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NEWSLETTER

False Claims Act: State of the Union

February 19, 2019

The False Claims Act (FCA) remains one of the Government's most powerful tools to fight fraud, and its dual threat of treble damages and statutory penalties puts it front and center as a business risk for those who regularly do business with the Government. This article summarizes major developments from 2018. Wiley Rein has a more detailed analysis of these statistics and developments available here.

I. Statistics

In FY 2018, the Department of Justice (DOJ) recovered over $2.8B in settlements and judgments under the FCA. While this is the first year since 2009 that recoveries did not exceed $3B, 2018 was tenth on the all-time annual list. As usual, most of the money came from *qui tam* cases ($2.1B), but only $119M came from non-intervened cases, a decline from last year. Notably, health care comprised 89% of total recoveries, continuing a nine-year trend of those recoveries exceeding $2B. Total new cases filed in 2018 exceeded 750, and 645 of those were *qui tam* actions—which was a slight decline from 2017 but within the recent average and part of an overall upward trend since 2008. One thing remains clear, FCA actions are not going away any time soon.

II. Legislative Branch Developments

The recent tax reform legislation forces parties in FCA settlement negotiations to directly confront the extent to which FCA settlements constitute "restitution" that may be claimed as a deductible business expense. This will likely impede negotiations and has already pressured DOJ to consider changing its standard policy, which is to avoid characterizing settlement payments. Meanwhile, a proposed bipartisan bill that did not gain passage, the Fixing Housing Access Act of 2018 (H.R. 5993), had an unusual mix of pro-plaintiff and pro-

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defense provisions, potentially signaling odd compromises in future litigation as Congress tries to combat fraud.

Fierce FCA supporter Senator Chuck Grassley (R-IA) stepped down as Chairman of the Senate Judiciary Committee after holding the position for four years. Known for authoring the 1986 FCA amendments allowing whistleblowers to share in FCA recoveries, Grassley remains committed to protect the FCA. He continues to serve on the Committee, but new Chairman Senator Lindsey Graham (R-SC) could reshape the FCA as part of his efforts to repeal and replace the Affordable Care Act. The defense bar would welcome repeal of the ACA's pro-plaintiff amendments expanding FCA liability and exposure by relaxing the public disclosure bar and making overpayments a basis for penalties.

III. Executive Branch Developments

DOJ was prolific in communicating its approach to enforcement, articulating several new or modified polices that may help level the FCA playing field for defendants. ***First***, DOJ released the Granston Memo directing attorneys to examine several factors and consider the merits of filing a motion to dismiss *qui tam* actions when the Government declines to intervene. It appears to have embraced this doctrine, based on a slight uptick in these filings. While defendants may welcome this doctrine, DOJ can also wield it as a shield to protect pro-Government precedent from being revisited in other cases that could reach different outcomes. In *Gilead Sciences Inc. v. United States ex rel. Campie*, DOJ told the Supreme Court it would move to dismiss the case on remand, boldly revealing the protective nature of this doctrine: dismissal would preserve the Ninth Circuit's ruling, one of the most pro-plaintiff post-*Escobar* materiality rulings. At the same time, DOJ's dismissal rationale highlighted the tension between Granston's agency interference concern and *Escobar's* discovery implications for agency knowledge. ***Second***, DOJ prohibited the use of agency guidance documents to create *de facto* obligations, standards, or rights with the Brand Memo and Justice Manual § 1-20.100. A word of caution: Justice Manual § 1-20.201 allows use of the *awareness* of such guidance to establish "scienter, notice, or knowledge of the law." ***Third***, new DOJ policy encourages cooperation and coordination between parallel and joint investigations to avoid "piling on" penalties for related conduct. ***Lastly***, DOJ redefined its cooperation credit policy, lowering the Yates standard to a more attainable bar and abolishing its "all or nothing" approach to credit in civil cases. While it is helpful for corporations to have more certainty as to the "costs" of cooperation, the metrics for "credit" in FCA cases remain somewhat undefined. Recognizing as much, in January 2019 Deputy Associate AG Stephen Cox hinted at possible forthcoming guidance, telling an audience to "[s]tay tuned on this front."

The quantity of DOJ communication in 2018 highlights the critical nature of DOJ leadership, and shines a brighter light on how AG nominee Bill Barr's confirmation might alter DOJ's policies and practices. Mr. Barr received a great deal of attention for his past views on the FCA (which he has characterized as "an abomination" that "violates separation of powers and establishes a basis for governance by tyranny") in his recent confirmation process (pledging that he "will diligently enforce the False Claims Act.").

IV. Judiciary Branch Developments

This term the Supreme Court may resolve a three-way circuit split about the application of the statute of limitations when the Government declines to intervene. *See Cochise Consultancy Inc. et al. v. United States ex rel. Hunt*. Although courts continue to grapple with the materiality standard post- *Escobar*, the Supreme Court denied *certiorari* for two landmark cases on January 7, 2019: *Gilead Sciences Inc. v. United States ex rel. Jeffrey Campie* and *United States, ex rel. Harman v. Trinity Industries, Inc*. The Court may provide more clarity next term, as a *cert*. petition is pending in *Brookdale Senior Living Communities, Inc. v. United States ex rel. Prather*.

Next term could also include new cases on the FCA's constitutionality and Rule 9(b)'s heightened pleading standard. *See Intermountain Health Care Inc. v. United States ex rel. Polukoff*. There are a range of potential issues involving the application of Rule 9(b) that could be reviewed by the Supreme Court. The Ninth Circuit held if defendants have "the exact same role in a fraud," Rule 9(b) does not require distinguishing among them in the Complaint. *United States ex rel. Silingo v. WellPoint, Inc.*, 904 F.3d 667 (9th Cir. 2018). The Second Circuit joined two circuit splits by holding (1) a Rule 9(b) deficient complaint *can* bar a later-filed complaint under the first-to-file bar despite the pleading deficiency and (2) relators *cannot* circumvent the first-to-file bar by filing an amended complaint after a case barring the original complaint is no longer pending. *United States ex rel. Wood v. Allergan Inc.*, 899 F.3d 163 (2d Cir. 2018). The Sixth Circuit held that although Rule 9(b) does not apply to pleading scienter, "the mere possibility of misconduct . . . is insufficient." *United States ex rel. Harper v. Muskingum Watershed Conservancy Dist.*, 739 Fed. App'x 330 (6th Cir. 2018).

In other circuit court developments, the Third and Seventh Circuits strictly enforced scienter. *See United States ex rel. Streck v. Allergan*, No. 17-1014, 2018 WL 3949031 (3d Cir. 2018); *United States ex rel. Berkowitz v. Automation Aids, Inc.*, 896 F.3d 834 (7th Cir. 2018). The Tenth and Ninth Circuits tried to clarify the falsity requirement which the FCA left undefined. *United States ex rel. Polukoff v. St. Mark's Hosp.*, 895 F.3d 730 (10th Cir. 2018); *United States ex rel. Berg v. Honeywell Int'l, Inc.*, 740 Fed. App'x 535 (9th Cir. 2018). Finally, the Third Circuit held there is no public disclosure bar "where a relator's non-public information permits an inference of fraud that could not have been supported by the public disclosures alone." *United States v. Omnicare, Inc.*, 903 F.3d 78 (3d Cir. 2018).

See here for more on the FCA's state of the union.