Westlaw Journal
GOVERNMENT CONTRACT
Litigation News and Analysis • Legislation • Regulation • Expert Commentary
VOLUME 25, ISSUE 24 / APRIL 2, 2012

Expert Analysis

Not Your Parents' Lawsuit: The New Face of False Claims Act Litigation

By Lori L. Pines, Esq., and Nadya Salcedo, Esq.
Weil, Gotshal & Manges

The False Claims Act, 31 U.S.C. § 3729, is a Civil War-era law enacted to address the fraudulent provision of defective goods to the Union Army by unscrupulous defense contractors. The typical FCA case involved a federal government contractor as the defendant and either the Department of Justice or a *qui tam* relator filing on behalf of the government as the plaintiff.[1]

The fraudulent conduct at issue in the classic FCA case stemmed directly from the procurement or performance of that government contract, such as overbilling for substandard goods or inflating requests for reimbursement. Recent trends, however, including the proliferation of state and city false-claims acts, recent amendments to the false-claims statutes and the focus on new industries not previously targeted, have changed the face of FCA litigation.

States and municipalities are enacting and aggressively enforcing false-claims legislation, leading to FCA exposure at state as well as federal levels. At least 30 states and two cities have enacted their own versions of the FCA, and *qui tam* suits filed pursuant to these laws have resulted in recoveries in the hundreds of millions.[2]

In 2011 California Attorney General Kamala D. Harris announced two major settlements totaling nearly $300 million under the *qui tam* provision in the state's false-claims act.[3]

New York Attorney General Eric T. Schneiderman has called his state's False Claims Act the "False Claims Act on steroids"[4] and has affirmed his tactic of partnering with whistle-blowers to generate "much-needed revenue" for the state by using the statute.[5]

The expanding web of state and federal false-claims acts lends prosecutors and potential *qui tam* relators multiple and overlapping forums in which to pursue their

claims. For example, in 2009 a whistle-blower group, FX Analytics, brought suits against the Bank of New York Mellon based on state false-claims acts in California,[6] Virginia[7] and Florida.[8] FX Analytics accused BNY Mellon officials of defrauding public pension funds on foreign-exchange trades.

In August 2011, the attorneys general of both Florida and Virginia filed their own suits based on the same whistle-blower claims.[9] Schneiderman joined the fray in October, filing a lawsuit against BNY Mellon under both the state and New York City false-claims acts, as well as the Martin Act, a 1921 law allowing prosecutors to pursue securities fraud without proof of intent to defraud.[10] On the same day, the U.S. attorney for the Southern District of New York, Preet Bharara, also filed an action against BNY Mellon for the same conduct, although not under the False Claims Act.[11]

Following this spate of lawsuits, Massachusetts's secretary of the commonwealth filed an administrative complaint against BNY Mellon Oct. 26 based on similar conduct (again, not under a false-claims statute).[12]

States and municipalities are enacting and aggressively enforcing false-claims legislation, leading to FCA exposure at state as well as federal levels.

In addition, several other states, including North Carolina, Ohio and Oklahoma, are reportedly conducting their own inquiries or considering litigation based on the same conduct alleged by the initial *qui tam* plaintiff group.[13] In preliminary settlement talks with Bharara's office, BNY Mellon expressed concern over the effect that any settlement with the federal prosecutors would have on the other lawsuits directly linked to claims brought by FX Analytics.[14]

The snowball effect of the initial 2009 *qui tam* lawsuits experienced by BNY Mellon demonstrates that not only can a national company face false-claims allegations on multiple fronts, but each suit and its resolution has a potential impact on subsequent suits.

Another way today's false-claim litigation deviates from the traditional plaintiff-vs.-federal-contractor case is that FCA liability is increasingly imposed on entities that have never submitted a claim to or received money from the government. This exposure to FCA liability reaches "downstream" entities, such as subcontractors and providers of components or raw materials that are ultimately used in end products sold to the government.

