GIBSON DUNN

2020 False Claims Act Webcast Series: Government Contracting

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Today's Presenters

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MCLE Certificate Information

- Most participants should anticipate receiving their certificate of attendance in four weeks following the webcast
- Virginia Bar Association members should anticipate receiving their certificate of attendance six weeks following the webcast
- Please direct all questions regarding MCLE to CLE@gibsondunn.com

Today's Agenda

- False Claims Act Overview & Enforcement Updates
- DOJ Policy & Legislative Developments
- Notable Case Law Developments
- Continuing and Emerging Considerations for Federal Contractors
- Questions

We encourage your questions throughout this presentation

False Claims Act Overview & Enforcement Updates

The False Claims Act ("FCA") Overview

- The **False Claims Act**, 31 U.S.C. §§ 3729-33, is the federal government's **primary weapon to redress fraud** against government agencies and programs

- Imposes liability any "person" (natural or corporate entity) who **knowingly submits or causes the submission** of a **material false or fraudulent claim to the United States** for money or property

- ***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
  - DOJ may intervene in relator's case, decline to intervene, and/or move to dismiss

The FCA provides for **treble damages** and **civil penalties.**
Current civil penalties are assessed at $11,665 to $23,331 per FCA violation.

Government Players

Department of Justice

DOJ continues to devote more and more resources to pursuing FCA claims, including against contractors

Contracting & Support Agencies

Contracting agencies and support agencies (such as DCAA) increasingly view contract disputes as false claims

Cooperation

Inspectors General

Include the Special IG for Pandemic Recovery, the DOD OIG, and your other contracting agencies' OIGs

By the Numbers: 2019 Federal Fiscal Year

> $3 Billion

Civil Settlements and Judgments under the FCA

782

New FCA Cases Filed

81%

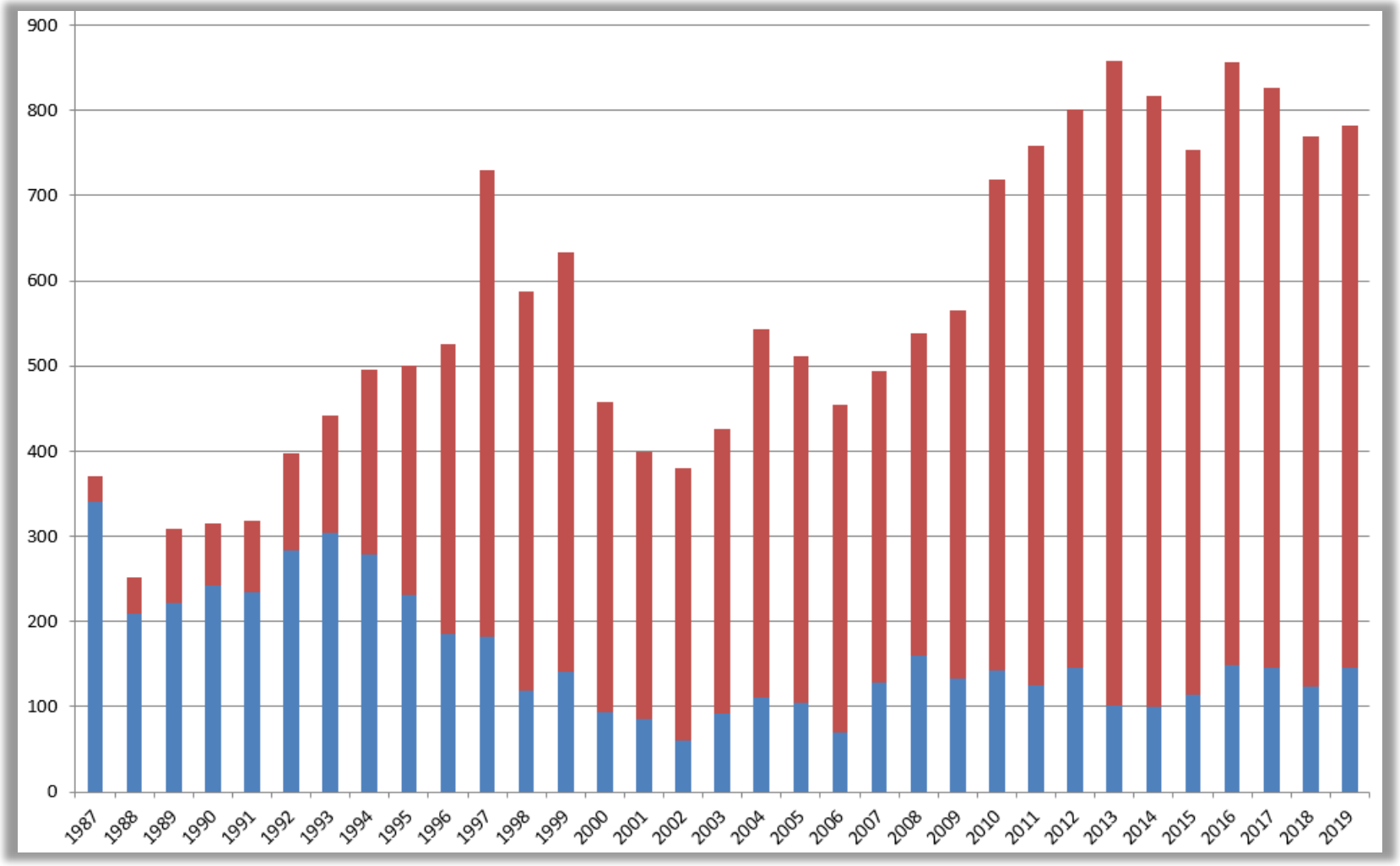
New FCA Cases Initiated by a Whistleblower

