FALSE CLAIMS

FALSE CLAIMS CASES ARE ON THE RISE THANKS TO RECENT AMENDMENTS, INCLUDING THOSE IN the Patient Protection and Affordable Care Act. Our panel of experts discusses these issues as well as the Anti-Kickback Statute and Stark Law, California's Attorney General, and the impact of *Laidlaw*. They are Maria Ellinikos of Akin Gump Strauss Hauer & Feld; Ryan G. Hassanein of Morrison & Foerster; Robert J. Nelson of Lieff, Cabraser, Heimann & Bernstein; Steven Saltiel of the U.S. Attorney's Office for the Northern District of California. The roundtable was moderated by *California Lawyer* and reported by Krishanna DeRita of Barkley Court Reporters.

EXECUTIVE SUMMARY

MODERATOR: What has been the impact of the Fraud Enforcement and Recovery Act of 2009 (FERA) and Patient Protection and Affordable Care Act of 2010 (PPACA) amendments to the False Claims Act (FCA)?

NELSON: The FERA (Pub. L. No. 111-21) has been transformative for qui tam practitioners. We have seen an extraordinary number of FCA cases in the last four years compared to the four years before that, and FERA is in part responsible because it expanded FCA liability in very important ways. Since 2009, the DOJ has recovered $11 billion and FCA filings have increased some 50 percent. As a result of the FERA, many people think that they have the potential to be whistle blowers and we hear from would-be whistleblowers literally on a daily basis.

One really interesting aspect of the 2010 amendments to the FCA (31 U.S.C. §§ 3729–3733) is its impact on the Anti-Kickback Statute (42 U.S.C. § 1320a-7b). A violation of the Anti-Kickback Statute now serves a predicate for a violation of the FCA, and as a result we've seen a number of Anti-Kickback law cases filed as FCA cases.

SALTIEL: I should clarify that I am not speaking on behalf of the Department of Justice or the U.S. Attorney's Office. With one or two exceptions, the substantive amendments from 2009 or 2010 are not retroactive, so we are just starting to see cases involving conduct that took place before May 2009. So a lot of that remains to be seen, but some changes are imminent in terms of the practical impact they will have. One amendment from the FERA that was effective immediately is the government's CID authority. Before that amendment, it was virtually impossible to get a CID issued because it had to be signed off by the Attorney General. We are seeing that in investigating these cases, whether they be qui tams or not, the government is starting to use that tool, and it's valuable. It allows the government to get both documents and testimony, which was rare in these cases before that amendment. FERA's CID provisions also allow the government to share that information both with the relator and with other federal agencies without a court order.

HASSANEIN: As a result of FCA suits remaining under seal for what is often a lengthy period of time, though those sealing periods are beginning to shorten, we are only now starting to see the FERA and PPACA amendments litigated in the courts. One exception is the retroactivity of FERA's amendment to the second liability provision of the FCA.

Let me review the Supreme Court's decision in *Allison Engine Co., Inc., v. United States ex rel. Sanders* (553 U.S. 662 (2008)), and how Congress overruled that decision when it enacted FERA. *Allison Engine* involved a subcontractor that allegedly presented false claims to a prime contractor without necessarily knowing that federal funds would be used to pay the claims. The Supreme Court appropriately limited liability to false statements intended "to get" false claims paid by the government. In FERA, Congress replaced the statutory phrase "to get" with the term "material" and expressly defined "material" as a false statement "having a natural tendency to influence or be capable of influencing" the government's decision to pay a claim. Accordingly, the purposeful intent that the Supreme Court read into the second liability provision of the FCA was replaced with an arguably less stringent materiality standard.

Turning back to the retroactivity language in FERA, there is a clear split among the circuits as to whether this FERA amendment applies to "cases" or "claims" pending as of the date of the *Allison Engine* decision. The statute says that the amendment applies retroactively to "all *claims* under the False Claims Act…that [were] pending on or after"

June 7, 2008. The majority of courts, including the Ninth Circuit, have concluded that the term "claim" should be read as it is defined in the statute—"a demand for money or property." In November 2012, however, the Sixth Circuit joined two other Circuits in finding that the term "claim" means "case." The Sixth Circuit reached this conclusion in the same *Allison Engine* case that led to the FERA amendment, and which was remanded to district court after the Supreme Court's 2008 decision. It remains to be seen whether *Allison Engine* will take another trip to the Supreme Court.

