False Claims Act Litigation:
A Practitioner's Guide to the False Claims Act

by Larry Golston

"The world is a dangerous place, not because of those who do evil, but because of those who look on and do nothing." -Albert Einstein

INTRODUCTION

The False Claims Act ("FCA") is a federal statute that imposes liability on individuals, companies or entities that defraud the federal government. The FCA is the primary weapon used to combat fraud and recover funds owed to the Federal Government. What makes the FCA an effective litigation tool? Without a doubt, the strength of the FCA lies in the statute's qui tam and damages provisions. In the fiscal year ending September 30, 2018, the U.S. Government recovered approximately $2.88 billion in FCA lawsuits from civil settlements and judgments.[1] The recovery in 2018 marked an eight year low with respect to recoveries.[2] In each fiscal year from 2010 to 2017 the government recovered more than $3 billion.[3]

I. History of the False Claims Act

The False Claims Act ("FCA"), 31 U.S.C. §§3729-3730, was enacted by Congress in 1863 at the request of President Abraham Lincoln, in an effort to combat profiteering by Union Army suppliers.[4] The Act provided both civil and criminal penalties for fraudulent claims submitted to the United States.[5] Initially known as the "Informer's Act," the FCA was designed to combat

[1] See, Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Recovers Over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018 Recoveries (Dec. 21, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-reovers-over-28-billion-false-claims-act-cases-fiscal-year-2018.
[2] See, https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery.
[3] Id.
[4] See, Act of Mar. 2, 1863, ch. 67, § 1, 12 Stat. 696-697 (1863) (current version at 31 U.S.C. §§ 3729-3733.
[5] Id.

defense procurement fraud by providing to any private citizen the right to file a civil action against anyone who submitted a false claim for payment to the United States Government.[6] Under the original FCA, the private citizen ("relator") acted essentially as a private attorney general by bringing a civil suit and was rewarded by receiving fifty percent of all moneys recovered in the lawsuit.[7]

These civil suits were known by the Latin phrase "qui tam pro domino rege quam pro si ipso in hac parte sequitur," which translated into English means he "who sues on behalf of the King as well as for himself."[8] The purpose of the *qui tam* provision of the FCA, originally and now, is to encourage private individuals who are aware of fraud being perpetrated against the Government to bring such information forward.[9] The language of the original FCA permitted the relator to initiate suit even though that private individual contributed nothing to the exposure of the fraud alleged.[10] That right remained intact until the FCA was amended. During the 1930s relators could, and routinely did, file FCA suits without having any independent knowledge of the fraudulent acts.

In some instances, relators filed civil qui tam suits that were based on allegations copied from criminal indictments.[11] The 1940s, witnessed a rise in FCA lawsuits filed by individuals who had no independent knowledge of any particular fraud. Rather, these individuals simply copied information from criminal indictments and other public sources and regurgitated the information in FCA civil complaints. In response to what it deemed an abuse of the statute,

[6] See United States ex rel. Graber v. City of New York, 8 F. Supp. 2d 343, 352 (S.D.N.Y. 1998).
[7] See, Act of Mar. 2, 1863, ch. 67, §§ 1, 3, 6, 12 Stat. 696-698 (1863).
[8] Black's Law Dictionary Law Dictionary 867 (6th ed. 1991).
[9] See, United States ex rel. Williams v. NEC Corporation, 931 F.2d 1493, 1497 (11th Cir. 1991).
[10] See supra note 13.
[11] Id. See also United States ex rel. Marcus v. Hess, 317 U.S. 537, 545-48, 63 S.Ct. 379, 384-86, 87 L.Ed. 443 (1943).

Congress amended the FCA in 1943.[12] The 1943 Amendments made two substantial changes to the FCA. First, Congress incorporated a broad jurisdictional bar against qui tam lawsuits "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States or any agency, officer or employee thereof, at the time such suit was brought."[13] Additionally, the 1943 amendment reduced the qui tam relator's share of the recovered proceeds from 50% to between 10% and 25%; thereby creating less of an incentive for individuals to report government fraud.[14] The 1943 Amendments weakened the FCA to such an extent that, from a practical standpoint, meaningful qui tam suits ceased to exist for the next forty-three years.

