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False Claims Act: Are Businesses' Worst Fears Being Realized?

By **Richard B. Ancowitz**

The federal False Claims Act (FCA), 31 U.S.C. §§3729-3733, was enacted in 1863 by a Congress concerned that suppliers of goods to the Union Army during the Civil War were engaged in fraud against the government.[1] Since then, the FCA has been amended several times, most notably in 1986 by re-inventing itself as a qui tam[2] statute, by allowing citizen-whistleblowers to bring matters to the attention of the U.S. Department of Justice, and to share in the funds ultimately recovered from those who have made false claims against the government.

As many lawyers (and perhaps taxpayers) now realize, the federal FCA has been an overwhelming success at recouping monies falsely claimed from the federal government. The U.S. Department of Justice has recently written that the FCA has brought over $22 billion in recoveries for the U.S. Treasury from 2009 through 2014 alone,[3] and in the fiscal year ending Sept. 30, 2014, recoveries to the U.S. Treasury totaled over $5 billion.[4]

> In a 2013 study, the Justice Department and Department of Health and Human Services pointed out that for every $1 it spends on fraud enforcement, the United States recoups $7.90.[6]

Significant qui tam recoveries abound, e.g., $70 million recovered against the City of New York, as a result of false claims made via the Medicaid system; a $90 million settlement on the eve of trial against Florida's Halifax Hospital involving false claims made to Medicare, with defense costs said to exceed $20 million; an $81 million settlement against Johnson & Johnson subsidiaries to resolve allegations of off-label promotion of Topamax.[5]

Indeed, in a 2013 study, the Justice Department and Department of Health and Human Services pointed out that for every $1 it spends on fraud enforcement, the United States recoups $7.90.[6] This may well be a conservative estimate, as Taxpayers Against Fraud estimates that for every dollar so spent, $20 is recouped by the United States.[7]

FCA liability is like no other liability known in law. Well-rooted in common law is the typical instance of injury to person or property, where the plaintiff brings an action based upon damages that the plaintiff has sustained. However, in a federal False Claims action, the plaintiff (also known as the "relator") is compensated to the extent of damages

RICHARD B. ANCOWITZ *is a partner in Rosenblum & Ancowitz and of counsel to Godosky & Gentile. As counsel to the Judiciary Committee of the New York State Assembly, he was one of the drafters of New York State's False Claims Act in 2007 as well as the 2010 amendments.*

suffered by another, in this case, the U.S. Treasury. Specifically, the government can recover compensatory damages, treble damages, attorney fees, and a civil penalty of between $5,500 and $11,000 for each false claim made.

Since 1986, many state and local governments have tried to emulate the success of the federal FCA, by enacting legislation to permit qui tam recoveries to redress false claims that have been made against them. At latest count, 30 States plus the District of Columbia have such a statute. Indeed, New York City enacted such legislation in 2005, which was ultimately subsumed when New York State enacted its own legislation in 2007. In addition, New York State's 2007 legislation, when combined by a significant series of amendments in 2010, is acknowledged to be even more amenable to recouping false claims than is the federal statute.[8] This is largely due to the efforts of prior Attorneys General Dennis Vacco, Eliot Spitzer, Andrew Cuomo, and now Attorney General Eric Schneiderman. (As a state senator, Schneiderman was one of the drafters of the 2010 amendments, along with this author who was counsel to the Judiciary Committee of the New York State Assembly. In that position, this author was also one of the drafters of New York State's False Claims Act in 2007.)

All the while, however, the U.S. Chamber of Commerce, in addition to others in the business community, has sounded the alarm about how the FCA is fundamentally unfair to business and does little to deter fraud against government. Further, the Chamber has fiercely fought legislative efforts to introduce new FCA legislation, or to expand laws already enacted.[9] While no one can credibly argue that there does not exist extensive fraud against government, and indeed, the Chamber does not, they still contend that the FCA does little to prevent or recoup fraud, and sometimes results in babies getting thrown out with bath water, i.e., "good" businesses being harmed along with "bad."[10]

> Businesses can reasonably insulate themselves from liability, and often do so. But the businesses with the most to fear, such as the institutional big billers of government, e.g., Medicaid and Medicare providers, must take great care to insure that all billings are done pursuant to all applicable statutes and billing regulations required by government.