ELLINIKOS: It will be interesting to see how the PPACA's incorporation of the FCA, which hasn't been litigated, will impact the health care exchanges created under the PPACA (Pub. L. No. 111-148). There is a provision that specifically subjects payments involving federal funds made through or in those exchanges to FCA liability, and the federal funds can come in the form of tax credits or cost sharing reductions. With regard to the tax credits, how will courts reconcile the PPACA with the FCA, which exempts claims for tax fraud? Now we have this specific inclusion of tax credits as a form of federal funds that could subject a health insurer participating in a health exchange to FCA claims.

SALTIEL: Does that appear in Title 26? Is it put in the tax code?

ELLINIKOS: It's specifically in the PPACA, which states that compliance with the PPACA is a material condition of an issuer's entitlement to receive payments, including tax credits.

NELSON: The PPACA has the potential at least to result in a whole new area of FCA cases arising out of these health care exchanges once the exchanges become effective.

ELLINIKOS: I believe we'll see that in 2014.

NELSON: Congress is sensitive to the FCA implications of much of its legislation and seems more and more willing to insert an FCA component into various kinds of legislation. We'll see a few years from now what that means for our practice vis-à-vis the PPACA.

SALTIEL: The act doesn't apply to claims records and statements made under the Internal Revenue Code of 1986. If those tax credits are part of the Internal Revenue Code of 1986—that's an interesting argument.

HASSANEIN: PPACA made three changes to the FCA's public disclosure bar. First, prior to PPACA, the public disclosure bar stripped courts of subject matter jurisdiction over an action if the action was "based upon" public disclosures, and if the relator was not an "original source." Now, after PPACA, the government can oppose a defendant's motion to dismiss on public disclosure grounds. Courts are thus no longer obligated to dismiss an action if it's based upon prior public disclosures, and the relator is not an original source because the government can, arguably, say no. It's yet to be seen how that trump card, if that's what it is, will play out in the courts. Second, PPACA redefined what constitutes a public disclosure. For example, prior to PPACA, public disclosures included allegations disclosed in the context of state proceedings or hearings. After PPACA, public disclosures are limited to federal forums, and in the event of a disclosure in a civil lawsuit, the federal government must be a party to that lawsuit for it to constitute a public disclosure. Third, prior to PPACA, a relator had to have "direct and independent knowledge" of the allegations to constitute an "original source." PPACA redefined an "original source" as a person with "knowledge that is independent of and materially adds to the publicly disclosed allegations."

SALTIEL: The amendment provides that the court shall dismiss the

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case if there's a public disclosure as defined, and the relator is not an original source, unless the government opposes it. So there's a legal question as to what that means. Is it a veto power, or must the government oppose it on the merits? I imagine the government will take the position that it's more veto power than it is otherwise. In my own practice, I haven't seen it used yet, but I can imagine a scenario where the government declines to intervene for whatever reason and yet opposes a motion to dismiss because it wants the case to go forward and it wants a way to recover money, yet doesn't have the resources to get in there and litigate the case. I haven't seen it happen, but I can imagine it. There are a number of reasons why the government might decline and they are not always based on the merits of the case.

MODERATOR: Are trends emerging from FCA cases based on the Anti-Kickback Statute and Stark law?

HASSANEIN: As was alluded to earlier, there's now an express tie between violations of the Anti-Kickback Statute and the FCA. Prior to PPACA, the courts grappled with the controversial topic of implied certification and when a defendant might be liable under the FCA in the event of a violation of the Anti-Kickback Statute. Now, it is no longer necessary to plead express or implied certification in order to predicate an FCA violation on a violation of the Anti-Kickback Statute. The PPACA amendment, however, does contain a causal connection requirement between the Anti-Kickback Statute violation and the allegedly false claim. It's yet to be seen how the courts will apply that causation requirement. Prior to PPACA, the courts struggled with determining when a violation of the Anti-Kickback Statute caused a false claim in the health care context where there are multiple entities within the supply chain. There was a real question in the case law as to whether an Anti-Kickback Statute violation that occurred upstream taints a claim that is submitted downstream by an innocent provider who didn't violate the Anti-Kickback Statute and who was entirely unaware of the allegedly illegal financial arrangements upstream in the supply chain.