In the 1980s, in response to the Cold War, U.S. defense spending soared. As defense spending increased, highly-publicized fraud involving defense industry contractors also increased. These incidents caused Congress to reassess the FCA's utility in combating fraud. Consequently, in 1986 Congress once again amended the FCA. These amendments substantially expanded the scope of the FCA by providing large financial incentives to whistleblowers and increased the whistleblower's ability to bring qui tam lawsuits and participate in the litigation. In 2009, Congress enacted the Fraud Enforcement Recovery Act ("FERA"). FERA effectively stands as a legislative reversal of the Supreme Court decision in *Allison Engine v. United States ex rel. Sanders*.[15]

In *Allison Engine*, the Supreme Court held that there is no FCA liability when a subcontractor submits a false or fraudulent claim to the contractor for work done on behalf of the

[12] See supra note 13.
[13] 31 U.S.C. § 232 (c) (Supp. III 1943). 57 Stat. 608 (1943).
[14] Id.
[15] 553 U.S. 662 (2008).

Government. The Court reasoned that in such instances the subcontractor's intent is to defraud and/or submit a false claim to the contractor, not the Federal Government. FERA changes the result in Allison Engine by extending liability to subcontractors when: (1) the subcontractor intended to defraud a contractor that is providing services or goods to the Government; and (2) the contractor is receiving or will receive payment from federal funds.

II. FCA Liability

Under the FCA, liability extends to any person who:

1. Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; (31 U.S.C. §3729 (a)(1)(A))

2. Knowingly makes, used or caused to be made or used, a false record or statement material to a false or fraudulent claim; (31 U.S.C. §3729 (a)(1)(B))

3. Conspires to commit a violation of subparagraph (A), (B), (C), (D), (E), (F) or (G); (31 U.S.C. §3729 (a)(1)(C))

4. Has possession, custody or control of property, or money used, or to be used, by the Government and, knowingly delivers, or causes to be delivered, less than all of that money or property; (31 U.S.C. §3729 (a)(1)(D))

5. Is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; (31 U.S.C. §3729 (a)(1)(E)

6. Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; (31 U.S.C. §3729 (a)(1)(F)); or

7. Knowingly makes, uses, or causes 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 conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, (31 U.S.C. §3729 (a)(1)(G)).

(a) Definition of "Claim"

The FCA contains a broad definition of what constitutes a claim. Section 3729(c) provides:

> For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Consequently, under the FCA, a claim encompasses virtually all demands or requests that cause the disbursement of federal funds whether the demand or request is on the government directly or is made on some other recipient of government funds.[16] Essentially, any action by a claimant that causes the government to pay out money it is not obligated to pay, or any action which intentionally deprives the government of money it is lawfully due, are properly deemed a "claim" by the FCA.[17] However, the FCA explicitly states that it does not apply to tax claims under the Internal Revenue Code.[18]

(b) Made "Knowingly"

The pre-1986 version of the FCA made it clear that a person was liable of an FCA violation if he or she knowingly intended to defraud the Government.[19] However, a split in the Circuit Courts emerged over the requisite degree of knowledge necessary to prove an FCA violation. Some courts held that "knowingly" did not rise to the level of a specific intent to defraud.[20] On the other hand, other courts held that the FCA's "knowingly" requirement did mandate a specific intent to defraud.[21] The 1986 amendments to the FCA resolved the split among the Circuit Courts.

---

[16] See, United States v. Neifert-White Co., 390 U.S. 228, 233 (1968).
[17] Id.
[18] 31 U.S.C. § 3729(d) (2006).
[19] See 31 U.S.C. § 3729(1)-(3) (1982).
[20] See, United States v. Hughes, 585 F.2d 284, 286-88 (7th Cir. 1978).
[21] See, United States v. Mead, 426 F.2d 118, 122-23 (9th Cir. 1970).

Under the 1986 amendments, §3729(b) clearly states that "no proof of specific intent to defraud is required" to prove a violation.[22] Instead, a defendant will be liable if the relator proves that the defendant "knowingly" submitted a false claim.

The term "knowingly" is defined as (1) actual knowledge of the false information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information.[23] While a relator can establish liability under the FCA by proving deliberate ignorance or reckless disregard for the truth of claims, negligence or an innocent mistake are not sufficient.[24] This is a much easier burden than having to prove the defendant actually intended to submit a false claim under the FCA.

