



False Claims Act Trends And Remote Investigations During – And After – The Pandemic

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through partnership

Disclaimer

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False Claims Act (FCA) basics

History

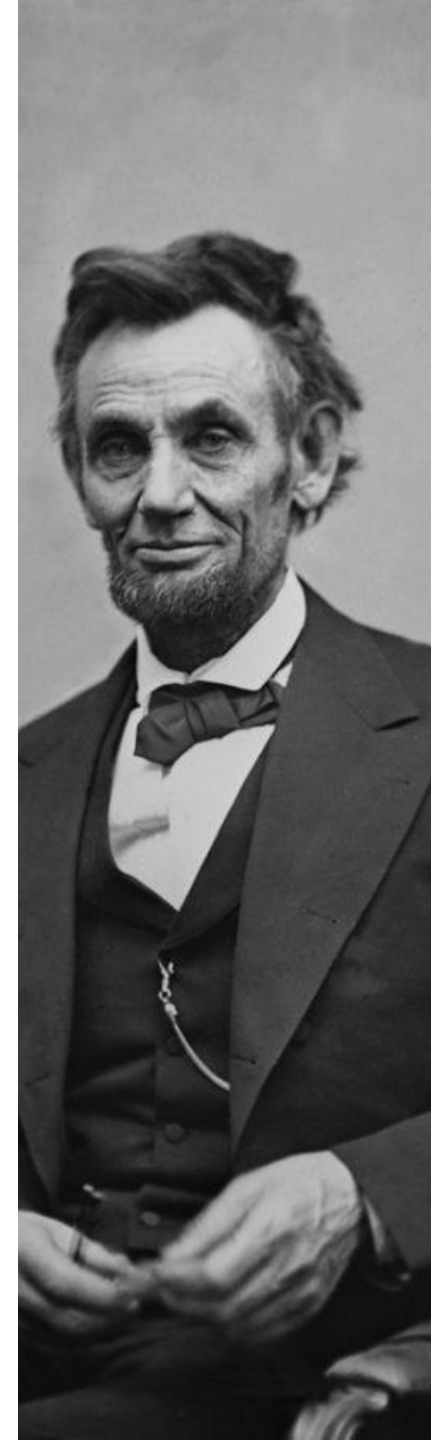
The “Lincoln Law”

Enacted during the Civil War in 1863

- Protection against fraud perpetrated by government contractors that sold supplies to the Union Army

Contained “*qui tam*” provisions

- Short for Latin phrase “he who brings an action for the king as well as for himself”
- Private whistleblowers, or **relators**, are entitled to share of the recovery
- Government entitled to investigate and potentially intervene



How an FCA case works

Steps:

1. Relator files the case under seal
2. Government investigates
3. Government decides if it will prosecute the case
4. Relator may continue to prosecute even if government declines
5. Complaint is unsealed and litigation begins



Active litigation of declined *qui tam* cases by sophisticated private law firms is one of the most significant enforcement trends in the last several years

Damages for an FCA violation

- A civil penalty **for each false claim** of up to \$23,000
- Plus up to **three times** the amount of damages
- Reasonable costs/expenses and attorneys' fees that relators incur in successfully prosecuting *qui tam* actions
- May lead to **exclusion** from participation in government programs (e.g., Medicare)
- Enormous financial pressure to resolve these cases

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Noteworthy FCA developments

Elements a “relator” must prove

- Claim for payment
- Falsity
- Knowledge
 - Actual
 - Deliberate ignorance
 - Reckless disregard
 - **Specific intent to defraud is not required**
- Materiality



Developments in Falsity

Objective falsity: A win for providers in the Eleventh Circuit

Background

***United States v. AseraCare* – 11th Cir. (September 2019)**

- Relators alleged defendant violated the FCA by falsely certifying patients as “terminally ill” (i.e., life expectancy is six months or less) on hospice claims submitted for Medicare reimbursement
- Government intervened, and case went to trial: jury found against defendant on basis of a jury instruction that “a claim is ‘false’ if it is an assertion that is untrue when made or used”
- District court set aside verdict due to improper jury instructions and granted summary judgment, *sua sponte*, in defendant’s favor
- Government appealed

Objective falsity: A win for providers in the Eleventh Circuit

Mere differences in clinical judgment among physicians cannot establish falsity under FCA

United States v. AseraCare – 11th Cir. (September 2019)

- District court concluded that proper jury instructions would have advised the jury that (1) FCA's falsity element requires proof of an **objective** falsehood and (2) a mere difference of opinion between physicians, without more, is not enough to show falsity
- On appeal, although it determined that the government should have been allowed to rely on the entire record to prove falsity, Eleventh Circuit affirmed the district court's finding that a reasonable disagreement in clinical opinion of terminal illness warranting hospice benefits under Medicare cannot serve as the basis for an FCA action without other evidence of falsehood

“[A] clinical judgment of terminal illness warranting hospice benefits under Medicare **cannot be deemed false**, for purposes of the False Claims Act, when there is **only a reasonable disagreement between medical experts** as to the accuracy of that conclusion, with no other evidence to prove falsity of the assessment”

- Judge Carnes,
delivering the opinion for the Eleventh Circuit

Other circuits disagree . . .

