

LEGAL AFFAIRS

Qui Tam Actions Under the False Claims Act

Whistleblowers as Soldiers of Fortune in Uncle Sam's War Against Healthcare Fraud.

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An assortment of pharmaceutical companies, managed care organizations, hospital chains, long-term care facilities, and individual physicians all have at least one thing in common. All have recently been the subject of highly publicized *qui tam* actions brought by whistleblowers under federal and/or state false claims acts.



The Federal False Claims Act

As the name of the act suggests, the federal False Claims Act targets false claims. In general, the act prohibits persons (including but not limited to healthcare providers) from knowingly presenting or causing to be presented to an officer or employee of the United States government a false or fraudulent claim for payment or approval. In addition, the act prohibits knowingly making, using, or causing to be made or used a false record or statement to get a false or fraudulent claim paid or approved by the government. Fraudulent claims presented to government contractors or in connection with governmental programs can also give rise to liability under the act.

Violation of the act subjects the responsible party to a civil penalty of not less than \$5,000.00 and not more than \$10,000.00 per violation, plus three (3) times the amount of

damages that the government sustains as a result of the violation.

Understanding Qui Tam

The *qui tam* provisions of the False Claims Act permit private citizens to pursue actions for fraudulent claims in the name of the federal government. Almost anyone can instigate a *qui tam* action, including current and former employees of the entity allegedly defrauding the government, competitors, and private citizens. Legally, these private citizens are known as relators, but are more commonly referred to as whistleblowers. In exchange for bringing the fraudulent claims to light and for pursuing the *qui tam* action, if the action is successful whistleblowers can recover up to 30 percent of the proceeds, in addition to reasonable attorney's fees and costs. In just the past few years alone, hundreds of millions of dollars in "bounties" have been recovered by whistleblowers.

Procedurally, *qui tam* actions are filed under seal and are not immediately served on the alleged wrongdoers in order to provide the government with an opportunity to investigate the alleged fraud. In addition, the government has an opportunity to decide whether or not the government wants to intervene in the action and assist in the prosecution of the claims being asserted against the alleged wrongdoers.

Qui Tam Actions in the Healthcare Field

In terms of *qui tam* cases currently on file, healthcare fraud is far and away the leader.

Protecting Against Whistleblowers

From the perspective of the healthcare provider, the most important prophylactic

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At present, approximately 60% of all *qui tam* cases filed involve alleged healthcare fraud. Among others, durable equipment suppliers, physician groups, hospital chains, nursing home chains, managed care organizations, pharmaceutical companies, laboratories, and home health agencies have all been the subject of *qui tam* actions. Some examples of the type of conduct that can be involved include the following:

- Providers upcoding, unbundling, double billing, or submitting claims resulting from referrals in violation of the Medicare anti-kickback statute (i.e., illegal remuneration) or in violation of the Stark laws proscribing nonexempt self-referrals;
- Drug manufacturers falsifying information to obtain FDA approval;
- Physicians falsely certifying medical necessity, billing for services not performed, or utilizing incorrect diagnosis codes; and
- Managed care organizations improperly refusing to authorize or pay for care, or intentionally misrepresenting information used to calculate capitated fee rates.

for guarding against *qui tam* actions brought under the False Claims Act continues to be the implementation of a comprehensive and effective compliance program.

Protection of Whistleblowers

From the perspective of the employees who come forward to disclose fraud, the federal False Claims Act includes provisions that protect those employees who investigate, testify, initiate or assist in a *qui tam* action from any threats, harassment, demotion, or wrongful termination.

State False Claims Acts

Following the lead of the federal government, several states (some running significant deficits and in desperate need of money) have enacted false claims acts containing *qui tam* provisions. Given the current budget constraints being experienced by both federal and state governments, one thing seems certain—Whistleblowers likely will continue to play a significant role in the ongoing fight against healthcare fraud in the years to come. ▼

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