Specifically, the Chamber argues that it is difficult for good, honest businesses to avoid being drawn into FCA litigation.[11] In fact, the Chamber is presently seeking legislative changes that would, among other things, reduce the relator's share of any ultimate recovery.[12] New York medical malpractice practitioners may recognize a structural similarity between the Chamber's proposal and Judiciary Law Sec. 474-a, where a plaintiff's medical malpractice attorney cannot receive the typical 1/3 fee as would be the case in other types of professional negligence actions. Clearly, a lower fee chills lawsuits, which is why the medical community supports it, and why lawyers representing plaintiffs typically oppose it. Limiting a relator's fee in FCA cases can be expected to have a similar effect.

It is clear that this is the perception of many in the business community. But is this perception congruent with reality? The answer to this question involves an examination of how FCA liability is established.

Litigation

As successful as the FCA has been in recovering money wrongfully claimed from government, litigating these cases is difficult for both the relators and the government.[13] The Justice Department intervenes in approximately one in five cases presented to it. Naturally, those are the cases that have the greater likelihood of success. In the remaining four of five cases, the relators and their attorneys are left to go it alone, typically without Justice Department support. Suffice to say, most claims brought by relators are not successful, and are either dismissed or withdrawn by the relators. In addition, as discussed below, business is fighting back, with creative non-legislative strategies designed to make it more difficult for relators to succeed against them.

Whether the defrauded government intervenes alongside the relator or not,[14] there are simply a panoply of defenses available to FCA defendants, and many of these are asserted in a pre-answer motion to dismiss (with a summary judgment motion to follow if needed). These defenses include a failure to plead the action with specificity pursuant to the requirements of pleading fraud as per FRCP Rule 9 (b), a defense that has enjoyed a significant success rate. It should suffice to state that the generally liberal rules of pleading in federal court, even as most recently limited by the U.S. Supreme Court in *Bell Atl. Corp. v. Twombly*, requiring "only enough facts to state a claim to relief that is plausible on its face," are not typically applied in FCA cases.[15] If a relator has not complied with the more exacting pleading rules of Rule 9(b), which require great specificity to be pleaded, the FCA claim will be dismissed.[16]

In addition, the business community had fought back in other strategic ways. For example, it is now common for employment termination agreements to include specific FCA release language. Typically, this involves a quid pro quo: if the employee on the way out the door would like to receive a severance check, a release of FCA (and other) liability must be signed. This is becoming a common occurrence, and it is reasonable to presume that many employees have signed away their FCA rights—without even knowing what those rights might be—in exchange for a relatively nominal payment.

Another example of businesses fighting back includes attempting to compel employees to report all fraud or suspicious activities—but only to the employer, often via a special "hotline" or toll-free telephone number. Reporting by employees in this way helps discourage employees from reporting fraud to any government agencies, or worse yet, to an employee's own lawyer, who could institute a qui tam whistleblower action. Such defensive mechanisms are now fairly commonplace. However, as a matter of law, an employee's right to bring a false claims action is relatively unfettered, even if an employment manual says that the employee must self-report to the company.

In addition, employers are nowadays more likely to institute counterclaims against FCA relators, contending that the relator did something improper or illegal, such as stealing documents or trade secrets in order to make out a FCA case. In one leading case, *Cafasso v. General Dynamics C4 Systems*, the U.S. Court of Appeals for the Ninth Circuit affirmed a grant of summary judgment to defendant on its counterclaim that the relator's appropriation of electronic documents and files violated a confidentiality agreement that the relator had executed at the start of her employment.[17]

While much has been written on the use of severance clauses as a means to chill future discrimination claims—and while the Equal Employment Opportunity Commission has even commenced an action against one major employer to restrain what it saw as improper severance agreements requiring employees to sign away the right to make a future discrimination claim,[18]—this area of law is still fairly unsettled in a False Claims context. One thing that is clear is that the federal FCA does provide retaliation protection to whistleblowers, which indeed has been extended and strengthened in actions brought under New York's FCA.[19]

It should further be noted that, contrary to the Chamber's claims, mere garden-variety negligence or sloppiness in billing will not result in FCA liability—this much was made clear in the leading Second Circuit case of *Mikes v. Straus*.[20] Still, it is sometimes possible for relators and the Government to establish repeated patterns of false claims, which can be suggestive of FCA liability. This was the holding of the U.S. Court of Appeals for the Sixth Circuit, in *Mich. Dept. of Educ. v. U.S. Dept. of Educ.*, which affirmed the validity of random sampling as acceptable evidence

of the validity of various expenditures when an individual audit of thousands of cases at issue would not be possible.[21] Thus, aside from the importance of following applicable billing rules, and to generally conduct themselves in an ethical and forthright manner, it is critical for businesses to avoid the possible temptation of cutting billing corners.

