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PERSPECTIVE

FCA enforcement, one year into the Biden administration

By James L. Zelenay, Nick Hanna and Harper Gernet-Girard

Since the American Civil War, the False Claims Act has served as the federal government's primary mechanism for redressing fraud by entities doing business with the government. Thirty-five years ago, Congress ushered in the modern era of FCA enforcement when it enacted the False Claims Amendments Act of 1986. The amendments transformed the FCA from a seldom-enforced statute to one that, in the last decade, yielded nearly $40 billion in recoveries, with $5.6 billion recovered during fiscal year 2021 alone.

Any entity that accepts money from a government program is subject to the FCA — from Medicare participants to the information technology sector to defense contracting. Judgments under the statute can be costly because the FCA provides for recovery of treble damages, up to more than $20,000 in financial penalties per claim, and attorney fees and costs for the knowing submission of false or fraudulent claims for payment to the government or a government agency.

Private parties may pursue FCA claims on behalf of the government in what are known as qui tam actions. The government then has the option of intervening in the case or declining to intervene and allowing the private whistleblower to proceed. Whistleblowers may receive up to 30% of the government's recovery in successful suits. The vast majority of FCA suits are filed by qui tam whistleblowers.

In 2020, we wrote an article commenting on trends in the FCA landscape under the Trump administration. Now, roughly one year into the Biden administration, both FCA legislative and litigation activity continue the upward trajectory of the past decade, with 2021 bringing the second-largest total ever for FCA recoveries and the largest since 2014.

The government and qui tam whistleblowers filed 801 new cases in 2021 and recovered more than $5.6 billion. While that is the second-largest total ever for FCA recoveries and the largest since 2014, that figure includes $2.8 billion from a bankruptcy payment by Purdue Pharma in connection with opioid crisis litigation. Even without that amount, the total recovery is in line with year-over-year trends for the last five years. The 801 new cases filed is also consistent with the pace set over the past decade. Health care cases comprised 90% of total recoveries, Department of Defense procurement issues made up 2%, and the remaining 8% was split among other industries. Heading into 2022, we can expect increased focus on fraud in cybersecurity and COVID-19 relief, as the government has announced a new cybersecurity initiative and has announced its intent to focus on pandemic-related fraud.

One of 2021's most significant developments was on the legislative front. Senator Chuck Grassley (R-Iowa), a longtime proponent of tough FCA enforcement and the chief architect of the FCA's 1986 amendments, has proposed another set of significant amendments to the FCA. First, targeting the U.S. Supreme Court's decision regarding the FCA's materiality standard in *Universal Health Services Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016), Grassley has proposed that "in determining materiality, the decision of the Government to forego a refund or pay a claim despite actual knowledge of fraud or falsity shall not be considered dispositive if other reasons exist for the decision of the Government with respect to such refund or payment." Second, the amendments propose an opportunity for a whistleblower to respond to the government's decision to dismiss a qui tam case by articulating why the reasons for the dismissal are "fraudulent, arbitrary and capricious, or contrary to law." Third, the amendments would allow the government to recover its costs from a defendant for any defense discovery requests that are deemed irrelevant, disproportional, or unduly burdensome. Finally, the amendments would expressly apply the FCA's existing anti-retaliation provisions to post-em-

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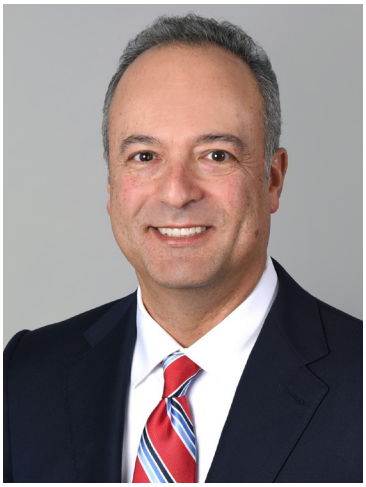

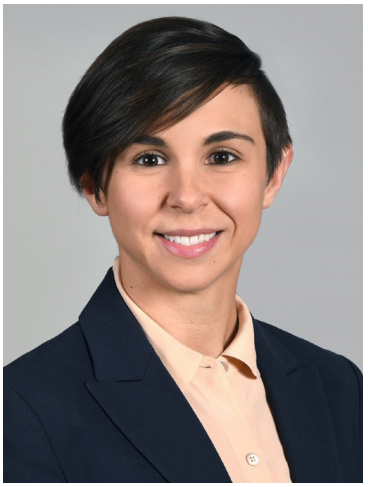

ployment retaliation. Grassley's bill was reported out of Committee in November 2021; it remains unclear if it will receive a vote on the Senate floor.

