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Looking back and ahead at the False Claims Act

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Originally enacted in 1863 in response to suspected fraud by suppliers of the Union Army during the Civil War, over 150 years later the False Claims Act, 31 U.S.C. Section 3729, et seq., has become the federal government's primary tool to combat fraud in government programs. Over the past decade alone, the government has recovered nearly $40 billion in FCA actions. And the FCA's reach is broad — covering "fraud" wherever government dollars flow, from Medicare to infrastructure to defense contracting to education.

The FCA punishes the submission of false or fraudulent claims for payment to be reimbursed by the government or a government program, and liability requires a showing of a "false" statement or claim, made knowingly, that was material to the government's decision to pay or provide funding. More than 30 states, including California, have enacted their own FCA statutes for state or local programs, modeled on the federal FCA.

The FCA (and its state counterparts) is unique in that not only may the government enforce the statute, but private persons, called whistleblowers or relators, may file FCA suits on the government's behalf. These so-called qui tam actions are filed confidentially, under seal, so that only the government knows about them. And they allow a relator to pursue the claim whether or not the government takes over. The FCA incentivizes such actions by providing whistleblowers 15 to 30 percent of the government's recovery. And it works: since 1991, over 70 percent of FCA cases have been filed by whistleblowers.

FCA cases pose substantial risk, including virtually automatic trebling of damages, civil monetary penalties of up to more than $20,000 per false claim, and attorney fees and costs. Beyond that, FCA defendants face potential suspension or debarment from government programs. And, even those who escape liability face costs of litigation as well as reputational harm.

FCA cases have been a hotbed of activity in recent years. 2018 was no exception, with over 700 new cases filed, and the government securing almost $3 billion in recoveries.

New York Times News Service

William Barr appear at his confirmation hearing before the Senate Judiciary Committee in Washington on Jan. 15, 2019. Barr has stated in the past that the FCA whistleblower provisions are an unconstitutional "abomination." But during his confirmation hearings, he pledged to "diligently enforce" the statute.

Among the noteworthy legal topics this past year was the question of what makes a claim "false." Although the FCA does not define "false" or fraudulent, courts have found "false" claims include those containing an affirmative misrepresentation as to the goods or services provided. Courts also have found claims can be "false" under the so-called "implied false certification" theory where a claimant does not say anything overtly false, but the claim is nevertheless deemed "false" because it was submitted by the defendant while in noncompliance with some underlying rule or regulation.

Recent cases make clear that the answer to "what is false" can be counterintuitive. For example, one court concluded that a claim for reimbursement for a medical procedure may be "false" if the underlying care was determined not to be "reasonable and necessary," even though the necessity of a surgical procedure may seem to be a matter of subjective medical judgment. On the other hand, another court ruled that claims based on use of cost estimates that were incorrect under relevant accounting methods were nevertheless not "false" because the claimant openly disclosed the methods used.

Another trending issue involves whether something is "material." FCA liability requires that the misrepresentation or falsity of a claim be "material" to the government's decision to pay the claim. Here, too, the issue is not as straightforward as it may seem. For example, it may seem obvious that misrepresentations about compliance with certain requirements are immaterial if the government continues paying claims after discovering the failure to comply. However, courts have reached differing views on the effect on materiality in these circumstances.

On the political side, this past year saw the start of a significant shift in the Department of Justice's enforcement policies under the Trump administration. For example, based on an internal DOJ memorandum created last year, the DOJ moved to dismiss 11 qui tam cases as not brought in the government's interest — an unprecedented action.

More changes may be on the way in 2019. Nominee for Attorney General William Barr has stated in the past that the FCA whistleblower provisions are an unconstitutional "abomination." But during his confirmation hearings, he pledged to "diligently enforce" the statute.

The states, meanwhile, have pledged to pick up the slack for what they may view as less enforcement by the federal government. The California attorney general's office aggressively pursues FCA cases, and California has the largest Medicaid program in the nation. California has recovered over $1 billion under the statute to date, primarily from the health care industry.

California also has a law — the Insurance Frauds Prevention Act — that punishes false claims made to private insurers the same way the FCA applies to government claims. This statute is pursued by the California Department of Insurance, which has indicated it is hiring staff to ramp up enforcement efforts.

Because of the risks posed, it is important to know about a potential FCA case as soon as possible. There are obvious signs, such as receipt of a Civil Investigative Demand from DOJ. But warning signs can be more subtle — unannounced program audits, vague references by employees in exit interviews, or even scuttlebutt on internet websites.

If you believe that you or your company may be the target of an FCA action, there are critical steps to take:

• **Avoid government intervention.** The most important development in any qui tam case is whether the government takes over. Each year approximately 90 percent or more of recoveries come from cases brought by the government or in which the government intervened. It is therefore critical to make your case to the government as to why intervention is not warranted as soon as possible.

• **Attack the pleadings.** Once the case is at issue, it is critical to attempt to dismiss the case at the pleadings. Plaintiffs' counsel may attempt to get these cases to discovery, one result of which can be crippling discovery costs and attempts to pressure a settlement. Recent jurisprudence provides defense counsel a number of arrows in the quiver to dismiss a case before this happens.

• **Be prepared to go all the way.** The sunshine of trial can expose a relator's case for what it really is. If that doesn't work, appellate judges often benefit from some distance from the case. In the last year, the 5th U.S. Circuit Court of Appeals reversed the largest FCA verdict in history, $663 million.

• **Prevention.** Of course the best way to avoid FCA liability is not to get sued. Most whistleblowers attempt to complain internally before going to a lawyer. A strong HR and compliance program can help prevent FCA cases. They also serve as strong evidence to the government (and jury, if needed) why you or your company would never violate the FCA in the first place.

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