

# North Carolina False Claims Act (WEBCAST)

Presented by:  
The North Carolina Bar Association  
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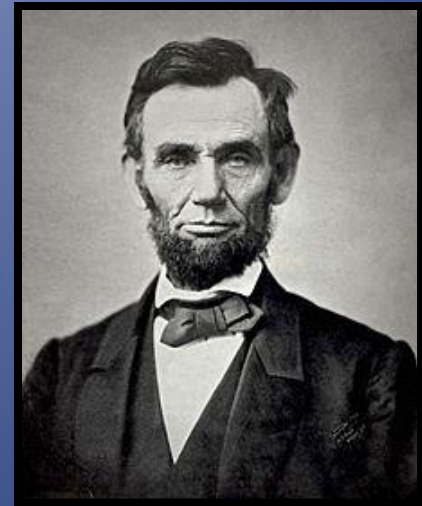
# The Federal False Claims Act

1863 – 2012

- Also known as the Qui Tam Statute, the Whistleblower Law or the Lincoln Law

# The False Claims Act Overview

- Enacted during the Civil War by Abraham Lincoln
- Strengthened in 1986 during the Cold War
- Expanded through Healthcare
- Vibrant future – recently amended substantially by Congress
- Can affect any institution, entity or individuals doing business directly or indirectly with the federal Government



# The Federal False Claims Act

- What it does NOT cover
  - Tax fraud
  - New IRS Whistleblower Provision
    - 26 U.S.C. § 7623
  - New SEC Whistleblower Program
    - 15 U.S.C. § 78a et seq.



# The Federal False Claims Act

- Act has produced numerous settlements in hundreds of millions to in excess of \$1 billion
- Examples of top recoveries:
  - GlaxoSmithKline (2012) - \$2 billion
  - Pfizer (2009) - \$1 billion
  - Bank of America (2012) - \$1 billion
  - Tenet Health (2006) - \$900 million
  - Abbott (2012) - \$800 million



# Recent Pharmaceutical Settlements

- Allergan - \$600 million
- AstraZeneca - \$520 million
- Novartis Pharmaceuticals - \$422.5 million
- Forest Laboratories - \$313 million
- Elan Corporation – \$203.5 million
- Teva Pharmaceuticals - \$169 million
- WellCare Health Plans - \$137.5 million
- AstraZeneca and Ortho-McNeil - \$124 million
- Health Alliance of Greater Cincinnati and Christ Hospital - \$108 million



# Federal False Claims Act

## Prohibited Conduct

- FCA prohibits
  - Knowing submission or causing submission of false or fraudulent claims for payment
  - Knowing submission or causing submission of false or fraudulently records in support of a false claim
  - Conspiracy to submit a false claim
  - Submission of false records to reduce money owed to the U.S.
    - 31 U.S.C. § 3729

# What Is A Claim Under FCA?

- Any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the U.S. provides or reimburses any portion of the money or property
- Examples of Claims Under the Act:
  - Direct requests for payment
  - Indirect requests for payment
  - Obligations owed to the Government
  - Bids
  - Loan applications
  - Grant documents

# The Federal False Claims Act

- What Defendants can owe if held liable:
  - Defendant liable for mandatory treble damages sustained by the Government
  - Defendant also liable for penalty of between \$5,500 and \$11,000 per claim for each false claim to the Government
  - Defendant liable for attorneys fees and costs
  - Joint and several liability with no right of contribution or indemnity

# The Federal False Claims Act

- What can be a “Relator?”
  - Can be any “person,” including individuals, entities, and companies



# Federal False Claims Act

- Attorneys fees and costs
  - If found liable, Defendant must pay the Relator's reasonable attorneys fees and costs
  - Attorneys fees and costs are in addition to Relator's share of the recovery obtained by the government

# Federal False Claims Act

- Important legal issues
  - 6 year statute of limitations but can be extended to 10 years in certain cases
  - Only the Relator who is the “first-to-file” is eligible to share in the recovery



