LOS ANGELES & SAN FRANCISCO

Daily Journal

www.dailyjournal.com

MONDAY, APRIL 8, 2024

PERSPECTIVE

GUEST COLUMN

Supreme Court decisions and cyber-fraud focus drive record-setting FCA enforcement in 2023

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For years the False Claims Act (FCA) has served as a critical tool for the government in combating fraud related to government programs and funding, and 2023 was a record-setting year for FCA enforcement. The FCA has evolved to encompass a wide array of industries involved in government contracting and procurement, including defense, healthcare, and cybersecurity. 2023 witnessed a surge in FCA litigation, characterized by two landmark Supreme Court decisions, ongoing circuit court divisions, and substantial government recoveries exceeding $2.7 billion in the fiscal year ending Sept. 30, 2023.

At its essence, the FCA prohibits the deliberate submission of false or fraudulent claims for payment to government entities. Violators face severe consequences, including treble damages, hefty fines, and potential restrictions on future government contracting opportunities. Although the FCA incorporates scienter and materiality prerequisites that provide a certain level of protection to accused parties, those found in violation of the FCA face severe repercussions.

Here are major highlights from the historic year of 2023 in FCA enforcement:

Record-breaking FCA caseload Last year saw an unprecedented surge in FCA enforcement actions with a total of 1,212 new cases initiated–marking a 26% increase over the preceding year. In 2023, the government itself initiated 500 cases based on referrals or investigations, surpassing the prior

record set in 1987 with 340 government-initiated cases, and overshadowing the 305 cases from 2022. Additionally, a distinctive feature of the FCA is its provision deputizing private citizens, often referred to as "whistleblowers" or "relators," to initiate FCA claims on behalf of the government through *qui tam* actions. Relators are incentivized to file these suits because they can receive a bounty–up to 30%–of what is recovered on the government's behalf. The number of *qui tam* actions has grown since 1986, with relators filing 712 *qui tams* cases this past year with an average of more than 13 new cases per week. Press Release, U.S. Dep't of Justice, False Claims Act Settlements and Judgments Exceed $2.68 Billion in Fiscal Year 2023 (Feb. 22, 2024), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-268-billion-fiscal-year-2023 [hereinafter DOJ FY 2023 Recoveries Press Release].

Prominence of healthcare cases and growing focus on cyber-fraud

The distribution of FCA recoveries across industries experienced a slight change in 2023. The healthcare sector remained a focal point of FCA enforcement efforts, with a lion's share of the FCA recoveries stemming from cases related to Medicare Advantage fraud, substandard care, and unlawful kickbacks. DOJ also continued to pursue defendants like pharmaceutical companies, pharmacies, and healthcare providers related to the opioid epidemic. Healthcare accounted for 68% of all recoveries.

Additionally, the Civil Cyber-Fraud Initiative, unveiled in 2021, underscored the growing significance of cyber-fraud in government enforcement. As DOJ touted, "[t]he Initiative is dedicated to using the [FCA] to promote cybersecurity compliance by government contractors and grantees by holding them accountable when they knowingly violate applicable cybersecurity requirements," (DOJ FY 2023 Recoveries Press Release), including through providing deficient cybersecurity products or services, misrepresenting relevant cybersecurity practices and protocols, or violating obligations to monitor and report cybersecurity breaches. The last year saw, among others, a cybersecurity-related resolution involving an information technology company that paid $4.1 million to settle allegations of issues with its cybersecurity controls affecting compliance. These types of cases may become more common as DOJ utilizes the FCA to enforce cybersecurity and compliance requirements in government agreements.

New legal precedents and developments

In the first half of 2023, the Supreme Court addressed the FCA in two landmark rulings. In *United States ex. rel. Polansky v. Executive Health Resources, Inc.*, 143 S. Ct. 1720 (2023), the Court clarified that the government has the authority to seek dismissal of an FCA action notwithstanding a relator's objection, as long as the government intervened at some point during the litigation, providing a potential check on relator-driven lawsuits. The Court's holding strengthened the government's ability to dismiss cases it deems not in its best interest. In *United States ex rel. Schutte v. SuperValu Inc.*, 143 S. Ct. 1391 (2023), the Court addressed the FCA's scienter standard, ruling unanimously that what matters is whether the defendant knew the claim was false, regardless of whether its interpretation of the law was objectively reasonable. The precedent allows FCA cases to proceed past the initial stages based on the defendant's alleged subjective belief in the falsity of the claim even though the interpretation defendant utilized may have been objectively reasonable.

