

The Federal False Claims Act: Enforcement and Recent Updates

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PRESENTER PROFILE:

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Objectives

- Provide an understanding of the False Claims Act, its various elements, how it works and its whistleblower provisions.
- Provide an understanding of federal enforcement efforts.
- To show how an action is filed, how the government responds and how the courts interpret the FCA.
- To show how the FCA is being used in the health care area.
- Provide an understanding of how the FCA is impacted by Obamacare.

FEDERAL FALSE CLAIMS ACT

- Prohibits presenting a false or fraudulent claim for payment to the Federal Government, or causing the use of a false record to get a claim paid by the Federal Government.
- Includes billing for work not performed, upcoding, billing for unnecessary services, and even billing for services that were obtained in violation of other laws and/or regulations (such as the Anti-Kickback Statute).
- The bottom line: the False Claims Act covers fraud against the federal government.

FEDERAL FALSE CLAIMS ACT

- Originally passed in 1863
- Amended in 1986 to make it more relator friendly
- The number of cases filed since the 1986 amendments has risen from 33 in 1987 to over 700 in 2020.

False Claims Act Recoveries Exceed \$64 Billion Since '86

- More than \$2.2 billion in 2020.
- Whistleblower suits accounted for 80% of this total.
- More than \$64 billion recovered since 1986

AWARDS TO WHISTLEBLOWERS

- Since 1986, whistleblowers have been awarded over \$7.8 billion
- \$309 million in awards in fiscal year 2020.

How does the False Claims Act Work

- Financial Incentive: 15-30%
- Filed on behalf of US under seal
- Government investigates
- If US intervenes, Relator gets 15-25% of successful recovery
- If US declines, 15-30%

PROOF OF FALSE CLAIM

- Civil standard: more likely than not.
- Intent does not have to be shown.
- Must show “knowingly” filed.
- Needs to be as detailed as possible.
- Knowingly includes deliberate ignorance or reckless disregard.
- Head in the sand won’t work.

FALSE CLAIMS ACT

- Anyone with knowledge of the illegal conduct can bring suit
- Suit must be brought within six years from the date of the false claim, or within three years after the Government knows or should have known of the false claim, but in no event later than ten years after the false claim.

FALSE CLAIMS ACT

- If the allegations in the False Claims Act suit were already “publicly disclosed,” the relator has to be the “original source” of the allegations.

Pleading Requirements

- The FCA's false presentment provisions generally require relators to establish four elements:
 - (1) a false statement or fraudulent course of conduct;
 - (2) that was made or carried out with the requisite scienter;
 - (3) that was material; and
 - (4) that caused the government to pay out money (i.e., that involved a claim). (Note *Universal Health Servs., Inc. v. U.S. & Mass. ex rel. Escobar*, ___ U.S. ___, 136 S.Ct. 1989, 195 L.Ed.2d 348 (2016)).

The 12(b)(6)Rule

- FRCP 12 (b) (6): Failure to state a claim.
 - Grounds entitlement to relief requires more than labels and conclusions.
 - Must not be speculative.
 - A claim must be plausible on its face.

FRCP 9 (b): Failure To Plead Fraud With Particularity.

- The circumstances constituting fraud or mistake shall be stated with particularity.“
- Who, what, when, where, and how.
- [United States ex rel. v. Medtronic, Inc., No. LA CV15-01212 JAK \(ASx\) \(C.D. Cal. Sept. 11, 2017\).](#)

FRCPP 9 (b): Failure To Plead Fraud With Particularity (continued)

- Quote from *Fass v. State Farm Fire & Cas. Co.*,
"No. 06-02398, 2006 WL 2129098, at *2 (E.D. Pa.
July 26, 2006):

“The Relator must plead the following elements with particularity:

- (1) a specific false representation of material fact;
- (2) knowledge by the person who made it of its falsity;
- (3) ignorance of its falsity by the government;
- (4) the intention that it should be acted upon; and
- (5) that the government acted upon it to its damage.”

FALSE CLAIMS ACT DAMAGES

- Treble damages, costs, attorneys' fees, and penalties
- The penalties are a mandatory \$5500 - \$11,000 per false claim.

