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MUELLER LAW

Written by: William L. Hurlock[1]

Without Justice: Courage is Weak[2]

Attorneys are increasingly availing themselves of the Federal False Claims Act ("Act") as a resource to prosecute allegations of fraud, particularly in the healthcare field. The filing of these cases increased substantially in the last five years. This article attempts to provide an overview of the operation of the Act.

Congress passed the Act in 1863 at the height of the Civil War in an attempt to address the rampant fraud occurring in the procurement of supplies and materiel for the Union. President Lincoln signed the legislation into law on March 2, 1863. It thus became known as the "Lincoln Law."

The Act was amended in 1943 during the Second World War. Once again, the Government attempted to combat war profiteers selling inferior products to the United States military. Many question the effectiveness of these amendments as few cases were filed after their enactment.

In 1986, at the height of the Defense Department build-up during the Reagan Administration, Congress again amended the Act to further combat procurement fraud and encourage the filing of cases. Many contend that these amendments made the statute an effective tool to remedy fraud perpetrated on the United States.

Congress recently amended the statute as part of the Patient Protection and Affordable Care Act. These amendments further strengthened the Act and addressed the ambiguities that developed thorough inconsistent court rulings applying the statute.

Congress also enacted certain incentives for states to pass False Claims Act legislation. Those states with a statute may share in recoveries made in their enforcement. Currently, twenty-nine states (including New Jersey) and the District of Columbia now have False Claims Acts.

Overview of the Act

An individual or entity may violate the Act if they present, or cause to be presented, a false claim for payment – or if they made a false statement or record to get a claim paid – to the United States Government with knowledge of the falsity. "Knowledge" can be actual knowledge or deliberate ignorance or reckless disregard of the truth or falsity of the information.

The statute contains a *qui tam* provision allowing an individual citizen or entity, referred to as a "relator," to sue on behalf of the Government. If successful, they receive a percentage of the recovery. *Qui tam* is an abbreviation of the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur* which translates into "he who brings a case on behalf of our lord the King, as well as for himself." The relator may also assert personal employment claims for wrongful termination under Section H of the Act. The Government does not participate in or share in the recovery for employment claims.

Relators must voluntarily disclose the possible existence of a violation of the Act and evidence supporting those claims prior to filing a complaint. A "disclosure statement" details the allegations and evidence supporting the claim. Providing documentation to the Government in response to a subpoena may impact whether disclosure was done "voluntarily."

After making the disclosures, cases are filed in court under seal. The Government has sixty days to investigate a case once filed to determine if it is going to intervene. In reality, intervention decisions can often take years and seals are routinely extended for six month intervals. Certain courts, however, are becoming less inclined to grant extensions without some explanation by the Government as to need.

The Public Disclosure Bar and the Original Source Exception

The Act bars courts from hearing qui tam cases when allegations contained in the complaint are based on publicly disclosed information. This prohibition is known as the "public disclosure bar." The public disclosure bar is jurisdictional in nature and prevents a relator from pursuing a claim. There is no difference between a *complaint* based upon information contained in public disclosures and an *amended complaint* based on such information.

There exists, however, an exception to this prohibition. It is known as the "original source" exception. Under this exception, a relator is not barred from pursuing a matter under the Act if the relator was an original source of the publicly disclosed information.

Thus, a court must determine if the allegations underlying a case have been publicly disclosed. If they have been, the court must then determine if the relator is an original source of the information supporting the allegations. A determination must be reviewed in the context of rejecting suits which the government can pursue itself, while promoting those which the government cannot.

The First-to-File Doctrine

After a relator files a suit, no person other than the Government can file a related action based on the same facts underlying the relator's action. This doctrine is known as the "first-to-file bar." Quite simply, only the relator who first files an action may proceed. Those filing afterwards cannot. Again, the reasoning is to limit filing multiple suits for the same conduct.

This may arise in many ways. For instance, does the first-to-file bar preclude the filing of a later complaint when an earlier complaint is rendered jurisdictionally defective because the relator was not an original source of the publicly disclosed information? Depending on the jurisdiction, it may.

Some courts, however, recognize that if public disclosure is an issue, the first-to-file bar prohibits only those complaints filed after a complaint that fulfills the jurisdictional requirements. The originally filed complaint does not exist for purposes of the first-to-file bar if the court lacks jurisdiction over the complaint. Thus, it is necessary to review the rule in the jurisdiction in which you practice.

Conclusion

Professionals are becoming increasingly exposed to the Act. As noted above, issues can surface in a variety of contexts. One confronting the statute must be mindful of the myriad of ways in which such issues may arise to effectively represent their clients.

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[1] Partner Mueller Law LLC, 363 Bloomfield Ave. Suite 2-C, Montclair, New Jersey (973) 233-8290 william.hurlock@muellerlaw.com .

[2] Benjamin Franklin, Poor Richard's Almanac, (Sept. 1734).

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