

The Salcido Report

September 25, 2015

If you read one thing...

- Launch of a new False Claims Act (FCA) resource
- The Public Disclosure Alert (PDA) provides expert analysis of latest paradigm shifting FCA developments
- Informs readers regarding latest trends influencing obligations to report overpayments under the FCA and compliance with the Anti-Kickback law and Stark law.



False Claims Act Public Disclosure Alert

The FCA is the government's primary weapon to prevent fraud against the United States. Since Congress substantively amended the FCA in 1986 to facilitate the filing of private whistleblower lawsuits (known as *qui tam* actions filed by plaintiffs known as "relators"), more than 9,000 *qui tam* actions have been filed. In fact, over one recent five-year period (2008-2013) alone, more than 3,000 lawsuits were filed, and \$20 billion was recovered. These numbers rival or even eclipse securities and antitrust in annual filings and recoveries.¹

The FCA's reach is vast. It is potentially implicated whenever any claim for payment includes any federal funds. Moreover, it is the primary enforcement vehicle for the Anti-Kickback law and the Stark law, which potentially impact substantially all relationships that many health care providers have with vendors and physicians.

To address the burgeoning FCA case law and paradigm shifting developments, Akin Gump Strauss Hauer & Feld LLP, beginning October 1, 2015, will launch the FCA PDA by Robert Salcido. The PDA is not intended merely to provide case law summaries, define the FCA's elements to liability, or discuss the elements to satisfy an Anti-Kickback law safe harbor or a Stark law exception. Instead, its objective is more ambitious. The PDA's goal is to identify what is not on the surface, but what is latent, the kernel of principle and other significance that exists, recognized or not, at the root of trending FCA case law developments.

¹ See David Freeman Engstrom, *Private Enforcement's Pathways: Lessons From Qui Tam Litigation*, 114 Colum. L. Rev. 1913, 1944 (2014) (hereinafter "Lessons From Qui Tam Litigation").

Topics in monthly installments will include:

- distinguishing between when mere regulatory violations result in an FCA violation and when they do not
- determining how to comply with the FCA and Stark law when a hospital tracks “contribution margin” and “leakage”
- determining when a “quality of care” FCA case can proceed and when it should be dismissed
- describing how to win an FCA medical necessity case (based upon personal experience) against the government
- determining when a mere overpayment is “identified” and “known” and therefore actionable under the FCA
- describing why the 4th Circuit’s decision in *United States ex rel. Drakeford v. Tuomey Health*, regarding FCA/Stark law damages is demonstrably wrong
- applying a correct interpretation of the FCA “original source” standard in light of Congress 2010 amendments to the FCA’s public disclosure bar
- describing how to win an FCA case alleging an FCA violation based upon an alleged Anti-Kickback Act (based upon personal experience) against the government
- drawing the line: When is an advice of counsel defense helpful, and when is it harmful in FCA actions?

The FCA PDA is intended to benefit compliance professionals who, under the FCA, are called upon to determine, in the first instance, whether there is an overpayment due to the government because of some potential breach of a rule, regulation or standard and hence an obligation to repay those funds or breach the FCA, and when to make voluntary disclosures to the government. The FCA PDA is also intended to benefit both beginning and experienced FCA litigators who are interested in what doors courts are opening regarding nascent theories of FCA liability and what doors they are closing.

About the Author

Robert Salcido is a leading False Claims Act (FCA) practitioner.

Although the United States typically obtains a positive monetary recovery in more than 90 percent of the FCA actions it institutes, see *Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. at 1991, Mr. Salcido has been lead counsel in several FCA actions in which he successfully defended clients in FCA actions the government filed at trial or summary judgment, including:

- Mr. Salcido was lead counsel for Golden Living in an FCA action where the federal government had sued Golden Living’s predecessor company, Beverly Enterprises (“Beverly”), for \$895 million, alleging

that Beverly had engaged in an unlawful kickback scheme with McKesson Corp. in violation of the Anti-Kickback Act and the FCA. After 14 days of trial, the court ruled that Beverly and McKesson did not violate the FCA or the Anti-Kickback Act, because their business negotiations were fair, reasonable and conducted in good faith. *See United States of America ex rel. Jamison v. McKesson Corp.*, 900 F. Supp. 2d 683 (N.D. Miss. 2012).

