

False Claims Process and Practice

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Qui Tam Claims Procedure and Process

- ◆ Derived from Latin phrase: "qui tam pro domino rege quam pro se ipso in hac parte sequitur"
- ◆ meaning "[he] who sues in this matter for the king as [well as] for himself."
- ◆ False Claims Act, 37 U.S.C. § 3729

Causes of Action under the False Claim Act:

- ◆ 31 U.S.C. § 3729(a) as it appeared until May 20, 2009:
 - (1) knowingly presented a false or fraudulent claim for payment or approval to an officer or employee of the United States Government;
 - (2) knowingly made, used or caused to be made or used a false record or statement to get a fraudulent claim paid or approved by the government; or
 - (3) conspire to defraud the government by getting a false or fraudulent claim paid or approved by the government.

- (4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;
- (5) 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;
- (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 the property; or
- (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government

- ◆ Defendant could be liable to Government for civil penalty between \$5,000-\$10,000, plus treble damages
- ◆ Complaint must be filed under seal
 - complaint remains under seal for at least 60 days, and is not served on the defendant until the court orders it to do so.
- ◆ Government conducts an investigation and has 60 days to decide to intervene in the suit or not, or file for more time to decide 37 U.S.C. § 3730(b)(4).

- ◆ Private plaintiffs are referred to as "relators"
- ◆ Relator prepares a disclosure statement
 - not filed
 - served on the government by serving the Attorney General of the United States
 - includes details of all of the false claims in the action.
- ◆ If the government chooses not to intervene, relator may pursue the case himself on behalf of the government
- ◆ Relator shall be awarded 15%-25% of the proceeds of the action or settlement of the claim in an intervened case, and 25%-30% in a declined case
- ◆ Amount of recovery determined by extent to which relator contributes to the prosecution of the action.

Statute of Limitations

- ◆ A qui tam action may not be brought after the later of:
 - a) more than six years after the date on which the false claim is made, or
 - b) more than three years after the date on which facts material to the right of action are known or reasonably should have been known by the official of the U.S. 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. 37 U.S.C. § 3731(b)(1).

Recent Changes to FCA

- ◆ In May, 2009 President Obama signed the Fraud Enforcement and Recovery Act (FERA), Pub. L. No. 111-21, 123 Stat. 1617, sec. 4(a) (2009), effective May 20, 2009
- ◆ Reversed *Allison Engine Co. v. United States, ex rel. Sanders, et al.*, 128 S.Ct. 2123 (2008).
 - Interpreted as requiring proof that the defendant intended that the false record or statement be material to the Government's decision to pay or approve the false claim.
 - Under *Allison Engine*, it was not sufficient to simply show that the funds used to pay the false claim ultimately came from the Government.
 - Under *Allison Engine*, if the federal government provides money in a lump sum to a grantee, and is thereafter uninvolved in the disbursement, the FCA does NOT apply.

Some Changes under FERA

- ◆ (A) knowingly presents or ~~causes to be presented~~ a false or fraudulent claim for payment or approval to an officer or employee of the United States Government;
- ◆ (B) knowingly makes, uses or causes to be made or used a false record or statement to get a fraudulent claim paid or approved by the government: **material to a false or fraudulent claim;** or
- ◆ (C) conspires to defraud the government by getting a false or fraudulent claim paid or approved by the government **commit a violation of subparagraph (A), (B), (D), (E), (F), or (G)**
- ◆ (D) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, **knowingly** delivers, or causes to be delivered, **less property than the amount for which the person receives a certificate or receipt than all of that money or property;**

- ◆ FERA expands liability to encompass a conspiracy to violate any provision of § 3729(a)
- ◆ Under FERA, the claim at issue no longer has to be presented to an officer or employee of the government
- ◆ term "claim" expanded
- ◆ requires simply that a person use, or cause to be made or used, "a false record or statement **material** to a false or fraudulent claim."
- ◆ Define "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."

