Bad Mules

A Primer on the Federal and Michigan False Claims Acts

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> "Worse than traitors in arms are the men who pretend loyalty to the flag, feast and fatten on the misfortunes of the nation while patriotic blood is crimsoning the plains of the south and their countrymen are moldering in the dust."
>
> —Abraham Lincoln

The federal False Claims Act (FCA)[1] was enacted in part because of bad mules. During the Civil War, unscrupulous defense contractors sold the Union Army decrepit horses and mules in ill health, faulty rifles and ammunition, and rancid rations. These frauds caused President Abraham Lincoln to urge Congress to pass, in 1863, the original FCA, commonly known as the "Informer's Law" or the "Lincoln Law."[2]

In a nutshell, the FCA made it illegal for a party to present false statements in writing (claims) to the United States government to obtain money or reimbursements to which the claimant was not entitled—for example, payment for sickly mules. The statute also prohibited the presentation of false claims to conceal an obligation to transmit money to the government, usually referred to as "reverse false claims."

Today, while the FCA is no longer used against traitorous Union suppliers, it is still an important weapon against government fraud—one that has become increasingly relevant as the federal deficit mounts and the costs of government-sponsored health-care programs, in particular, steadily inflate. Today, health-care costs associated with Medicare and Medicaid alone consume more than 20 percent of the federal budget.[3] In addition, Medicaid (which is jointly funded by state and federal governments) is one of the largest and fastest-growing items in state budgets.[4]

For this reason, many states, including Michigan, have borrowed from the nineteenth-century law and enacted their own versions of the FCA, several of which specifically target Medicaid fraud. In 2008, Michigan amended its own false claims statute, the Michigan Medicaid False Claims Act (Michigan FCA).[5] The amendments, which took effect January 6, 2009, are intended to expand the scope of the statute and make it easier to hold Medicaid fraudsters liable for their wrongdoing.

This article will provide an overview of both the federal FCA and the Michigan FCA and how both can be used to protect taxpayer dollars.

Fast Facts:

- The False Claims Act allows private citizens with knowledge of fraud against the federal government to file a whistleblower or "*qui tam*" suit on the government's behalf.
- Billions of dollars of taxpayer money are wrongfully obtained by fraudsters each year, with the Medicare and Medicaid programs serving as popular targets for fraudulent billings.
- Michigan has enacted its own version of the False Claims Act to combat fraud and abuse in the Medicaid program.

The History of the FCA

The Relator

When the FCA was originally enacted in 1863, government resources were strained by Civil War efforts, and officials could not police and enforce the laws themselves. For this reason, the FCA conferred standing on private citizens to file lawsuits on behalf of the federal government against the wrongdoers. An action filed by a private citizen (called a "relator") on behalf of the government is known as a "*qui tam*" action—shorthand for a Latin phrase, roughly translated as "one who sues for the King, as well as for himself"[6] because *qui tam* actions are derived from the early English common law. These *qui tam* lawsuits are commonly known to the public as "whistleblower" lawsuits.

A key provision of the original FCA awarded 50 percent of the recovery to the relators (the "relator's share") to encourage private citizens to expose fraud.[7] Although the modern day relator's share is less than 50 percent, relators are still eligible to receive a portion of the recovery, as discussed more fully below.

The 1943 Amendments

Following perceived abuses by a number of so-called "parasitic" FCA lawsuits filed by plaintiffs relying on information already in the government's possession or public knowledge, the FCA was crippled by congressional amendment in 1943.

The 1943 amendments greatly reduced the relator's share and eliminated *qui tam* lawsuits when the government had prior knowledge of the fraud—even when the government had taken no action after a number of years and obviously intended to take no action to stop the fraud. The 1943 amendments stopped virtually all *qui tam* cases, and fraud against the government increased.

The 1986 and 2009 Amendments

During the massive defense buildup of the 1980s, reports of $900 toilet seats and $500 hammers aroused congressional ire. A new era for the FCA was ushered in by amendments of the FCA in 1986 championed by United States Senator Charles Grassley (R–Iowa) and signed into law by President Ronald Reagan.

The 1986 amendments vastly strengthened the FCA as a tool for fighting profiteering and fraud against the government. Specifically, the 1986 amendments increased the relator's share,[8] provided for treble damages and civil monetary penalties,[9] granted employees whistleblower protection,[10] extended the period of limitations,[11] and reduced the level of proof for fraud to "actual knowledge," "deliberate ignorance," or "reckless disregard."[12]

The FCA was further amended in 2009 following congressional concerns that the effectiveness of the act had been undermined by court decisions limiting the scope and purpose of the law.[13] Specifically, legislators felt that with the federal government projected to spend more than $1 trillion under the Troubled Asset Relief Program (TARP) and the Stimulus Bill,[14] the FCA needed to be corrected to protect government funds.

