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PERSPECTIVE

Mid-year review: False Claims Act enforcement in 2019

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The False Claims Act, 31 U.S.C. Section 3729 et seq., has served as the principal tool for combatting fraud in government programs since the Civil War — the government has recovered $40 billion in the last decade alone — and, if the last six months are any indication, 2019 is shaping up to be no exception.

Although this year the government has largely focused its efforts on fraud in health care programs, the FCA is an extraordinarily broad statute — reaching fraud in any government program, from Medicare to defense contracting, to the education sector.

The core provisions of the FCA punish the submission of false or fraudulent claims for payment for reimbursement by the government or a government agency, predicated on (i) a "false" statement or claim, (ii) made knowingly, that was (iii) material to the government's decision to pay or provide funding.

More than 30 states, including California, have enacted their own FCA statutes that mirror the federal FCA for payments by state or local programs — with several states, including California, taking steps this year towards strengthening their statutes.

All of these statutes permit private parties (so-called relators, or whistleblowers) to pursue FCA claims on behalf of the government. These cases, known as qui tam actions, are filed under seal so that only the government knows about them as it decides whether to take over. Whistleblowers can pursue a case whether or not the government takes over, and successful ones receive up to 30% of the government's recovery.

The U.S. Department of Justice has announced recovery of more than $750 million to date this year in FCA cases, an uptick from the halfway point in 2018.

DOJ's recoveries from the last six months reflect a wide variety of theories of FCA liability. Although DOJ has long targeted the health care sector, this year it has stepped up its efforts, applying greater scrutiny to cases involving claims for payment allegedly submitted in violation of the Anti-Kickback Statute and the Stark Law, which generally prohibit various types of remunerative arrangements with health care providers.

FCA recoveries predicated on an Anti-Kickback Statute theory in 2019 included hundreds of millions of dollars from companies accused of covering Medicare copays for their own products through charitable foundations and companies seeking payment for allegedly medically unnecessary treatments. Further, DOJ turned its attention to the opioid epidemic, recovering more than $200 million from an opioid manufacturer accused of kickbacks.

DOJ has not ignored other sectors in 2019. For example, in the education sector, a private university paid over $100 million to resolve allegations it relied on fabricated research results to secure federal research grants.

In the courts, the U.S. Supreme Court — deciding an FCA case for the third time in the last four years — made it easier for private relators to sue under the FCA, holding that a relator pursuing a case where the government declined to intervene can take advantage of a statute of limitations period of up to *10 years*.

On the political side, the shift in DOJ's enforcement policies under the Trump administration that began last year encountered some hurdles in 2019.

For example, although DOJ continued its efforts (based on a memorandum released by the director of the civil fraud division) to seek dismissal of qui tam cases not brought in the government's interests, its efforts were stymied at times by some courts that refused to dismiss cases where the government had not shown it had adequately investigated the matter beforehand.

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In an effort to more publicly and transparently articulate its approach to resolving FCA cases, DOJ also in May 2019 released long-awaited guidance regarding cooperation credit in FCA matters, providing for varying levels of credit depending on a defendant's level of efforts across numerous categories of cooperation.

Meanwhile, not unexpectedly, the States continued vigorous efforts to enforce their FCAs. California — which pursues cases under both the state FCA and a companion statute (the Insurance Frauds Prevention Act, which punishes false claims made to *private* insurers the same way the FCA applies to government claims) — led the charge. The California attorney general and Department of Insurance vigorously pursue these cases. And this year, the California Legislature took steps toward amending the California FCA to make it easier for plaintiffs to prove "materiality" — often a key point of attack for FCA defendants, and to extend the statute's reach, for the first time, to cases involving tax-related fraud (the assembly-approved bill awaits passage in the senate).

Whether brought by the government or a private party, FCA actions pose serious risks to defendants, not only financially — the statute provides for automatic trebling of damages, civil monetary penalties of up to more than $20,000 per false claim, and attorney fees and costs — but reputationally and professionally, as FCA defendants may face potential suspension or debarment from eligibility in government programs.

Because of the risks involved, it is imperative to know immediately about a potential FCA case. To that end, the last six months is another reminder to be watchful not only for obvious indicators of an FCA case such as a civil investigative demand, but even more obscure signs such as surprise audits or even employee gossip.

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

• Investigation. Conducting a prompt investigation of any alleged wrongdoing — before the government reaches out — is a critical step. Doing so will allow your company to be in a position to potentially take advantage of cooperation credits based on DOJ's recently announced guidance.

• Avoid government intervention and attempt to convince the government to dismiss. The most important development in any qui tam case remains whether the government takes over. Each year approximately 90% or more of recoveries come from cases brought by the government or in which the government intervened. Accordingly, it is critical to attempt to convince the government not to take over a matter. Further, based upon DOJ's recent guidance, it is also worth the effort to attempt to convince the government to dismiss any case in which it does not intervene.

• Attack the pleadings. Once the case is at issue, attempt to dismiss the case at the pleadings. Plaintiffs' counsel may try to get these cases to discovery, one result of which can be crippling discovery costs and attempts to pressure a settlement.

• Prevention. Most whistleblowers complain internally before going to a lawyer. A strong HR and compliance program can not only help prevent FCA cases, but can serve as compelling evidence that your company did not violate the FCA in the first place.

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