

- a newsletter by Cohen Law Group, P.C., a law firm dedicated to the representation of whistleblowers under the False Claims Act.

## A False Claims Act Primer

Summer 2003

In 1986, Congress passed legislation to strengthen a Civil War era statute known as the False Claims Act (FCA), 31 U.S.C. § 3729 et seq. Congress recognized that the Government alone, with its limited resources, was outmatched in the fight against rampant fraud. This law put into play a public-private partnership for uncovering fraud against the federal government and obtaining the maximum recovery for the U.S. Treasury.

The FCA has now become a powerful tool for uncovering fraud and abuse of Government-funded programs. One reason for this is the FCA's *qui tam* provisions, which provide a mechanism for private citizens to "blow the whistle" on those who defraud the Government. The FCA compensates the private citizen if his or her efforts are successful in helping the Government recover fraudulently obtained funds.

### What does "qui tam" stand for?

"Qui tam," short for "qui tam pro domino rege quam pro si ipso in hac parte sequitur," is a Latin phrase which translates to "he who brings an action for the king as well as himself."

The key provisions of the 1986 FCA Amendments:

- Entitle successful whistleblowers to receive at least 15% and up to 30% of the money the Government recovers from the defendant;
- Require the defendant to pay the successful whistleblowers' reasonable attorneys' fees and costs;
- Protect whistleblowers from employment retaliation;
- Allow whistleblowers to remain as parties even after the Government intervenes or joins in the lawsuit;
- Lower the standard of proof to provide liability for a defendant who acts in "deliberate ignorance" or "reckless disregard" of the truth.

An FCA violation occurs when a person or entity deceives the Government in order to improperly obtain money or improperly be relieved from paying money to the Government. The FCA prohibits, among other things:

- Knowingly presenting (or causing to be presented) to the Government a fraudulent claim for payment;
- Knowingly using (or causing to be used) a false record or statement to get a claim paid by the Government;
- Conspiring with another to get a false or fraudulent claim paid by the Government; and
- Knowingly using (or causing to be used) a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the Government.

Persons who violate the False Claims Act are required to pay back the Government three times the actual damages suffered by the Government, in addition to mandatory civil penalties of \$5,500 to \$11,000 for each false claim.

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To read the text of the False Claims Act and state false claims laws, read answers to Frequently Asked Questions and view the Chronology of a Typical Qui Tam Case, please visit our website at [www.cohenlawgroup.com](http://www.cohenlawgroup.com).



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Importantly, the FCA only applies to fraudulently obtained federal funds. However, eleven states (California, Delaware, Florida, Hawaii, Illinois, Louisiana, Massachusetts, Nevada, Tennessee, Texas and Virginia) and the District of Columbia have now enacted their own false claims statutes, many of which are modeled after the federal FCA. These statutes address fraud against state-funded programs such as Medicaid. Legislation is currently pending in many more states.

In the private sector, several states, including Illinois, have enacted statutes allowing an “interested person” to bring a lawsuit on behalf of the State to recover damages and penalties arising from a

**The Illinois Insurance Claims Fraud Prevention Act** covers the submission of false claims in the private sector.

defendant’s submission of false claims to an insurance company. The Illinois statute, the Insurance Claims Fraud Prevention Act, 740 ILCS 92/1 et seq., allows the interested person to receive up to 40% of the proceeds the State recovers from the defendant.

## Key FCA Statistics\*

- Since 1986, the Federal Government has collected more than \$10 billion dollars from FCA prosecutions, over \$6 billion of which has been recovered as a result of private whistleblower lawsuits brought under the FCA’s *qui tam* provisions.
- Since 1986, approximately 4,000 *qui tam* cases have been filed.
- In fiscal year 2002 alone, the federal Government recovered almost \$1.2 billion as a result of FCA settlements and judgments. Of that amount, approximately \$1.1 billion arose from *qui tam* suits.
- Of the \$1.2 billion collected in 2002, more than \$980 million involved health care fraud and abuse.
- In fiscal year 2002 alone, whistleblowers received more than \$160 million for their efforts in exposing fraud and abuse.

*\*Statistics provided by the U.S. Dept. of Justice.*

## “Hot” False Claims Act Enforcement Areas

The rise in *qui tam* cases by private whistleblowers has changed the face of the Government’s fraud enforcement activity, particularly in the health care context. Historically, the Government limited its health care fraud enforcement activity to “traditional” billing fraud cases. Government prosecutions focused on claims against medical providers and hospitals who overcharged the Medicare and Medicaid programs by “upcoding” claims for medical services and procedures, submitting false or fraudulent cost reports, billing for unnecessary medical procedures and for services that were not actually provided to patients.

In the last few years, private whistleblowers have been providing Government investigators and prosecutors with information uncovering new types of fraud. Government prosecutors are increasingly focusing their efforts in two new areas: “quality of care” and pharmaceutical company marketing practices.

Quality of care cases involve medical providers or institutions who provide care, to patients that is so substandard that had the Government known about it, the Government would not have paid the claims associated with that care. The focus in this area has been spurred by the ever-rising costs of medical care coupled with reports of severe understaffing and outbreaks of hospital-acquired infection and other quality control problems occurring at health care institutions nationwide.

Although Government enforcement activity in the “quality of care” context is relatively new, all indications are that this is just the beginning of the trend. The Office of Inspector General for the Department of Health and Human Services (OIG HHS) announced in its 2003 Work Plan that quality of care by nursing home and long-term health care facilities will be a primary focus of its enforcement activity for the upcoming year.

