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Expert Analysis

Amendments to Federal False Claims Act And Likely Effect on State Counterparts

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Since its adoption in the Civil War era, the federal False Claims Act (FCA) has provided for treble damages and penalties against those who submit false or fraudulent claims to the United States. In addition to authorizing the government to sue, the FCA's "qui tam" provision allows a private person (the "relator") to initiate an action on behalf of the United States and, if the action is successful, to receive a percentage of the recovery. After years of dormancy, amendments to the FCA in 1986 strengthened its provisions, resulting in increasing recoveries by the United States and by qui tam relators. For the fiscal year ended Sept. 30, 2010, the Department of Justice reported $3 billion in FCA recoveries, and aggregate recoveries since the 1986 amendments of $27 billion.

Two sets of recent amendments to the FCA further extend its reach in ways that may well exceed the impact of the 1986 amendments. In 2009 and 2010, Congress enacted amendments to overturn restrictive interpretations of the FCA relating to the scope of claims subject to liability and the types of public disclosures that preclude qui tam relators from pursuing actions in which the government declines to intervene. In addition to reversing these particular interpretations, the amendments significantly broadened the FCA in ways that have not yet been reflected in the case law.

These amendments to the federal FCA will likely also lead to parallel changes in state false claims act statutes, which provide similar incentives to qui tam relators and provide for similar penalties and damages against those submitting false or fraudulent claims to a state. The Office of Inspector General (OIG) for the U.S. Department of Health and Human Services has advised many state Medicaid fraud control units that their state false claims act statutes need to be revised to incorporate federal changes in order to qualify for federal incentives. These incentives and the states' own interest in maximizing recoveries under their statutes will likely lead to widespread adoption of the amended FCA provisions in the counterpart state statutes.

'Allison Engine'

In its unanimous decision in *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008), the U.S. Supreme Court addressed the FCA provision imposing liability on a defendant 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)(2) (1994) (amended 2009) The Court interpreted this provision to require that a defendant must intend that the government itself pay the false claim instead of merely showing that a false statement resulted in the use of government funds to pay a false or fraudulent claim. 553 U.S. at 665.

Similarly, the Court held that the provision applicable to a defendant who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid" was not satisfied by a scheme that had the effect of causing a private entity to make payments using money obtained from the government. Id. at 672-73 (quoting 31 U.S.C. §3729(a)(3) (1994)).

Thus, the defendant subcontractors escaped liability where the case against them included invoices to the shipyard contractors, which falsely stated that their work was completed in compliance with Navy requirements, but failed to include the shipyards' invoices to the Navy. The Court held the government was required to show a direct link—that the purpose of the false statement was "to get" the government to pay or approve a claim. Id. at 672. The broader interpretation advocated by the government, the Court warned, "would threaten to transform the FCA into an all-purpose antifraud statute." Id.; see also id. at 669 (removing FCA requirement that defendant must intend that the government pay the false claim would render the provision "almost boundless") (citing *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488, 496 (D.C. Cir. 2004), cert denied, 544 U.S. 1032 (2005)).

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Congress reversed these limitations on FCA liability in the Fraud Enforcement Recovery Act of 2009 (FERA), Pub. L. No.

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111-21 §4, 123 Stat. 1617, 1621-23 (2009), amending the FCA in several respects, including the false-record provision, and expanding liability to anyone who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim." 31 U.S.C. §3729(a)(1)(B)(2009). In turn, the definition of "claim" was expanded beyond claims made directly to the government to include "any request or demand, whether under a contract or otherwise, for money or property…that…is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest…" 31U.S.C. §3729(b)(2)(A)(ii)(2009).

The FERA amendment stated that these provisions should be deemed to "take effect as if enacted on June 7, 2008" and should "apply to all claims under the [FCA] that are pending on or after that date." FERA, Pub. L. No. 111-21, §4(f)(1) (2009).

Although these changes significantly expand the FCA, the impact of the amendments has not yet been fully realized. Federal courts have almost uniformly held that "claims" in the provision regarding the effective date refers to claims for reimbursement, not cases, and therefore have applied the pre-FERA version of the FCA to cases that involve allegedly false claims submitted for payment prior to June 7, 2008. E.g., *United States ex rel. Carpenter v. Abbott Labs., Inc.* 723 F.Supp.2d 395, 402 & n.15 (D. Mass. 2010) (summarizing cases and characterizing the few cases that interpret FERA to apply to cases pending on June 7, 2008 as containing "no analysis that refutes the well-reasoned views of the majority").

Because FCA complaints by qui tam relators remain under seal for months or even years while the government investigates and determines whether to intervene, most cases now being litigated involve claims submitted prior to the amendments. The changes to FCA liability made by FERA and the potential impact on parties defending FCA claims thus have yet to be explored in published decisions.

Public Disclosure and PPACA

Prior to 2010, the FCA's "public disclosure" provision withheld jurisdiction over an action by a relator (but not the government) that was "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless…the person bringing the action is an original source of the information." 31 U.S.C. §3730(e)(4)(A) (2009). The Supreme Court held this public disclosure bar extended to disclosures by state and local sources, including audit reports issued by those authorities. See *Graham County Soil and Water Conservation Dist. v. U.S. ex rel. Wilson*, 130 S. Ct. 1396, 1411 (2010).

The amendments to the federal FCA will likely also lead to parallel changes in state false claims act statutes, which provide similar incentives to qui tam relators and provide for similar penalties and damages against those submitting false or fraudulent claims to a state.

As part of the Patient Protection and Affordable Care Act (PPACA),[1] Congress specified that only federal audits and federal civil or administrative proceedings, not state or local, would give rise to this bar. The public disclosure bar also was made discretionary, rather than absolute, allowing qui tam relators to proceed when the government opposed dismissal. PPACA also loosened the standard for the relator to qualify as an "original source." The changes thus significantly reduce the ability of defendants to bar claims by qui tam relators.

Expansion of State Statutes

Although the impact of these changes to the federal FCA have yet to be fully developed, states are likely to adopt similar revisions to state false claims and Medicaid Fraud Control statutes. Under section 1909 of the Social Security Act, states are provided a financial incentive—a higher percentage recovery on Medicaid fraud claims—to enact laws relating to false or fraudulent claims submitted to a state Medicaid program that meets certain requirements monitored by OIG. The OIG criteria for evaluating such state statutes include whether liability for false Medicaid claims will be assessed in circumstances where federal FCA liability would attach, whether the state statute incentivizes qui tam relators as effectively as the FCA, and whether penalties match FCA levels. See OIG's Guidelines for Evaluating State False Claims Acts, 71 Fed. Reg. 48552 (Aug. 21, 2006).

Earlier this year, OIG notified two dozen states that as a result of the amendments to the FCA described above, the state laws were no longer as effective as the federal FCA, jeopardizing eligibility for federal financial incentives. States were provided a grace period until March 31, 2013, to amend their laws. See State False Claims Act Reviews, http://oig.hhs.gov/fraud/state-false-claims-act-reviews/index.asp. (last visited Dec. 23, 2011). OIG's position, as well as each state's own financial interest in more effective statutes to recover for false claims, will likely cause states to modify their statutes to encompass the expanded liability and narrowed defenses provided under the amended federal False Claims Act.

1. Pub. L. 111-148, §10104(j)(2), 124 Stat. 119, 901-02, signed into law on March 23, 2010, amended 31 U.S.C. §3730(e)(4).