

1997

# The Government's Use of the Civil False Claims Act to Enforce Standards of Quality of Care: Integrity or the Heavy Hand of the 800-Pound Gorilla

Michael M. Mustokoff  
*Duane, Morris & Heckscher*

Jody A. Werner  
*Duane, Morris & Heckscher*

Michael S. Yecies  
*Duane, Morris & Heckscher*

Follow this and additional works at: <http://lawcommons.luc.edu/annals>

 Part of the [Health Law and Policy Commons](#)

---

### Recommended Citation

Michael M. Mustokoff, Jody A. Werner & Michael S. Yecies *The Government's Use of the Civil False Claims Act to Enforce Standards of Quality of Care: Integrity or the Heavy Hand of the 800-Pound Gorilla*, 6 *Annals Health L.* 137 (1997).  
Available at: <http://lawcommons.luc.edu/annals/vol6/iss1/7>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in *Annals of Health Law* by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

# The Government's Use of the Civil False Claims Act to Enforce Standards of Quality of Care: Ingenuity or the Heavy Hand of the 800-Pound Gorilla\*

Michael M. Mustokoff\*\*  
Jody A. Werner  
Michael S. Yecies

## INTRODUCTION

On February 21, 1996, the federal government filed a civil false claims complaint against the Tucker House II, Inc. nursing home and its management company, GMS Management-Tucker, Inc.<sup>1</sup> Depending upon one's point of view, the complaint was either an ingenious exercise of federal power or another example of the heavy hand of the 800-pound gorilla. The prosecutor's theory was novel. It invoked the False Claims Act ("FCA")<sup>2</sup> in combination with the Nursing Home Reform Act<sup>3</sup> to allege that billing the government for purportedly inadequate care was the equivalent of recklessly submitting a false claim. Within days after the plaintiff filed the complaint, the parties settled. The management company paid a \$575,000 fine to the

---

\* This article reflects the views of the authors, who represented Tucker House II in the case of *United States v. GMS Management-Tucker, Inc.*

\*\* Michael M. Mustokoff is the Chairman of the Special Litigation department at Duane, Morris & Heckscher in Philadelphia, Pennsylvania. He received his Bachelor of Arts degree from Albright College and his Juris Doctor degree from the University of Pennsylvania Law School. Mr. Mustokoff was an Assistant Philadelphia District Attorney and served as Chief of that office's Economic Crime Unit. Mr. Mustokoff has written extensively on a wide variety of legal issues, including federal fraud and abuse enforcement and false claims actions.

Ms. Werner and Mr. Yecies are associates at Duane, Morris & Heckscher. Ms. Werner received her Bachelor of Arts from Cornell University in 1988 and her Juris Doctor from Columbia University School of Law in 1991. Mr. Yecies received his Bachelor of Arts from the University of Pennsylvania in 1989 and his Juris Doctor from the University of San Francisco Law School in 1994.

1. *United States v. GMS Management-Tucker, Inc.*, No. 96-1271 (E.D. Pa. 1996).

2. 31 U.S.C. §§ 3729 to 3732 (1994). For a detailed explanation of the FCA, see Robert Salcido, *Mixing Oil and Water: The Government's Mistaken Use of the Medicare Anti-Kickback Statute in False Claims Act Prosecutions*, 6 ANNALS HEALTH L. 105 (1997); and David J. Ryan, *The False Claims Act: An Old Weapon with New Firepower Is Aimed at Health Care Fraud*, 4 ANNALS HEALTH L. 127 (1995).

3. 42 U.S.C. § 1395i-3 (1994).

government; the nursing home owners, which consisted of the board of trustees of the nonprofit home, paid \$25,000. Both defendants signed consent decrees agreeing to submit to highly supervised compliance programs. While one may applaud the ultimate result achieved by the government, its legal means and theory invite closer inspection.

The FCA dates back to the Civil War and the need to protect the Union Army from unscrupulous government contractors, who cheated the government: "For sugar it [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; [and] for sound horses and mules, spavined beasts and dying donkeys; . . . The manufacturers of Colt's revolvers had been receiving \$25 for a revolver that would ordinarily sell in the open market for \$14.50."<sup>4</sup> It imposes liability on one who submits a false claim to the federal government *knowing* that the claim is false or fraudulent.<sup>5</sup> Under the civil provisions of the FCA, "knowing" requires at least deliberate ignorance or reckless disregard of the truth or falsity of the information. No proof of specific intent to defraud is required.<sup>6</sup> The government can recover three times the amount of the actual damages suffered by the government, a penalty of \$5,000 to \$10,000 per false statement, and costs.<sup>7</sup> A distinctive and historical use of the FCA is in a *qui tam* action, where an ordinary citizen, called the relator, brings the defendant to court on behalf of the government, allowing the citizen to personally recoup some of the monies recovered from the defendant.<sup>8</sup> The government can elect to intervene, which aids the relator in the prosecution but reduces the relator's percentage take.