SALTIEL: That change in the FCA with respect to a kickback being a false claim for the purposes of the FCA was passed to overturn cases where the courts held that the claim was not false for the purposes of the FCA when the claim was submitted by an innocent intermediary. Under the statute, the law is clear that that's not the case. Even if the claim is ultimately submitted by a hospital or billing company or somebody that's down the supply chain, the claim itself is still false. Now, that innocent intermediary may not be responsible under the FCA because of the scienter provisions, but the person or entity that took the kickback and started the process, I think is now clearly liable. The cases that held otherwise before the amendment, weren't largely in the Ninth Circuit, so I'm not sure much has changed here.

NELSON: The FERA made clear that a company need not submit a false claim directly to the government to be liable for an FCA violation. I strongly agree that you can go downstream and get to the most culpable wrongdoer. Obviously you need proof of scienter to get to the entity that actually submitted the false claim, but the wrongdoing subcontractor who knowingly engaged in the kickbacks is plainly liable now under the FCA.

On another point, I see more and more Stark law cases (42 U.S.C. § 1395nn), which is implicated when physicians or hospitals refer patients to entities in which they have a financial interest. The medical profession is undergoing interesting changes in the ways physicians and hospitals interact with each other and that implicate the Stark law. Specifically, hospitals are doing what they can to attract top physicians to their facilities and seem willing to offer benefits and services to those physicians that cross the line, and is resulting in a number of FCA cases based on a violation of the Stark law. I sometimes wonder whether hospitals have read the legal memo on the Stark law.

SALTIEL: It's hard to believe that physicians or hospitals wouldn't know about the Stark law. They teach it in medical school now.

NELSON: I hear you, except that when we repeatedly encounter relationships that appear to cross the line, you wonder. I am curious if others have witnessed an uptick in FCA cases based on a violation of the Stark law?

ELLINIKOS: I have not. But the difficulty is that a hospital seeking to attract physicians assumes that there will be referrals, but the hospital may not base compensation on the volume or value of the referrals. That requires a delicate balance. The Stark law has so many exceptions and is so complicated. It is very difficult for physicians and hospitals to know what financial arrangements are permissible. The law is not as simple as its sponsor originally intended.

SALTIEL: I'm not aware of a significant increase in those kinds of cases in our office, but they could be increasing in other districts. In addition to the amendment of the FCA dealing with kickbacks, the Ninth Circuit recently held in *Ebeid ex rel. United States v. Lungwitz* (616 F 3d 993 (9th Cir. 2010)), that the implied certification is a valid theory under the FCA, and specifically that Stark is a valid basis from which to imply certification. The fact that Stark was left out of the PPACA amendment is probably not going to affect those types of violations.

ELLINIKOS: Historically, Stark cases have been brought by whistleblowers. Have you noticed a trend that whistleblowers bring these cases, and the government gets involved? Is there a lack of government interest in bringing these cases?

NELSON: My experience is that the government is interested in these cases. Not only has there been an increase in the number of Stark law whistleblowers coming to us for assistance, but government officials will closely scrutinize these cases, and it's not all that uncommon now for a U.S. Attorney's Office to have a Stark law expert in its ranks.

HASSANEIN: The government is aggressively pursuing FCA claims based on Anti-Kickback Statute violations, though not necessarily with success. There was a bench trial earlier this year in Mississippi federal court in a case entitled *U.S. ex rel. Jamison v. McKesson Corp.*

(2012 WL 4499136 (N.D. Miss. Sept. 28, 2012)). A central theory of the case was that the nursing home defendant solicited a below-cost bid from McKesson subsidiaries during a competitive bid process by "dangl[ing] the prospect" of a separate business opportunity. Before final bids were submitted, however, the other business opportunity was awarded to someone else and the McKesson subsidiaries knew this when they submitted a bid that was similar to and, in some cases, higher than other bids. The court found the government's theory to be "illogical," given the factual record, and rendered a verdict in the defense's favor.

MODERATOR: Considering recent intervention, what is the impact of the insurance commissioner and attorney general's increased commitment to whistleblower litigation?

ELLINIKOS: The new insurance commissioner intervened in two Insurance Fraud Prevention Act (IFPA) cases in 2011 (see Cal. Ins. Code §§ 1871–1879.8) The cases are *State of California ex rel. Rockville Recovery Assocs. Ltd. v. Multiplan, Inc.* (Sacramento County Super. Court No. 34-2010-00079432) and *State of California ex. rel. Wilson v. Bristol Myers Squibb, Inc.* (Los Angeles Super. Court No. BC 367873). With the budget crises affecting many states and the federal government, increased government intervention is likely to be a continuing trend.