BUSINESSES SHOULD DEVELOP STRATEGY TO MITIGATE EXPOSURE TO FERA AND THE FCA:

- ◆ companies must carefully track money received from government
 - no improperly retained overpayments.
- ◆ Any corporation who has received or is planning to receive government funds must make sure that there are processes in place to mitigate the risk posed by the FCA.
 - Corporations should integrate a risk mitigation strategy

Qui Tam Actions

- ◆ Qui Tam actions occur in a variety of industries, including:
 - Flood Insurance
 - Highway Funds and Transportation
 - Crop Insurance
 - Military Spending
 - Medicare

Flood Insurance

- ◆ Flood insurance is available through the Federal Government by the National Flood Insurance Program (NFIP)
- ◆ FEMA established the Write Your Own (WYO) program which allowed for private insurers to issue standard government guaranteed flood insurance policies, written by FEMA, in their own names.
- ◆ The private companies are responsible for adjustment, settlement, payment, and defense of claims under the policies.

U.S. ex rel. Branch Consultants, L.L.C. v. Allstate Insurance et. al, No. 06-4091, 2009 U.S. Dist. LEXIS 101155, (E.D. La, Oct. 19, 2009).

- ◆ After Katrina the government paid 162,000 flood damage claims in May 2006.
 - Due to volume, FEMA relaxed the standards for submitting proof of loss claims.
- ◆ Insurance company made adjustment and if policy holder did not dispute, the amount was based solely on their report
- ◆ Branch alleges that insurance companies overstated the amount of flood losses to the properties they adjusted.
- ◆ Branch reexamined numerous properties and found the actual flood damage to the properties to be significantly less than the defendants had claimed to the government.
- ◆ Branch claimed that this insurance scheme included hundreds of millions, if not billions, of dollars in fraudulent insurance claims.

Branch, continued

- ◆ **Whether Branch is an Original Source, or whether there has been a public disclosure of the fraud**
 - If fraud has been publicly disclosed, court lacks jurisdiction
 - Court considered it crucial whether or not the defendants were mentioned by name or identified specifically.
- ◆ Public disclosures a basis for the allegations
- ◆ Jurisdictional bar indicated

- ◆ Branch's suit was based upon public disclosures and therefore, it was barred unless Branch was an "original source"
- ◆ Branch pleaded facts that establish direct knowledge of the fraud
 - information is different than the information that had been placed into the public domain
- ◆ The claim survived the motion to dismiss

TRANSPORTATION AND HIGHWAY FUNDS

U.S. Department of Transportation ex rel. August Arnold v. CMC Engineering, 564 F.3d 673 (3d Cir. 2009).

- ◆ Arnold claims that consultants falsified their credentials to qualify for higher pay rates from the government who funded the contract.
- ◆ Court held that getting a fraudulent claim paid by the government is NOT the same as having a fraudulent claim paid by government funds.
 - Despite the fact that PennDOT receives substantial funding from the US DOT.
- ◆ Court granted the motion to dismiss because claims presented to state agencies that disburse funds are not actionable under the FCA.

- ◆ Case was remanded to be analyzed under the framework of *Allison Engine*, just prior to FERA
 - Remanded to determine whether the funding scheme would lead to an actionable claim under the FCA
 - If the Federal Highway Administration was involved in the disbursement of funds from PennDOT to consultants after submission of their fraudulent claims, the court stated the claims may have been actionable.
- ◆ FERA made the overruling of *Allison Engine* retroactive.
- ◆ Now, under the relaxed FERA standards, a person need only use, or cause to be made or used, "a false record or statement material to a false or fraudulent claim."

U.S. v. TDC Management Corp., Inc., 24 F.3d 292 (D.C. Cir. 1994); 288 F.3d 421 (D.C. Cir. 2002).

- ◆ The Demonstration Bonding Program of the Urban Mass Transit Authority (UMTA) of the DOT was designed to assist minority enterprises in receiving bonding from sureties when bidding on large transportation construction projects.
- ◆ TDC entered into a cost reimbursement contract with a UMTA to implement the program. The program failed to progress as expected and the agency terminated it and disallowed \$441,972 of the \$928,916 TDC claimed as contract related expenditures.
- ◆ TDC appealed the disallowances to the Department of Transportation Board of Contract Appeals.
- ◆ The US then brought suit alleging FCA violations because TDC misrepresented its actual progress in monthly reports.

- ◆ The Government filed a civil action under the FCA alleging that TDC knowingly submitted false progress reports to UMTA.
- ◆ The Court held that the Government had to prove that TDC actually knew it had omitted material information from the reports or that it recklessly disregarded or deliberately ignored the possibility.
- ◆ Summary judgment was granted for the Government on the FCA.
 - Judgment was entered against TDC for \$1,281,198— which was twice the amount of vouchers paid by the government
 - plus a \$2,000 civil penalty for each of the 18 false payment vouchers produced and costs.