$1.9 Billion

Government recovery in *qui tam* cases where the Government intervened

Source: U.S. Dep't of Justice, "Fraud Statistics – Overview" (Jan. 9, 2020)

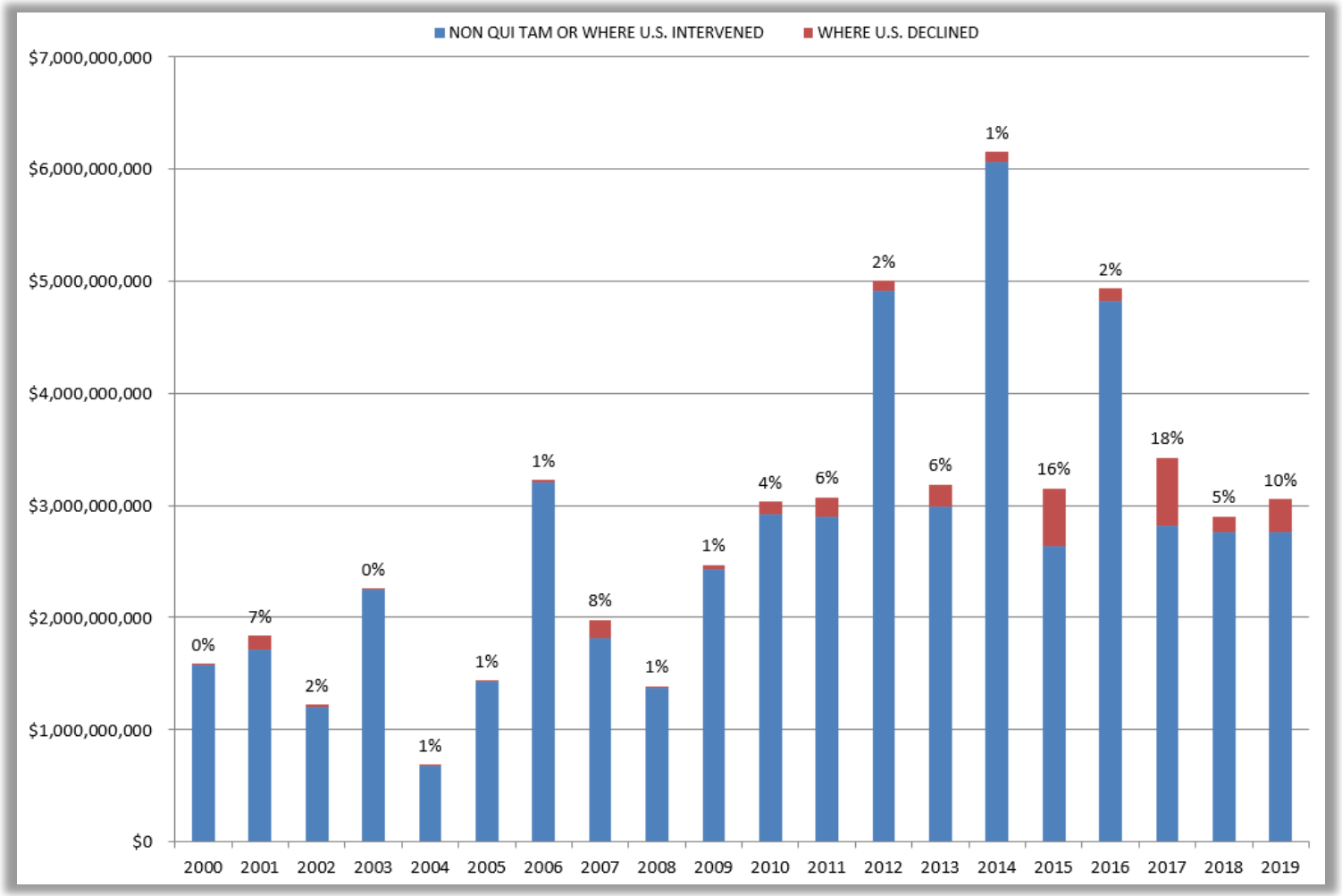
Number of New FCA Suits (FFY 1987-2019)



FFY 2019: 782 new FCA suits • 636 *qui tam* • 146 non-*qui tam*

Source: DOJ, "Fraud Statistics – Overview"

Recoveries through Settlements & Judgments (FFY 2000–2019)



FFY 2019: >$3B • $2.74B intervened & non-*qui tam* • $293M declined

Source: DOJ, "Fraud Statistics – Overview"

Key Risk Areas for Government Contractors

- Mandatory disclosure rule
- Small business status
- GSA schedule pricing
- Anti-trust / bid rigging
- Price and cost issues
- Labor billing and executive compensation caps
- Testing and quality control
- Performance and delivery requirements
- Compliance with cybersecurity requirements
- Supply chain and imports
- CARES Act
- FY2019 NDAA Section 889

Recent settlements provide examples of how some of these risks serve as the basis for FCA allegations

Corporate Compliance Agreements

Engineering/Construction Firm & Infrastructure Consulting Firm

- An engineering/construction firm, infrastructure consulting firm, and a subsidiary agreed to pay **$57.75 million** to resolve claims that the companies overcharged DOE in connection with the operation of a waste treatment plant.
- The Government alleged the companies fraudulently overcharged DOE for unallowable and excessive personnel idle time.
- The companies agreed to enter into a Corporate Compliance and Cooperation Agreement, which requires them to retain and pay for an Independent Compliance Reviewer for three years.