# False Claims Act

## Qui Tam / Whistleblowers

- § 3730(b) actions by private person
  - A person may bring a civil action...for the person and for the U.S. Government
  - The complaint shall be filed *in camera* and shall remain under seal for at least 60 days
  - Before the seal expires, the Government shall
    - Intervene and assume responsibility for the case
    - Decline and allow the private person to pursue the case on their own
    - File a notice of non-intervention at this time
    - Other action

# The False Claims Act

- False Claims Acts apply to all types of goods, services and Government contracting, and have been particularly effective in combating
  - Healthcare (Medicare and Medicaid) Fraud
  - Pharmaceutical Fraud
  - Financial Industry Fraud
  - Defense Contracting Fraud
  - Energy (Oil and Gas) Contracting Fraud
  - Iraq Reconstruction Fraud
  - Environmental Fraud
  - Disaster Relief Fraud
  - Construction and Procurement Fraud
  - Research Fraud



# Qui Tam Litigation

- Whistleblower – a.k.a. “Relator”
- Files in the name of the Government
- Compliant filed under seal
- U.S. has 60 days to investigate and decide whether to intervene or not – declination is 75%-80% of cases
- Relator shares in recovery (15%-30%)
- Relator recoveries are usually higher in DOJ-intervened cases

# Qui Tam Litigation

- Intervention
  - Government may elect to intervene or decline
  - In some or all of allegations
  - Can file an amended complaint / common law causes of action
  - Seal is lifted
  - If Government declines, remains real party in interest
  - Relators may pursue some or all of the case

# Hot Button Sections Of Law

- First to File Bar - 31 U.S.C. § 3730(b)(5)
- Public Disclosure Bar - 31 U.S.C. § 3730(e)(4)(A)
- Original Source - 31 U.S.C. § 3730(e)(4)(B)
- Fair, Adequate & Reasonable - 31 U.S.C. § 3730(c)(2)(B)
- Relator Share Award - 31 U.S.C. § 3730(d)(1)
- Attorney Fees Award - 31 U.S.C. § 3730(d)(1)
- Anti-Retaliation Provision - 31 U.S.C. § 3730(h)



# Qui Tam Litigation

- Relators' shares
  - If Government intervenes – 15%-25% plus attorneys fees and costs
  - If Government declines – 25%-30% plus attorneys fees and costs
  - Awards reduced for Relators who planned and initiated fraud
    - No recovery if criminally convicted of fraud

# Investigative Techniques

- How will a FCA investigation generally proceed?
  - Civil Investigative Demands
  - Inspector General Subpoenas
  - Search Warrants
  - Grand Jury
  - Interviews – voluntary
  - Criminal HIPAA Subpoenas

# Healthcare Fraud

- Since the 1986 amendments to the federal FCA, the federal Government has recovered \$27 billion from False Claims Act cases
- More than 67% of qui tam cases in the last decade have been healthcare fraud qui tam cases
- Healthcare fraud cases accounted for over 80% of total civil fraud recoveries for FY 2011 and FY 2010
- Typical healthcare defendants: pharmaceutical companies; medical device companies; hospitals; durable medical equipment; physicians; medical suppliers
- Millions of small claims which are submitted 7 days a week / 24 hours a day, somewhere in the U.S.

# Typical Qui Tam Healthcare Fraud Whistleblowers

- Pharma Sales Reps & Managers
- Medical Device Sales Reps
- Any Sales Reps
- Medical Directors
- Physicians
- Hospital Executives
- Quality Control Personnel
- Pharmacists
- Nurses
- Accountants
- Contractors
- Compliance Officers
- Counsel



# Typical Healthcare Fraud Allegations

- Drugs – (off label marketing; kickbacks; inflated pricing; PRM fraud)
- Upcoding
- Excessive or unnecessary medical / diagnostic tests being performed
- No healthcare services actually provided to the patient
- Kickback to illegally induce physician referrals
- All types of hospital based fraud
- Stark violations
- Ghost patients billed
- Quality of healthcare services provided
- Overcharging Government health programs for DME services
- Unlawful sales and promotion
- Research grant fraud



