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Recent Cases Reflect that Broadened Scope of FCA Is Catching On

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What must an individual do to receive protection from retaliation under the False Claims Act (FCA)? Seven years after major revisions to the FCA, the frustrating answer for plaintiffs, defendants and their counsel is "It depends."

Enacted during the Civil War, the FCA has undergone dramatic changes during the past 30 years. Amendments in 1986 added an anti-retaliation provision, and since 2009, Congress has revised the law several times, with the express purpose of expanding the coverage of the anti-retaliation provision to include more individuals and a wider array of protected conduct. After the 2009 amendments, some courts that specifically referenced the revisions nevertheless applied narrower interpretations of the FCA adopted under previous versions of the statute.

A number of recent decisions suggest that the broader definition of protected activity is catching on, but it is not yet clear how specific plaintiffs must be in reporting or attempting to stop violations of the FCA.

The FCA Amendments

Under the 1986 version of the FCA, the anti-retaliation provision protected only employees who took steps "in furtherance of" a *qui tam action*, i.e., of a suit brought on behalf of the government based on a contractor's submission of false claims for payment. In 2009, the Fraud and Enforcement Recovery Act (FERA) amended the FCA in several significant respects, including by expanding the scope of protected activity and the coverage of the law.

> First, FERA revised the definition of protected activity to include "efforts to stop one or more violations of [the FCA]."
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> Second, FERA eliminated the requirement that there be an employment relationship between the plaintiff and the alleged retaliator. After FERA, contractors and agents were among the parties entitled to protection under the law. The following year, the Dodd-Frank Wall Street Reform and Consumer Protection Act further added "associated others" to the list, meaning that it is now illegal to retaliate against a person because of his or her close relationship to someone who has engaged in protected activity under the FCA.

Following the recent amendments to the FCA, some courts embraced the broader definition of protected activity. For example, the 4th and 7th Circuit Courts of Appeal held that the FCA's anti-retaliation provision applied where employees made internal complaints about practices that violated contracts with the federal government, even where the plaintiff's complaints did not raise the "distinct possibility" of FCA litigation. Other courts, however, seemed stuck on the notion that a plaintiff's conduct had to raise a "distinct possibility" of FCA litigation, a standard that arose from a narrow reading of the "in furtherance" language of the 1986 version of the law – language that carried over into the amended FCA.

The fallout from this inconsistency has meant unpredictability for both plaintiffs and defendants, with outcomes seemingly depending on the federal district in which a claim arises.

Support for the Broadened Scope of the Amended FCA

While uncertainty remains in the judicial interpretation of the FCA's anti-retaliation provision, several district court cases decided in March 2016 suggest a wider adoption and application of the expanded scope of the law, both in terms of protected activity and covered parties.

In *Ickes v. Nexcare Health Sys., L.L.C.*, No. 13-14260, 2016 WL 1275543 (E.D. Mich. Mar. 31, 2016), the district court denied the defendants' motion to dismiss the plaintiff's retaliation claim under the FCA, explicitly referencing the broadened scope of the FCA.

The plaintiff in *Ickes* was a physical therapist hired by Integrity Rehab Services to work at South Lyon, a nursing and rehabilitation home, which received management services from a third company, NexCare. During the course of her employment, Joanne Ickes learned that South Lyon had adopted a practice of falsely informing patients whose short-term care period had ended that the facility had no long-term care beds available.

Medicare Part A, which pays for short-term care services, expires after 100 days. Thereafter, a patient has to switch to Medicaid or private insurance, both of which reimburses providers at a lower rate than Part A. South Lyon's beds were "dual-certified," meaning that the nursing home was required to offer them to patients regardless of their insurance payor.

On numerous occasions, Ms. Ickes expressed her concerns to various managers about this practice, stating that South Lyon was improperly discharging patients who needed long-term beds. Ms. Ickes explained that she had consulted with an elder-law attorney about the issue. For a time, South Lyon purportedly ceased the practice of denying long-term beds to patients, but by the end of 2012, had resumed doing so. Ms. Ickes thereafter advised several patients to "push back" against South Lyon's attempts to discharge them due to a supposed lack of long-term beds. She was fired soon afterward.

