Qui Tam actions and the Civil False Claims Act

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What is Prohibited?

Four most common liability provisions (31 U.S.C. § 3729):

- (a)(1) – Direct False Claims
- (a)(2) – False Records
- (a)(3) – Conspiracy
- (a)(7) – Reverse False Claims

False Claims under 31 U.S.C. § 3729(a)(1) – Direct False Claims

The elements of a direct false claim:

- Presented or caused to be presented
- A "claim" for approval to the United States government
- That is "false" or "fraudulent"
- "knowing" the claim is false

False Claims under 31 U.S.C. § 3729(a)(2) –False Records

The elements of a false records claim:

- The defendant made, used, or caused to be made or used, a false record or statement
- The false record or statement was used to get a false claim approved by the government
- The defendant acted "knowingly"

False Claims under 31 U.S.C. § 3729(a)(3) – Conspiracy

The elements of a conspiracy:

- A false or fraudulent claim to the United States (which is paid or approved by the government
- An agreement to submit the false claim
- An act in furtherance of the object of the agreement
- An intent to defraud

False Claims under 31 U.S.C. § 3729(a)(7) – Reverse False Claims

The elements of a conspiracy:

- Have possession, custody or control of property or money used or to be used by the government
- 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 United States.

What Does *Qui Tam Mean?*

In Latin - Qui tam (pronounced key-tam or kwee-tam) ***pro domino rege quam pro se ipso***

which means

"Who sues on behalf of the King, as well as for Himself"

Qui Tam Actions

In *qui tam* provisions, the government gives private citizens the right and the financial incentive to act in the place of law enforcement.

A Case Is Filed

How does it work?

"Remember the good old days when it was a suggestion box?"

A Case is Filed

- The person bringing the suit (the relator) files it in the name of the United States.
- The relator must provide the government with written disclosure of the evidence.
- The suit remains under seal (secret) for at least 60 days so that the government can investigate.

How do you know you have an FCA case?

- Subpoena
  - Grand jury
  - Civil
  - OIG
- Civil Investigative Demand
- Federal Agents Appear
  - FBI
  - OIG

Response

- Review subpoena to attempt to determine government's focus
- Conduct an internal investigation – review documents and interview witnesses
- Consider retaining counsel for key employees
- Begin preparing your case *immediately*

Intervention

- At some point, the government will usually provide the defendant with an opportunity to present its position prior to the government's decision to intervene.
- Amazingly, this may be the most important phase in *qui tam* litigation -- and it occurs before the case is unsealed or the complaint is served.

Why Does Intervention Matter?

FY 1987 – FY 2005

- Cases where the government intervened or the case settled prior to a decision to intervene:
  - $9 billion in recoveries
- Non-intervened cases:
  - $400 million in recoveries
- The government only intervenes in about 20% of all cases.

Why Does Intervention Matter?

- Resources
  - DOJ’s budget vs. counsel for relators’ bank account
- Investigative tools
  - The FBI
- Legitimacy
  - Although they won’t admit it, courts view an intervened case differently

Negotiating with the Government

- Develop your own story
  - The government will have a narrow focus – don’t rely on the government’s framing of the issues
  - Find contradictions to the government’s version of events
  - Find out if other government witnesses (DOE, EPA, etc.) will support your story
- Present it with an eye toward trial

Litigating the Case

Issues on a Motion to Dismiss

- Public Disclosure
- First to File
- Fed. R. Civ. Pro. 9(b)
- Statute of Limitations

Public Disclosure

- Unless a relator is an "original source of the information," he may not bring a *qui tam* action based upon publicly disclosed allegations or transactions.
  - Public disclosure is a complete bar in non-intervened cases
  - Relevant to relator's share of recovery and legal fees in non-intervened cases

Public Disclosure

- "Public disclosure" occurs in one of three ways under the Act:
  - in a criminal, civil, or administrative hearing;
  - in a congressional, administrative or General Accounting Office report, hearing, audit or investigation; or
  - from the news media

Original Source Exception

- Where the basis of false claims allegations is publicly disclosed, a relator may still bring a case if he is an “original source.” An original source:

  (1) must have direct and independent knowledge of the information on which the allegations are based and

  (2) must have voluntarily provided the information to the government before filing the action based on the disclosure.

