What Lawyers Should Know About the False Claims Act and the Wave of New *State* False Claims Acts After the 2009-2010 Amendments

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Michael A. Sullivan[1]

Now, more than ever, it is essential for lawyers—especially those in health care-- to understand their clients' potential liabilities under the federal False Claims Act ("FCA").[2] The health care industry increasingly has become the major focus of the federal government's enforcement efforts, and usually pays at least two-thirds of the money recovered each year under this anti-fraud statute.[3]

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2 31 U.S.C. §§ 3729-33.

3 For example, the Justice Department has announced that, in the fiscal year ending September 30, 2010, the health care industry accounted for a record $2.5 billion of the $3 billion recovered in cases

Adding to the health care lawyer's challenges, since 2009 Congress has amended the False Claims Act *three times*, primarily to overturn judicial decisions that once created obstacles to FCA actions.[4] Those amendments also have created an important new basis of FCA liability – retention of overpayments – which has great significance to health care providers. These 2009-2010 amendments make the FCA a far more effective enforcement tool for the government, and thus a much greater problem for defendants accused of health care fraud.

Further, a wave of *new* "whistleblower" statutes continues, inspired by the successes of the False Claims Act. These new laws include (1) an increasing number of state versions of the federal False Claims Act;[5] (2) the new IRS Whistleblower Rewards Program;[6] and (3) new "SEC Whistleblower" and "CFTC Whistleblower" programs, authorized in July 2010 as part of the Dodd-Frank Financial Reform Act.[7] By encouraging employees, contractors, and others to report

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alleging fraud or false claims. (http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html).

4 Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 ("FERA"); Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 ("PPACA"); Dodd-Frank Financial Reform Act, Pub. L. No. 111-203, 124 Stat. 1376.

5 *See infra* section III.

6 The False Claims Act expressly "does not apply to claims, records, or statements made under the Internal Revenue Code of 1986." 31 U.S.C. § 3729(e). In December 2006, however, Congress used the False Claims Act as a model in establishing the new IRS Whistleblower Rewards Program, which provides incentives to "whistleblowers" to report violations of the Internal Revenue laws in excess of $2 million. IRS Whistleblowers may receive 15-30% of the recovery. *See* 26 U.S.C. § 7623(b)(1) (providing for "an award at least 15 percent but not more than 30 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts))." Regularly updated information about the IRS Whistleblower program may be found at http://www.whistleblowerlawyerblog.com/irs_rewards_program_tax/.

7 Section 922 of the Financial Reform Act provides for the first potentially meaningful rewards to whistleblowers by the Securities and Exchange Commission. (http://www.whistleblowerlawyerblog.com/2010/07/new_sec_whistleblower_program_1.html). Section

allegations of fraud, these new whistleblower provisions create substantial concerns for health care organizations and other defendants alleged to be liable.

This article provides an overview of what health care lawyers should know about the federal False Claims Act and the new state False Claims Acts. As discussed below, the state Acts mirror the federal False Claims Act in important respects, but can differ in some significant ways.

These new state False Claims Acts and the federal False Claims Act create civil liability for *treble* damages and potentially huge penalties for fraud and false claims submitted to the government. They authorize "*qui tam*"[8] or "whistleblower" lawsuits by employees or other persons, who may share in the government's recovery, as well as allow whistleblowers to recover damages for retaliation. These state False Claims Acts, like the federal Act, have unique procedural requirements that are foreign to most lawyers.

This article explains how both the federal and state False Claims Acts work. It summarizes the background of the federal False Claims Act, outlines how it operates, and discusses the Act's increasing use to combat fraud directed at public funds. This article also highlights some important differences between state False Claims Acts and the federal False Claims Act.

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748 provides for similar rewards to whistleblowers by the Commodities Futures Trading Commission. (http://www.whistleblowerlawyerblog.com/2010/07/whistleblowers_reporting_deriv.html#more).

8 The term "*qui tam*" is derived from the Latin phrase, "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means "who pursues this action on our Lord the King's behalf as well as his own." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 769 n.1 (2000).

I. Why A "False Claims Act"?

> *Fraud is perhaps so pervasive and, therefore, costly to the Government due to a lack of deterrence. GAO concluded in its 1981 study that most fraud goes undetected due to the failure of Governmental agencies to effectively ensure accountability on the part of program recipients and Government contractors. The study states:*
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> > *For those who are caught committing fraud, the chances of being prosecuted and eventually going to jail are slim. . . . The sad truth is that crime against the Government often does pay.*[9]

Fraud – and allegations of fraud – plagues government spending at every level. Today, as the federal government struggles to fund the hundreds of billions of dollars spent annually on health care through Medicare, Medicaid, and other programs; the Iraq and Afghanistan wars; the financial "bailout" measures enacted after the 2008 financial collapse; disaster relief efforts; and government grants and programs of every description, there is no shortage of opportunities for fraud against the public fisc.

The federal False Claims Act has been the federal government's "primary" weapon to recover losses from those who defraud it.[10] The Act not only authorizes the government to pursue actions for treble damages and penalties, but also empowers and provides incentives to *private citizens* to file suit on the government's behalf as "*qui tam* relators." Over the past two decades, recoveries for the federal government have grown dramatically since Congress

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9 S. REP. No. 99-345, at 3 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5268 [hereinafter "Legislative History"] (quoting 1981 GAO Report to Congress, "Fraud in Government Programs: How Extensive Is It? How Can It Be Controlled?").