For example, in *United States ex rel. Roby v. Boeing Co.*, after a U.S. Army Chinook helicopter crashed during Operation Desert Storm, a *qui tam* relator brought an FCA claim not only against Boeing, which contracted with the Army to remanufacture the Chinook-model helicopters, but also against Speco Corp., a supplier for the defective transmission gears used in Boeing's remanufacturing process.[15]

Although Speco was the parts supplier, it was Boeing that made the misrepresentation to the government that triggered the FCA liability: that the helicopter conformed to contract requirements. Speco eventually settled the claim, but only after it filed a petition for bankruptcy.

The Fraud Enforcement Recovery Act of 2009,[16] which amended the FCA in several important ways, has widened the door for downstream and subcontractor FCA liability.

©2012 Thomson Reuters

The amendments disposed of the requirement of intent that the U.S. Supreme Court in *Allison Engine Co. v. United States ex rel. Sanders* had read into certain provisions the FCA.[17]

In *Allison Engine*, *qui tam* plaintiffs brought suit against several subcontractors, alleging that components suppliers for electrical systems in Navy destroyers had presented fraudulent invoices to shipyards that were in turn presented to the Navy.

The relevant provisions under which the claims were pursued impose civil liability on any person who knowingly uses a "false ... statement *to get* a false or fraudulent claim paid or approved by the government"[18] or who "conspires to defraud the government *by getting* a false or fraudulent statement allowed or paid."[19] The Supreme Court focused on the phrase "to get" in the first FCA provision to require an intent on behalf of the subcontractors to cause a false claim to be paid or approved by the government.[20]

The court similarly interpreted the second provision, holding that "it must be shown that the conspirators had the purpose of 'getting' the false record or statement to bring about the government's payment of a false or fraudulent claim."[21] Through this interpretation, the Supreme Court gave companies some relief from mounting FCA liability.

With the enactment of FERA in 2009, however, Congress removed the intent requirement and nullified the *Allison Engine* holding. Specifically, FERA amended FCA Section 729(a)(2) by removing the language "to get" and replacing it with the requirement that the false record or statement be "material" to the false claim to the government.[22] This means the false record or statement must "have a natural tendency to influence, or be capable of influencing" the payment or receipt of money, and does not require further intent or purpose on behalf of the subcontractor.[23]

The expanding web of state and federal false-claims acts lends prosecutors and potential* qui tam *relators multiple and overlapping forums in which to pursue their claims.

Decisions are now being published in which courts have had to interpret the amended FCA provisions, a difficult task since the cases were filed under the pre-amended FCA.[24] In *United States ex rel. Loughren v. Unum Group*,[25] the court confronted the FERA amendments by distinguishing the facts before it from those in *Allison Engine*. In doing so, the court found that the "intent requirement" *Allison Engine* read into the FCA "was in the context of a party submitting a false statement not directly to the government, but to a private third party (as in the case of a subcontractor and prime contractor)."[26]

In saying that *Allison Engine* had a unique effect in contractor-subcontractor situations, the court implicitly acknowledged that the removal of the intent requirement also affects subcontractor liability. Previously, "a subcontractor would only violate Section 3729(a)(2) if it intended for the prime contractor to use the statement to get the government to pay its claim;" that intent limitation is now removed.[27] Thus, subcontractors can expect to see increasing FCA claims targeting them instead of, or in addition to, their prime contractor.

The expanding reach of FCA claims is not limited to subcontractors, but to entire industries not traditionally thought of as subject to such scrutiny. Currently, the health care industry is a frequent target of FCA litigation. According to the Department

©2012 Thomson Reuters

of Justice, of the $3 billion in settlements and judgments obtained in FCA cases in 2011, $2.4 billion were recoveries involving claims of fraud against federal health care programs.[28] The pharmaceutical industry was the largest source of the Justice Department's 2011 recoveries, totaling $2.2 billion.[29]

The financial and mortgage industries, though, have recently begun to receive increased congressional and prosecutorial attention, paving the way for growing FCA exposure. Congress explicitly focused on the financial industry in enacting FERA in 2009. The introductory language of the act says FERA's purpose is to "improve enforcement of mortgage fraud, securities and commodities fraud, financial institution fraud, and other frauds related to federal assistance and relief programs."[30]

The Justice Department echoed Congress' concerns and has dedicated itself to "aggressively pursuing all manner of fraud schemes, including mortgage fraud ... and fraud involving the Troubled Asset Relief Program, the American Recovery and Reinvestment Act and other economic stimulus programs."[31]

The department also said combating mortgage fraud is a "top priority" to which it is devoting increased resources.[32] The BNY Mellon cases exemplify the new and intense national scrutiny on financial sector conduct under the lens of false-claims acts.

