The False Claims Act – 2019 Mid-Year Update: Financial Services Sector

September 17, 2019

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.

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.

Sean Twomey is a senior litigation associate in the Los Angeles office specializing in complex commercial cases, sports law, and health care enforcement, compliance, and litigation. He is experienced in handling white collar investigations, audits, enforcement actions, and has significant experience in False Claims Act litigation and related civil and criminal investigations in which he has represented clients in a variety of industries.

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

Agenda

- FCA Overview and Recent Jurisprudence
- DOJ Policy Developments
- Recent Developments: FCA Financial Sector Settlements & Enforcement
- 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*** …."

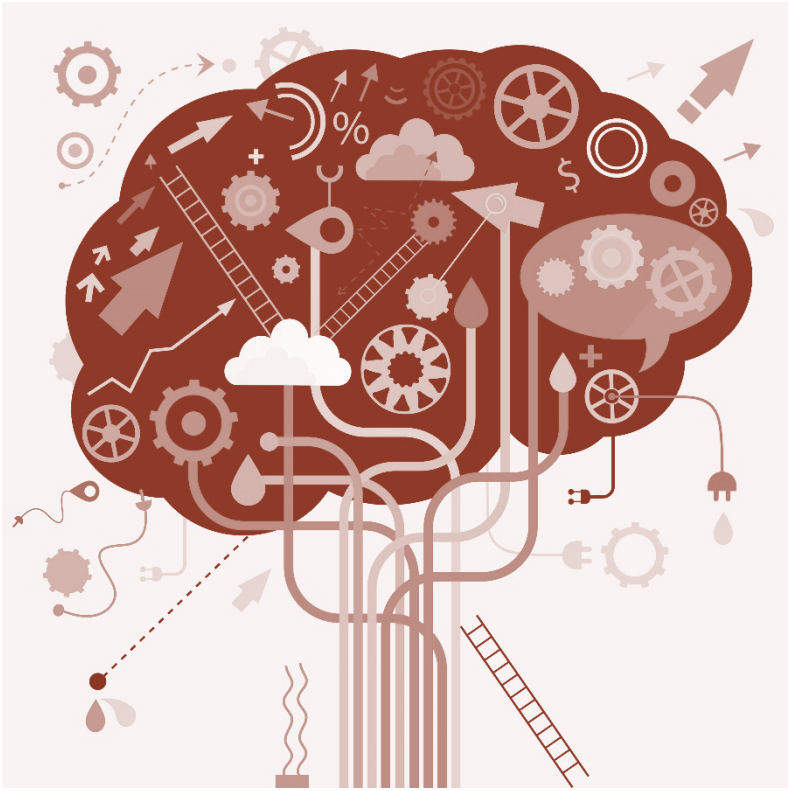
Rainwater v. United States, 356 U.S. 590 (1958)

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

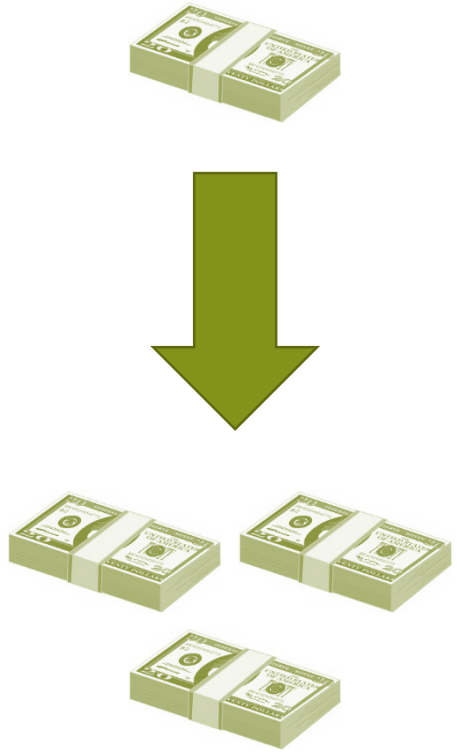
- Obtaining a contract through false statements or fraudulent conduct
- *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (claims by contractors who colluded on bids)