(c) Must be "False" or "Fraudulent"

Unlike the terms "claim" and "knowingly," the terms "false" and "fraudulent" were not defined by Congress in the FCA. Courts have held that the essence of a fraudulent claim is one that is based on a lie.[25] The withholding of information critical to the government's decision to pay is the essence of a false claim.[26] Also, Courts have held that by adding the connector "or," a relator does not have to prove a claim is both false and fraudulent.[27] The most common examples of false claims are claims for goods or services not provided. False claims can also arise from goods or services provided in violation of contract terms, specifications, statutes, or regulations.

[22] 31 U.S.C. § 3729(b).
[23] Id.
[24] See, United States ex rel. Farmer v. City of Houston, 523 F.3d 333, 338 (5th Cir. 2008); See also Androphy & Corerro, supra note 22, at 36-37.
[25] See, Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1478-79 (9th Cir. 1991).
[26] See Dr. C. Pacini & M. Hood, *The Role of Qui Tam Actions Under The False Claims Act in Preventing and Deterring Fraud Against Government*, 15 U. Miami Bus. L. Rev. 273 (2007).
[27] Id.

A government contractor or vendor may defeat a finding of falsity, however, when a contract or regulation is subject to more than one reasonable interpretation.

(d) Materiality

The FCA defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[28] Most courts have held that a relator has to establish materiality when bringing an FCA claim. The question of materiality gets murky, however, when dealing with an FCA claim based upon implied false certification claims. An implied false certification theory is a claim alleging that when the defendant made a claim for payment to the Government, it failed to disclose that the goods or services at issue were not incompliance with statutory, regulatory or contractual requirements. In *Universal Health Services, Inc., v. Escobar*, the Supreme Court weighed in on two important FCA related issues: (1) whether implied false certifications are a viable FCA theory; and (2) the materiality requirement for implied false certification claims.[29] First, the Supreme Court held that implied false certification theories can be maintained under the FCA.[30] Second, with respect to the materiality inquiry, although it described the standard as "demanding" the Supreme Court rejected a bright line test for determining when implied false certifications were material. Rather, the *Escobar* Court identified the following factors as relevant, but not dispositive, when a trial court makes a materiality determination:

---

[28] 31 U.S.C. § 3729(b)(4).

[29] Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989, 2001 (2016).

[30] The Court held that the implied false certification theory may apply under the FCA where at least two conditions are satisfied: a defendant must (1) make a specific representation on a claim for payment to the government, and (2) knowingly fail to disclose noncompliance with a material requirement for payment, which failure renders that representation a "misleading half-truth" (even if the representation is true on its face). Universal Health Servs., Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989, 2001 (2016).

1. Government Knowledge /Government Treatment of Violations (Subjective test): Whether the Government knew of a claim's falsity but nevertheless paid the claim would tend to negate a finding that the alleged noncompliance was material.[31] On the other hand, "evidence that the defendant knows that the government consistently refuses to pay claims in the mine rune of cases based on noncompliance" supports a finding of materiality.[32];

2. WWGD: What would the Government have done if it knew of the defendant's noncompliance? What the Government could have done or whether it would have had the option to decline making the payment if it knew of the defendant's noncompliance is not relevant. Rather, this factor focuses only on what the Government would have actually done.[33]

3. Importance of the Violation to the Government Decision Maker (Objective test): a violation is material when the violation is important to the Government decision maker. Materiality may be found if a "reasonable man [acting on the government's behalf] would attach importance to the [representation] in determining his choice of action in the transaction."[34]

4. Labels Used: Did the statute, regulation, or contract at issue identify compliance as a condition of payment? The Supreme Court rejected the so-called "condition of payment" argument as being dispositive of the materiality issue. Whether the Government has expressly identified a provision as a condition of payment, however, is relevant to the question of materiality.[35]

5. Essence of the Bargain: Does the regulatory, statutory or contractual violation go to the "essence of the bargain" between the defendant and the Government. If so, the violation is material.[36]

(e) Causation and Damages

When a person "presents, or causes to be presented, a false or fraudulent claim to the U.S. government for approval," the causation element under the FCA is satisfied.[37] The FCA applies to any person who knowingly assisted in causing the government to pay claims that are grounded in fraud, without regard to whether that person had direct contractual relations with the

[31] Escobar, 136 S.Ct. at 2003.
[32] Id.
[33] Id.
[34] Id.
[35] Escobar, 136 S.Ct. at 2002.
[36] Id. at 2003, n..5.
[37] See Androphy & Corerro, supra note 22, at 35-36.

government. The FCA allows for significant civil monetary damages to be awarded against a defendant who submits a fraudulent claim to the government.[38] Violators are liable for a civil penalty of 5,500 too $11,000 per claim plus three times the government's damage.[39] The courts disagree, however, as to whether the relator must prove injury or damages as an element of a FCA violation.[40]

(f) Public Disclosures

Section 3730(e)(4)(A) contains the "public disclosure" bar to FCA litigation. The public disclosure bar provides that the a court shall dismiss a FCA qui tam lawsuit where the allegations or transactions in the qui tam suit were publicly disclosed: "(i) in a federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office or other Federal report, hearing, audit or investigation; or (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."

