The Federal False Claims Act: An Opportunity for Justice

By C. Dean Furman

Using a rarely invoked federal statute, the False Claims Act, attorneys can help our clients be "private attorney generals," assisting the United States in seeking justice for both our clients and for every taxpayer. Thanks to President Abraham Lincoln, the United States enacted the False Claims Act (the "FCA") during the Civil War as a means to combat war profiteering from unethical defense contractors. Through the years, the FCA changed and evolved as a whistleblower statute that allows anyone to file a sealed federal lawsuit (called a *qui tam* lawsuit) on behalf of the United States against a federal contractor defendant. Codified under 31 U.S.C. § 3729, *et seq.*, the FCA creates an opportunity for committed whistleblowers to expose fraud and false billings that harm taxpayers.

Although the False Claims Act was originally enacted to stop war profiteers, you do not need an Iraqi conflict to find a government contractor. Every community in Kentucky has federal contractors -- they wear white coats and often carry stethoscopes. Larger communities with hospitals, nursing homes, durable medical equipment suppliers, and home health agencies have an abundance of federal contractors for whom an FCA lawsuit may target. In addition to medical providers, common federal contractors include construction companies, road contractors, service providers for military bases, or manufacturers, such as General Electric.

The perception in federal law enforcement is that white-collar criminals steal billions of dollars every year through fraud in government contracts. Although difficult to calculate, the United States estimated that close to twelve billion dollars ($12,000,000,000.00) in fraud was committed against Medicare alone in fiscal year 2000. This number excludes the billions

of dollars spent on government contracts outside of healthcare. For FCA cases, since 1986, judgments and settlements against contractors totaled over ten billion dollars.

The only problem in using the FCA to combat fraud is the lack of public knowledge of its existence, as well as the lack of attorneys practicing in the area or knowing to whom a *qui tam* client may be referred. Fraud and improper billings happen. When they do and you have a client who has inside knowledge of a federal contractor's operations, whether the contractor is a doctor, hospital, or other government provider, you very well may have a viable FCA case.

Background of the False Claims Act

First, let's consider the FCA itself and how the statute works. The FCA establishes liability when a government contractor has submitted a false claim for payment either with the intent to defraud or with a reckless indifference as to whether the claim is proper. What is fraud? As a former colleague at the United States Attorney's Office once told me, the definition of fraud is simple – it's lying, stealing, or cheating for the purpose of making money. Reckless indifference is even an easier knowledge standard to prove, encompassing deliberate ignorance of the truth or falsity of the billings, or a reckless disregard as to the truth or falsity of the billings. The FCA, under 31 U.S.C. § 3729(b)(3), is clear that "no proof of specific intent to defraud is required" to prove an FCA violation.

The government can be harmed under the FCA in numerous ways. A doctor or hospital can submit a bill for services never rendered, or charge for a higher service than what was provided to or required by the patient. A construction contractor can charge for excess materials that were never used on a project. A federal prime contractor can create fictitious companies as suppliers, marking up invoices by factors of ten or more, to fraudulently increase a cost/plus contract.

False claims can be direct, such as the previous examples with submitted fraudulent charges or invoices. False claim cases can also be more subtle and involve a contractor who is required to follow all terms of a federal contract, including all applicable statutes and regulations. If the contractor is knowingly and materially breaching the contract without informing the government, the contractor can be held liable under the FCA for contract payments received by the contractor.

As noted earlier, the problem with our potential clients becoming whistleblowers is knowing that a remedy exists for the fraud. Too many employees are dissatisfied with their jobs because of ethical lapses by their employers. Moreover, employees can find themselves terminated for questioning their company's billing practices. Without knowing about the FCA or finding an attorney who does, the potential whistleblower will let the opportunity to right the wrong, and be compensated for doing so, pass by.

For a potential FCA client, doing "the right thing" is a noble goal and a benefit in and of itself. Nonetheless, "Honest" Abe knew that it took more than good character to encourage reporting of government fraud. As discussed in the next section of this article, the FCA created incentives for people to become whistleblowers.

