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**HEALTH CARE PROVIDER
PERSPECTIVE ON FALSE CLAIMS
ACT ENFORCEMENT**

by

Thomas S. Crane

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I. CASE LAW DEVELOPMENTS

1. Background Data on Declined Cases.

- Most of the cases below are cases brought under the *qui tam* provisions of the False Claims Act (“FCA”) in which the government does not intervene.
- According to J. Smith’s dissenting opinion in United States ex rel. Riley v. St. Luke’s Episcopal Hosp., 2001 U.S. App. LEXIS 10832, __ F.3d __, n.37, No. 97-20948 (5th Cir. May 25, 2001), since 1988:
 - These cases account for 78% of the cases filed;
 - These cases account for 5% of the total amounts recovered (1.47% excluding “the anomalous year of 1999), or \$211 million, compared to \$3.962 recovered where the government has intervened;
 - In these cases where the government does not intervene, only 5% have resulted in recoveries, while 74% have been lost (remaining 21% are either active, inactive, or uncertain).
 - In cases where, the government does intervene, 77% have resulted in recoveries (settlements or judgments), while 2% have been lost.

- “These figures show that the cases in which the government declines to intervene are generally meritless cases.” *Id.*
- These figures show that declined cases consume a large amount of government and industry resources with disproportionately small gains to the government treasury.
- These figures suggest that whatever the ultimate outcome of this line of cases, the government will continue to pursue significant health care cases under the FCA, with large recoveries likely to result.

2. **Vermont Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765 (2000) (“Stevens”)**.

A. **Brief Facts and Background.**

- Stevens (“relator”) brought a *qui tam* action under the FCA against the relator’s former employer, the Vermont Agency of Natural Resources (“VANR”).
- The relator claimed that the state agency had submitted false claims to the EPA in connection with various federal grant programs by overstating the amount of time spent on projects by the agency’s employees. As a result, the agency received more grant money than it was entitled to.
- The government declined to intervene in this case.
- VANR defended on grounds:
 - A state (or state agency) is not a “person” subject to liability under the FCA, and
 - a *qui tam* action in federal court against a state is barred by the 11th Amendment.
- Second Circuit affirmed the district court’s denial of VANR’s motion to dismiss.

- Certiorari granted on these two issues. Additionally, within days of Riley I 5th Cir. decision in November, 1999 (see below), the Court requested briefs regarding the issue of standing.

B. Decision.

- The Court held that a private individual has standing to bring action on behalf of the United States.
- The Court based its holding on:
 - A lengthy analysis of the history of *qui tam* statutes in our history supports the finding that *qui tam* statutes are consistent with constitutional standing principles;
 - The government’s injury in fact is enough to grant standing to the relator;
 - In effect, the FCA partially assigns the government’s damages claims to the relator.
- The term “person” in the FCA does not include states for purposes of *qui tam* liability.
 - The Court applied the longstanding interpretive presumption that “person” does not include the sovereign.
 - In addition, the 1986 amendments to the FCA’s liability provision do not suggest that “person” includes states, and the Court found additional support for its position in the current statutory scheme.
- The Court based its holding that a state is not a person under the FCA on the position that “the current version of the FCA imposes damages that are essentially punitive in nature,” and there is a presumption against imposing punitive damages against governmental entities.

- The Court made clear that it was not deciding whether an action in federal court by a relator against a state would run afoul of the Eleventh Amendment.
- The Court also made clear that it was expressing no view regarding the validity of the FCA under the Appointments Clause or Take Care Clause of Article II as those issues were not the subject of the appeal.

3. United States v. Bajakajian, 524 U.S. 321 (1998).

NOTE: This case is not a FCA case.

