December 17, 2008

FALSE CLAIMS ACT ALERT

FALSE CLAIMS ACT – END OF YEAR SUMMARY

The past year has seen many developments regarding the False Claims Act (FCA). Most importantly, there has been a sustained push to pass sweeping amendments to the FCA. This alert will provide an update on the status of this controversial legislation, as well as thoughts on its prospects for passage in 2009.

Moreover, we wanted to share with you some "lessons learned" from three important FCA victories our clients won this year in cases involving Iraqi procurement and health care issues. We hope they will make good reading and provide you with good FCA cheer.

FALSE CLAIMS ACT AMENDMENTS UPDATE

There remains a significant possibility that the False Claims Act will be amended within the next year. The drumbeat for reform of the procurement system and for investigation of perceived waste, fraud and abuse will continue, and there appears to be support in the incoming administration for amendments to the FCA. While it is impossible to predict what will happen, the Obama administration may view FCA reform as legislation that should be accomplished within its first 100 days. Here are some thoughts on what the new year might bring.

Where The Legislation Stands Now

False Claims Act Corrections Act bills were passed in 2008 by the Senate Judiciary Committee (S. 2041) and by the House Judiciary Committee (H.R. 4854). Neither bill has been sent to the floor for a vote. Moreover, there are significant differences between the two bills, including the following—

- The House bill would eliminate Rule 9(b) as a defense to a *qui tam* action, but the Senate bill would not do so.
- The Senate and House bills adopt different approaches to overturning the results of the decisions in *Allison Engine* and *Custer Battles*.
- The bills adopt different standards for the public disclosure bar, although both provide that the public disclosure bar can be invoked only by the Department of Justice (DOJ), not the defendant.
- The Senate bill would authorize government employees to serve as *qui tam* plaintiffs, but the House bill would not.
- The Senate bill provides for a 10-year statute of limitations, and the House bill provides for an eight-year statute.
- The Senate bill would expand the damages provision to permit recovery of three times the amount of money or property paid or approved by the government on a claim, instead of the current measure of three times the government's actual damages, whereas the House bill would not.
- The bills adopt different standards for retroactive application.

These and other differences will need to be resolved before the legislation could move forward. At a minimum, however, one can expect the basic goal of the proposed amendments to remain unchanged—to expand the scope of potential liability, limit the defenses available under the statute and encourage *qui tam* suits.

New Analysis by Congressional Budget Office

In April 2008, the Congressional Budget Office (CBO) determined that the pending Senate bill, S. 2041, would not significantly increase government revenues, i.e., "scoring" the bill as revenue-neutral. Recently, however, the CBO issued a cost estimate for the House bill, H.R. 4854, stating that "[the] CBO estimates that [the legislation] would, on net, increase revenues and offsetting receipts collected by the federal government because it would likely lead to the initiation of additional claims under FCA." (CBO Cost Estimate (November 21, 2008).) It thus "scored" both the Senate and House bills as revenue-raisers. Since the new Congress and administration will be looking to enact revenue-raising legislation, the CBO's decision to score the proposed FCA amendments as revenue-raisers increases their likelihood of enactment.

Likely Support from Obama Administration

The incoming Obama administration has not made any direct statements of support for passage of the pending FCA amendments, but there are several indications that the new administration may support some type of legislation.

First, then-candidate Obama released a proposal in September indicating that his administration would support amendments to strengthen the FCA:

> [I] would empower the [Department of Health and Human Services] inspector general, implement anti-fraud measures in [Center for Medicare and Medicaid Services] contracting, expand the scope of Medicare and Medicaid audits, strengthen the False Claims Act, encourage states to go after fraud, and increase funding for Justice Department prosecutors and FBI agents to fight this fraud.

There has been no indication since the election that his views on this issue have changed.

Second, the Obama administration transition Web site indicates that one goal for the Defense Department is to "realize savings by reducing the corruption and cost overruns that have become all too routine in defense contracting." This includes "order[ing] the Justice Department to prioritize prosecutions that will punish and deter fraud, waste and abuse."

