wiley

NEWSLETTER

False Claims Act: State of the Union

February 2020

As FY 2019 closed in September 2019, so too did a decade of aggressive False Claims Act (FCA) enforcement yielding $38 billion in total government recoveries. This article summarizes major developments from 2019, highlighting the continued need for government contractors to remain vigilant and maintain strong compliance programs if they want to reduce the risk that they will fall prey to the FCA's dual hammers of treble damages and statutory penalties.

I. Statistics

The U.S. Department of Justice (DOJ) recovered over $3 billion in settlements and judgments under the FCA during FY 2019–a top ten all-time recovery. Far and away, the health care industry remained DOJ's largest target, accounting for $2.6 billion (more than 85%) of the total recoveries. Defense-related matters came next, generating $252 million in recoveries (less than 8.5%). The relator bar continued to flex its muscles last year, with recoveries from non-intervened cases rising from $135 million to $293 million. As usual, *qui tam* actions generated more recoveries than DOJ's original actions ($2.2 billion v. $800 million), which corresponds with relators generally being responsible for filing the majority of FCA actions (more than 81% in 2019). These facts and figures leave no doubt–FCA actions, *qui tam* or otherwise, represent a continued risk for those doing business with the Government.

II. Executive Branch Developments

After issuing a slew of FCA enforcement policies in 2018, DOJ gave its pen a modest rest in 2019. The most notable FCA policy pronouncement in 2019 was a re-articulation of its position regarding cooperation credit. Under Justice Manual 4-4.112, DOJ made it clear

Authors

Roderick L. Thomas
Partner
202.719.7035
rthomas@wiley.law

Brandon J. Moss
Partner
202.719.7554
bmoss@wiley.law

Michelle B. Bradshaw
Associate
202.719.7290
mbradshaw@wiley.law

Practice Areas

Civil Fraud, False Claims, *Qui Tam* and Whistleblower Actions

Government Contracts

Internal Investigations and False Claims Act

White Collar Defense & Government Investigations

that disclosure of new and additional misconduct should be "proactive," "timely," and "voluntary." The guidance identifies other forms of cooperation and guideposts for determining cooperation's value. DOJ continues to have discretion to reward cooperation credit. Maximum credit should generally be awarded after "timely self-disclosure... [identification of] all individuals substantially involved in or responsible... full cooperation... [and] tak[ing] remedial steps...." Even more vague, partial credit is appropriate when an entity has "meaningfully assisted." As for quantifying cooperation, maximum credit "may not" cause the Government to "receiv[e] less than full compensation for the losses." Discretion will "most often" be applied with a reduction in "penalties or damages multiple." While this guidance is an improvement from last year's general cooperation credit policy, the policy continues to lack some of the details and transparency the defense bar has sought for years.

DOJ's prohibition of using agency guidance documents to create *de facto* obligations, standards, or rights, first articulated in the 2018 Brand Memo and then Justice Manual § 1-20.100 were incorporated into two Executive Orders last year. That said, the Executive Orders continue to make it clear that such guidance documents are not irrelevant, as *awareness* of such guidance can still establish "scienter, notice, or knowledge of the law." Justice Manual § 1-20.201.

III. Legislative Branch Developments

In September 2019, staunch FCA champion Sen. Chuck Grassley (R-IA) wrote U.S. Attorney General (AG) Bill Barr expressing concerns about the 2018 Granston Memo. The Granston Memo's stated purpose is to guide DOJ decisions regarding its dismissal authority under 31 U.S.C. § 3730(c)(2)(A). While it can be argued that DOJ has used (c)(2)(a) offensively, as a key tool for dismissing cases that could create bad case law, Sen. Grassley expressed concern that the Granston Memo's direction undercut the FCA's purpose. Ignoring the Senator's two-week deadline, AG Barr evasively responded in December, explaining DOJ had used its (c)(2)(A) authority "sparingly" since issuing the Memo. While noting that DOJ "only" filed 45 motions to dismiss between January 1, 2018 and December 19, 2019, it neglected to mention the 45 dismissals in fact represented an uptick in the use of (c)(2)(A). It also did not mention how many relators voluntarily dropped their cases in response to a threatened (c)(2)(A) motion in the wake of the Granston Memo. It remains to be seen whether Sen. Grassley or another lawmaker might put forth legislation amending (c)(2)(A).

IV. Judiciary Branch

In May 2019, the Supreme Court of the United States issued a unanimous decision reflecting an expansive interpretation of the FCA's statute of limitations in resolving a three-way circuit split. *See Cochise Consultancy Inc. v. United States ex rel. Hunt*, No. 18-315. It held that relators can use 31 U.S.C. § 3731(b)(2) *even if* the Government declines, and the U.S. official whose knowledge triggers the clock is *not* the relator. But the Court declined to define the operative individual within the Government whose knowledge starts the clock. This decision incentivizes relators to conceal their knowledge from the Government and underscores the importance of discovery into the Government's knowledge of the alleged fraud.

The Supreme Court declined *certiorari* in cases presenting opportunities to resolve other circuit splits: (1)

whether the "first-to-file bar" under 31 U.S.C. § 3730(b)(5) is jurisdictional, *see Estate of Robert Cunningham v. McGuire*, No. 19-583; and (2) whether Rule 9(b)'s particularity standard requires a relator's personal knowledge of billing records to allege falsity, see *United States ex rel. Strubbe v. Crawford County Memorial Hospital*, No. 9-225.

Lower federal courts continued grappling with the proper standard for DOJ to dismiss pursuant to (c)(2)(A), an issue thrust to the forefront in the wake of the Granston Memo. DOJ succeeded with 10 of its 11 attempts to dismiss the FCA copycat cases "shell company" whistleblowers brought against drug manufacturers with backing from National Healthcare Analysis Group (NHCA). DOJ had argued the allegations were meritless, burdensome, and contradicted HHS OIG guidance. The district courts granting dismissal either applied the "rational relation" test under *Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998) or sidestepped the (c)(2)(A) split by holding DOJ had met *Sequoia Orange* or the "unfettered right to dismiss" standard in *Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003). The sole denial held DOJ failed to adequately investigate and perform sufficient cost-benefit analysis. *See United States ex rel. CIMZNHCA v. UCB, Inc.*, No. 3:17-cv-00765 (S.D. Ill.). That court noted the statute's hearing requirement would be superfluous if judges had no power. Unsurprisingly, DOJ has appealed to the Seventh Circuit. As courts hash out the appropriate standard, it remains clear DOJ's (c)(2)(A) authority is an effective tool to resolve declined cases, and defendants' litigation avoidance efforts should be guided by DOJ's commitment to the Granston factors.

V. Conclusion

Using past as predicate, there is reason to believe the upcoming "roaring 20s" will continue to be a decade full of FCA enforcement and litigation. For instance, Deputy Associate AG Stephen Cox recently revealed at the 2020 American Conference Institute's Advanced Forum on False Claims and *Qui Tam* Enforcement that DOJ is considering seeking a disclosure of third-party litigation financing (at least to DOJ). Additionally, DOJ's enforcement priorities will continue to include health care (particularly opioids), private equity, customs, antitrust (e.g., Procurement Collusion Strike Force), and cybersecurity. While this year's election may shape the FCA's application at the margins, it is unlikely that the FCA will disappear whether there is a new party in charge, or if the status quo holds–every politician likes to tout his or her commitment to fighting fraud against the taxpayer. As such, those who do business with the Government must remain vigilant–those looking to mitigate their FCA risks would be wise to craft well-tailored compliance programs designed to detect and address fraud.