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PREPARED BY



Earsa Jackson

901 Main Street
Suite 4400
Dallas, Texas 75202
214.651.2394

earsa.jackson@
strasburger.com

EDITORS

David K. Meyercord
C. Scott Nichols

HEALTH INDUSTRY GROUP

Tejal P. Banker
Debra W. Biehle
Thomas W. Burton
Merritt M. Clements
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Amendments to False Claims Act Pack a Punch for Health Care Providers

On May 20, 2009, President Obama signed the Fraud Enforcement and Recovery Act of 2009 (FERA) into law. The bill, in addition to enhancing the government's ability to prosecute financial fraud, also amended the False Claims Act (FCA), 31 U.S.C. §§ 3729-3733 (2009). Many of the changes were in direct response to existing case law that Congress concluded did not reflect the original intent of the law. Over the past 20 years, courts have gradually cut back on the scope of the FCA. However, with the increase in government funding for various programs and bailout money, Congress saw fit to reverse the effect of those decisions. According to §4 of the FERA, "[t]he effectiveness of the False Claims Act has recently been undermined by court decisions which limit the scope of the law and, in some cases, allow subcontractors paid with Government money to escape responsibility of proven frauds."

Since most of the recoveries under the FCA historically have come from health care providers, they bear the brunt of the punch of the amendments. Ten of the most significant changes resulting from FERA are:

1. Creates Lower Standard for Attaching Liability

In *Allison Engine v. United States ex. rel. Sanders*, 128 S.Ct. 2123 (2008), the United States Supreme Court unanimously held that in order to be actionable under the FCA the fraudulent statements must have been made "to get" false claims paid or approved "by the Government." In other words, the Supreme Court held that there must be a relationship between the fraudulent statement and the government's payment or approval and implied an intent element. Under such rulings, subcontractors were able to escape liability under the FCA for fraud merely because requests for payments were submitted only to the government's general contractor and not the government even though the money paid by the general contractor came from the government. The amended FCA provides that the statement need only be "material" to having the false claim paid or approved and extinguishes the

David L. Ovard
 D. Patrick Owens
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 Melissa Webb
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 Ivan Wood
 Kevin M. Wood



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requirement that a false record or statement be made “to get” a false or fraudulent claim “paid or approved by the Government.” §3729(a)(1)(B). Material is defined as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” §3729(b)(4). This change could have substantial effects on pending FCA suits because there is no longer an intent element because the statement need only be capable of influencing a payment decision.

2. Eliminates the “Presentment” Requirement

The amendments also overruled *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004) in which the D.C. Circuit held that presentment of a claim to a government officer or employee was necessary for FCA liability. The amendment to §3729(a)(1)(A) deletes the reference of presentment to “an officer or employee of the United States Government.” Many past defendants found comfort in the *Totten* line of cases and escaped liability merely because there was no presentment of a claim to the government. Further, the definition of “claim” in §3729(b)(2)(A)(ii) was expanded to include a demand “made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest . . .” if the government provides any portion of the money or property requested or will reimburse any portion thereof. This provision has far reaching implications as it begs the question of just how far down the line a “claim” reaches – i.e., how many steps removed can FCA liability go? The definition of “claim” will likely be litigated frequently since the presentment requirement has been eliminated.

3. Expands Scope of Liability for Reverse False Claims

The old reverse false claims provision established liability for those who knowingly use false records or statements to conceal or avoid returning government overpayments; however, the amendment removed the requirement of an actual statement so long as there is concealment of an obligation to pay back funds. §3729(a)(1)(G). Under the amended FCA, obligation is defined as an “established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the *retention of any overpayment.*” §3729(b)(3). (emphasis added) The effect of this amendment is to attach liability for alleged failures to pay or pay back government funds based on the interpretation of any and all statutory, regulatory,

contractual, and other requirements – even when there has been no prior determination that the money is owed to the government. As a practical matter, health care providers may wonder what their obligations are for reporting overpayments. Section 4E of the FERA provides some comfort by stating:

The Committee does not intend this language to create liability for a simple retention of an overpayment that is permitted by a statutory or regulatory process for reconciliation, provided the receipt of the overpayment is not based upon any willful act of a recipient to increase the payments from the Government when the recipient is not entitled to such Government money or property.

The health care provider's compliance team will be critical in minimizing exposure under the reverse false claims provisions.

4. Expands Retaliation Protection to Contractors

The FCA retaliation provision now protects whistle-blower contractors the same as it protects whistle-blower employees. §3730(h). This addition was designed to create an incentive for contractors to freely report fraud without the fear of retaliation.

5. Extends Conspiracy Provisions

Previously, FCA liability only attached to a conspiracy associated directly with getting a false or fraudulent claim paid. The new provision includes liability for conspiracy that violates any of the requirements of the FCA, including, for example, conspiracy to retaliate against whistle-blowers. §3729(a)(1)(C).

6. Clarifies Conversion Provision

Section 3729(a)(1)(D) clarifies the former §3729(a)(4) which had been in its original form since the FCA was originally enacted in 1863. The original section provided for a cause of action for conversion of government property but only if there was a "certificate of receipt." This archaic language was removed so that an action for conversion may now proceed without the need for proof of a receipt.

7. Permits Sharing of Complaints with State and Local Law Enforcement Agencies as Co-Plaintiffs While Case Under Seal

Under prior law, it was unclear whether the complaint and other evidence could be shared with state and local law enforcement agencies as co-plaintiff while the case was still under seal. Section 3732(c) clarifies that this is permissible without violating the seal.

8. Makes Issuance of Civil Investigative Demand Easier

In the past, civil investigative demands (“CIDs”) were not used frequently because it was almost impossible to obtain one from the Attorney General (“AG”), and the old FCA prohibited the AG from delegating this authority. Section 3733(a)(1) now permits the AG to delegate this responsibility. Any information uncovered pursuant to the CID may be shared with the relator if it is deemed by the AG or designee to be “necessary as part of any False Claims Act investigation.” There are likely to be more CIDs issued as a result of the amendment which could prove highly beneficial for relators in developing a case.

9. Permits Relation Back Even When Government Asserts New Complaint Upon Intervening

The amended §3731(c) provides that the government, upon a decision to intervene, “may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening *and to add any additional claims. . . .*” (emphasis added) A new or amended complaint now specifically relates back to the filing date of the relator’s complaint “to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or *attempted to be set forth*, in the prior complaint of that person.” (emphasis added) This provision effectively extends the statute of limitations period. This amendment has serious repercussions because it essentially gives the government an extensive amount of time to investigate and even expands the scope of the claims. Finally, it remains to be seen how broadly the phrase “attempted to be set forth” will be construed. Expect a flurry of challenges to this amendment.

10. Makes Certain Provisions Retroactive

Perhaps the strongest punch in the amended FCA was the effective date of the amendments. While most of the provisions were effective May 20, 2009, the FERA provides that the effective date for all claims under §3729(a)(1)(B) was June 7, 2008, two days before the *Allison Engine* decision. This retroactive provision reverses *Allison*

Engine. This change may affect defendants involved in pending litigation since the rules of the game have changed.

In the coming months, expect courts to start unpacking the amendments as various legal arguments are crafted. Health care providers should ensure that their compliance teams are well-trained in an effort to minimize the blow from the punch of the amended FCA. Given the Congressional intent set forth in the FERA, expect an increase in enforcement actions.

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