

## Newly Enacted Fraud Enforcement and Recovery Act Expands Liability for Healthcare Providers Under the False Claims Act

By Craig A. Conway, J.D., LL.M.

On May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act (FERA),<sup>1</sup> which makes significant changes to the False Claims Act (FCA)<sup>2</sup> – the primary civil enforcement tool used by the federal government to combat healthcare fraud. According to a Senate Judiciary Committee report, the legislation is intended, at least in part, to correct erroneous interpretations of the law as decided by the federal court cases *Allison Engine Company v. United States ex rel. Sanders*<sup>3</sup> and *United States ex rel. Totten v. Bombardier Corp.*<sup>4</sup> These modifications to the FCA coupled with President Obama's proposal<sup>5</sup> to infuse an additional \$311 million to strengthen Medicare and Medicaid fraud-fighting programs<sup>6</sup> as well as fraud task forces in cities such as Miami, Houston, and Detroit, should be a cause for concern for healthcare providers and physicians with lackluster compliance and billing programs and those companies having significant involvement with subcontractors.

### False Claims Act Background

As currently enacted, the FCA imposes liability on “[a]ny person who...knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.”<sup>7</sup> Additionally, liability is imposed in six other categories, including imposition of liability when a person “knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government...,”<sup>8</sup> and when a person conspires with others to defraud the Government in any of the other sub-categories.<sup>9</sup> Offenders may be liable for penalties ranging between \$5,000 and \$10,000 plus three times the amount of damages the government sustains because of the act.<sup>10</sup>

The requisite intent for proving an individual “knowingly” submitted a false claim involves showing that the person has (a) actual knowledge of the falsity, (b) acts in deliberate ignorance of the truth or falsity, or (c) acts in reckless disregard of it.<sup>11</sup> No specific intent to defraud is required.<sup>12</sup> For example, in *United State v. Krizek*,<sup>13</sup> a psychiatrist failed to pay close attention to

---

<sup>1</sup> Pub. L. No. 111-21, 111th Cong. (2009), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ21/pdf/PLAW-111publ21.pdf>.

<sup>2</sup> 31 U.S.C. § 3729 et seq. (West 2009).

<sup>3</sup> 128 S.Ct. 2123 (2008).

<sup>4</sup> 380 F.3d 488 (D.C. Cir. 2004).

<sup>5</sup> Pres. Obama's proposed fiscal 2010 budget is a 50 percent increase over 2009 funding to fight fraud.

<sup>6</sup> See Amy Lynn Sorrel, *Feds' New Anti-Fraud Effort Pressures Doctors*, AM. MED. ASSOC. NEWS, June 15, 2009, <http://www.ama-assn.org/amednews/2009/06/15/gvsa0615.htm>.

<sup>7</sup> 31 U.S.C. § 3729(a)(1); see also *Vermont Agency of Nat. Resources v. United States ex rel. Stevens*, 529 U.S. 765, 769, 120 S.Ct. 1858 (2000).

<sup>8</sup> 31 U.S.C. § 3729(a)(1)(B) (West 2009).

<sup>9</sup> 31 U.S.C. § 3729(a)(1)(C) (West 2009).

<sup>10</sup> 31 U.S.C. § 3729(a) (West 2009).

<sup>11</sup> 31 U.S.C. § 3729(b)(1) (West 2009).

<sup>12</sup> 31 U.S.C. § 3729(b)(1)(B) (West 2009).

<sup>13</sup> 859 F.Supp. 5 (D.C. Cir. 1994).

the billing practices used by his staff who were upcoding treatment sessions and receiving larger financial reimbursement amounts from the government. As a result, the court found that the psychiatrist's lack of knowledge amounted to "reckless disregard," and imposed significant financial liability. The court ultimately held that physicians must have some oversight to ensure billing is correctly submitted.<sup>14</sup>

Commencing an FCA action can be done in one of two ways. First, the Government may bring an action against the claimant directly.<sup>15</sup> Second, a private individual (a "relator") may bring a *qui tam* action "for the person and for the United States Government" against the alleged false claimant.<sup>16</sup> The federal government has the prerogative to intervene into a *qui tam* action, but is not obligated to do so.<sup>17</sup> A relator will receive a percent share of the proceeds recovered from a successful action, depending on whether or not the government has actively participated in the case.<sup>18</sup>

One of the most serious consequences for healthcare providers and physicians found guilty of fraud is the possibility of mandatory exclusion from participating in the Federal health care reimbursement programs, including Medicare. Section 1128 of the Social Security Act imposes mandatory exclusion from the program for four areas of wrongdoing including felony conviction relating to health care fraud.<sup>19</sup>

United States Supreme Court and federal appeals court cases interpreting the FCA have, to date, effectively guided healthcare attorneys and other practitioners advising clients of the outer boundaries of lawful activity. However, members of Congress expressed discomfort with the courts' decisions noting that its interpretations limit the scope of the law and allow subcontractors and other non-governmental entities to escape responsibility for proven frauds.<sup>20</sup> FERA amends the FCA to clarify and correct these interpretations of the law as decided in the following cases.

#### Allison Engine Co. v. United States ex rel. Sanders

In 2008, the United States Supreme Court unanimously decided *Allison Engine Company v. United States ex rel. Sanders*,<sup>21</sup> which involved the Court determining the requisite intent necessary to succeed in a *qui tam* action alleging that false or fraudulent claims were paid by the federal government.<sup>22</sup>

---

<sup>14</sup> *Id.*

<sup>15</sup> 31 U.S.C. § 3730(a) (West 2009).