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 government charged $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
  - Increased by interim rule in 2016, with later adjustment for inflation in 2018 to range of $11,181 to $22,363 per violation (no rule issued yet in 2019 increasing penalties)
  - Interim rule was finalized in April 2019
  - Final rule does not require DOJ to seek maximum number or amount of penalties available in any particular case



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***

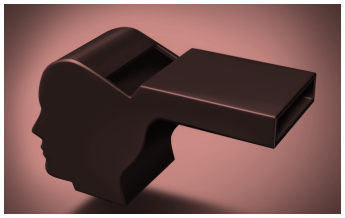
Recent Jurisprudence – Statute of Limitations

Cochise Consultancy, Inc. v. United States ex rel. Hunt, 139 S. Ct. 1507 (2019)

- Resolving a circuit split, the Supreme Court held that an extended limitations period of up to ten years applies in all FCA cases, whether the government has intervened or not. 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" but not more than 10 years after the violation)
- Following *Cochise*, ***relators can now employ the extended limitations period even in cases where the government has declined to intervene***
- The Court held that courts must look to the government official's knowledge (not the relator's), as the trigger for the additional three-year period

FCA – *Qui Tam* Provisions

- ***Qui Tam Provisions***
  - Enable so-called "relators" to bring cases in the government's name and receive ***as much as 30%*** of recovery or judgment
  - Allow government to intervene
    - An increasing number are pursued ***without government intervention*** (but often with government statement of interest)
  - DOJ has broad dismissal authority
    - We will cover ongoing developments in DOJ's use of this power shortly
- ***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 same level); costs and attorneys' fees
  - Ongoing developments in case law, e.g., whether subject to Rule 9(b) particularity requirements and "objective reasonableness" standard



"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"***

- First-to-file and public disclosure bars do not apply to DOJ

Recent Jurisprudence – First-to-File Bar

United States v. Millennium Laboratories, Inc., 923 F.3d 240 (1st Cir. 2019)

- The First Circuit, reversing its prior precedent, joined the D.C. Circuit and the Second Circuit in holding that ***the FCA's first-to-file bar is not jurisdictional, such that arguments under the first-to-file bar do not implicate the court's subject matter jurisdiction***, even if they are a cause for dismissal

- This distinction can affect how, and when, arguments under the first-to-file bar may be made, and also the standard of review a court applies

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

136 S. Ct. 1989 (2016)

- **Implied Certification**

- 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"

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

136 S. Ct. 1989 (2016)

- **Materiality – "Demanding" Requirement**
- Key issue is whether alleged violation of particular statutory, regulatory, or contractual provision, or misrepresentation regarding compliance, is "material" to government payment decision
- Under the FCA, "the term 'material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money"
- *Escobar* recognizes relevant factors—none dispositive alone—that lower courts should consider in determining materiality under the FCA:

1. Whether government has expressly identified compliance with provision or regulation as ***a condition of payment***
2. Whether government would ***deny payment if it had known of the alleged noncompliance***
3. Whether noncompliance is ***minor or insubstantial***

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

***United States ex rel. Lemon v. Nurses To Go, Inc.*, 924 F.3d 155 (5th Cir. 2019)**

- Under *Escobar*, when evaluating materiality of regulatory violations under the FCA, relevant considerations include the violations are substantial or minor, are violations of conditions of government payment, and whether the government would have denied reimbursement if it had actual knowledge of the alleged violations

- The Fifth Circuit, analyzing these *Escobar* factors, reversed the district court's 12(b) dismissal, concluding that the allegedly violated regulatory requirements were conditions of payment

- Recognizing *Escobar's* directive that this was "probative evidence of materiality," but "alone does not conclusively establish materiality," the Court also held that generalized allegations that the government had taken enforcement actions for similar violations against other companies in the past was sufficient for the pleadings stage, observing that it did "not expect Relators to know precisely the Government's prosecutorial practices without the benefit of discovery"

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

136 S. Ct. 1989 (2016)

- **Scienter**
- *Escobar* describes as a "rigorous" requirement
- But nevertheless makes clear defendants can have "actual knowledge" that a condition is material to a decision to pay without the Government expressly calling it a condition of payment
    - If a reasonable person would realize materiality of condition or compliance, defendant's failure to appreciate materiality amounts to "deliberate ignorance" or "reckless disregard" even if the Government does not expressly spell this out