(g) Original source

Under the FCA, an original source is someone 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."[41] Since 2010, when the definition of "original source" was amended, a relator can establish that he or she is an original source even if some of their allegations are based on secondhand/publicly disclosed

[38] See United States ex rel. Marcus v. Hess, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943).
[39] See, 31 U.S.C. § 3729(b) wherein the FCA states that a penalty of $5,000 to $10,000 per claim may be recovered; but see also Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s)(2), 110 Stat. 1321-358, 373 (1996) indicating that the Department of Justice increased the penalty amount by 10 percent to adjust for inflation. The current amount for FCA penalties ranges from $11,000 to $22,000.
[40] See Pacini & M. Hood, supra 34 at 297.
[41] 31 U.S.C. §3730(e)(4)(B).

information – so long as those allegations materially add to the information that has already been publicly disclosed.

III. The FCA's Qui Tam Provisions and Procedures for Filing a Claim

An FCA claim can be brought by the Government directly or by the relator pursuant to the FCA's qui tam provisions.[42] In the case of qui tam relators, the FCA requires a relator to follow special filing procedures in initiating a qui tam lawsuit. Prior to filing a qui tam suit, a relator must prepare and serve a copy of the complaint and a written disclosure of substantially all material evidence within his possession on the U.S. Attorney General, not the defendant.[43] Next, the relator must file the complaint in camera and under seal. The complaint will remain under seal for at least 60 days so that the government can decide whether to intervene.[44] Failure to file the complaint under seal and provide the written disclosure statement may result in the lawsuit being dismissed.[45]

The defendant is not served with the Complaint until the government decides whether to intervene and the court orders service.[46] The relator must deliver a copy of the summons and complaint to the United States Attorney for the district where the action is brought and send a copy of the summons and complaint by registered or certified mail to the Attorney General of the United States in Washington, D.C.[47] Upon the expiration of the sixty-day period during which the complaint is sealed, the Government has five basic options on how to proceed. The government can request an extension of the time period to continue its investigation; intervene and take over the prosecution of the FCA suit; decline to intervene and permit the relator to prosecute the FCA

[42] 31 U.S.C. §3730(a) and (b).
[43] Id. at §3730 (b)(2).
[44] Id.
[45] See, Foster v. Savannah Communication, 140 Fed. Appx. 905, 908 (11th Cir. 2005).
[46] See, 31 U.S.C. §3730 (b)(2).
[47] Id.

suit; move to dismiss the suit; or attempt to settle the suit prior to formal intervention or declination.[48] Even if the government declines to intervene initially, it may intervene at a later date upon a showing of good cause. If the Government intervenes in the qui tam action, it is responsible for the prosecuting the lawsuit.[49]

Also, when it intervenes, the Government can settle the action even if the relator objects provided that the relator is given a hearing to express his or her concerns and the court finds that the settlement is fair.[50] If the government intervenes in the qui tam action, the relator is entitled to receive between 15 to 30 percent of the amount recovered in the qui tam lawsuit.[51] However, if the Government declines intervention, the relator's share is increased to an amount of 25 to 30 percent.[52] If the qui tam lawsuit is successful, the relator is also entitled to recover attorney's fees and expenses from the defendant.[53]

A. Statute of Limitations

In addition to affording the Government an opportunity to investigate the claim prior to proceeding with litigation, the qui tam relator must also file his or her suit within the time prescribed by the statute of limitations. With respect to the statute of limitations, the FCA states in §3731(b):

> A civil action under 3730 may not be brought –
>
> **(1)** more than 6 years after the date on which the violation of section 3729 is committed, or

[48] See, 31 U.S.C. §3730(b)(3); 31 U.S.C. §3730(b)(4)(A)(B); and 31 U.S.C. §3730(c)(2)(A) and(B).
[49] 31 U.S.C. § 3730(c)(1).
[50] 31 U.S.C. §3730(c)(2) (B).
[51] 31 U.S.C. §3730(d)(1).
[52] 31 U.S.C. §3730(d)(1).
[53] 31 U.S.C. § 3730 (d)(1) and (2).

