The False Claims Act – 2018 Mid-Year Update: Financial Services Sector

August 29, 2018

MCLE Certificate Information

- Most participants should receive their certificate of attendance about four weeks after the webcast
- Virginia Bar Association members should receive their certificate of attendance about six weeks after the webcast
- All questions regarding MCLE Information should be directed to Jeanine McKeown (Gibson Dunn's National Training Administrator) at 213–229-7140 or jmckeown@gibsondunn.com

Today's Panelists

F. Joseph Warin is a partner in the Washington, D.C. office, Chair of the office's Litigation Department, and Co-Chair of the firm's White Collar Defense and Investigations practice group. His practice focuses on complex civil litigation, white collar crime, and regulatory and securities enforcement – including FCA cases, FCPA investigations, special committee representations, compliance counseling and class action civil litigation.

Stuart Delery is a partner in the Washington, D.C. office. He represents corporations and individuals in high-stakes litigation and investigations that involve the federal government across the spectrum of regulatory litigation and enforcement. Previously, as the Acting Associate Attorney General of the United States (the third-ranking position at the Department of Justice) and as Assistant Attorney General for the Civil Division, he supervised the DOJ's enforcement efforts under the FCA and FIRREA.

Jim Zelenay is a partner in the Los Angeles office and a member of the firm's Litigation Department. He is experienced in federal and state FCA matters and whistleblower litigation, in which he has represented a breadth of industries and clients, including financial institutions. Mr. Zelenay is one of the primary authors of the Firm's mid-year and year-end FCA updates and he has represented clients in FCA matters in all phases – investigation, litigation, trial, and appeals – in both federal and state courts.

Agenda

- FCA Overview and Recent Jurisprudence
- DOJ Policy Developments
- Recent Developments: FCA Financial Sector Settlements
- Recent Developments: FCA Financial Sector Decisions
- FCA Compliance Best Practices
- Questions

FCA Overview and Recent Jurisprudence

The False Claims Act (FCA)

- The FCA, 31 U.S.C. §§ 3729–3733, is the federal government's ***primary weapon to redress fraud*** against government agencies and programs
- The FCA provides for recovery of ***civil penalties and treble damages*** from any person who knowingly submits or causes the submission of false or fraudulent claims to the United States for money or property
- Under the FCA, the Attorney General, through DOJ attorneys, investigates and pursues FCA cases
- DOJ is devoting more and more resources to pursuing FCA cases—and considering whether *qui tam* cases merit parallel criminal investigations

"It seems quite clear that the objective of Congress was broadly ***to protect the funds and property of the Government from fraudulent claims*** …."

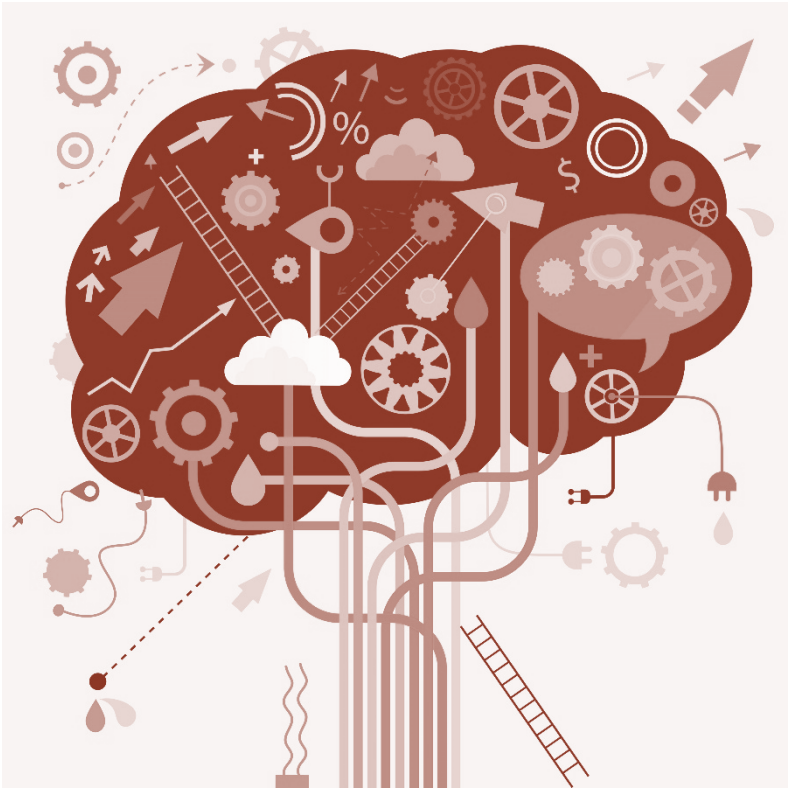
Rainwater v. United States, 356 U.S. 590 (1958)

FCA – Key Provisions

31 U.S.C. § 3729(a)(1)	Statutory Prohibition	Summary
(A)	Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval	False/Fraudulent Claim
(B)	Knowingly makes, uses or causes to be made or used, a false record or statement material to a false or fraudulent claim	False Record/Statement
(C)	Knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government	"Reverse" False Claim
(G)	Conspires to violate a liability provision of the FCA	Conspiracy

FCA – Scienter

- "***Knowingly***" requires scienter and is defined as:
  - Actual knowledge,
  - Deliberate ignorance, or
  - Reckless disregard
- Negligence is not actionable
- Specific intent to defraud is not required



FCA – Overview of Key FCA Theories

Factual Falsity

- False billing (e.g., services not provided)
- Overbilling (e.g., upcoding)

