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By Mark Labaton

The Federal False Claims Act: A primer for lawyers pursuing actions on behalf of whistle blowers

Introduction

It started in the age of Abraham Lincoln when, during the Civil War, Congress enacted the False Claims Act (FCA) to curtail rampant government fraud and corruption. Congress acted because war profiteers were looting the federal treasury: They were, for example, selling sawdust to the Union Army, but calling it gunpowder, and selling diseased horses and mules under the guise that these were healthy animals. So, in 1863, Congress passed the FCA,[1] also known in honor of President Lincoln as the "Lincoln Law."

Between the Civil War and the dawn of the Cold War, Congress amended the FCA.[2] But it was seldom used before 1986 when Congress bolstered the FCA largely to combat fraud committed by defense contractors.

Led by Republican Senator Charles Grassley of Iowa, and Democratic Congressman Howard Berman of California, Congress expanded the FCA "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government."[3] Congress intended these amendments "to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services."[4] Specifically, Congress expanded the FCA's scope, enhanced monetary incentives for bringing FCA claims, and increased protections for whistle blowers.

The 1986 amendments have proved effective. Since 1986, the United States has recovered more than $16 billion stolen through fraud in almost every area where government money is spent. And states, including California,[5] and municipalities have enacted their own false claims acts modeled after the FCA.[6] Under the state acts, which largely mirror the FCA,[7] whistle blowers can bring claims related to the misuse of state funds belonging to the state or entities within the state such as public universities, colleges, and community colleges, municipal transportation districts and other public entities. Most of these state statutes have been passed only in recent years, and the majority of cases and largest recoveries have come through federal FCA, some of which contain pendant state claims.

This article provides a roadmap of the federal FCA. It begins by discussing the procedures for bringing and litigating an FCA claim, then provides a representative list of FCA cases, and then sets forth the key substantive FCA statutes and describes a few key statutory provisions.

Bringing and prosecuting a civil FCA action

The FCA has two parts. Title 18 § 287 imposes criminal liability; Title 31 §§ 3729-31 imposes civil liability. Both parts have been used to prosecute false claims, sometimes through parallel actions; both punish the same conduct and require proving the same acts. The main differences are the ways to start an action, the burdens of proof, and the penalties imposed. Civil actions start with a complaint rather than an indictment; must be proven through a preponderance of evidence rather than evidence beyond a reasonable doubt; and seek monetary relief, not criminal penalties.

The Department of Justice can bring a civil FCA action or a private citizen (called a "relator") can begin one on behalf of the government, and obtain a significant share of any government recovery. Civil FCA actions started by private citizens are called *Qui Tam* lawsuits from the Latin "qui tam pro domino rege quam pro se ipso in hac parte sequitur," which means: "[w]ho as well for the King as for himself sues in this matter."[8] The *Qui Tam* relator brings the action as a private attorney general in the name of the government.

The action begins when the relator files a complaint under seal, and provides the Department of Justice with a disclosure statement describing supporting evidence.[9] The Department of Justice then has 60 days to elect to intervene or decline to intervene in the case. During the investigative period, the complaint remains sealed. This period typically is extended so that the Department of Justice has enough time to investigate the claim. By intervening, the government takes control of the action. If it declines to intervene, the relator can litigate the case alone, but the United States has the right to intervene at any time.

If the alleged fraud has not been publicly disclosed in (1). a criminal, civil, or administrative hearing, (2). a congressional, administrative, or government accounting office report, hearing, audit, or investigation or (3) in the news media, a relator can bring an action regardless of whether the relator has direct or first-hand knowledge of the fraud.[10] When the action is based upon information previously publicly disclosed, the relator can bring suit only if he or she is the "original source" of the information.[11] A relator, claiming to be an "original source" must inform the Department of Justice of his or her intention to bring a Qui Tam action before filing the action.[12]

Under the civil statute, the federal government can recover treble damages plus penalties of $5,500 to $11,000 for each false claim or statement.[13]

The relator is entitled to a monetary award of between 15 and 25 percent of any monetary settlement or judgment when the government intervenes, and 25 to 30 percent when it does not,[14] and can also apply for costs and reasonable attorney fees.[15]

In addition, the relator can seek damages and other relief based on employer retaliation when he or she is "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against" after reporting a false claim.[16] Such relief includes reinstatement with benefits and lost seniority, double back pay, interest, and compensatory damages, including costs and reasonable attorney fees.[17]

Representative actions

The largest FCA recoveries have involved forms of health care, pharmaceutical, or defense contractor fraud.