10 *Id.* at 2.

amended the Act in 1986 to encourage greater use of the *qui tam* provisions, as part of a "coordinated effort of both the [g]overnment and the citizenry [to] decrease this wave of defrauding public funds."[11]

The federal False Claims Act since 1986 has been successful in recovering more than $27 billion,[12] increasingly through *qui tam* lawsuits brought by private citizens. In light of the federal Act's successes, Congress in the Deficit Reduction Act of 2005[13] created a large financial "carrot" for states that adopt state versions of the False Claims Act. Any state that passes its own "False Claims" statute with *qui tam* or whistleblower provisions that are at least as effective as those of the federal Act becomes eligible for a 10% increase in its share of Medicaid fraud recoveries.[14]

Thus, the impetus for states to enact a False Claims Act is this incentive of more dollars. Since 2006, the number of states with a state version of the False Claims Act covering at least Medicaid has grown to at least twenty-eight.[15] Many other states[16] are considering enacting

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11 *Id.*

12 See http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html .

13 *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4.

14 *Id*. § 6031. In the legislative hearings that led to passage of the new Georgia State False Medicaid Claims Act (all attended by this writer, and at which this writer also testified), former Inspector General Doug Colburn of the Georgia Department of Community Health testified that Georgia currently pays approximately 38 cents of every dollar spent in the Georgia Medicaid program, and thus Georgia currently receives 38% of Medicaid fraud recoveries. This ten point increase to 48% in Georgia's share of Medicaid fraud recoveries would thus effectively increase Georgia's share of these recoveries by more than 26% in actual dollars (i.e., by the fraction 10/38).

15 As of November 1, 2010, state "False Claims" statutes have been enacted in at least California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico,

similar statutes of their own so that they, too, qualify for increased funds under the Deficit Reduction Act.

II. Background of the Federal False Claims Act

Although the False Claims Act may be the best known *qui tam* statute, it is far from being the first. *Qui tam* actions date back to English law in the 13th and 14th Centuries. This tradition took root in the American colonies and, by 1789, states and the new federal government had authorized *qui tam* actions in various contexts.[17]

According to one writer:

New York, North Carolina, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Virginia, Wisconsin, and the District of Columbia. *See* CAL. GOV'T CODE §§ 12650-12656; COL. REV. STAT. §§ 25.5-4-303.5 to 25.5-4-310; CONN. GEN. STAT. ANN. §§ 17B-301 to 17A-301P; DEL. CODE ANN. tit. 6, §§ 1201-1209; FLA. STAT. §§ 68.081-68.09; O.C.G.A. §§ 49-4-168 to 49-4-168.6; HAW. REV. STAT. §§ 661-21 to 661-29; 740 ILL. COMP. STAT. §§ 175/1 to 175/8; IND. CODE §§ 5-11-5.5-1 to 5-11-5.5-18; LA. REV. STAT. ANN. §§ 46:437.1-440.3; MD. HEALTH GEN . §§ 2-601 to 2-611; MASS. GEN. LAWS 12 §§ 5A; MICH. COMP. LAWS §§ 400.601-400.613; M.S.A. §§ 15C.01 to 15C.16; MONT. CODE ANN. §§ 17-8-401 to 17-8-412; NEV. REV. STAT. §§ 357.010 to 357.250; N.H. REV. STAT. ANN. §§ 167:61 to 167:61-e; N.J. STAT. ANN §§ 2A:32C-1 to 2A:32C-17; N.M. STAT. §§ 27-14-1 to 27-14-15; N.Y. STATE FIN. LAW §§ 187-194 (McKinney); N.C.G.S.A. §§ 1-605 to 1-618; OKLA. STAT. tit. 63, §§ 5053-5053.7; O.R.S. §§ 180.750 to 180.785; R.I. GEN. LAWS §§ 9-1.1-1 to 9-1.1-8; TENN. CODE ANN. §§ 71-5-181 to 71-5-185; TEX. HUM. RES. CODE ANN. §§ 36.001 to 36.132; VA. CODE ANN. §§ 8.01-216.1 to 8.01-216.19; WIS. STAT. ANN. §§ 20.931; and D.C. CODE §§ 2-308.13-2.308.21. A regularly updated list of state False Claims Acts appears at www.taf.org/statefca.htm. For an excellent 2005 article on state False Claims Acts, see James F. Barger, Jr., Pamela H. Bucy, Melinda M. Eubanks, and Marc S. Raspanti, *States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts*, 80 TUL. L. REV. 465 (2005) [hereinafter *State False Claims Act Study*].

16 State False Claims Acts also have been proposed in at least Arkansas, Iowa, Kansas, Mississippi, Missouri, North Dakota, Pennsylvania, and South Carolina. *See* John T. Boese, FraudMail Alert, http://www.friedfrank.com/wcc/pdf/fm070314.pdf.

17 *See, e.g., Marvin v. Trout*, 199 U.S. 212, 225 (1905) ("Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our government.") *See generally* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 2.3, at 34-36 (West 2004).

