The Affordable Care Act & Qui Tam Whistleblower Claims

Controlling healthcare costs is essential to the economic security of the United States. Total **healthcare spending in the U.S.**, already an astronomical $3 trillion dollars in 2013, is expected to grow almost 6% annually through 2022.[1] Spiraling healthcare costs is an obvious problem on many levels, including the fact that, through Medicare, the federal government is the single largest purchaser of healthcare in our third party payer system. Total Medicare spending is expected to increase from $523 billion in 2010 to $932 billion by 2020.[2]

The Patient Protection and Affordable Care Act, commonly known as the Affordable Care Act (ACA) or "Obamacare," has frequently been in the spotlight for website issues and intense political debate over the law. However, a less publicized – but critical – aspect of the ACA is its intended role of curbing the rise in our nation's healthcare costs.[3]

There are several ways the ACA is designed to control healthcare costs including, for example, excise taxes on Cadillac health plans, provider incentives to control costs, promotion of prevention and wellness, and many others.[4] But one of the more significant and effective means by which the ACA targets reduction in government healthcare expenditures is enhancement of the **False Claims Act** (FCA) and its mechanisms for financial recoveries based on fraud and abuse. The FCA[5] imposes civil liability for fraud in government programs including Medicare and Medicaid, and allows private citizens to file "**qui tam**" or **whistleblower lawsuits** on behalf of the government. From 1987 through 2013, the U.S. government and taxpayers recovered over $24 billion from FCA actions.[6] Last year alone, the government recovered over $3.8 billion in FCA cases, $2.6 billion coming from **healthcare fraud cases**.[7]

Over the years, the FCA has been amended to implement policy initiatives. In 1986, due to concerns about the rising national debt the FCA was strengthened to curb government spending caused by waste and fraud. At that time, the law was principally used against defense contractors who defrauded the government. By the late 1990s, however, the FCA's focus had become, and now remains, healthcare fraud.

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[1] https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsProjected.html
[2] https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/ReportsTrustFunds/downloads/tr2010.pdf
[3] http://obamacarefacts.com/obamacare-facts.php
[4] *See "How does the ACA control health care costs?* Health Policy Snapshot," Robert Wood Johnson Foundation (July 2011) http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2011/rwjf71451
[5] 31 U.S.C. §§ 3729-3733, also called the "Lincoln Law."
[6] http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf
[7] http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html

The FCA prohibits the following acts by healthcare providers, facilities, drug manufacturers and others who provide goods or services paid for by the federal government:

1. Presenting a false claim for payment;
2. Making a false statement to support a false claim;
3. Conspiring to violate the FCA;
4. False certification of a document supporting a claim for payment;
5. Certifying receipt of property on a document without completely knowing the information is true;
6. Knowingly buying government property from an unauthorized seller; and
7. Knowingly making a false record to avoid an obligation to the Government.

The FCA's success is due largely to *qui tam* provisions[8] that allow "relators" or whistleblowers (persons with knowledge or evidence of fraud in federal contracts and programs) to bring an action in court on behalf of the government. In a ***qui tam* whistleblower case**, the federal government has the right to intervene or join the action; if it declines, the relator may proceed on her own. Whistleblowers, who typically come forward at great personal risk and expense, are financially incentivized to report fraud and abuse. In a successful *qui tam* case, the whistleblower may recover from 15 to 30% of the government's recovery. Last year, FCA whistleblowers received incentive awards totaling $345 million.[9]

Because of the success of the FCA program (attributable largely to financial incentives for whistleblowers), under the ACA lawmakers relaxed certain procedural barriers to bringing *qui tam* claims. The ACA does so by softening rules regarding a legal doctrine known as the **public disclosure bar**. Formerly, **FCA whistleblower lawsuits** could be barred if they were based on information disclosed publicly through legal or governmental proceedings, news releases or otherwise. FCA defendants often use the public disclosure bar as a defense and ground for dismissal of a whistleblower case. Under the ACA amendments, however, the federal government now essentially has veto power over this defense. As amended, the FCA now provides "the court shall dismiss an action *unless opposed by the Government*, if substantially the same allegations or transaction alleged in the action or claim were publicly disclosed."[10]

The ACA further amends the FCA's public disclosure bar by expanding the definition of the "original source" exception. A whistleblower can defeat the public disclosure bar if he is the original source of the disclosure. Before the ACA, to be considered an original source the whistleblower had to have "direct and independent knowledge of the information on which the allegations are based." However, the ACA liberalized the original source definition. Now, a

[8] "Qui tam" is from the Latin phrase "*qui tam pro domino rege quam pro sic ipso in hoc parte sequitur*," which translated means "he who as well for the king as for himself sues in this matter."
[9] http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html
[10] 31 U.S.C. 3730(e)(4)(A)(emphasis added).

person with "knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions" may be considered an original source.[11]

These changes to the FCA were clearly designed to make it easier for whistleblowers to bring ***qui tam* claims**. It is too early to know the effectiveness of these changes, as few courts have yet to consider the revised provisions. However, it is clear the U.S. government intends to continue the expansion of **FCA whistleblower lawsuits and recoveries** as one means of controlling healthcare costs.

Disclaimer: thoughts shared here do not constitute legal advice. Please consult with an attorney to discuss your legal issue.

About the authors
Jay Brownstein and Kevin Little are experienced litigators who often represent parties in complex disputes pending in state and federal courts and before administrative agencies, including whistleblower matters. To learn about the authors, please visit their websites at www.bnlawatlanta.com and www.ksllawfirm.com, or email them at jdb@bnlawga.com or kevin@ksllawfirm.com.

[11] 31 U.S.C. 3730(e)(4)(B).