  (9th Cir. only) must have had a hand in the public disclosure

Current Issues: Knowledge

- What kind of "direct and independent knowledge" is required?
  - 10th Cir.: Relator must know of facts "underlying or supporting" the complaint's allegations of fraud
  - 3rd Cir. (per Alito, J.): Relator must have knowledge of the alleged false representation itself.
- *Rockwell International Corp. v. U.S. and ex rel. Stone*, No. 05-1272 (Sup. Ct. oral argument 12/5/06)

Current Issues: Disclosure

- To be an "original source" must a relator provide the information to the government before the public disclosure or merely before filing?
- Circuit split recognized: *U.S. v. Johnson Controls, Inc.*, 457 F.3d 1009 (9th Cir. 2006)
  - 6th and D.C. Circuits require information to be provided before public disclosure
  - 8th and 9th Circuits require information to be provided only before filing; prior public disclosure is irrelevant

First-to-File Rule

- The False Claims Act provides that "[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5).

First-to-File Rule

- The first-to-file rule facilitates the "twin goals" of

  (1) encouraging whistleblowers to come forward quickly with their allegations, yet

  (2) preventing duplicative or parasitic *qui tam* litigation. U.S. ex rel. Hampton v. Columbia/HCA Healthcare Corp., 318 F.3d 214 (D.C. Cir. 2003).

First-to-File Rule

- The first-to-file rule is broad:
- It bars later-filed *qui tam* actions based on the same "material" facts or "essential" elements of fraud as the first-filed suit – the second case need not allege identical facts to be barred. U.S. ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181 (9th Cir. 2001).
- It bars a successive action even if the second action adds details or specificity to the allegations of the first action. Grynberg v. Koch Gateway Pipeline Co., 390 F.3d 1276 (10th Cir. 2004).
- It bars a later-filed action even if the second relator adds defendants or alleges similar conduct by the same defendant at a different location. U.S. ex rel. Hampton v. Columbia/HCA Healthcare Corp., 318 F.3d 214 (D.C. Cir. 2003).

First-to-File Rule

- A number of courts have held that the first-filed complaint will bar a second if the same material facts are at issue or if the same recovery is sought:

- In U.S. ex rel. Ortega v. Columbia Healthcare, Inc., 240 F.Supp.2d 8, 13 (D.D.C. 2003), the court explained that "[a] later-filed *qui tam* complaint is barred unless (1) it alleges a **different type of wrongdoing, based on different material facts** than those alleged in the earlier suit; and (2) it **gives rise to separate and distinct recovery** by the government."

First-to-File Rule

- The first-to-file bar is generally imposed based strictly on a comparison of the first-filed and successive complaints. U.S. ex rel. Ortega v. Columbia Healthcare Corp., 240 F. Supp. 2d 8 (D.D.C. 2003).
- A relator is not entitled to discovery to defend himself from the first-to-file bar. U.S. ex rel. LaCorte v. SmithKline Beecham Clin. Labs, Inc., 149 F.3d 227 (3d Cir. 1998).
- A successive relator may not amend his complaint to avoid the first-to-file bar—only the original complaint will be evaluated. U.S. ex rel. Ortega v. Columbia Healthcare Corp., 240 F. Supp. 2d 8 (D.D.C. 2003).

First-to-File Rule

- Formerly an "exception-free" rule, U.S. ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181 (9th Cir. 2001), new developments have limited the preclusive scope of the bar:
- The 6th Circuit held that a "fatally broad" first-filed complaint that does not comply with Rule 9(b) cannot bar a successive complaint. U.S. ex rel. Walburn v. Lockheed Martin Corp., 431 F.3d 966 (6th Cir. 2005).
- Similarly, the 9th Circuit held that a first-filed complaint barred by public disclosure cannot bar a successive complaint. Campbell ex rel. U.S. v. Redding Medical Center, 421 F.3d 817 (9th Cir. 2005).