> *In the early years of the Nation, the qui tam mechanism served a need at a time when federal and state governments were fairly small and unable to devote significant resources to law enforcement. As the role of the Government expanded, the utility of private assistance in law enforcement did not diminish. If anything, changes in the role and size of Government created a greater role for this method of law enforcement.*[18]

***A. Birth of the False Claims Act*:** The Civil War prompted Congress to enact the original False Claims Act in 1863. As government spending on war materials increased, dishonest government contractors took advantage of opportunities to defraud the United States government. "Through haste, carelessness, or criminal collusion, the state and federal officers accepted almost every offer and paid almost any price for the commodities, regardless of character, quality, or quantity."[19]

One senator explained how the *qui tam* provisions of the Act were intended to work:

> *The effect of the [qui tam provisions] is simply to hold out to a confederate a strong temptation to betray his co-conspirator, and bring him to justice. The bill offers, in short, a reward to the informer who comes into court and betrays his co-conspirator, if he be such; but it is not confined to that class. . . . In short, sir, I have based the [qui tam provision] upon the old fashioned idea of holding out a temptation and setting a rogue to catch a rogue, which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.* [20]

The original Act provided for double damages, plus a $2,000 forfeiture for each claim submitted.[21] If a private citizen or "relator" used the *qui tam* provision to file suit, the

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18 SYLVIA, *supra* note 18 § 2:6, at 41.

19 *Id.* § 2:6, at 42 (quoting 1 FRED ALBERT SHANNON, THE ORIGINATION AND ADMINISTRATION OF THE UNION ARMY, 1861-65, at 55-56, 58 (1965) (other sources quoted omitted)).

20 *Id.* § 2:6, at 43 (quoting Cong. Globe, 37th Cong., 3d Sess., 955-56 (1863)).

21 Legislative History, *supra* note 10.

government had no right to intervene or control the litigation. A successful "relator" was entitled to one-half of the government's recovery.[22]

The Act survived in substantially its original form until World War II.[23] In a classic and oft-quoted 1885 passage, one court rejected the argument that courts should limit the statute's reach on the grounds that *qui tam* actions were poor public policy:

> The statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.[24]

***B. "Over-Correction" of the False Claims Act*:** Until World War II, perhaps because of the relatively small amount of government spending compared to the modern era, the Act did not attract much attention.[25] World War II then spawned various *qui tam* actions over defense procurement fraud. Some relators sought to exploit what was effectively an unintended "loophole" in the Act that permitted them to file "parasitic" lawsuits. These relators simply copied the information contained in criminal indictments, when the relator had no information to

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22 Act of March 2, 1863, ch. 67, § 6, 12 Stat. 698 (discussed in SYLVIA, *supra* note 18, § 2:6, at 44 & n.18).

23 Certain amendments to the Act did occur in the early 1900s. SYLVIA, *supra* note 18, § 2.6, at 44 & n.18. In addition, the United States Supreme Court declined to limit the Act's application in 1937 in *United States v. Kapp*, 302 U.S. 214 (1937). In *Kapp*, the Supreme Court rejected the defendant's argument that the government must show a monetary loss and that the representations in question were not material. *Id.* at 217-18.

24 *United States v. Griswold*, 24 F. 361, 365-66 (D. Or. 1885).

25 *See generally* JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS §§ 1-9, 1-10 (1993).

bring to the government's attention independently.[26]

In 1943 the Supreme Court in *United States ex rel. Marcus v. Hess*[27] held that it was up to Congress to make any desired changes in the Act to eliminate "parasitic" lawsuits.[28] Congress amended the Act that same year to do so. The 1943 Amendments eliminated jurisdiction over *qui tam* actions that were based on evidence or information in the government's possession, even if the relator had provided the information to the government.[29]

In addition, Congress in 1943 also gave the government the right to intervene and litigate cases filed by *qui tam* relators. The 1943 amendments also dramatically reduced incentives for *qui tam* suits to be filed, by reducing to 10% the maximum amount of the recovery that a relator could receive if the government intervened, with a 25% maximum award if the government did not intervene and the private citizen alone obtained a judgment or settlement.[30]

***C. The 1986 Amendments Establish the Modern False Claims Act*:** By the 1980s, both the Justice Department and congressional leaders realized that the 1943 amendments and "several restrictive court interpretations"[31] had made the False Claims Act ineffective. Congress acted decisively in 1986 with major amendments that breathed life into the False

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26 Legislative History, *supra* note 10, at 11.

27 317 U.S. 537 (1943).

28 *Id*. at 546-47.

29 Act of December 23, 1943, ch. 377, 57 Stat. 608.

30 SYLVIA, *supra* note 18, § 2:8, at 51.

31 Legislative History, *supra* note 10.

Claims Act.[32]

A representative of a business association testified that the 1986 Amendments were:

> supportive of improved integrity in military contracting. The bill adds no new layers of bureaucracy, new regulations, or new Federal police powers. Instead, the bill takes the sensible approach of increasing penalties for wrongdoing, and rewarding those private individuals who take significant personal risks to bring such wrongdoing to light.[33]

The 1986 Amendments increased financial and other incentives for *qui tam* relators to bring suits on behalf of the government. Congress increased the damages recoverable by the government from double damages to treble damages, and increased the monetary penalties to a minimum of $5,000 and a maximum of $10,000 per false claim. The 1986 Amendments also increased the *qui tam* relator's share of recovery to a range of 15% to 25% in cases in which the government intervenes, and 25% to 30% in cases in which the government does not intervene, plus attorney's fees and costs.

