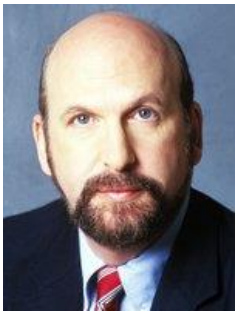
Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

FCA Whistleblowers Are More Important Than Ever Before

By **Neil Getnick** (January 6, 2021, 6:10 PM EST)



Neil Getnick

The authors of "HHS Working Group Could Take FCA Pressure Off Health Cos.," a recent Law360 guest article about the new U.S. Department of Health and Human Services False Claims Act working group, missed the mark.

The 35-year track record of the anti-fraud Federal False Claims Act and its qui tam whistleblower provisions is a story of great success. Key to that result was the establishment over time of a new paradigm in the form of a public/private partnership. Today, lawyers who represent whistleblowers carry on that tradition by offering needed resources to government officials, in the fight against fraud, waste and abuse of COVID-19 disaster relief funds.

The authors' statement that HHS is correct to deemphasize that role is wrong on two fronts. First, it inaccurately interprets the intent of the new HHS working group. And second, given this unprecedented surge in emergency funding, now totaling over $3 trillion, the role whistleblowers are playing to ensure the proper use of that money is more important than ever.

Missing the Mark

The article, authored by two commercial defense counsel, lauds HHS for "providing defense counsel with a seat at the table — but not members of the qui tam plaintiffs bar."

Fortunately, that is a false premise. It is based on a misreading of HHS' Dec. 4 news release announcing the new working group. In fact, the group as described in the release is composed entirely of HHS staff and therefore, while it includes former defense lawyers, by definition it does not include either current defense or whistleblower lawyers.

And the HHS news release praises the False Claims Act recognizing the role of its qui tam whistleblower provisions. It states:

> This working group strengthens our partnership with DOJ and OIG on using the False Claims Act to pursue bad actors and protect taxpayer funds ... The United States may pursue such actions on its own, or a private citizen may file a False Claims Act suit on behalf of the government and receive a portion of the recovery.

Misreading the release to imply that HHS intentionally excluded current whistleblower lawyers, led the authors to a series of erroneous conclusions as embodied by the title of the column itself: "HHS Working Group Could Take Pressure off Health Cos."

Rather than acknowledging the enormously successful public/private partnership created by the False Claims Act qui tamwhistleblower provisions and the value of whistleblowers in HHS' efforts to battle COVID-19-related fraud, the authors mistakenly conclude:

> On balance, the new working group may prove to be a positive development for the life sciences and health care companies as they partner with HHS to respond to the COVID-19 crisis, while qui tam plaintiffs and their lawyers try to secure a share of massive federal spending in response to the pandemic.

Characterizing qui tam plaintiffs and their lawyers in this way reflects a deep misunderstanding of both the history of qui tam cases and the actions taking place today in the battle against the fraudulent use of critical emergency funding.

The False Claims Act: 35 Years of Success

The modern-day Federal False Claims Act and its qui tam whistleblower provisions grew out of the seminal 1986 amendments, which resulted from the bipartisan sponsorship of Sen. Charles Grassley, R-Iowa, and former Rep. Howard Berman, D-Calif.. By any measure, the 1986 amendments, augmented by technical changes in 2009 and 2010, have been and are a fantastic success.

Prior to 1986, the U.S. Department of Justice recovered less than $50 million a year under the False Claims Act. In the 10 years following 1986, the DOJ recovered $1 billion. Last year alone, the DOJ recovered more than $3 billion, more than two-thirds of which came from qui tam suits.

The total recoveries since 1986 are $62 billion, and this number does not include billions more recovered as related criminal fines and as Medicaid money returned to the states.

At a time when people question government efficiency and effectiveness, the False Claims Act has a 20-to-1 return in fighting health care fraud. In other words, for every dollar that the federal government spends on federal FCA health care enforcement, it recovers $20 in return. The False Claims Act enhances the government's defenses against fraud without increasing the size or the cost of government.

But these numbers are an incomplete measure of the False Claims Act's success, which has reformed corrupt industries, stopped unconscionable and illegal practices, and, yes, saved lives. Examples abound.