# Key Statutes

- Federal False Claims Act – 31 USC 3729 et seq.
- False Claims Act Anti-Retaliation Provisions – 31 USC 3730(h)
- 29 State False Claims Acts
- Anti-Kickback Statutes – State and Federal
- The Stark Law, 42 USC §1395nn
- FERA (2009) and PPACA (2010) Amendments



# State False Claims Act

29 States have FCA's

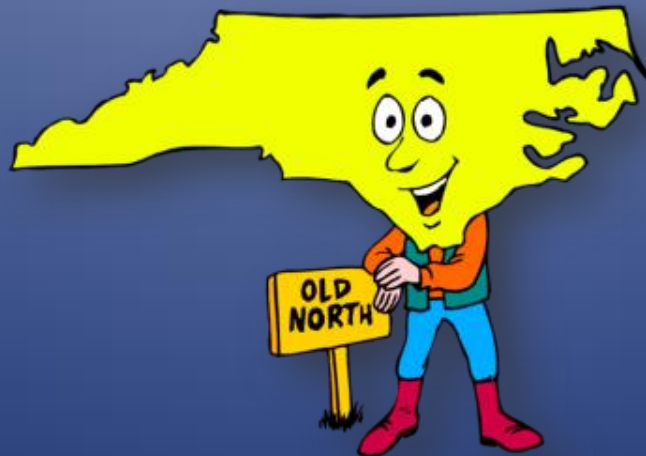
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- Connecticut
- Delaware
- Florida
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- Hawaii
- Illinois
- Indiana
- Iowa
- Louisiana
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Montana
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- New York
- North Carolina
- Oklahoma
- Oregon
- Rhode Island
- Tennessee
- Texas
- Virginia
- Wisconsin



James F. Wyatt, Esquire

# The North Carolina False Claims Act

- The North Carolina Medical Assistance Provider False Claims Act (“Medicaid FCA”) preceded the North Carolina False Claims Act (“NC FCA”)
- The Medicaid FCA is still in effect
- The NC FCA was passed on August 28, 2009 and became effective on January 1, 2010



# Medicaid FCA - Provisions

- The Medicaid FCA authorized the North Carolina Attorney General's Office ("NCAG") to pursue civil and criminal actions related to Medicaid fraud
- Medicaid is funded by both federal and state dollars
- Medicaid FCA gives the NCAG subpoena (CID) and deposition powers
- Medicaid FCA was not replaced by the NC FCA
- Medicaid FCA is limited to Medicaid program fraud claims

# Medicaid FCA – Practice

- The focus under the Medicaid FCA was mainly on criminal prosecutions and joint federal-state civil actions
- NCAG attorneys are cross-designated as Assistant United States Attorneys
- The NCAG, under the Medicaid FCA, was involved in numerous federal/state or national civil actions
- NCAG staffing was considerably less than the present staff
- There are no reported decisions under the Medicaid FCA

# Background Of The NC FCA

- The NC FCA came about because of the Deficit Reduction Act of 2005
  - Any state passing a FCA that meets certain requirements receives a 10% increase in Medicaid recoveries
  - Requirements
    - Qui tam provisions must be at least as effective as federal FCA
    - Civil penalties must be similar to federal FCA
  - HHS Office of Inspector General determines compliance with the DRA

# NC FCA – Provisions

- Claim – is broadly construed and goes well beyond the Medicaid program
- Exclusions – General Assembly, judiciary, and senior executive branch officials are excluded if the facts are known to the State; public employee actions are excluded if based on information learned within the scope of employment
- Liability Standard – actual knowledge or reckless disregard
- Discovery – NCAG can issue civil subpoenas for documents (CIDs), but cannot conduct depositions (Medicaid FCA authorizes depositions)