(2) more than 3 years after the 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.[54]

As noted above, both the qui tam relator and the Government must file the FCA claim within 6 years of the FCA violation regardless of who (relator or Government) initiates the lawsuit. Lawsuits commenced by the Government can receive an additional 3-year tolling period if circumstances are warranted.

IV. Common Areas of Concern and Theories of Liability

A. Common FCA Issues

(a) Criminal prosecution.

Filing a civil qui tam lawsuit may have risks for the relator that should be explored by the attorney and prospective plaintiff. For example, if the aspiring relator personally participated in the actions or misconduct that is the basis of the fraud, that person could be in jeopardy of being prosecuted for a crime.[55] If the relator participated in the crime, filing a qui tam case will likely not provide him with protection from criminal prosecution.

In fact, the filing the lawsuit could make the Government aware of an indictable offense that might otherwise have gone undetected. Additionally, a relator convicted of a crime related to the underlying fraudulent activity cannot recover under a civil qui tam suit.[56] Qui tam relators who are not convicted but are the masterminds of the fraudulent claims can recover an award but these relators are generally limited in the amount they can recover.[57] A lawyer thinking of filing

[54] 31 U.S.C. § 3731(b).
[55] See Pacini & M. Hood, supra 34 at 287.
[56] 31 U.S.C. §3730(d)(3).
[57] Id.

a qui tam suit under the FCA should carefully examine the possibility of criminal liability before proceeding.

(b) Retaliatory discharge claim.

If the relator is a current employee of the Defendant there are obviously concerns regarding whether the relator's employment would be jeopardized by informing the government of the Defendant's fraudulent activities. To address this concern, the FCA includes provis0ions protecting whistleblowers from adverse employment actions or discrimination by their employers. An FCA retaliatory discharge claim can be filed when an employer discharges, demotes, suspends, harasses, or otherwise discriminates against the employee with respect to her employment. Under §3730(h) of the FCA, the employer may be liable for two times the amount of back pay, interest, and special damages.[58] Section 3730(h) also includes reinstatement to the same seniority status for employees that establish retaliation under the FCA.[59] Whistleblower protection is available to any employee who participates in the qui tam action on behalf of the government or relator.[60] An employer may be liable for a whistleblower retaliation claim even if the fraud allegation underlying the qui tam action is shown to be without merit.

In addition, qui tam relators seeking to file a retaliation claim now have the benefit of an important new amendment. Recently, the retaliation provisions of the FCA were amended by the Dodd-Frank Wall Street and Consumer Protection Act. Specifically, under §1079(b)(1)(c) of the Dodd-Frank Act qui tam relators now have up to three (3) years to file a retaliatory discharge

[58] See, 31 U.S.C. §3730(h).
[59] Id.
[60] Id.

lawsuit. Also, §1079(b)(1)(c) broadens the scope of activity protected from retaliation as well as the class of persons protected by the FCA's retaliation provisions.

(c) Rule 9(b), of the Federal Rules Civil Procedure

Because FCA suits are civil actions based on fraud, relators are subject to the pleading requirements of the Federal Rules of Civil Procedure 9(b) which states, in pertinent part that "the circumstances constituting fraud or mistake shall be stated with particularity." Most courts strictly apply Rule 9(b) to FCA qui tam complaints.[61] Rule 9(b) requires a complaint to specify the time, place, persons involved, and the fraudulent nature of the alleged acts. Essentially, qui tam relators must state "who, what, when, where, and how" with respect to fraudulent claims actually submitted to the government.

B. Theories of Liability[62]

(a) Fraudulent Billing for Medicare/Healthcare Treatment

As mentioned above, from fiscal year 2010-2017, the DOJ recovered $3 billion or more each fiscal year in FCA settlements and judgments. The overwhelming amount of these recoveries involved health care fraud. For example, in 2010 the largest amount of the $3 billion recovered ($2.5 billion), was attributable to HHS' Medicare and Medicaid programs. There are several areas within the Medicare/healthcare treatment arena which FCA qui tam cases arise.