The 1986 Amendments also clarified the standard of proof required and made defendants liable for acting with "deliberate ignorance" or "reckless disregard" of the truth. Congress also lengthened the statute of limitations to as much as ten years, modernized jurisdiction and venue provisions, and made other changes as well.[34]

D. The 2009 and 2010 Amendments Remove Judicially Created Obstacles to the False Claims Act: Responding to variety of court decisions since 1986 that had limited the FCA's

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32 S. 1562, 99th Cong., 2d Sess. (1986) (False Claims Reform Act) (discussed in Legislative History, *supra* note 10).

33 Legislative History, *supra* note 10, at 14.

34 *See* section III, *infra*.

effect, Congress again acted decisively in 2009 and 2010 with amendments, in three stages:

First, the 2009 Fraud Enforcement and Recovery Act ("FERA") legislatively overruled judicial decisions that had limited the FCA's reach, including *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008); *United States ex rel. Totten v. Bombardier Corp*., 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005); and *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D. Va. 2005), *rev'd*, 562 F.3d 295 (4th Cir. 2009). The major effects of the 2009 FERA amendments included the following:

1. The amendments expanded the definition of "claim," and fraud directed against government *contractors*, *grantees* and *other recipients* is now plainly covered by the FCA.

2. Funds *administered by* the United States government (such as in Iraq) are now included within the FCA's protections.

3. *Retaining overpayments* of money is now an explicit basis of liability, which is an important broadening of the Act from the perspective of health care providers, among others.

4. Liability for "*conspiracy*" to violate the FCA is far broader, and now includes conspiring to commit a violation of any substantive FCA theory of liability.

5. Protection of whistleblowers and others against *"retaliation"* now extends not only to "employees," but also to "contractors" and "agents"; and persons other than "employers" potentially may be held liable for retaliation.

6. In investigating, the government now has authority to use *"civil investigative demands"* more broadly to gather evidence and take testimony, and to *share information* more with state and local authorities and with whistleblowers/relators.

7. A standard definition of what is *"material"* now applies in False Claims Act cases.

8. The *statute of limitations* has been clarified in *qui tam* cases to facilitate the government's asserting its own claims.

Second, in the 2010 Patient Protection and Affordable Care Act ("PPACA"), Congress made other important changes to the FCA. From a relator's perspective, perhaps most significant was eliminating language in the "public disclosure" provision (section 3730(e)(4)(a)) that sometimes deprived the court of subject matter jurisdiction. Congress rewrote that provision so that the court no longer loses subject matter jurisdiction even if a "public disclosure" has occurred. Another change to this section was to empower the government to prevent dismissals based on "public disclosure" through the following language: "the court shall dismiss an action or claim under this section, unless opposed by the Government . . . ." [35]

From a health care entity's perspective, the most important FCA changes in PPACA may be that it (1) clarified and extended liability for overpayments identified but retained by providers in Medicare and Medicaid claims;[36] and (2) made explicit that claims which include items or services resulting from an Anti-Kickback Act violation constitute false claims under the FCA.[37]

Third, in the July 2010 Dodd-Frank Financial Reform Act, Congress created a uniform three year statute of limitations for claims of "retaliation" pursuant to section 3730(h). It also corrected an apparent drafting error in FERA's 2009 changes to the same section by restoring its intended breadth. The anti-retaliation provision now encompasses (a) not only the pre-FERA definition of "protected conduct" as "lawful acts done . . . in furtherance of [an FCA action]"

35 31 U.S.C. § 3730 (e)(4)(A) (as amended in 2010 by PPACA).

36 Pub. L. No. 111-148, § 6402.

37 Pub. L. No. 111-148, § 6402(f).

(which FERA had mistakenly dropped from the statute), but also (b) FERA's expansion of the definition of "protected conduct" to include "other efforts to stop 1 or more violations [of the FCA] . . . ." 31 U.S.C. § 3730(h).

III. Overview of How the Modern False Claims Act Works (with Comparisons to Some State False Claims Acts)

A. Conduct Prohibited

The federal False Claims Act imposes civil liability under several different theories, only four of which were generally used before FERA. FERA has added an additional theory of liability for retention of overpayments, which now will likely be used quite often in health care cases:

First, the Act makes liable any person who knowingly presents, or causes to be presented, a "false or fraudulent claim for payment or approval."[38]

Second, the Act creates liability for using a "false record or statement." It imposes liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."[39]

"Claim" is broadly defined, and is not limited to submissions made directly to the federal government:

> (2) the term "claim"--
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> (A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that--

38 31 U.S.C. § 3729(a)(1)(A).

39 *Id.* § 3729(a)(1)(B).

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is 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, and if the United States Government--

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property.[40]

Third, since the government also can be defrauded when a private entity *underpays* or *avoids paying* an obligation to the government, the Act contains what is known as a "reverse false claim" provision. FERA has added language to this provision to establish liability for *retention of overpayments*. This provision of the FCA creates liability for any person who "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, *or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.*"[41] For example, a company that is obligated to pay royalties to the government under an oil lease can be held liable if it uses false records or statements to pay less than what it owes. Health care providers can now also be liable for retaining identified overpayments from federal health care programs such as Medicare and Medicaid.

