

The False Claims Act and Financial Institutions: A New Role for an Old Statute

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Agenda

1. Background on False Claims Act
2. FCA in healthcare and pharmaceutical context
3. Recent FCA litigation against financial institutions
4. Key potential defenses
5. Compliance Considerations

False Claims Act— Background

- Civil War-era statute (enacted in 1863)
 - To combat fraud by suppliers to Union Army
- Increased importance as government grows
- DOJ: “most potent civil weapon in addressing fraud against the taxpayers”
 - More than \$33 billion recovered since 1986
 - More than \$11 billion since 2009
 - More than \$493 million from financial institutions from February to May 2012

False Claims Act (31 U.S.C. § 3729 et seq.)

- Prohibits knowingly:
 - Presenting a false or fraudulent claim to the federal government; or
 - Making a false record or statement to get a false or fraudulent claim paid
- Extends to those who “cause” the submission of a false claim, not just those who submit claims
- “Knowingly” means actual knowledge, reckless disregard, or deliberate ignorance of the falsity of the information

Role of Whistleblower in FCA Cases

- FCA permits private parties to bring lawsuits against companies that violate the statute
 - Suit is on behalf of the United States
 - Suit filed under seal to allow DOJ time to investigate
 - U.S. Government can intervene and take over the case
- The whistleblower—also called a “relator”—can share in any eventual recovery (15-30%)
- Creates strong incentive for “whistleblowers” to sue
 - 2/3 of FCA recoveries since 1986 (\$22 billion) come from qui tam cases
 - 630 qui tam complaints filed in 2011 – up 47% from 2009

FCA— A Powerful Weapon

- Violations of the FCA give rise to potentially enormous economic liability
 - Treble Damages
 - Statutory Penalties—\$5,500 to \$11,000 per claim
- Increases pressure on defendants to settle even baseless qui tam suits

Focus on Pharma and Healthcare Industries

- Coordinated, national effort to pursue FCA cases against pharma and healthcare companies
- Theories of liability
 - “Caused” others (eg, doctors, pharmacies) to submit false claims to Medicaid, Medicare
 - “False Certification” Cases
 - Off-label promotion
 - Kickbacks
- Many billions of dollars recovered in recent years

New Role for FCA: Financial Institutions

- In wake of financial crisis, private plaintiffs and DOJ have turned to FCA to recover losses in government-sponsored loan programs
 - FHA-insured mortgages, student loans, SBA loans
- Theories of liability
 - False certifications regarding specific facts
 - General express certifications of compliance with rules of program
 - “Implied” certifications

Recent Wave of FCA Cases Against Financial Institutions

Institution	Government Program	Suit Filed	Settlement Date	Settlement Amount
Allied	FHA mortgage insurance	Nov. 1, 2011	N/A (Case ongoing)	N/A (Case ongoing)
Deutsche Bank/MortgageIT	FHA mortgage insurance	May 3, 2012	May 10, 2012	\$202.3 million
JPMorgan	VA home refinancing	March 2006 Whistleblower	April 24, 2012 (Case ongoing against other lenders)	\$45 million
Flagstar Bank FSB	FHA mortgage insurance		Feb. 24, 2012	\$132.8 million
CitiMortgage	FHA mortgage insurance	Aug. 2011 Whistleblower	Feb. 15, 2012	\$158.3 million
Nelnet	Dept. of Ed. student loans	2008	N/A (Case dismissed)	N/A (Case dismissed)

Theories of Liability— False Certifications

- Direct Endorsement Lender (DEL) originates, underwrites, and endorses mortgages for FHA insurance
- DEL must certify every mortgage it endorses for FHA insurance
 - Neither FHA nor HUD reviews loan before endorsement
 - If loan defaults, then holder of loan may submit insurance claim to HUD for defaulted loan
- DEL certifies compliance with program rules annually
 - Program requirements include quality control program, including review for early payment defaults

Theories of Liability— False Certifications

- Theory: False Certification of Specific Facts
- Government alleged that, since 1999, MortgageIT:
 - Endorsed more than 39,000 mortgages for FHA insurance, and FHA paid more than \$368 million in insurance claims on more than 3,200 mortgages
 - Certified each loan as eligible for FHA insurance, even though such certifications were “knowingly or recklessly false”
 - Failed to perform basic due diligence to verify that loans were not eligible for FHA insurance

Theories of Liability— False Certifications

- Theory: False Certification of Program Compliance
- Government alleged that since 1999, MortgageIT:
 - Failed to maintain quality control system for early payment defaults as required by DEL program
 - Falsely certified compliance with program requirements on annual basis to remain eligible for DEL status
 - Government alleged it paid more than \$92 million in FHA insurance for early default loans
- Deutsche Bank held liable for conduct of MortgageIT

Theories of Liability— Implied Certifications

- Theory: Request for payment implicitly certifies compliance with relevant law.
- *United States v. Nelnet, Inc.* (8th Cir. 2011)
 - Under FFELP, DoEd pays claims submitted by eligible student lenders for interest rate subsidies and special allowances
 - FFELP participation conditioned on compliance with regulations
 - Relator alleged lenders submitted false claims because they violated DoEd regulations governing FFELP
 - District Court dismissed, and Eighth Circuit affirmed

Key Potential Defenses

- Rule 9(b)
 - FCA complaints must be pled with particularity
- Public disclosure bar
 - Prevents “parasitic” suits brought by relators trying to cash in on publicly available information
- Materiality
 - Regulatory compliance not condition of payment
 - Regulatory framework renders FCA liability inappropriate
- Damages/penalties-related defenses
 - Expansive government/relator view of damages and penalties
 - Recent cases limiting potential damages and penalties

Compliance Considerations

- Compliance program related to government-sponsored loan programs
 - Mandatory training for employees on program requirements
 - Effective compliance testing to identify issues
 - Fixing issues once they are identified internally or by government agency
- FCA-specific compliance program
 - Mandatory training for employees on FCA requirements
 - Focus on internal whistleblowers
 - Extensive HR involvement given employment issues
- Importance of early internal investigation to assess scope of potential liability

DISCUSSION

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