ANDREWS LITIGATION REPORTER

THOMSON WEST

Health Care Fraud

COMMENTARY

VOLUME 10, ISSUE 11 / MAY 2005

The False Claims Act: What Every Employment Lawyer Must Know

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The stories are legion.

The Federal Bureau of Investigation raids a company that provides geriatric care and related services at nursing and assisted-living facilities and carts away tens of thousands of documents. Whistle-blowers file a complaint against a hospital alleging the hospital's top brass established a corporate climate that tolerated and encouraged illegal remuneration as one way to ensure the success of its various enterprises.

A major defense contractor is investigated for allegations of improper accounting of government billings. A major pharmaceutical company is investigated for making allegedly improper payments to physicians in return for their agreement to prescribe certain drugs. Renal care clinics are subpoenaed for information about their businesses and laboratory operations.

Companies settle with the government for unpaid postage. Accounting firms settle with the government for allegedly bad advice given to hospitals. Superfund fraud is alleged. A farmer settles claims that he defrauded the government of federal farm payments. A major American university settles federal claims that it overbilled Medicaid and Medicare.

These are just a few examples of cases either investigated or prosecuted under the federal False Claims Act. Most of these cases began as the result of a disgruntled current or former employee who decided to "blow the whistle" on an employer.

By now, anyone doing business with the government knows that at any given moment any employee can allege fraud. If successful, that employee may expect to receive a potentially huge bounty and the employee's attorney will be entitled to have the company pay the employee's attorney fees.

The False Claim Act

The False Claims Act, 31 U.S.C. § 3729 *et seq.*,[1] provides for treble damages and a penalty ranging from $5,500 to $11,000 per claim for anyone who knowingly submits or causes the submission of a false or fraudulent claim to the United States.[2] The law further allows any person (referred to as a "relator") who is an original source of knowledge of a financial fraud on the government[3] to file a federal lawsuit on the government's behalf.[4]

Even relators who are, themselves, culpable may share in a recovery.[5] In return, the relator can receive a share of the recovery, sometimes up to 30 percent.[6] In addition, the statute provides for the relator's attorney fees.[7] Given the size of the recoveries in recent history, these shares can be staggering.[8]

The Economics of False Claims Act Cases

The False Claims Act permits a law firm, for a relatively small investment, to generate a potentially huge yield. For the cost of preparing a complaint and assembling a disclosure statement,[9] a single attorney can marshal the efforts of several government agents and a prosecutor to investigate the relator-client's allegations.

If successful, the work of these federal agents and prosecutors may well result in a significant recovery for the relator, plus statutorily awarded attorney fees for relator's counsel.[10] Many times relator's counsel and the prosecutor investigate the case together, each taking depositions or reviewing documents,[11] such that the statutory attorney fees can pile up quite quickly.

The act requires the relator to file the False Claims Act complaint and disclosure statement *in camera* and under seal, meaning the complaint does not immediately become

a matter of public record.[12] Once the complaint is filed, the government investigates the allegations, which usually involves one or more federal law enforcement agencies and, in some investigations where state agencies are victims, state law enforcement may become involved as well. (Many states have their own, similar, false-claims acts.[13])

The investigation may involve subpoenas, witness interviews, compelled oral testimony and consultation with experts. Indeed, the False Claims Act itself sets forth a civil investigative demand provision that permits the attorney general to require witnesses to produce documents, testify in deposition or answer interrogatories.[14] These discovery vehicles may be utilized even before the government has made the decision whether to intervene.[15]

If there is a criminal investigation going on simultaneously with the civil investigation, search warrants and wiretaps or other investigative tools may be used to obtain evidence as well. While this investigation is statutorily limited to 60 days, it often lasts for more than a year because the government can seek *ex parte* continuances.[16]

At the investigation's conclusion, the government decides whether to "intervene" in one or more counts of the pending action.[17] This intervention signals the government's intention to assume primary responsibility for prosecuting the action.[18] In practice, the government often settles the pending action during the investigative stage (notwithstanding the objections of the relator).[19]

The government may, however, notify the court that it declines to intervene, in which case the relator may prosecute the action on behalf of the United States.[20] Finally, with notice to the relator and an opportunity for a hearing, the government may move to dismiss the relator's complaint altogether.[21]

Consequences of Investigation

The target of a False Claims Act prosecution must be aware that the government has leverage unavailable to any other private litigant. In addition to treble and statutory damages available under the act, the government generally also has the power to seek exclusion or debarment of the defendant under any number of statutes.[22]

Moreover, in addition to the specter of civil penalties, treble damages, debarment and exclusion, the prospect of criminal prosecution looms large in these cases as well.[23] Many false claims giving rise to a *qui tam* could easily be charged as mail or wire fraud. Even without this threat of mail or wire fraud, a *qui tam* defendant runs the risk of an obstruction-of-justice charge every time an employee speaks to a government agent.

The government may threaten witnesses with obstruction charges where the witness has given what the government believes to be misleading statements, either during the civil investigative demand process or during a simple interview with a government agent. Such threats can have a ripple effect throughout the case because they force corporate witnesses to decide whether to assert their Fifth Amendment right not to testify in deposition (and take the adverse inference attendant to that assertion in the civil case) or, alternatively, testify truthfully to what the government may later argue are criminal acts.