CROP INSURANCE

***U.S. v. Hawley*, 566 F. Supp. 2d 918 (N.D. Ia 2008).**

- ◆ The government claimed the Defendant engaged in improper conduct that allowed ineligible farmers to make claims against crop insurance policies that were sold by Defendant, issued by a private insurer, and reinsured by the FCIC.
- ◆ Relied on *Allison Engine*:
 - submission of a fraudulent claim to North Central Crop Insurance, the private insurer who received money from FCIC, was not good enough to constitute a claim, as the government didn't directly pay the claims.
 - If a defendant makes a false statement to a private entity without intending the government rely on it as a condition of payment, the statement is not made with the purpose of inducing payment of a false claim "by the Government."
- ◆ FERA:
 - claims only have to be material to a false claim submitted to the government or contractors or recipients of government funds.

Hawley, continued

- ◆ Here, crop insurance claims were never forwarded to or approved by the government
 - no showing that the defendant intended that the false records or statements would be material to the government's decision to pay or approve the false claim.
- ◆ evidence that the government ultimately reimbursed NCCI for the false claims that NCCI paid was not sufficient to make out a submissible claim pursuant to § 3729 (a)(2) according to *Allison Engine*
- ◆ the court held that because the records were never submitted to the government, but only to the private insurer, there was no showing that the defendant *intended* that the false records would be material to the government's decision to approve the false claim.
- ◆ Once again, under FERA, these standards have been relaxed.

***U.S. v. Bli*, No. 00-10484, 2006 U.S. Dist. LEXIS 83426 (E.D. Mich. 2006).**

- ◆ Bli family of potato farmers purchased crop insurance
- ◆ Bli claimed a loss and filed claims with the crop insurance adjuster.
- ◆ The Court found that they presented or caused to be presented to the United States for payment each of the crop insurance claims at issue.
- ◆ The Defendants' certifications of the farm's production were material to the US payment or reimbursement.
- ◆ US paid out indemnities in the amount of \$897,188
 - \$704,640 of which Bli was not entitled to
- ◆ overpayments of \$704,640 are trebled for a total of \$2,113,920 and a penalty of \$5,000 for each of the 3 false insurance claims.

MILITARY

***U.S. ex rel. Jordan v. Northrop Grumman Corp*, No. CV 95-2985 ABC, 2002 U.S. Dist. LEXIS 26674 (C.D. California Aug. 5, 2002).**

- ◆ Northrop made false statements and claims under government contracts for the manufacture and sale of Aerial Target Drones that contained 22 defective parts that it knowingly sold to the US Navy under various contracts
- ◆ Defendant's Motions for Summary Judgment that they were not responsible for alleged target failures due to a purportedly defective design were denied.

U.S. ex rel. Taxpayers Against Fraud v. General Electric, 41 F.3d 1032 (6th Cir. 1994).

- ◆ GE sold jet engines to the US Airforce for resale to the Israeli Ministry of Defense.
- ◆ According to the Relator, in 1984 a marketing sales manager for GE and an officer in the Israeli Air Force had began talking about how to defraud the US out of military funds.
- ◆ GE alleged that Walsh participated in the fraud and delayed bringing the suit
- ◆ The action remained sealed for 9 months
 - US kept requesting extensions

G.E., continued

- ◆ Government pursued settlement after joining the case in 1992 and agreed a year later that GE would pay \$59,500,000 in civil damages and \$6,158,301 in restitution because the marketing sales manager and the Israeli officer had Swiss bank accounts into which they had been diverting funds.
- ◆ The contest then came down to what the relator's share would be
 - The court awarded the relators 22.5% of the \$ 59.5 million, nearly the maximum percentage permitted by statute.
 - The United States filed a notice of appeal, seeking to reduce that award, and the relators settled with the government for about 19% of the settlement, or approximately \$ 11,300,000.
- ◆ The relators were awarded reasonable attorney's fees

U.S. ex rel. Sarmont v. Target Corp, No. 02-C-0815, 2003 U.S. Dist. LEXIS 18729 (N.D. Ill., Oct. 17, 2003).

- ◆ Target produced electronic components used by the U.S. military to emit "friend or foe" signals.
- ◆ Target substituted higher grade commercial parts for military grade parts and represented that the parts met government specifications.
 - Motorola, a subcontractor of Target, was also failing to properly test components and falsely certifying that they met military specifications.
- ◆ After this complaint was filed, the Government undertook a 7 year criminal investigation into the issue.
 - government sought and was granted 15 separate extensions.