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

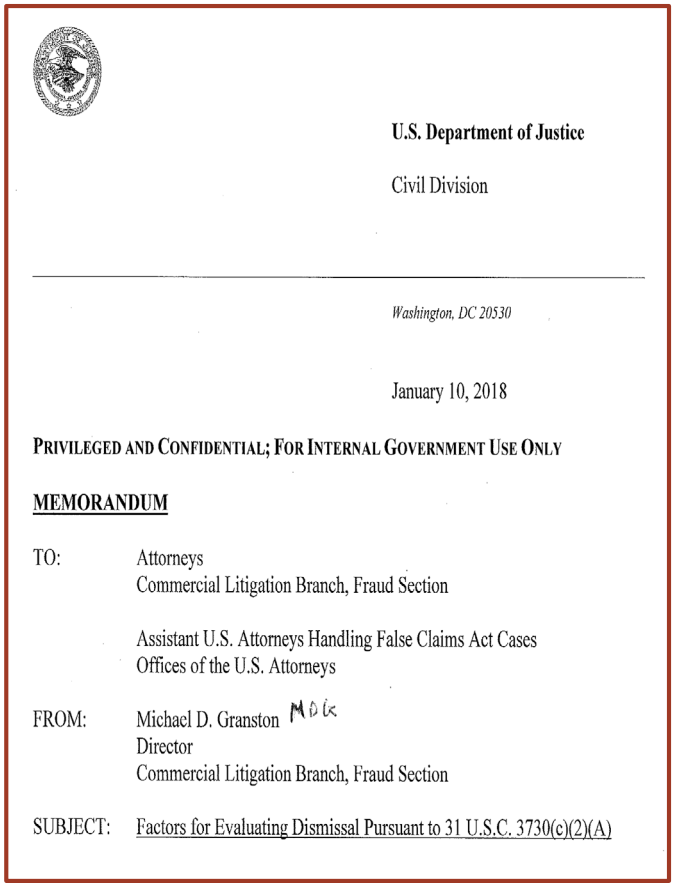
FCA – The Granston Memo (Jan. 10, 2018)

- 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 seen as interfering with agency policy/programs
  - Suits that threaten DOJ's litigation positions
  - Cases that might reveal classified information
  - Low expected-value suits
  - Actions that frustrate investigative efforts

- Principles in Granston Memo incorporated into DOJ Justice Manual at Section 4-4.111 in September 2018



U.S. Department of Justice

Civil Division

Washington, DC 20530

January 10, 2018

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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 – Application of The Granston Memo (2019)

- In a March 2019 speech at the Federal Bar Association's FCA Conference, ***DOJ Civil Fraud Section Director Michael Granston*** explained DOJ's approach under the memo, stating "dismissal will remain the exception rather than the rule"
  - He expanded that the government's cost-benefit analysis will focus on the likelihood that the relator can prove the allegations
  - DOJ will not *dismiss qui tam* actions based solely on prospective discovery obligations, so pursuing excessive discovery may not help get a case dismissed
  - But DOJ referenced discovery burden in a recent case urging the Supreme Court to deny certiorari, so that the case could be dismissed
- In remarks in January 2019 at the American Conference Institute's Advanced Forum on False Claims Act Enforcement, ***Deputy Associate Attorney General Stephen Cox*** acknowledged DOJ's use of its dismissal authority has increased since 2017
  - Mr. Cox stated that while DOJ "will remain judicious," it "will use this tool more consistently to preserve our resources for cases that are in the United States' interests," noting DOJ plays "a gatekeeping role" in the "partnership" between *qui tam* relators and the government

FCA – Application of The Granston Memo (2019) (cont.)

- ***Sequoia*** test: government may dismiss if: (1) it identifies a valid government purpose; and (2) a rational relation exits between the dismissal and accomplishment of that purpose; unless (3) dismissal is fraudulent, arbitrary and capricious, or illegal. *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998)

- ***Swift*** *test:* government has "an unfettered right to dismiss" FCA actions under 3730(c)(2)(A), and so dismissals are "unreviewable" with a possible exception for dismissals constituting "fraud on the court." *Swift v. United States*, 318 F.3d 250, 253 (D.C. Cir. 2003)

FCA – Application of The Granston Memo (2019) (cont.)