If a person has a legitimate false claims case, he or she can file a sealed, *in camera*, lawsuit on behalf of the government against the wrongdoer, who is the named defendant in the lawsuit. A copy of this *qui tam* lawsuit is confidentially sent to the United States Attorney General and to the United States Attorney's Office for the district in which the case is filed. With the lawsuit under seal, the public, including the defendant, cannot initially see the accusations or even know that a *qui tam* lawsuit was filed. The whistleblower/plaintiff is known as the "relator" and the case is styled United States of America *ex. rel.* [your client, the relator] v. [the federal contractor].

After the relator files suit, the government works with the relator and relator's counsel to determine if legitimate false claims exist. For a relator, this is the crucial stage for his or her attorney to be able work with government attorneys and investigators to provide as much assistance as the government needs. Relator's counsel should understand the complexities of these *qui tams,* know the nuances of evidence in fraud cases, and be able to relate the severity of the defendant's conduct to other cases so that finite government resources can be directed to the best avenues for investigation.

If satisfied with the evidence, the government will intervene in the *qui tam* litigation, unseal the lawsuit, and assume handling of the case while working with the relator and relator's counsel. The government, if it recovers, can obtain up to three times the value of the actual fraudulent claims and a penalty of up to $11,000.00 per fraudulent claim. This means that $100,000.00 in false billings could turn into damages in excess of $300,000.00. In addition, the whistleblower defendant must also pay for the whistleblower's attorney's fees.

If the government elects not to intervene in the case, the relator and his or her counsel have a choice. If the United States Attorney's Office has provided compelling reasons for not intervening, such as the case lacks merit or that the regulations create too many loopholes for the defendant's actions, then the case can be dismissed while still under seal and no one, including the defendant, will ever know it has been filed. Alternatively, if you disagree with the government's rationale or if the government simply lacks the resources to pursue the case, the relator can decide to pursue the case without the government. This can create future problems because the government remains in the case to the extent of looking over the relator's shoulder and the United States ultimately decides on any proposed settlement.

The False Claims Act from the Whistleblower's Perspective

After understanding these basics of the FCA, let's look at a *qui tam* suit from a relator's perspective. The FCA provides many benefits for the potential whistleblower. First, the FCA offers job protection, making it unlawful to retaliate against a whistleblower. Imagine the incentive for a frustrated employee who cannot make his or her superiors understand or correct fraudulent billing to be given an option that would allow the employee's fears to be validated while preserving the employee's job. If an employer does retaliate and terminate the whistleblower, the FCA allows the recovery of two times back pay, mandatory reinstatement of the whistleblower's job, compensation for the whistleblower's emotional distress, plus any special damages, including the whistleblower's attorney's fees.

Second, the FCA created a bounty for those who turned in wrongdoers. The whistleblower can receive between fifteen percent (15%) and twenty-five percent (25%) of the government's recovery if the government pursues the case. With the government being allowed to recover up to treble damages plus fines per each false claim, this recovery can be significant. For instance, the whistleblowers against Louisville based health care company Vencor, Inc. received millions of dollars from the government's recovery in an FCA case. If the government elects not to intervene and, instead, you pursue the *qui tam* for your client and recover, your client's relator's share increases to a range between twenty-five percent (25%) and thirty percent (30%) of the government's recovery.

Third, the whistleblower may fear prosecution if the fraud comes to light and, by filing a *qui tam*, the whistleblower may receive some protection from such a prosecution. Although reporting the fraud to the government is no guarantee of immunity, the government rarely initiates criminal charges against an employee who exposes the fraud of

his or her employer. The alternative for the potential whistleblower is to see someone else blow the whistle first and then be questioned by government investigators as to why the potential whistleblower did not come forward when he or she thought the employer's actions were wrong.

The potential whistleblower also needs to understand that, with few exceptions, the FCA is a "first to file" statute. In other words, if three *qui tams* are filed alleging the same conduct against the same company, then only the first whistleblower will share in the government's recovery. This provides an arguably perverse incentive under the FCA to file first and investigate later. Yet, with potential relators being disgruntled employees, former employees, and hungry competitors, you need to need to act with relative haste in pursuing a legitimate *qui tam* lawsuit while balancing your ethical duties in filing a meritorious lawsuit.

Conclusion

Qui tams, as lawsuits originating from insiders with information, are often seen by the federal government as the best opportunities to use its limited resources in fighting fraud. For clients, it is another avenue to obtain justice. For attorneys, it is an opportunity to help your client wear the white hat and be rewarded for doing public good. In other words, the FCA is a winner for everyone but the wrongdoer.

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