(1) Claims For Services Not Actually Performed: The simplest FCA claims arise when a medical provider bills for services that were not provided. This usually occurs when the

[61] See, e.g., United States ex rel. McCoy v. California Med. Review, 723 F. Supp. 1363 (N.D. Cal. 1989).
[62] Although the FCA originally involved fraud in the defense contractor industry, there are numerous theories of liability under the FCA and the following list of theories is by no means exhaustive.

provider performs one procedure yet bills for other procedures that could be related to the procedure performed but were not actually performed.

(2) Claims for Services Not Medically Necessary: Medical providers are routinely required to certify to the Government that services provided to a patient (e.g. tests, therapy, etc.) are medically necessary and that the patient met the requisite criteria for receiving the service. The certification to the government typically takes place when the provider submits a Certificate of Medical Necessity ("CMS") to the government.

(3) Claims Misrepresenting the Provider of Services: When a medical provider misrepresents the qualifications of the person that provides medical services to patients, an FCA violation may occur. Often these FCA claims arise where a provider represents to the Government that someone eligible to receive Medicare reimbursement provided a service, when in reality the service was provided by someone not eligible to receive reimbursement. Examples of this behavior could be a Doctor instructing a nurse to provide a service but then insisting that the nurse bill Medicare using the Doctor's provider identification number (PIN).

(4) Upcoding for Services and/or Goods: Billing for a service not provided or products not delivered as billed.

(5) Unbundling Services: In the healthcare industry it is common for certain procedures and services that are automatically performed as a group or set to be billed as a single service. Unbundling occurs when medical providers are reimbursed for bundled services. Then, in addition to what they have already billed the government, the provider pulls out a service or services from the bundled group and submits another claim to the Government. Essentially, the medical provider is paid multiple times for a service that was only provided once.

(6) **False Cost Reports:** Medicare Part A providers such as hospitals, nursing homes, and home health facilities routinely have to submit cost reports submitted by medical providers to Medicare. Typically, these cost reports require the providers to certify that the medical provider is in compliance with all federal laws that are required for reimbursement. Examples of false cost reports that result in FCA claims are: inflating the costs of patient care; reporting costs of non-covered services; seeking reimbursement for costs that are not related to patient care; improperly manipulating statistics; and seeking reimbursement for costs related to non-Medicare patients.

(b) **The Stark Act:** The Stark Act, 42 U.S.C. §1395 prohibits a physician or immediate family member from referring a patient to any provider that provided designated health services ("DHS") if the physician or immediate family member has a direct or indirect financial relationship with the provider. A financial relationship is defined as any compensation arrangement between the physician and the provider. In the event that a referral is made and a financial relationship exists, the provider cannot submit a claim to Medicare for the DHS provided unless the financial relationship falls under a statutory or regulatory exception. A Stark Act violation can result in FCA liability.

(c) **Anti-Kickback Statute:** The Anti-Kickback Statute ("AKS"), 42 U.S.C. § 1320a-7b(b), prohibits, among other things, paying kickbacks to induce referrals for services paid for under Federal healthcare programs. The AKS arose out of Congressional concern that payoffs to those who can influence healthcare decisions corrupt professional healthcare decision-making. These actions could result in Federal funds being diverted to pay for goods and services that are medically unnecessary, of poor quality, or even harmful to a vulnerable patient population. In pertinent part, the statute states:

> (b) Illegal remuneration
>
> * * *
>
> (2) whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to

induce such person -

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care p r o gram, or

(B) to purchase, lease, order or arrange for or recommend purchasing, leasing or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program, shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.[63]

Violation of the statute can also subject the perpetrator to exclusion from participation in Federal health care programs and civil monetary penalties of up to $550,000 per violation and up to three times the amount of remuneration paid.[64] Under amendments to the FCA made in 2010 (i.e., the Patient Protection and Affordable Care Act [also referred to as the ACA or PPACA] amendments), a violation is automatically a FCA violation.

(d) <u>Off Label Drug Marketing</u>: The Federal Drug Administration ("FDA") is required by law to approve all prescription drugs sold in the United States. Once an application for approval has been made, the FDA reviews a drug's safety and effectiveness. Thereafter, the FDA will approve the drug for the treatment of particular illnesses or diseases. Once it has been approved for a particular illness, the manufacturer must market the drug for only that use. However, in an effort to increase revenues and profits, some drug manufacturers will market or promote a drug for a use that the FDA has not approved. If the Medicare program pays for these non-approved uses, an FCA claim may arise.

[63] 42 U.S.C. § 1320a-7b(b)(2).
[64] 42 U.S.C. § 1320a-7(b)(7); 42 U.S.C. § 1320a-7a(a)(7).