Legal Falsity

- Express certification of compliance with legal requirements
- Submission of claim with representations rendered misleading as to goods / services provided

Promissory Fraud / Fraud in the Inducement

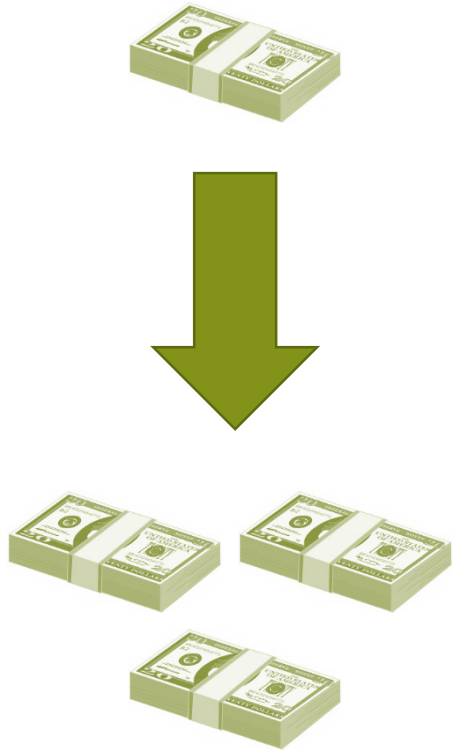
- Obtaining a contract through false statements or fraudulent conduct
- *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (claims by contractors who colluded on bids)

Reverse False Claims

- Improper avoidance of obligation to pay money to the government
- Retention of government overpayment

FCA – Damages and Penalties

- ***Simple Damages Calculation***
  - Treble damages are traditionally calculated by multiplying the government's loss by three (e.g., if defendant charged government $100 for goods not received, damages would be $300)
- ***Complex, Contested Damages Calculation***
  - Calculations are more complicated (and less certain) when the government receives goods or services it considers deficient or when there is a "false certification" or "promissory fraud"
- ***Civil Per Claim Penalty***
  - Previously $5,500 to $11,000
  - Nearly doubled effective August 1, 2016
  - 2018 inflation adjustment increased to range of $11,181 to $22,363 per violation



FCA – Statute of Limitations

- The ***statute of limitations*** is:
  - 6 years from the date of violation *or*
  - 3 years from when facts material to the violation are known or reasonably should have been known to the government
- But ***not more than 10 years from the violation***

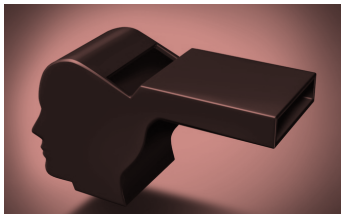
Recent Jurisprudence – Statute of Limitations

United States ex rel. Hunt v. Cochise Consultancy Inc., 887 F.3d 1081 (11th Cir. 2018)

- An extended limitations period of up to ten years applies in select FCA cases. 31 U.S.C. § 3731(b)(2) (permitting actions for "3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances")
- Circuits are split in deciding whether the up to ten-year period is only available when the government files or intervenes in the FCA suit, as opposed to *qui tam* actions where the government declines to intervene
- The Eleventh Circuit held that ***relators can employ the extended limitations period even in cases where the government has declined to intervene***—and that the courts must look to the government official's knowledge (not the relator's)

FCA – *Qui Tam* Provisions

- ***Qui Tam Provisions***
  - Enable so-called "relators" to bring cases in the government's name and recover ***as much as 30%*** of favorable judgment or recovery
  - Allow government to intervene
    - An increasing number of whistleblower cases are pursued ***without government intervention*** (but often with government statement of interest)
  - DOJ has broad dismissal authority
  - The January 2018 Granston Memo may result in more frequent use of this power
- ***FCA Whistleblower Protections (31 U.S.C. § 3730(h))***
  - Protects employees and others (e.g., contract workers)
  - Relief may include double back pay and interest on back pay; reinstatement (at seniority level); and/or costs and attorneys' fees
  - Ongoing developments in case law on causation – "but for"



"In short, sir, I have based the [*qui tam* provision] upon the old-fashioned idea of holding out a temptation and '***setting a rogue to catch a rogue***,' which is the safest and most expeditious way I have ever discovered of bringing rogues to justice."

Statement of Senator Howard, Cong. Globe, 37th Cong. 955-56 (1863)

FCA – Public Disclosure and First-to-File Bars

- ***Public Disclosure Bar.*** A relator's *qui tam* complaint cannot be "***substantially the same***" as allegations or transactions ***publicly disclosed in certain enumerated sources*** such as public hearings, government audits or reports, or the news media

  - ***"Original source" exception:*** A relator may proceed on publicly disclosed allegations if he is an "original source" of the allegations, meaning he ***voluntarily disclosed*** them before filing and has knowledge that is ***"independent of and materially adds to"*** the public disclosures

  - ***2010 Amendments:*** The public disclosure provisions were amended to the current language by PPACA in 2010; previously, the bar contained slight differences in the public disclosure and original source provisions

- ***First-to-File Bar.*** The FCA provides that, when a *qui tam* action is ***"pending," "no person*** other than the Government ***may intervene or bring a related action based on the [same] facts"***

Recent Jurisprudence – First-to-File Bar: Circuit Split

U.S. ex rel. Wood v. Allergan, Inc.,
No. 17-2191 (2d Cir. Aug. 9, 2018)

