Unique Aspects of Litigating Federal False Claims Act Cases

By Patricia A. Stamler

In 1991, I served as local counsel on a *qui tam*[1] case filed under the federal False Claims Act.[2] I had to master the complexities of the act in an expedited time frame. Now, False Claims Act cases are a focal point of my practice.

Legal framework

The False Claims Act permits plaintiff whistleblowers, known as relators, to sue on behalf of the United States, entities, and individuals who "knowingly" submit false claims for payment to the federal government. The plaintiff's burden of proof to show intent is relatively low: the plaintiff must demonstrate that the defendant either had actual knowledge of the claim's falsity or acted in reckless disregard of the claim's legitimacy. During the litigation, the government has the right to intervene in whole or in part in the case.[3]

Many *qui tam* claims pertain to fraud in the healthcare or defense industries. However, the False Claims Act applies to federal funds beyond Medicare and Medicaid or defense. In addition to tackling the intricacies of the act, *qui tam* litigators must become experts in a variety of regulations, government guidelines for various federal departments, and other statutes like the Stark Act[4] and the Anti-Kickback Statute.[5]

Along with pursuing healthcare fraud cases, I have handled a variety of *qui tam* claims involving the Department of Defense, Department of Housing and Urban Development, Federal Aviation Administration, and Federal Housing Administration and Education. The Department of Justice reported that in FY 2013 it "secured $3.8 billion in settlements and judgments from civil cases involving fraud against the government…."[6]

Procedural and jurisdictional requirements

The False Claims Act contains unique procedural and jurisdictional requirements including (1) pre-suit written service of "substantially all material evidence and information" in the relator's possession to the attorney general of the United States;[7] (2) filing the complaint under seal (allowing the government to complete its investigation);[8] (3) mandatory attorney representation of the whistleblower;[9] (4) a first-to-file bar, which can result in a dismissal of the latter filed complaint(s) of overlapping claims;[10] (5) service of the *sealed* complaint solely on the United States Department of Justice and the local United States attorney without service on the defendant(s) until the court orders the defendant to be served;[11] (6) the case and all filings remain under seal for at least 60 days[12] with potential for several extensions for "good cause";[13] (7) dismissal of the case can only occur with the written consent of the attorney general;[14] and (8) the relator must be the original source of the information.[15] The law allows for treble damages and civil penalties of $5,500 to $11,000 and provides for awards of 15 to 30 percent of recoveries for relators.[16]

Private/public partnership

The private/public partnership creates interesting dynamics between practitioners, relators, and the government. During the investigatory phase of the litigation, government attorneys and government agents work closely with relators and their counsel. Fundamentally, the relator's credibility, inside information, and depth of knowledge regarding the false claims are key factors in assessing the relator's value to the case.

General practice tips

Counsel for relators must spend hours preparing a client for the initial meeting with government personnel. The key to a successful meeting with the government is ensuring your client is fully acquainted with all the materials in his or her disclosure statement to demonstrate knowledge of the false claims allegations. It is important

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for the relator to convey what he or she knows and acknowledge any limitations on specific issues. In addition to the substantive preparation, it is crucial to inform your client about the meeting process, which can feel quite intimidating. Describing the location of the meeting, potential attendees, and how the government conducts the meeting are all keys to putting the relator at ease. Posing anticipated questions to the relator will aid in easing the client's fears and prepare him or her for the meeting. The following sample set of hypothetical questions and responses are illustrative.

General knowledge of the industry and personal knowledge regarding upcoding claims

(1) **What licenses or certifications do you have in the field of Medicare/Medicaid billing or coding?** I received a BA in business from the University of Kentucky. I obtained additional training and certification in Medicare/Medicaid billing from Med Tech U. **Have you had any suspensions or complaints affecting your license or certification?** No. **Have you ever been an instructor on Medicare/Medicaid billing or coding?** Yes, I typically lecture four to six times a year in health law courses at various Michigan law schools.