***U.S. ex rel. Druding v. Care Alternatives* – 3rd Circuit (2020)**

- “Objective falsity” conflates scienter and falsity; ignores legal falsity – Supreme Court denied cert this week

***U.S. ex rel. Winter v. Gardens Regional Hosp.* – 9th Circuit (2019)**

- A doctor “can express an opinion that he knows to be false”

***U.S. ex rel. Polukoff v. St. Mark’s Hospital* – 10th Circuit (2018)**

- Doctor will be deemed to have made a false statement if the procedure is determined to have not been reasonable or necessary

***United States v. Paulus* – 6th Circuit (2018)**

- Doctor’s conviction reinstated for healthcare fraud; convicted for misrepresenting facts, not giving opinions



Developments in Knowledge

Safeway and Safeco

- *United States v. Safeway Inc.*, No. 11-CV-3406, 2020 WL 3132397 (C.D. Ill. June 12, 2020):
 - Issue: U&C prices offered by supermarket pharmacies
 - Held that *Safeco*, which examined scienter requirement under Fair Credit Reporting Act, applied to FCA too
 - No FCA liability where reasonable minds could differ on the interpretation of the law and no authoritative guidance
- Takeaway
 - An objectively reasonable interpretation of unsettled law does not meet FCA's "knowledge" standard and therefore cannot give rise to FCA liability



Developments in Materiality

Universal Health Services v. U.S. ex rel. Escobar

Supreme Court decision – June 2016

Clarified the FCA's materiality standard

- Fraud Enforcement and Recovery Act of 2009 defined “material:”
 - “having a natural tendency to influence, or being capable of influencing, the payment or receipt of money”
- Supreme Court said that:
 - Materiality standard is “rigorous” and “demanding”
 - Question is not **could** the government have declined payment had it known of the misrepresentation, but rather **would** the government have declined payment
 - Look at what government does in the “mine run” of cases to make that determination

Key lesson learned from *Escobar*

Government knowledge and continued payment weighs heavily against materiality

- Government knowledge can arise from:
 - Investigating and declining to intervene
 - Filing of a *qui tam* action
 - Communications about a defendant's practices and explicit confirmation from government that those practices are allowed or implicit confirmation through continued payment after disclosure
- Two questions:
 - If the government had knowledge of the misrepresentation, what **did** the government do about payment?
 - If the government had no knowledge of the relevant facts, what **would** the government **likely** do about payment?

Continued Interpretations of *Escobar*

United States ex rel. v. Magnolia Health Plan (5th Circuit 2020)

Relator did not adequately allege that the misrepresentations were “material” to the government’s payment decision

- Court held that a boilerplate certification of compliance with all laws was too general to establish that compliance with all laws is a condition of payment
- Mississippi Division of Medicaid “took no action after [the relator] informed the Division that [the health plan] was staffing care and case management positions with licensed practical nurses”
- Instead, Medicaid continued payment and renewed its contract

Practical Implications

- **May consider potential disclosure actions in ambiguous billing scenarios**
- **Disclosure to the government agency in charge of payment with detailed information about the action may defeat a later FCA action if:**
 - The government continues to pay claims because **materiality** would not be present
 - The government affirmatively agrees that the pharmacy's actions are in line with statutory or regulatory guidelines because **falsity** would not be present
- **Disclosure could be used as later evidence of scienter**

Practical Implications

- **If defending FCA litigation, discovery from the government becomes crucial to obtain evidence to defeat materiality**
- **If the government has intervened in the matter, consider discovery through requests for production, interrogatories, 30(b)(6) depositions, and requests for admission**
- **If the government declines to intervene in the matter, consider discovery through Rule 45 subpoenas**
 - Need to comply with agencies' *Touhy* regulations
 - Be prepared for the government to raise volume or limited government resources



On the horizon: the FCA post-pandemic



The CARES Act

Significant potential for liability under the FCA

CARES Act

Coronavirus Aid, Relief, & Economic Security (CARES) Act

- \$100 billion relief to support health care-related expenses or lost revenue due to COVID-19 and testing/treatment
- Both general and targeted allocations (high impact areas, treatment of uninsured, etc.)
- These are payments, not loans with forgiveness criteria, but retaining the payments requires compliance with Terms & Conditions

CARES Act



DEPARTMENT OF HEALTH & HUMAN SERVICES

Acceptance of Terms and Conditions

If you receive a payment from funds appropriated in the Public Health and Social Services Emergency Fund for provider relief (“Relief Fund”) under Public Law 116-136 and retain that payment for at least 90 days without contacting HHS regarding remittance of those funds, you are deemed to have accepted the following Terms and Conditions. Please also indicate your acceptance below. This is not an exhaustive list and you must comply with any other relevant statutes and regulations, as applicable.

