Legal Backgrounder

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THE FALSE CLAIMS CORRECTION ACT: WHAT WOULD IT CORRECT?

by

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The essential feature of the Federal False Claims Act ("FCA"), 31 U.S.C. § 3729, is its provision for so-called "*qui tam"* actions, *i.e.*, lawsuits brought in the name of the United States by private citizens known as "relators," functionally serving as assignees of claims owned by the Government. The phrase "*qui tam*" is derived from a Latinism roughly translated as "he who as much for the king as for himself." Given the realities of the modern American litigation explosion, the Latin phrase now might to a significant degree be accurately parodied as "he more for himself than for the Government."

The FCA, with its *qui tam* provisions, has become the most powerful, and often effective, weapon in the federal arsenal of fraud fighting machinery. It has led to the discovery of significant cases of which the Government might never have known, but for relators coming forward and disclosing wrongdoing, and to the recovery of billions of dollars for the public fisc. However, the FCA itself has not been a model of legislative clarity. Nor is its regime a model of efficiency. In the wake of several recent judicial interpretations dealing with the language and application of the statute, a bipartisan group of legislators has introduced "The False Claims Correction Act of 2007," which they claim responds to case holdings that threaten to limit the reach of the Act to an extent not intended by Congress.

The proponents of this legislation include Senator Charles Grassley (R-Iowa) and Congressman Howard Berman (D-Cal.), who are widely regarded as the architects of the expansive 1986 amendments to the FCA, and they are joined by, among others, the Chairman of the Senate Judiciary Committee, Senator Patrick Leahy (D-Vt.), and the Committee's ranking Republican, Senator Arlen Specter (R-Pa.). Some of the provisions of their proposal would seem to further legitimate legislative goals and are reasonably well-crafted. Others, however, arguably do little more than to add gold to the already attractive ring on the FCA litigation merry-go-round.

Passed in 1863, the FCA was, designed to combat "the massive frauds perpetrated by large contractors during the Civil War." *United States v. Bornstein*, 423 U.S. 303, 309 (1976). From the Act's original passage until 1943, someone could originate a suit based on privately-obtained, or even publicly-available, information, and could maintain it to the exclusion of the Attorney General. In 1943, Congress amended the Act in response to the Supreme Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). To prevent "parasitical" suits, the 1943 amendments added a jurisdictional provision barring *qui tam* actions whenever the Government had prior

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knowledge of the information in the complaint. In 1986, Congress amended the bar on "parasitical" suits and provided the relator with an ongoing, active litigation role even when the Attorney General enters the case.

The current version of the Act provides that a person who commits any of several specified violations, particularly submitting or causing to be submitted a false claim for payment, "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000 [which has been cost-adjusted by regulation], plus 3 times the amount of damages which the Government sustains because of the act of that person." 31 U.S.C. § 3729(a).

If the Government assumes the conduct of the litigation and ultimately secures a monetary award, the relator is entitled to between 15 and 25 percent of the award, "depending upon the extent to which the person substantially contributed to the prosecution of the action," plus expenses, costs, and attorneys' fees. If the Government declines to intervene and the relator successfully conducts the litigation, his share is to be between 25 and 30 percent, plus expenses, costs, and fees. If the Government declines to intervene in the lawsuit and the defendant ultimately prevails against the relator, "the court may award to the defendant its reasonable attorneys' fees and expenses if . . . the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." 31 U.S.C. § 3730(d)(4).

The Public Disclosure/Original Source Jurisdictional Bar. Under the FCA, "no Court shall have jurisdiction over an action. . . 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." 31 U.S.C.A. § 3730(e)(4)(A); *Rockwell International Corp. v. United States,* --- S. Ct. ----, No. 05-1272, 2007 WL 895257, at *7 (March 27, 2007); *United States. ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990) ("[I]f the information on which a *qui tam* suit is based is in the public domain, and the *qui tam* plaintiff was not a source of that information, then the suit is barred.").