A. Brief Facts and Background.

- Bajakajian attempted to leave the U.S. without reporting, as required by 31 U.S.C. § 5316(a)(1)(A), that he was transporting more than \$10,000.
- A person convicted of willfully violating the reporting law must forfeit to the government any property involved in the offense, pursuant to 18 U.S.C. § 982(a)(1).
- Bajakajian and his family were waiting in the L.A. airport to fly to Italy.
- A search of the family's carry-on bags, purse and wallet found \$357,144 in cash.
- Brought on appeal from the Ninth Circuit, which determined that a forfeiture must fulfill two conditions: (1) the property forfeited must be an "instrumentality" of the crime committed, and (2) the property's value must be proportional to its owner's culpability. Specific to the facts, the Ninth Circuit determined that the \$357,144 was not an "instrumentality" of the crime of failure to report, it was unnecessary to apply the "proportionality" prong of the test, and forfeiture of any of the unreported currency was impermissible (but the court lacked jurisdiction to set forfeiture aside).

B. Decision.

- Full forfeiture of Bajakajian’s \$357,144 would violate the Excessive Fines Clause because it would be grossly disproportional to the gravity of the offense and is therefore unconstitutional. (“...the forfeiture is punitive, and the test for the excessiveness of a punitive forfeiture involves solely a proportionality determination.”)
- The money was not related to a crime or other unlawful activity, and Bajakajian was transporting the money to repay a lawful debt.
- In addition, had Bajakajian’s crime gone undetected, the government would have only been deprived of the information that \$357,144 had left the country, but not the money itself.

4. United States v. Mackby, 243 F.3d 1159 (9th Cir. 2001).

A. Brief Facts and Background.

- Mackby owned and managed a physical therapy clinic.
- He instructed the clinic’s billing services to substitute his physician father’s PIN for the PIN of the clinic’s previous owner for Part B claims.
- His instructions were to use his physician father’s PIN in billing third-party payers, including Medicare.
- The U.S. District Court for the Northern District of California found that Mackby violated the FCA and instituted a civil penalty of \$555,000 and treble damages of \$174,454.92 for Medicare overpayments.

B. Decision.

- The Ninth Circuit affirmed Mackby's violation of the FCA because he was responsible for many aspects of the clinic's business and had an obligation to be familiar with Medicare reimbursement rules for physical therapy services.
- But, the court stated that the FCA clearly has a punitive purpose: no damages to the government need to be shown and a deterrent purpose is found in the legislative history of the False Claims Act Amendments of 1986.
- Relying heavily on Bajakajian and on Stevens to a lesser extent, the court held that the FCA's statutory fines (now \$5,500 to \$11,000 per claim) and treble damages provision are not solely remedial, but have a punitive and deterrent purpose, and therefore are subject to a Constitutional Eighth Amendment Excessive Fines Clause analysis.
- The case was remanded to district court to determine whether both monetary judgments were unconstitutionally excessive.

**5. United States ex rel. Garibaldi v. Orleans Parish School Board, 244 F.3d 486
(5th Cir. 2001).**

A. Brief Facts and Background.

- Relators sued their employer, the Orleans Parish School Board, for numerous violations of the FCA.
- A jury had found that the school board had submitted more than 1500 false claims to the federal government over 11 years for total damages of \$7.6 million.

- As a result, the district court entered a treble damages judgment against the school board for approximately \$23 million, and a civil penalty of \$7.85 million (\$5,000 X No. of false claims).
- The government intervened on the appeal to defend its interpretation of the FCA.

B. Decision.

- The court held that a local government (such as the school board) is not subject to liability under the FCA and vacated the lower court’s judgment. The court relied on the Stevens holding that states are not persons for purposes of the FCA.
- The court also relied on the Supreme Court’s reasoning in Stevens that the FCA is punitive to determine that, since local governments are not subject to punitive damages, they escape FCA liability.
- In addition, punishing a local government violates public policy since it results in higher taxes to be paid by the town’s blameless citizens.