RISK OF FILING A FALSE CLAIMS ACT SUIT

- “RETALIATION”
- *If clearly frivolous, vexatious or brought for harassment, then the court may find the relator liable for the defendant’s expenses and fees*

FALSE CLAIMS IN THE HEALTH CARE ARENA

- A distinct trend toward health care fraud cases.
- In 1994, only 18% of the cases involved health care fraud.
- In 2020, that percentage was 80%.

How the Case Proceeds

- Gathers evidence.
- Find a lawyer with False Claims Act experience.
- Disclosure document.
- Disclosure document is filed with the Department of Justice.
- Complaint is filed under seal.

How the Case Proceeds

- Justice Department investigates while under seal. (Has 60 days but can ask for extension.)
- Decision to intervene or to decline intervention.
- Sometimes, the seal partially lifted, to negotiate a settlement.

Enforcement Actions In FY 2020

- DOJ opened 1,148 new criminal health care fraud investigations.
- 440 defendants were convicted of health care fraud related crimes.
- DOJ opened 1,079 new civil health care fraud investigations.
- 1,498 civil health care fraud matters were pending at year's end.

Enforcement Activities

- Strike Force
- Opioid Fraud and Abuse Detection Unit
- Health Care Fraud Prevention and Enforcement Action Team (HEAT)
- Health Care Fraud Prevention Partnership (HFPP)

Attorney Ethical Obligations

- *Fair Labor Practices Associates v. Quest Diagnostics, Inc.*, 2013 WL 5763181 (2nd Cir. Oct. 25, 2013).
 - Longstanding tradition of clients being able to communicate freely with their counsel without fearing that their confidential communications may become the basis of a later suit.
 - If the court had sided with the former general counsel, companies may have been discouraged from seeking legal advice about FCA compliance.

Recent Cases

- *United States ex rel. Hilliard v. Hardin House Inc.*, No. 17 CV 1043 (N.D. Ill. Jan. 22, 2020).
- *United States v. Gibson*, 875 F.3d 179 (5th Cir. 2017)
- *United States ex rel. Beaujon v. Hebrew Homes Health Network, Inc., et al.*, Case No. 12-20951 CIV (S.D. Fla.).
- *United States ex rel. FBH1 LLC v. Boston Heart Diagnostics Corp.*, No. 17-cv-206 (E.D. Cal.) and *United States ex rel. Riedel v. Boston Heart Diagnostics Corp.*, No. 12-cv-1423 (D.D.C.).
- *United States v. Patel*, No. 17-30725 (5th Cir. 2018).
- *United States v. Sandesh Patil, M.D.* (Press release US Attorney, Eastern District of Kentucky, June 5, 2013).
- *United States v. Greenspan*, 923 F.3d 138 (3rd Cir. 2019);
- *United States v. Thomas Whitten* ((Press release US Attorney, Western District of Pennsylvania, February 3, 2020).

Recent Cases (Continued)

- Frank Santangelo (Press Release, U.S. Attorney, District of New Jersey, June 10, 2013).
- Community Health Network (Press Release, U.S. Attorney, Southern District of Indiana, June 30, 2015).
- Ezcov Medical Supply (Press Release, DOJ, March 20, 2015).
- Gladys Fuertes (Press release US Attorney, Middle District of Florida, June 29, 2015).
- *United States ex rel. Syd Ackerman v. William M. Kelly, M.D., Inc. and Omega Imaging, Inc.*, No. EDCV 13-02195 JGB (DTBx) (C.D. Cal.).
- Athenahealth (Press Release, DOJ, January 2, 2021).

Recommendations

Advise your clients to:

- Develop a good compliance program that is a living document.
- Periodically conduct internal audits of billing and payment practices.
- Review all contracts with physicians and other providers, paying close attention to contract with entities in a position to refer.
- Develop a training program to teach compliance to employees and contracted personnel.
- Understand and comply with the law and regulations.
- Create a culture of compliance, strongly supported by top management.
- Maintain quality of care.