The Federal False Claims Act: Perspective from Both Sides Of a *Qui Tam* Case

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I. INTRODUCTION

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 (referred to as "relators" in a *qui tam* action) to expose fraud and false billings that harm taxpayers, as well as being awarded a portion of any recovery the government receives.

Although the False Claims Act was originally enacted to stop war profiteers, you do not need an Iraqi conflict to find a government contractor.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 that 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 Raytheon or General Electric. The vast majority of doctors and other federal contractors are honest and diligent, but the ones who defraud the taxpayers harm all of us.

Putting aside the technical terms of the FCA statute, 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? It's 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 is clear that "no proof of specific intent to defraud is required" to prove an FCA violation.

The government, and we as taxpayers, 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 defense contractor can bill unnecessary items or provide lower quality parts than required under a federal contract. 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 subtler and involve a contractor that 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.

The primary problem with 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 without doing anything.

II. PERSPECTIVE FROM A WHISTLEBLOWER

For a potential FCA client, doing "the right thing" is a noble goal and a benefit in and of itself. The first thing that many clients say at the initial client meeting is that "this is not about the money." Nonetheless, "Honest" Abe knew that it took more than good character to encourage reporting of government fraud. The FCA created incentives for people to become whistleblowers.

The FCA provides many benefits for the potential whistleblower. 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.

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.

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.

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. Recently, upon orders from the Department of Justice, local U.S. Attorney's Offices are now filing objections to keeping dismissed cases under seal – this is another example of how the Bush administration is hostile to whistleblowers. Nonetheless, federal judges can keep the seal intact on dismissed cases, over the government's objections. 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 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.

However, for the whistleblower client who has criminal exposure, special caution must be taken. The whistleblower may have been a member of management and had helped direct the fraud. The whistleblower may have personally profited from the fraud. Under these circumstances, the whistleblower could be barred from receiving a relator's share or such share could be reduced. More importantly, the whistleblower could face criminal charges.

Filing a *qui tam* does not provide immunity from prosecution. Relators have been prosecuted in the past and, it is assumed, will be prosecuted in the future. When you have a situation where your client has potential criminal exposure, you must weigh all options, including having the client walk away from filing the *qui tam*, before proceeding forward.

III. PERSPECTIVE FROM A WHISTLEBLOWER DEFENDANT

If you represent a client who has a FCA case filed against the client, you have a number of issues about which to be concerned: (1) the source of the FCA filing; (2) the extent of the investigation; (3) the client's defenses; (4) the client's criminal exposure; (5) exclusion and debarment issues; and (6) damages and the opportunity for a global resolution. Clients who are subject to government investigation, whether it is from a *qui tam* or another avenue, are typically scared, anxious, and uncertain about the future. Needless to say, the client may not be willing to tell you the full extent of the client's conduct or a truthful rendition of the material facts at the early stages of the FCA representation.

A client may discover the existence of a *qui tam* from being served with the *qui tam* complaint or by a letter from the USAO informing the client that an FCA investigation is pending. The client or you may discern that an FCA case is pending, or at minimum a government investigation is underway, with investigative agents conducting interviews, serving subpoenas, or conducting a search of the client's premises. At worse, the FCA case may come to light after your client has been indicted by a federal grand jury.

The source of the FCA filing is important because it allows you to understand the extent of the government's initial information against your client. A whistleblower who is a competitor of your client knows far less than a top management employee of your client. When the government discloses the *qui tam*, it can do so with a full disclosure or it can ask the federal court for a partial lifting of the seal, which allows the government to redact the name of the whistleblower as well as the name of the whistleblower's counsel. Nonetheless, the nature of the allegations in the complaint should provide clues as to who the whistleblower is and what information the government had at the beginning of its investigation.

Even if you know who the whistleblower is, the extent of the government's investigation will not be known until you conduct your own investigation. The government prefers to talk with ex-employees and these individuals should be your first targets for interviews after you receive the *qui tam* disclosure. In health care fraud cases, the government has already reviewed Medicare, Medicaid, and TRICARE databases to see what your client's billing patterns are and how the client compares to other similarly situated providers. You can assess your client's risk only by attempting to discover what the government knows or what the government thinks it knows.

The last part of the prior sentence – "what the government thinks it knows" – is vitally important in cases where your client has a legitimate defense to the *qui tam* charges. You must know what your client's defenses are to the charges, if any. Did fraud or false claims occur? Was it the responsibility of a third party (such as a medical billing company)? Was it the result of actions of lower tiered employees who directly benefitted from the fraud? Was it negligence and not intentional false billings? If your client has no defense, you need to know it before you begin negotiating with the government.

If there is no defense, review the client's actions for criminal exposure. Reckless indifference to billing rules should fall into civil *qui tam* liability, but an aggressive prosecutor may turn it into a criminal case. The government could also rely on less than trustworthy former employees who have a grudge and are painting a picture of fraud and cheating to the government. If your client actually defrauded the government, then you need to deal with it before an indictment is issued.

In addition to potential criminal exposure, the government holds another large hammer over any *qui tam* defendant – exclusion/debarment. The federal contractor could be excluded from participating in any federal programs and be debarred from bidding on any federal contracts. For Medicare exclusion, private pay insurers (such as Humana and Anthem) will quickly follow government payers by excluding the health care provider from their programs. Without negotiating a resolution of the *qui tam* case favorably for your client, a client could pay hefty damages and then be surprised with exclusion and debarment.

Despite the consequences of exclusion, damages will always drive the civil *qui tam* suit. The government will seek treble damages and significant fines for every false claim. However, by negotiating, the government may reduce its damage demand, as well as address the fines favorably for your client. If criminal exposure exists, then you may wish to consider asking for a global resolution of the case, meaning that you wish to resolve both the criminal and civil cases at the same time. The government will not ask you if you want a global resolution, because it does not wish to be seen using its prosecution powers to coerce a civil settlement, but the government will engage in these discussions if requested by a *qui tam* defendant.

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 who are whistleblowers, it is another avenue to obtain justice. For clients who are defendants of FCA cases, it is opportunity for the defendants' attorneys to either show that the clients are being wrongfully singled out or to resolve the FCA case with minimal damage to the clients. In either situation, FCA suits are growing as awareness of the statute increases.