- Mr. Salcido was lead counsel for Aegis Therapies and a Golden Living skilled nursing facility where the federal government had alleged that defendants provided medically unnecessary rehabilitation therapy. The district court granted defendants' summary judgment motion, ruling that the government had used the wrong standard to assess whether the services were medically necessary and failed to prove that defendants' certification regarding medical necessity was objectively false. *See United States ex rel. Lawson v. Aegis Therapies, Inc.*, 2014 U.S. Dist. LEXIS 45221 (S.D. Ga. Mar. 31, 2015).
- Mr. Salcido was lead counsel for a defendant physician and multispecialty group practice that the government accused of FCA violations. The district court dismissed all the government's claims on summary judgment. Ultimately, because the United States' action lacked "substantial justification," the United States was ordered to pay defendants more than \$500,000 in legal fees. In making the ruling, the court ruled that Medicare fraud law is an area of expertise and ruled that it was undisputed that Mr. Salcido possessed such expertise. *See United States v. Prabhu*, 442 F. Supp. 2d 1008 (D. Nev. 2006).
- Mr. Salcido was lead counsel for Golden Living in an action where relator and government sued multiple defendants alleging that they violated the FCA because they knowingly created and operated a supply company in violation of Medicare Supplier Standards. The district court granted defendants' FCA summary judgment motion regarding the Supplier Standards allegations, finding that the government's prior administrative proceedings demonstrated that the defendant supply company was entitled to payment. *See United States ex rel. Jamison v. McKesson Corp.*, 784 F. Supp. 2d 664 (N.D. Miss. 2011).

Mr. Salcido has authored a number of books and chapters in leading publications (including the American Health Lawyers Association, *BNA Books*, and *Bloomberg BNA*) regarding the application of the FCA, including:

- FALSE CLAIMS ACT & THE HEALTH CARE INDUSTRY: COUNSELING & LITIGATION (2d ed. American Health Lawyers Ass'n 2008) (3d edition forthcoming in 2016)
- 2014 Supplement to False Claims Act and the Health care Industry: Counseling and Litigation (American Health Lawyers Ass'n 2014)
- "The False Claims Act in Health Care Prosecutions: Application of the Substantive, *Qui tam* and Voluntary Disclosure Provisions," in HEALTH CARE FRAUD AND ABUSE: PRACTICAL PERSPECTIVES, Ch. 3 (3d ed. BNA Books 2013) (with annual supplements)

- “False Claims Act: Health Care Applications and Defenses” in Bloomberg BNA Health Law and Bus. Series No. 2650 (2012) (with annual supplements).

Because of his work successfully defending a number of FCA lawsuits, he has been recognized in:

- *The National Law Journal* in its 2014 Litigation Trailblazers & Pioneers as one of 50 “people who have made a difference in the fight for justice” for his outstanding work in defending FCA lawsuits
- *Chambers USA: America’s Leading Lawyers for Business* (2006-2014), in the 2011-2014 editions of Chambers USA, listed under Health Care: Regulatory and Litigation, Leading Individuals (Nationwide) (Band 1) and as Health Care Leading Individuals (District of Columbia) (Band 1)
- *Law360*, which selected Mr. Salcido as one of the four Health Care MVPs for 2012 based upon a successful trial verdict obtained in the Golden Living FCA/Anti-Kickback Act lawsuit.

Before entering private practice, Mr. Salcido served as trial counsel for the U.S. Department of Justice Civil Fraud Section, which has nationwide jurisdiction over the FCA, where he led several successful prosecutions of the FCA on the United States’ behalf.

Contact Information

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