUSA's judgment, so be sure to give the lead AUSA due respect and let them know when you plan to call their supervisor, rather than have them find out after-the-fact.

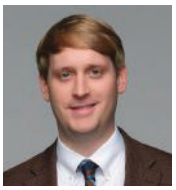
Resources

The Department of Justice website (www.justice.gov) is an invaluable resource. The site is helpful for at least two reasons. First, it contains press releases on all settlements reached in qui tam cases (www.justice.gov/civil/fraud-section-press-releases). Becoming familiar with the settlement terms reached in other cases will be helpful in your negotiations with the government and in advising your client. Note that all settlements with the government are public and will be announced in a press

release. Second, the site contains a link to the Justice Manual, which contains DOJ's internal policies and procedures. Two key sections are Title 9-42.000 regarding fraud against the government and Title 4-4.00 regarding commercial litigation.

Conclusion

The False Claims Act is a powerful tool, and the government will undoubtedly continue using it to combat fraud in the years ahead. Although this article provides a general overview and pointers for lawyers handling FCA cases, the FCA landscape is constantly evolving, and staying informed is essential to achieving the best possible outcome for your client.



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Endnotes

[1] U.S. Dep't of Just., *False Claims Act Settlements and Judgments Exceed $2.68 Billion in Fiscal Year 2023* (Feb. 22, 2024), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-268-billion-fiscal-year-2023.

[2] *Am. C.L. Union v. Holder*, 673 F.3d 245, 247 (4th Cir. 2011). – *ACLU v. Holder*, 673 F.3d 245, 247 (4th Cir. 2011).

[3] *United States ex rel. Ibanez v. Bristol-Myers Squibb Co.*, 874 F.3d 905, 923 (6th Cir. 2017).

[4] *Qui tam* is short for the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means "who pursues this action on our Lord the King's behalf as well as his own." Different practitioners pronounce "qui tam" different ways. The most common pronunciation is "kee tam," although some pronounce the phrase "kwee tam" or "kwee tom." – good content but make shorter.

[5] 31 U.S.C. § 3729(a)(1).

[6] *See, e.g.*, *United States v. United Techs. Corp.*, 626 F.3d 313, 321 (6th Cir. 2010).

[7] 31 U.S.C. § 3730(d)(1).

[8] § 3730(d)(2).

[9] S.C. Code Ann. § 43-7-60(B)(1).

[10] S.970, 2024 Gen Assemb., 125th Sess. (S.C. 2024).

[11] *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir. 2008).

[12] *Id.*

[13] 31 U.S.C. § 3729(a)(1).

[14] § 3729(b)(1)(A).

[15] § 3729(b)(4).

[16] *Kellogg Brown & Root*, 525 F.3d at 379. – *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.* 525 F.3d 370, 379 (4th Cir. 2008). – may be able to use a supra because the case name is long.

[17] § 3730(b)(2).

[18] *Id.*

[19] § 3730(c).

[20] § 3733(j)(3).

[21] § 3730(b)(1) ("The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."); *see also United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 339 (4th Cir. 2017) (discussing § 3730(b)(1) and holding "the Attorney General possesses an absolute veto power over voluntary settlements in FCA qui tam actions"). – maybe add period inside the parathesis before "" as well.

[22] In April 2024, the government announced a $16 million settlement with one of the defendants in the *Bluewave* case. The settlement also resolved a separate case filed by the government post-judgment, alleging that the defendant fraudulently transferred funds to avoid paying the judgment. Case No. 9:19-cv-00234-RMG.