# NC FCA – Provisions

- Damages – treble damages, costs of investigation and attorney fees; civil penalties between \$5,500 to \$11,000 for each false claim
  - Double damages if defendant reports fraudulent activities within 30 days, cooperates, and is unaware of a pending investigation
- Qui Tam Plaintiffs
  - Similar procedure to federal law
  - Fees: either 15%-25% or 25%-30% of damages plus attorney fees
  - Retaliatory discharge protections
  - NCAG can control the litigation if it intervenes
- Statute of Limitations – 3 years from when facts were known or reasonably should have been known; maximum of 10 years from violation

# NC FCA – OIG Findings

- The OIG did not certify the NC FCA for the 10% additional recovery (March 21, 2011)
- Reasons – there are 5 provisions of the NC FCA that the OIG viewed as not being as effective as the federal FCA

# NC FCA – OIG Findings

- 1) Public Disclosure Bar
  - Federal FCA allows the dismissal of a qui tam case, unless opposed by the Government, based on a prior criminal case, civil case, administrative hearing where the Government is a party, governmental hearing, or news media story (unless the Relator is an original source)
  - NC FCA does not allow the government to oppose dismissal, and the public disclosure bar is broader (including hearings where the Government is not a party)
- 2) Original Source Exception
  - NC FCA adopted the previous federal standard; direct and independent knowledge of information which is voluntarily provided before the filing of an action
  - Federal FCA has broadened this language to “knowledge that is independent of and materially adds to the publicly disclosed allegations and transactions.”

# NC FCA – OIG Findings

- 3) First-to-File Provision
  - Federal FCA allows governmental intervention and prohibits recovery unless the Relator is the “first-to-file”
  - NC FCA allows the NCAG to intervene and prohibits others from bringing a similar action
- 4) Public Employee Limitation
  - NC FCA departs from the federal FCA in limiting actions brought by public employees or officials
  - Such suits cannot be brought if based on facts the person had a duty to investigate/report within the scope of employment, or if based on records/data the person had access to
  - There is no such federal limitation

# NC FCA – OIG Findings

- 5) Statute of Limitations for Retaliatory Claims
  - NC FCA has no explicit statute of limitations for these claims
  - NC FCA has a general statute of limitations (3 years from discovery; 10 year maximum limitation)
  - The most analogous statute of limitation is 3 years (NCGS 1-52(5) for wrongful discharge)

# Current Practice

- Most qui tam cases result from joint federal/state investigations and are brought in federal court
- NC FCA claims are usually added to federal qui tam actions
- Federal dollars supply 60% of Medicaid funding
- Medicaid spending now exceeds Medicare spending
- Federal prosecutors can issue CIDs and take testimony
  - NC FCA only authorizes CIDs (except Medicaid FCA)
- NCAG staffing – greatly increased over Medicaid FCA (60+ attorneys and staff)

Pamela C. Brecht, Esquire

# The Modern Federal False Claims Act

- Two separate Causes of Action
  - Fraud Cause of Action – Essentially share with the Government
  - 31 U.S.C. § 3730(h) allegation – Relator's Cause of Action only





# Federal FCA Anti-Retaliation Provision

## 31 U.S.C. 3730(h)(1)

### Relief From Retaliatory Actions —

(1) In general — Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter

# NC FCA: Modeling The Anti-Retaliation Provision Of The Federal FCA

- Like the federal FCA, the NC FCA contains a strong anti-retaliation provision
- N.C. Gen. Stat. § 1-613
  - Affords redress for North Carolina whistleblowers who are retaliated against (fired, demoted, etc.) for blowing the whistle;
  - NC FCA shall be interpreted in a manner consistent with the federal FCA, including its amendments (see N.C. Gen. Stat § 1-616(c))

# NC FCA – Protection For Potential Whistleblowers

- § 1-613 of the NC FCA, “any employee, contractor, or agent who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done...[i]n furtherance of an action under the Article or in furtherance of other efforts to stop one or more violations of G.S. § 1-607...[s]hall be entitled to all relief necessary to make the employee whole”

