

False Claims in Healthcare Chapter 5. Government Investigations

By David Schumacher^[1]

Any substantial False Claims Act (FCA) lawsuit is accompanied by a government investigation. FCA cases are investigated primarily by the U.S. Department of Justice (DOJ), which deploys hundreds of assistant U.S. attorneys (AUSAs) and trial attorneys to investigate allegations of healthcare fraud. The prosecutors work with scores of federal agents from the U.S. Department of Health & Human Services (HHS) Office of Inspector General (OIG), the Federal Bureau of Investigation (FBI), and numerous additional agencies to investigate a wide variety of healthcare fraud cases, including allegations raised in qui tam lawsuits. Healthcare fraud has been an active area of enforcement for federal prosecutors for more than 25 years, and with a track record of securing tens of billions of dollars of recoveries to federal healthcare programs through FCA investigations, there is every reason to expect that the DOJ will continue robust healthcare enforcement efforts in years to come. Healthcare providers should be aware of the basic steps involved in a typical FCA investigation so they can be prepared when an agent comes knocking with a subpoena.

Genesis of an FCA Case

A DOJ healthcare fraud investigation can begin in various ways—with proactive data mining, through an anonymous tip, or with a media report, for example. But by far, the most common sources of DOJ healthcare fraud investigations are qui tam lawsuits filed by whistleblowers pursuant to the FCA. The plaintiff in an FCA case is a relator who brings the lawsuit “in the name of the Government.”^[2] The relator prepares a civil complaint and files the lawsuit in any judicial district where the defendant can be found, resides, transacts business, or where any alleged false claim occurred.^[3] At the same time that the complaint is filed, the relator also must submit a disclosure to the government of “substantially all material evidence and information the person possesses.”^[4] The complaint is filed under seal and served on the U.S. attorney general. It is not served on the defendant for at least 60 days, so the government has an opportunity to investigate the allegations.^[5] The U.S. attorney general provides a copy of the complaint to the U.S. attorney in the applicable district, which is reviewed by that office’s criminal and civil healthcare fraud coordinator. Because FCA complaints often allege complex nationwide schemes, 60 days is rarely enough time for the DOJ to complete its investigation. Prosecutors regularly request seal extensions, and it is not uncommon for investigations to last several years. Ultimately, the DOJ must determine whether it wants to intervene in the lawsuit and file a new civil action of its own, often adding new allegations uncovered in its investigation.^[6]

The relator is typically an insider at a healthcare organization who believes they witnessed wrongdoing. However, there is no requirement that the relator has to be a prototypical whistleblower. Indeed, the FCA merely states that “a person” may initiate an FCA case. Anyone who satisfies the various FCA requirements—including the “first to file” rule and the “public disclosure” bar—can be a relator. In recent years, a new type of “professional relator” has become increasingly common. A number of cases have been brought by individuals who have never been employed by the defendant at all, but have used various techniques, such as data analysis, to identify supposed false claims and bring cases. The advent of professional relators has come under some scrutiny. In some cases, the DOJ has exercised its authority to dismiss FCA cases brought by professional relators,

over their objection, because they believe the lawsuit has no merit or would result in an unnecessary drain on DOJ resources. For instance, the DOJ recently filed motions to dismiss a number of qui tam actions that were brought by companies affiliated with the National Health Care Analysis Group, an organization “established for the sole purpose of serving as the named relator in [solely to file qui tam actions].”^{[7][8][9]}

The Government’s Covert Investigative Steps

Complaint Intake

Once the qui tam is filed, the local AUSA healthcare fraud coordinators triage the complaint in conjunction with the DOJ. The mere filing of a qui tam does not mean that the DOJ will investigate the allegations, and even if the DOJ chooses to investigate, there is no guarantee that the investigation will result in a prosecution or a settlement. If the prosecutors determine that the complaint merits investigation, the case is staffed based on the resources available in the district. In smaller districts, the case may be investigated solely by a DOJ trial attorney at “Main Justice” in the Civil Frauds Unit. In districts with active healthcare fraud units—such as Massachusetts, New York, Philadelphia, Miami, Los Angeles, and San Francisco—AUSAs within the district take the lead on the case. Federal agents are also assigned to investigate the complaint. The progress of the investigation, and the ultimate result, often depends on the individual initiative of the prosecutor and the investigating agent(s).