Significantly, the current FCA allows the government to recover treble the amount of damages due, as well as penalties[15] and fees for the relator's attorneys in *qui tam* cases.[16] Its impact on the federal "fisc" (i.e., government funds) has been enormous, resulting in the recovery of more than $1.3 billion during fiscal year 2008 and more than $21 billion since 1986.[17] In 2008, about 78 percent of the year's recovery came from relator-initiated *qui tam* lawsuits.[18]

Since wrongdoers now face the threat of having to repay more than the amount stolen, the FCA silently deters fraud against the government by its mere presence. Today, a key provision in the FCA remains the relator's entitlement to a sizable portion of the recovery, which has caused some wrongdoers to refer to the FCA as the "Bounty Hunter's Law." Significantly, the relator is entitled to 15 to 25 percent of the recovery in intervened cases[19] and 25 to 30 percent in declined cases[20] (which are discussed below).

Since the relator's reward derives from treble damages, the relator's share can be sizable. For example, in August 2008 the United States and the state of Illinois negotiated a $225 million settlement with Amerigroup Corporation, following a lawsuit alleging that Amerigroup and its Illinois subsidiary were systematically excluding pregnant women and other high-cost patients from the company's managed care program, thus increasing its own profits in violation of the law. The relator received more than $56.2 million as his share of the federal and state recoveries.[21]

While some FCA opponents complain that these bountiful rewards are unjustified and harm the federal treasury, since the government can itself recover treble damages plus penalties, the net recovery to the government will nearly always exceed what has been taken from it even after the relator's share and costs are deducted. Said another way, the relator makes the government whole for fraud the government knew nothing about or did nothing about.

The modern FCA also includes a civil penalties provision. Specifically, the statute imposes liability from $5,500 to $11,000 for each false claim submitted for payment.[22] Even if the actual damages resulting from false claims are small—for example, a defendant who intentionally overbilled repeated small amounts to avoid detection—the penalties allow the wrongdoers to be punished, the government to be compensated for its losses, and future fraud to be deterred.

Modern False Claims Act Litigation

Beginning with the Civil War and continuing with the 1986 amendments, the FCA primarily targeted defense contractor fraud.[23] Today, however, the FCA widely applies to almost any situation in which federal dollars are found. The range of FCA cases has grown and will continue to grow, limited only by fraudsters' ingenuity and creativity. They include, but are certainly not limited to, fraud involving:

- Defense contracting.
- Federal educational grants (e.g., a researcher who receives federal funding and then fails to use the money as directed or promised).
- Government set-aside contracts (e.g., a business that poses as being woman- or minority-owned, when in fact it is not, to receive government contracts set aside for such disadvantaged businesses).
- Emergency relief programs.
- Housing programs.
- "Reverse false claims" (e.g., bulk or mass mailers certifying that their mailing is eligible for fourth-class postage rather than third-class, which carries a higher rate).

Health-Care Fraud

Today, the FCA is increasingly used to recover losses from Medicare and Medicaid fraud.[24] In 2008, health-care-related cases accounted for the majority of fraud settlements and judgments—the United States recovered $1.3 billion from both *qui tam* and cases initiated by the United States.[25]

As with the examples listed earlier, health-care fraud can manifest itself in many ways. For example, a nurse in a hospital or doctor's office may choose to "blow the whistle" after observing physicians billing for services that were not actually provided to patients, such as blood tests or medical examinations. Health-care fraud may also take the form of billing for medically unnecessary procedures, billing for services provided by untrained personnel (for example, a CT scan technician performing procedures designated as physicians' services), "upcoding" (for example, billing for a 30-minute patient visit when the physician only spent 5 minutes with the patient), or "unbundling" (billing extra for services already paid for as part of a global fee). One extensive kind of fraud scheme involves "off-label marketing," in which a pharmaceutical company markets drugs for purposes not approved by the FDA.

Other examples include:

- Paying unlawful remunerations or "kickbacks" to physicians in exchange for patient referrals or drug prescriptions.
- Double billing.
- Providing inadequate patient care.

Beginning with California in 1887, 25 states—including Michigan—have enacted their own versions of the FCA. Michigan had previously enacted anti-Medicaid fraud statutes, but only the attorney general had a right to sue under those antifraud laws. In 2005, the Michigan FCA was strengthened by adding a *qui tam* provision[26] and whistleblower protection rights.[27]

The 2008 amendments to the Michigan FCA included a retroactivity provision, which means that a person may file suit under the Michigan FCA alleging fraudulent conduct that took place before the 2008 amendments (so long as the relator complies with other statute of limitations provisions).[28] The amendments also included the addition of civil penalties, thus making the statute compliant under the federal Deficit Reduction Act of 2005 (DRA).[29]

The DRA compliance provision is especially important to ensure that money paid out because of fraud is returned to the state. The Medicaid program is jointly funded between the state and federal governments, with the federal government paying, on average, approximately 50 percent of a state Medicaid program's costs. Under the DRA, states with "qualifying" false claims statutes will receive, as an allocation from the federal government, an additional 10 percent of any recovery from fraud on the Medicaid program.[30] Key elements required to "qualify" include allowing *qui tam* suits, providing whistleblower protections, allowing relators to proceed with litigation when the state declines to intervene, providing for periods during which the lawsuit is not disclosed to anyone but the government, and penalties, all of which must be at least equal to the provisions of the federal FCA.