(2) **Describe your education and training in Medicare/Medicaid billing or coding.** The courses at Med Tech U covered the Medicare and Medicaid laws and regulations, including Centers for Medicare & Medicaid Services manuals. I was also instructed on CPT (current procedural terminology) coding and ICD-9 coding. I was educated on the various laws prohibiting false billing, including upcoding and double billing.

(3) **Other than ABC, what employment experience do you have in billing/coding?** I have more than 20 years of employment history in the billing/coding field. I worked for We Bill Right, Inc. for approximately 10 years. I then went to work for Coding Experts, LLC for approximately eight years. I have been with ABC for the last three-plus years.

(4) **You indicated that three years before filing your *qui tam* complaint, you noticed ABC's physicians and mid-level providers were billing at higher codes than the services rendered. Why did you make such a claim?** I observed a coding pattern among certain doctors who billed every patient visit at the highest coding level possible. Further examination of the billing records showed overutilization of certain billing codes that, based on my years of experience, were statistically way outside the norm. **Do you know why this was occurring?** Yes. After I detected this pattern, I contacted Dr. Z and advised her of my findings. Dr. Z told me to continue billing at the codes yielding the highest level of reimbursement to capture as much revenue as possible. I was really worried about this, so I raised my concerns with Mr. B, our compliance officer. Mr. B told me not to worry and that he would handle it. **Which doctors/physician assistants/nurse practitioners were participating?** All the doctors in the practice group except Dr. C. **Did you notify anyone in ABC about your observations?** Yes. I notified my supervisor, Ms. G; Dr. Z; and Mr. B.

(5) **You provided the government with 2,000 pages of billing records. How did you get these records?** These are billing records I personally worked on over the three years I worked at ABC.

(6) **We observed that these records have several acronyms. Can you assist us in defining these acronyms?** Sure. The acronym E/M is "evaluation and management"…

Client relations

Practitioners must establish trust with *qui tam* clients and manage their expectations. Often, by the time the putative relator seeks legal counsel, he or she has sought redress. The relator may have been terminated or is in fear of imminent termination. *Qui tam* clients often fear for their physical well-being. Initial phone contact occurs in hushed tones, necessitating repeated assurances of confidentiality and advising that the False Claims Act prohibits retaliation.[17] Relators often have a strong sense of justice and are steadfastly righteous, outspoken, and tenacious. The very qualities that make outstanding relators can also make them challenging clients. The duration of the government's investigation and the seal requirements can pose significant friction with *qui tam* clients, particularly when they are involved in other litigation. The relator must constantly be on guard that breaching the seal can bar a relator from claiming his or her portion of the government's recovery.[18]

Conclusion

The challenges that exist in litigating False Claims Act claims are often exhilarating and rewarding. The unique aspect of working with various government personnel—including assistant United States attorneys, FBI agents, and Office of Inspector General agents—is truly rewarding. Perhaps, though, the greatest part of handling False Claims Act claims is the opportunity to work with heroic individuals who have the conviction to stand up and challenge wrongdoing. ■