Your commitment to full compliance with all Terms and Conditions is material to the Secretary’s decision to disburse these funds to you. Non-compliance with any Term or Condition is grounds for the Secretary to recoup some or all of the payment made from the Relief Fund.

CARES Act

Terms & Conditions

- Cannot be used to reimburse expenses/losses that have been reimbursed from other sources, or which other sources are obligated to reimburse
 - **Example:** Insurance policy subsequently reimburses expenses, must repay funds from HHS
- Funds cannot be used for certain purposes
 - **Examples:** Excessive executive pay, gun control advocacy, abortion, lobbying, embryo research, promotion of legalization of controlled substances, pornography, human trafficking, and more

CARES Act

Terms & Conditions

- T&C warning: Any deliberate omission, misrepresentation, or falsification of information in application or future reports can result in criminal civil, or administrative penalties
- The T&C expressly state that a provider's "commitment to full compliance with all Terms and Conditions is material to the Secretary's decision to disburse these funds to you."
 - Government's attempt to shore up "materiality" argument for future FCA litigation; uncertain success

CARES Act

Enforcement

- Special Inspector General for Pandemic Recovery (SIGPR)
 - Modeled after SIGTARP following 2008 financial collapse
 - SIGTARP investigations resulted in 380 convictions (97 percent conviction rate) and recovery of > \$11 billion
- Attorney General William Barr directed all U.S. Attorneys to “prioritize the detection, investigation, and prosecution of all criminal conduct related to the current pandemic”
 - “[W]e will deploy the False Claims Act against those who commit fraud related to the various COVID-19 stimulus programs...” – Ethan Davis, Principal Deputy AAG for DOJ Civil Division (June 26, 2020)

CARES Act – Enforcement

First settlement reached

- First CARES Act settlement announced January 12, 2021
- SlideBelts Inc., an internet retail company, admitted false statements to federally insured banks that SlideBelts was not in bankruptcy to influence those banks to approve, and the Small Business Administration to guarantee, a Paycheck Protection Program loan
- DOJ claimed this violated the FCA as well as the Financial Institutions Reform, Recovery and Enforcement Act
- Company and President/CEO paid a combined \$100,000 in damages/penalties
- Also repaid the CARES Act funds received (\$350,000)



Remote Investigations: COVID and Beyond





Access and confidentiality for employees to raise concerns with compliance officer and team





Response to concerns:

- Investigating those concerns
- Conducting telephone and Zoom interviews
- Completing the investigation in a timely manner
- Ensuring that remedial measures are put in place



Step 1: Considering the risks & rewards



Information
compromise

Risk. Employees might take screen shots of shared documents.



Employee
anxiety

Risk. Virtual barrier to reassurance and empathy with a distressed employee.



Observation

Risk. Difficulties sharing documents and managing technology.



Feed the
need for speed

Reward. Virtual interviews allow quick access to employees without travel.



Employee
assurance.

Reward. Quickly address employee concerns.



Rapid regulator
response

Reward. Faster self-reporting and response to requests.

Step 2: Selecting your tech



Breakout rooms

Can be useful if an interviewee needs to liaise with a representative or attorney.



Chat functions

Consider whether to allow private messaging during the meeting.



Recording

Will you record, if so where will you save – cloud/local?



Employee capabilities

Can the interviewee use the platform. Do they have bandwidth limitations.



Documents

Functionality for sharing and highlighting documents.

Step 3: Ensuring security



Encryption

Check your platform has end to end encryption throughout the meeting.



Interview room integrity

Set ground rules. Ensure the witness is alone unless authorised.



Access

Use a secure link, password protect and admit from waiting room.



Data protection compliance

Check document share will comply with local data regulations.

Step 4: Planning & testing



Employee representatives

Does the interviewee need a representative/attorney assistance.



Legal attendees

Consider additional lawyers to assist observation and legal compliance.



Ground rules

Set in advance with interviewee/manage expectations.



Legal

Ensure compliance with local employment law/contractual rights.



Technical assistance

Identify who will resolve technical issues.



Test call

It's a no brainer.

Step 5: What to do on the day



Smart questioning

Anticipate response time lags, observe micro expressions.



Keep it brief

Video interviews can be more tiring for all concerned.



Avoid information overload

Concentrate on key documents, highlighted in advance.



Technical issues

Keep calm, troubleshoot, engage technical assistance if required.

The biggest FCA risk of all

Motivated whistleblowers

- Strategies for mitigating whistleblower risk
 - Now is the time for an active compliance program
 - Listen to your employees' concerns
 - Exit interview strategies (especially for laid off or furloughed employees)

Questions?



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