40 *Id.* § 3729(b)(2).

41 *Id.* § 3729(a)(1)(G). The Act also lists three little-used bases of liability in subsections (a)(1)(D), (E), and (F), which are omitted from this discussion.

FERA has introduced the following definition of "obligation":

> (3) the term "obligation" means 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; . . . .

Fifth, the False Claims Act imposes liability under a "conspiracy" provision, which FERA has broadened to cover conspiracy to violate any substantive provision of the FCA. Any person who "conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G)" is liable under this provision.[42]

State False Claims Acts compared: *Before FERA included retention of overpayments as a basis of FCA liability, several states—including Hawaii, Massachusetts, Nevada, Tennessee, and Wisconsin—had expanded the federal Act's other four commonly-used theories of liability listed above. These state laws recognized a legal theory for holding liable a person or entity who is the "beneficiary" of the "inadvertent submission" of a false or fraudulent claim, if that person or entity fails to disclose (and presumably correct) the false claim after discovering it.*[43]

Moreover, Tennessee's False Claims Act reaches beyond false or fraudulent "claims" and imposes liability for false or fraudulent "conduct" that apparently does not necessarily involve "claims" submitted to the state. This state law adds a new category of liability for "any

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42 *Id.* § 3729(a)(1)(C).

43 *See, e.g.*, TENN. CODE ANN. § 4-18-103 (imposing liability on a "beneficiary of an inadvertent submission of a false claim to the state or a political subdivision, [who] subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim"). *See also* HAW. REV. STAT. § 661-21 (similar provision for failing to disclose inadvertent submission of false claim after discovery of submission); MASS. GEN. LAWS 12 § 5B (similar provision); NEV. REV. STAT. § 357.040 (similar provision); WIS. STAT. ANN. § 20.931(2)(h) (similar provision).

false or fraudulent conduct, representation, or practice in order to procure anything of value directly or indirectly from the state or any political subdivision."[44]

B. Retaliation Protection for Employees, Contractors, and Agents

As noted, the federal False Claims Act also creates a cause of action for damages for retaliation against employees, contractors, and agents who assist in the investigation and prosecution of False Claims Act cases.[45] This cause of action belongs to the employee alone, and the government does not share in any recovery for retaliation.

As summarized above, FERA and the Dodd-Frank Financial Reform Act have modified the federal FCA retaliation provision in section 3730(h) so that it now provides as follows:

> (h) Relief from retaliatory actions.
>
> (1) In general. Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.
>
> (2) Relief. Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.
>
> (3) Limitation on Bringing Civil Action. A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

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44 TENN. CODE ANN. § 4-18-103.

45 31 U.S.C. § 3730(h).

31 U.S.C. § 3730(h).

State False Claims Acts compared: *The New Jersey False Claims Act goes further than the federal Act's retaliation provision. It authorizes, "where appropriate, punitive damages," and affirmatively prohibits employers from attempting to restrict employees' abilities to report evidence of fraud to the government.* [46]

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46 The "employee protections" of the New Jersey False Claims Act are set forth below:

§ 2A:32C-10. Employer policies restricting employees from disclosing information or reporting violations prohibited; employee protections; remedies for violations

a. No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a State or law enforcement agency or from acting to further a false claims action, including investigating, initiating, testifying, or assisting in an action filed or to be filed under this act.

b. No employer shall discharge, demote, suspend, threaten, harass, deny promotion to, or in any other manner discriminate against an employee in the terms and conditions of employment because of lawful acts done by the employee on behalf of the employee or others in disclosing information to a State or law enforcement agency or in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this act.

c. An employer who violates subsection b. of this section shall be liable for all relief necessary to make the employee whole, including reinstatement with the same seniority status such employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, compensation for any special damage sustained as a result of the discrimination, and, where appropriate, punitive damages. In addition, the defendant shall be required to pay litigation costs and reasonable attorneys' fees associated with an action brought under this section. An employee may bring an action in the Superior Court for the relief provided in this subsection.

d. An employee who is discharged, demoted, suspended, harassed, denied promotion, or in any other manner discriminated against in the terms and conditions of employment by his employer because of participation in conduct which directly or indirectly resulted in a false claim being submitted to the State shall be entitled to the remedies under subsection c. of this section if, and only if, both of the following occurred:

C. Broad Definition of "Knowing" and "Knowingly"

The federal Act's "scienter" requirement of "knowingly" presenting false claims, or "knowingly" using false records or statements, is broadly defined as well. A person is liable not only when acting with "actual knowledge," but also when acting in "deliberate ignorance" or "reckless disregard" of the truth or falsity of the information in question.[47] The Act also makes explicit that no "specific intent to defraud" need be shown to impose liability, and thus rejects this traditional "fraud" standard.

State False Claims Acts compared: *The state False Claims Acts typically incorporate the same broad definitions of "knowing" and "knowingly," and likewise makes clear that "[n]o proof of specific intent to defraud is required." States have no leeway in this regard if they wish to qualify for the additional funds under the Deficit Reduction Act. In fact, when the Georgia bill was under consideration in 2007, Indiana's statute had already been determined not to qualify that state for additional funds under the Deficit Reduction Act, precisely because the Indiana statute did not define "knowing" and "knowingly" as broadly as does the federal Act.*[48]

> (1) The employee voluntarily disclosed information to a State or law enforcement agency or acts in furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed.
>
> (2) The employee had been harassed, threatened with termination or demotion, or otherwise coerced by the employer or its management into engaging in the fraudulent activity in the first place.
>
> N.J. STAT. ANN. § 2A:32C-10.

