

Holding Rogue Employees Accountable Under The FCA

Law360, New York (November 03, 2011, 1:29 PM ET) -- Corporate defendants in False Claims Act cases are often held responsible for submitting false claims, when in fact a rogue employee caused the submission of those claims by his or her employer. For example, companies with a decentralized sales force often rely on their sales representatives and territory managers to submit true and accurate paperwork to substantiate claims ultimately submitted by the company.

Where compensation is largely based on commission, field personnel may be incentivized to use false or falsely procured documents to support claims they tender to headquarters to boost sales revenue and thus, their compensation.

Though companies typically train employees as part of robust compliance programs, even the most diligent supervision may not catch an employee determined to break the law. Given their relatively shallow pockets, the government may never seek to hold these individuals responsible. FCA defendants, however, have several options for holding the most culpable parties accountable.

Counterclaims Against Rogue Relators, Employees and Other Wrongdoers

Since the U.S. Supreme Court decided *United States v. Park*, (421 U.S. 658 (1975)) in 1975, it is challenging for a corporate FCA defendant or a responsible corporate officer to defend a false claims allegation by claiming ignorance of the activities of corrupt field personnel. It certainly is a discretionary factor a prosecutor will consider when deciding whether to pursue a case, but there are no guarantees the prosecutor will decline the matter for that reason.

However, given the incentives provided by the FCA and the Dodd-Frank whistleblower regulations, employees in the hot seat are increasingly encouraged to go on the offensive and sue their employer for submitting false claims to which they contributed, while invoking the protections afforded by these statutes' anti-retaliation provisions. In these instances, courts have approved counterclaims brought by defendants against rogue employees turned relators, to recover damages caused by the employees' own conduct.

In *Madden v. General Dynamics Corp.*, 4 F.3d 827, 830-31 (9th Cir. 1993), the Ninth Circuit held that while the qui tam defendants could not bring counterclaims against the relator for indemnification or contribution, they could bring claims for "independent damages."

The *Madden* court distinguished damages for indemnification or contribution, which have the effect of offsetting liability, from "independent damages" that are not dependent on a qui tam defendant's liability. *Id.*; see also *United States v. Allegheny Hospital*, 2005 (W.D. Pa. 2005) (sustaining an FCA defendant's counterclaim against the relator where defendant was not liable in an overbilling case and where the relator had deleted other, unrelated billing records).

The *Madden* court, and subsequent courts upholding similar counterclaims, have recognized that a qui tam defendant's counterclaims against a relator will often be compulsory under Rule 13 of the Federal Rules of Civil Procedure and, accordingly, a defendant must be afforded the opportunity to bring such claims within an FCA suit.

Thus, the *Madden* court and subsequent courts, see e.g., *Burch ex rel. U.S. v. Piqua Engineering Inc.*, 145 F.R.D. 452 (S.D. Ohio 1992), have determined that if a qui tam defendant is found liable, the counterclaims can be dismissed; but, if the qui tam defendant is not found liable, the counterclaims against the relator could be addressed.

As this law has developed, there appear to be two ways an FCA defendant can bring a claim against a rogue employee: first, where the conduct at issue is distinct from the conduct underlying the FCA claim; and second, where a claim is tied to facts of an FCA claim, but the defendant is found not liable. See e.g., *United States ex rel. Miller v. Bill Harbert Intern. Constr. Inc.*, 505 F.Supp.2d 20, 27 (D. D.C. 2007).

For example, in *Burch*, the court permitted the FCA defendant's counterclaims against the relator to go forward where the defendant alleged defamation and breach of various duties based on poor work performance. Courts have also permitted counterclaims to proceed in causes of action for libel, malicious prosecution and abuse of process where relator's accusations were untrue. See, e.g., *United States ex rel. Stephens v. Prabhu*, 1994 (D. Nev. 1994) (allowing defendants' counterclaims of libel, trade libel, malicious prosecution, and abuse of process against relator to proceed to preserve the claims in case defendant found not liable).

Theft of trade secrets or theft of property are two other potential theories for such counterclaims when whistleblowers take company materials and use them, particularly for their own personal gain.

Similarly, Federal Rules of Civil Procedure 19 and 20 permit a defendant to join as a party other individuals without whom complete and fair recovery would not be possible, and who are related to the allegations at issue. Thus, where a defendant submitted claims based on false information provided by another, the rules permit the defendant to seek joinder of the responsible rogue.

Recently, the Ninth Circuit permitted claims against a third-party consultant to proceed where the corporate FCA defendant based its submissions on bad advice. In *Cell Therapeutics Inc. v. Lash Group Inc.*, 586 F.3d 1204 (9th Cir. 2010), CTI retained Documedics, a reimbursement consultant, to handle CTI's Medicare reimbursement processes.

Documedics mistakenly advised CTI that off-label uses of its drug were reimbursable, and the government and a relator subsequently sued for recovery of these off-label claims. Both CTI and Lash (Documedics' successor-in-interest) ultimately settled with the government.

While the suit was pending, CTI sued Lash in a separate case. CTI alleged that Lash's bad advice resulted in \$12.3 million in damages and a \$10.5 million payment to settle the government's claims. Relying on *Madden*, the district court dismissed the suit against Lash.

On appeal, the Ninth Circuit ruled CTI had alleged four types of damages caused by Lash: (1) investigation, litigation and settlement expenses; (2) lost opportunities; (3) damages to reputation; and (4) increased cost of capital. The Ninth Circuit concluded that, "although these claims may follow from the alleged bad advice, only the first is arguably a claim for indemnification."

The Ninth Circuit remanded the case to the district court to determine whether the claims were independent and, as to the third-party claims that were not independent, how to proceed in light of its holding that the settlement agreement did not constitute a finding of liability under the FCA.

Of course, entities need to take care that in pursuing appropriate actions against responsible persons, FCA defendants do not retaliate against whistleblowers for being whistleblowers.

Pitching the Government

Still another opportunity for FCA defendants to hold rogue employees accountable is in a proactive government meeting, where internal or external corporate counsel meets with prosecutors and agents. Government employees consistently laud the FCA as an important weapon it wields to combat fraud and abuse. To that end, prosecutors should be interested in holding all responsible persons accountable for their conduct, especially where the true wrongdoers may submit their own false claims (e.g., providers).

Further, experience has taught defense counsel that cooperative FCA defendants may often settle their cases for a reduced multiplier or receive a full declination, depending on the facts. Informing the government who was responsible for providing, obtaining, creating or submitting a false claim allows the government to take action against such persons as well, thus accomplishing its greater goal of eliminating the submission of false claims. Indeed, where a corporation has agreed to cooperate to efficaciously resolve its dispute with the government, full cooperation is often more valuable (and more valued) than partial cooperation.

Conclusion

FCA defendants often miss an opportunity to act offensively against accountable persons and parties. By availing themselves of the legal landscape, rogue relators and employees can also be held accountable for their role in the submission of false claims.

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