This presents significant problems for a corporate target of a *qui tam* investigation on several levels. First, although employers must generally cooperate in the conduct of any internal investigation conducted by a corporate target, the corporation may later decide to disclose employee interviews to the government as part of the negotiations to settle the case.

Counsel conducting those investigations must, accordingly, take special care in discussing issues with employees that implicate potential criminal liability. Of course, in most cases, corporations are vicariously liable for the criminal acts of their employees.

This is probably one reason why nearly all False Claims Act cases in which the government intervenes are ultimately settled. If the potential treble damages and statutory penalties do not bring a *qui tam* defendant to the bargaining table, then the threat of exclusion or debarment (and consequent loss of federal funding) will.

If that doesn't do it, a *qui tam* defendant must understand that the government is not just another civil litigant. It is a civil litigant with the power to bring criminal charges.

Statistics[24]

The False Claims Act, originally known as the Informers' Act and the Lincoln Law, was enacted by a Civil War Congress responding to fraud, defective weapons and illegal price-gouging of the Union Army.[25] The act was not widely used until 1986, when Congress amended the False Claims Act.[26] The act, as amended, has been described as "the weapon of first choice in combating fraud in virtually every program involving federal funds."[27]

Congress revised the False Claims Act in 1986 to create incentives for whistle-blowers and their attorneys to use their own resources to investigate allegations of fraud. When this happened, the floodgates opened. Moreover, the government and relators are using the act creatively in the developing areas of "false certifications" and "reverse false claims."[28]

According to the Department of Justice, in 1987, the year after the amendment, 33 cases had been filed under the False Claims Act. By 2002 that number had increased, by an order of magnitude, to 320.

The recoveries have been equally impressive. In 1988 recoveries in cases where the government intervened totaled $355,000. By the year 2000 that number exceeded $1 billion. According to published reports, to date, the government has recovered nearly $12 billion under the act, and relators have received $1 billion in bounties. Conversely, of the 2,516 cases in which the government declined to intervene, 2,022 were dismissed without recovery.

Suffice it to say that the greatest predictor of the success of any False Claims Act lawsuit is whether the government chooses to intervene. Of course, the cause and effect relationship is not so clear. Are those cases more meritorious? Probably. Does the government exercise greater non-fact-based leverage? Certainly.

By far, the largest numbers of False Claims Act cases filed have been those alleging health care fraud. According to the Justice Department, by Sept. 30, 2000, of 3,323 *qui tam* cases that had been filed, 1,602 were investigated by the U.S. Department of Health and Human Services. The next highest-number of cases were those investigated by the Department of Defense, for a total of 1,054 cases.

Other noteworthy agencies investigating *qui tam* cases were the Department of Agriculture (100 cases), the Department of the Interior (211 cases) and the Department of Energy (96 cases).

Protecting the Corporate Client

A company seeking to protect itself from whistle-blower lawsuits ever being filed in the first place must foster an environment where employees feel free, and have channels, to report corporate wrongdoing within the corporation. Moreover, a viable compliance program is a must. The Department of Health and Human Services even promulgates compliance plan guidance for various health care providers.[29]

It has been the author's experience that, although there is a growing cadre of professional whistle-blowers, it is also often the case that many relators had tried to work within the corporation to stop what they perceived as illegal practices before they went outside the corporation. Ultimately, in frustration, these employees contacted a private employment lawyer, who in turn either referred the case to a specialist or simply filed a case under the False Claims Act.

Nonetheless, once a case under the act has been filed, a company seeking to respond to an employee's allegation of fraud should generally conduct a thorough internal investigation to determine what happened. This course of action is not without risk.

First, the act itself provides relators with protection against retaliation.[30] Moreover, any employer conducting such an investigation must assume everything that occurs in the conduct of the internal investigation, including discussions with counsel, will be disclosed, not only to the prosecution but to potential private litigants in unrelated cases during discovery.

The government often requires corporate defendants, as part of settlement negotiations, to waive the attorney-client and work product privileges attendant to the internal investigation. It has even been the author's experience that the government may even seek to depose outside counsel performing that investigation in an effort to ensure outside counsel had access to all information and witnesses necessary to conduct a thorough internal investigation.

If the government believes the investigation was incomplete, then at the very least it will perceive it to be a whitewash and, at worst, the government may interpret the disclosure of that investigation to the government during settlement negotiations as obstructive conduct subject to potential criminal prosecution. In other words, a corporate defendant must take extraordinary care during the internal investigation phase and must decide, when asked, whether to disclose the results to the government.

The decision whether or not to waive the privilege is among the most difficult for attorneys representing corporate defendants. And this does not even address the possibility that private litigants in unrelated cases may try to obtain the same information, which some courts have permitted.

Where Is This All Going?

The now-famous TAP Pharmaceuticals case cited in the Annual Report of the Attorney General and the Secretary Detailing Expenditures and Revenues under the Health Care Fraud and Abuse Control Program for Fiscal Year 2002, is a paradigm of just how far-reaching a *qui tam* case can become.