Small Business Status – Recent Settlements

Construction Company

- The contractor agreed to pay $1 million to resolve allegations that it misrepresented its status as a **small disadvantaged business** to obtain a federally funded construction contract.
- The contractor built a new terminal building at the Peoria Int'l Airport using FAA grant funds.

Construction Company

- Oklahoma contractor and its corporate affiliates paid over $2.8 million to settle allegations that they had improperly obtained **contracts set aside for disadvantaged small businesses**.
- The contractor allegedly created two companies to obtain small business set-aside contracts for which the contractor itself was ineligible.

Labor Billing – Recent Settlements

Government Services/IT Support Company

- The contractor paid nearly **$6 million** to resolve allegations that it had submitted false claims on a U.S. Army information technology support contract.
- The contractor had self-disclosed certain time charging and contract administration irregularities, and an investigation by the Army Criminal Investigative Command and Air Force Office of Special Investigations ensued.
- The Government claimed contractor employees misused administrative leave by working on contract requirements for a project before funding was available, and later clearing those charges by adding extra billing hours not worked to a separate project.
- The Government also claimed that employees would charge time worked on unfunded projects to funded projects, and when the funding arrived, would charge time spent working on the previously funded projects to the newly funded project.

Bid Rigging – Recent Settlements

Engineering & Construction Firm

- One of the largest engineering firms in South Korea agreed to pay **$5.2 million** in civil penalties as part of a larger resolution of civil and criminal allegations of the company's participation in an alleged fraudulent scheme to obtain U.S. Army contracts through payments to a DoD contracting official.

Logistics Company

- The company and its president agreed to pay **$2 million** for their alleged involvement in a bid-rigging conspiracy that targeted contracts to supply fuel to military bases in South Korea.

Industrial Services Companies

- Paid **$29 million** to settle claims that they allegedly colluded to rig the bid of an auction to purchase a Department of Energy loan.
- Government alleged the bidders exerted pressure on the other two competing bidders to suppress their bids during a live auction, thereby acquiring the loan for less than fair market value.

Defective Products – Recent Settlements

Heavy Equipment Parts Company

- Paid **$10.8 million** to resolve allegations that the company produced and sold substandard steel components for installation on U.S. Navy vessels.
- An employee allegedly falsified test results to conceal the fact that the components did not meet Navy specifications.

Aerospace Services Company

- Agreed to pay **$375,000** to resolve *qui tam* allegations that it submitted claims under a NASA contract for certain ground support equipment designed to support NASA's Space Launch System rocket and Orion space capsule.
- DOJ alleged that the contractor delivered products that failed to conform to contract requirements and verify cleanliness to NASA's requirements.

Other Enforcement Frontiers

- While we have not yet seen FCA settlements based on Government enforcement of the **CARES Act** (including receipt of PPP loans), we expect this to be an area of increased focus in the coming months and years.

- Earlier this year, the FAR Council announced an interim rule implementing **NDAA 2019 Sec. 889(a)(1)(B)**, which prohibits contractors from using covered Chinese telecommunications or video equipment. This left many contractors scrambling to perform the reasonable inquiry required to certify compliance.

- **E.O. 13,950 on Combating Race and Sex Stereotyping** prohibits government contractors from including certain so-called "divisive concepts" in employee workplace training, and may be a focus of enforcement depending on the next administration.

DOJ Policy & Legislative Developments

The Government's Right to Dismiss *Qui Tam* Actions

- **Before defendant files an answer or MSJ**, the plaintiff may dismiss an action by providing notice, "subject to … any applicable federal statute." Fed. R. Civ. P. 41(a)(1)(A).
  - Otherwise, the plaintiff may dismiss an action "on terms that the court considers proper." Fed. R. Civ. P. 41(a)(1)(B).
- The FCA permits the government to **move to dismiss** a *qui tam* claim **over the objection of the relator** if: (1) the relator is notified; and (2) the court provides the relator "with an opportunity for a hearing on the motion." § 3730(c)(2)(A).
  - The FCA does not state a standard of review for such dismissal; nor does it state whether, or under what circumstances, a relator can defeat the government's motion to dismiss.
- The so-called **Granston Memo (Jan. 10, 2018)** underscored that dismissal is "an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent."
  - Since the Granston Memo, DOJ has sought to dismiss approximately 50 times, or more often than it sought to dismiss in the prior 30 years *combined*

Backlash to the Granston Memo

- **Senator Chuck Grassley** (R-IA), Chairman of the Finance Committee, has repeatedly expressed concerns with DOJ's implementation of the Granston Memo and stated that **the text of the FCA subjects DOJ's dismissal decisions to judicial review**
- Sen. Grassley has announced that he is **drafting legislation to amend the FCA** to "require[] the Justice Department to state its reasons and provide whistleblowers who bring the cases an opportunity to be heard whenever" the DOJ decides to dismiss a complaint.