6. United States ex rel. Dunleavy v. County of Delaware, 2000 U.S. Dist. LEXIS 14980 (E.D. Pa. Oct. 12, 2000).

A. Brief Facts and Background.

- Anthony J. Dunleavy (“relator”) claimed that Delaware County (PA) (“County”) and other defendants fraudulently retained Department of Housing and Urban Development (“HUD”) funds.
- The HUD funds were given to the County for purchase of land to expand a pre-existing park.
- The County then entered into an agreement with the Pennsylvania Department of Transportation for purchase and use of the land for a new highway.

- As a result, the money from the sale of the land was put in an escrow account; if the highway was completed, the funds (plus interest) would be returned to HUD.
- However, before the highway was completed, the County used the funds for non-HUD purposes.
- The court requested the parties to submit briefs on the issue of whether the case could proceed in light of Stevens.
- The government declined to intervene in this case.
- The issue before the court was whether, absent federal intervention, an individual relator may pursue claims under the FCA against a county.

B. Decision.

- The court held that the relator's claim failed because (1) there is a presumption against imposing punitive damages against government entities, and (2) the FCA's damages have a punitive nature.
- The court summarized the holding and rationale of Stevens, including the Supreme Court's holding that states are not subject to FCA liability.
- Although Stevens involved a state, the court found the Supreme Court's reasoning applicable to the analysis of whether or not the County can be held liable for punitive damages.
- The court noted that Stevens reiterated the Supreme Court's presumption that government entities are not subject to punitive damages.

7. **United States ex rel. Riley v. St. Luke's Episcopal Hosp.,**
- 982 F.Supp. 1261 (S.D. Tex. 1997);
 - 196 F.3d 514 (5th Cir. 1999); vacated by 196 F.3d at 516;
 - 2001 U.S. App. LEXIS 10832, __ F.3d __, No. 97-20948 (5th Cir. May 25, 2001).

A. **Brief Facts and Background.**

- Riley was employed as a hospital nurse; she believed that the defendant-hospitals were submitting false claims, and filed suit as a *qui tam* relator, and the government declined to intervene.
- One of the hospital defendants, the University of Texas Health Science Center, defended on the grounds of sovereign immunity under the XI Amendment.
- The court also asked for briefing on the constitutional issue of Article III Standing.

B.1 **District Court Decision.**

- The court determined that the Constitution does not grant standing to a relator who has not suffered a cognizable injury, consistent with the principles of separation of powers. The court found no merit in the theory of Congress assigning a future interest in a lawsuit to unnamed future plaintiffs.
- Essentially, Riley suffered no injury-in-fact as required by Article III's standing requirements.

B.2 Fifth Circuit Three Judge Panel Decision (“Riley I”). (196 F.3d 514 (5th Cir. 1999); vacated by 196 F.3d at 516.)

- On appeal, defendants also argued, *inter alia*, that in cases where the government decides not to intervene, the *qui tam* provisions of the FCA violate the Constitution’s Article II Take Care Clause and the doctrine of separation of powers.
- Based on a prior 5th Cir. decision, the court found standing.
- This part of the decision was the subject of J. DeMoss’s concurring opinion, in which he voted to uphold the District Court’s holding that Riley lacked standing.
- In a lengthy opinion, a divided panel of the court held that the FCA violated the separation of powers doctrine as found in the Take Care Clause, creating a split in the circuits on this issue.
- Rehearing en banc granted November 15, 1999. See 196 F.3d at 561 (5th Cir. 1999).

B.3 Fifth Circuit En Banc Decision (“Riley II”). (2001 U.S. App. LEXIS 10832, __ F.3d __, No. 97-20948 (5th Cir. May 25, 2001)).

- The government intervened for the purposes of arguing in defense of the constitutionality of the FCA.
- Eight *amici* briefs were filed.
- In an 11-2 decision, the court upheld the constitutionality of the FCA under doctrine of separation of powers under the Take Care and Appointment Clauses of Article II.
- Take Care Clause -- majority opinion:
 - “[W]e are persuaded that it is logically inescapable that the same history that was conclusive on the Article III [standing] question in Stevens with respect to *qui*

tam lawsuits initiated under the FCA is similarly conclusive with respect to the Article II [separation of powers] question concerning the statute.”