- Relator, a former Allergan sales representative, alleged that the company provided free products to physicians in violation of the AKS and FCA
- Because two related suits had been filed before relator's suit (but remained under seal at that point), the district court and the circuit court addressed whether a violation of the FCA's first-to-file provision requires dismissal of the action or, rather, can be cured by an amendment to the complaint
- The Second Circuit sided with the D.C. Circuit and the Fourth Circuit, which had held that ***the first-to-file provision requires dismissal of the second-filed action***, and rejected relator's argument that amending the second-filed complaint cures the violation of the first-to-file provision
- However, the First Circuit case law disagrees

Universal Health Services, Inc. v. U.S. ex rel. Escobar

136 S. Ct. 1989 (2016)

- Relator brought FCA suit against leading nationwide provider of mental health services, alleging that hospital provided inadequate care to a teenage patient by using personnel to deliver counseling services who did not meet state regulations governing staffing qualifications

- The Supreme Court held that the implied certification theory can provide a basis for FCA liability "***at least in certain circumstances***":

1. "the claim does not merely request payment, but also makes ***specific representations about the goods or services provided***," and
2. "the defendant's ***failure to disclose noncompliance with material statutory, regulatory, or contractual requirements*** makes those representations misleading half-truths"

DOJ Policy Developments

Government Players

DOJ

DOJ is devoting more and more resources to pursuing FCA cases—and considering whether *qui tam* cases merit criminal investigation

Support Agencies

Parent agencies (e.g., HUD, SBA) participate in financial sector FCA investigations

Cooperation

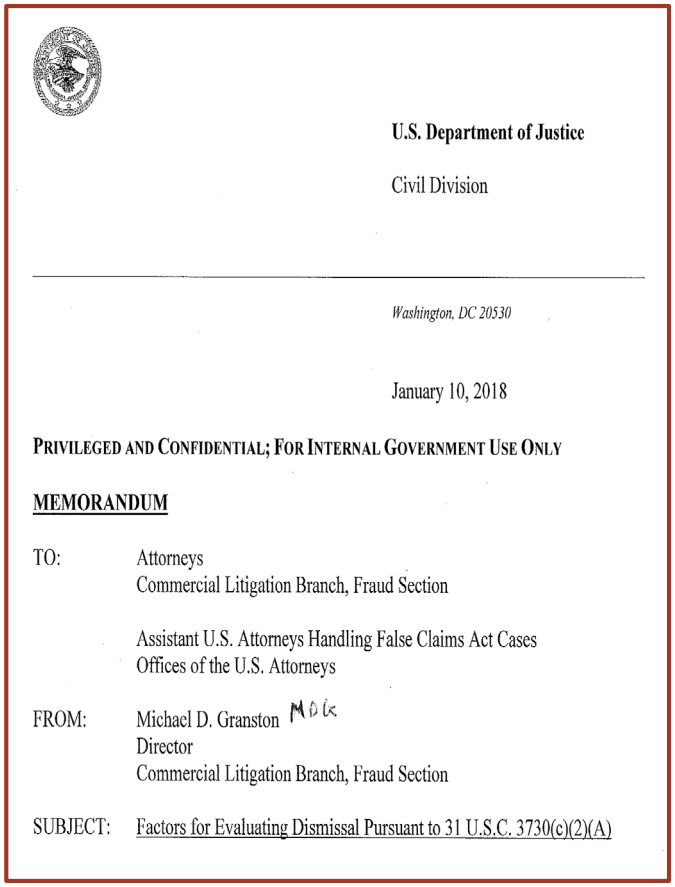
Inspectors General

FCA – The Granston Memo (Jan. 10, 2018)

- This internal memo focuses on DOJ's use of its ***dismissal authority*** (31 U.S.C. § 3730(c)(2)(A))

- Responding to "record increases in *qui tam* actions" and acknowledging its "rate of intervention has remained relatively static," DOJ underscored that ***dismissal is "an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent"***

- DOJ attorneys should ***consider dismissal*** for:
  - Facially meritless or duplicative *qui tam* suits
  - Cases that agencies view as interfering with policies / agency programs
  - Suits that threaten DOJ's litigation positions
  - Cases that might reveal classified information
  - Low expected-value suits
  - Actions that frustrate the government's investigative efforts



U.S. Department of Justice

Civil Division

Washington, DC 20530

January 10, 2018

PRIVILEGED AND CONFIDENTIAL; FOR INTERNAL GOVERNMENT USE ONLY

MEMORANDUM

TO: Attorneys
Commercial Litigation Branch, Fraud Section

Assistant U.S. Attorneys Handling False Claims Act Cases
Offices of the U.S. Attorneys

FROM: Michael D. Granston MDG
Director
Commercial Litigation Branch, Fraud Section

SUBJECT: Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A)

FCA – The Granston Memo (Jan. 10, 2018)

- *Maldonado v. Ball Homes LLC* (E.D. Ky. 2018): Kentucky district court judge agreed with DOJ that the relator's claims were weak and dismissed the case

- *Thrower v. Academy Mortgage* (N.D. Cal. 2018): Court denied DOJ motion to dismiss and ruled that the government had not sufficiently investigated to move for dismissal

FCA – The Brand Memo (Jan. 25, 2018)

- Agencies commonly issue ***guidance documents interpreting legislation and regulations***, and the government has sometimes employed evidence that a defendant violated such guidance to prove a violation of the underlying statute or regulation.

- A January 25, 2018 DOJ internal memo ***prohibits DOJ from:***
  - (1) using noncompliance with other agencies' "guidance documents as a basis for proving violations of applicable law in" affirmative civil enforcement cases, and
  - (2) using "its enforcement authority to effectively convert agency guidance documents into binding rules."

FCA – The Brand Memo (cont.)

