

## ACA and FCA Litigation

### *Peril and Opportunity for Med Mal Lawyers*

#### *Part One of a Two-Part Article*

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Claims brought under the False Claims Act (FCA) are a significant part of the federal government's efforts to combat Medicare and Medicaid fraud and abuse. According to statistics published by the United States Department of Justice (DOJ), the federal government received \$1.6 billion in FCA recoveries in 2009, and \$2.5 billion in 2010. It seems unlikely that these figures will decline in the future. The majority of these recoveries (85% in 2009 and 78% in 2010) were in cases brought under the FCA's *qui tam* provisions, which essentially allow an individual (called a relator) to file suit on behalf of the government. The amounts recoverable in an FCA case can include treble damages and significant statutory penalties, and can also include an award of costs and attorneys' fees. A *qui tam* relator is potentially entitled to receive up to 25% of the amount recovered if the government intervenes and essentially takes over the case, and up to 30% of the amount recovered if the government does not, plus costs and attorneys' fees.

#### **MED-MAL ATTORNEYS TAKE HEED**

Despite the obvious economic significance of these claims and their prominence on the health care landscape, lawyers whose practices are focused on individual medical malpractice cases have traditionally had little involvement with the FCA and its *qui tam* provisions, or with the complicated health care funding issues that can potentially give rise to these claims.

That might be changing, for two reasons.

First, the Patient Protection and Affordable Care Act (ACA) changes federal law governing FCA claims, in a way that gives individual plaintiffs new power to use information learned in discovery in a civil case as the basis for a *qui tam* case brought under the FCA.

Second, the ACA and other recent federal laws continue to expand the number of ways in which a provider's right to receive payment from the federal government is tied to patient safety. The same events that give rise to a malpractice case might also give rise to a *qui tam* case, if discovery reveals that the provider received federal funds that it should never have received in the first place.

#### **THE AFFORDABLE CARE ACT AND QUI TAM LITIGATION**

Before passage of the ACA, a lawyer who learned of a billing and payment error in the course of discovery would have had little incentive to do anything about it. The pre-ACA FCA provided: "No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing ... unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."

Case law established that information obtained during discovery in a civil case constituted "public disclosure" in a "civil ... hearing," and this acted as a jurisdictional bar to the pursuit of such cases. *See, e.g., Stinson v. Lyon*, 944 F.2d 1149 (3d Cir. 1991). While there is an exception to the public disclosure bar when the litigant is an original source of the information, the archetypal original source is a former employee who becomes a whistleblower, and private malpractice litigants were rarely an original source. Thus, for nearly two decades, at least in the Third Circuit (in which this author practices), civil malpractice litigants were categorically barred from using information obtained in discovery as the basis for a *qui tam* case.

The ACA changes that. The FCA, as modified by the ACA, now provides:

The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as al-

leged in the action or claim were publicly disclosed —

- (i) in a Federal criminal, civil, or administrative hearing in which the government or its agent is a party;
- (ii) in a congressional, Governmental Accountability Office, or other Federal report, hearing, audit, or investigation; or
- (iii) from the news media unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

ACA § 10104 (codified at 31 U.S.C. § 3730(e)(4)(A)(i)-(iii) (2010)).

Under this new standard civil litigation is only a "public disclosure" barring a *qui tam* case if the government or its agent is a party — and this is almost never the case. Even where the public disclosure bar does apply, the government is free to oppose the application of the bar if it decides that the case should be pursued regardless of the previous public disclosure. The ACA also significantly expands the definition of "original source," in a way that makes it much more likely that an individual malpractice plaintiff or her counsel could qualify as an "original source."

These changes came on the heels of the Fraud Enforcement and Recovery Act of 2009 (FERA), which also expanded the FCA in a number of ways. Before FERA an FCA claimant was required to prove that the false claim was submitted "to get" the claim "paid or approved by the government." The FERA amendments relaxed that standard, and the FCA now permits recovery whenever the false statement is "material to" the false claim.

Taken together, these recent changes make it significantly more feasible for individual plaintiffs to initiate successful *qui tam* claims.

This discussion concludes in next month's issue.