

# A Recent False Claims Act Case Being Brought Against an Individual Physician has Resulted in a Record Recovery for the Government.



**(February 12, 2013):** The civil False Claims Act is the primary civil enforcement tool used by the U.S. Department of Justice. As discussed below, the False Claims Act is an extraordinarily useful statute for government prosecutors, both in terms of ease of use and in terms of the damages which may be recovered by the government.

## I. Overview of the False Claims Act:

As set out below, the civil False Claims Act imposes civil monetary penalties and will expose a person to civil liability under the circumstances below:

### **Sec. 3729. False claims**

#### **(a) Liability for Certain Acts—any person who:**

**(1) Knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;**

**(2) Knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;**

**(3) Conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;**

**(4) Has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;**

**(5) Authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;**

**(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or**

**(7) Knowingly 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 Government,**

**. . . is liable to the United States Government...**

## **II. What is Not Covered Under the False Claims Act:**

It is essential to keep in mind that the civil False Claims Act does **not** cover ***mistakes, accidents,*** or ***mere negligence.*** Unfortunately, the line separating a billing “**mistake**” from a non-intentional wrongful billing, which could give rise to an action under the False Claims Act, is not always easy to discern. In an effort to provide additional guidance to DOJ attorneys on the judicial use of the False Claims Act, guidance setting out a number of factors to be considered when pursuing a False Claims Act case.

## **III. Damages Under the Civil False Claims Act:**

A “person” (which would covers individuals, physician practices, home health agencies, hospice agencies, third-party billing companies, ambulance companies, hospitals, skilled nursing facilities and other health care providers) found to have violated this statute is liable for civil penalties in an amount between \$5,500 and not more than \$11,000 ***per false claim,*** as well as up to three times the amount of damages sustained by the government.

## **IV. What is the Involvement of the U.S. Department of Justice?**

While attorneys in DOJ’s Civil Division in Washington, D.C. are likely to be involved in most of the larger, more complex cases under the False Claims Act, it is important to remember that a “**Civil Health Care Fraud Coordinator**” has been appointed in each of the 94 U.S. Attorney’s Offices around the country. Assistant U.S. Attorneys are highly trained and experienced in handling False Claims Act cases and will readily file a case against a health care provider in the event that improper conduct can be shown.

## **V. Whistleblower or “Qui Tam” Provisions of the False Claims Act:**

One of the most unique elements of the False Claims Act is that it authorizes private parties having direct knowledge of fraudulent conduct to bring a civil suit against the violator on behalf of the government. These civil suits are known as ***qui tam*** actions, and the private parties who initiate such actions are called “**relators.**” Relators may share in any monies recovered as a result of their ***qui tam*** action.<sup>[1]</sup>

A ***qui tam*** action is initiated when a relator files a complaint – along with supporting documentation – “under seal” in federal court. When a case is filed under seal, it means that all records associated with the whistleblower are maintained on a non-public docket by the Clerk of the Court. A copy of the complaint is given to the judge assigned to the case. The relator’s attorney also serves a copy of the complaint on the Attorney General in Washington, D.C. and on the U.S. Attorney in the federal judicial district in which the case was filed.<sup>[2]</sup> Initially, the government will have 60 days to evaluate whether to proceed against the defendant. In almost all cases, the government will seek an extension to allow it an opportunity to investigate the allegations. After showing “**good cause**” for an extension, most federal courts will readily grant the request for an extension. It is not at all uncommon for a ***qui tam*** to remain under seal for over a year (and often much longer) while the government reviews the allegations. The

seal is important for several reasons:

- ***The government can quietly investigate the allegations without the defendant knowing that their company is under investigation.***
- ***The mere existence of a government investigation can be devastating on the public's view of a company. Moreover, if a company is publicly-traded, the publicity surrounding a government investigation can severely affect the price of a company's stock—despite the fact that the allegations at issue have not been investigated or proven at this point in the process.***

After concluding its evaluation, the government may elect to proceed with the complaint and intervene in the case or it may decline to intervene. If the government decides to intervene in the action, then the relator has the right to remain a party to the action. If the government decides not to intervene in the case, the *qui tam* relator may elect to proceed on his or her own against the defendant. Notably, the government always retains the ability to intervene in the case at a later time. From a practical standpoint, if the government decides not to intervene in a case, in all likelihood the relator will seek to dismiss the suit. Unlike the government, the relator's ability to investigate a False Claims Act case is quite limited, both in terms of resources and in terms of investigative tools. As a result, the government's decision to decline to intervene severely impacts a relator's ability to move forward with the case.

The government often asks the court to partially lift the seal solely for the purpose of advising the defendant of the existence of the case and to seek their cooperation in resolving the allegations.

