The Federal False Claims Act

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September 2017

False Claims Act: Background

• Federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729 – 3733, is the primary tool in the federal government’s arsenal to combat fraud against the government
• Enacted in 1863. Amended in 1986 by adding whistleblower and heightened damages provisions
• Periodically amended since 1986
• Most states have false claims acts nearly identical to the FCA, and which most courts interpret identically to the FCA

FCA: Bases for Liability

• 7 total bases for liability under the FCA
• FCA most commonly provides liability for any person who:
  (1) Presents, or causes to be presented, a claim for payment to the government
    a. A “claim” is ordinarily the document which creates the justification for the government to make payment
  (2) That is false or fraudulent
  a. This includes: (i) actual knowledge; (ii) deliberate ignorance of the truth or falsity of the information; or (3) reckless disregard of the truth or falsity of the information
  (3) Knowing of its falsity
    a. This includes: (i) actual knowledge; (ii) deliberate ignorance of the truth or falsity of the information; or (3) reckless disregard of the truth or falsity of the information
  (4) That is material to the government’s decision to pay
    a. Meaning “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property”
  Liability may also attach for anyone who makes a false record or statement material to a false or fraudulent claim
• The “reverse” FCA provision provides liability for any person who acts improperly to avoid having to pay money to the government
• The FCA also provides for conspiracy liability and other, rarely invoked, bases for liability
Penalties and Damages

- Civil penalties of between $10,957 to $21,916 for each false claim
- These amounts are adjusted penalties from time to time
- The government’s damages are trebled

Who can file suit

- (1) U.S. Attorney General
- (2) private persons (known as “relators” who file “qui tam” actions)
  - The government can intervene in a qui tam suit. If it does, the relator can receive between 15% and 25% of the amount recovered; if the government does not intervene, the relator can receive between 25% and 30% of the recovery

Antiretaliation provisions

- Anyone who is “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against” in their employment due to efforts to stop a violation of the FCA is entitled to all relief necessary to make that person “whole,” including by filing a civil action within 3 years of the retaliation

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The FCA’s Increasing Relevance

“Congress amended the False Claims Act 30 years ago to give the government a more effective tool against false and fraudulent claims against federal programs. An astounding 30 percent of those recoveries were obtained in the last eight years.”
- Principal Deputy Assistant Attorney General Benjamin C. Mizer, head of the Justice Department’s Civil Division, Dec. 14, 2016
- The government recovered $4.7 billion from FCA claims last fiscal year (ending Sept. 30, 2016), marking the third highest annual recovery in FCA history
- The government has recovered more than $31.3 billion since 2009 under the FCA, bringing the fiscal year average to nearly $4 billion since then
- $2.5 billion of this came from the health care industry, and $1.7 billion from the financial industry related to housing and mortgage fraud
- Most FCA actions are filed by whistleblowers pursuant to the Act’s qui tam provisions
- An average of 13.5 new qui tam cases are filed every week
- $2.9 billion of the government’s total $4.7 billion recovery for FY 2016 came from qui tam cases
FCA Under the Trump Administration

The current administration will need to allocate resources based on their priorities:
- Not appointing a civil division chief may create uncertainty regarding the government’s level of FCA enforcement
- Experts suggest plaintiffs bar may have to carry a bit more weight
- However, waste and abuse are generally “bi-partisan,” and given that the government enjoys significant monetary recoveries through the FCA and the majority of FCA actions are brought by relators, FCA enforcement is likely to continue being aggressive
- During the campaign, Trump vowed to “attack our debt and deficit by vigorously eliminating waste, fraud and abuse in the federal government.”
- Attorney General Jeff Sessions echoed these sentiments during his confirmation hearing

Trump Administration continues aggressive FCA enforcement
- Extension of “Yates Policy” of holding individuals financially accountable
- May 2017 – all co-founders of a manufacturer of an electronic medical records system held “jointly and severally liable” with the company for a $155M settlement in alleged violation of the FCA
- May 2017 – former COO of a Medicare Advantage plan, Freedom Health, held accountable for $750,000 for his role in Freedom’s alleged violation of the FCA

FCA Under the Trump Administration (cont’d)