- Under the Brand Memo, DOJ will be more ***limited in its ability to wield guidance affirmatively***

- Guidance may still be relevant for other reasons:
  - DOJ may continue to use "***agency guidance documents for proper purposes***":
    - where a guidance document "simply explain[s] or paraphrase[s] legal mandates from existing statutes or regulations"; or
    - as "evidence that a party read such a guidance document to help prove that the party had requisite knowledge of the mandate"

- Nothing in the Brand Memo suggests that the government will be able to use this policy decision to limit a defendant's use of guidance documents ***to defend*** itself

FCA – Additional DOJ Policy Initiatives (2018)

- In a June 14, 2018 speech, ***Acting Associate Attorney General Jesse Panuccio*** described three additional DOJ policy initiatives to reform FCA enforcement:

Cooperation Credit	Whereas DOJ has delineated the benefits of cooperation in other investigations (e.g., antitrust, FCPA), less guidance has been available in the FCA space
Compliance Program Credit	DOJ will "reward companies that invest in strong compliance measures"
Efforts to Prevent "Piling On"	DOJ attorneys will promote coordination within the agency and with other regulatory bodies to ensure that defendants are subject to fair punishment and receive the benefit of finality that should accompany a settlement

Task Force on Market Integrity and Consumer Fraud (July 11, 2018)

- Deputy Attorney General Rod J. Rosenstein announced an Executive Order establishing the Task Force on Market Integrity and Consumer Fraud, which will partially focus on "corporate fraud that victimizes . . . the government."

- Although the announcement and the Executive Order do not mention FCA by name, DAG Rosenstein referred directly to FCA recoveries in the announcement.
  - "Last year, we obtained more than $3.7 billion in settlements and judgments from civil cases involving fraud against the government."

- Rosenstein noted: "The new Task Force on Market Integrity and Consumer Fraud will allow us to do even more."
  - For the unified purpose of "fight[ing] fraud affecting American citizens," the Task Force will gather various departments and agencies together, including many that are involved in FCA enforcement in the financial sector, such as the Federal Housing Finance Agency and HUD.
  - Rosenstein stated that the purpose is to investigate and litigate jointly, which should increase detection and reduce "piling on."

