LITIGATING A FALSE CLAIMS ACT CASE

Scott R. Grubman

Partner
Chilivis, Grubman, Dalbey & Warner

Linda McMahon

Senior Trial Counsel
Civil Frauds, Department of Justice

1

2

BRIEF OVERVIEW OF THE FCA AND HOW FCA CASES DIFFER FROM OTHER LITIGATION

2

FCA Overview

3

- Imposes liability for (among other things):

(A) knowingly presenting, or causing to be presented, **a false or fraudulent claim** for payment or approval;

*Example of "causing" a false claim to be presented

(B) knowingly making, using, or causing to be made or used, **a false record or statement** material to a false or fraudulent claim;

(C) **conspiring** to commit a substantive violation;

(G) knowingly making, using, or causing to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly **concealing or knowingly and improperly avoiding or decreasing an obligation** to pay or transmit money or property to the Government.

31 U.S.C. § 3729(a)(1)

3

FCA Overview

4

- Violations punishable by:
  - Treble (3x) damages
  - Per-claim penalties between $11,665 to $23,331 (adjusted annually for inflation)

31 U.S.C. § 3729(a)(1)

4

Important Definitions

5

- 31 U.S.C. § 3729(b)
- "Claim"
  - "[A]ny request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property that" is presented to an officer, employee, or agent of the U.S. or to a contractor.
- "Obligation"
  - "[A]n established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from **the retention of any overpayment**."
- "Material"
  - "[H]aving a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."

5

Important Definitions (cont.)

6

- Scienter Standard = "knowing"/ "knowingly"
- "Knowing" and "knowingly"
  - Person has **actual knowledge** of information;
  - Acts in **deliberate ignorance** of the truth or falsity of the information;
  - Acts in **reckless disregard** of the truth or falsity of the information;
- Requires **no proof of specific intent to defraud**.

6

Qui Tam Provisions

7

- *Qui Tam* provisions:
  - FCA action can be brought directly by government, or by a private person ("relator") in a *qui tam* action
  - Relator files complaint under seal and serves upon government
  - Government has 60 days (with extensions for good cause) to investigate and make **intervention** decision
    - Qui tam complaint can be under seal for extended period of time while government investigates relator's allegations.
  - If government intervenes, relator receives a share of between **15 and 25%** of FCA recovery
  - If government declines to intervene, relator typically can move forward on behalf of government if he/she so chooses. Relator receives a share of between **25 and 30%** of FCA recovery in matters he/she litigated
  - PLUS attorneys' fees and expenses

7

Government Investigation

8

- Scope of government investigation varies by circumstances of allegations, but is often time and resource intensive
  - Witness interviews
  - Agency subpoenas for information
  - Civil Investigative Demands (CIDs) for documents
  - CIDs for testimony
  - Opportunity for parties to discuss early resolution
- Intervention decision follows investigation

8

Qui Tam Relator's Rights

9

- Relator rights if Government intervenes:
  - Government has primary responsibility for prosecuting case, but relator has right to continue as a party, subject to certain limitations. 31 U.S.C. § 3730(c).
  - Right to be notified if the Government chooses to file a motion to dismiss the action, and right to an opportunity for a hearing on the motion. *Id.* at § 3730(c)(2)(A).
  - Right to object to the Government's decision to settle the case and receive a hearing as to the fairness, adequacy, and reasonableness of the settlement proposal. *Id.* at § 3730(c)(2)(B).

9

Qui Tam Relator's Rights

10

- If Government does not intervene:
  - Right to proceed with the action alone. 31 U.S.C. § 3730(c)(3).
    - Government has the right to request that it be served with copies of all pleadings filed and deposition transcripts. *Id.*
    - Government also has the right to intervene at a later date "upon a showing of good cause." *Id.*
- "Notice of no decision"

10

11

FREQUENT ISSUES REGARDING ELEMENTS OF THE FCA

11

Jurisdictional Bars to *Qui Tam* Cases

12

- No *qui tam* cases by members of Armed Forces against members of Armed Forces relating to such services.
  - 31 U.S.C. § 3730(e)(1)
- No *qui tam* cases against members of Congress, judges, or senior executive branch officials, if the Government already knows of the misconduct.
  - 31 U.S.C. § 3730(e)(2)
- First-to-file bar
- Public disclosure bar

12

First-to-File Bar

13

- Provides that "[w]hen a person brings an action . . . no person other than the Government may intervene or bring a related action based on the facts underlying the **pending** action." 31 U.S.C. § 3730(b)(5)
- *Kellogg Brown & Root Servs., Inc. v. U.S. ex rel Carter* ("KBR"), 135 S. Ct. 1970 (2015)
  - Issue: Whether the FCA's first-to-file rule keeps new claims out of court only while related claims are still alive (i.e., pending), or whether it may bar those claims in perpetuity.
  - Held: "[A]n earlier suit bars a later suit while the earlier suit remains undecided **but ceases to bar that suit once it is dismissed**."

