

Amendments to the False Claims Act Expand Exposure to the Health Care Industry

BY STEPHEN G. SOZIO & RACHAEL A. REAM

The False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, is the government's primary civil tool to combat fraud and abuse in federal funding and procurement. In the health care industry, the Office of the Inspector General of the Department of Health and Human Services (HHS OIG) and the Department of Justice (DOJ) utilize the FCA to pursue false or fraudulent claims for Medicare and Medicaid reimbursement and other potential violations, including unlawful marketing and distribution of drugs and devices, kickbacks to providers, and inflated drug pricing. FCA claims against health care providers have risen dramatically in recent years and frequently have resulted in staggering monetary penalties. In no little part, this increase has been aided by recent amendments that have expanded liability under the FCA.

The False Claims Act

The FCA provides that any person who knowingly presents, or causes to be presented, to the U.S. government a false or fraudulent claim for payment or approval; knowingly makes, uses, or causes to be made or used a false record or statement to get a false or fraudulent claim paid or approved by the government; or conspires to defraud the government by getting a false or fraudulent claim allowed or paid violates the FCA. The FCA authorizes the Attorney General to investigate and bring civil actions, and it allows a private person (a relator) to bring a qui tam civil action in the name of the United States. The DOJ must then decide on behalf

of the government whether to intervene or allow the relator to pursue the action alone. The purpose of the qui tam provisions is to give an incentive to relators to come forward to help the government discover fraudulent claims by awarding them a percentage of the amount recovered.

Those who violate the FCA are liable to the government for a civil penalty of not less than \$5,500 and not more than \$11,000, 28 C.F.R. § 85.3(a)(9), plus treble damages sustained by the government, for each false claim filed. 31 U.S.C. § 3729(a)(1). No proof of actual damages, such as payment or approval of the claim, is needed to prove a violation of the FCA. As an incentive for providing information the government might not have uncovered, the FCA entitles successful qui tam relators to between 15 and 30 percent of the damage award or settlement recovered on behalf of the government.

Fraud Enforcement and Recovery Act of 2009

The Fraud Enforcement Recovery Act of 2009 (FERA) amendments to the FCA expand exposure to FCA investigations and claims. Pub. L. No. 111-21 (2009). First, FERA provides the DOJ with expanded tools to conduct civil investigations into possible health care fraud before an action is commenced. Under FERA, the Attorney General may delegate the power to issue Civil Investigative Demands (CIDs) under the FCA to the Assistant Attorney General for the Civil Division, which order of the Attorney General redelegated this authority to all U.S. Attorneys. This power in the hands of local U.S. Attorney offices expanded the

number of cases that may be investigated, while potentially decreasing the threshold of evidence needed by a relator to convince the government to intervene.

FERA also gives the DOJ more freedom to share information obtained using CIDs with relators and federal and state agencies. Prior to FERA, relators were often denied access to documents and information that a defendant in an FCA case or a party under investigation produced to the government in response to a CID. Allowing access to information produced in response to CIDs could enable relators who lack specific knowledge of violations to supplement speculative, generalized allegations with information obtained by the government, and thereby avoid dismissal of an otherwise legally insufficient complaint.

Second, liability is not reserved solely for actors who knowingly submit false claims. Under FERA, parties now are liable under the FCA when they knowingly receive overpayments or conspire to conceal evidence of an overpayment. 31 U.S.C. § 3729(a)(1). Thus, even if there is no overtly fraudulent act, courts and juries may find that actors violated the FCA by inaction.

Third, FERA creates an FCA-specific relation-back provision that effectively expands the statute of limitations under the FCA. 31 U.S.C. § 3731(c). A FCA action may not be brought more than six years after the date of the violation or more than three years after the date when facts material to the action are known or reasonably should have been known by the government official responsible (but in no event more than 10 years after the date on which the violation was committed), whichever occurs later. 31 U.S.C. § 3731(b). Generally, the filing of a complaint "tolls" the statute of limitations.

Where a defendant is on notice of the allegations filed against it, the court presumes it is fair to base the statute of limitations on the earliest-filed complaint because the defendant has had a chance to begin preparing its defense and thus was not prejudiced by the passage of time. However, in qui tam actions, the defendant does not get the benefit of notice when the relator's complaint is filed in secret and is not served on the defendant immediately. FERA codifies an exception that, for purposes of the statute of limitations, treats the government's later-filed allegations as if they were filed when the case was initiated. 31 U.S.C. § 3731(c). For example, if a qui tam case was filed in 2008 and not made known to the defendant until 2012, the defendant may have to defend allegations dating back to 1998, which is four years more than the 10-year statute of limitations would allow.

Finally, FERA expands the protections afforded to qui tam relators under the FCA. To encourage employees to come forward against their employers, the FCA protects any employees who are discharged, demoted, harassed, or in any manner discriminated against by their employer because of their participation in or furtherance of an FCA action. 31 U.S.C. § 3730(h). FERA extends this protection to contractors and agents. The statute entitles all such employees, contractors, and agents to all necessary relief to make them whole. This includes reinstatement with the same seniority status they would have had but for the discrimination, twice the amount of back pay, interest on back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. 31 U.S.C. § 3730(h).

Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010

The Affordable Care Act (ACA), effective March 23, 2010, also has expanded exposure and liability under the FCA. Pub. L. No. 111-148 (2010). First, the public disclosure bar has been greatly relaxed. Previously, a qui tam relator was barred from bringing an action based on information that had been subject to a "public disclosure" unless the relator was the "original source" of the information. The ACA amendments removed the jurisdictional bar for allegations based on publicly disclosed information and relaxed the "original source" requirements, making it easier for a qui tam relator to qualify to bring an action. Before ACA, relators were able to bring qui tam actions based on public disclosures only if the relator had "direct and independent knowledge" of the information and provided it to the government before filing suit. Under the ACA amendments, a relator's allegations may be based on secondhand information, provided those allegations add to the information already contained in the public sphere. See ACA, H.R. 3590 §1303(j)(2).

Second, pursuant to Section 6402 of the ACA, overpayments that are not reported and returned within 60 days after the date identified or the date that a corresponding cost report is due are now considered an "obligation" under the FCA and are the basis for civil monetary penalties. On February 14, 2012, Centers for Medicare and Medicaid Services (CMS) released the Proposed Rule regarding the identification, reporting, and repayment of Medicare overpayments as required under the ACA. CMS proposes a 10-year look-back period for an overpayment. Under this provision, providers

and suppliers would be required to report and return overpayments identified within 10 years of the date the overpayment was received. CMS is also proposing to amend the reopening regulation to expand it an additional six years. If finalized, the 10-year look-back period will create an additional level of risk for liability under state and federal false claims statutes, and expanded opportunities for relators.

Conclusion

On December 4, 2012, the DOJ announced that from January 2009 through the end of the 2012 fiscal year, it recovered more than \$9.5 billion in federal health care dollars through FCA actions. In 2012 alone, the DOJ made a record recovery for health care fraud, recovering over \$3 billion, of which nearly \$2 billion resulted from cases alleging false claims for drugs and medical devices under federally insured health programs. There is no sign of the aggressive pursuit of the health care industry through the FCA letting up. Indeed, the amendments to the FCA under FERA and the ACA only expand the liability and make the cases more difficult to defend.



Steve Sozio is a partner in Jones Day's Health Care and Government Investigations Practices. He can be reached at (216) 586-7201, or at sgsozio@jonesday.com.



Rachael Ream is an associate in Jones Day's Health Care and Government Investigations Practices. She can be reached at (216) 586-7759, or at raream@jonesday.com.