GIBSON DUNN

FCA Enforcement Developments

GIBSON DUNN

By the Numbers: 2017 Federal Fiscal Year

$3.7 billion

Civil Settlements and Judgments Under the FCA

799

New FCA Cases Filed

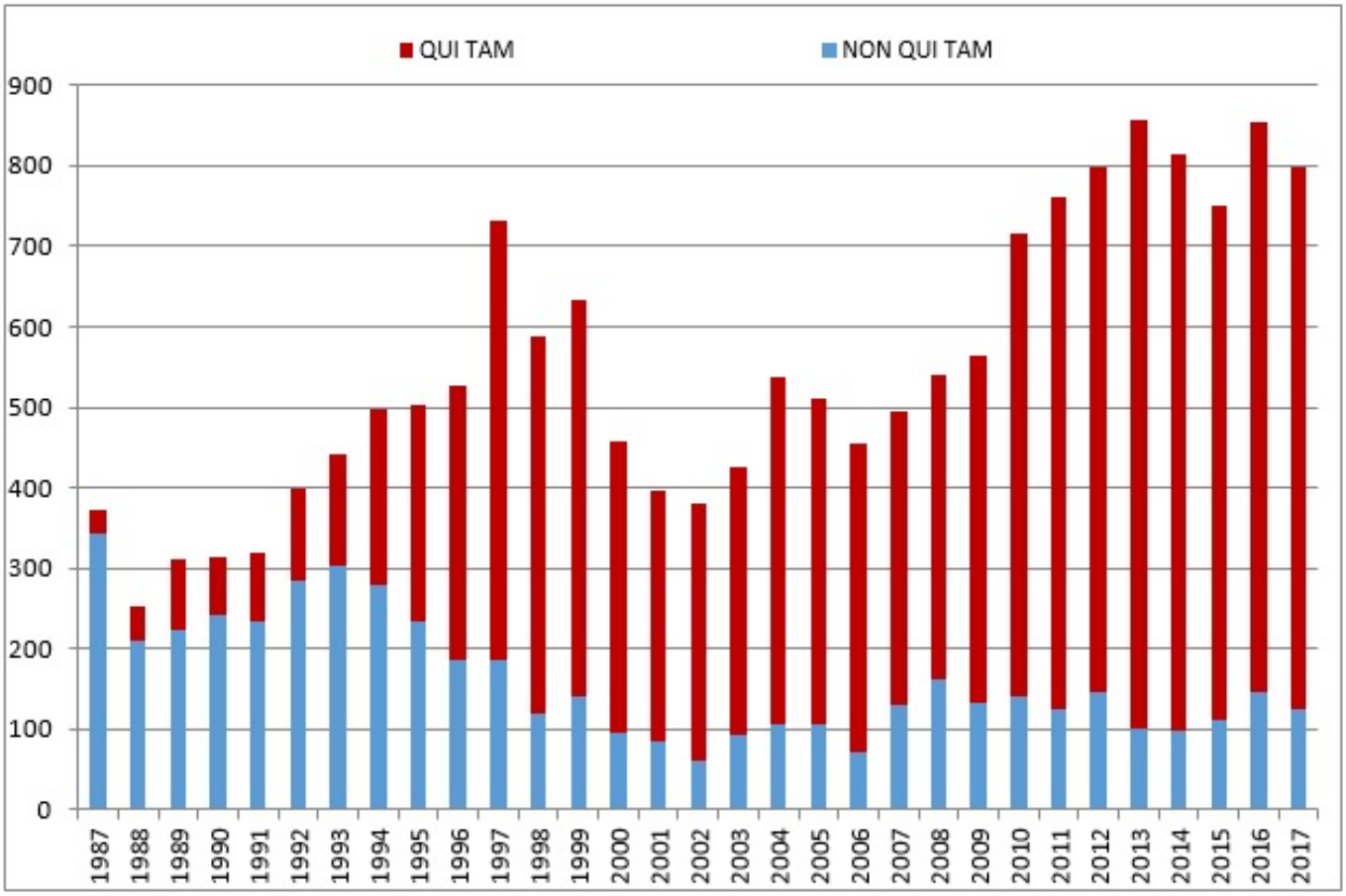
84 percent

Percentage of New FCA Cases Initiated by a Whistleblower

89 percent

Percentage of Overall Federal Recovery from Cases in which the Government Intervened

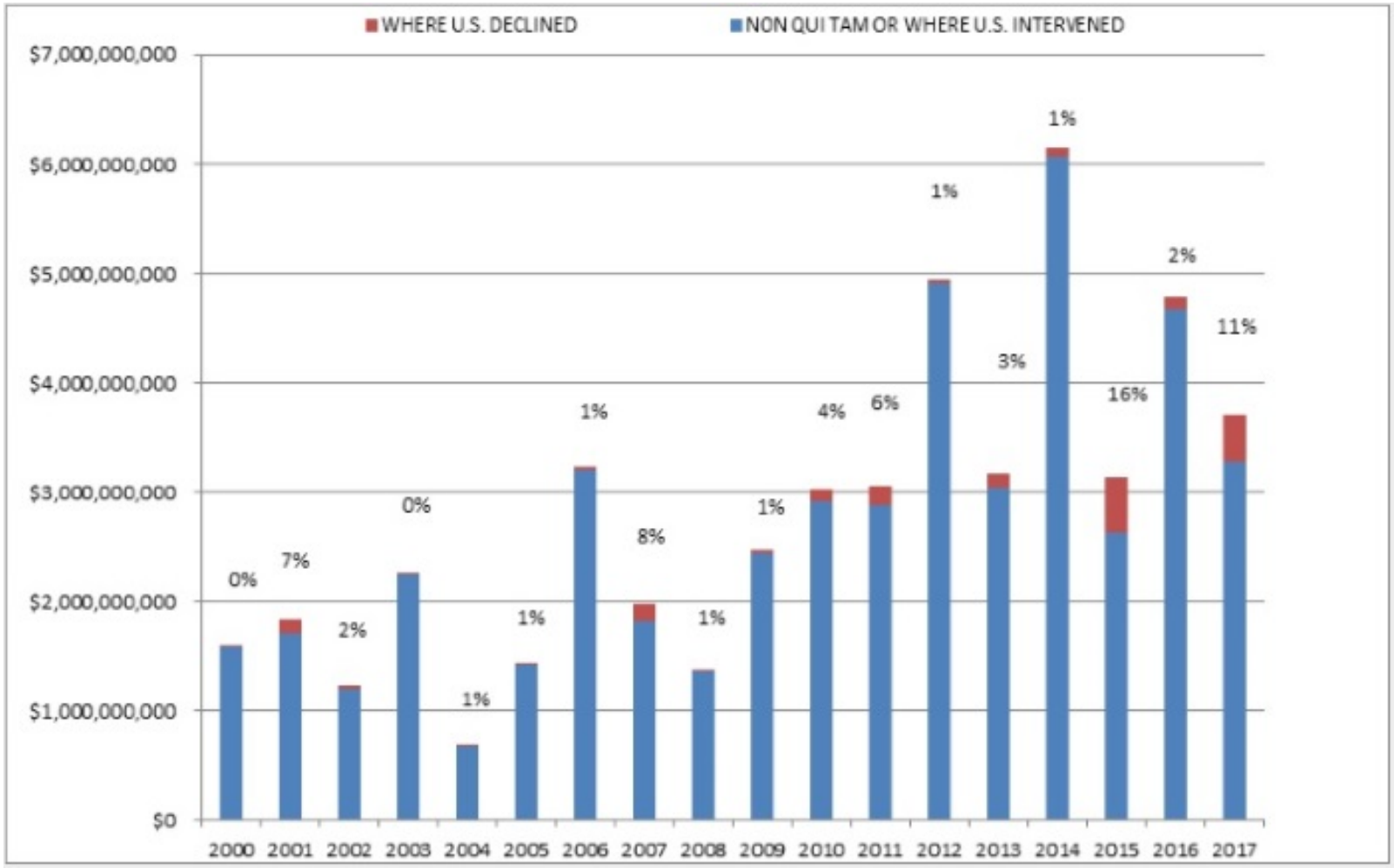
Number of New FCA Suits (1987-2017 Federal Fiscal Years)



799 new cases in 2017 FFY:

- 674 *qui tam* cases
- 125 non-*qui tam* cases

Declined Cases in FCA Settlements / Judgments (2000–2017 Federal Fiscal Years)



Source: DOJ "Fraud Statistics – Overview" (Dec. 21, 2017)

By the Numbers: Mid-Year 2018

>$600 million

FCA recoveries from ***settlements*** in the first half of 2018, according to Gibson Dunn calculations

$114 million

Judgments from FCA cases in the first half of 2018, according to Gibson Dunn calculations

9th?