Press Release, "Grassley Celebrating Whistleblower Appreciation Day" (Jul. 30, 2020).

DOJ has maintained that the Granston Memo is not "pro-defendant" and that it "will continue to use the authority judiciously, to weed out cases that involve regulatory overreach or are otherwise not in the interests of the United States" citing as examples "*qui tams* that are based on technical mistakes with paperwork or honest misunderstandings of the rules." *Principal Deputy Assistant Attorney General Ethan P. Davis (Jul. 30, 2020).*

Circuit Split on the Government's Right to Dismiss *Qui Tam* Actions

- **Ninth Circuit (*Sequoia* test)**: government may dismiss if: (1) it identifies a **valid government purpose**; and (2) a **rational relation** exists between the dismissal and accomplishment of that purpose. *U.S. ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998)
  - The burden then shifts to relator "to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal." This test was expressly adopted by the **Tenth Circuit** in *Ridenour v. Kaiser Hill Co., L.L.C.*, 397 F.3d 925, 936 (10th Cir. 2005)
  - Rule 41 does not apply, because it is intended to protect *defendants* from vexatious plaintiffs

- **D.C. Circuit (*Swift* test)**: government has "**an unfettered right to dismiss**" FCA actions
  - 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)
  - The purpose of the hearing required by § 3730(c)(2)(A) "is simply to give the relator a formal opportunity to convince the government not to end the case"

Circuit Split on the Government's Right to Dismiss *Qui Tam* Actions

- **Third Circuit**: declined to choose between *Sequoia* and *Swift* because the government met the higher standard required by *Sequoia*. *Chang v. Children's Advocacy Ctr. of Del.*, 938 F.3d 384 (3d Cir. 2019).
  - The relator must request a hearing; the FCA does not "guarantee an automatic in-person hearing in every instance."
- **Seventh Circuit**: the choice between *Sequoia* and *Swift* "is a false one." Because the MTD was filed before an answer or MSJ, the government had an "unrestricted substantive right under Rule 41(a)" to dismiss. *U.S. ex rel. CIMZNHCA LLC v. UCB Inc. et al.*, Case No. 19-2273 (7th Cir., Aug. 17, 2020).
  - Rejects *Sequoia* test: "the government is not required to justify its litigation decisions … as though it had to show 'reasoned decisionmaking' as a matter of administrative law."
  - The court characterized its holding as lying "much nearer to *Swift* than *Sequoia*"
  - DOJ must intervene before moving to dismiss, but the Court construes DOJ's MTD as a motion to intervene and then dismiss.
- **Fifth Circuit**: oral arguments held on August 5, 2020 in *U.S. ex rel. Health Choice Alliance et al. v. Eli Lilly & Col. Inc. et al.*, Case No. 19-40906.

Coronavirus Aid, Relief, and Economic Security Act (CARES Act)

- Largest emergency stimulus package in history – $2.2 trillion in government funds to mitigate effects of COVID-19, with key features including:
  - **Paycheck Protection Program (PPP)**, a Small Business Administration (SBA) loan program
  - Made allowable government contractors' **costs for paid leave or to keep "employees or subcontractors in a ready state"** where there are facility closures and the work cannot be done remotely. § 3610.
- Past trends of high government spending have resulted in uptick of FCA cases (*e.g.*, the wars in Iraq and Afghanistan, disaster relief after Hurricane Katrina, Troubled Asset Relief Program)

The CARES Act created the Special Inspector General for Pandemic Recovery ("SIGPR") to conduct audits and investigations into CARES Act relief programs. § 4018.

CARES Act – Enforcement

- DOJ has already announced that it "will **make it a priority to use the False Claims Act** to combat fraud in the Paycheck Protection Program."
  - "Our enforcement efforts may also include, in appropriate cases, private equity firms that sometimes invest in companies receiving CARES Act funds. . . . Where a private equity firm takes an active role in illegal conduct by the acquired company, it can expose itself to False Claims Act liability"
  - **But**: "You can rest assured that the Civil Division **will not pursue** companies that made **immaterial or inadvertent technical mistakes** in processing paperwork, or that simply and honestly misunderstood the rules, terms and conditions, or certification requirements"
- Several U.S. Attorneys' offices have signed Memoranda of Understanding with the SIGPR to coordinate enforcement efforts

The Procurement Collusion Strike Force

- On November 5, 2019, DOJ announced the establishment of the **Procurement Collusion Strike Force**, described as "a joint law enforcement effort that will combat antitrust crimes and related fraudulent schemes that impact government procurement, grant, and program funding."
- "[M]ore than one third of the Antitrust Division's 100-plus open investigations relate to public procurement or otherwise involve the government being victimized by criminal conduct"
- " The Strike Force is on high alert for collusive practices in the sale of COVID-19-related products to federal, state, and local agencies." DOJ Press Release, "Justice Department and Federal Trade Commission Jointly Issue Statement on COVID-19 and Competition in U.S. Labor Markets" (April 13, 2020)

