



Women's Caucus Section



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HOW TO MAKE MONEY FROM FALSE CLAIMS ACT QUI TAM ACTIONS ARISING FROM MEDICAL MALPRACTICE PRESUIT INVESTIGATIONS

I. Introduction

You may uncover instances of Medicare or Medicaid fraud in your medical malpractice presuit investigations. But how can you and your client make money from that, in addition to recovering for the malpractice? The answer is to bring an action on behalf of the United States under the False Claims Act, 31 U.S.C. §3729 et seq., or on behalf of the State of Florida under the Florida False Claims Act, F.S. §68.082 et seq.

But False Claims Act (“FCA”) and Florida False Claims Act litigation are full of traps for the unwary. This article summarizes some of those traps to avoid. The key for the medical malpractice attorney in evaluating qui tam actions is to file

the qui tam action *before* filing the medical malpractice lawsuit. The practitioner should screen thoroughly, screen early, and do not delay in developing the potential claim. You will discover that the statute of limitations³ is but one of many potential challenges under the FCA.

II. Liability, Damages, Relator’s Share Awards, and Attorneys’ Fees and Costs under the False Claims Act and the Florida False Claims Act

The False Claims Act and the Florida False Claims Act prohibit knowingly submitting false and fraudulent claims, knowingly causing others to submit false and fraudulent claims, knowingly making or using false records or statements to get false and fraudulent claims paid or approved, and knowingly concealing, avoiding or decreasing an obligation to pay or transmit money or property to the Government (“reverse false claims”).⁴ Essentially, qui tam claims turn on whether there is proof that the State of Florida or Federal Government have been defrauded and whether the Government will ultimately intervene in the case.

Both acts provide for the Government to recover treble damages. The treble damages are in lieu of punitive damages. In addition, the Florida False Claims Act provides for civil penalties of \$5,000-\$10,000 per claim and the False Claims Act provides for civil penalties of \$5,500-\$11,000 per claim.

Under both acts, the plaintiff, known as “the relator”, is eligible to receive 15-25 percent of the Government’s recovery if the Government intervenes in the case and takes it over. If the Government chooses not to intervene, but the relator persists and obtains a recovery, then the relator’s share rises to 25-30 percent of the recovery.

A key provision for the practitioner to keep in mind is that both acts provide the successful relator reasonable attorneys’ fees and costs.⁵ So with that in mind, what type of potential claims should a medical malpractice or personal injury attorney be looking for when examining medical records and billing statements?

III. Types of Frauds You May Uncover

You may uncover evidence that Medicare or Medicaid was billed for services or tests that were not provided according to your client’s medical records. Or you might have evidence that Medicare or Medicaid was billed for services that objectively were not medically necessary.⁶ Or you might have evidence that your client did not receive all the services that Medicare or Medicaid were billed for. Or you might have evidence that although the services billed to Medicare or Medicaid were fully provided and were medically necessary, they were provided by that particular provider pursuant to a kickback arrangement with another provider.⁷

IV. First Trap for the Unwary: Assuming the Government Will Investigate Your Single Patient Case

Many relators (and attorneys) assume erroneously that the Government, whether that be the Department of Justice, the Office of Inspector General of the Department of Health and Human Services, the FBI, or the Medicaid Fraud Control Unit of the Florida Attorney General’s Office, will automatically investigate their single patient case. This assumption is based on the fact that the mission of these agencies includes investigating Medicare and/or Medicaid fraud.

The reality is that these agencies are too overburdened and understaffed to fully investigate every FCA case filed. That helps explain the Department of Justice’s 80 percent non-intervention rate nationally in FCA cases.

If you have a single patient case, you need to develop evidence that the target provider is engaged in identical or similar conduct on lots of other patients in order to get the Government interested in intervening in your case. You may be able to get that evidence from other patients, from former employees, or even from current employees of the provider (prior to filing your FCA case). If you absolutely cannot develop such evidence, at the very least you need to be able to show the Government attorneys how they can get that evidence without a lot of effort, perhaps by running claims history reports focused on particular procedure codes.

V. Second Trap for the Unwary: Assuming Your False Claim is Material

Not every misbilling is evidence of a potential qui tam action. You may find evidence that a hospital billed your client for a service that does not appear by the medical record to have been provided. However, if the hospital is paid a flat rate by Medicare based on your client’s DRG (diagnostic related group), Medicare may not have been

harmed. Since the False Claims Act penalizes only “material” false claims, the Department of Justice probably will not be interested in this case.⁸

The bottom line is that you will need to establish how the false or fraudulent claim harmed the Medicare or Medicaid program by causing the program to pay more to the target provider than it should have if the claim had been truthful.