13

Public Disclosure Bar

14

- Requires a court to dismiss an FCA *qui tam* action if "substantially the same allegations or transactions" alleged in the action were publicly disclosed:
  - (1) in a federal criminal, civil, or administrative hearing to which the government or its agent is a party;
  - (2) in a congressional, Government Accountability Office ("GAO"), or other federal report, hearing, audit, or investigation; or
  - (3) from the news media.

  31 U.S.C. § 3730(e)(4)
- Only applies to *qui tam* actions, not direct actions by DOJ.

14

Public Disclosure Bar

15

- Disclosures made on a publicly available website (even D's own website) count as public disclosures. *eg: U.S. ex rel. Osheroff v. Humana, Inc.*, 2015 WL 223705, at *6 (11th Cir. Jan. 16, 2015).
- After 2010 amendments, *qui tam* does not have to be "based upon" the public disclosure. Public disclosure bar now triggered as long as "substantially the same allegations or transactions" alleged in *qui tam action* were publicly disclosed.
- **Other examples of public disclosure:**
  - Responses to FOIA request (*Schindler Elevator*, 131 S.Ct. 1885 (2011)).
    - SCOTUS says "report" = "something that gives information"
  - Self-disclosure to the government?
    - Only in 7th Circuit, SDNY, ND Okl.

15

Public Disclosure Bar

16

- **<u>Original Source</u>:** Public disclosure bar does not apply if Relator is "original source."
  - An individual who either:

    (1) prior to a public disclosure, has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based; or

    (2) who has knowledge that is **independent of and materially adds to** the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

    31 USC § 3730(e)(4)(B)

16

Statute of Limitations

17

- 31 U.S.C. § 3731(b):
  - FCA action may not be brought:
    - More than **6 years** after date of violation; *or*
    - More than **3 years** after date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than **10 years** after the date on which the violation is committed
      - Whichever occurs last
  - Upon intervention, government can file its own complaint and complaint relates back to filing date of *qui tam* complaint (31 U.S.C. § 3731(c)).

17

Jurisdiction & Venue

18

- 31 U.S.C. § 3732 is a **very broad** venue provision:
  - Any FCA action may be brought in any judicial district in which the defendant or, in case of multiple defendants, *any one defendant* can be found, resides, transacts business, or in which any act proscribed occurred.
  - District Court has jurisdiction over any action brought under state law for recovery of funds paid by state or local government if action arises from "same transaction or occurrence" as FCA action.

18

Federal Rule of Civil Procedure ("FRCP") 9(b)

19

- **FRCP 9(b):** "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake."
- Rule 9(b) applies to FCA cases. Question is how to satisfy.
- **Circuit Courts have reached conflicting results as to application of Rule 9(b) in FCA context:**
  - **First, Fourth, Fifth, Seventh, Ninth:** complaint satisfies 9(b) if it alleges particular details of a scheme to submit false claims together with reliable indicia supporting inference that claims were actually submitted, even if complaint does not identify specific claims

19

Federal Rule of Civil Procedure ("FRCP") 9(b)

20

- **Sixth, Eighth, Tenth, Eleventh:** complaint must identify specific claims submitted to government to satisfy Rule 9(b)
  - **BUT these Courts have not consistently adhered to this rigid understanding of Rule 9(b)** Example: *U.S. ex rel. Mastej v. HMA* (No. 13-11859, Oct. 2014), 11th Cir. held that court should engage in case-by-case approach and there are no bright-line rules: "Providing exact billing data . . . or attaching a representative sample claim is one way a complaint can establish the necessary indicia of reliability that a false claim was actually submitted . . . **However, there is no per se rule that an FCA complaint must provide exact billing data or attach a representative claim** . . . Under this Court's nuanced, case-by-case approach, other means are available to present the required indicia of reliability that a false claim was actually submitted. Although there are no bright-line rules, our case law has indicated that a relator with direct, first-hand knowledge of the defendants' submission of false claims gained through her employment with the defendant may have a sufficient basis for asserting that the defendants actually submitted false claims . . . By contrast, a plaintiff-relator without first-hand knowledge of the defendants' billing practices is unlikely to have a sufficient basis for such an allegation."
- SCOTUS denied cert. in 2014 in case that could have resolved issue. *U.S. ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc., et al.* No. 12-1349.

