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False Claims in Healthcare
Chapter 1. The History and Purpose of the False Claims Act

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In recent decades, the False Claims Act (FCA) has become one of the most important laws related to the US government's protection of the federal treasury from fraud and abuse. With federal health program spending accounting for more than 30% of all federal expenditures, the healthcare industry has been the target of some of the most extensive and aggressive FCA enforcement actions.[3] This chapter will review the history and development of the FCA, as well as the legal basics of the law's enforcement.

Development of the False Claims Act

For more than 150 years, the False Claims Act (31 U.S.C. §§ 3729-3733) has been available to the federal government as a powerful device in its efforts to control fraud. The origins of the FCA stem from the American Civil War, during which President Abraham Lincoln's government experienced rampant fraud by military contractors.[4] Originally entitled "An Act to Prevent and Punish Frauds upon the Government of the United States," the FCA was intended to protect the federal treasury from contractors who sold the Union army faulty rifles and ammunition, rancid rations, and sickly livestock.[5][6] In its original form, the FCA held any person who knowingly submitted false claims for payment to the government liable for double the government's damages, plus a penalty of $2,000 for each false claim.[7]

The FCA additionally empowered private citizens to sue, on the government's behalf, individuals and companies that defrauded the government. These provisions, known as qui tam provisions (from the Latin phrase meaning "he who brings a case on behalf of our lord the King, as well as for himself"), allowed the person who brought the suit (the relator) to enforce the act and to collect a percentage of the amount of damages recovered and penalties assessed.[8] For the first 80 years of the FCA's existence, relators were entitled to one-half of the total awarded amount.[9]

In 1943, the FCA was first modified. Reacting to concerns that qui tam suits were being filed based solely on information already contained in criminal indictments, Congress made such suits far less appealing for relators. First, a provision was added that barred any qui tam actions based on evidence or information already in the possession of the government.[10] Further, the Department of Justice (DOJ) was authorized to intervene or take control of any qui tam action initiated by a relator, and the relator's potential award was slashed to a maximum of just 10% of any proceeds if the government did intervene, or 25% if it did not. In addition, no award was guaranteed whatsoever.[11] As a result of these changes, the FCA was used far less frequently in the following decades.

The False Claims Amendments Act of 1986

In the early 1980s, the General Accounting Office reported that widespread fraud was resulting in monetary loss, diminished confidence in government programs, harm to public health and safety, and benefits being diverted from intended recipients.[12] Additionally, it was noted that the "knowledge bar" created by the 1943

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amendments had been interpreted broadly in certain court opinions to preclude relators who had provided otherwise unknown information to the government prior to filing their qui tam actions. Congress reacted by passing the False Claims Amendments Act of 1986, which was intended to modernize the FCA "to enhance the Government's ability to recover losses sustained as a result of fraud against [it] . . . in Federal programs and procurement."[13]

The Amendments Act included several significant changes. First, Congress re-incentivized qui tam actions. The civil remedies were increased from two times to three times the amount of damages the government sustained, and penalties were increased from $2,000 per claim to a range of $5,000 to $10,000 per claim.[14] Potential awards for relators were increased to 15%–30% of recovered funds, and a provision was added to make defendants potentially responsible for the relators' reasonable expenses and attorneys' fees.

The Amendments Act also extended the reach of the FCA to include "reverse false claims," in which a violation stems from avoiding a payment to the federal government through a material misrepresentation, and expanded FCA liability to include military personnel. Further, it provided employment protection for whistleblowers, created a public disclosure bar to prevent claims based on information already known to the public (rather than simply by the government), and required that FCA actions be filed under seal to allow government agencies to investigate claims without notifying the defendants.[15] The Amendments Act also added a section to the FCA authorizing the DOJ to issue civil investigative demands for documents or testimony when investigating a potential violation, which broadly expanded the DOJ's ability to collect documents and records from potential violators before a case is filed.[16]

The Fraud Enforcement Recovery Act of 2009

Following the Amendments Act in 1986, there was a dramatic increase in the number of civil and criminal FCA actions. In the subsequent two decades, a number of courts issued conflicting interpretations of some of the provisions, which led Congress to pass the Fraud Enforcement Recovery Act of 2009 (FERA). The intention was to reinforce the developments initiated in 1986, and to resolve some of the conflicts arising from case law.[17]

FERA clarified that claims did not need to be presented directly to the government, but also applied to claims submitted to intermediaries, so long as "the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest."[18] FERA also expanded "reverse false claims" liability by allowing claims for any known concealment, or improper avoidance or reduction of an obligation owed to the government. It expanded the definition of "obligation" to cover any "established duty, whether or not fixed, . . . express or implied" and included relationships arising from contract, grant, licensing, and fee arrangements.[19] It also defined "obligation" to include retained overpayments.[20] Additionally, FERA expanded whistleblower protections beyond employees to include contractors and agents.[21]

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