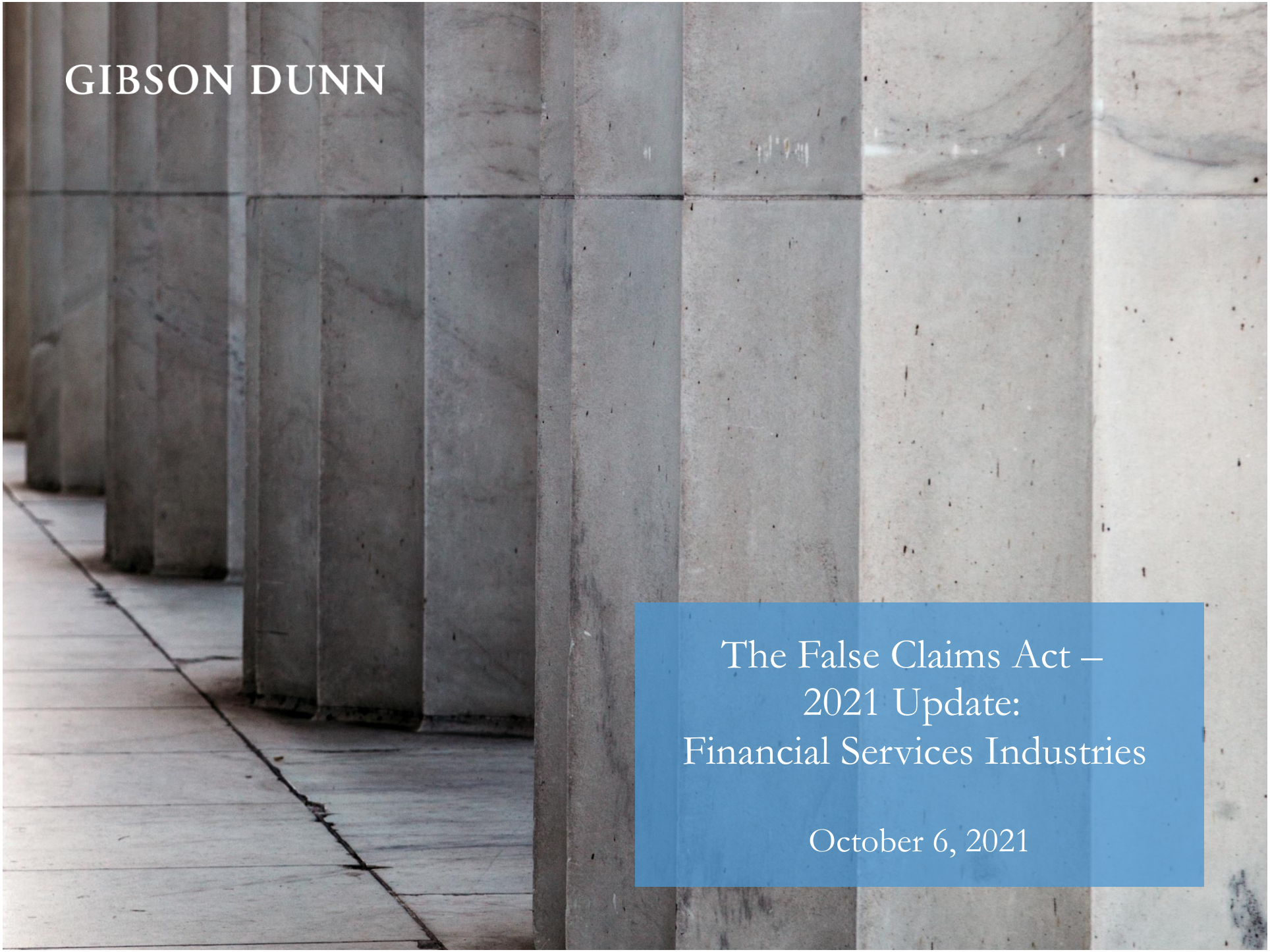

The False Claims Act – 2021 Update: Financial Services Industries

October 6, 2021

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.

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.

Casey Kyung-Se Lee is a senior associate in the New York office and a member of the firm's Litigation Department and White Collar Defense and Investigations practice group. Mr. Lee's practice focuses on representing clients in litigation and investigations involving the federal government, and in a range of complex commercial disputes. He previously served as an Assistant U.S. Attorney in the Civil Division of the U.S. Attorney's Office for the Southern District of New York, where he handled cases involving allegations under the FCA, the Anti-Kickback Statute, and other laws.