20

Knowledge

21

- A person acts knowingly under the FCA if he has actual knowledge or acts in deliberate ignorance or reckless disregard of the truth or falsity of information.
  - Issues continue to arise in application of the scienter element when an FCA claim stems from alleged violations of a material statutory, regulatory, or contractual requirement that is susceptible to more than one meaning.
    - Scienter requirement calls for a determination as to whether, in light of such ambiguity, a defendant nevertheless knew that its conduct violated the relevant requirement.
  - Questions come up as to the existence and application of:
    - Whether a defendant's interpretation of ambiguous rule was reasonable or unreasonable
    - When a defendant developed its interpretation of the ambiguous rule
    - Whether, if interpretation of ambiguous rule is reasonable, defendant knew of the proper interpretation of the rule
    - Did defendant have notice of the possibility that its interpretation was wrong, and did it inquire regarding proper interpretation

21

Falsity

22

- Claims can be considered "false" for different reasons.
  - Factual Falsity
    - Where the claim for payment is *literally* false. Example: Dr. Smith submits a claim for reimbursement to Medicare. On its face, the claim says, "Dr. Smith saw Patient X on Date Y." If patient X doesn't exist, or if Dr. Smith didn't actually perform the service, then the claim is factually false and the Government can bring a claim against Dr. Smith under the FCA.

22

Falsity

23

- Claims can be considered "false" for different reasons.
  - Fraud in the inducement or Promissory fraud
    - Where the underlying contract or benefit was obtained under false pretenses.
      - Example: *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) FCA liability found where the underlying contract was obtained through collusive bidding.

23

Falsity

24

- Claims can be considered "false" for different reasons.
  - Worthless Services
    - A claim for payment where the goods or services provided were so deficient as to be effectively worthless.
      - The Second Circuit described a worthless services claim as "effectively derivative of an allegation that a claim is factually false because it seeks reimbursement for a service not provided" and noted that, "the performance of the service is so deficient that for all practical purposes it is the equivalent of no performance at all." *U.S. ex rel. Mikes v. Straus,* 274 F.3d 687, 703 (2d Cir. 2001).

24

Falsity

25

- Claims can be considered "false" for different reasons.
  - Legal Falsity
    - Where a claim may be factually correct, but misrepresents compliance with an underlying statute, regulation, or contractual obligation. Example: Dr. Smith submits a claim for reimbursement to Medicare. On its face, the claim says, "Dr. Smith saw Patient X on Date Y." Dr. Smith did actually see and provide care for Patient X on Date Y; however, Patient X was referred to Dr. Smith in exchange for an illegal kickback in violation of the AKS. Government argues that the claim is "legally false" because it wouldn't have reimbursed Dr. Smith if it had known about the illegal kickback scheme.

25

Falsity: False Certifications

26

- Implied vs. Express False Certification
  - Express false certification = a claim to the government that includes a false express certification of compliance with a statutory, regulatory, or contractual legal requirement.
  - Implied false certification = submitting a claim without disclosing material violations of statutory, regulatory, or contractual legal requirements. "[W]here the government pays funds to a party, and would not have paid those funds had it known of a violation of a law or regulation, the claim submitted for those funds contained an *implied certification* of compliance with the law or regulation and was fraudulent." *U.S. ex rel. Barrett v. Columbia/HCA Healthcare Corp.*, 251 F.Supp.2d 28, 33 (D.D.C. 2003) (emphasis added).
  - Prior to 2016, circuit split as to viability of implied certification theory.