The Third Circuit addressed the interplay of the factors relevant to the potential materiality of a misrepresentation under the FCA as set forth by the Supreme Court in *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016). These factors include (1) whether the government has "designate[d] compliance with" the relevant "statutory, regulatory, or contractual requirement as a condition of payment"; (2) whether the alleged violation is "minor or insubstantial"; and (3) whether the government continued to pay claims "despite its actual knowledge that certain requirements were violated" or, instead, "consistently refuse[d] to pay claims in the mine run of cases based on noncompliance." *Id.* at 194-95. In *United States v. Care Alternatives*, 81 F.4th 361 (3d Cir. 2023), the Third Circuit held that district courts may not assign dispositive weight to a single Escobar factor–in the case at issue, that the government continued to reimburse despite knowing of the alleged clinical documentation deficiencies. The Third Circuit concluded that multiple disputes of fact remained, including whether the alleged regulatory violations were "minor" or "went to the very essence of the bargain," *id.* at 370-72, and remanded the case for further proceedings.

In *Hendrix ex rel. United States v. J-M Manufacturing Co., Inc.*, 76 F.4th 1164 (9th Cir. 2023), the Ninth Circuit imposed limitations on monetary penalties plaintiffs may pursue in FCA cases. In this case, a jury found that a government contractor knowingly made false claims for payment through the representations it made about its PVC pipes' compliance with industry standards. The district court awarded the plaintiffs a statutory penalty per project where the PVC pipes at issue were used, and not a penalty per pipe used as requested by the plaintiffs. Rejecting what it called a "strict liability standard" without requiring proof of actual damages, the Ninth Circuit affirmed the district court's damages. *Id.* at 1174. The Ninth Circuit reasoned that the government plaintiffs "did not establish how much non-compliant pipe they received nor were they able to identify any specific piece of non-complaint pipe," *id.* at 1172, and that plaintiffs successfully installed the pipes and used them without issue for numerous years.

Finally, the circuit split over the proper causation standard for Anti-Kickback Statute (AKS)-based FCA claims continued. The Sixth and Eighth Circuits have interpreted the AKS to impose a "but for" causation standard, as evidenced by cases like *United States ex rel. Martin v. Hathaway*, 63 F.4th 1043, 1052-53 (6th Cir. 2023) and *United States ex rel. Cairns v. D.S. Medical L.L.C.*, 42 F.4th 828 (8th Cir. 2022)– the "but for" standard requires a plaintiff to show that a claim would not have included the items or services under scrutiny had it not been for the presence of alleged illegal kickbacks. However, the Third Circuit has taken a different stance, rejecting the "but-for" causation standard and instead requiring something less stringent for proof under the FCA and AKS, as seen in *United States ex rel. Greenfield v. Medco Health Solutions, Inc.*, 880 F.3d 89 (3d Cir. 2018)–namely that there is a "sufficient causal connection" between the alleged kickback and claim for payment to the government. 880 F.3d at 96.

Struck by the same split among its district courts, the First Circuit is poised to address this question in two closely watched cases with conflicting interpretations that have been granted interlocutory appeal: *United States v. Regeneron Pharms., Inc.*, No. CV 20-11217-FDS (D. Mass.) and *United States v. Teva Pharms. USA, Inc.*, Civil Action No. 20-11548-NMG (D. Mass.). These forthcoming rulings by the First Circuit will potentially open a path for review by the Supreme Court.

Guidance relating to cooperation and disclosure

Since May 2019, the Department of Justice has had an FCA cooperation credit policy aimed at incentivizing companies to engage in voluntary disclosure, cooperation, and remediation in connection with FCA issues for credit in settlement agreements. See Justice Manual 4-4.112, Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters (May 2019), https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.112.

But application of the policy has been unclear and it has been ambiguous as to what type of actions by a company may lead to what type of credit. Almost five years later and little still is known. However, a few resolutions in 2023 shed some light. For instance, in a cybersecurity-related case, DOJ credited a company in settlement for cooperation, yet the specific factors influencing how DOJ applied the cooperation credit were

unclear. The steps the company took included self-disclosing of the issue, conducting an independent investigation and sharing of facts learned, and taking remedial measures. Yet, DOJ did not specify the weight given to each action. In another case without a published agreement involving a hospital system, DOJ's press release about the settlement highlighted that "[b]ecause the company self-reported the conduct to the government, it was able to resolve its [FCA] liability for only 1.5 times the amount of monetary loss caused by its false claims." Press Release, U.S. Atty's Office for Eastern Dist. of Ky., Eastern Kentucky Hospital System and Cardiologist Agree to Collectively Pay More Than $3 Million to Resolve Civil Liability for Improper Healthcare Billings (Nov. 28, 2023), https://www.justice.gov/usaoedky/pr/eastern-kentucky-hospital-system-and-cardiologist-agree-collectively-pay-more-3.

As the dust settles on a year marked by historic FCA activity, one thing remains clear–enforcement efforts under the FCA show no signs of abating. With more cases filed than ever, evolving legal interpretations, and heightened scrutiny across sectors, stakeholders must remain vigilant to navigate the intricate and ever evolving FCA landscape.

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