Rule 9(b)

- Undisputed that Rule 9(b) applies to FCA complaints.
- Key element: particulars about the false claims (the *sine qua non* of an FCA case)
- Alleging details about the fraudulent scheme is not enough—the relator must provide some information about a representative claim (United States ex rel. Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 228 (1st Cir. 2004)):
  - Dates of the claims,
  - Content of the forms or bills submitted or identification numbers,
  - Amount of money charged to the government,
  - The goods or services for which the government was billed
  - Individuals involved in the billing

Statute of Limitations

- 31 U.S.C. 3731(b): An FCA action may not be brought:

  (1) more than 6 years after the violation

  (2) more than 3 years after the date when facts become known or reasonably should have been known by the responsible U.S. official, but in no event more than 10 years after the date of the violation

Statute of Limitations

- Courts are split as to whether the 3/10 year limitation in (b)(2) applies in non-intervened cases
  - *U.S. ex rel. Sikkenga v. Regence Blue Cross and Blue Shield of Utah*, 472 F.3d 702, 725 (10th Cir. 2006) ("[W]e hold that § 3731(b)(2) was not intended to apply to private *qui tam* relators at all.")
  - *U.S. ex rel. Pogue v. Diabetes Treatment Centers of America, Inc.*, --- F.Supp.2d ---, 2007 WL 404260, at *7 (D.D.C. Feb. 7, 2007) ("The Court thus holds that § 3731(b)(2) unambiguously applies to relators.")

Document Discovery: Contractor's Nightmare, or Dream?

- In many cases, DOE contractors have left many documents in the possession of DOE, making production of documents relatively painless.

BUT…

- Trying to get these documents back from DOE is often incredibly painful.
  - Security issues/Clearances
  - Who pays: DOE v. DOJ

Witnesses: Why Won't DOE Return My Calls?

- An incredibly frustrating aspect of an FCA case is that longtime friends and working colleagues at DOE suddenly make themselves scarce.
  - Rank & file and former employees may be supportive
  - Higher-ups are subject to political pressure and often have changed attitudes and selective memories.
- Retaining experts may also be problematic—many experts involved in the government contracting arena do not want to testify against the government.

Witnesses: DOE Employees

- Having a witness affiliated with a government agency who supports your story is incredibly helpful.
- *Touhy* regulations make it difficult or impossible to speak with current government employees informally.
- Instead, contact retired and former government employees.

Issues for MSJ/Trial

- Presentment
- Materiality
- Government Knowledge defense
- Ambiguity of regulations
- Scientific Errors

Presentment

- Issue: Does (a)(2) require presentation of a claims to the Government?
  - "Paid or approved by the Government"
- Circuit Split
  - *United States ex rel. Totten v. Bombarier Corp.*, 380 F.3d 488 (D.C. Cir. 2004)
  - *United States ex rel. Sanders v. Allison Engine Co., Inc.*, 471 F.3d 610 (6th Cir. 2006)
- Relation to pleading standard

Materiality

- Requirement?
  - Every court to consider the issue has found that materiality is a required element.
- Two tests:
  - Outcome materiality—the government would have acted differently had it known of the contract violations
  - Natural tendency—the violations would have had a natural tendency or been capable of influencing the government’s decision
- Trend is toward the natural tendency test

Government Knowledge

- Prevailing trend is the recognition that government knowledge of the falsity of a claim *may* be relevant in determining whether the defendant "knowingly" submitted a false claim; however, *it is not an automatic defense to a FCA case.*
  - Recognized by 2nd, 4th, 8th, 9th, and 10th Circuits

Ambiguous Regulations

- Reliance on a good faith interpretation of a regulation is a viable FCA defense.
- Even if the interpretation is incorrect, the good faith nature of the reliance eliminates the scienter element.
  - *E.g. United States ex rel Oliver v. Parsons Co.*, 195 F.3d 457, 463 (9th Cir. 1999) (reasonableness of interpretation of "technical and complex" federal regulations may be relevant to determining "knowing" submission of false claim)

Scientific Errors

- There is no *per se* liability for mistakes; the "knowing" element of FCA requires that the defendant knew it was lying.
  - "Bad math is no fraud, proof of mistakes is not evidence that one is a cheat, and the common failings of engineers and other scientists are not culpable under the Act." *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 815-16 (9th Cir. 1995).

Conclusion

- From the moment you become aware of a potential FCA case, every act you take should be geared towards trial.
- DOJ will make use of its time to investigate—don't let DOJ get too far ahead.