<sup>16</sup> 31 U.S.C. § 3730(b) (West 2009).

<sup>17</sup> 31 U.S.C. § 3730(c)(1) and (2) (West 2009).

<sup>18</sup> *See* 31 U.S.C. §§ 3730(d)(1)-(2); Typically, a relator may receive a 15 to 25 percent share of proceeds recovered if the Government intervenes and as much as 25 to 30 percent if the Government does not.

<sup>19</sup> 42 U.S.C. §1320a-7(a)(3) (West 2009).

<sup>20</sup> *See* CCH Medicaid, *False Claims Act Changes Aim at Subcontractors for Federal Programs*, June 4, 2009, <http://health.cch.com/news/medicaid/060409a.asp>.

<sup>21</sup> 128 S.Ct. 2123 (2008).

<sup>22</sup> *Id.* at 2124.

The United States Navy had entered into contracts with two shipyards to build a new fleet of guided missile destroyers.<sup>23</sup> Each destroyer required three generator sets to supply all of the electrical power for the ship. Thereafter, the shipyards subcontracted with Allison Engine Company, Inc., to build the generators, which then sub-contracted with several other companies to provide specific parts.<sup>24</sup> The Navy's contract with the shipyards specified that each part of each destroyer be built according to Navy specifications.<sup>25</sup> The Navy paid a total of \$1 billion for each new destroyer and all of the funds used to pay for work completed came from the Federal Treasury.<sup>26</sup>

In 1995, former employees of one of the sub-contractors brought a *qui tam* action as relators alleging that certain invoices submitted by Allison Engine Company to the shipyards fraudulently sought payment for substandard work that did not meet the Navy's and contract specifications.<sup>27</sup>

Writing for the Court, Justice Alito noted the FCA, specifically § 3729(a)(2), requires a defendant to make a false record or statement "to get" a false/fraudulent claim "paid or approved by the Government."<sup>28</sup> He noted that the statutory language, "to get," denotes "purpose, and thus a person must have the purpose" of getting a false claim paid or approved by the Government to be liable.<sup>29</sup> Further, Justice Alito wrote, getting a false/fraudulent claim "paid by the Government" is not the same as getting the claim paid using "government funds."<sup>30</sup> The Court concluded that a defendant must intend that the Government itself pay the claim.<sup>31</sup>

The new FERA legislation revises the FCA to remove the words "to get" and "by the Government" essentially eliminating the requirement that a claim be presented to a representative of the federal government. Now, liability under the FCA extends to include any false or fraudulent claim "for money or property," and whether or not the claim is presented to a federal government official or employee, whether or not the government has actual custody of the funds, and whether or not the defendant specifically intended to defraud the government.<sup>32</sup>

#### United States ex rel. Totten v. Bombardier Corp.

In 2004, a federal appeals court decided a *qui tam* action brought by a relator against Bombardier and another company alleging they violated the FCA by delivering defective rail cars to Amtrak.<sup>33</sup> The companies submitted invoices for payment for the defective rail cars to Amtrak which paid them from an account that included federal grant funds.<sup>34</sup> Amtrak relied on subsidies

---

<sup>23</sup> *Id.* at 2126.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 2127.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 2128.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> See Richard A. Duncan, T. Jeffrey Fitzgerald, and Steve Lokensgard, *Expansion of the False Claims Act: What Health Care Companies Need to Know*, May 21, 2009, <http://www.faegre.com/showarticle.aspx?Show=9788>.

<sup>33</sup> 380 F.3d 488, 490 (D.C. Cir. 2004).

<sup>34</sup> *Id.*

from the federal government to fund its business, and Totten reasoned that overcharging Amtrak was the same as overcharging the federal government.<sup>35</sup>

The Court disagreed and held that FCA liability will not attach if false claims are presented to government grantees or contractors, such as Amtrak, and paid with government grant or contract funds.<sup>36</sup> In other words, the Court reasoned that false claims would only violate the FCA if actually relied upon by the federal government when it disbursed the funds directly.

To correct this interpretation of the law, FERA amends the FCA to ensure that liability will attach whenever a person knowingly makes a false claim to obtain money or property, any part of which is provided by the government without regard to whether the wrongdoer deals directly with the government and regardless of who the individual or wrongdoer is—i.e. subcontractor, agent on behalf of the government, grantee, etc.<sup>37</sup>

In addition to the substantial changes made to the FCA via FERA mentioned above, healthcare providers and physicians are also subject to increased risk of potential liability if one “knowingly” and “improperly” retains, or conceals, an overpayment.<sup>38</sup>

### Implications of FERA on Healthcare Providers

The United States Department of Justice will actively step up health care fraud efforts in the coming months and Government contractors and organizations participating in federally-funded programs, such as Medicare and Medicaid, will likely be the first to feel the effects of FERA. Thus, it would be prudent for healthcare providers and physicians to take measures to reassess billing and compliance programs and policies to correct any issues that might need to be addressed, i.e., establishing a mechanism to specifically track possible overpayments.

Though many healthcare providers, like much of the nation, are facing difficult economic conditions, a comprehensive and effective compliance and billing program and policy is imperative to reduce a healthcare provider’s the risk of becoming the target of a FCA investigation or enforcement action.

### **Health Law Perspectives (June 2009)**

**Health Law & Policy Institute**

**University of Houston Law Center**

<http://www.law.uh.edu/healthlaw/perspectives/homepage.asp>

---

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 493.

<sup>37</sup> See Duncan et al., *supra* note 32.

<sup>38</sup> Pub. L. No. 111-21, 111th Cong. (2009), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ21/pdf/PLAW-111publ21.pdf>.