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The scope of possible FCA actions in these and other areas where the federal government is a victim of fraud includes the following representative examples:

• **False submissions**: Billing the government for goods and services never delivered;

• **Overcharging or duplicate billing**: Overcharging or duplicate billing the government for goods or services;

• **Mischaracterization**: Billing the government for activities not covered under the applicable contract;

• **Rigged or collusive bidding:** Winning a government contract through kickbacks or bribes;

• **Reverse false claims:** Making false statements to avoid paying money owed to the government or being overpaid by the government for goods or services and not reporting that overpayment;

• **False cost reports:** Fabricating or inflating reimbursement costs submitted to the government;

• **Cost misallocation:** Allocating to a government contract direct or indirect costs properly attributable to a private-sector contract or allocating to a government "cost plus" contract costs properly attributable to a government "fixed price" contract;

• **Substituted products:** Billing for premium products and substituting inferior ones;

• **Research grants:** Making false statements to obtain a grant (or contract), applying grant proceeds to non-grant purposes, or submitting requisitions based on inflated reported costs or other false statements;

• **False service records:** Submitting false service records or samples to show better-than-actual performance;

• **Billing for unnecessary medical tests:** Performing inappropriate or unnecessary medical procedures or tests to increase Medicare or Medicaid reimbursements;

• **False certifications or defective testing:** Certifying that something has passed a test when in fact it has not or falsely certifying that a product complies with certain contract requirements;

• **Prescription or pharmaceutical fraud:** Lying to the government about the wholesale price of prescription drugs or billing the government for unapproved or off-label uses of certain drugs;

• **Unbundling:** Using multiple billing codes instead of one billing code for a drug panel test to increase remuneration;

• **Bundling:** Billing for a panel of tests when a single test was requested;

• **Upcoding:** Inflating bills by using diagnosis billing codes that suggest a more expensive illness or treatment or billing at doctor rates for work conducted by a nurse, resident intern, or other assistant;

• **Billing for brand:** Billing for brand-named drugs when generic drugs are provided;

• **Phantom employees and doctored time slips:** Charging for employees that were not actually on the job, or billing for made-up hours to maximize reimbursements;

• **Medical fraud:** Billing for unsafe or unapproved uses of medical devices or services;

• **Billing for work not done or completed:** Billing to increase revenue instead of billing to reflect work performed;

• **Selling defective goods:** Failing to report known product defects; and

• **False research:** Falsifying research or billing for research never performed.

Key statutes imposing FCA offense under 31 U.S.C. §§ 3729-3733

The FCA civil statutes imposing liability for false claims and statements are set forth in Title 31 Sections 3729 *et. seq.*, with the core provisions being:

• 31 U.S.C. § 3729(a)(1) imposes liability on 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;"

• 31 U.S.C. § 3729 (a)(2) imposes liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;"

• 31 U.S.C. § 3729(a)(3) imposes liability on any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;"

• 31 U.S.C. § 3729(a)(7) imposes liability for making or using false records or statements "to conceal, avoid, or decrease and obligation to pay or transmit money or property to the government". . .

• 31 U.S.C. § 3729 (c) defines claim by stating "[f]or purposes of this section, 'claim' includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded."

"Knowingly" is defined to include either actual knowledge, deliberate ignorance, or acting in reckless disregard of the truth or falsity of the information.[18]

"Persons" include individuals, partnerships, corporations, states, and other entities.

The statute of limitations is six years from the false claim or statement or three years after the facts became known or should have been known up to a maximum of 10 years from the date of submission of the false claim or statement.

Conclusion

The FCA, a unique statutory plan, has been enormously successful in combating fraud and recovering funds on behalf of taxpayers for ill-gotten gains. Although greatly expanded – perhaps far beyond what its original authors contemplated – Lincoln's Law continues to do much good seven score and three years after its enactment.

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Endnotes:

[1] The FCA came into being following "a series of sensational congressional investigations" into the sale of provisions and munitions to the War Department, which revealed that the United States "had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in the pur-

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chasing the necessities of war." *United States v. McNinch*, 356 U.S. 595, 599 (1958).

[2] The most significant amendment occurred in 1943 when Congress imposed new conditions on using the FCA to bring actions that were "parasitic," such as the copying of a criminal indictment to bring an FCA action in hopes of obtaining a whistle-blower award.

[3] Senate Rep. 99-345, 99th Congress, 2nd Sess. 19, *reprinted in*, 1986 U.S.C.C.A.N. 5266, 5284.

[4] *Id.* at 5276.

[5] California Civil Code §§ 12650-12656 *et seq.*

[6] Fifteen states, the District of Columbia, New York City and Chicago have false claims acts.

[7] These state acts are not identical to the FCA. For example, under California state law, the whistle blower is eligible to receive between fifteen and fifty percent of the recovery from a settlement or judgment (excluding costs and attorney fees) compared to fifteen and thirty percent in a federal case.

[8] Blacks Law Dictionary at 1262 (7th ed. 1999).

[9] 31 U.S.C. § 3730(a)-(c).

[10] 31 U.S.C. § 3730(e)(4)(A).

[11] 31 U.S.C. § 3730(e)(4)(B).

[12] *Ibid.*

[13] 31 U.S.C. § 3729 (a)(7).

[14] 31 U.S,C. § 3730 (d).

[15] *Ibid.*

[16] 31 U.S,C. § 3730 (h).

[17] *Ibid.*

[18] 31 U.S.C. § 3729(b).