- *United States v. EMD Serono, Inc.* (E.D. Pa. 2019): Pennsylvania district court judge, following *Sequoia*, agreed with DOJ that allegations lack merit, pursuing case will be too costly and contrary to the public interest, and dismissed the case

- *United States ex rel. CIMZNHCA, LLC v. UCB, Inc.* (S.D. Ill. 2019): following *Sequoia*, Court denied DOJ motion to dismiss and ruled that the government had not sufficiently investigated to move for dismissal

- District court judges in Minnesota, Mississippi, and Texas agreed with the *Swift* standard, but observed that the government would still be entitled to dismissal even under *Sequoia*. In all three cases the court granted the government's motion to dismiss

FCA – Cooperation Credit Guidance (May 7, 2019)

- DOJ's formal policy identifying the type of cooperation eligible for credit, included in Justice Manual Section 4-4.112
- Guidance is the latest chapter in effort to scale back "all or nothing" approach to cooperation credit in 2015 Yates Memo and to describe the bases for cooperation credit
- Driven by belief that all or nothing approach had been counterproductive in civil cases because it deprived DOJ of the "flexibility" they needed "to accept settlements that remedy the harm and deter future violations"
- Guidance provides clarity regarding DOJ's overall approach and flexible standards provide opportunities for defendants to formulate creative negotiation and litigation strategies
- On the other hand, the guidance lacks specificity regarding several critical issues (e.g., what constitutes cooperation and how to assess the value that cooperation provides to DOJ)

FCA – Cooperation Credit Guidance (May 7, 2019) (cont.)

- Under the Guidance, defendants may receive varying levels of cooperation credit depending on their efforts in cooperation categories including:
  - "[i]dentifying individuals substantially involved in or responsible for the misconduct";
  - making individuals available who have "relevant information";
  - "[a]dmitting liability or accepting responsibility for the relevant conduct"; and
  - "[a]ssisting in the determination or recovery" of losses

- Guidance notes that cooperation must have value for DOJ, measured by:
  - "timeliness and voluntariness" of cooperation
  - "truthfulness, completeness, and reliability" of information provided
  - "nature and extent" of the cooperation
  - "significance and usefulness of the cooperation" to DOJ

- Full credit requires self-disclosure of all those involved in misconduct, full investigation cooperation, and remedial steps to prevent and detect similar wrongdoing

- Unlike criminal case cooperation guidance, no percentage reductions in penalties or damages. Instead, DOJ may reduce multiple sought

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FCA Enforcement Developments

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By the Numbers: 2018 Federal Fiscal Year