More recently, the FCA has been used to punish double billings and invoices for unprovided services.<sup>9</sup> But recently, the government took a new approach.<sup>10</sup> The novelty of the government's approach is best seen from the perspective of its target

---

4. United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 609 & n.2 (N.D. Ca. 1989) (citations omitted).

5. 31 U.S.C. § 3729(a) (1994).

6. 31 U.S.C. § 3729(b) (1994). See Salcido, *supra* note 2, at 118-24 for a detailed explanation of the intent standard of the FCA.

7. 31 U.S.C. § 3729(a).

8. See Ryan, *supra* note 2, at 127-30, for an interesting history of *qui tam* actions brought for violations of the FCA.

9. See, e.g., United States *ex rel.* Stephens v. Prabhu, 163 F.R.D. 340 (D. Nev. 1995).

10. See Salcido, *supra* note 2, at 124-34 for an argument against the government's use of the FCA for violations of the Anti-Kickback Statute.

defendants, Tucker House II, Inc., the owner and licensee of the nursing home, named Tucker House, and its management company, GMS Management-Tucker, Inc.

Tucker House II, Inc. is a community-run organization. The nursing home, called Tucker House, had earned a commendable reputation as an effort by inner-city residents to provide quality long-term care to an elderly population with nowhere else to go. Tucker House II, Inc. took over ownership of the nursing home from the community, which had filed for bankruptcy. It contracted with Geriatric and Medical Companies ("GeriMed") to run its home after all other efforts to save the home had failed. GMS Management was a subsidiary of GeriMed. Thus, GMS Management submitted the bills for payment to the federal government. Tucker House II and its board of trustees neither submitted bills to the government nor had any role in the billing process. As a state licensee, however, it did have a responsibility to comply with all state and federal rules, laws, and regulations governing the operation of its home.

The government's case against both Tucker House II and GMS was based upon allegations of inadequate care rendered to several nursing home residents over a fifteen-month period, during which the home was under the management of Tucker House II. The residents were of an advanced age and suffered from complications common to advanced diabetes. GeriMed had a history of prior criminal prosecutions based on illegal, reckless indifference in the care of nursing home residents that predated Tucker House II's acquisition of the home.

The government's use of the FCA under these circumstances raised several issues. First, is there any legal basis for the government to file a civil false claims action against the licensed owner, an entity that neither bills nor profits from the billings submitted by a third party? Second, is there a legal basis to attribute responsibility under the FCA for the rendering of services that, however negligent, had not been previously determined to be either deliberately reckless or per se illegal? Put another way, does every successful civil malpractice case against a Medicare/Medicaid provider carry with it the seeds of a civil false claims prosecution? Third, with other adequate remedies under state and federal law sufficient to meet the problems of inadequate care, why resort to the FCA?

## I. TUCKER HOUSE II: A PRINCIPAL RATHER THAN AN ACTOR

The Tucker House II board of trustees did not and could not know that its agent, GeriMed, was submitting false claims as it, the passive principal, did not participate in the billing practice. However, Tucker House II received a portion of the reimbursements generated by its management company's billings to the government. Although knowledge of wrongdoing is a necessary element of a claim under the FCA, the government maintained that the agent's knowledge can be imputed to the principal even where the agent's interests in the wrongdoing are adverse to those of the principal.

General rules of agency law impose liability on principals for the misconduct of their agents who act with their apparent authority.<sup>11</sup> However, there is a split of authority as to whether a principal is liable under a statute for the fraud of an agent who acts solely for self-benefit, the so-called "rogue employee."

In *United States v. O'Connell*,<sup>12</sup> the First Circuit Court of Appeals held that a corporation was liable under the FCA for the fraud of its agent, who had acted with apparent authority. The court acknowledged that the corporation had received no benefit from the agent's fraud. However, it held that the correct standard to determine vicarious liability in FCA actions was that of apparent authority and not corporate benefit.<sup>13</sup> The court noted that nothing in the language of the FCA proscribes vicarious liability, and the purposes of the FCA—to make the government whole and to deter fraud against the government—supported the imposition of liability upon principals for the fraud of their agents.<sup>14</sup> By employing the broad, general purposes of the FCA, the wide web spun by the government could ensnare a broad range of individuals and entities with a relation to the claim for payment.

There is, however, a contrary line of cases, primarily in the Fifth Circuit. In *United States v. Ridglea State Bank*,<sup>15</sup> the Fifth

---

11. *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 565 (1982).