**“Quality of Care” and pharmaceutical fraud are top Government enforcement priorities.**

Quality of Care enforcement issues include:

- Withholding necessary medical services to patients;
- Providing intrusive unnecessary surgeries or medical procedures;
- “Doctoring” or falsifying diagnoses to support unnecessary medical services;
- Providing medical care below regulatory or agency-approved standards; and
- Falsely certifying or reporting the level of care being provided to patients.

In the pharmaceutical context, Government prosecutors are now targeting drug companies whose sales and marketing practices violate federal fraud and abuse laws, including the Anti-Kickback Act, Stark Act and Best Price regulations. Violations of these laws give rise to a claim under the FCA. The Government has already announced a number of settlements recovering hundreds of millions of dollars against major drug company defendants, with more to follow.

On April 28, 2003, the OIG issued its final compliance guidelines for the pharmaceutical industry, identifying three major fraud and abuse risk areas: (1) inaccurate reporting of average wholesale price (AWP) (*i.e.*, drug companies must account for discounts, rebates, or other “freebies” offered to some or all purchasers); (2) the payment of money or other remuneration to doctors and others for the purpose of influencing prescription writing; and (3) illegal drug sampling.

Of particular significance is the Government’s new focus on a drug company’s relationship with medical providers. A drug company that seeks to influence prescribing patterns by “wining and dining” doctors, paying for lavish trips, or paying fees to doctors in exchange for illusory or de minimis services faces liability under the False Claims Act, as well as other federal and state fraud and abuse laws.

The OIG highlights the following drug company marketing practices as particularly suspect:

- “Switching” programs where the drug company pays cash or other value each time a doctor switches a patient’s prescription to its product from a competing product;
- Paying doctors a “consultant” fee to attend a meeting, read a journal article, listen to marketing information, or perform other de minimis tasks;
- Paying a doctor to “train” a drug company sales rep (including the so-called “shadowing” or preceptor-type programs where the sales rep follows the doctor around as he or she treats patients);
- Providing lavish meals, entertainment, trips and other gifts to doctors or other parties in a position to influence referrals; and
- Furnishing of unrestricted “educational” and “research” grants to doctors.

The Federal Government is not alone in prosecuting quality of care and pharmaceutical fraud cases. These areas are also coming under heightened scrutiny by the states, particularly those states that have enacted a false claims statute. Because these practices typically cost the Medicaid programs millions of dollars per year, state Attorneys’ General offices are accelerating their use of these laws to prosecute quality of care and pharmaceutical fraud cases.

The National Association of Medicaid Fraud Control Units (NMFCU) is currently coordinating a number of multi-state teams of prosecutors, who in conjunction with federal prosecutors, investigate and prosecute nationwide fraud and abuse cases, particularly in the pharmaceutical area. Last year, a number of state Attorney Generals’ offices created a Pharmaceutical Pricing Task Force, specifically targeting illegal pricing and marketing schemes by drug companies and providers.

*To read the full text of the 2003 OIG Work Plan or the OIG Compliance Guidelines for Pharmaceutical Manufacturers, please visit our website at [www.cohenlawgroup.com](http://www.cohenlawgroup.com).*

## What’s Coming Next...

At a recent conference of *qui tam* relators’ counsel sponsored by Taxpayers Against Fraud, [www.taf.org](http://www.taf.org), leading federal prosecutor James G. Sheehan of the U.S. Attorneys’ Office in Philadelphia described “pharmaceutical quality of care” as a new area of False Claims Act enforcement. This next wave of cases will focus on the serious risk of patient harm associated with drug prescription and administration. Medical providers, health care facilities, pharmacists and drug manufacturers who fail to meet their responsibilities in ensuring patient safety risk exposure under the FCA. The following is just a sampling of the types of practices that may trigger prosecution in this new area:

- Using prescription drugs to improperly restrain patients in long-term or other medical care facilities;
- Failing to monitor patient responses to prescription medications;
- Failing to review patient drug profiles prior to dispensing prescription medication;
- Continuing the use of drugs with adverse side effects or in medically unnecessary situations;
- Improperly or unnecessarily switching or inducing the switch of a patient’s prescription from one drug to another;
- Failing to notify FDA of adverse side effects associated with use of a particular drug.

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## About this Newsletter

The materials in this newsletter are for the general education and knowledge of our readers and do not constitute legal advice or create an attorney-client relationship. False Claims Act litigation is a complex and ever-changing area of law that varies from jurisdiction to jurisdiction. If you have an individual legal problem or question involving issues raised in this newsletter, you should seek a legal opinion that takes into account the applicable law and your particular circumstances.

Questions or comments regarding this newsletter or its content may be directed to Tracy L. Netzel, Esq. at Cohen Law Group, 641 W. Lake St., Suite 403, Chicago, IL 60661, (312) 327-8800 x 224 or by email at [tnetzel@cohenlawgroup.com](mailto:tnetzel@cohenlawgroup.com).

Additional general information relating to the False Claims Act and *qui tam* litigation may be found on our website at [www.cohenlawgroup.com](http://www.cohenlawgroup.com).



*“It is not the critic who counts, not the man who points out how the strong man stumbled, or where the doers of deed could have done better. The credit belongs to the man who is actually in the arena: whose face is marred by the dust and sweat and blood; who strives valiantly; who errs and comes short again and again...who knows the great enthusiasms, the great devotions, and spends himself in a worthy cause; who, at the best, knows in the end the triumph of high achievement; and who, at the worst if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who know neither victory nor defeat.”*

— Theodore Roosevelt

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