VI. Third Trap for the Unwary: Stepping Into the “Public Disclosure Bar”

Let’s say you develop your Medicare or Medicaid fraud theory during your presuit investigation, but you don’t file a False Claims Act case at that point. So you file your medical malpractice case and commence discovery. You confirm your suspicions of Medicare or Medicaid fraud after obtaining discovery documents from the target provider produced without a protective order. Then you file your False Claims Act complaint.

Surprise! Your False Claims Act case may be dismissed under the public disclosure bar of 31 U.S.C. §3730(e)(4), which provides that “[n]o court shall have jurisdiction over an [FCA] 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 person bringing the action is an original source of the information.” “Original source” is defined as “an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an [FCA] action”

Your problem is that “discovery material disclosed ‘to a party who is not under any court imposed limitation as to its use’ is a public disclosure” under Section 3730(e)(4)’s public disclosure bar.⁹ Since your FCA complaint was filed *after* these documents were obtained in discovery and since those documents formed part of the basis of your FCA claims, your FCA complaint is likely to be held to be “based upon” allegations or transactions which were publicly disclosed in a civil hearing.¹⁰ This means that you cannot sit back and put it on the “back burner” while focusing on obtaining discovery in the underlying medical malpractice action. If you are unable to devote energy and resources to developing the potential qui tam claim early on, associate or co-counsel with a qualified qui tam attorney to simultaneously investigate the issues.

Bottom line: File your FCA case based on your presuit investigation *before* you have obtained discovery through the filed medical malpractice lawsuit.

VII. Fourth Trap for the Unwary: Violating FCA Filing and Service Requirements

If you fail to file the FCA claim in accordance with the statutory requirements, there is no “do over” in qui tam actions.

The FCA has unique filing and service requirements:

1. If you want to preserve your client’s claim to be an original source, you need to provide the information on which the allegations are based to the Government *before* filing your FCA complaint.¹¹

2. Your FCA complaint must be filed under seal.¹²
3. Your FCA complaint must be served on the Government, but not on the defendant(s).¹³

If you violate these requirements, your FCA complaint may be subject to dismissal.¹⁴

VIII. Fifth Trap for the Unwary: You Are Not First-to-File

Suppose you are focused on your med mal case. You delay filing your FCA case and, unknown to you, another lawyer representing another relator files an FCA case based on your allegations or allegations similar to yours.

Surprise! Your FCA complaint is subject to dismissal based upon 31 U.S.C §3730(b)(5), which provides that “[w]hen a person brings an [FCA] action ..., no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.”

Solution: Investigate, file early, and do not delay.

IX. Sixth Trap for the Unwary: The Government Tries to Settle Your Relator’s Share for a Minimum Award

Suppose you avoid all the other traps and the Government ends up choosing to intervene after your case has been under seal for several years. What do you have to look forward to then? A potential fight with your ally, the Department of Justice, over your relator’s share award.

An extended discussion of the DOJ Relator’s Share Award Guidelines and the caselaw on relator share awards is beyond the scope of this article. Suffice it to say that if you can’t reach a deal with the Department of Justice, you may need to litigate your relator’s share award percentage in the district court, possibly with help from someone who has done this before.

X. Conclusion

Successful and lucrative False Claims Act cases have been brought on behalf of patients. On the other hand, the False Claims Act presents many ways for lawyers who lack expertise in this area to make mistakes, including potentially fatal mistakes. Medical malpractice lawyers and personal injury lawyers who see or smell a potential FCA claim may wish to refer the case to, or co-counsel with, an experienced False Claims Act litigator. In the meantime, key points to remember: 1) investigate early; 2) build a case so that it may be more far reaching than just the one individual violation; 3) file the qui tam action before your underlying tort claim; and 4) be sure to abide by the filing and service requirements.

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³ Sec. 31 U.S.C. §3731(b) and Fla. Stat. §68.089. Generally, there is a six (6) year statute of limitations which applies to actions brought under the False Claims Act and the Florida False Claims Act. In limited instances, a three (3) year tolling provision may be applied but in no instance may a FCA or FFCA claim be filed after ten (10) years.