$2.9 billion

Civil Settlements and Judgments Under the FCA

767

New FCA Cases Filed

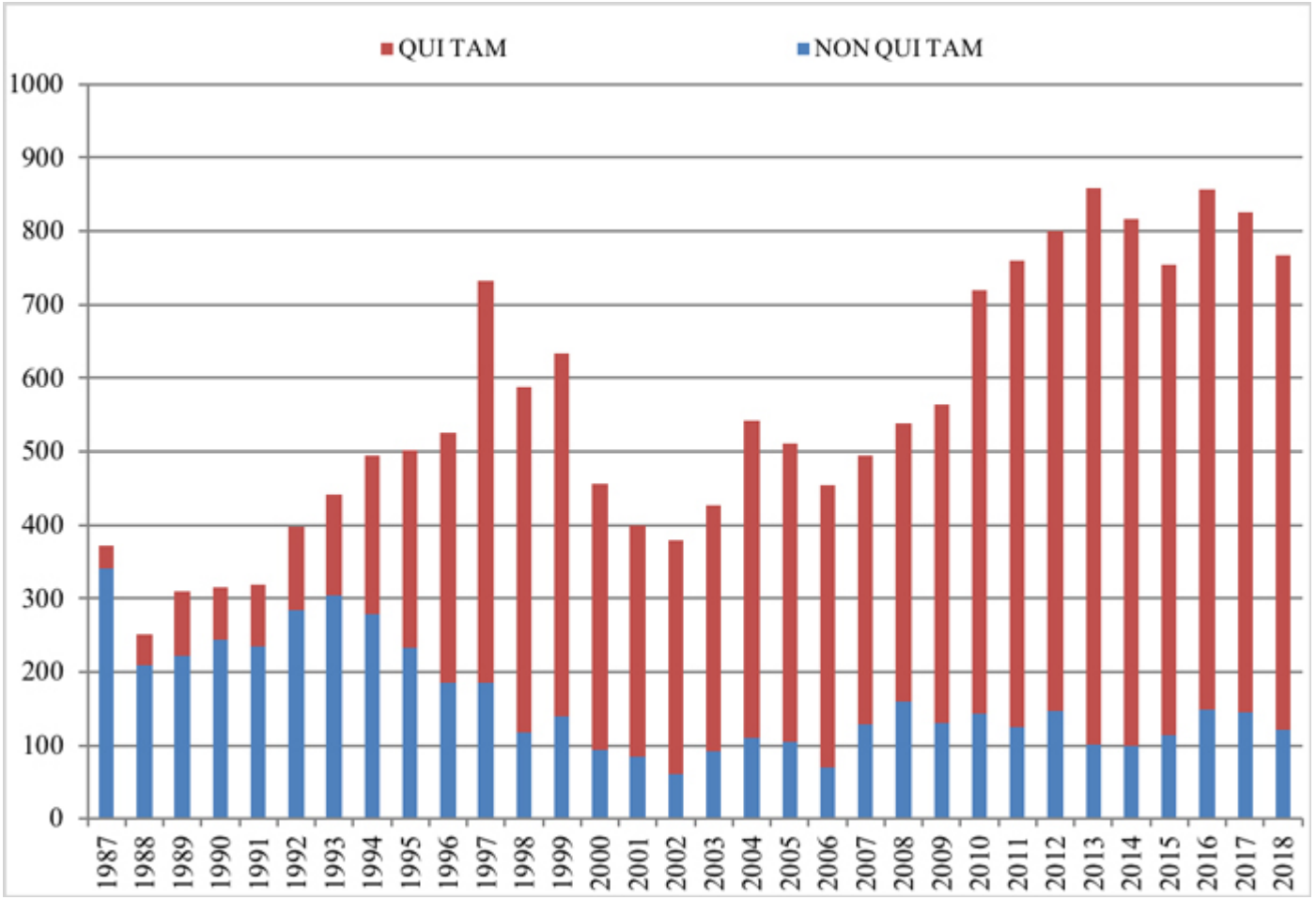
84 percent

Percentage of New FCA Cases Initiated by a Whistleblower

96 percent

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

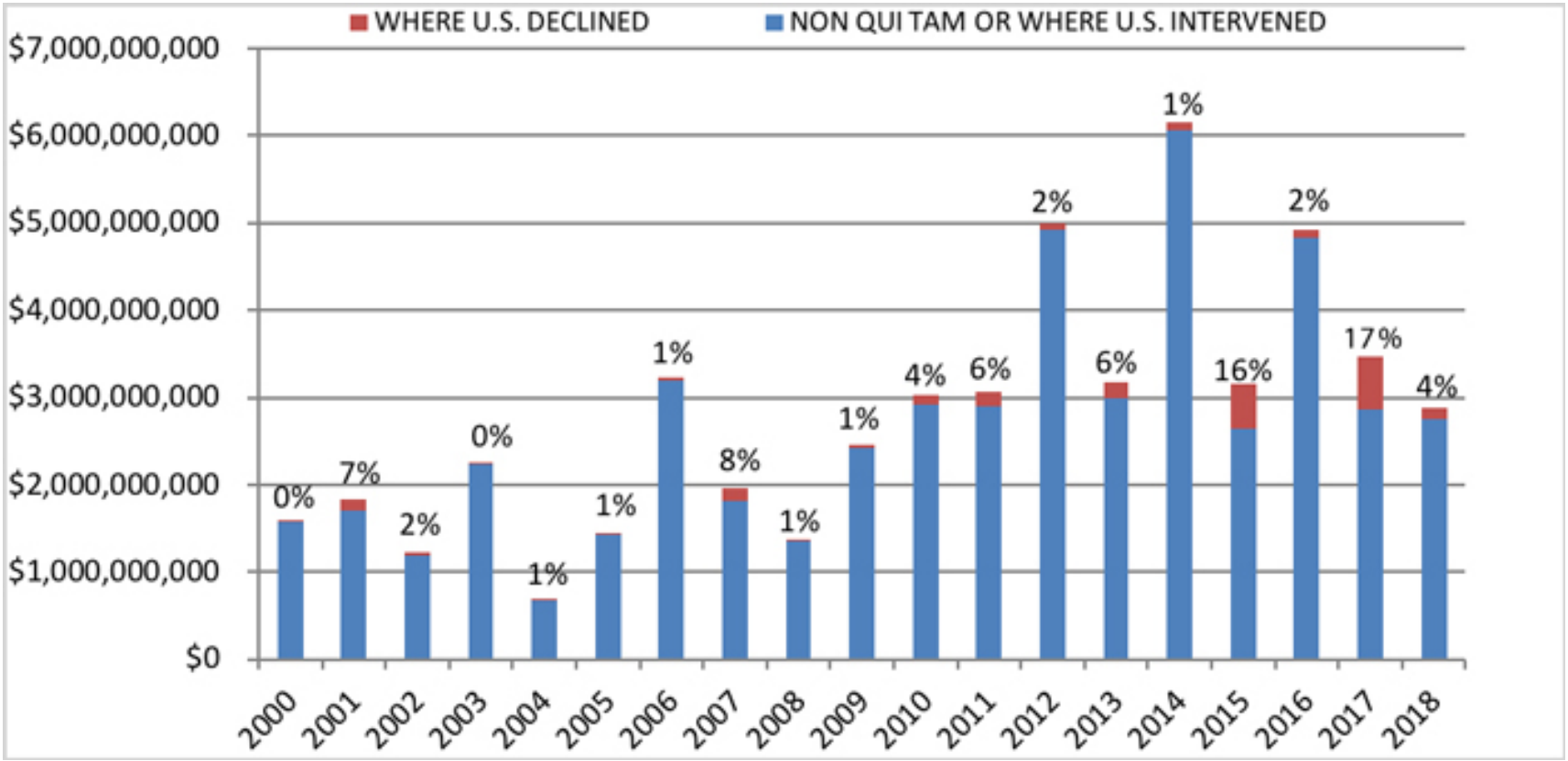
Number of New FCA Suits (1987-2018 Federal Fiscal Years)



767 new cases in 2018 FFY:

- 645 *qui tam* cases
- 122 non-*qui tam* cases

Declined Cases in FCA Settlements / Judgments (2000–2018 Federal Fiscal Years)



Source: DOJ "Fraud Statistics – Overview" (Dec. 21, 2018)

By the Numbers: Mid-Year 2019

>$750 million

FCA recoveries from ***settlements*** in the first half of 2019, according to Gibson Dunn calculations

>$50 million

from ***settlements*** involving financial entities in the first half of 2019, according to Gibson Dunn calculations

2nd?

2019 on pace to match dip in 2018 as only year in the past 10 with ***below $3 billion*** in FCA recoveries

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Recent FCA Settlements & Enforcement: Financial Sector

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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

- **Amount of settlements much smaller than similar cases a few years ago**
  - May 2018 statement by HUD Secretary Ben Carson promised to "seek[] to limit the use of the False Claims Act as a tool of last resort"
- **FCA Claims Relating to Participation in FHA Mortgage Insurance Program**

Settlement	Date	Amount
Quicken Loans	June 14, 2019	$32.5 million
Finance of America Mortgage	December 12, 2018	$14.5 million
Universal American Mortgage Company	October 19, 2018	$13.2 million

FHA Releases Proposed Clarifications to Loan Certification Requirements (May 2019)

- In May, FHA released proposed clarifications in the Federal Register to its annual and loan-level certification requirements, as well proposed new language regarding what constitutes a defective loan