Trump Administration continues aggressive FCA enforcement (cont’d)
- May 2017 – DOJ statement of interest brief attempted to strip the heightened materiality standard articulated in Escobar
- United States ex rel. Kolchinksy v. Moody’s Corp. – DOJ argued that an agency’s continued payment of claims to a potential FCA defendant is insufficient to establish that fraud is immaterial
- April 2017 – DOJ amicus brief on recent case provides an insight into the Trump Administration’s view on a limited public disclosure bar
- U.S. ex rel. Advocates for Basic Legal Equality, Inc. vs. U.S. Bank, N.A – DOJ implies its disagreement with the Sixth Circuit’s determination that relators were barred from bringing an action against defendants because of certain documents that amounted to a previous public disclosure

Post-Trump settlements indicating strong stance on FCA enforcement:
- Feb. 15, 2017 – an electronic systems provider settled for $14.9 million to resolve allegations that it knowingly misstated its manufacturing and production engineering costs
- Apr. 10, 2017 – Virginia Dept. of Social Services settled for more than $7.15 million to resolve allegations that it improperly implemented food stamp programs to secure performance bonuses
- May 26, 2017 – Kuwaiti-based defense contractor settled for $95 million to resolve allegations that it overcharged the Department of Defense on food supplies to U.S. troops

Recent Significant Cases

The government has aggressively pursued fraud in any and all industries where government funding plays a role, large or small. Below are just a small list of the diverse examples:
- Bank of America, JP Morgan Chase, Wells Fargo, Citigroup Inc., and Ally Financial reached a $25 billion landmark settlement in 2012 with the government and the attorneys general of 49 states and D.C. to address alleged mortgage loan servicing and foreclosure abuses
- BP Exploration and Production Inc. paid $8.6 billion, pursuant to a $20 billion consent decree entered in 2016, arising from the Deepwater Horizon/Macando Well explosion and oil spill in the Gulf of Mexico in 2010
- Wells Fargo paid $1.2 billion in 2016 for endorsing residential mortgages as eligible for federal insurance by the FHA that did not meet requirements intended to reduce the risk of default.
Recent Significant Cases (cont’d)

- **Supreme Group B.V.** paid $434 million in a 2015 settlement to resolve allegations that the company submitted false claims to the Department of Defense for supplies and transportation for American soldiers in Afghanistan.

- **Education Management Corp.** paid $52.6 million in FCA recoveries – out of a total settlement of $95.5 million – in 2016 to resolve allegations that unlawfully recruited students, engaged in deceptive and misleading recruiting practices, and falsely certified compliance with Title IV of the Higher Education Act.

- **U.S. Customs and Border Protection** recovered $50 million in customs fraud in 2016. Importers who seek an unfair advantage by knowingly evading their obligation to pay duties on imports of foreign goods are subject to damages under the FCA.

Developing Issues and Trends

**Implied false certification liability**

- **Universal Health Services, Inc. v. United States ex rel. Escobar:** In 2016 the U.S. Supreme Court accepted the implied false certification theory of FCA liability.
  
  “When . . . a defendant makes representations in submitting a claim but omits its violations of statutory, regulatory, or contractual requirements, those omissions can be a basis for liability if they render the defendant’s representations misleading with respect to the goods or services provided.”

- Limiting principle: the court clarified that the theory only applies where a defendant’s misrepresentation is material to the federal government’s payment decision.

Focus on individual accountability in FCA cases:

- Increased commitment to more aggressively pursue individual liability in FCA cases in line with the Yates Memo.
  
  - Corporate settlement no longer resolves individual liability.
  
  - Enforcing individuals’ accountability for corporate wrongdoing – even through civil enforcement actions – provides a powerful deterrent against future misconduct . . . . “[I]t is a notable civic judgment or even simply be subject to a civil injunction, haunts the mind.” — June 9, 2016 speech by DOJ Acting Associate Attorney General, Bill Baer.

- Recent cases:
  
  - **UFC Aerospace**, government contractor, along with its former president, Douglas Davis, settled for $23 million in October 2015 for fraudulently certifying the contractor’s status as a female-owned small business, in violation of the Small Business Act.
  