False Claims Act cases have:

- Made health care safer by rooting out adulterated prescription drugs and faulty medical devices being sold to an unsuspecting public;
- Exposed corrupt military contractors selling substandard or flawed weapons systems for our troops;
- Fixed faulty bulletproof vests;

- Protected small businesses opportunities reserved for veterans and minorities;

- Routed out illegal kickbacks and bribes to doctors and government officials; and

- Obtained restitution and reform connected with the financial crisis and mortgage and securities frauds that tanked our economy in 2008.

The New Paradigm

The authors insist that "meritless qui tam cases ... create inefficiencies and distractions for government and industry alike." In fact, the modern-day False Claims Act benefits from a new paradigm of public-private partnerships between the Department of Justice, qui tam whistleblowers and their counsel.

The qui tam whistleblower provisions also allow cases to proceed whether or not DOJ intervenes. That provides an action forcing mechanism ensuring that fraud on the government will be exposed and dealt with, even when busy workloads, limited budgets, or bureaucratic headwinds would otherwise shield fraudsters from exposure and pursuit.

Additionally, the False Claims Act provides more safeguards and oversight to protect against frivolous or ill-advised lawsuits than just about any other civil enforcement statute in the Federal code.

Not only does the FCA specifically provide for penalties for frivolous and vexatious litigation, but these penalties are very rare because there are so many filters against folly when it comes to pursuing a weak case without much chance of winning.

The Role of Whistleblowers and Their Lawyers in Fighting COVID-19-Related Fraud

New fraud schemes are being created every day, and they often involve dizzying complexity. If fraud were easy for government programs to detect and prevent, it wouldn't be so lucrative.

Empowering and incentivizing whistleblowers with either inside information or expertise in an industry to point out frauds is common sense. As HHS states in the Dec. 4 press release: "The False Claims Act is now one of the government's most potent tools to pursue those who defraud government payment programs."

HHS' support of the False Claims Act is particularly welcome as it comes at a time when some federal workers fear their superiors are covering up fraud. On Dec. 21, four oversight and good government organizations sent letters to federal agencies asking them to reinforce their employees' whistleblower rights amid the presidential transition.[1] The letter stated:
During a global pandemic and a volatile transition between administrations, civil servants, and intelligence contractors and grantees are the first line of defense to prevent, mitigate or address abuses that violate the public trust.

In the last six months alone, successful FCA qui tam cases have recovered over $1 billion for taxpayers stemming from pharmaceutical, medical device, hospital, federal mortgage insurance, customs and import duties, kickback, bribery, energy contractor, cost data, pricing data and research grant fraud.

Given that False Claims Act qui tam cases are filed under seal, it is too early to say what cases have already been filed and what is to come regarding COVID-19 fraud.

But, for example, the U.S. Small Business Administration's inspector general's report of late October, which identified billions of dollars of potential fraudulent disaster loan applications, is a harbinger of anticipated future FCA qui tam litigation.

At over $3 trillion, the COVID-19 disaster relief package amounts to the largest in U.S. history, taking in a wide variety of programs including small business loans, hospitals and health care, vaccines and therapeutics, procurement contracts, and funding for state programs.

Already, whistleblowers and their lawyers have played an important role in unmasking potential COVID-19-related fraud schemes. In June, the whistleblower bar launched a national COVID-19 Anti-Fraud Task Force to assist federal and state law enforcement in deterring, detecting and exposing fraudulent business practices targeting government dollars.

In the health care sector that HHS oversees, the bar has assembled COVID-19-related teaching tools regarding: pharmaceuticals, biologics and devices; clinical trials; and current good manufacturing practices (i.e. manufacturing quality).

The bar strives to shine a light on COVID-19 relief funds fraud schemes and to support the fraud-fighting efforts of federal and state law enforcement, extending the public/private partnership envisioned by the Federal False Claim Act whistleblower qui tam provisions.

The aim is to create and sustain a synergistic team effort, with HHS as well as other government agencies, to successfully fight fraud, waste and abuse of COVID-19 relief funds.

Neil Getnick is the managing partner at Getnick & Getnick LLP and chairman of Taxpayers Against Fraud.

[1] https://whistleblower.org/wp-content/uploads/2020/12/DOD%E2%80%93Whistleblower-Rights-Notice.pdf.