CARES Act Implications for *Qui Tam* Activity

- SBA maintains a publicly accessible database of PPP loan-level data
  - When launched, the data covered 4.9 million PPP loans
- Examples of information included in the data:
  - Business names (except for loans below $150,000)
  - Business types
  - Addresses
  - Demographic data
  - Jobs supported by loans
  - Loan amounts
- This public data can serve as a starting point for *qui tam* relators and law firms looking for allegations of potential fraud

Even if your company did not apply for a PPP loan, large contractors should consider FCA risks resulting from PPP loans when conducting due diligence on smaller firms

Potential Theories of FCA Liability under the CARES Act

Factual Falsity

- Improper use of PPP funds
- Fraudulently claiming unallowable costs under § 3610

False Certification

- Falsely certifying eligibility for loan
- Falsely certifying eligibility for loan forgiveness

Reverse False Claims

- Fraudulently retaining loan payments

Best Practices for Mitigating CARES Act FCA Risks

- Assume you will be audited
  - All PPP loans in excess of $2 million are subject to review by SBA for compliance with requirements
- Maintain contemporaneous documentation of compliance with every certification (employee counts, financial issues, employment decisions, etc.)
- Maintain contemporaneous documentation of how PPP funds were spent
- Consider whether the SBA's safe harbor may apply if the loan is repaid
- Segregate costs made allowable by § 3610 and maintain supporting documentation

Notable Case Law Developments

Implied (False) Certification & Materiality

***Universal Health Services v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016)** held that implied certification theory can provide a basis for FCA liability when two conditions are met:

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"

Analysis of materiality as instructed by *Escobar*

- Government's payment of the claim or practice of paying the type of claims, when it has actual knowledge of the alleged violation, is "strong evidence" that the requirements are not material
  - Proof can include "evidence that the defendant knows that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory or contractual requirement"
- Allegations must be more than:
  - The Government had the right to refuse payment based on the noncompliance
  - A minor or insubstantial noncompliance with a regulatory requirement

Materiality Post *Escobar*

Circuit-level cases involving government contractors have been sparser than usual in the past year, but District Courts continue to regularly engage on post-*Escobar* materiality issues.

***U.S. ex rel. ANHAM FZCO v. Supreme Foodservice GmbH*, 2020 WL 4579458 (E.D. Va. July 8, 2020)**

- No materiality where the government was informed multiple times of alleged violations but "continued to make payments to [defendant]" under the relevant contract

***U.S. ex rel. PCA Integrity Assocs., LLP v. NCO Fin. Sys., Inc.*, 2020 WL 686009 (D.D.C. Feb. 11, 2020)**

- Court rejected, among other things, the relator's argument that a "material breach" of a subcontracting plan incorporated into a prime contract "amount[ed] to a condition of payment for the subcontractor" – relator did not "connect these dots" or "explain with any specificity how the subcontractor self-certifications were a 'misrepresentation' that was 'material'" to the government
- Court held that relator's materiality-related allegations failed to satisfy Fed. R. Civ. P. 9(b)

***Cimino v. Int'l Bus. Machines Corp.*, 2019 WL 4750259 (D.D.C. Sept. 30, 2019)**

- No materiality where IRS continued to pay IBM on a licensing agreement after the relator filed suit
- "The court finds it implausible that the IRS sat on its hands upon learning that IBM had tricked it into signing a contract for $265 million for software that it did not need"

Materiality Post *Escobar*

***U.S. ex rel. Porter v. Magnolia Health Plan, Inc.*, 810 F. App'x 237 (5th Cir. 2020)**

- Affirmed dismissal with prejudice, at the pleadings stage, on materiality grounds
- Medicaid took no action even after being informed of allegations that the defendant staffed certain positions with licensed practical nurses, in violation of contractual requirements. "**Instead, it continued payment and renewed its contract with Magnolia several times. And even after Plaintiff-Appellant's suit was unsealed, [the third-party Medicaid contractor] awarded Magnolia a contract for the fourth time.**"

***U.S. ex rel. Janssen v. Lawrence Mem. Hosp.*, 949 F.3d 533 (10th Cir. 2020)**

- Affirmed summary judgment for defendants on materiality grounds
- Prior to filing suit, Relator had complained to CMS hotline of allegations of false certifications to Medicare
- CMS's third-party investigative service investigated, but otherwise CMS did "nothing in response and continue[d] to pay [defendant's] Medicare claims"
- "Although CMS may not have independently verified [defendant's] noncompliance—and thus may not have obtained 'actual knowledge' of the alleged infractions—**its inaction in the face of detailed allegations from a former employee suggests immateriality**"

***U.S. ex rel. Patel v. Catholic Health Initiatives*, 792 F. App'x 296 (5th Cir. 2019)**

- Affirmed dismissal of complaint alleging false representations of identity of owner of hospital
- Court pointed to **allegations in the complaint that the government continued paying claims** "even after a court determined that the entity designated as owner of the Hospital was not really the owner. This suggests that the government does not care who the 'rightful' owner of the Hospital is, and Relators have not alleged facts to the contrary."

Materiality Post *Escobar*

Even where government knowledge is not a factor, courts have dismissed complaints for failure to affirmatively allege facts supporting materiality.