TAP settled a *qui tam* case involving allegations of improper inducements to physicians to administer the company's products. In addition to paying a huge settlement, TAP was required to plead guilty to criminal acts in return for which the company would not be excluded from Medicare.

In addition, several of the urologists who administered TAP's products were criminally prosecuted and forced to make reimbursement to Medicare. Many of these physicians faced the possibility of the loss of their licenses to practice medicine and settled against threats of exclusion from Medicare.

The cases did not end when the government settled. A spate of class actions has recently been filed on behalf of patients suing these companies and physicians, on related factual allegations. Despite a nine-figure settlement by TAP and physicians, the case is still not over.

The Future?

Recently, government scrutiny has focused on certain companies doing government contract business in Iraq and the rest of the Middle East. If history is an indicator, those companies may well, at some point, face allegations prosecuted under the False Claims Act. (Indeed, there are some in the industry who believe government contract managers use the threat of a False Claims Act prosecution to extract unfair billing concessions from government contractors.)

If recent press coverage is any indication, the relationship between the pharmaceutical industry and physicians will continue to be scrutinized by the government (and by relators and their counsel), and it is likely that some of these investigations will result in huge settlements with the government and relators as well.

It is hard to imagine a large publicly traded company doing business with the government without disgruntled employees who, for whatever reason and with the prospect of monetary gain, will blow the whistle. As discussed, the damage can be minimized, but it never completely goes away.

The bottom line is this: The competition for good *qui tam* cases is intense, and there is a burgeoning cottage industry of excellent attorneys with good relationships with local U.S. attorneys' offices to handle them. Corporations that do business with the government must be ever vigilant to the possibility that they may come into the crosshairs and must plan accordingly.

Notes

[1] 31 U.S.C. §§ 3729 (false claims); 3730 (civil actions for false claims); 3731 (false-claims procedure); 3732 (false-claims jurisdiction); 3733 (civil investigative demands).

[2] *Id.* § 3729(a).

[3] *Id.* §§ 3730(e)(4)(A) & (B).

[4] *Id.* § 3730(b).

[5] *Id.* § 3730(d)(3).

[6] *Id.* §§ 3730(d)(1) & (2).

[7] *Id.*

[8] *See* Press Release, Justice Department, Justice Department Recovers Over $3 Billion in Whistleblowers False Claims Act Awards and Settlements (Feb. 24, 2000) (http://www.usdoj.gov/opa/pr/2000/February/079civ.htm).

[9] 31 U.S.C. § 3730(b)(2).

[10] *See supra* note 7 and accompanying text.

[11] *See generally* 31 U.S.C. § 3730(c). Even in cases where the government intervenes, relator's counsel may participate in the lawsuit unless limited by court order, either on the government's motion, *see* 31 U.S.C. § 3730(c)(2)(C), or on motion of the defendant, *see* 31 U.S.C. § 3830(c)(2)(D).

[12] 31 U.S.C. § 3730(b)(2).

[13] *See, e.g.,* CAL. GOV'T CODE §§ 12650 *et seq.*; FLA. STAT. §§ 58.081 *et seq.*; 740 ILL. COMP. STAT. 175/1 *et seq.*; LA. REV. STAT. §§ 46:437.1 *et seq.*; TEX. HUM. RES. CODE §§ 36.001 *et seq.*; HAW. REV. STAT. §§ 661.21 *et seq.*; NEV. REV. STAT. 31.357 *et seq.*; D.C. CODE §§ 2-308.13 *et seq.*; MASS. GEN. LAWS ch. 12, §§ 5 *et seq.*; VA. CODE §§ 8.01–216.1 *et seq.*

[14] 31 U.S.C. §§ 3733(a)(1)(A)-(D).

[15] *Id.* § 3733(a)(1).

[16] *Id.* § 3730(b)(2)-(3).

[17] *Id.* § 3730(b)(4).

[18] *Id.* § 3730(c)(1).

[19] *Id.* § 3730(c)(2)(B).

[20] *Id.* § 3730(b)(3)(B).

[21] *Id.* § 3730 (c)(2)(A).

[22] *Id.* § 3730.

[23] *See, e.g., United States v. Brekke*, 97 F.3d 1043 (8th Cir. 1996), *cert. denied,* 520 U.S. 1132 (1996); *United States v. Peters*, 927 F. Supp. 363 (D. Neb. 1996), *aff'd,* 110 F.3d 616 (8th Cir.), *cert. denied*, 522 U.S. 860 (1997).

[24] *See* JOHN T. BOESE, CIVIL FALSE CLAIMS & QUI TAM ACTIONS, App. H (2002).

[25] *Id.* at 1-3.

[26] *Id.*

[27] *Id.*

[28] *Id.* For an excellent discussion of the False Claims Act's history, see Boese, *supra* note 24, at 1-1 through 1-51.

[29] These can be found at the HHS-OIG Web site, www.oig.hhs.gov.

[30] 31 U.S.C. § 3730(h).

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