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 CLE@gibsondunn.com

Agenda

1	**FCA Overview and Recent Jurisprudence**
2	**Policy Developments**
3	**FCA Enforcement**
4	**Key Industry Developments / Hot Topics**
5	**Compliance Best Practices**
6	**Questions**

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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 devotes substantial resources to pursuing FCA cases—and to 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 or uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim	False Record/Statement
(C)	Conspires to violate a liability provision of the FCA	Conspiracy
(G)	Knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government	"Reverse" False Claim

FCA – Overview of Key FCA Theories

Factual Falsity

- False billing (e.g., goods or 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
- *United States 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 – *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 of cases 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
- ***FCA Whistleblower Protections (31 U.S.C. § 3730(h))***
  - Protect employees and others (e.g., contract workers)
  - Relief may include double back pay and interest on back pay; reinstatement (at same level); or costs and attorneys' fees
  - Case law continues to develop, e.g., around meaning of the anti-retaliation provision's causation language ("because of")

"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 – Damages and Penalties

- ***Simple Damages Calculation***
  - Treble damages are traditionally calculated by multiplying the government's loss by three (e.g., if the 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 adjustments for inflation; current range, per final rule issued in June 2020: ***$11,665 to $23,331 per violation***
  - Lower penalty range still in effect for violations occurring on or before November 2, 2015 ($5,500 to $11,000 per violation)

Universal Health Services, Inc. v. United States ex rel. Escobar

579 U.S. 176 (2016)

- The Supreme Court's opinion reached a number of key conclusions that have formed the basis for significant follow-on FCA litigation:
  - The Court deemed the ***"implied false certification"*** theory of liability viable in certain circumstances, but declined to decide whether "all claims for payment implicitly represent that the billing party is legally entitled to payment"
  - The Court stated that the FCA's materiality and scienter requirements are ***"rigorous" and must be "strict[ly] enforce[d]"***
  - The Court set forth factors for consideration in analyzing what makes a particular regulatory or other requirement "material" to government payment decisions:
    - Whether the government has expressly identified compliance with the provision or regulation as ***a condition of payment***
    - Whether the government would have ***denied payment if it had known of the alleged noncompliance***
    - Whether the government in fact ***continued paying*** despite ***knowledge of the alleged noncompliance***
    - Whether the noncompliance is ***minor or insubstantial***

Post-*Escobar* Materiality – Government Knowledge

***United States ex rel. Bibby v. Mortg. Inves. Corp.*, 987 F.3d 1340 (11th Cir. 2021)**

- The relators alleged that a lender falsely certified charging only fees permitted by Department of Veterans Affairs ("VA") regulations, despite bundling prohibited fees (i.e., attorneys' fees) together with permissible fees
- The district court granted the lender summary judgment on materiality grounds, in light of evidence that the **government continued paying claims** after having notice of the alleged improper fees
- The Eleventh Circuit reversed. It held that government payment despite knowledge of a noncompliance is relevant, but "the **significance of continued payment may vary** depending on the circumstances" and **must be evaluated "holistically" alongside other facts regarding government behavior**
- Here, because the VA reminded lenders of applicable fee requirements, and ramped up its audit efforts, the court found that a genuine factual issue existed that precluded summary judgment.
- The court also found it significant that the VA is required to honor loan guaranties by paying holders in due course "regardless of any fraud by the original lender"

Post-*Escobar* Materiality – Government Knowledge

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

- The case concerned alleged certifications to Medicare regarding patient arrival times, and the district court granted summary judgment to defendants on materiality
- The Tenth Circuit affirmed, finding it significant that the Centers for Medicare and Medicaid Services' third-party investigative service had investigated the relator's allegations after she raised them via CMS's hotline prior to filing suit—and that 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**"

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

Post-*Escobar* Scienter

United States ex rel. Schutte v. SuperValu, Inc., 9 F.4th 455 (7th Cir. 2021)