Among other things, the defendants claimed that they were not proper parties because they did not directly employ the plaintiff, and that in any event, the plaintiff had not engaged in protected activity within the meaning of the FCA. The court quickly dispensed with the argument that South Lyon and NexCare were not proper defendants simply because Integrity was the plaintiff's direct employer. The court noted that the three companies shared some common owners and that all exercised a degree of control over Ms. Ickes's employment. Under the common-law theories of alter ego and/or joint employment, therefore, the defendants were proper parties. But the court noted that even if South Lyon was not Ms. Ickes's common-law employer, the revised FCA had eliminated the requirement of an employment relationship as a basis for liability.

The Court's Decision on Protected Activity

With respect to protected activity, the *Ickes* court noted that, after FERA, there was no requirement that allegedly protected conduct could lead to a viable FCA action. The court concluded that by repeatedly questioning and opposing the practice of discharging patients after their Medicare Part A reimbursement expired, Ms. Ickes had engaged in an effort to stop a violation of the FCA.

A few weeks before the *Ickes* decision, the Middle District of Florida similarly acknowledged that internal efforts to stop violations of the FCA were protected activity. In *United States ex rel. Perkins v. Wellcare Health Plans, Inc.*, No. 8:12-CV-2032-T-30EAJ, 2016 WL 1077359, at *3 (M.D. Fla. Mar. 18, 2016), the district court denied a health plan management company's motion to dismiss an FCA retaliation claim brought by a clinical supervisor. The court held that the plaintiff's efforts to stop fraudulent billing practices by speaking to her supervisors, and eventually emailing the company's chief compliance officer, constituted protected activity. The court noted that the 2009 FERA amendments had expanded the scope of the FCA retaliation provision to include "steps taken to remedy fraud through other means, such as by internal reporting," and that plaintiff's oppositional conduct fell within the scope of the law.

Plaintiffs' Activities Must Clearly Implicate the FCA

While *Ickes* and *Perkins* may be representative of a trend toward broader construction of the FCA, courts will not bridge the gap for plaintiffs whose purported protected activity does not clearly implicate the FCA.

In *Reed v. Colorado Tech. Univ.*, No. 15 C 3368, 2016 WL 1019830, at *3 (N.D. Ill. Mar. 15, 2016), the plaintiff was a financial aid officer who refused to enroll a prospective student who told her that he only sought admission to receive financial aid. The district court acknowledged that the amended FCA applied to individuals who make an effort to stop an FCA violation, but held that the plaintiff had not done so. The court observed that even in her complaint and her opposition to the university's motion to dismiss, the plaintiff had not alleged that any violation of the FCA was occurring or about to occur. Rather, the plaintiff said that she believed that enrolling the student would violate Department of Education laws. In other words, in the court's view, it was not enough that the plaintiff thought that it was improper to enroll and request federal aid for students who did not intend to continue their studies – something that conceivably might constitute fraud on the government – because she did not suggest a belief that it was some sort of false claim for payment.

Looking Ahead at FCA Retaliation Claims

Although some courts continue to analyze FCA retaliation claims using tests very similar to the pre-FERA days, more courts are recognizing and conducting thoughtful analyses of what it means to make a lawful effort to stop a violation of the False Claims Act. It is generally accepted that making an internal complaint that references the FCA is enough, even if there is no indication that the plaintiff intends to file a *qui tam*.

Beyond that, the level of specificity required of a complaint or objection is unclear. Saying something is "fraud" is probably sufficient, but saying that something is "illegal" may not be – unless it is obviously illegal *because* it defrauds the government. Similarly, claiming that a government contractor's invoicing process is deficient could be protected, but claiming broadly that the company is violating its contract, without more, likely is not.

As with many newly amended or enacted whistleblower laws, the interpretation of retaliation under the amended FCA is in flux, and old interpretations die hard. It is likely that even as courts seek to incorporate the new definition of protected activity, seemingly analogous cases will continue to yield divergent results. Practitioners on both sides of the bar would do well to focus on the details and articulate exactly how a plaintiff's conduct implicates – or does not implicate – the submission of false claims for payment, no matter how obvious the answer may seem.