By the end of 2006, the Michigan attorney general and his staff had recovered approximately $21 million in Medicaid funds under the Michigan FCA. However, because of Michigan's previous lack of compliance with the DRA, Michigan lost 10 percent of the recovery, or approximately $2.1 million.[31]

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Filing the Case

Filing procedures are similar for both the federal and Michigan FCAs. A relator must provide to the government a written disclosure of all his or her evidence of the fraud. This is normally done in the form of a "disclosure statement" or narrative that is submitted to the United States attorney general and the local United States Attorney's office (and the state attorney general, for Michigan actions).[32] The lawsuit is filed in the circuit court or federal

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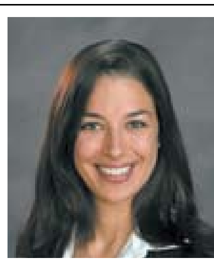
court in secret, or "under seal," and only the government is notified of the action so that it can effectively investigate the merits of the relator's allegations.[33]

During this "seal period," which can be extended by the court for "cause," the government investigates and decides whether the case has sufficient merit to justify "intervening" and taking over prosecution of the case. Conversely, the government may opt to decline intervention and leave prosecution of the case to the relator, which occurs in more than 75 percent of cases.[34] Although the initial seal period is 60 days (90 days or longer if filed in state court), some cases have remained under seal for nearly a decade while the government investigated.[35]

Conclusion

As this article is intended to be but a primer for those unfamiliar with the FCA and the Michigan FCA, a number of concepts like materiality, original source, exclusions, first to file, public disclosure, corporate integrity agreements, and statutes of limitations are left to another day. At first reading, the FCA appears to be simple; however, despite the noble objective of such *qui tam* laws, numerous filing requirements are woven into the statutes to discourage frivolous FCA lawsuits.

With the epidemic in corporate wrongdoing and the government's ballooning deficit, the FCA is vital to those concerned about profiteering, fraud, and integrity in government. In Michigan, the Medicaid False Claims Act provides the opportunity and protection for those with knowledge of fraud to come forward and help protect our state from those who siphon off health-care funds reserved for the sick, poor, and elderly. ■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FOOTNOTES

1. 31 USC 3729 *et seq.*
2. Dating back to at least as early as 1692, the American colonies had allowed citizens to sue on behalf of the government. However, the FCA in its current form originated in the Civil War. Sylvia, The False Claims Act: Fraud Against the Government (1st ed), § 2.5.
3. Furrow, Greaney, Johnson, Jost & Schwartz, Health Law: Cases, Materials and Problems (abridged 6th ed), ch 9, p 370.
4. *Id.*
5. MCL 400.601 *et seq.*
6. More fully, "*qui tam pro domino rege quam pro se ipso in hac parte sequitur.*" 3 Blackstone, Commentaries on the Laws of England, p 161.
7. Act of March 2, 1863, ch 67, § 6, 12 Stat 698.
8. 31 USC 3730(d).
9. 31 USC 3729(a)(1).
10. 31 USC 3730(h). Such protection now extends to contractors and agents, as well as employees.
11. 31 USC 3731(b).
12. 31 USC 3729(b)(1). Additionally, the FCA now makes clear that "no specific proof of intent to defraud" is necessary.
13. Fraud Enforcement and Recovery Act of 2009, PL 111-21, 123 Stat 1617.
14. American Recovery and Reinvestment Act of 2009, PL 111-5, 123 Stat 115.
15. Before September 29, 1999, the FCA imposed penalties of at least $5,000 and up to $10,000 at the discretion of the judge. 31 USC 3729(a)(1)(G). These amounts increased to $5,500 and $11,000 effective September 29, 1999. 28 CFR 85.3(a)(9).
16. 31 USC 3730(d).
17. United States Department of Justice, *More Than $1 Billion Recovered by Justice Department in Fraud and False Claims in Fiscal Year 2008* (November 10, 2008) <http://www.usdoj.gov/opa/pr/2008/November/08-civ-992.html>. All websites cited in this article were accessed October 25, 2009.
18. *Id.*
19. 31 USC 3730(d)(1).
20. 31 USC 3730(d)(2).
21. United States Department of Justice, *Amerigroup Settles Federal & State Medicaid Fraud Claims for $225 Million* (August 14, 2008) <http://www.usdoj.gov/opa/pr/2008/August/08-civ-723.html>.
22. 31 USC 3729(a)(1)(G); 28 CFR 85.3(a)(9).
23. Sylvia, § 2:13.
24. See United States Department of Justice, *More Than $1 Billion Recovered by Justice Department in Fraud and False Claims in Fiscal Year 2008,* n 17 *supra.*
25. *Id.*
26. MCL 400.610a.
27. MCL 400.610c.
28. MCL 400.614.
29. PL 109-171, 120 Stat 4.
30. 42 USC 1396h(b).
31. Congress enacted the DRA after the 2005 amendments of the Michigan FCA.
32. 31 USC 3730(b)(2); MCL 400.610a(2).
33. 31 USC 3730(b)(2); MCL 400.610a(2).
34. United States Department of Justice memorandum, *False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits,* available at <http://www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf>.
35. See 31 USC 3730(b)(2); MCL 400.610a(3).