NELSON: Commissioner Dave Jones has made health insurance fraud a priority in his office and has intervened in these litigations as you described. Until these interventions, very few practitioners had even heard of the IFPA, which has a whistleblower provision. We have a trial set in the Sutter litigation next July, and we certainly are learning a lot about this statute as we go forward in the litigation. For example, the court has ruled that there is a right to a jury trial under the IFPA.

The Attorney General of California has made and continues to make a serious commitment to California FCA cases. She has made it a priority in her office to closely examine and investigate cases as they come in, and the office has a sizable, very experienced and qualified staff devoted to FCA cases. Among other state attorneys general, this office not surprisingly is regarded as a leader in the FCA arena.

HASSANEIN: Given the nature of the allegations in the *Bristol Myers* case, I was surprised to see the insurance commissioner intervene. Bristol Myers allegedly paid kickbacks to doctors that resulted in the defrauding of private insurance companies. Since these are very sophisticated entities with a lot of resources, I think this case presents a policy question as to whether it is the best use of the insurance commissioner's time and expense to police the private health insurance market.

NELSON: The Department of Insurance responded in the *Sutter* case to allegations involving double billing and overbilling for anesthesia related services. One of the problems we've observed is that health insurers have little incentive to challenge false billing because it is so easy for them simply to pass on those costs to the consumer in the form of higher premiums. In this litigation the insurance commissioner represents the State of California, and so the commissioner is standing in the shoes of California consumers who pay extraordinarily high health care premiums. The commissioner is arguing that even though the health insurers may be paying the allegedly false anesthesia bills, it is the consumers of California who ultimately pay the price.

HASSANEIN: The causal connection between higher premiums paid by consumers and the type of wrongdoing alleged in suits such as the *Bristol Myers* case is far from clear. For instance, there are financial arrangements, including rebate payments, which run from drug manufacturers to private insurance companies. Given such financial arrangements and the other ways insurance companies can recoup higher drug costs, the extent to which, if at all, consumers' premiums are increasing as a result of such malfeasance is far from obvious.

We're now seeing an increasing number of non-Medicaid California FCA cases with no parallel federal violation. The recent amendments to the California FCA statute, which went into effect January 1, may continue that trend. California was motivated to make these amendments because it gets a 10 percent bump to its standard 50 percent share of any litigation recovery obtained on behalf of its Medicaid program, so long as the Office of the Inspector General to the U.S. Department of Health and Human Services concludes that the California FCA is "at least as effective" as the federal FCA (see 42 U.S.C. § 1396h).

ELLINIKOS: But there is an incentive to an insurance company to bring a claim under IFPA. IFPA hasn't been interpreted much by the courts, but it allows any interested person to bring an action. One of the issues litigated in the Sutter case is the definition of interested person, but it certainly includes insurance companies. There's very little visibility with IFPA and a lot of insurers aren't aware of IFPA or its remedies. As you point out, the penalties are significant. With the recent interventions, perhaps more insurers will become aware of the statute and bring IFPA claims. In fact, I currently represent Fireman's Fund Insurance Company in an action alleging IFPA violations, *State of California ex rel. Fireman's Fund Ins. Co. v. Front Gate Plaza, LLC* (Los Angeles Super. Court, No. LC093216).

SALTIEL: From our experience with the federal FCA, we see that when cases have merit, intervention often is not necessary. The cases are often resolved prior to intervention, or the government intervenes for the purposes of finalizing a resolution or a settlement. I'm not surprised that there are interventions by the insurance commissioner or the AG in these types of cases because it seems like this a new theory. I wonder whether, after some of these cases are tried, we'll see more of an effort to resolve these cases without litigation.

MODERATOR: What has been the impact of the Laidlaw decision under the California FCA (San Francisco Unified Sch. Dist. ex rel. Contreras v. Laidlaw Transit, Inc., 182 Cal.App.4th 438 (2010))? And what other trends are there in the assessment of damages and civil penalties in FCA cases?

NELSON: The *Laidlaw* decision from 2010 was criticized by the defense bar as being an extraordinary decision that qualitatively changed the California FCA (Cal. Gov't Code § 12650–12656) and they asserted that it would open the floodgates to litigation involving implied certification theories. My sense is that the defense bar's worst fears have not been realized.

