

False Claims Act: New Developments for an Old Law

August 23, 2019 – FCA Now

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The past 18 months have been a (relatively) wild time for the False Claims Act — on the books since 1863. In FY2018 the Department of Justice obtained more than \$2.8 billion in settlements and judgments from cases involving fraud and false claims against the United States government.

Add to this staggering statistic the fallout of the Supreme Court’s decision in *Universal Health Services Inc. v. United States ex rel. Escobar*, circuit splits on key timing provisions, and a change in DOJ leadership, and we are left with some very costly questions. Fortunately, government enforcement agencies and the Supreme Court are providing some much-needed guidance on open issues and interpretative revisions that make it an opportune time to take another look at “Lincoln’s Law.”

DOJ and Barr to curb *qui tam* actions?

The vast majority of recoveries from FCA cases come from lawsuits filed by whistleblowers, or “relators,” suing on behalf of the government under the FCA’s *qui tam* provisions. In 2018, the director of DOJ’s Civil Frauds section issued a memorandum encouraging DOJ trial attorneys to consider dismissing unmeritorious *qui tam* cases (even over the objection of the relator). The DOJ’s authority to dismiss FCA cases has long been built directly into the governing statute, 31 U.S.C. § 3730(c)(2)(A). But in practice DOJ trial attorneys rarely used this power, preferring to allow *qui tam* cases in which DOJ declined to intervene to continue being prosecuted by the relator. The new internal guidance suggests that DOJ attorneys should be more energetic in dismissing *qui tam* cases that lack substantial merit, are the product of parasitic relators, or that would unduly tax government resources. Meritless *qui tam* cases may also “generate adverse decisions that may affect the government’s ability to enforce the FCA.” The early returns show that DOJ seems to be more willing to dismiss declined *qui tams* than at any point in recent memory.

This development is notable under a department headed by Attorney General William

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Barr. Before serving as AG under George H.W. Bush, Barr served in the department's Office of Legal Counsel, where he provided legal advice to the president and executive branch agencies. In 1989, Barr authored a memorandum arguing that the qui tam provisions of the FCA were "patently unconstitutional," in violation of the Appointments Clause, the Article III standing doctrine, and the doctrine of separation of powers. Barr wrote that private qui tam actions are a "devastating threat to the Executive's constitutional authority." When pressed, Barr walked back this position during his recent confirmation hearing before the Senate Judiciary Committee, noting he would enforce the FCA "diligently" and "in good faith." While it remains to be seen whether dismissals increase under his leadership, DOJ has already moved to dismiss at least one high-profile case after SCOTUS denied review. See *Gilead Sci. Inc. v. U.S. ex rel. Campie*, U.S. No. 17-936, pet. denied Jan. 7, 2019 (9th Cir.).

Consolidated guidelines regarding cooperation credit

The DOJ also recently released a revised and consolidated set of guidelines for determining cooperation credit for organizations facing exposure under the FCA. The consolidated guidelines — revisions to the U.S. Attorney's Manual — identify the main factors that the DOJ will consider when assessing the maximum "credit" parties will get for (1) voluntarily self-disclosing misconduct; (2) proactively cooperating with FCA investigations; and (3) taking effective remedial measures. The guidelines define "credit" as, typically, "reducing the penalties or damages multiple sought by the Department." The guidance aims to consolidate and add uniformity to how these issues will be addressed — something that historically could vary considerably. Although the guidelines do not significantly alter existing DOJ policy, they provide a clearer and concise set of guidelines to the AUSAs and Civil Frauds trial attorneys who will evaluate an organization's cooperation and self-disclosure. For organizations seeking to understand their own obligations and potential options, understanding the government's playbook has never been more important.

SCOTUS settles circuit split regarding tolling of statute of limitations

While circuits remain divided on many key issues (see below), on May 13, 2019, the U.S. Supreme Court decided *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, 587 U.S. ____ (2019), and resolved a circuit split regarding the statute of limitations for an FCA claim brought by a relator between six and 10 years after a violation, but fewer than three years after the government knew or should have known the relevant facts. The court held that relators can invoke a statute that tolls the usual six-year FCA statute of limitations to permit suit until up to three years "after the date when facts material to the right of action are known or reasonably known to the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed." 31 U.S.C. § 3731(b). This means a relator can claim the benefit of this tolling provision even when the government declines to intervene and the relator knew of the alleged violation before the usual six-year statute of limitations expires. Bottom line: relators under certain circumstances now have more time to sue, and targets of FCA claims must now prepare themselves for the possibility of

defending against qui tam FCA claims for up to ten years after an alleged violation.

Falsity and materiality post-Escobar

SCOTUS' guidance ends there, as it has denied all six recent petitions asking the court to clarify both the falsity and materiality requirements of its decision in *Universal Health Services Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). While Escobar clarified that contractors requesting payment could be liable under the FCA for concealing their failure to comply with contract requirements that are important to the government, it did not provide guidance on when a violated contractual requirement is material. One enduring circuit split concerns whether a complaint automatically fails for lack of materiality when a contractor shows that the government knew about noncompliance but still continued to pay the contractor. Compare *Gilead*, U.S. No. 17-936 (9th Cir.) with *United States ex rel. Harman v. Trinity Indus. Inc.*, U.S. No. 17-1149, pet. denied Jan. 7, 2019 (5th Cir.). Another split involves whether a complaint must identify specific misrepresentations a contractor made about performance, as well as materiality, to adequately allege falsity.

One hundred and fifty-six years have passed since the FCA's passage, but the passage of time hasn't necessarily clarified many of the FCA's nuances and ambiguities. For regulated entities that are subject to the FCA (and for the lawyers who represent them), nuance and ambiguity can be a source of liability and grief — or a source for defenses and advocacy. In short, it has never been more important to understand the peril and promise of a very old law.