12. 890 F.2d 563, 568-69 (1st Cir. 1989).

13. *Id.*

14. *Id.* at 568.

15. 357 F.2d 495, 500 (5th Cir. 1966). The United States Supreme Court rejected a similar argument, citing *Ridglea* as an example of a court refusing to apply apparent authority. Defendant argued unsuccessfully that given the punitive nature of treble damages for an antitrust violation, traditions of agency law prohibit the use of appar-

Circuit Court of Appeals held that a violation of the FCA by an agent could not be imputed to a corporation, so as to render the corporation vicariously liable, where the agent had not acted with the purpose of benefiting the corporation, but rather with an eye solely for personal profit.

Unfortunately for Tucker House II, the FCA debate as to whether a corporate benefit is necessary to impose false claims liability was academic, as it had received a benefit through the reimbursements. The government's theory was that liability under the FCA was appropriate because of the owner's responsibility as a licensee to provide safe and healthful living conditions for its nursing home residents. This is true under both federal and state laws and regulations. The point, however, is that it is these laws and sharply focused regulations dealing with everything from diet to therapy that should be the framework for enforcement, not the FCA. Mere negligence by a licensee in its failure to adhere to safety or other regulated standards of care should not be bootstrapped into "knowing and willful" conduct, required under the FCA.

Intuitively, there seems to be something particularly unfair about a nonprofit, community-based board of trustees being prosecuted under the FCA for the reckless submission of bills by an independent management company. This is especially true where the board exercises no authority other than the right to hire and fire. The unfairness is magnified by the board's lack of technical expertise required for any kind of intelligent judgment of the quality of care being rendered by its agent. Unfortunately for the board of trustees, however, instinctual notions of fairness do not carry the day. Using the same logic that imposed legal responsibility on the *Oliver Twist* character Mr. Bumble for his wife's misconduct, the law appears to impose liability on the unwitting nonprofit organization.

## II. ALLEGEDLY NEGLIGENT MEDICAL CARE: A BASIS FOR A FALSE CLAIM?

In this case, the government used the FCA to remedy allegedly substandard care. Quality of care, however, is a subjective issue. The government based its action on a Pennsylvania De-

---

ent authority to impose these damages upon a principal for the conduct of the agent. *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 565 (1982) (citing cases holding corporations liable for punitive damages for the conduct of their agents who were discharging their corporate duties).

partment of Health survey that found deficiencies in care and ordered the transfer of several residents to area hospitals. Although the government deemed the care at issue to be inadequate, there was no *adjudicatory finding* that the quality of that care was substandard. There had been surveys indicating inadequacies in the care of several individuals who had been repeatedly hospitalized, but the board had been assured by its management company that the problem was one of medical complications and not disregard. So the question at hand is whether negligent care can serve as a basis of an FCA action.<sup>16</sup>

It was Tucker House II's contention that it does not logically follow that inadequate care, whether negligent or even reckless, could serve as valid grounds for an FCA cause of action. No previous finding or adjudication that evidenced reckless disregard or per se illegality existed in this case. Under these circumstances, there is no legal basis to expand the FCA to include violations of *subjective* standard of care requirements.

Nor does it follow that a *successful* malpractice case could be the basis for a False Claims Act prosecution. The elements of a common civil action and the quasi-criminal FCA are not identical. First, the crux of a medical malpractice case is subjective: Was the provider's treatment reasonable when viewed against the prevailing standard of medical care? Failure to meet this medical standard of care is not the equivalent of a reckless evaluation of that care or even deliberate ignorance in submitting a bill for the care provided.

The mere specter of allowing health care quality issues to form the basis of an FCA prosecution is a federal court's nightmare. First, the use of *qui tam* suits could become the first

---

16. It is the grasp rather than the reach of the FCA, however, that is the subject of real debate. The federal courts are split on the scope of the applicability of the FCA where the underlying question is one of Medicare fraud and abuse. (Federal law prohibits the offer of financial inducements to physicians in exchange for patient referrals to institutions receiving funds from Medicare or Medicaid. 42 U.S.C. § 1320a-7 (1994).) For a detailed explanation, see Salcido, *supra* note 2. Recently, in *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 938 F. Supp. 399, 406-07 (S.D. Tex. 1996), a district court in Texas rejected the government's theory that regulatory violations, without more, can suffice as a basis for an FCA action. In dismissing the government's complaint, the court reasoned that neither violations of the Anti-Kickback Statute nor violations of the Stark provisions, if proven, would support a claim under the FCA. Conversely, in a similar action, a district court in Tennessee noted in *United States ex rel. Pogue v. American Healthcorp, Inc.*, 914 F. Supp. 1507, 1509 (M.D. Tenn. 1996), that "[a] recent trend of cases appear to support [plaintiff's] proposition that a violation of Medicare anti-kickback and self-referral laws also constitutes a violation of the False Claims Act."

recourse of any Medicare recipient who claims to be the victim of questionable treatment. This will shift medical malpractice cases based on negligence, typically handled by state courts, into the federal court system for no compelling reason. Second, the true purpose of a qui tam action, to save the government from the fraudulent actions of its contractors, will be affected by various judicial rulings interpreting the FCA in an arena in which it was never intended to be found.