  - **Dynaplast Systems Inc.**, a sprint supplier company, and its founder and president, George Hodium, settled for $10.3 million in December 2015 for billing patients in violation of Medicare rules.
Developing Issues and Trends (cont’d)

Rising rates of Qui Tam actions and whistleblower success:
• The FCA’s Qui Tam provisions incentivize private individuals to be watchdogs
• Less than 8% of cases were Qui Tam actions in 1987. By contrast, in FY 2016 approximately 83% were Qui Tam actions
• Growing number of Qui Tam lawsuits has led to increased recoveries. From January 2009 to the end of FY 2016, the government recovered nearly $24 billion related to Qui Tam suits (out of a total recovery of $31.3 billion during that same period)

Increased state FCA activity:
• Over 30 states and municipalities have enacted FCAs of their own, providing particular incentives and benefits, and plaintiffs are increasingly bringing suits under both federal and state laws

Developing Issues and Trends (cont’d)

Reasonable interpretations of ambiguous regulations can trigger FCA liability:
• In the past, noncompliance with ambiguous regulations did not meet the FCA “knowing” standard for the requisite mens rea to commit a wrongful act
• In an effort to curb post lawsuit rationales, the Eleventh Circuit recently reached a contrary conclusion, holding that defendants who articulate reasonable interpretations of ambiguous regulations can nonetheless be liable under the FCA

Broad reach of public disclosure bar:
• Public disclosure bar prevents a person from pursuing an action based on certain publicly disclosed information unless that person qualifies as an “original source” of the information
• Ninth Circuit recently affirmed broad application of the rule such that prior disclosures need not explicitly mention federal or state false claims, or overlap precisely with public statements, to trigger the FCA’s public disclosure bar

Developing Issues and Trends (cont’d)

FCA liability for misrepresentations to FDA:
• In the past, courts have hesitated to accept “fraud on the FDA” theories of liability
• Such a theory would mean that any misrepresentations aimed at FDA render subsequent requests to government payors false
• Ninth Circuit recently articulated a broad understanding of how noncompliance with FDA regulations can form the basis of FCA liability
• If relators can adequately allege that a defendant has fraudulently obtained FDA approval for its products, each of the resulting claims for those products is false, even if the claims themselves did not contain false representations
Establish an effective compliance program:

- The benefits of a strong compliance program far outweigh the costs
- A strong compliance program can help with early detection of misconduct, increasing awareness and understanding of the FCA, and decreasing the probability of violating the FCA
- Further helps to avoid financial, reputational, and organizational losses
- If there is an FCA allegation
  - Plaintiffs can use weak compliance programs to argue defendants acted with deliberate ignorance or reckless disregard; or
  - Defendants can use a strong compliance program to show that even if unlawful conduct did occur, it was carried out by rogue actors, without company knowledge

Principal components of a strong compliance program:

- Clearly establish and publicize standards/procedures on FCA compliance
- Appoint lead/compliance officers from senior management to oversee the program
- Conduct a risk assessment to identify best allocation of resources to key risk areas
- Provide regular training, notifications, tips, and information (such as pamphlets and emails) on FCA compliance and reporting potential violations
- Continue to monitor and update the program for maximum effectiveness, conduct internal audits
- Establish reporting mechanisms, i.e., an anonymous, non-retaliatory whistleblower hotline
- Require business partners to abide by the same compliance standards as the company
- Ensure consistent enforcement of standards through appropriate disciplinary mechanisms
- Take reasonable steps when an offense occurs to respond and to prevent future violations

If FCA misconduct is discovered, the company should consider self disclosure:

- Reduced penalties
- A court may assess reduced damages if a company furnishes all information regarding the violation within 30 days of obtaining it, and cooperates fully with the government investigation, and if at the time of self-disclosure no criminal prosecution, civil action, or administrative action has been commenced
- Avoid whistleblower lawsuits (and fines)
  - If the company has already disclosed the information, a whistleblower can be barred from filing suit on the same misconduct
  - It may be mandatory
  - Certain parallel laws and regulations make self-disclosure mandatory; avoidance may lead officers to be excluded, suspended or disbarred from government programs
- Given the complex considerations on self-disclosure, it is important to seek legal counsel
Questions?