***Barnes v. Clark County*, 800 F. App'x 582 (9th Cir. 2020)**

- Affirmed dismissal of complaint against local government alleging false statements in applications for funding submitted to the Federal Aviation Administration
- The complaint "indicate[d] only that the **FAA conditioned its payments on the County's compliance with a long list of statutes, regulations, and policies . . . . That fact, standing alone, is insufficient to establish materiality.**"
- Court also found it significant that defendant's certifications of compliance were limited to the applications in which the certifications appeared, and did not certify compliance "with the [relevant] provisions in every prior application for federal funding" – so any past noncompliance with the provisions "could not have been material to the FAA's decision to approve the County's subsequent applications"

Scienter Post *Escobar*: Disputed Interpretive Questions

Escobar made clear that "concerns about fair notice and open-ended liability 'can be effectively addressed through strict enforcement of the [FCA's] materiality and scienter requirements,'" and that "[t]hose requirements are rigorous." FCA jurisprudence has long held that **mere negligence is insufficient for scienter**, and since *Escobar*, courts have continued to enforce that rule.

***U.S. ex rel. Complin v. N.C. Baptist Hosp.*, 818 F. App'x 179 (4th Cir. 2020)**

- Court rejected relator's argument that scienter could be "inferr[ed] from the alleged regulatory violation itself . . . because the FCA does not punish 'honest mistakes or incorrect claims submitted through negligence.'"
- Court emphasized the **ambiguity of the regulation at issue in the case**, including the open question of whether the rule "even . . . applies in the first place to the transactions in question."
- In the course of its analysis, the court cited favorably to FCA caselaw applying the ***Safeco* rule that reckless disregard cannot exist where the alleged fraud "turns on a disputed interpretive question"** and the defendant has not been "warned away" from its interpretation

Post-*Escobar* Scienter Jurisprudence: Sub-Regulatory Guidance

In the FCA context, DOJ's **Brand Memo** limits the Department's use of noncompliance with **sub-regulatory guidance** to establish FCA falsity – but the Memo explicitly contemplates the use of sub-regulatory guidance to establish scienter.

***U.S. ex rel. Drummond v. BestCare Lab. Servs., LLC*, 950 F.3d 277 (5th Cir. 2020)**

- Defendant allegedly violated a statute permitting the collection of transportation fees surrounding the collection of lab samples, but only when "trained personnel" themselves are traveling
- Court found that "[t]he statutory text clearly forbids BestCare's billing practices," where it was "undisputed that BestCare billed for the shipment of samples via airplane when no technician was traveling"
- Court rejected argument that Defendant had complied with the CMS Policy Manual:
  - Manual was a "policy statement" with "no binding legal effect," so the manual's "instructions cannot legally justify a clear violation of a statute"
  - While **a reasonable interpretation of an ambiguous provision can vitiate scienter**, here "there [was] **no plausible reading of the CMS Manual** that could support the defendants' billing practices"

Developments in the "Objective" Falsity Requirement

FCA cases against government contractors often are grounded in legal disputes over the meaning of contractual provisions or regulations. Circuit Courts have continued to weigh in on the extent to which plaintiffs must demonstrate an **objective falsehood** in order to establish FCA liability.

U.S. ex rel. Druding v. Care Alternatives, 952 F.3d 89 (3d Cir. 2020)

- District court granted summary judgment to defendants, holding that a dispute between the parties' experts on the necessity of care for certain hospice patients could not form the basis for a conclusion that physicians' determinations of the patients' eligibility were false
- Third Circuit reversed, holding that **differences in medical judgments are sufficient "to create a triable issue of fact regarding FCA falsity" and that "subjective opinions may be considered false" under the "common-law definition of fraud"**
- The court continued, "[t]his does not mean that objectivity is never relevant for FCA liability. However, we find that objectivity speaks to the element of *scienter*, not *falsity*."

Developments in the "Objective" Falsity Requirement

Ruckh v. Salus Rehabilitation, 963 F.3d 1089 (11th Cir. 2020)

- Relator alleged that a nursing home misrepresented the services provided and failed to comply with Medicaid requirements (e.g., by upcoding claims)
  - Jury awarded more than $100M in damages before trebling
  - District court set aside the verdict, finding a lack of sufficient evidence of **materiality** and **scienter**
- On appeal, the Eleventh Circuit reversed and reinstated the verdict in part
  - "The scienter requirement in FCA actions is rigorous and must be strictly enforced"
  - Held that **evidence showing management was allegedly aware of and approved the practices at issue** supported the jury's finding that the defendants acted with scienter
  - This was despite the district court's observation there was no evidence of a "massive, authorized, cohesive, concerted, enduring, top-down corporate scheme"

Public Disclosure Bar

The **public disclosure bar** provides that a relator's *qui tam* complaint cannot be "substantially the same" as allegations publicly disclosed in certain enumerated sources such as public hearings, government audits or reports, or the news media.