Third, President-elect Obama has repeatedly endorsed legislation to protect government whistleblowers and made statements indicating his support for government employees serving as whistleblowers. The administration transition Web site states—

> We need to empower federal employees as watchdogs of wrongdoing and partners in performance. Barack Obama will strengthen whistleblower laws to protect federal workers who expose waste, fraud, and abuse of authority in government. Obama will ensure that federal agencies expedite the process for reviewing whistleblower claims and whistleblowers have full access to courts and due process.

Although this statement refers to legislation aimed at protecting federal employee whistleblowers from retaliation, not to the FCA, it may provide insight into the president's potential support for legislation aimed at encouragement of qui tam litigation. Indeed, it may provide evidence that the president-elect would favor a provision like that found in the Senate FCA bill that would explicitly permit government employees to serve as *qui tam* plaintiffs.

Support Within Congress

The strongest supporters of the proposed Senate and House legislation remain in Congress, including Sen. Grassley and Rep. Berman. Moreover, a *qui tam* plaintiff's attorney was elected to the House from Orlando, Florida—Alan Grayson, the lawyer who brought the *Custer Battles* lawsuit and its follow-on lawsuit, which Akin Gump recently won (see details below). As a champion of *qui tam* cases and Taxpayers Against Fraud's 2006 "Lawyer of the Year," Mr. Grayson can be expected to provide staunch support for amendments to the FCA.

In our opinion, the amendments remain unnecessary and misguided. As Akin Gump Strauss Hauer & Feld LLP lawyer Peter Hutt testified before the House last June—

> The current proposed amendments would not assist the Department of Justice in its efforts to protect the federal Treasury. Rather, they would encourage private qui tam plaintiffs ("relators") to file baseless and derivative actions that are not in the interests of the government or the taxpayers of the United States

Peter and other Akin Gump lawyers intend to be actively engaged in monitoring the legislation, and will provide updates as events under a new Congress and administration unfold.

2008 LESSONS LEARNED

The past year brought three important FCA victories for our clients. We wanted to share important lessons we gleaned from these cases, and we hope you find them helpful.

Litigation Basics Win FCA Cases

Although the merits of FCA jurisprudence can carry the day in some cases, basic blocking and tackling on discovery issues can also provide a victory. We recently prevailed in a follow-on matter to the well-known *Custer Battles* case, securing dismissal as a sanction for discovery abuse by the relator and his counsel.

In the first *Custer Battles* case, two relators accused suspended defense contractor Custer Battles of overbilling on Iraq reconstruction contracts. (*See* 444 F. Supp. 2d 678 (E.D. Va. 2006).) Although the jury found Custer Battles liable for submission of false claims, the judge ultimately dismissed the case on a variety of grounds. (*See id.*) In the meantime, a second action was filed against Custer Battles and other defendants alleging that Custer Battles had improperly transferred its Iraq contracts and assets to a sham successor entity in Romania to evade the effect of the government's suspension order. (*United States ex rel. Mayberry v. Custer Battles LLC, et al.*, No. 1:06-cv-364 (E.D. Va.).)

We were engaged to represent parties alleged to have assisted in the alleged improper transfer of contracts. After several months of discovery, we filed motions for summary judgment, which we believed would have been successful, pointing out that there was no conceivable factual or legal basis for FCA liability. But while these motions were pending, numerous egregious discovery violations committed by one of the relators and his counsel came to light, ultimately rendering the summary judgment motions moot.

At a hearing in October, Judge Liam O'Grady of the Eastern District of Virginia stated, among other things—

- that one of the relators was a "pathological liar" who had engaged in "repeated discovery abuses that were perpetrated . . . in his three false affidavits"
- that the relator had failed to produce electronic drives that he had been ordered to produce and had failed to produce his military discharge form "to try to prevent discovery about how many lies he had talked about" in his deposition
- that the Judge wanted the Department of Justice to conduct an investigation into whether the relator should be indicted for false statements
- that the relators' counsel had "completely abrogated their positions as officers of this Court"
- that the case "should have been voluntarily dismissed months ago, if it should have been brought at all."