- The relator alleged that SuperValu knowingly submitted false reports of its pharmacies' usual and customary ("U&C") drug prices when seeking reimbursements under Medicare and Medicaid
- The district court granted summary judgment to SuperValu on the basis that it lacked scienter, because then-existing case law was unclear on whether SuperValu's intepretation of U&C prices was correct, SuperValu's interpretation was **"objectively reasonable,"** and "there was **no authoritative guidance to warn SuperValu away** from its interpretation of U&C price"
- The district court applied the Supreme Court's decision in *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47 (2007), which dealt with scienter under the Fair Credit Reporting Act ("FCRA") and which several other Circuits—but not the Seventh—had applied to the FCA
- The Seventh Circuit affirmed, holding that:
  - *Safeco* applies to the FCA because it interpreted **common-law scienter concepts** that appear in both FCRA and the FCA
  - *Safeco* applies to **all three forms of FCA scienter** (knowledge, deliberate indifference, and reckless disregard)
  - SuperValu's interpretation of the definition of U&C prices satisfied *Safeco*

Key Limits on the Fraudulent Inducement Theory

***United States ex rel. Cimino v. Int'l Bus. Machs. Corp.*, 3 F.4th 412 (D.C. Cir. 2021)**

- The relator alleged that IBM had violated the FCA by, among other things, fraudulently inducing the IRS to enter into a license agreement for software it did not want or need
- The district court dismissed the fraudulent inducement claim because, among other things, the relator failed to plausibly plead that IBM's conduct was the but-for cause of the IRS's entering into the agreement
- The D.C. Circuit reversed the dismissal of the fraudulent inducement claim after undertaking a detailed analysis of the fraudulent inducement theory of FCA liability and that theory's causation requirement
- The court held that fraudulent inducement **requires pleading "actual cause" under the common law but-for test** and rejected the relator's argument that "proximate cause under the substantial factor test" alone is sufficient
  - "[F]raudulent inducement under the FCA **incorporates** the **common law causation requirement**"

Recent Jurisprudence – Definition of "Claim" under the FCA

United States ex rel. Kraus v. Wells Fargo & Co., 943 F.3d 588 (2d Cir. 2019)

- This case related to representations allegedly made to the Fed's Federal Reserve Banks ("FRB")
- The district court dismissed the case, holding that, for purposes of the FCA's definition of "claim," FRB personnel are not "officer[s], employee[s], or agent[s] of the United States," and the United States does not provide the money given to Fed borrowers
- The Second Circuit reversed, holding that the loan requests in question were claims
- "FRB personnel are not 'officer[s]' or 'employee[s] . . . of the United States,'" but they are "agents of the United States" and the "'money . . . requested' by Fed borrowers is 'provided' by the United States to advance a Government program or interest"
- The court explained that "the United States created the FRBs to act on its behalf in extending emergency credit to banks; the FRBs extend such credit; and the FRBs do so in compliance with the strictures enacted by Congress and the regulations promulgated by the Board, an independent agency within the executive branch"
- The court also held that the fact that the U.S. Treasury does not fund the FRBs was not dispositive of whether the government "provide[d]" the funds in question—what mattered was that "the United States is the source of the purchasing power conferred on the banks when they borrow from the Fed's emergency lending facilities"

FCA – Statute of Limitations

- The ***statute of limitations*** is:
  - 6 years from the date of the 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 date of the violation,

whichever occurs last.

31 U.S.C. § 3731(b)

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
- 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

Recent Jurisprudence – Statute of Limitations

Houpt v. Wells Fargo Bank, N.A.,
800 F. App'x 533 (9th Cir. 2020)

- The relator alleged FCA claims relating to payments of a loan guarantee by the Small Business Administration
- The District Court granted summary judgment for defendant, in part on the basis that the relator's claims were outside the FCA's statute of limitations
- On appeal, the Ninth Circuit affirmed on statute of limitations grounds, holding that the six-year limitations period begins running when a claim for payment is submitted, and assuming without deciding that the SBA official—***not DOJ***—was the relevant official for purposes of the three-year tolling provision under the statute

FCA – Public Disclosure Bar

- **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/she is an "original source" of the allegations, meaning he/she either:
    - voluntarily disclosed them to the government prior to the public disclosure; or
    - voluntarily disclosed them to the government 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 was jurisdictional and contained differences in the public disclosure and original source provisions
- The public disclosure bar does not apply to DOJ