The scope of FCA litigation has clearly expanded. Companies that have never submitted a claim directly to the government and industries that have never before been the focus of regulators and prosecutors are facing both state and federal exposure. In a time when state and federal budgets are severely strained, the revenue-generating feature of FCA litigation is attractive to governments.

With the *qui tam* provisions, which allow individuals to collect up to 30 percent of the recovery,[33] there are ample incentives for the Justice Department, plaintiffs and government interveners to expand FCA liability in novel ways. As "the fastest-growing area of federal litigation,"[34] the rate of change is rapid, requiring any company receiving money from or owing money to the government to be vigilant and mindful of the potential for state and federal exposure.

NOTES

1 The FCA includes a "*qui tam*" provision allowing private persons, known as relators, to file actions on behalf of the government (informally called "whistle-blowing"). 31 U.S.C. § 3730(b).

2 For an illustrative list of judgments or settlements recovered pursuant to state false-claims acts, *see* the False Claims Act Legal Center's sample of cases at http://www.taf.org/statefca.htm.

3 Press Release, Office of the California Attorney General, Attorney General Kamala D. Harris announces $49.5 million settlement with Labcorp (Aug. 30, 2011), *available at* http://oag.ca.gov/news/press_release?id=2556.

4 *See* Michelle Breidenbach, *NY hopes incentives will help blow the whistle on tax cheats*, THE POST-STANDARD, Jan. 10, 2011, *available at* http://www.syracuse.com/news/index.ssf/2011/01/ny_hopes_new_law_wets_your_whi.html.

5 Press Release, Office of the New York Attorney General, A.G. Schneiderman launches new initiative to bolster recovery of taxpayer dollars and fight government fraud (Jan. 27, 2011), *available at* http://www.ag.ny.gov/media_center/2011/jan/jan27a_11.html. *See, e.g., State ex rel. Jamaica Hosp. Med. Ctr. v. UnitedHealth Group*, 84 A.D.3d 442 (N.Y. App. Div., 1st Dep't May 3, 2011) (*qui tam* action brought — and dismissed — based on allegations already in the public domain).

©2012 Thomson Reuters

[6] *See FX Analytics v. Bank of N.Y. Mellon*, No. RG09480749, *complaint filed* (Cal. Super. Ct. Alameda County Oct. 22, 2009).

[7] *See Commonwealth ex rel. FX Analytics v. Bank of N.Y. Mellon,* No. 2009-CL-15377, *complaint filed* (Va. Cir. Ct. Oct. 23, 2009).

[8] *See State ex rel. FX Analytics v. Bank of N.Y. Mellon,* No. 2009 CA 4140, *complaint filed (*Fla. Cir. Ct. Oct. 21, 2009).

[9] *See Commonwealth ex rel. FX Analytics v. Bank of N.Y. Mellon,* No. 2009-CL-15377, *complaint in intervention filed* (Va. Cir. Ct. Aug. 11, 2011); *State ex rel. FX Analytics v. Bank of N.Y. Mellon,* No. 2009 CA 4140, *complaint in intervention filed* (Fla. Cir. Ct. Aug. 11, 2011).

[10] *State ex rel. FX Analytics v. Bank of N.Y. Mellon,* No. 09/114735, *complaint and superseded complaint filed* (N.Y. Sup. Ct. Oct. 4, 2011).

[11] *United States v. Bank of N.Y. Mellon,* No. 11 Civ. 6969, *complaint filed* (S.D.N.Y. Oct. 4, 2011).

[12] *See Bank of New York Mellon*, No. 2011-0044, *administrative complaint filed* (Office of Sec'y Sec. Div. Oct. 26, 2011).

[13] *See* Carrick Mollenkamp, *New York's top cop jumps into fray*, Wall. St. J., Aug. 3, 2011, *available at* http://online.wsj.com/article/SB10001424053111904292504576484441822166386.html.