47 *Id.* § 3729(b).

48 *See* http://www.oig.hhs.gov/fraud/docs/falseclaimsact/Indiana.pdf.

D. Damages and Penalties Under the False Claims Act

Exposure of defendants in False Claims Act cases can be enormous. First, the Act provides for *treble* damages—"3 times the amount of damages which the Government sustains because of the act of that person."[49]

Second, the Act now provides for a civil penalty of $5,000 to $10,000 for each false claim submitted, an amount that has been adjusted for inflation for more recent claims to $5,500 to $11,000 per violation.[50]

***State False Claims Acts*:** *The state Acts likewise provide for treble damages and penalties that are typically $5,500 to $11,000 for each false claim submitted, although states are free to impose larger penalties. For instance, under the New York FCA enacted in 2007 and substantially amended in 2010 in light of FERA, penalties range from $6,000 to $12,000 for each false or fraudulent claim.*[51]

E. Some of the Peculiar Jurisdictional and Procedural Requirements In *Qui Tam* Cases

The False Claims Act establishes a wholly different process for *qui tam* actions from the usual one encountered in civil litigation. The Act has unique jurisdictional and procedural requirements.

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49 31 U.S.C. § 3729(a)(1). In specified circumstances in which the defendant reports the fraud to the government promptly and cooperates fully, the Act provides for double damages. 31 U.S.C. § 3729(a)(2).

50 31 U.S.C. § 3729(a)(1). For violations of the Act occurring after September 29, 1999, the penalty range has increased to $5,500 to $11,000 per violation. *See* 28 U.S.C. § 2461; 28 C.F.R. § 85.3(9) (2006).

51 N.Y. STATE FIN. LAW § 189 (McKinney).

The *qui tam* relator brings the lawsuit for the relator and for the United States, in the name of the United States.[52] The Complaint must be filed "in camera" and "under seal," and must remain under seal for at least 60 days.[53] The relator must serve the government under Rule 4 of the Federal Rules of Civil Procedure with a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses."[54]

In reality, courts regularly extend the seal for many months (or even years) at the government's request. The purpose is to permit the government to evaluate and investigate the case and make its decision as to whether to intervene. Thus, it is not uncommon for the defendant to receive no notice for more than a year that it has been sued in a *qui tam* action, even as the government meets with the relator and relator's counsel to develop the case against the defendant. Nonetheless, defense counsel may infer the existence of a *qui tam* action when the client or its employees are contacted by government agents.

If the government elects to intervene, it assumes primary responsibility for prosecuting the case, although the relator remains a party with certain rights to participate.[55] The defendant is served once the complaint is unsealed, and has 20 days after service to respond.[56]

If the government intervenes, it is not "bound by an act of the person bringing the

52 31 U.S.C. § 3730(b)(1).

53 31 U.S.C. § 3730(b)(2).

54 *Id.*

55 *Id.* § 3730(c)(1).

56 *Id.* § 3730(b)(3).

action."[57] The government can file its own complaint and can expand or amend the allegations made.[58] Once it has intervened, the government also has the right to dismiss the case notwithstanding the relator's objections, but the relator has a right to be heard on the issue.[59]

The government may petition the court before intervention for a partial lifting of the seal in order to disclose the complaint to the defendant and discuss resolution of the case, even before it decides whether to intervene.

If the government elects not to intervene, the relator has the right to "conduct the action."[60] Although the relator must prosecute the case without the government, as stated the relator is entitled to a larger share of any recovery, 25-30%, in non-intervened cases.[61]

After intervention, the government is authorized to settle the case even if the relator objects, but the relator has a right to a "fairness" hearing on any such settlement. In actuality, a relator's objections are highly unlikely to stop a settlement that the government, after intervention, seeks to make.

Before PPACA, the Act stated that, when there is an action "based upon the public

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57 *Id.* § 3730(c)(1).

58 *See id.*

59 *Id.* § 3730(c)(2)(A).

60 *Id.* § 3730(c)(3).

61 Even "non-intervened" cases sometimes result in substantial liabilities to defendants. For example, in *United States ex rel. Franklin v. Parke Davis*, No. 96-11651-PBS (D. Mass.), a relator pursued an action over the off-label marketing of Neurontin, and the government elected not to intervene. Ultimately, the defendant entered into a global settlement of $430 million, of which $152 million was to settle False Claims Act liability, and $38 million was to settle civil liabilities to the fifty states. *See* http://www.usdoj.gov/civil/foia/elecread/2004/Warner-Lambert%202004.pdf.

disclosure of allegations or transactions" in one of three specified categories of places where disclosures can occur, the court shall lack jurisdiction over the action, unless "the person bringing the action is an original source of the information." The three specified places of "public disclosure" were "[1] in a criminal, civil, or administrative hearing, [2] in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or [3] from the news media."[62]

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62 The "public disclosure" provision before PPACA provided as follows:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office Report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

[Former] 31 U.S.C. § 3730(e)(4)(A). After PPACA, this section of the Act provides as follows:

> (4) (A) The court shall dismiss an action or claim under this section, *unless opposed by the Government*, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed-
>
> (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
>
> (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
>
> (iii) from the news media,
>
> unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.'" (31 U.S.C. 53730 (e)(4)(A) (Emphasis supplied).