Recent Jurisprudence – Public Disclosure Bar

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

- Applying the pre-2010 version of the public disclosure bar, the First Circuit held that, for purposes of the original source exception, a relator's "independent knowledge" need not be based on actual participation in or observation of the alleged conduct; rather, the relator need only have **direct and independent knowledge "of the information on which the allegations are based"**
- The court held that **the fact that the relator learned about the alleged conduct from other people did not disqualify him as an original source**
  - The relator was "a corporate insider" who learned of the underlying conduct during his employment, and via communications with the primary participants in the conduct and "documents . . . that he obtained through his own investigative efforts"
  - There was no "intervening agency, instrumentality, or influence" between the sources of the relator's knowledge and the knowledge itself

Recent Jurisprudence – Public Disclosure Bar

***United States ex rel. Schweizer v. Canon, Inc.*,**
9 F.4th 269 (5th Cir. 2021)

- The relator filed her first FCA *qui tam* case against a company that was subsequently acquired by Canon prior to settlement of the first FCA lawsuit
- After settlement of her first FCA lawsuit, the relator then filed an FCA *qui tam* case against Canon, alleging the same fraudulent conduct (including violation of the same government contracts) at issue in the first FCA lawsuit
- The court affirmed the dismissal of the relator's complaint under the public disclosure bar, holding that the scheme alleged against Canon was "based upon" the same allegations and transactions asserted in the relator's first FCA lawsuit
- The court rejected the relator's arguments that the public disclosure bar did not apply because the **companies were different**, that Canon's alleged scheme **occurred at a later time**, and that Canon violated **additional government contracts**

FCA – First-to-File Bar

- **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"**
- The first-to-file bar does not apply to DOJ

Recent Jurisprudence – First-to-File Bar

***In re Plavix Marketing, Sales Practice & Prods. Liability Litig. (No. II)*, 974 F.3d 228 (3d Cir. 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
- In contrast, the Fourth, Fifth, Ninth, and Tenth Circuits have held that the bar is jurisdictional
- 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

Denials of Writs of Certiorari in Key Cases

- *United States ex rel. Druding v. Care Alternatives*, 952 F.3d 89 (3d Cir. 2020)
- *Winter ex rel. United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc.*, 953 F.3d 1108 (9th Cir. 2020)
  - Both courts held that a relator does not need to show **"objective falsehood,"** and that medical **opinions** underlying certifications to the Government can be false or fraudulent
- The Supreme Court denied both writs of certiorari, leaving a potential circuit split over whether FCA falsity requires an "objective falsehood"
  - *United States v. AseraCare, Inc.*, 938 F.3d 1278 (11th Cir. 2019): FCA falsity requires proof of an **"objective falsehood,"** and a **"reasonable disagreement between medical experts** as to the accuracy of" "a clinical judgment" regarding eligibility for benefits "with no other evidence to prove the falsity of the assessment" is **not an "objective falsehood"**

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Policy Developments

FCA – Biden Administration

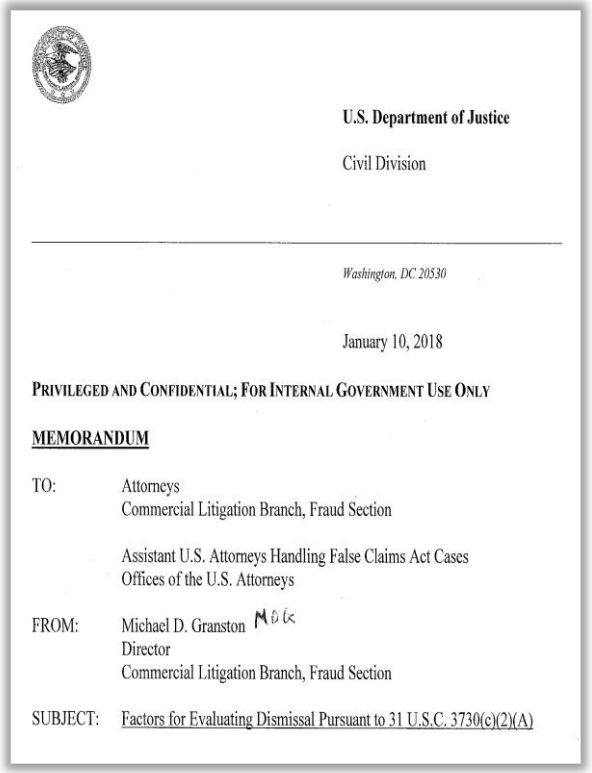
- To date, there have been no major shifts in overarching FCA policy, but the contours of the Biden Administration's priorities are emerging
- With nearly $400 million in FCA settlements in the first half of the year, **more aggressive and forward-leaning** FCA enforcement may well be on the horizon
- The Biden Administration forecasts that its efforts to root out COVID-19-related fraud will result in **"significant cases and recoveries"** under the FCA
- In a February 2021 speech at the Federal Bar Association *Qui Tam* Conference, Acting Assistant Attorney General Brian M. Boynton outlined DOJ's Civil Division's six enforcement priorities:
  1. Pandemic-related fraud;
  2. Opioids;
  3. Fraud targeting seniors;
  4. Electronic health records;
  5. Telehealth; and
  6. Cybersecurity
- Acting AAG Boynton also stated explicitly that observers can "expect the Civil Division to continue to expand its own efforts to identify potential fraudsters, including its reliance on various types of data analysis"