Process in Place

In sum, given that establishing FCA liability is typically a heavy lift, only those involved in making wrongful claims to the government should have realistic liability concerns. The Chamber might argue that even weak FCA claims require a defendant or its insurer to retain counsel to have them dismissed. On the other hand—and unlike typical difficult liability cases in a non-FCA context—where the government doesn't intervene in an FCA case, the case may well be dropped without the defendant even becoming aware of the matter. This is because the case remains under seal until the government decides upon its course of action, i.e., whether or not to intervene. So, after a declination of intervention by the government, the relator may not even serve process on the defendant(s), knowing he or she would have to go it alone without governmental intervention or assistance.

The bottom line: Businesses can reasonably insulate themselves from liability, and often do so. But the businesses with the most to fear, such as the institutional big billers of government, e.g., Medicaid and Medicare providers, must take great care to insure that all billings are done pursuant to all applicable statutes and billing regulations required by government. For example, in order to be paid, Medicaid providers must certify, under oath, that they are following applicable presentment and recoupment regulations, i.e., Title 18 of the NYCRR. Obviously, lawyers advising these businesses have an important proactive role to play: to insure that their clients are cognizant of applicable law and regulation.

All things considered, the federal FCA and the various state FCAs, including New York's, remain vital and important weapons in governments' fight to recoup taxpayer monies wrongfully paid out.

1. http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf

2. Commonly translated as "who as well"; http://dictionary.law.com/Default.aspx?selected=1709A. The phrase has deep roots in the common law, an abbreviation of the Latin phrase qui tam pro domino rege quam pro se ipso in hac parte sequitur, meaning "one who sues in this matter for the king as well as for himself."

3. http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014. In 2013, the Department of Justice calculated that there were over $38 billion in False Claims Act recoveries since 1986, with over $27 billion resulting from qui tam actions. http://www.justice.gov/sites/default/files/civil/legacy/2013/12/26/C-FRAUDS_FCA_Statistics.pdf.

4. http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014

5. E.g. http://www.nytimes.com/2011/11/02/nyregion/whistle-blower-in-medicaid-suit-dr-gabriel-feldman-says-parents-and-capra-inspired-him.html; http://www.news-journalonline.com/article/20140818/NEWS/140819450;, http://www.justice.gov/opa/pr/two-johnson-johnson-subsidiaries-pay-over-81-million-resolve-allegations-label-promotion

6. http://www.hhs.gov/news/press/2013pres/02/20130211a.html

7. http://taf.org/publications/reports/fighting-health-care-fraud-using-whistleblower-statute-returns-20-every-1

8. For example, New York State's False Claims Act permits recovery of the loss of tax revenues under certain circumstances. See, State Finance Law Sec. 189 (1)(g); *People v. Sprint Nextel Corp*., 114 AD 3d 622 (1st Dept 2014). Under federal law, the recouping of tax revenues is far more limited, and is largely a discretionary function of the Internal Revenue Service.

9. E.g. Written testimony of Marcia G. Madsen, on behalf of the US Chamber of Commerce, to the House Judiciary Committee, April 1, 2009; https://www.uschamber.com/testimony/testimony-hr-1788-false-claims-act-correction-act-2009

10. http://www.instituteforlegalreform.com/issues/false-claims-act

11. E.g. http://www.instituteforlegalreform.com/uploads/sites/1/Fixing_The_FCA_Pages_Web.pdf

12. Id, at pp. 23-25.

13. http://www.instituteforlegalreform.com/resource/federal-judge-rejects-expansive-interpretation-of-false-claims-act/

14. For example, 31 USC 3730 (b)(2) allows the United States to intervene in such actions, which are kept under seal while the Department of Justice investigates the claim. New York's State Finance Law Sec. 190 (2)(b) provides similar rights to the New York State Attorney General's office.

15. 127 S. Ct. 1955, 1974

16. *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475 (2d Cir. 1995); see also, *US ex rel. Grubbs v. Kanneganti*, 565 F.3d 180 (5th Cir. 2009).

17. 637 F. 3d 1047, 1061 (9th Cir. 2011).

18. *Equal Employment Opportunity Commission v. CVS Pharmacy*, civil action no. 14-cv-863 (N.D. Ill., 2014).

19. State Finance Law Sec. 191; 31 U.S.C. §3730(h).

20. 274 F.3d 687, 703 (2d Cir. 2001).

21. 875 F.2d 1196, 1205 (1989). While this was not an FCA case, it's rationale has been followed in a false claims context as well. *US v. Robinson*, Dist. Court, ED Kentucky 2015 (Civil No: 13-cv-27-GFVT); *US Ex rel Bilotta v. Novartis Parm. Corp*. SDNY 2014 (No. 11 Civ. 0071 (PGG)).