⁴ “Knowingly” under both the False Claims Act and the Florida False Claims Act is defined as having actual knowledge of the information, acting in deliberate ignorance of the truth or falsity of the information, or acting in reckless disregard of the truth or falsity of the information. Proof of specific intent to defraud is not required.

⁵ Both the False Claims Act, 31 U.S.C. §3730(d)(4), and the Florida False Claims Act, F.S. §68.086(3), provide that a relator who continues his or her case after the Government chooses not to intervene and loses may have to pay the prevailing defendant’s reasonable attorneys’ fees and expenses if the court finds that the relator’s claim “was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.”

⁶ Medicare only pays for medically necessary services and Medicare claim forms certify that the services billed for were medically necessary. Accordingly, Medicare claims knowingly submitted for medically unnecessary services are by definition false claims. *United States v. Campbell*, 845 F.2d 842, 847 (4th Cir. 1978).

⁷ In *McNutt v. Haleyville Medical Supplies, Inc.*, 423 F.3d 1256, 1260 (11th Cir. 2005), the Eleventh Circuit held that claims for Medicare services obtained by payment or receipt of remuneration in violation of the Anti-Kickback Act, 42 U.S.C. §1320a-7b, inherently constitute false claims under the False Claims Act.

⁸ *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 461 (5th Cir. 1977).

⁹ *R.A. McElmurray v. Consolidated Government of Augusta-Richmond County*, 501 F.3d 1244, 1253 n.19 (11th Cir. 2007).

¹⁰ Nevertheless, there may be creative arguments which might save your case. See *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562, 567 (11th Cir. 1994) (holding that a GAO report criticizing BCBSF was not a public disclosure because “the report does not allege that BCBSF in its capacity as a primary insurer actually engaged in wrongdoing”).

¹¹ 31 U.S.C. §3730(e)(4)(B).

¹² 31 U.S.C. §3730(b)(2).

¹³ *Id.*

¹⁴ *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 998-1000 (2d Cir. 1995); *Erickson ex rel. United States v. American Institute of Biological Sciences*, 716 F.Supp. 908, 911-12 (E.D. Va. 1989).

HUMAN THOUGHTS: Every day I remind myself that my inner and outer life are based on the labors of other men, living and dead, and that I must exert myself in order to give in the same measure as I have received and am still receiving.

—Albert Einstein

Young Lawyers Section



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CONTINUING THE BATTLE AGAINST CONSUMER ARBITRATION: FIGHT THE GOOD FIGHT

Litigating over anything involving a consumer contract – or a cell phone, a home, a car, a credit card,¹ for care of a loved one in a nursing home – will invariably bring a consumer into the orbit of a unilaterally drafted binding mandatory arbitration (BMA) clause.

Invariably, anyone fighting to protect the rights of consumers arising from a contract has dealt with these clauses. The stories you will usually hear from your client are always the same – your client has no idea of the rights that he or she signed away, no idea that the clause was present in the contract, was never informed of its presence in the contract. Unfortunately for many consumers, consumer lawyers included, these BMA clauses are a fact of life; if you want to have access to certain “necessities” of everyday living, you have little choice but to accept these provisions. Moreover, since most BMA clauses call for arbitration of disputes before any dispute has occurred, consumers are not likely to seek legal advice at the time they enter the prospective contract.

The BMA clause is a company’s first line of defense in an action to protect itself from consumers seeking to protect their rights, bolstered by a national policy favoring arbitration and years of U.S. Supreme Court decisions sending matters to arbitration rather than litigating in the court system.² Statements parroted by supporters of arbitration claim it is a form of faster, more efficient justice.³ Opponents’ studies on arbitration have demonstrated that the arbitration of disputes is invariably one sided and have raised questions as to the impartiality of arbitration companies, with the consumer coming out on the losing end of the arbitration battle more often than not.⁴ Additionally, since administrative costs alone for arbitration can be in the tens of thousands of dollars, when factoring in filing fees, fees for arbitrator’s time and location fees coupled with the potentially small amounts in controversy, many people will opt to cut their losses and not arbitrate the matter.

What to do if you find yourself with a client who has a good case but is facing an arbitration clause? The analysis of whether your client ends up litigating his or her case in front of a judge or a jury as opposed to an arbitrator will invariably turn on the facts surrounding the entry into the contract, the language of the clause, and the conduct of the parties after entering into the contract. Only after examining all of these factors can you truly advise your client on how best to proceed.