Experience Under the 1986 Amendments: Is Anything in Need of Repair? The ample statistical data that are available give a useful illustration of the strengths and weaknesses of the FCA *qui tam* regime. In the largest sense, the 1986 amendments have proved successful. Total FCA recoveries, including *qui tam* cases, have exceeded $20 billion. The total attributable to *qui tam* settlements and judgments is about $12 billion. Whereas in the years immediately following the 1986 amendments, non-*qui tam* cases substantially outnumbered *qui tam* filings, it is unsurprising that the substantial monetary incentives have influenced complainants to file lawsuits rather than merely reporting alleged fraud to Government agents. Thus, starting in 1995, the number of *qui tam* FCA filings, began to exceed non-*qui tam* filings, and in recent years, has come to outnumber them by about four to one.

Although over the last several years the number of *qui tam* filings actually has gone down slightly, perhaps indicating that the overall enforcement mechanism is serving as a useful deterrent, one thing has remained constant since 1986. The Government investigates every *qui tam* filing and consistently has declined to intervene in about 80% of the cases filed by relators. This selectivity is indicative of genuine discernment by the Government. More than 90% of the amounts received in settlements and judgments in *qui tam* cases has come in the 20% of the matters in which the Government has intervened. In other words, a mere ten percent of recoveries has been derived from the 80 percent of the total investigative pool that the Justice Department has rejected. For 2006, the latest year for which full data are available, the Government recovered about $1.7 billion in non-*qui tam* FCA cases, and about $1.4 billion in *qui tam* cases; relators litigating declined cases recovered only about $16.6 million.

At the beginning of the period, defense industry cases predominated. However, starting in the 1990s, cases involving health care have provided the overwhelming majority of FCA filings and recoveries. Few of these cases actually go to trial. Indeed, many providers complain that they are forced to settle, not because of the strength of the cases against them, but because of the risk of administrative exclusion from federally financed health care programs like Medicare and Medicaid. In any event, by far the largest FCA recoveries in the most

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recent years have come in health care cases, with several of those recoveries approaching and exceeding $1 billion. That fact mirrors a larger truth: just as the recoveries in cases where the Government intervenes are far greater than those in declined cases, the vast majority of FCA dollars retrieved come from a relative handful of cases. This statistical tapestry usefully describes what, if any of the proposed alterations might be beneficial in the detection of fraud, the magnification of recoveries and the enhancement of efficiency.

Proposals for Amending the FCA. The sponsors of the False Claims Corrections Act propose to amend the Act's requirement that the claim at issue must have been presented to an officer or employee of the United States Government or to a member of the Armed Forces. Understandably applying the plain language of the statute, the D.C. Circuit has held that requests for payment presented to an employee of Amtrak, albeit that Amtrak is a federal grantee, were not "presented" to a Government employee. *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (2004). The sponsors would strike the current language and focus instead on a requirement that what is being sought is Government money or property no matter to whom a claim were submitted.

Similarly, the sponsors would clarify the FCA specifically to include funds administered by the United States on behalf of foreign nations and other entities, thus reversing a holding of the United States District Court for the Eastern District of Virginia dismissing a jury's finding that the FCA was violated with respect to funds allocated to contractors using Iraqi funds administered by the U.S. *United States ex rel. DRC, Inc. v. Custer Battles*, *LLC*, 2006 WL 2388790 (E.D. Va. Aug. 16, 2006).

Each of these amendments would appear to be sensibly addressed to ensuring that money and property owned by, or entrusted to, the United States be protected against fraud. This is not to say that these provisions would not lead to disputes over what constitutes a claim or whether economic loss or the potential for economic loss is a necessary element of proof also are likely to persist.

Far more controversial, however, are the sponsors' proposals with respect to "parasitic" and Government-employee relators. As noted, the FCA currently provides that, if the Government declines to intervene, and there has been a public disclosure of the information in through a criminal, civil, or administrative hearing, a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, or, according to some courts, a federal or state Freedom of Information Act request, a relator may not proceed with the litigation, unless he or she is the "original source." This requirement constitutes a jurisdictional bar, and it was originally inserted into the FCA to prevent relators from reaping windfalls when what they report already has been revealed to someone outside of the fraud who could take action.

In *Rockwell International Corp. v. United States*, the Supreme Court denied an FCA recovery to an individual whose theory of fraud had been rejected by the Government, which proceeded on grounds entirely unmentioned by the relator and unknown to him. The Court, in denying that relator was an original source, reiterated that such status is dependent upon direct and personal knowledge. Thus, under current law, someone who is a mere echo, and who provides the Government no ascertainable benefit, cannot share in a recovery. Note that in this scenario there is always a report of fraud to the Government. The relator's incentive is always to try to convince the Government that he or she is the first reporter of the activity upon which a recovery is based.