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ENDNOTES

1. *Qui tam* is shorthand for *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means "who pursues this action on our Lord the King's behalf as well as his own." *Vermont Agency of Natural Resources v United States*, 529 US 765, 768 n 1; 120 S Ct 1858; 146 L Ed 2d 836 (2000).
2. 31 USC 3729 through 31 USC 3733; see also PL 111-21, § 386, 123 Stat 1617 (hereafter FERA); PL 111-148, 124 Stat 119. The False Claims Act creates seven categories of false claims: (1) knowing presentation of a false or fraudulent claim to the federal government; (2) knowing creation or use of a false statement or false record to get the federal government to pay a false or fraudulent claim; (3) conspiring to defraud the federal government to get a false or fraudulent claim paid; (4) intentional failure to return all federal government money or property; (5) intentional making and issuance of a receipt for more than what the federal government actually received; (6) knowing purchase or receipt of property from a federal official who is not authorized to sell or deliver the property; and (7) knowing creation or use of a false record or statement to decrease a monetary obligation to the government. 31 USC 3729(a). The FERA amended this provision to expand liability to "knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money or property to the Government." 31 USC 3729(a)(1)(G). The Patient Protection and Affordable Care Act clarified that receipt of Medicare and Medicaid overpayments must be reported and returned to the government within 60 days of discovery and the provider's failure to timely report and return an overpayment exposes it to liability under the False Claims Act. 42 USC 1320a-7k(d)(2)(A). Note: The District of Columbia and 29 states, including Michigan, have their own false claims statutes. Michigan's statute is narrow in scope and pertains solely to false claims involving the state's portion of Medicaid dollars. See MCL 400.601 *et seq.*
3. 31 USC 3730(b)(2).
4. 42 USC 1395nn.
5. 42 USC 1320a-7b(b). The Anti-Kickback Statute is a criminal statute prohibiting anyone from soliciting, receiving, offering, or paying remuneration (money or otherwise) in exchange for referring patients to receive certain services that are paid for by the government. The Patient Protection and Affordable Care Act modified the Anti-Kickback Statute to provide that claims for payment submitted in violation of the statute automatically constitute false claims under the False Claims Act. 42 USC 1320a-7b(a). Further, the new language of the Anti-Kickback Statute provides that "a person need not have actual knowledge…or specific intent to commit a violation" of the statute. 42 USC 1320a-7b(h).
6. Department of Justice Office of Public Affairs, *Justice Department Recovers $3.8 Billion from False Claims Act Cases in Fiscal Year 2013* (December 20, 2013) <http://www.justice.gov/opa/pr/justice-department-recovers-38-billion-false-claims-act-cases-fiscal-year-2013> (accessed November 24, 2014).
7. 31 USC 3730(b)(2).
8. *Id.*
9. *Timson v Sampson*, 518 F3d 870, 873–874 (CA 11, 2008); *United States ex rel Mergent Servs v Flaherty*, 540 F3d 89 (CA 2, 2008); *Stoner v Santa Clara Co Office of Ed*, 502 F3d 1116, 1126–1128 (CA 9, 2007); *United States ex rel Lu v Ou*, 368 F3d 773, 775–776 (CA 7, 2004); *United States v Onan*, 190 F2d 1, 6–7 (CA 8, 1951).
10. 31 USC 3730(b)(5); cf. *United States ex rel Poteet v Medtronic, Inc*, 552 F3d 503, 516 (CA 6, 2009) (where the Sixth Circuit did not apply the first-to-file bar when the first filed complaint failed to meet the heightened pleading requirements of FR Civ P 9(b)).
11. 31 USC 3730(b)(2).
12. *Id.*
13. 31 USC 3730(b)(3).
14. 31 USC 3730(b)(1).
15. 31 USC 3730(b)(4)(A). The Patient Protection and Affordable Care Act amended the False Claims Act to allow the federal government to have the final say on whether a court may dismiss a case based on a public disclosure. 31 USC 3730(e)(4)(A). Note, the relator may overcome the public disclosure bar if he or she qualifies as an "original source" under 31 USC 3730(e)(4)(B).
16. See 18 USC 287; 31 USC 3730(d)(1) and (2).
17. 31 USC 3730(h).
18. 31 USC 3730(b)(2); see also *United States ex rel Gale v Omnicare, Inc*, unpublished opinion and order of the U.S. District Court for the Northern District of Ohio, issued June 7, 2013 (Docket No. 1:10-CV-127).

SBM MONEY JUDGMENT INTEREST RATE

MCL 600.6013 governs how to calculate the interest on a money judgment in a Michigan state court. Interest is calculated at six-month intervals on January and July of each year, from when the complaint was filed, and is compounded annually.

For a complaint filed after December 31, 1986, the rate as of July 1, 2014 is 2.622 percent. This rate includes the statutory 1 percent.

But a different rule applies for a complaint filed after June 30, 2002 that is based on a written instrument with its own specified interest rate. The rate is the lesser of:

(1) 13 percent a year, compounded annually; or

(2) the specified rate, if it is fixed—or if it is variable, the variable rate when the complaint was filed if that rate was legal.

For past rates, see http://courts.mi.gov/Administration/SCAO/Resources/Documents/other/interest.pdf.

As the application of MCL 600.6013 varies depending on the circumstances, you should review the statute carefully.