On the basis of these findings, the court dismissed the action in its entirety with prejudice. Following the dismissal, we filed a motion seeking recovery of all attorneys' fees and costs incurred by our clients.

The broader lesson of this case is that all too frequently in *qui tam* actions, relators and their counsel will take shortcuts in discovery. It is important to follow up vigorously and ensure that *qui tam* plaintiffs comply fully with all obligations imposed on them by the Federal Rules of Civil Procedure.

Don't Fear the Government

In 2006, a Nevada District Court judge granted summary judgment to Dr. R.D. Prabhu and his medical practice in an FCA suit asserted by the DOJ alleging false claims for pulmonary stress tests. (Please click here to read a prior alert on the topic.) We moved to recover our clients' attorneys' fees and costs under the Equal Access to Justice Act (EAJA), on the basis that the government's position was not "substantially justified." In doing so, we argued that our client had presented to the government the same facts, evidence and case law authority that resulted in the dismissal of the government's action both before and after the action was filed, and that the government refused to withdraw allegations that any pre-suit investigation would have revealed were clearly erroneous. In 2008, the District Court agreed that our clients were entitled to recover attorneys' fees under EAJA, awarding the medical practice $542,494, which the government ultimately settled for $500,000.

By having the courage to fight the government's weak allegations, Dr. Prabhu and his medical practice transformed a government FCA claim of more than $22 million into a $500,000 payment from the government. The broader lesson we glean is that even when the government has intervened in a *qui tam* case or brought a direct FCA action, all is not lost. If a defendant has a meritorious position, it can ultimately prevail and even recover its attorneys' fees.

Sometimes the Government Can Be Your Friend

In some qui tam cases where the government declines to intervene, careful work can convince the DOJ to take positions that are helpful to the defendant. Earlier this year, our client settled a non-intervened *qui tam* case on very favorable terms in part because of a helpful amicus brief filed by the DOJ.

The action was filed in District Court in Utah in 1999 against Regence BlueCross BlueShield of Utah and other defendants, based on allegations that defendants had submitted false claims to Medicare because they employed codes that did not accurately reflect patients' diagnoses or did not demonstrate the medical necessity of the services. The action was dismissed under rule 12(b)(6), but the dismissal was overturned as to one count by the Tenth Circuit. (*United States ex rel. Sikkenga v. Regence Bluecross Blueshield*, 472 F.3d 702 (10th Cir. 2006).) On remand, the District Court again dismissed the action as to the remaining count, this time under Rule 9(b). (*United States ex rel. Sikkenga v. Regence Bluecross Blueshield*, 2007 U.S. Dist. LEXIS 67896 (D. Utah Sept. 11, 2007).) The District Court found, as one ground for dismissal, that the plaintiffs failed to identify any statute or regulation that required defendants to include different or more specific diagnosis codes in seeking reimbursement for tests. This dismissal was again appealed to the Tenth Circuit.

The DOJ indicated that it intended to file an amicus brief. There were several communications between Akin Gump lawyers and the DOJ, and ultimately the DOJ filed an amicus brief in the Tenth Circuit that disagreed with a portion of the District Court's legal analysis, but very helpfully stated that it would "express no view" on the key issue of whether there was any statute or regulation that supported the relator's position, and went on to "note" that the one of the regulations cited by the relator was inapplicable. Hence, the DOJ brief implicitly supported the defendants' position, fatally undermining the relator's case. Shortly afterwards, the case settled on favorable grounds.

The moral of this story is that with the proper arguments, the DOJ can be turned into an ally rather than a foe in combating a meritless *qui tam* case. Although the DOJ will not intervene to dismiss an action, in non-intervened cases it will recognize cases that should not go forward and will provide support in indirect ways that can contribute to a positive result.

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