Should the government choose not, to intervene, it will often ask that the Court remove the seal to the case. Once the seal is removed, the case (and its allegations) will be part of the public record. In cases where the government chooses to intervene, the case is often kept under seal until a settlement is worked out with the defendant.

There are a number of limitations placed on the filing of *qui tam* cases. Two of the more commonly seen limitations include:

- ***When the government has already initiated an action against a party for the same allegations that would form the basis of a qui tam suit; or***
- ***When the action is based on publicly-disclosed information<sup>[3]</sup> that was contained in an official hearing, report, investigation, audit, or information disseminated by the news media.***

## **VI. Record Recoveries in 2012 Under the False Claims Act:**

In recent years, False Claims Act recoveries resulting from whistleblower suits have exceeded most observers' expectations. Issues related to the False Claims Act should be at the top of the list of ongoing concerns for most health care Compliance Officers. The potential damages a provider may face for violations of the False Claims Act cannot be understated.

In Fiscal Year 2012, the U.S. Department of Justice secured settlements and judgments in civil False Claims Act of \$4.9 billion. Notably, this includes a “record recovery for a single year” by more than \$1.7 billion. Over the last four years, \$13.3 billion has been recoveries. Notably, this represents more than a third of the total recoveries achieved since the False Claims Act was amended over 26 years ago.<sup>[4]</sup>

## **VII. Are Physicians Being Targeted Under the False Claims Act:**

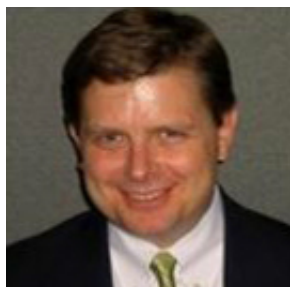
While large pharmaceutical, durable medical equipment and hospital chain cases continue to dominate the press, physicians, dentists and other solo health care providers are increasingly finding themselves and their practices subject to whistleblower suits under the False Claims Act by former employees, competitors and others who believe that false claims are being submitted to the government for payment.

Notably, a recent whistleblower case pursued by the [U.S. Department of Justice](#) against an individual physician (a dermatologist) resulted in a \$26.1 million settlement. In this case, the physician was alleged to have accepted kickbacks from a pathology laboratory. The physician was also accused of billing Medicare for medically unnecessary services. The whistleblower reportedly collected \$4 million as part of the settlement.

## **VIII. How Can You Prevent a False Claim Act from Being Filed Against You?**

Ultimately, your ability to avoid the filing of a False Claims Act case against you or your practice rests on your ability to comply with state and federal laws, regulations and rules governing the provision, coding and billing of health care services. Without a doubt, the single most important step you can take in this regard is to develop, implement and adhere to the provisions and guidelines set out in an effective Compliance Plan. While most hospitals and other institutional providers have had Compliance Plans in place for many years, very few physicians have taken this necessary preventative step.

Will a Compliance Plan prevent you from having a False Claims Act case brought against you or your practice? No, not necessarily. Instead, you should look at a Compliance Plan as being akin to a flu shot. Just because you have received a flu shot does not mean that you will never catch the flu. However, if you do come down with the flu, chances are that it won't be as serious and it might otherwise have. All of us make mistakes, and physicians are not immune to this risk. Nevertheless, having an effective Compliance Plan in place is likely to greatly assist you in your efforts to stay within the four corners of the law.



**Robert W. Liles serves as Managing Partner at Liles Parker. Robert and other attorneys at Liles Parker have extensive experience working on False Claims Act matters and case. For a free consultation, please call Robert at: 1 (800) 475-1906.**

[1] Whistleblowers (also known as "Relators") can receive between 15% and 25% of any recovery in a *qui tam* action where the government has intervened in the case. In a non-intervened case, a relator may recover up to 30%. Consequently, there is a tremendous financial incentive to file and pursue these types of actions.

[2] The relator must also serve a "disclosure statement" on DOJ (normally, it is provided to the U.S. Attorney's Office) which sets out the evidence that the relator has in support of the allegations set out in his/her Complaint. This statement is not filed with the Complaint and is not given to the defendant.

[3] This rule is known as the "public disclosure bar." The Affordable Care Act modifies this rule in several respects. First, a *qui tam* action will not be dismissed under the public disclosure rule if the government opposes dismissal. Second, fraud disclosed in private legal actions will not activate the public disclosure bar; the government must have been a party to the action in order for the public disclosure rule to apply. Third, information obtained from **state** proceedings or hearings likewise will not qualify under the public disclosure bar. Finally, the public disclosure bar will not operate where the relator was the "original source" (e.g., has independent knowledge) of the fraud or false claim allegation.

[4] <http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html>