After ***8 consecutive years exceeding $3 billion*** in FCA recoveries, the streak is in jeopardy this year

Recent FCA Enforcement: Financial Sector

The FCA Implicates a Wide Range of Financial Services

- **False Certification Regarding Servicing & Origination of FHA-Insured Loans**
- **False Statements Regarding Servicing of "Reverse" Mortgage Loans**
- **False Statements to Obtain Ex-Im Bank Loan Guarantees**
- **False Representations Regarding Financial Health to Borrow Money**
- **False Certification to Obtain Reimbursement**
- **False Promises to Obtain Federal Grant Dollars**
- **Any other interactions with federal or state government**

Recent FHA Mortgage Insurance Program Settlements

- **Deloitte & Touche (February 28, 2018) - $149.5 Million**
  - Mortgage originator Taylor, Bean & Whitaker Mortgage Corp. allegedly defrauded the government by originating fake FHA-insured mortgage loans. TBW executives were criminally prosecuted. (TBW itself declared bankruptcy in 2009.)
  - The government alleged that Deloitte (TBW's financial auditor) deviated from proper auditing procedures in the course of its work for TBW.
  - "The United States alleged that Deloitte's audit failures extended to the specific financial arrangements through which TBW carried out its fraudulent conduct. By failing to detect TBW's misconduct, Deloitte's audit reports allegedly enabled TBW to continue originating FHA-insured mortgage loans until TBW collapsed and declared bankruptcy in 2009." -- DOJ Press Release
  - "When auditors fail to exercise their professional judgment, and make false statements that allow bad actors to remain in government programs and submit false claims to the government, there will be consequences." -- Acting Assistant Attorney General Chad A. Readler
  - The case settled, with Deloitte disclaiming wrongdoing or liability. Deloitte publicly stated: "Members of Taylor Bean & Whitaker management, including its CEO, were convicted of engaging in a complex, collusive fraud with a counterparty bank specifically aimed at misleading our organization and investors. . . . Deloitte & Touche is deeply committed to the highest standards of professionalism, and we stand behind this work that dates back over a decade."

Other FHA Mortgage Insurance Program Settlements

- **IberiaBank Corp. (December 8, 2017) - $11.6 Million**
  - IberiaBank, as part of settling, admitted to certifying noncompliant mortgage loans for FHA insurance and receiving payments from HUD under the FHA insurance program.
  - IberiaBank also admitted to operating an incentive program that rewarded underwriters with commissions in alleged violation of HUD rules and, moreover, continuing that program after it told HUD in 2010 that it had ceased.

- **PHH Corp. (August 8, 2017) - $74.4 Million**
  - PHH admitted it failed to document borrowers' earnings and employment and other signs of their creditworthiness, meaning loans it issued allegedly failed HUD's standards for eligibility for FHA insurance.
  - A 2007 PHH audit allegedly revealed these problems, but PHH purportedly failed to self-report until 2013 (after the government initiated an investigation)
  - PHH also admitted to violating VA standards for mortgage loans to veterans

GIBSON DUNN

Recent FCA Developments: Financial Sector FCA Decisions

GIBSON DUNN

Split Ninth Circuit Panel Rules That Both *Escobar* Implied False Certification Conditions Are Mandatory

***U.S. ex rel. Rose v. Stephens Institute*, No. 17-15111 (9th Cir. Aug. 24, 2018)**

- Under *Escobar*, Defendants face FCA liability under the implied certification theory "at least where [the following] two conditions are satisfied": First, when the claim "makes specific representations about the goods or services provided"; second, when "the defendant's failure to disclose noncompliance . . . makes those representations misleading half-truths."

- A split panel of the Ninth Circuit followed two of its earlier post-*Escobar* decisions and held last week that both conditions are mandatory to find liability. However, the two-judge majority implied that the full Ninth Circuit should review this en banc ("The Court did not state that its two conditions were the *only* way to establish liability under an implied false certification theory. But our *post-Escobar* cases . . . appear to require *Escobar's* two conditions nonetheless. . . . We conclude, therefore, that Relators must satisfy *Escobar's* two conditions to prove falsity, unless and until our court, en banc, interprets Escobar differently." (emphasis in original)).

- DOJ had filed an amicus brief contending that the two factors are *not* mandatory.

Post-*Escobar* Materiality – When Does Government Knowledge Defeat Materiality?

***U.S. v. Luce*, 873 F.3d 999 (7th Cir. 2017)**

- Luce, the owner of a mortgage company, allegedly falsified statements about his background – namely his criminal record – to induce the government to accept his company into a mortgage insurance program. After three years, the company corrected the false statements on its Yearly Verification Forms. The ***government still issued the company new loans under the program***, but also began debarment proceedings.
- The Northern District of Illinois district court granted summary judgment for the government and the Seventh Circuit agreed that, even though new loans were issued after the government knew the truth about the owner's criminal background, the fact that it began debarment proceedings confirmed that the Yearly Verification Reports are material to the government's decision-making under the *Escobar* standard.

***U.S. ex rel. Kolchinsky v. Moody's Corp.*, 2017 WL 825478 (S.D.N.Y. Mar. 2, 2017)**

- Judge Pauley dismissed relator's FCA claims alleging Moody's manipulated credit ratings in return for payments that allegedly were improperly deflated or inflated.
- Relying on *Escobar*, the court held that "materiality is absent at the pleading stage" where, as here, "the relator's chronology suggests that the Government knew of the alleged fraud, yet paid the contractor anyway."

