False Claims Act Enforcement: A Self-Fulfilling Prophecy?

Since the amendments to the Fraud Enforcement and Recovery Act (FERA), the government Department of Justice (DOJ) has ramped up its enforcement through an increased number of qui tam suits and significant monetary gains (Department of Justice, 2011). In 2011, realtors filed 638 qui tam suits, which represented a 10% increase over the 73 qui tam suits filed in 2010 and roughly a 50% increase over the 433 qui tam suits filed in 2009 (Federal Acquisition Regulations, 2016). The DOJ has recovered more than $8.7 billion in settlements and judgments since FERA arrived, including $3 billion in fiscal year 2011 alone (DOJ, 2011).

In the past few years, the legislative and executive branches have passed legislation and introduced task force objectives that make it easy for the governments to pursue False Claims Act (FCA) cases at the state and national federal levels. In 2007, Congress added § 1909 to the Social Security Act to create a financial incentive for States to enact legislation that establishes liability to the State for individuals or entities that submit false or fraudulent claims to the State Medicaid program (Publication of OIG’s Guidelines for Evaluating State False Claims Acts, 2006).

For states with a qualifying FCA, § 1909 of the Act provides that the state’s share in any recovery will grow by 10 percentage points (Publication of OIG’s Guidelines for Evaluating State False Claims Acts, 2006). In 2009, Attorney General Eric Holder and Secretary of Health and Human Services Kathleen Sebelius announced the creation of the Health Care Fraud Prevention Enforcement Action Team (HEAT) to prevent fraud in federal health-care programmes and strengthen local, state, and federal partnering (DOJ, 2016).
In 2011, the Senate passed the Small Business Contracting Fraud Prevention Act, which increased penalties for misrepresenting small business status. Under § 3, a person would be subject to civil penalties under the False Claims Act for misrepresenting the status of any business or person as a small business concern, a qualified HUBZone small business concern, a small business concern owned and controlled by socially and economically disadvantaged individuals, a small business concern owned and controlled by women, or a small business concern owned and controlled by service-disabled veterans in order to obtain federal contracts (Small Business Contracting Fraud Prevention Act of 2011). That same year, Senators Chuck Grassley (R-IA) and Patrick Leahy (D-VT) introduced the Fighting Fraud to Protect Taxpayers Act of 2011, which among other things seeks to reimburse money awarded related to FCA prosecutions and requires the Attorney General to submit an annual report to the House and Senate Judiciary Committees on DOJ settlements (see Fighting Fraud to Protect Taxpayers Act of 2011, Senator Patrick Leahy, 2011; S. 890, 112th Cong. (2011)).

As things presently stand, contractors, businesses, and individuals, such as those reimbursed by third parties with government money, are all on the hook liable for costs, regardless of whether they intended that the government should rely on the statement in making its payment. The American Hospital Association (AHA) appropriately described the tense situation for contractors, businesses, and individuals when it expressed the concerns that aggressive FCA investigations are being initiated upon the discovery of evidence of a mistake or overutilization, making FCA enforcement through negotiated "settlements" a self-fulfilling prophecy (American Hospital Association, 2011). The health care industry is...
not the only target, as federal prosecutors have expanded FCA investigations and prosecutions to includes defence, financial services, and other industries (Department of Justice DOJ, 2013).

Congress should further revise the FCA to define “false” and “fraudulent” and thereby clarify the boundaries of implied false certification theory. The revisions could even include “implied false certification” and define the boundaries of the theory that way in that manner accordingly. While Although amendments from the 1986 amendments have expanded FCA liability, Congress must remember that it originally enacted the FCA to help the federal government recover cash monies from private contractors who sold non-working munitions, equipment, and supplies to the Union Army (DOJ, 2012).

Although the qui tam provision was intended to help the government root out fraud, the intended reach of the statute was intentionally limited (Erickson ex rel. United States v. American Inst. of Biological Sciences, 1989 Erickson, 716 F.Supp at 915).

### 8. Scaling Back Implied False Certification Theory

On 2 May 2012, six members of the Senate Finance Committee, including Senator Grassley, published an open letter to the health-care community; asking for the collective wisdom and accumulated insights of thousands of professionals and individual experiences [which] could offer a fresh perspective and potentially identify solutions that may have been overlooked or underutilized by the federal government (U.S. Senate Committee on Finance, 2012). The American Hospital Association (2011) responded with several recommendations, but cautioned that mistakes are made by hospital staff, the Centers for Medicare & Medicaid Services and program contractors alike. Such mistakes are not fraud, and the powerful weapon of the False Claims Act (FCA) should not be wielded in a misguided attempt to correct or prevent mistakes.
The AHA emphasised that defendants are forced to settle FCA claims rather than face the potential negative consequences of an adverse jury verdict, which include—treble damages (31 U.S.C. § 3729(a)(1)), civil penalties (31 U.S.C. § 3729(a)(1)), attorney fees (31 U.S.C. § 3730(d)(2)), and potential debarment or suspension (Federal Acquisition Regulations, 2016). As the AHA noted in its letter, "the FCA imposes stiff penalties... The threat of an allegation of fraud is no small matter for any hospital" (AHA (American Hospital Association, 2011)). The same can be said about any other business or individual, large or small (Doan, 2011, p. 69).

This raises a number of certain practical concerns are raised for companies, such as whether they may be exposed to False Claim Act (FCA) liability for conduct typically challenged by actions by private party actions. For instance, example, the First Circuit’s construction of the FCA in US Ex Rel. Hutcheson v. Blackstone Medica Hutcheson permits a relator to claim FCA violations for a party’s alleged failure to comply with a contract provision even when that provision is not an express condition of payment. Ignoring such practical concerns, the First Circuit assured-opined that "other means exist to cabin the breadth of the phrase ‘false or fraudulent’ as used in the FCA" (US Ex Rel. Hutcheson v. Blackstone Medica, 2011, p. 388). After all, the The court reasoned, that FCA liability requires that the defendant acted knowingly and that the false claim was material to the government’s decision to pay (p. 388). The Westmoreland court observed that while the provider agreements speak to the compliance of the providers rather than third parties... this is of no moment as to whether they rendered the relevant claims false or...
The agreements amount to a representation of compliance with the relevant anti-kickback.