# Whistleblowers' Protected Conduct Under The Federal FCA And NC FCA

- Section 3730(h)(1) of the Federal FCA protects potential whistleblowers engaged in “lawful acts...done in furtherance of efforts to stop one or more violations”
- Section 1-613 of the NC FCA protects employees or others acting either:
  - To further “an action under” the NC FCA, or
  - To “stop one or more violations” of the NC FCA;
- Essentially the same conduct protected

# NC FCA Section 1-613 Describes Potential Whistleblowers' Protected Conduct

- Persons protected: employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others, engaged in lawful actions
  - In furtherance of an action
  - In furtherance of other efforts to stop one or more violations including;
    - Investigation for
    - Initiation of
    - Testimony for
    - Assistance in an action filed or to be filed under the NC FCA

# Identical Relief For Retaliation

- Relief available under the NC FCA is identical to that available under the federal FCA
  - Two times the amount of back pay and interest on the back pay
  - Reinstatement with the same seniority status
  - Compensation for any special damages including litigation costs
  - 31 U.S.C. § 3730(h)(2); N.C. Gen. Stat. § 1-613

# NC Medicaid Anti-Fraud Statute Retaliation Occurring Pre-NC FCA

- North Carolina's Medicaid Anti-Fraud statute's anti-retaliation provision predates the effective date of the NC FCA (1/1/2010), and is incorporated by reference into the NC FCA
- Discrimination or retaliation in violation of the NC Medicaid Statute is actionable under the NC FCA (even if the retaliation predates the passage of the NC FCA), so long as the SOL under the Medicaid statute has not lapsed (N.C. Gen. Stat. § 1-605)



# NC FCA Anti-Retaliation Provision – Statute Of Limitations

- § 3730(h) which specifies that claims for retaliation have a 3 year statute of limitations
- NC FCA: No clear statute of limitations on anti-retaliation actions but 3 year SOL applies to wrongful discharge actions (N.C. Gen. Stat. § 1-52(5))
  - *Graham County Soil & Water Conservation Dist. v. United State ex rel. Wilson*, 125 S. Ct. 2444 (2005): reversed the 4<sup>th</sup> Circuit and rejected applying the 6 year statute of limitations that applies to the fraud cause of action, and held that the SOL under 3730(h) was the most analogous limitations period under state law for retaliation
- Limitations period for FCA retaliation claims is triggered by the date the discrimination occurs, not when the fraudulent conduct occurred



# Other Potential State Law Causes Of Action For NC Whistleblowers

- NC Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat § 75-1.1
  - Elements
    - An unfair or deceptive act or practice
    - In or affecting commerce
    - Proximately caused actual injury to the plaintiff or her business
    - Standard: Did the act have the tendency or capacity to mislead, or created a likelihood of deception (Melton v. Family First Mortg. Corp., 156 N.C. App. 129, 576 S.E.2d 365 (2003))
  - Proof of actual fraud is not required, but fraud is sufficient evidence of an unfair or deceptive act, i.e., healthcare fraud
    - Potential defendants: pharmaceutical industry; device and manufacturers;
    - Violation of Certification of Compliance with state law, including NC UDTPA (i.e., PBM, Express Scripts 2008)
- Common law claims
  - Intentional Infliction of Emotional Distress
  - Tortious Interference with Contractual Relationship
  - Defamation/Slander Per Se

# Damages For Private Causes Of Action (Outside NC FCA)

- Whistleblower's Private Causes of Action – recovery not shared with the Government
- Unfair and Deceptive Trade Practices Act: Treble damages, Section 75-16
  - Mandatory upon finding of a violation
  - Intended to encourage private enforcement actions
- Actual Damages
  - Intentional infliction of emotional distress
  - Tortious interference with contractual relationship
  - Defamation/Slander Per Se
- Punitive Damages: “willfully...evidences a reckless and wanton disregard of the plaintiff's rights”
  - Intentional infliction of emotional distress
  - Tortious interference with contractual relationship
  - Defamation/Slander Per Se
- Attorney's fees
  - Unfair and Deceptive Trade Practices Act



# Questions?