Relator Interview

After assessing the qui tam complaint, the prosecutor will interview the relator. This is an important event. The relator is highly motivated to present a compelling case to the prosecutor, hoping that the DOJ will take over the case and use its vast resources to investigate the defendant. Relators frequently come to the DOJ interview armed with evidence in support of their allegations, including emails, internal company documents, and recordings of interactions with company personnel, hoping to give the DOJ a head start on the case. From the DOJ’s perspective, the prosecutor is sizing up the relator, assessing that person’s credibility, and determining if the case seems worthwhile to investigate. Federal agents also attend the interview and memorialize the relator’s statements in an interview report.

Additional Interviews

After reviewing the complaint and initial disclosures and debriefing the relator, the government begins its investigation in earnest. The prosecutor and agents typically attempt to speak with individuals familiar with the allegations. However, particularly in the early stages of the investigation, the government does not want the target company to learn about the case. The government will often start with former employees and third parties who the relator has identified as reliable sources of information.

Data Analysis

The government will also conduct some type of data analysis related to the allegations. For example, in an upcoding case the government may review claims data from federal healthcare claims. In a kickback case, agents may investigate the number of referrals from particular sources. And in a case alleging Stark Law violations, the government may review the number and value of referrals of designated health services related to the target. Clearly, a case involving substantial sums of money will be more attractive to the DOJ than a small case. The organization under investigation will not see the government’s analysis unless the case is litigated in court.

Covert Recordings

Prosecutors like to say that “tapes don’t lie.” During the covert stage of a qui tam investigation, the government may attempt to obtain secret recordings from individuals at the target company. Unguarded, contemporaneous, recorded admissions can be the most powerful evidence that the DOJ gathers in an investigation. If the relator still works for the company, he or she may agree to wear a wire for the government. Otherwise, the DOJ may try to use a third party—a physician, a sales colleague, or a patient—to record interactions with the target. While many states have two-party consent laws that prohibit covert records, the DOJ is authorized to secretly record a conversation as long as “one of the parties to the communication has given prior consent” to the recording.^{[10][11][12]}

Parallel Investigations

At the outset of an investigation, the government may not know if the misconduct is civil in nature or also implicates criminal statutes. While qui tam complaints are filed under the civil FCA, the alleged conduct may also constitute a criminal violation. For instance, when a complaint alleges violations of the Anti-Kickback Statute (AKS), the DOJ may prosecute this conduct as a crime or as a civil violation, either under the Civil Monetary Penalty authorities or, since the passage of the Patient Protection and Affordable Care Act of 2010 (ACA), as a predicate to a civil FCA complaint.^{[13][14][15]} Whether the government proceeds criminally or civilly in a healthcare case, however, the elements of the alleged violation are the same. The determination to take a case criminal or civil typically depends on the nature of the allegations and the quality of the evidence. Federal prosecutors in a criminal case typically have evidence that the target was lying, cheating, or stealing, or the case involves a plus factor, such as harm to victims. Moreover, a criminal prosecution requires that the government prove its case beyond a reasonable doubt, whereas in a civil case, the standard is lower: the government must prove that the violation occurred by a preponderance of the evidence.

Because it may be unclear at the outset how a case will proceed, the DOJ often staffs an investigation with civil and criminal prosecutors. Indeed, the DOJ encourages civil and criminal prosecutors to coordinate at the early stage of an investigation and conduct parallel investigations whenever appropriate.^[16]

DOJ criminal prosecutors have access to an enhanced set of investigative tools. Criminal prosecutors can convene a grand jury to investigate allegations of criminal wrongdoing.^[17] They can obtain a court order to wiretap a target’s phone and execute search warrants (for physical or electronic evidence).^[18] Prosecutors can also use undercover sources to obtain evidence. The FBI has even established phony companies to attempt to elicit evidence from targets in healthcare cases.

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