### III. FITTING A SQUARE PEG IN A ROUND HOLE: WHY NOT USE THE SQUARE HOLE?

The *Tucker House II* case presents an example of the FCA being stretched beyond recognition to redress the evils of inadequate care. While the goal is laudable, the means provided by the Act are both ill suited and unnecessary to deal with issues of quality of care. Various civil and criminal statutes, both state and federal, as well as the common law are available to accomplish the goals of quality of care without violating the laws of unintended consequences.

First, the federal Social Security Act ("SSA")<sup>17</sup> carries both civil and criminal penalties that can be imposed whenever a medical provider commits any number of violations, including improperly filing a claim for reimbursement, receiving an illegal bribe or kickback, or even knowingly making a false statement with respect to the condition or operation of a specified health care facility. The SSA also allows the government to exclude from Medicare and state health care programs a health care provider who violates the Act. Mandatory exclusion from these programs occurs when the provider has been convicted of a program-related crime or when the provider "has been convicted, under Federal or State law, of a criminal offense relating to neglect or abuse of patients in connection with the delivery of a health care item or service."<sup>18</sup> Permissive exclusion can occur for various offenses, including the conviction of a provider for use of a controlled substance, the revocation of a provider's professional license, or the conviction of a provider "under Federal or State law, in connection with the delivery of a health care

---

17. 42 U.S.C. §§ 301 to 1397f (1994).

18. 42 U.S.C. § 1320a-7(a)(2). Any practitioner convicted of a crime concerning the delivery of Medicare or Medicaid services or the neglect or abuse of patients must be excluded from participation in Medicare and other governmental health care programs for at least five years.

item or service . . . of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct."<sup>19</sup> The FCA should not be used as a tool to deal with inadequate care problems when the Social Security Act specifically addresses those concerns and provides a variety of civil and criminal remedies.

Second, existing state law addresses concerns of inadequate care. For example, in Pennsylvania, the state can revoke a nursing home's license because of its gross incompetence, negligence, or misconduct in operating a facility as well as for its mistreatment of residents.<sup>20</sup> Similarly, a provider's license to run a nursing home in Pennsylvania can also be suspended and the provider can be placed on probationary status if it fails to comply with any of the care and treatment standards enacted by state departments and agencies.<sup>21</sup> The threat of the loss of one's license should motivate an extended care facility to provide quality care far more than the monetary penalties available under the FCA.

Of course, a patient's or resident's recourse for inadequate care is a state tort claim for medical malpractice, battery, or, if relevant, fraud. The purpose of the tort system is to correct negligent behavior and compensate the victim. By correcting negligent behavior to assure that care at the requisite standard is provided, the court is enforcing quality care on a case-by-case basis.

Finally, a criminal prosecution is the appropriate recourse in cases where a health care provider's care is truly egregious. The criminal system is equipped to prosecute providers who mistreat patients through crimes such as neglect, assault, battery, and reckless endangerment.

There are only three perceived advantages to using the FCA blunderbuss: treble damages, an open door to civilian relators under the Act's private cause of action provisions, and the availability of the federal courts for what is an otherwise state court action. The downside, however, is significant. This novel but questionable theory is likely to encourage relators who lack any objective standard as to what meets the two-pronged test identi-

---

19. 42 U.S.C. § 1320a-7(b)(1). The Secretary of Health and Human Services may exclude a practitioner from participation in the Medicare and Medicaid programs if convicted of one or more of the crimes enumerated in this statute.

20. 62 Pa. Cons. Stat. Ann. § 1026 (1996).

21. *Id.*

fyng whether the targeted care is so substandard as to make the submission of a bill for treatment a knowing submission of a false claim.

### CONCLUSION

There is no doubt that the quality of care given to Medicare/Medicaid recipients must be vigorously protected. That is not the issue presented by the government's use of the FCA in the *Tucker House II* case. The question is whether the exploding canister of a fraud statute should be the chosen weapon. State and federal officials, as well as those damaged, have a full arsenal available to them, should they choose to use it. There is no need to resort to the statutory equivalent of a Saturday night special available to any gunslinger able to spell "qui tam."