***U.S. ex rel. Holloway v. Heartland Hospice, Inc.*, 960 F.3d 836 (6th Cir. 2020)**

- Relator alleged defendants falsely certified patient eligibility for hospice care
- Sixth Circuit affirmed dismissal on public disclosure bar grounds, holding that **three prior *qui tam* complaints counted as public disclosures**
  - Court held that a *qui tam* relator is the government's "agent" for purposes of the prong of the public disclosure bar requiring disclosure in a federal proceeding in which the government or its agent is a party

Original Source Exception

The **original source exception** to the public disclosure bar applies when a relator 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

***U.S. ex rel. Banigan v. PharMerica, Inc.*, 950 F.3d 134 (1st Cir. 2020)**

- District court dismissed under the public disclosure bar, holding that a prior FCA action alleged the same kickback scheme
- First Circuit reversed, holding that **relator was an original source**
  - **"Direct knowledge" need not be based on actual participation in or observation of the alleged conduct; relator need only have direct and independent knowledge "of the information on which the allegations are based"**
    - Fact that relator here learned about the alleged scheme from others did not disqualify him as an original source

***Vierczhalek v. MedImmune Inc.*, 803 F. App'x 522 (2d Cir. 2020)**

- District court dismissed relator's complaint under the public disclosure bar
- Second Circuit affirmed, holding that relator was not an original source
  - **"A relator cannot qualify as an original source . . . merely by providing *some* core information. Rather, she must provide information regarding 'the essential elements of the alleged fraud'"**

First-to-File Rule

The **first-to-file rule** 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**" Courts are split on whether the first-to-file rule is jurisdictional.

***In re Plavix Marketing, Sales Practice & Prods. Liability Litig. (No. II)*, 2020 WL 5200681 (3d Cir. Sept. 1, 2020)**

- Deepening a Circuit split, the Third Circuit joined the First, Second, and D.C. Circuits 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
- The Fourth, Fifth, Ninth, and Tenth Circuits have held the bar is jurisdictional

Case to Watch – *Res Judicata* in *Qui Tam* Cases

***State ex rel. Balderas v. Bristol-Myers Squibb Co.*, 436 P.3d 724 (N.M. 2018)**

- The State of New Mexico filed this case—which is related to the *In re Plavix Marketing* litigation—separately in state court while the other litigation was pending
- New Mexico had declined to intervene in the *In re Plavix Marketing* case, which was ultimately dismissed
- The state trial court denied defendants' motion to dismiss on claim preclusion grounds, and the New Mexico Court of Appeals affirmed, holding that the dismissal of the *Plavix* relator's claims with prejudice did not act as dismissal with prejudice as to the government
- A petition for writ of certiorari was filed before the U.S. Supreme Court in early September, and it remains pending

Whistleblower Protections

The FCA **protects employees and others (e.g., contract workers) from retaliation**. Relief may include double back pay and interest on back pay; reinstatement (at seniority level); and/or costs and attorneys' fees. The FAR provides additional protection and requires contractors and subcontractors to inform their employees in writing of whistleblower rights (FAR 52.203-17).

Nesbitt v. Candler Cty., 945 F.3d 1355 (11th Cir. 2020)

- Employee suing under the FCA's retaliation provision **must satisfy a "but-for" causation standard** – that is, the employee must show that the claimed retaliation would not have occurred absent the employee's protected action
- Rejected the more plaintiff-friendly "motivating factor" standard applied by the Sixth, Seventh, and D.C. Circuits

Sherman v. Berkadia Commercial Mortgage LLC, 956 F.3d 526 (8th Cir. 2020)

- Similar conclusion, albeit under different rubric
- Absent "direct evidence" of retaliation, *McDonnell-Douglas* burden-shifting framework applies such that plaintiff must show retaliation was "motivated solely by" the protected activity
- Practical upshot: a "legitimate reason for the adverse action" cuts against a finding of retaliation, provided the reason was not "a mere pretext"

Continuing and Emerging Considerations for Federal Contractors

Deciding Where to Pursue Contract Disputes Act Claims

Court of Federal Claims

- Has jurisdiction over fraud claims
- The government may assert FCA violations as counterclaims to a contractor CDA claim at the Court of Federal Claims

Boards of Contract Appeals

- **Generally lack jurisdiction over fraud claims**, but not all appeals involving or relating to alleged fraud must be dismissed
- The government is increasingly using allegations of fraud to seek dismissal of contractor CDA claims at the Boards of Contract Appeals

The contracting officer's "authority to decide or resolve claims does not extend to … [t]he settlement, compromise, payment or adjustment of any claim involving fraud." FAR 33.210(b)

Allegations of Fraud to Dismiss Contractor Appeals

ESA South, Inc., ASBCA No. 62242 (June 9, 2020)

- Government moved to dismiss appeal filed in October 2019 based on January 2020 letter from contracting officer claiming that there was a "reasonable suspicion" of fraud.
- The Board denied the motion, noting that a "contracting officer's post-appeal articular that a contractor's claim is suspected to be fraudulent" does not divest the Board of jurisdiction.

Mountain Movers/Ainsworth-Benning LLC, ASBCA No. 62164 (Aug. 7, 2020)

- Government argued it should be entitled to unilaterally remove litigation from the BCA whenever it suspects fraud.
- Board determined it possessed jurisdiction to review that final decision because the final decision asserted a basis that the contracting officer is permitted to assert - that is, a basis other than fraud.

What Happens to CDA Claims After FCA Cases Are Resolved?

