

False Claims Act: FY 2014 in Review

The *False Claims Act* (FCA) continues to grow in strength as the government increases its use of the law to recover billions of dollars from companies that violate the Act's provisions. The FCA is the government's primary tool to hold companies or individuals liable for defrauding the government through civil monetary penalties or sanctions.¹ For fiscal year 2014, the government reported its highest recovery amount in history through its use of the FCA. Further, there were few changes made to the legislative language of the FCA, but there were many provisions of the FCA argued on the circuit court level in 2014. This article will review the primary legislative change, circuit court splits, and government recovery efforts for fiscal year 2014.

The most noteworthy change to the interpretation of the FCA in 2014 involved CMS's release of its final rule entitled, "*Medicare Program; Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and Prescription Drug Benefit Programs.*"² The Final Rule requires Medicare Advantage plans and Part D sponsors to identify, report, and return overpayments by Medicare,³ which CMS estimates will save the government \$1.6 billion from 2015-2024.⁴ Another important provision in the Rule allows CMS to revoke Medicare enrollment from prescribers who abuse their prescribing privileges through fraudulent and false claims.⁵ Further, the Rule contains a provision that streamlines the investigation process for anti-fraud contractors who access records during fraud investigations.⁶

On a judicial level, multiple circuit courts hear arguments regarding the interpretation of FCA provisions. Specifically, there were three issues on which the circuits were split, and the Supreme Court granted certiorari to hear a particularly contentious issue. One issue that arose in many circuits is the requirement for specific allegations in the pleading under the Federal Rules of Civil Procedure 9(b) in order for a claim to survive a motion to dismiss. After the Supreme Court declined to hear the issue, believing circuits could resolve it, the Eighth, Third, and Eleventh Circuits ruled in favor of greater leniency in the pleadings, thus potentially increasing the opportunities for whistleblowers to file claims.⁷ Additionally, courts continued to dispute the intent and application of the *Patient Protection and Affordable Care Act* (ACA) in

regard to the FCA's public disclosure and original source exception.⁸ Typically, a qui tam suit is dismissed if it was based on information that was publically disclosed, unless the relator/whistleblower fits the *original source exception*,⁹ meaning the relator has "*knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions and who has voluntarily provided the information to the Government before filing an action under this section.*"¹⁰ This part of the FCA was designed to prevent whistleblowers from collecting on previously disclosed acts of fraud. The issue on which circuits continue to be split is whether the FCA amendments included in the ACA apply to actions before 2010. A third issue that circuits debated in 2014 was the *first-to-file rule*. This rule has generally been interpreted by courts to mean that later claims based on the same facts as a previous claim are barred, even if they raise new, specific information. However, a split between the Fourth and D.C. Circuit emerged regarding the *first-to-file rule* when prior claims are dismissed instead of pending, so the Supreme Court granted certiorari in 2014 to determine whether the FCA's *first-to-file rule* bars subsequent claims when prior actions are no longer pending; the Supreme Court heard the case in January 2015, but a decision is still pending.¹¹

Other issues related to FCA provisions argued in the various U.S. circuit courts in 2014 include: statute of limitations for filing civil claims (part of the Supreme Court's expected decision from the *first-to-file* case); penalties on suits brought by relators and the amount of *civil monetary penalties* compared to *compensatory damages* (finding relators are not officers so some compensatory provisions do not apply; also finding that the amount of a civil penalty is up to the discretion of the district court and not dependent on amount of compensatory damages); settlement issues (finding relators can receive portion of settlement with party not from original suit; also finding relators may have consent authorized for parts of settlement even without full agreement); the "*knowingly*" requirement in ambiguous contracts (finding the "*knowing*" requirement is not satisfied when ambiguity is present); attorneys' fees for successful defendants (defining the prevailing defendant; also finding only attorneys' fees from time of suit filing are recoverable); the government as a defendant (finding relators may bring suits against municipal governments); counterclaims against relators

(finding counterclaims for relator breaches of employment contracts were valid actions); relators' rights (finding relators are entitled to a portion of any civil penalties, but not criminal penalties; also finding relators have no standing if they filed a qui tam suit after declaring bankruptcy if aware of issues prior to bankruptcy); Stark Law and Anti-Kickback Statute violations related to FCA liability; and, analysis of worthless services (finding "worthless services" must be so lacking of necessity that they equal no service performed at all, not that they are worth less than amount paid).¹²

The government's recovery of funds from FCA suits in 2014 was even greater than previous years. The *Department of Justice* (DOJ) recovered a record breaking \$5.69 billion from false and fraudulent claims in fiscal year 2014, which ended September 30, 2014.¹³ Since 2009, the DOJ has recovered more than \$22 billion.¹⁴ The two largest contributors to the DOJ's recovery in 2014 are the false claims associated with financial institutions and federal healthcare programs.¹⁵ This record breaking recovery was due in large part to the government's attempt to hold banks and financial institutions accountable for the false claims filed that contributed to the housing and mortgage crisis during the recession, although these were not healthcare related.¹⁶