- FHA Commissioner Brian Montgomery stated that the revisions are intended to increase transparency in response to decline in bank FHA loan origination, commenting that: "***Banks have said time and time again that the reason for their limited participation in FHA is the legal liability associated with enforcement actions stemming from the False Claims Act***. They have expressed concern that even minor errors could expose them to severe penalties"

- Commissioner Montgomery described the revisions as a proposal to replace the "jumbled legalese" in its certification and compliance documents with "plain English"

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Recent FCA Developments: Financial Sector FCA Decisions

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DOJ's Pursuit of Granston Dismissals Produces Mixed Results in Financial Sector Cases

***United States v. U.S. ex rel. Thrower et al.* (No. 18-16408) (9th Cir. 2019)**

- In the Ninth Circuit, which applies the more relator-friendly standard of review to dismissal motions (*Sequoia*), DOJ has appealed a June 2018 ruling by a California federal judge denying DOJ's motion to dismiss
- In briefing, DOJ called the refusal to dismiss the FCA action—which related to certification of borrowers for FHA insurance even though it was likely that the borrowers would default— "unprecedented"

***United States ex rel. Schneider v. J.P. Morgan Chase Bank, N.A.*, No. CV 14-1047, 2019 WL 1060876 (D.D.C. Mar. 6, 2019)**

- In the D.C. Circuit, which applies the government-friendly standard of review (*Swift*), a district judge dismissed an FCA action relating to the National Mortgage Settlement and Home Affordable Modification Programs
- The court relied on DOJ's "unfettered discretion" to dismiss *qui tam* cases and found DOJ had afforded the relator an opportunity to be heard

Fifth Circuit Affirms $298 Million Judgement in Mortgage Fraud Case Involving Sampling

United States v. Hodge, 933 F.3d 468 (5th Cir. 2019)

- Fifth Circuit affirmed a nearly $300 million treble damages judgment against two mortgage companies and their owner for allegedly fraudulently obtaining FHA insurance for loans that later defaulted
- Jury found, after a five week trial, that the defendants had misrepresented compliance with FHA underwriting guidelines and had concealed the use of unregistered branches to originate loans
- Court rejected challenge to sufficiency of the evidence, holding that the government had shown scienter, materiality, and causation. Evidence the defendants had continued to originate loans from unregistered branches after being notified it was unlawful by HUD demonstrated scienter
- As to materiality, Court relied on fact that HUD demanded indemnification from defendants after discovering a handful of loans were originated from unregistered branches, and later barred them from the FHA program entirely
- Government relied on sampling of loan files and extrapolation, which showed that loans from unregistered branches had higher default rates. Court found this sufficient to show causation because even "if the defendants did not know which specific loans would eventually default, it was foreseeable that a higher percentage of them would"

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

***United States ex rel. Houpt v. Wells Fargo Bank, N.A.*, No. 4:17-CV-00377-CWD, 2019 WL 591441 (D. Idaho Feb. 13, 2019)**

- Relator alleged FCA claims relating to payments of loan guarantee by Small Business Administration
- The court found no materiality because the SBA had paid the bank despite having knowledge of the alleged misrepresentations at issue, citing *Escobar* that when the government "pays a particular claim in full despite its actual knowledge that certain requirements were violated that is very strong evidence" against materiality
- The defendant either "was truthful in its representations, or the SBA reporting requirements [that the relator] alleges were violated were not material to the SBA's decision to pay the loan guarantee"
- The court also doubted whether the relator sufficiently alleged any false statement or scienter, as the complaint alleged that the representations were either true or had been voluntarily disclosed by the bank to the SBA
- Has been appealed to Ninth Circuit

Relators Must Identify Specific False Claims or a Scheme that Resulted in Money Expended by the Government