In the litigation arena, courts continued to interpret the Supreme Court's decision in *Escobar* and to issue key holdings on scienter, falsity, and the public disclosure bar.

The 7th and 2nd U.S. Circuit Courts of Appeals diverged in their interpretations of the Supreme Court's decision in *Escobar*. In *United States v. Molina Healthcare of Illinois, Inc.*, 17 F.4th 732 (7th Cir. 2021), the 7th Circuit reversed a district court's order holding that defendant's alleged misrepresentation was not material, finding that even though the state continued paying after it knew of defendant's alleged misconduct, that fact was not dispositive. The court pointed to the difference in price between the services defendant represented it provided and the services it actually provided and reasoned that the significant difference in cost suggested materiality.

The 2nd Circuit treated the government's continued payment differently. In *United States ex rel. Foreman v. AECOM*, 19 F.4th 85 (2d Cir. 2021), the 2nd Circuit affirmed, in part, a district court's decision to dismiss. Key to the 2nd Circuit's decision were government reports indicating that the government had been aware of the alleged false claims and nevertheless chose to pay the defendant for its work under the contract.

The 7th Circuit was also busy interpreting another Supreme Court ruling, this one on scienter. In *Safeco Insurance Company of America v. Burr*, 551 U.S. 47 (2007), which addressed the Fair Credit Reporting Act's scienter requirement, the Supreme Court determined that a person who acts under an incorrect interpretation of a relevant statute or regulation does not act with "reckless disregard" if the interpretation is objectively reasonable and no authoritative guidance cautioned the person against it. In *United States ex rel. Schutte v. SuperValu, Inc.*, 9 F.4th 455 (7th Cir. 2021), the court agreed that the defendant had incorrectly reported its prices to the government, but, applying the *Safeco* scienter standard, the court concluded that defendant's interpretation of the regulations was objectively reasonable, that there was no authoritative guidance that warned against that interpretation, and therefore there was no liability under the FCA.

In *United States ex rel. Schweizer v. Canon, Inc.,* 9 F.4th 269 (5th Cir. 2021), the 5th Circuit took up the issue of whether a copycat lawsuit premised on the same fundamental facts, but against a different defendant, is prohibited by the FCA's public disclosure bar. The court held that allegations, which could have been produced "merely by synthesizing" the publicly available information from the lawsuit against the previous defendant, were barred by the public disclosure bar.

Finally, one additional notable case involved the question of the government's statutory authority to dismiss an FCA qui tam suit. *In Polansky v. Exec. Health Res. Inc.*, 17 F.4th 376 (3d Cir. 2021), the court considered whether the government may move to dismiss a qui tam suit in a case in which it did not previously intervene and what standard the government must meet for dismissal to be granted. The court recognized a split between the D.C., 9th and 10th Circuits, which have held that the government may move at any point in the litigation regardless of whether it intervenes, and the 6th and 7th Circuits, which permit dismissal only after intervention pursuant to Federal Rule of Civil Procedure 41. Ultimately, the 3rd Circuit adopted the 7th Circuit's approach: the government must first intervene in order to move to dismiss. "Having intervened" the court held, "the Government becomes a party, and like any party, it is subject to the Federal Rules of Civil Procedure, including the rule governing Voluntary Dismissal."

In closing, the FCA remains as active as ever. If your company or your client receives government funding, consider taking the following steps to reduce risk and liability under the FCA:

- Prevention: Most whistleblowers complain internally before investigating the possibility of filing a lawsuit. Strong HR and compliance programs not only prevent FCA cases but also serve as compelling evidence that your company is doing the right thing.
- Investigation: If there is an allegation of wrongdoing, conducting a prompt investigation is key. Doing so will not only put you in a position to understand what occurred and correct any errors, but may also allow your company to obtain credit for cooperating with the government.
- Avoid government intervention and attempt to convince the government to dismiss. Ninety percent of recoveries come from cases in which the government intervened.
- Attack the pleadings. If litigation is filed, move to dismiss the case at the pleadings stage. A significant number of FCA cases are dismissed on the pleadings and allow defendants to avoid discovery.