PPACA has removed this jurisdictional bar, has authorized the government to prevent dismissal on this basis if it chooses, and has relaxed the standard for relators to establish that they are an "original source" as a means of avoiding dismissal on that basis as well. In addition, PPACA limited the type of public disclosures in question to federal sources, and thus pre-empted for future violations the Supreme Court's ruling shortly thereafter in 2010 in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 130 S. Ct. 1396 (2010)(state report created public disclosure under prior version of FCA).

State False Claims Acts compared: *The state False Claims Acts establish essentially the same procedures. For example, the Georgia Act directs that the complaint and "written disclosure of substantially all material evidence and information shall be served on the Attorney General." The complaint must be filed in camera and shall remain under seal for at least 60 days, and it is not served on the defendant while it remains under seal. The Attorney General may move to extend the time under seal in order to investigate the allegations of the complaint, all pursuant to section 49-4-168.1(c).*

IV. The Trend of Recent Recoveries Under the False Claims Act

Over the past twenty-four years since the modern False Claims Act was established through the 1986 Amendments, the federal government's recoveries of dollars have grown astronomically, especially in health care cases. The Department of Justice ("DOJ") statistics[63] tell the story:

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63 *See* Department of Justice statistics reprinted at http://www.taf.org/statistics.htm.

In 1987, the government's recoveries in *qui tam* cases totaled *zero*, presumably because the 1986 Amendments had just taken effect; and total recoveries under the False Claims Act were just $86 million. The following year, *qui tam* and other False Claims Act settlements and judgments began a steady climb upward, exceeding $200 million by 1989, and $300 million by 1991. By 1994, the government's recoveries broke the $1 billion mark for the first time, with $380 million of that amount attributable to *qui tam* case recoveries alone.

In 2000, the government recovered more than $1.5 billion, of which $1.2 billion was derived from *qui tam* actions. In 2001, the government recovered more than $1.7 billion, with almost $1.2 billion of that amount from *qui tam* cases. With the exception of 2004, in each year since 2000 the government has recovered more than *a billion dollars per year* under the False Claims Act, and *qui tam* actions were responsible for the lion's share of those recoveries. For example, in 2003, government recoveries exceeded $2.2 billion, of which $1.4 billion came from *qui tam* cases. Similarly, in 2005, of the government's total recovery of $1.4 billion, $1.1 billion of that amount came from *qui tam* cases.

In 2006, the Justice Department recovered a record of more than $3.1 billion in settlements and judgments for fraud and false claims. Of this record $3.1 billion in recoveries, 72% came from the health care field; 20% from defense; and 8% from other sources. In that record year, health care alone accounted for $2.2 billion in settlements and judgments, which included a $920 million settlement with Tenet Healthcare Corporation, the country's second-largest hospital chain. Defense procurement fraud amounted to $609 million in recoveries, which included a $565 million settlement with the Boeing Company.

In 2010, DOJ set a record for health care fraud recoveries of $2.5 billion, out of a total of

$3 billion recovered from civil fraud claims.[64] $2.3 billion of that $3 billion resulted from *qui tam* cases. DOJ also set a two-year record for recoveries of $5.4 billion in 2009-2010, most as a result of *qui tam* cases.

It is interesting that, while defense procurement fraud both inspired the Act and was the largest source of recoveries at the time of the 1986 Amendments, health care cases now lead in recoveries, as health care costs have grown as a percentage of the federal budget. By industry, in 1987 the defense industry was the largest source of cases under the False Claims Act.[65] The health care industry accounted for only 12% of cases under the False Claims Act in 1987; that percentage grew to 54% by 1997.[66] In 2008, health care produced more than 80% of the government's recoveries,[67] and that figure grew to 83% in 2010.[68]

In short, the health care industry now consistently accounts for the vast majority of settlements and judgments obtained by the federal government for fraud and false claims.

V. Other States' Experiences With Their Own False Claims Acts

As noted, at least twenty-eight states now have a False Claims statute, and many other

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64 http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html.

65 SYLVIA, *supra* note 18, § 2:13, at 63.

66 *Id*. § 2:14, at 64.

67 *See* http://www.usdoj.gov/opa/pr/2008/November/08-civ-992.html.

68 http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html.

states are considering similar laws.[69] The financial incentives of the Deficit Reduction Act of 2005 have not only prompted states that lacked False Claims statutes to enact them, but also have caused many states wishing to qualify for the additional funds to amend their existing False Claims statutes.

In essence, while states may enact "tougher" or more comprehensive laws than the federal False Claims Act, states with "weaker" or less effective laws—as judged by the standards of the Deficit Reduction Act—will not qualify for the additional funds.[70]

Seven of the first ten states whose statutes were scrutinized by the Office of Inspector

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69 *See supra* notes 16 and 17 for lists of states.