- The Take Care Clause “does not require Congress to prescribe litigation by the Executive as the *exclusive* means of enforcing federal law.” (Emphasis in original)
- “The record before us is devoid of any showing that the government’s ability to exercise its authority had been thwarted in cases where it was not an intervenor.”
- Appointments Clause -- The majority opinion dismissed this challenge briefly by finding that relators were not officers and therefore not subject to the Appointments Clause.
- The dissenting opinion fundamentally challenges the applicability of the Stevens Article III analysis to the Article II questions before the court.
 - Stevens expressly left open the Article II questions.
 - The history relied on in Stevens is unique to Article III issues, but not controlling to Article II issues: “[T]he nature of the standing inquiry dictates that special attention be paid to historical practice. Such extreme deference need not be given, by contrast, within the context of Article II challenges.”
 - The conclusion in Stevens that a relator is only a partial assignee and therefore litigating, in part, on behalf of the government supports the position that the case “must be prosecuted by an officer of the United States under the Appointments

Clause, and must be faithfully managed by the Executive under the Take Care Clause.”

- Take Care -- The dissenting opinion:
 - “The FCA’s most severe violations of the separation of powers principles embedded in the Take Care clause include the fact that unaccountable, self-interested relators are put in charge of vindicating government rights, and that the transparency and controls of the constitutional system are not in place to influence the outcome of such litigation.”
 - The *qui tam* provisions diminish the political accountability of the Executive for enforcement, by removing the prosecutorial discretion vested in the Executive Branch, which is at the heart of the President’s power to execute the laws.
 - *Qui tam* relators aggrandize Congressional power and impermissibly undermine the Executive power “by wresting control, from the President, of the initiation and prosecution of government lawsuits.”
 - “The FCA does not provide the Executive with enough control over the relator to be able to ‘take care that the laws be faithfully executed.’”
- Appointments Clause -- dissenting opinion:
 - The majority avoids the fundamental question “whether non-officers may prosecute claims owned by the United States.”

- The Appointments Clause is violated because it protects against power being granted improperly.

II. STRUCTURAL PROBLEMS WITH THE FALSE CLAIMS ACT

1. Statutory Penalty Multiplier.

- Under the FCA, the government can recover \$5,500 to \$11,000 per claim.
- Penalties are tied to the number of claims filed.
- Providers that file numerous claims, for example clinical laboratories, are at risk for substantially greater fines than providers filing fewer claims.
- A fair enforcement statute should punish similar conduct similarly.
- Under the FCA, however, two providers that engage in the exact same type of billing problem with the same degree of “intent” characterizing their wrongdoing, and with the same actual damages to the government can be liable for dramatically different amounts merely because of the number of claims that were filed.

2. Is a Voluntary Disclosure a Public Disclosure?

- The FCA prohibits relators from filing actions that have already been publicly disclosed under certain circumstances unless the whistleblower is the original source.
- Although the FCA contains significant incentives for providers to voluntarily disclose wrongdoing, such a disclosure to the government does not appear to be deemed a public disclosure that would thereby require the relator to be the original source, even though one recent non-health care case from the 7th Circuit Court of Appeals suggests that a voluntary disclosure may in fact trigger this jurisdictional limitation.

- Consequently, in general, an employee could learn that his/her employer has conducted an internal investigation and voluntarily disclosed the results of the investigation to the government, and then file a FCA claim based on the internal investigation without providing the government with any new evidence.

3. Lack of Incentives for Compliance Programs.

- The FCA provides no official cognizance for corporate compliance programs, meaning that a provider that adheres in good faith to a *bona fide* compliance program does not escape FCA liability.
- A provider must first be found guilty and subject to the federal sentencing guidelines before formal cognizance is given to its implementation of an effective corporate compliance program.
- Although the federal sentencing guidelines give such formal recognition, the FCA does not, even though some US Attorneys will take the existence of a compliance program into account in determining intent as a matter of prosecutorial discretion.
- Unfortunately however, other US Attorneys are not so inclined.