Although the sponsors present no evidence that the public disclosure/original source bar has created any disincentive to the reporting of fraud, they would make a significant change in the FCA that does not appear to produce any discernible benefit. The sponsors would erase the jurisdictional bar, and only allow dismissal upon the motion of the Attorney General. They also would narrow the definition of a "public disclosure" to the point of rendering the term nearly useless as a screen, requiring that a public disclosure be dependent upon the allegations concerning all of the essential elements of liability (ostensibly both factual and legal), and it be made "on the public record" (also undefined), or have "been disseminated broadly to the general public" (undefined as well).

Nor would a relator create a public disclosure from having obtained the essential information from an official source through a Freedom of Information Act request or other governmental contacts. Moreover, the

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relator would not be disqualified unless "he derived his knowledge of all of the essential elements of liability" (again, undefined) from the public disclosure.

It would seem that this proposal originated with plaintiffs' lawyers rather than with Government officials. If enacted, it would lead to increased expense and litigation and would be unlikely to lead to the revelation of otherwise undisclosed large case frauds of the sort that have been producing the overwhelming percentage of FCA recoveries, although it probably would lead to unnecessary payouts to relators who have contributed nothing of a material nature.

The sponsors believe that reports which are ultimately discredited often lead the Government to information that eventually produces a recovery, albeit on a theory that might have been unknown to a relator. As the *Rockwell* case amply described, this is a debatable proposition. What is more certain is that the proposal will not lead to the disclosure of anything that a relator would not otherwise have incentive to report under the status quo. After all, the issue of the materiality and quality of what is reported to and relied upon by the Government necessarily presumes that a relator has made a disclosure in the first place. It would not seem to be in the public interest to reward someone for providing unimportant information or for litigating unmeritorious cases in the absence of the Government.

Another controversial aspect of the 2007 bill is its provision that would allow FCA actions to be brought by employees of the Federal Government. This proposal, which raises ethical and employment issues, has been considered before but has not been enacted. The current sponsors would allow a Government employee to proceed if he or she had reported the alleged fraud up the employment chain of command or to an Inspector General, and 12 months had elapsed from the time of disclosure without the Attorney General's having filed an action. The same over-generous definition that elsewhere would apply generally to an original source would protect the reporting Government employee.

Government employees are legally obligated to report improprieties of which they learn in the course of their official duties. That is one of the things for which the public pays them. It is unclear why such employees ought to be provided an alternative mode of compensation or reason why their best efforts should be applied on behalf of themselves rather than on behalf of their public employer.

The bill contains no limitation on who may be considered a Government employee, and the term apparently includes everyone from Cabinet level on down, even persons whose essential employment functions include the investigation and analysis of alleged fraud. While the 12-month consideration period provides a certain level of protection, Government employees still would be tempted to arrange things in a manner that could be of economic benefit to them. Especially in view of the fact that there is no evidence that Government employees are not reporting fraud, as indeed they should, this is a questionable proposal.

The 2007 FCA bill also amends some of the procedures governing civil investigative demands and clarifies the statute of limitations. Currently, the statute of limitations is six years, from the date of the violation, or three years from the date when an official who could have taken action knew of the offense, but in no case after ten years after the violation was committed. The sponsors would remove any issues related to concealment and provide that a flat ten year limitation would apply.

Conclusion. The post-1986 False Claims Act regime, as interpreted by the federal courts, has proven to be a useful and powerful weapon in the Government's fight against fraud. To the extent that the reach of the Act has been less than optimal, it is not because of any jurisdictional bar. The Act provides generous incentives for the reporting of fraud, and an extensive and capable bar has arisen to publicize the law and assist those that seek its benefits. In the wake of the Deficit Reduction Act of 2006, many states have enacted their own FCA analogs, including *qui tam* provisions. These very well may prove helpful in dealing with some of the smaller fraud cases that currently may not get enough attention. However, to the extent that there are larger problems in dealing with what members of Congress may believe are unaddressed instances of fraud and abuse, it would seem to be a better exertion of effort to reform reimbursement payment systems and entitlements than to increase payouts to relators and their lawyers, without any probable increase or improvement in the FCA case-mix.

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