***United States ex rel. Brooks v. Wells Fargo Bank N.A.*, No. 17-CV-1237, 2019 WL 1125834 (N.D. Ill. Mar. 12, 2019)**

- Brooks alleged that defendant, in seeking repayment from Fannie Mae and Freddie Mac for loans originated by the bank, made misrepresentations in loan applications
- District court granted motion to dismiss under FRCP 9(b). Relator had failed to allege with particularity that defendant submitted an actual false claim because he did not identify who the alleged false claim was given to—Fannie Mae or Freddie Mac—let alone state that relator had ever applied to either entity for a loan, such that bank would have submitted an application
- Court also reasoned that relator failed to sufficiently link the supposedly fraudulent claim with any actual government spending. Allegations that the government provided some measure of funding to Fannie Mae and Freddie Mac did not satisfy the obligation to show a payment by either one involved expenditure of government funds, as both entities also generated revenue on their own

Proximate Causation – Government Must Show Nexus Between Alleged Misrepresentation And Loss to Government

United States v. Luce, No. 11 CV 5158, 2019 WL 3003300 (N.D. Ill. July 10, 2019)

- Luce, president of a mortgage company that originated FHA loans, allegedly falsified statements about his criminal record, to meet certain lender fitness requirements and induce government to accept his company into mortgage insurance program
- Years earlier the Northern District of Illinois district court had granted summary judgment for the government, and, in 2017, the Seventh Circuit affirmed and reversed in part. On remand, parties filed cross-motions for summary judgment on causation
- District court held that while Luce's falsehoods might have been a but for cause, they were not proximate cause of government's loss, and granted him summary judgment
- There was no evidence of nexus between the false statements at issue (misrepresenting the existence of a federal investigation into Luce unrelated to the operation of Luce's mortgage business) and the eventual loan defaults, i.e., none of the loan defaults were caused by or related to the false certifications or any other wrongdoing by Luce or his company

Relators Must Have Direct Knowledge of Fraudulent Claims that Materially Adds to Public Disclosure and Cannot be Original Source if Hired to Investigate Fraud on the Government

***United States ex rel. Brooks v. Wells Fargo Bank N.A.*, No. 17-CV-1237, 2019 WL 1125834 (N.D. Ill. Mar. 12, 2019)**

- Court dismissed relator's claims for independent reason that allegations—relating to originating and underwriting federally insured mortgage loans—had been the subject of national press and prior litigation
- Relator was not an "original source" because his additional details, though from personal knowledge, did not "materially add" to the public disclosures

***United States ex rel. Hendrickson v. Bank of Am., N.A.*, 343 F. Supp. 3d 610 (N.D. Tex. 2018)**

- Relator alleged claims relating to recouping payment of government benefits to deceased individuals
- Case dismissed because prior state and federal court cases, government administrative reports, and news articles had all disclosed the allegations before the complaint was filed
- Relator was not an original source because his disclosures were not voluntary (he was a government employee "hired to investigate and disclose fraud") and he lacked personal knowledge about payments involving government agencies other than the one that he worked for
- Has been appealed to Fifth Circuit

Settlement Coverage Not Triggered By FCA Settlement Where Policy Limited to Professional Services Provided to Clients

***Iberiabank Corp. v. Illinois Union Ins. Co.*, No. CV 18-1090, 2019 WL 585288 (E.D. La. Feb. 13, 2019)**

- Louisiana federal judge held that insurance carriers did not have to cover the bank's nearly $12 million FCA settlement because the settlement was not a loss covered by the policies
- Settlement resolved claims relating to FHA mortgage insurance
- No coverage because government was not a "client," as policies required
- Further, coverage was limited to professional services and bank did not provide "professional services" to the government. While underwriting services provided to its borrowers were contemplated in its insurance policy, the allegedly false certifications the bank made to the government – the crux of the FCA *qui tam* action – did not qualify as professional services
- Has been appealed to Fifth Circuit

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FCA Compliance Best Practices

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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

Please contact the panelists with any questions:

F. Joseph (Joe) Warin / Washington, D.C.
Tel +1 202.887.3609
Int'l. Mobile +1 202.213.3597
FWarin@gibsondunn.com

Stuart Delery / Washington, D.C.

Tel +1 202.887.3650

SDelery@gibsondunn.com

Jim Zelenay / Los Angeles
Tel +1 213.229.7449
JZelenay@gibsondunn.com

Sean Twomey / Los Angeles
Tel +1 213.229.7284
STwomey@gibsondunn.com