26

Falsity: False Certifications

27

- In *United States ex rel. Escobar v. Universal Health Services*, 136 S. Ct. 1989 (2016), the U.S. Supreme Court held that the implied certification theory *can* be a basis of liability "at least" where two conditions are satisfied:
  - "the claim does not merely request payment, but also makes specific representations about the goods or services provided"
  - "the defendant's failure to disclose noncompliance with **material** statutory, regulatory, or contractual requirements makes those representations misleading half-truths"
    - The Escobar Court left open the possibility that implied false certification liability could be viable in other circumstances, and expressly declined to 'resolve whether all claims for payment implicitly represent that the billing party is legally entitled to payment.'
    - Issues are regularly raised in litigation following *Escobar* as to the contours and limitations of application of implied certification falsity, which depend upon the circumstances in which it is alleged

27

Materiality

28

- Materiality Defined
  - The False Claims Act defines materiality as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4)
  - Courts repeatedly emphasize that, in enacting the FCA, "Congress wrote expansively, meaning to reach all types of fraud, without qualification, that might result in financial loss to the Government." *U.S. v. Neifert-White Co.*, 390 U.S. 228, 232 (1968); *Cook Cnty., Ill. v. U.S. ex rel. Chandler*, 538 U.S. 119, 129 (2003). The purpose of the False Claims Act is "to provide for restitution to the government of money taken from it by fraud." *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 551 (1943). These cases echo Congress' intent for the FCA to be broadly construed. In amending the FCA in 1986, Congress emphasized that "each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim." S.Rep. No. 99-345, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5274.

28

Materiality

29

- In *United States ex rel. Escobar v. Universal Health Services*, 136 S. Ct. 1989 (2016), the U.S. Supreme Court endorsed the "natural tendency" test for materiality.
  - The Court indicated that materiality does not depend on a single fact or occurrence, and identified several non-exhaustive factors to be evaluated by courts in determining whether a violation is material.
  - On remand from the Supreme Court, the First Circuit noted that, "[t]he language that the Supreme Court used [ ] makes clear that courts are to conduct a holistic approach to determining materiality in connection with a payment decision, with no one factor being necessarily dispositive." *U.S. ex rel. Escobar v. Universal Health Services, Inc.*, 842 F.3d 103, 109 (1st Cir. 2016).
  - Materiality law continues to evolve in post-*Escobar* litigation

29

30

COMMON DISCOVERY ISSUES IN FCA LITIGATION

30

Discovery re: Materiality

31

- One of the factors delineated by the *Escobar* Court was "proof of materiality can include, but is not necessarily limited to, evidence that the defendant knows that the government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory, or contractual requirement." *Id.* at 2003.
  - Has lead to a significant increase in discovery request to the government
    - Increased discovery requests still subject to F.R.C.P 26(b)(1): scope of discovery is that which is relevant to any party's claim or defense and proportional to the needs of the case
      - Includes balance between burden or expense of proposed discovery and its' likely benefit

31

Government Privileges

32

- There are certain privileges unique to a government litigant
  - Generally developed through case law
- Among others, the government has a privilege as to:
  - Deliberative process information
  - Law enforcement investigatory information

32

Discovery re: Investigative Files

33

- Upon service of RPDs for documents regarding the government's underlying investigation of defendant
  - Government may assert the law enforcement/investigatory privilege.
- Three elements are required to assert the privilege:
  (1) the head of the department having control over the documents must raise a formal claim of privilege;
  (2) the department head must assert the privilege based on his or her actual personal consideration of the documents; and
  (3) the plaintiff must make a detailed specification of the information for which the privilege is claimed and include an explanation of why that information properly falls within the scope of the privilege.
  See In re Polypropylene Carpet Antitrust Litig., 181 F.R.D. 680, 687 (N.D. Ga. 1998).

33

Statistical Analyses

34

- Given the large number of claims that can be at issue in FCA cases, and the challenges presented by requiring a claim by claim review, statistical analysis has been introduced as a means to assess liability and damages.
- Issues arise as to the appropriateness of statistical sampling generally, as well as the specific application of sampling and extrapolation given the circumstances of a case
  - The use of statistical sampling to prove damages
  - The use of statistical sampling to prove liability
    - Issues are regularly raised as to the viability of proving the elements of the FCA with statistical evidence
- Jury will assess the weight and credibility of statistical evidence

34

Quasi-Criminal

35

- FCA violations are "quasi-criminal" in nature. *Atkins v. McInteer*, 470 F.3d 1350, 1360 (11th Cir. 2006).
- Discovery disputes regarding defendant's responses to requests for admission and interrogatories:
  - Beware of over-generalizations.
  - Distinguish FCA case from ordinary civil litigation because of penalties.
  - Remind the Court of what is at stake and the need to protect your client.

35

Questions?

36

Scott R. Grubman
sgrubman@cglawfirm.com

Linda McMahon
linda.mcmahon2@usdoj.gov

36