HASSANEIN: In terms of whether fears have been realized, the *Laidlaw* decision was issued in 2010. To the extent cases were filed after the *Laidlaw* decision in hopes of embracing some of its holdings, I suspect those cases are still under seal.

ELLINIKOS: What's significant about *Laidlaw* is that one breach could lead to the imposition of thousands of penalties based on the number of invoices submitted pursuant to the contract. An interesting case pending on appeal in the Fourth Circuit is *United States ex rel. Bunk v. Birkhart Globistics Gmbh & Co.* (2012 WL 488256 (E.D. Va. 2012)). The defendant submitted an allegedly false certification of independent pricing with its bid, won the government contract and then submitted over 9,000 invoices pursuant to the contract. There was no issue that the services were not provided or were in any way deficient, but the jury found that the certification of independent pricing was false. The FCA mandated a penalty of $5,000 per invoice submitted, resulting in a $50 million penalty, and the district court found the mandated penalty disproportional to the gravity of the offense and unconstitutional. Anticipating an appeal, the district court proposed three alternative rulings to avoid the constitutional problem. One was to apply the plain language of the statute. Although every court interprets the penalty provision as requiring a penalty per false claim, the statutory language actually states per violation. Applying the plain language of the statute in this case results in a single penalty of $5,000. Another alternative was for the court to exercise its discretion and come up with a number that it thought was appropriate under the circumstances—$500,000. Under the third alternative, the court applied the maximum multiple for assessing punitive damages to the defendant's profit. That resulted in a penalty of $1.5 million. It's very interesting that the three alternatives each produce a vastly different result.

NELSON: So the trial court said that there were three available options?

ELLINIKOS: No, it anticipated an appeal and said, "Even though we're finding that it's unconstitutional, here are some approaches that could be adopted to reach a constitutional result." It's on appeal in the Fourth Circuit now. California courts find federal FCA case law persuasive and in light of the *Laidlaw* decision and other implied certification cases, you could have a lot of unconstitutional verdicts.

Even though there was nothing false about any of the invoices, and none of them even referred to the certification of independent pricing, they were deemed false. So everything derived from this one false statement in the certification, which is the same idea as *Laidlaw*.

SALTIEL: These issues have come up in cases for years. Both relators and the government often take the position that a claim is a violation and an invoice is a claim, and that the penalty should be per claim or invoice. There's always going to be an excessive fines analysis under the Constitution. In a case where there's $50 million in fines and the actual loss to the government is a fraction of that, the court isn't likely going to uphold that. These are all issues that have come up a lot in the past, long before *Laidlaw*.

HASSANEIN: *Laidlaw* raises a broader issue of how to calculate damages and penalties in an FCA case in which the government contractor actually provides the services or goods that they billed to the government. I agree with Ms. Ellinikos that the per "violation" language in the FCA is important, particularly when you look at each liability provision in the FCA separately. A "violation" of the first liability provision is submitting or causing to be submitted a false claim. In contrast, a "violation" of the second liability provision is the false or fraudulent statement "material" to a false claim. In many cases, there is only one false statement, thus only one "violation," and therefore only one penalty under the FCA.

NELSON: These issues torment us and they are part of almost all FCA cases. How do you calculate the number of violations? What constitutes a claim? Even in the IFPA, for example, there is a provision saying that these penalties are not meant to be punitive. It's kind of an odd statement given that statutory penalties of between $5,000 and $10,000 for each false or misleading claim are contemplated by the statute. So the reality is that we struggle with how to come up with resolutions and approaches that the court will deem appropriate under the specific circumstances of the case. As to *Laidlaw*, I agree with Steve [Saltiel], that the case is not earth shattering and false certification cases are not uncommon, including, for example, the FCA case we did involving the University of Phoenix, where University of Phoenix certified it was in compliance with the Higher Education Act (Pub. L. No. 89-329)—despite paying its recruiters in a way that we alleged was not allowed under the HEA (see 20 U.S.C. § 1094(a)(20); 34 C.F.R. § 668.14(b)(22)(i)). As a qui tam practitioner, we continue to grapple with what consequences are appropriate based upon the type and number of violations, and the law often simply is not clear. It's what makes this practice area at once so exciting and exasperating. ■

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