70 Under the Deficit Reduction Act, the Office of Inspector General of HHS, in consultation with the Justice Department, must determine that the state law meets the following criteria in order to qualify for the increased share of Medicaid funds recovered:

> (1) The law establishes liability to the State for false or fraudulent claims described in section 3729 of title 31, United States Code, with respect to any expenditure described in [31 U.S.C. § 1396b(d)].
>
> (2) The law contains provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in sections 3730 through 3732 of Title 31, United States Code.
>
> (3) The law contains a requirement for filing an action under seal for 60 days with review by the State Attorney General.
>
> (4) The law contains a civil penalty that is not less than the amount of the civil penalty authorized under section 3729 of Title 31, United States Code.

42 U.S.C. § 1396h(b).

General (OIG) quickly learned this lesson when OIG disapproved their state statutes.[71] These included California (which lacked a minimum penalty), Florida (which omitted "fraudulent" from its definition of claims), Indiana (which did not make defendants liable for "deliberate ignorance" and "reckless disregard"), Louisiana (which did not permit the state to intervene in cases, set too low a percentage for whistleblowers to recover, and set no minimum penalty), Michigan (which omitted penalties and liability for decreasing or avoiding an obligation to pay the government, i.e., a "reverse false claim"), Nevada (which had a statute of limitations too short and a minimum penalty too low), and Texas (which did not permit the whistleblower to litigate the case if the state did not, and which provided for lower percentage shares to whistleblowers and lower penalties). Most of these states have gone back to the drawing board to correct these deficiencies.

In sum, the Deficit Reduction Act has set minimum standards for state False Claims Acts for states wishing to receive these additional funds. In plain English, the state laws must protect at least Medicaid funds, and they must be at least as effective as the federal False Claims Act, especially in rewarding and facilitating *qui tam* actions for false or fraudulent claims, with damages and penalties no less than those under the federal Act.[72]

Many state False Claims laws have been in transition since 2006. States whose laws have

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71 The Office of Inspector General's reviews of these state laws may be found at http://oig.hhs.gov/fraud/falseclaimsact.asp.

72 42 U.S.C. § 1396h(b)(4).

been "disapproved" by OIG have begun to amend their statutes to meet the requirements for obtaining the additional funds under the Deficit Reduction Act, as Florida and Texas accomplished in 2007. While these laws are in flux, some significant differences from the "Medicaid-only" laws such as Georgia's new State False Medicaid Claims Act are likely to remain.

First, the majority of state False Claims statutes protect the state's funds generally, rather than protecting only state Medicaid funds, as Georgia's new State False Medicaid Claims Act is limited. Just as the federal False Claims Act is not limited to health care fraud, but encompasses fraud against the government generally (except for Internal Revenue violations, which are now covered by the new IRS Whistleblower program), many states have used these statutes to protect public funds in general from fraud. Those states include California, Delaware, Florida, Hawaii, Illinois, Indiana, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Virginia, and Tennessee.[73]

Because states have this leeway under the Deficit Reduction Act to pass laws that may be "tougher" or more "effective" than the federal Act, some states have set the statutory penalties higher than the federal level of $5,500 to $11,000 per claim. For instance, under the New York FCA enacted in 2007 and amended in 2010, penalties range from $6,000 to $12,000 for each false or fraudulent claim.[74]

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73 *See supra* note 16.

74 N.Y. STATE FIN. LAW § 189 (McKinney).

Some other states authorize a higher percentage of the state's recovery that a relator (whistleblower) may receive, instead of the percentages that the federal False Claims Act authorizes: 15-25% of the recovery in cases in which the government intervenes, and 25-30% in cases in which the government does not intervene. For example, Nevada's percentages are 15-33% in intervened cases, and 25-50% in non-intervened cases; Tennessee's are 25-33% in intervened cases and 35-50% in non-intervened cases; and Montana's range from 15-50%.[75]

Most *qui tam* cases filed under the state False Claims statutes have related to health care. Many are "global" Medicaid cases that were first developed in federal courts as Medicare and Medicaid fraud cases and that concerned a nationwide fraud which had been investigated by multiple federal and state jurisdictions.[76]

Most of the state settlements have come from "piggy backing" on federal law enforcement efforts and from joining in global settlements.[77] Experience with some of the newer state statutes is too recent to evaluate, but many states have reported the desire for more resources to develop such cases.[78]

We do not know with any precision the dollar amount of fraud that affects state

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75 *See* MONT. CODE ANN. § 17-8-410; NEV. REV. STAT. § 357.210; TENN. CODE. ANN. § 4-18-104.

76 *State False Claims Act Study*, *supra* 16, at 483.

77 *See* testimony of Patrick J. O'Connell, then of Texas Attorney General's Office, at http://oversight.house.gov/documents/20070209123455-21529.pdf.

78 *State False Claims Act Study*, *supra* note 16, at 483.

government spending, or how much of that fraud can be prevented through effective use of a state False Claims Act. For now, the states that have passed False Claims Acts will see how much of their fraud losses can be recovered through these laws.

VI. Conclusion

The heath care industry faces ever-increasing federal and state enforcement efforts through use of the newly amended False Claims Act, and the increasing number of state False Claims Acts. These statutes are profoundly important to any lawyer who practices in health care and who wishes to advise clients on the potentially huge damages and penalties that can result from violations of the federal and state False Claims Acts.