Supreme Foodservice GmbH, ASBCA Nos. 57884, 58666, 59636, 61361 (May 27, 2020)

- Even though Supreme had already paid around $400 million in criminal and False Claims Act cases arising out of its alleged fraud on the contract at issue, the Board held that the Government could not claw back the full $1.1 billion the agency alleged it overpaid to Supreme because some disputed cost claims had been legitimate.
- The Board rejected the Government's argument that Supreme's alleged fraud had made the contract entirely void, which would have required it to pay back the entire $8.8 billion it was paid under its contract.

Allowability of Legal Costs for FCA Investigations & Litigation

- Costs incurred in connection with FCA proceedings (including investigations) are unallowable if the result is (FAR 31.205-47):
  - Criminal conviction or finding of contractor liability; or
  - Final decision to suspend, debar, void or terminate a contract for default; or
  - Disposition of the matter by consent or compromise "if the proceeding could have led to any of the outcomes listed" above
- Settlement agreement with DOJ: costs are allowable only if specifically provided
- Settlement of non-intervened *qui tam*: costs are allowable if CO determines there was "very little likelihood" that the relator would have succeeded on the merits
- Contractor can only recover up to a maximum of 80% of reasonable costs

Tolliver Group, Inc. v. United States, Contractor's claim for 80% of its attorney fees incurred in successfully defending against a *qui tam* suit survived the Government's motion to dismiss, 140 Fed. Cl. 520 (2018), and motion for summary judgment, 147 Fed. Cl. 475 (2020) (reconsideration denied). On the merits, the Court found that the entire amount of Tolliver's claim was reasonable and awarded attorney fees. No. 17-1763 (July 14, 2020).

COVID-19 Changes to FCA Investigation & Litigation Practices

- Remote activities
  - Internal investigations and reviews
  - Document collection
  - Witness interviews
  - Depositions (and witness preparation)
  - Hearings
  - Settlement negotiations
- Potential discovery and trial delays

Upcoming Webcasts & Contact Information

Publications and Recorded Webcasts

- Executive Order on Combating Race and Sex Stereotyping (October 1, 2020): https://www.gibsondunn.com/executive-order-on-combating-race-and-sex-stereotyping/
- The CARES Act, the Higher Education Emergency Relief Fund, and Guidance for Schools to Limit Litigation Exposure (June 8, 2020): https://www.gibsondunn.com/the-cares-act-the-higher-education-emergency-relief-fund-and-guidance-for-schools-to-limit-litigation-exposure/
- Preparing for Enhanced Antitrust Enforcement in Government Procurement (Gibson Dunn Webcast/December 6, 2019): https://www.gibsondunn.com/webcast-preparing-for-enhanced-antitrust-enforcement-in-government-procurement/
- DOJ Announces a New Strike Force to Combat Antitrust Misconduct in Government Procurement (November 11, 2019): https://www.gibsondunn.com/doj-announces-new-strike-force-to-combat-antitrust-misconduct-in-government-procurement/
- 2020 Mid-Year False Claims Update (July 17, 2020): https://www.gibsondunn.com/2020-mid-year-false-claims-act-update/
- Implications of COVID-19 Crisis for False Claims Act Compliance (March 31, 2020): https://www.gibsondunn.com/implications-of-covid-19-crisis-for-false-claims-act-compliance/

Gibson Dunn COVID-19 Resources: https://www.gibsondunn.com/category/publications/

Gibson Dunn False Claims Act/Qui Tam Defense Practice: https://www.gibsondunn.com/practice/false-claims-actqui-tam-defense/

Upcoming Gibson Dunn Webcasts

- **October 16 | Trends in Government Investigations into Foreign Influence in the Private Sector: A discussion of FARA and related provisions** | 12:00 – 1:00 pm EDT

  If you are interested in attending, please click here.
- **October 22 | False Claims Act Updates for Drug and Device Manufacturers** | 12:00 – 1:30 pm EDT

  If you are interested in attending, please click here.
- **October 27 | In-house Guidance for Managing Non-U.S. Antitrust Investigations** | 12:00 – 1:30 pm EDT

  If you are interested in attending, please click here.
- **November 4 | False Claims Act Updates for Health Care Providers** | 12:00 – 1:30 pm EST

  If you are interested in attending, please click here.
- **November 9 | Spoofing: What it is, where it's going** | 12:00 – 1:00 pm EST

  If you are interested in attending, please click here.
- **November 16 | Corporate Compliance and Sentencing Guidelines** | 12:00 – 2:00 pm EST

  If you are interested in attending, please click here.

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Upcoming Gibson Dunn Webcasts (cont.)

- **November 18 | SEC Enforcement Focus on COVID-19 Issues and Recent Accounting Cases** | 12:00 – 1:15 pm EST

  If you are interested in attending, please click here.
- **December 2 | What's next? The Legislative and Policy Landscape After the 2020 Election** | 12:00 – 1:00 pm EST

  If you are interested in attending, please click here.
- **December 3 | FCPA 2020 Case Round-Up** | 12:00 – 1:30 pm EST

  If you are interested in attending, please click here.
- **December 8 | Congressional Investigations and Oversight Post-Election** |12:00 – 1:00 pm EST

  If you are interested in attending, please click here.
- **December 10 | International Anti-Money Laundering and Sanctions Enforcement** | 12:00 – 1:30 pm EST

  If you are interested in attending, please click here.

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