FCA – Government Knowledge and Discovery

- *Escobar* has facilitated FCA defendants' arguments that they are entitled to ***discovery regarding the government's knowledge of allegedly improper practices***

- Thus, the government has found itself seeking to limit the scope of discovery requests

- In a recent brief, DOJ argued the following:
  - ***In response to the [Defendants'] first two sets of [document] requests, the United States has collected over seven million documents from the files of 143 custodians within components of the Department of Health and Human Services, which amount to five terabytes of electronic material.***
  - The government estimates that there are already over 675,000 documents that agency personnel and DOJ attorneys must review for privilege. . . .
  - The volume of documents collected to date represents a small percentage of the expected production, and underscores the ***inordinate volume of documents*** that will need to be collected due to the overbreadth of the Defendants' discovery requests, unless the Court intervenes.

Post-*Escobar* – Materiality Cannot Be Found Where Noncompliance Is Minor or Insubstantial

Grabcheski v. Am. Intl. Group, Inc.
No. 16-1516, 2017 WL 1381264 (2d Cir. 2017)

- Second Circuit affirmed dismissal of relator's FCA suit against a parent company that allegedly misrepresented information about its subsidiaries in debt-reduction agreements with the Federal Reserve Bank of New York ("FRBNY")
- Relator alleged the subsidiaries were worth "at least $100 million less" than they appeared given their domestic insurance business.
- Second Circuit found relator failed to allege materiality (a material misrepresentation) with required particularity.
- Citing *Escobar,* court held that "even assuming arguendo that Grabcheski has sufficiently alleged knowing false . . . statement[s] . . . he has not plausibly pled that they were material." Specifically, "even assuming that Grabcheski's $100 million figure is backed by sufficient allegations, he has failed to allege with particularity facts that demonstrate how that difference in value—only 0.4%—was likely to have had any effect on the Agreements."
- Court relied on *Escobar's* holding that "Materiality . . . cannot be found where noncompliance is minor or insubstantial."

Recent Jurisprudence – Pleading Scienter

U.S. ex rel. Grubea v. Rosicki & Rosicki Assocs. PC
Nos. 12-cv-07199 & 13-cv-01467 (S.D.N.Y. June 23, 2018)

- A foreclosure law firm, Rosicki & Rosicki, allegedly inflated legal bills for foreclosure work and then passed along the inflated bills to the defendant banks (Bank of America, Citibank, JPMorgan Chase, SunTrust, Wells Fargo, and others) who allegedly serviced the mortgages and filed claims with Fannie Mae, Freddie Mac, and the FHA for reimbursement of the foreclosure expenses.

- The relator claimed that this scheme was so long-running that the banks must have been reckless not to notice the inflated bills in continuing to file the claims.

- Judge Rakoff of SDNY dismissed relator's FCA claims, finding that such allegations of "must have known" based upon the scheme being "long-running" were insufficient under the FCA and applicable pleading rules. Instead, the relator must plead some actual facts in support of scienter.

Relators Must Identify Specific False Claims or a Scheme that "Necessarily" Resulted in Submission of False Claims

U.S. ex rel. Szymoniak v. Am. Home Mortg. Servicing, Inc.
679 Fed. App'x 299, 301 (4th Cir. 2017)

- Fourth Circuit affirmed dismissal of claims against banks, mortgage-backed securities trustees, and servicers for failure to sufficiently allege defendants engaged in an "elaborate scheme" to submit false claims.

- Relator alleged defendants violated the FCA by: "1) charging the government, as an investor in mortgage-backed-securities trusts containing fraudulent assignments, for trustee and custodial services; 2) selling to the government securities in mortgage-backed-securities trusts whose values were impaired due to missing or forged assignments; 3) using false assignments to apply for payments from [HUD] . . . ; and 4) charging the government for the filing of falsified documents when foreclosing on federally insured mortgages."

- The Fourth Circuit held that "the district court's thorough order properly applied *Nathan*'s rule requiring an FCA relator to identify specific false claims *or* allege a scheme that *necessarily* resulted in the submission of false claims."

Federal Reserve Banks Are Neither the United States Nor its Agents, Despite Oversight by the Federal Reserve Board

U.S. ex rel. Kraus & Bishop v. Wells Fargo & Co.
No. 1:11-cv-05457 (E.D.N.Y. May 10, 2018)

- Relator alleged that defendant banks (Wachovia and World Savings Bank, now merged with Wells Fargo) committed fraud on Federal Reserve Banks by using accounting practices that hid toxic assets, allegedly allowing defendants to bower at lower rates.

- Judge Cogan of EDNY dismissed relator's claims on the grounds that Federal Reserve Banks were not components of the government that could be "defrauded" for purposes of an FCA action.

- Judge Cogan held that the Federal Reserve Board's supervision and ability to appoint three of each Bank's nine board members were insufficient to make the Banks part of the U.S. government, particularly as the banks received no government funding.

Relators Must Have Direct Knowledge of Fraudulent Claims and Provide Government with Information That Materially Adds Value to Be "Original Source"

U.S. ex rel. Hastings v. Wells Fargo Bank, NA, Inc.
656 Fed. App'x 328 (9th Cir. 2016)

- Court affirmed dismissal of relator's claims alleging lenders made false claims to the government about federal mortgage insurance because relator was not an "original source."
- 1986 Definition – someone who has "direct and independent knowledge of the information on which the allegations are based."
- 2010 Definition – someone who (1) "prior to a public disclosure ... has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based," or (2) "has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions."
- 1986 Analysis – Relator's 1997 letters to HUD consisted of speculation rather than knowledge because these letters lacked any factual allegations of fraudulent claims. Relator's 2012 letter to HUD fails because relator's knowledge of the alleged fraud was not "direct" because relator "did not see the fraud with" his "own eyes"; rather he assembled a collection of internal lending guidelines, real estate postings by brokers and a list of allegedly fraudulent insurance claims.
- 2010 Analysis – The 1997 letters did not provide the government with "information" because they did not state that HUD's requirements would continue to be violated or whether banks would certify that loans complied with HUD requirements. Relator's 2012 letter did not materially add to what HUD already knew because it contained only background information and details but did not add value.