- ◆ In 1998 Sarmont learned that the government was no longer pursuing criminal charges, but had not decided on intervention in the qui tam action.
- ◆ Next, the DOJ reviewed the file for 2.5 years
 - notified Sarmont in 2001 that they were not intervening.
 - resulted in a 9.5 year delay between Sarmonts filing of the complaint and the defendants' receipt of service.
- ◆ The Court held that this delay was not the fault of the relator because the relator takes over only upon the government's decision not to intervene in the case.
- ◆ The Federal Rule of Civil Procedure 41(b) claim for failure to prosecute or comply with rules of court failed.

**U.S. ex rel. John Doe v. John Doe Corp, 960 F.2d 318
(2d Cir. 1992).**

- ◆ attorney learned of fraud while representing a client who was being investigated
- ◆ The attorney instituted an action against his client's employer.
- ◆ John Doe Corp provides services for the military under several defense contracts.
- ◆ Meyerson was the employee who controlled falsified records. The government granted Meyerson immunity in exchange for his sworn testimony.
- ◆ Meyerson admitted that he falsified documents that overcharged the government on defense contracts.

- ◆ However, Courts have no jurisdiction based on the public disclosure of information.
 - Qui tam actions based upon information the government already possesses are barred.
- ◆ Here, the allegations of fraud were made known to individuals working at John Doe Corp. while the government was executing search warrants.
 - Told employees what was going on
 - The fact that it was not widely disseminated was of no consequence.
- ◆ Because disclosure occurred in the prior Grand Jury proceedings and investigation, the claim was barred.

**United States ex rel. Robinson v. Northrop
Grumman Corp., No. 89 C 6111 (N.D. Ill.).**

- ◆ Northrop allegedly overcharged the government by fraudulently accounting for materials purportedly used in multiple defense contracts.
- ◆ Northrop allegedly submitted false claims and proposals for progress payments and also concealed basic problems in handling inventory, scrap, and attrition.
- ◆ Holzrichter and Robinson both worked for Northrop Defense Systems Division. They filed the civil fraud case in 1989. The government declined to join until 2001.
- ◆ The case was settled in March 2005 when Northrop agreed to pay \$134 million dollars.
- ◆ This is one of the largest settlements achieved

Medicare

SouthernCare

- ◆ Two registered nurses filed an action for alleged Medicare fraud by a major hospice provider have sparked a record \$24.7 million settlement with the U.S. government by their former employer, SouthernCare.
- ◆ RNs themselves will get \$4.9 million
- ◆ The company allegedly enrolled ineligible patients in hospice care when they didn't qualify
- ◆ Medicare pays for hospice care yet, Medicare does not always pay for home care.

U.S. ex rel. Poteet v. Medtronic, Inc., 552 F.3d 503 (6th Cir. 2009).

- ◆ Medtronic manufactures and distributes medical supplies.
- ◆ Doctors and hospitals that use Medtronic products submit claims to the federal government for Medicare and Medicaid reimbursement.
- ◆ In Oct. 2001, Wiese filed a wrongful termination suit against Medtronic.
- ◆ In September 2002, Doe, a former attorney for MSD, a subsidiary of Medtronic, filed a qui tam action alleging MSD, Medtronic and 10 physicians used improper sales and marketing tactics to induce the defendant physicians to use MSD products.
- ◆ In December 2003, Poteet filed a qui tam action against 12 physicians and 5 healthcare providers alleging they filed false claims for Medicare. She amended her petition to include Medtronic and MSD after she became aware of Doe's suit.
- ◆ Government filed a motion to dismiss alleging her suit was barred by the first to file and public disclosure provisions of the FCA. The government informed the court it had entered into a settlement agreement with Medtronic for \$40 million.
- ◆ The court held that the first to file rule did not apply, but that Poteet's suit was barred by the public disclosure provision.

BANKING-TARP FUNDS

- ◆ Expect an increase in qui tam litigation against companies benefiting from Troubled Asset Relief Program (TARP) funds.
- ◆ The Inspector General for the TARP funds stresses that the government will require all entities receiving TARP funds to:
 - Outline their use and expected use of the funds
 - Provide supporting documentation
 - Certify the accuracy of all statements, representations, and supporting information.

◆Questions?

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