[14] *See* Jean Eaglesham & Michael Rothfeld, Talks in currency suit: BNY Mellon is negotiating with U.S. to settle claims it overcharged clients, Wall. St. J., Nov. 4, 2011, *available at* http://online.wsj.com/article/SB10001424052970204621904577016291145253260.html.

[15] 302 F.3d 637 (6th Cir. 2002). Speco was named a defendant in relator's original complaint but settled its portion of the claims. *See* Plaintiff-Appellee Brief at n. 26, *United States ex rel. Roby v. Boeing Co*., No. 00-4157 (6th Cir. Jan. 1, 2001).

[16] Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621 (2009) (signed by the president May 20, 2009).

[17] *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008).

[18] 31 U.S.C. § 3729(a)(2)(2008) (emphasis added) (amended by FERA).

[19] 31 U.S.C. § 3729(a)(3) (2008) (emphasis added) (amended by FERA).

[20] *Id.* at 668-69 ("'To get' denotes purpose, and thus a person must have the purpose of getting a false or fraudulent claim 'paid or approved by the Government' in order to be liable under § 3729(a)(2).")

[21] *Allison Engine,* 553 U.S. at 673.

[22] 31 U.S.C. § 3729(a)(1)(B) (2009).

[23] 31 U.S.C. § 3729(b)(4) (2009).

[24] *United States ex rel. Loughren v. Unum Group*, 613 F.3d 300, 307 n. 7 (1st Cir. 2010) (describing split in authority regarding retroactivity of Section 3729(a)(1)(B)).

[25] *Id. See Foglia v. Renal Ventures Mgmt. LLC*, 2011 WL 5882020, *7 (D.N.J. 2011) (quoting footnote 7 of *Loughren*, 613 F.3d at 307).

[26] *Id.*

[27] *Id.*

[28] Press Release, Department of Justice, Justice Department recovers $3 billion in False Claims Act cases in fiscal year 2011 (Dec. 19, 2011), *available at* http://www.justice.gov/opa/pr/2011/December/11-civ-1665.html; see Harris Press Release, *supra* note 3.

[29] *See* Department of Justice Press Release, *supra* note 28.

[30] FERA, *supra* note 19, Preamble.

[31] Department of Justice, Statement of Assistant Attorney General for the Civil Division Tony West Before the Senate Committee on the Judiciary 4-5 (Jan. 26, 2011), *available at* http://www.justice.gov/civil/opa/pr/testimony/2011/civ-testimony-110126.html.

[32] *Id.* at 4.

[33] 31 U.S.C. §§ 3730(d)(1), (2).

[34] ABA CLE Program Guide, 8th Annual National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 2-4, 2010), *available at* http://new.abanet.org/calendar/civil-false-claims-act-and-qui-tam-enforcement-2010/Documents/cen0cfc_Website_Brochure_5-7-10.pdf; Marc Raspanti & Meredith Auten, *Why is Qui Tam Litigation Often so Difficult to Resolve?*, AHLA

CONNECTIONS, (September 2011), at 22, 22, *available at* http://www.falseclaimsact.com/library/files/feature_sept2011%5B1%5D.pdf; Corporate Counsel Symposium, What to do When the Government Comes Knocking, Federation of Defense and Corporate Counsel (Sept. 20-22, 2011), *available at* http://www.thefederation.org/documents/03.When%20The%20Government%20Comes%20Knocking%20%28final%29.pdf; Gibson Dunn, 2010 Mid-Year False Claims Act Update (June 9, 2010), *available at* http://www.gibsondunn.com/publications/pages/2010Mid-YearFalseClaimsActUpdate.aspx#_ednref1.

Lori L. Pines (left) is a litigation partner in the New York office of **Weil, Gotshal & Manges**, where she serves as the chair of the firm's litigation training program. She has played a central role in managing the defense of some of the nation's most complex and public disputes, including one of the largest class action/multi-district litigation proceedings. **Nadya Salcedo** (right) is a litigation associate in the firm's New York office. Her practice includes commercial litigation in matters involving government investigations, financial services and transportation.

©2012 Thomson Reuters. This publication was created to provide you with accurate and authoritative information concerning the subject matter covered, however it may not necessarily have been prepared by persons licensed to practice law in a particular jurisdiction. The publisher is not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional. For subscription information, please visit www.West.Thomson.com.