4. Reliance on Government Advice Should be a Defense.

- A provider that seeks in good faith the advice of a fiscal intermediary and relies on such advice may still incur FCA liability if – as is unfortunately all too often the case – the fiscal intermediary is wrong.
- The FCA should properly be reserved for conduct where the government can prove that a provider has actual knowledge of the falsity of a claim or acts in reckless disregard.

- The line between negligence and recklessness is not clear, and it is not uncommon for providers who are negligent or act in good faith to pay exorbitant settlements or, in some cases, to be found liable.

5. Wrongdoing Relators Can Recover.

- Here's how recovery works for wrongdoing relators.
- The general range of recovery for relators is from 15% to 25% if the government intervenes.
- Under special limited circumstances a court may award no more than 10%, generally where the relator's suit is based on publicly disclosed information.
- Where a relator plans or initiates a scheme that results in a violation of the FCA, such conduct is not included in the listed conduct where recovery is limited to no more than 10%.
- Rather, another paragraph of the FCA states merely that a court may "reduce the relator's proceeds" if it finds he/she initiated or planned the violation. 31 U.S.C. § 3730(d)(3).
- However, if and only if the relator is convicted, can the relator be barred from recovery.
- The construction of these provisions leads to the conclusion that a wrongdoing relator may still be eligible to recover in the range of 15% to 25% although a court has the discretion to award an amount lower than 15%.

6. Parasitic Relators Can Recover.

- Congress's general reasons for encouraging whistleblower actions are understandable in many respects and a fact of life even though providers may dislike it.

- The problem, however, is that virtually anyone can be a whistleblower under the FCA.
- One notable exception is that the FCA prohibits relators from filing actions that have already been publicly disclosed under certain circumstances unless the whistleblower is the original source.
- Because of the narrowness in which these exceptions and limitations are drawn, there are certain situations where relators can file claims without providing any new or meaningful information to the government. In short, they are known as parasitic relators.
- One example illustrates some of the bizarre results.
 - The Supreme Court in Hughes Aircraft v. United States *ex rel.* Schumer, 520 U.S. 939 (1997); decided on other grounds, was asked to review a split in the Circuit Courts of Appeal of decisions of the questions whether a government auditor uncovering misconduct as part of his/her official duties can turn around and file a FCA action and recover a bounty.
 - This is such an objectionable situation that even DoJ favors amending the FCA here – the only situation that DoJ has gone on record as favoring FCA reform.

III. RECENT SETTLEMENTS

1. HCA - The Healthcare Company.

- HCA, the largest U.S. for-profit hospital chain, may enter into the largest health care fraud agreement. Announced December 14, 2000, the settlement may cost more than \$840 million in criminal fines, civil penalties and damages — \$745 million in tentative civil fines and more than \$95 million in criminal fines.
- Conduct at Issue: HCA or subsidiaries will pay civil fines for various anti-kickback statute and false claims violations, including:
 - outpatient laboratory billing practices,
 - upcoding,
 - maintaining reserve cost reports,
 - payments for non-reimbursable marketing and advertising costs,
 - conspiracy to defraud the government in the purchase and operation of home health agencies,
 - fraudulent billing for management and personnel costs,
 - payments for non-qualified home health patients.
- The case is, in fact, multiple cases:
 - brought by numerous *qui tam* relators, including:
 - James Thompson, M.D. (Texas physician)
 - James Alderson (CFO, North Valley Hospital, Whitefish, MT; managed by Quorum Health Group)
 - John Schilling (Florida Columbia hospital official, brought action against Columbia and five Florida Columbia hospitals)