The government can credit a majority of its healthcare recovery efforts to its healthcare specific task force, known as the *Health Care Fraud Prevention and Enforcement Action Team* (HEAT), which has collected \$14.5 billion from false claims since 2009.¹⁷ For 2014, over \$1 billion of the government's recovery within the healthcare industry came from Johnson & Johnson, which settled allegations of fraud for prescription drugs it marketed as FDA approved when the uses described were not authorized.¹⁸ In addition, about \$1.9 billion of the \$5.69 billion recovered in 2014 were allocated to the Medicare Trust Funds.¹⁹ The *U.S. Department of Health and Human Services* (HHS) reported that its return on investment from the healthcare recovery program over the last three years was \$7.70 for each dollar spent, which is \$2 more than the average return for the program,²⁰ indicating successful recovery efforts. Note that these recovery efforts include the government's sequestration of \$31.5 million from the program's funding in 2014, part of the government's initiative to cut spending.²¹

More than half of the \$5.69 billion recovered was due to qui tam suits filed by individuals—known as *whistleblowers* or *relators*—on the government's behalf.²² In fact, there were more than 700 qui tam suits filed in 2014, with the whistleblowers receiving a hefty \$435 million from the government's recovery.²³

The sheer volume of recovery dollars in 2014 indicates the government's continued heavy reliance on the FCA as a tool for enforcement and recovery. Further, the record-breaking numbers last year and the great success in recovering money from false claims indicate a continuance of this trend. From a judicial standpoint, the

numerous circuit level cases indicate the likelihood of additional disputes of the FCA as courts continue to try to interpret its language. Finally, the government will likely continue to use legislative action to enhance its use of the rule.

- 1 "Justice Department Recovers Nearly \$5 Billion in False Claims Act Cases in Fiscal Year 2012" Department of Justice, December 4, 2012, <http://www.justice.gov/opa/pr/justice-department-recovers-nearly-5-billion-false-claims-act-cases-fiscal-year-2012> (Accessed 4/20/15).
- 2 "CMS Finalizes Program Changes for Medicare Advantage and Prescription Drug Benefits Programs for Contract Year 2015 (CMS-4159-F)" Centers for Medicare & Medicaid Services, May 19, 2014, <http://www.cms.gov/Newsroom/MediaReleaseDatabase/Fact-sheets/2014-Fact-sheets-items/2014-05-19.html> (Accessed 4/15/15).
- 3 "Medicare Program; Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs" Fed. Reg. Vol. 79, No. 100 (May 23, 2014) p. 29847.
- 4 Centers for Medicare & Medicaid Services, May 19, 2014. Fed. Reg. Vol. 79, No. 100 (May 23, 2014) p. 29898.
- 5 Ibid, p. 29913-29914.
- 6 "Unites States ex rel. Thayer v. Planned Parenthood of the Heartland" 767 F.3d 914, 918-919 (8th Cir. 2014); "Foglia v. Renal Ventures Mgmt., LLC" 754 F.3d 153, 157-158 (3d Cir.2014); "U.S. ex rel. Mastej v. Health Management Associates, Inc." no. 13-11859, 2014 WL 5471925 (11th Cir. Oct. 30, 2014).
- 7 "United States ex rel. Kraxberger v. Kansas City Power & Light Co., 756 F.3d 1075, 1079 (8th Cir. 2014); "United States ex rel. Oliver v. Phillip Morris USA Inc., 763 F.3d 36, 42 (D.C. Cir. 2014).
- 8 "2014 Year in Review – The False Claims Act" Haynes Boone, January 2015, <http://www.haynesboone.com/~media/files/alert%20pdfs/falseclaimyearinreview2014.ashx> (Accessed 4/15/15) p. 5-6.
- 9 "Civil Actions for False Claims" 31 U.S.C. § 3730(e)(4)(B).
- 10 "Kellogg Brown & Root Services, Inc., et al. v. United States, ex rel. Benjamin Carter" 134 S.Ct. 2899 (2014).
- 11 "2014 Year in Review – The False Claims Act" Haynes Boone, January 2015, <http://www.haynesboone.com/~media/files/alert%20pdfs/falseclaimyearinreview2014.ashx> (Accessed 4/15/15) p. 3-15.
- 12 Department of Justice, Office of Public Affairs, November 20, 2014.
- 13 Ibid.
- 14 Ibid.
- 15 Ibid.
- 16 Ibid.
- 17 Ibid.
- 18 Ibid.
- 19 "Annual Report of the Departments of Health and Human Services and Justice Health Care Fraud and Abuse Control Program FY 2014" Department of Health and Human Services and Department of Justice, March 19, 2015, <http://oig.hhs.gov/publications/docs/hcfac/FY2014-hcfac.pdf> (Accessed 4/15/15) p. 5.
- 20 Ibid, p. 8.
- 21 Ibid, p. 2.
- 22 Department of Justice, Office of Public Affairs, November 20, 2014.
- 23 Ibid.



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