Settlement Coverage Not Triggered Where Sufficient Notice to Insurers of Government FCA Settlement Offer Lacking

First Horizon Nat'l Corp. et al. v. Houston Casualty Co.
15-CV-2235-SHL-DKV, 2017 WL 2954716 (W.D. Tenn. June 23, 2017), *aff'd* 2018 WL 3359555 (6th Cir. July 10, 2018)

- Tennessee federal judge held that insurance carriers of First Tennessee bank do not have to cover part of the bank's $212.5 million 2015 FCA settlement because First Tennessee did not provide sufficient notice to insurers concerning the circumstances that led to settlement.

- The 2015 settlement concerned claims that First Tennessee originated FHA-backed loans in violation of the FCA. In April 2014, the DOJ made an offer to settle the claims for $610 million. In May 2014, the bank sent a notice of circumstances ("NOC") to insurers stating it was cooperating with the DOJ investigation but did not mention the $610 million settlement offer.
- In June 2015, First Tennessee agreed to settle for $212.5 million. Prior to this settlement, the bank sued the insurers to provide insurance coverage for the deal.
- Insurers argued they did not have to cover the settlement because they received inadequate or untimely notice.

- Judge Lipman held that the bank's NOC did not provide sufficient notice: "To permit plaintiffs to rely on the NOC submitted in May 2014 as notice of the April 2014 claim defeats the policy behind a claims-made policy, wherein the purpose of the notice requirement is to inform the insurer of its exposure to coverage."
- Affirmed on July 10, 2018.

GIBSON DUNN

FCA Compliance Best Practices

GIBSON DUNN

Minimizing Exposure

- Set a compliance-focused “tone from the top”
- Adopt and implement reasonable compliance policies and controls
  - Standards and procedures, internal audits, external audits, compliance hotline
  - A strong internal compliance program may not prevent a rogue employee from committing fraud, but it may help to defeat scienter
- Train employees on compliance policies and reporting options
- Monitor and audit
- Investigate and remediate
  - Develop standards and procedures to prevent, detect, and respond to improper conduct

Risk Assessment

- Monitor government interactions
- Understand compliance requirements
- Account for internal quality control measures
- Evaluate business partners
- Have strong HR system in place – most whistleblowers are aggrieved/disgruntled former employees
- Document the government's knowledge, awareness, and ratification of contractual and programmatic deviations
- Take care in responding to billing inquiries as incorrect explanations may be used as evidence of fraud
- Documentation and transparency are key

Investigation Responsiveness

- Critical to know of FCA complaints as soon as possible
- Foster an environment in which employees and other interested parties report concerns internally
- Separate the message from the messenger, take allegations seriously and follow up
- *Qui tam* warning signs
  - HR issues;
  - Exit interview statements;
  - Unexpected audits;
  - Requests for billing explanations;
  - Increased web activity; and
  - Former employees contacted

- Proactively engage with and present your case to DOJ and USAO
- The most critical juncture is the government's intervention decision

Our Offices

Beijing
Unit 1301, Tower 1
China Central Place
No. 81 Jianguo Road
Chaoyang District
Beijing 100025, P.R.C.
+86 10 6502 8500

Brussels
Avenue Louise 480
1050 Brussels
Belgium
+32 (0)2 554 70 00

Century City
2029 Century Park East
Los Angeles, CA 90067-3026
+1 310.552.8500

Dallas
2100 McKinney Avenue
Dallas, TX 75201-6912
+1 214.698.3100

Denver
1801 California Street
Denver, CO 80202-2642
+1 303.298.5700

Dubai
Building 5, Level 4
Dubai International Finance Centre
P.O. Box 506654
Dubai, United Arab Emirates
+971 (0)4 370 0311

Frankfurt
TaunusTurm
Taunustor 1
60310 Frankfurt
Germany
+49 69 247 411 500

Hong Kong
32/F Gloucester Tower, The Landmark
15 Queen's Road Central
Hong Kong
+852 2214 3700

Houston
811 Main Street
Houston, TX 77002
+1 346.718.6600

London
Telephone House
2-4 Temple Avenue
London EC4Y 0HB
England
+44 (0) 20 7071 4000

Los Angeles
333 South Grand Avenue
Los Angeles, CA 90071-3197
+1 213.229.7000

Munich
Hofgarten Palais
Marstallstrasse 11
80539 Munich
Germany
+49 89 189 33-0

New York
200 Park Avenue
New York, NY 10166-0193
+1 212.351.4000

Orange County
3161 Michelson Drive
Irvine, CA 92612-4412
+1 949.451.3800

Palo Alto
1881 Page Mill Road
Palo Alto, CA 94304-1125
+1 650.849.5300

Paris
166, rue du faubourg Saint Honoré
75008 Paris
France
+33 (0)1 56 43 13 00

San Francisco
555 Mission Street
San Francisco, CA 94105-0921
+1 415.393.8200

São Paulo
Rua Funchal, 418, 35°andar
Sao Paulo 04551-060
Brazil
+55 (11)3521.7160

Singapore
One Raffles Quay
Level #37-01, North Tower
Singapore 048583
+65.6507.3600

Washington, D.C.
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5306
+1 202.955.8500