- Donald McLendon (Manager, Kimberly Home Health Care, Inc., subsidiary of Olsten Corp., (sold its home health care assets, retained exclusive management contracts); brought action Kimberly and Columbia
- several criminal cases against hospital officials
- related settlement cases with:
 - Quorum -- \$18 million civil settlement
 - Kimberly -- \$61 million in civil and criminal fines, including plea agreement
- Criminal Fines (\$95 million) and plea agreements involving two of Columbia's subsidiaries: Columbia Homecare Group, Inc. and Columbia Management, Inc.
 - United States District Court for the Middle District of Florida (Tampa) Case No. 8:01CR3-T-24 TGW. Transferred from the United States District Court for the Southern District of Florida;
 - United States District Court for the Middle District of Florida (Tampa) Case No. 8:00CR465-T-23 MAP. Transferred from the United States District Court for the Northern District of Georgia;
 - United States District Court for the Middle District of Florida (Tampa) Case No. 8:00CR461-T-24 MAP. Transferred from the United States District Court for the Middle District of Tennessee;
 - United States District Court for the Middle District of Florida (Tampa) Case No. 8:01CR12-T-24 MAP; and
 - United States District Court for the Middle District of Florida (Tampa) Case No. 8:01CR13-T-24 MAP. Transferred from the United States District Court for the Western District of Texas.

- Pending Allegations: HCA unlawfully charged for the cost of running its hospitals on cost reports, maintaining reserve cost reports, and paid kickbacks to physicians for referrals of Medicare and Medicaid patients.
- Post Columbia: Fiscal Intermediaries are asking hospitals to sign Reserve Cost Report certifications asking hospitals to acknowledge:
 - “Do you have knowledge of any questionable issues which should be disclosed to the intermediary?”
 - “Do you prepare a reserve cost report or an accounting journal entry which discloses potential cost report exposure?”
 - “Are you aware of any other circumstance which would prevent you from submitting an open, accurate and honest cost report?”

2. Fresenius & its U.S. Subsidiary: Fresenius Medical Care North America.

- Integrated dialysis company entered into a global criminal/civil settlement
 - Criminal plea agreement for its Medical Products and Laboratory Divisions
 - \$485 million in civil and criminal (\$101 million) fines
 - Case was brought by several whistleblowers under the FCA
- Their combined share was \$65.8 million
- One of the whistleblowers was Ven-A-Care of the Florida Keys, Inc., a Florida home health company
 - Ven-A-Care allegations netted them \$40.3 million
 - Ven-A-Care is no longer a home health provider
 - Ven-A-Care is now in the business of bringing other *qui tam* cases

- Individuals held accountable
 - December 1998, David Weber, former Vice President of Sales, pled guilty to criminal conspiracy -- offering and paying kickbacks and rebates to dialysis clinics
 - February 1999, K. Glenn Shaw, former President, indicted for criminal conspiracy, based on information Weber provided;
 - lavish holiday parties
 - Bear hunting trip to Canada
 - June 1999, Margaret Telgheder, former Business Manager for Clinical Lab Division (“LifeChem”), pled guilty to conspiracy to defraud

3. Bayer Corporation.

- In 1995, based on information learned in the Fresenius case, Ven-A-Care brought complaints against approximately 20 pharmaceutical companies under FCABasic allegations related to:
 - Injectables
 - Infusibles
 - Inhalants
 - Solutions that go with the above
 - Other
- Basic allegations:
 - Falsely reporting Average Wholesale Price
 - Marketing the spread --illegal inducements

- Mis-reporting wholesale and distributor price information by not reporting sales to wholesalers, leading to inflated WAC
- Mis-reporting of acquisition cost by not reporting actual net costs
- Underpaying Medicaid Rebates by mis-reporting best price and not factoring price concessions:
 - Off-invoice discounts
 - Rebates
 - Short-dated goods discounts
 - Unrestricted educational grants
 - Free goodsBayer Settlement -- January 2001
 - Civil
 - No admission of liability
 - Medicaid only allegations, but settlement covers Medicare
 - \$14 million, believed to be based only on single damages
 - Significant Corporate Integrity Agreement with many important going-forward changes in practices
 - Reported to be industry standard settlement, but with others not likely to settle for single damages

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