(e) Defense and Homeland Security Contracts: The United States spends approximately $500 billion per year in national defense. Fraud by defense contractors and contractors involved with homeland security continues to be one of the most important areas of FCA litigation. Although there are an infinite amount of theories in schemes involved with this kind of fraud, some common FCA theories in this area are:

(1) Product Substitution. Defense and security contracts routinely require contractors to use products or parts of a particular quality or type. Further, some contracts require that parts be made in the United States or made by American Companies. When contractors substitute products or parts of that are substandard or made of inferior quality, an FCA violation can occur. Likewise, if a contractor uses parts from foreign sources without obtaining the Government's permission, the contractor may be liable under the FCA.

(2) Mischarging and Cross-Charging. Both mischarging and cross-charging are common types of fraud. Mischarging, as the name suggests, occurs when the contractor submits bills to the Government that contain false charges. This type of fraud includes instances where a contractor inflates its bill to the Government by charging for labor, parts or other costs that are more than the costs actually incurred by the contractor. Cross-charging occurs when a contractor charges work performed on one contract to a different contract. Common occurrences of cross-charging occurs when the contractor shifts expenses and costs (e.g. overhead) from one contract to another in order to increase profits.

(3) Failure to Test or Inspect. Government contracts in the defense and homeland security sphere often require the contractor to perform tests or inspections on a product to ensure that the product functions properly. Failure to perform tests or inspections that are called for by the contract, or called for by government regulations, can result in an FCA violation.

(4) Substandard Products or Services/Failure to Adher to Specifications. Equipment, machinery, weapons and other products usually have to meet the design specifications incorporated into military contracts. The knowing submission of these items that do not meet military specifications could result in an FCA violation. Likewise, when a contractor knew or should have known, that equipment, machinery, weapons and/or a product was worthless or would not perform as promised but delivers the items to the Government anyway, the contractor violates the FCA.

(5) General Procurement. Any false certification that items furnished under a contract with the government are of a quality specified in the contract or a certification that the items conform with contract requirements is an FCA violation.

(6) Violations of the Truth-In-Negotiations Act ("TINA"). Because of the complex and specialized nature of weapons systems and certain equipment used by the U.S. Military, the Government often has no choice but to purchase weapons and equipment from a single supplier. The inherent problem in this circumstance is that the Government has no real way of knowing if it is paying a fair price since there is no competitive bidding process for the contracts. To alleviate this problem, the TINA requires contractors to disclose all relevant information about its cost information. Contractors who inflate their costs and expenses may be found liable for FCA violations.

(f) Scientific Research Cases: Typically these cases involve liability of hospitals and universities for false information in obtaining federal funding for research. A hospital or university that receives grants from the Government to fund a research project may be liable under the FCA for failing to comply with conditions and/or stipulations required by the federal grants.

CONCLUSION

Unlike many other cases, the investigation of a qui tam lawsuit must be done both efficiently and quickly. Plaintiff's counsel will serve their clients well if they ask and have answered the following questions in determining whether the relator has a viable qui tam lawsuit and whether any ancillary claims may be pursued:

1. Who made a false statement to the government for the purposes of getting a claim paid, or for purposes of avoiding paying money owed to the government? To whom? When, where and how?

2. How does your potential client know this (i.e. is he or she an "original source" as defined by the FCA or is his knowledge based on publicly disclosed information)?

3. Who else has knowledge of the information your client possesses?

4. Are there any documents that refer to or support the alleged fraudulent conduct? If so, where are these documents?

5. What government funds are involved?

6. Are there any government regulations related to the disbursement of these funds?

7. Did the defendant violate these regulations?

8. Did your client plan or initiate the false claim? If so, is this client likely to receive the zero to ten percent recovery amount, if at all? Plaintiff's counsel should do a criminal background check.

9. What is the client's motivation or rationale for being a whistleblower in this instance and has the client ever been a whistleblower before?

10. Was the client involved in presenting the false claims and/or the fraudulent conduct at issue?

11. How has the government harmed by the false claims? Did the government experience a small loss, large loss or no actual loss at all?

12. If the client is an employee of the defendant, what is the client's background and history with this or any other employers? Has the client signed any contracts or agreements while employed or contracted with the defendant that may affect his or her ability to bring the qui tam suit?

13. Does the client allege that he or she has been retaliated against because of acts done in furtherance of the FCA?

14. Have any other federal laws been violated?