The Future of the Brand Memo

- Jan. 2018 memo by then-Associate Attorney General Rachel Brand
  - DOJ **"may not use compliance with guidance documents as a basis for proving violations of applicable law"** in affirmative civil enforcement cases
  - Codified in Dec. 2018 at Section 1-20.000 of the Justice Manual
- Executive Order 13891 (Oct. 9, 2019):
  - Agencies must treat guidance documents as non-binding unless incorporated into a contract
  - Agencies may impose legally binding requirements only through regulation and adjudication
- Executive Order 13992 (Jan. 20, 2021):
  - Revoked EO 13891
  - Noted that agencies must have **"flexibility to use robust regulatory action"** in key areas
- Interim Final Rule (July 1, 2021):
  - Rescinds DOJ regulations limiting the use of guidance documents
  - Simultaneously-issued Garland Memo: guidance alone cannot form the basis for an enforcement action, but "may be entitled to deference or otherwise carry persuasive weight with respect to the meaning of the applicable legal requirements . . . . **Department attorneys are free to cite or rely on such documents as appropriate"**

The Future of the Granston Memo

- Recent DOJ focus on use of its **dismissal authority** (31 U.S.C. § 3730(c)(2)(A))
- Principles in Granston Memo incorporated into DOJ Justice Manual at Section 4-4.111 in September 2018
- 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
- Courts divided over which standard applies – the *Swift* (deferential) standard or the *Sequoia Orange* (less deferential)



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 – DOJ Dismissal Authority

- Outcomes in Circuits that have not yet adopted a standard of review remain mixed, but also highlight the ultimate similarities in the standards

Court	Circuit	Approach
D.R.I.	First	Declined to choose, but found *Sequoia Orange* satisfied
S.D.N.Y.	Second	Declined to choose, but found *Sequoia Orange* satisfied
S.D.N.Y.	Second	*Sequoia Orange*
E.D. Pa.	Third	Declined to choose, finding both standards satisfied
E.D. Pa.	Third	Declined to choose, but applied *Sequoia Orange* and found it satisfied
E.D. Va.	Fourth	*Swift* (but found *Sequoia Orange* satisfied)
S.D. Miss.	Fifth	*Swift*
N.D. Ala.	Eleventh	Predicted Circuit Court would apply *Swift*, but found both standards satisfied
S.D. Ala.	Eleventh	Applied *Sequoia Orange* "in abundance of caution" and found it satisfied

FCA – Proposed Amendments

Proposed Change	Issue That Proposed Change Attempts to Address
Shift the burden of proof to the defendant(s) to disprove materiality	Supreme Court's 2016 *Escobar* decision breathing new life into "materiality" requirement
Make it more difficult for DOJ to dismiss *qui tam* cases	Granston Memo policy encouraging more DOJ dismissal of *qui tams*
Allow DOJ to shift the Government's discovery costs to the defendant(s)	FCA defendants' efforts to seek burdensome discovery from Government to disprove materiality under *Escobar*
Make the FCA's existing anti-retaliation provisions expressly applicable to post-employment retaliation	Conflicting judicial opinions about whether FCA covers post-employment retaliation

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FCA Enforcement

By the Numbers: 2020 Federal Fiscal Year

> $2.2 Billion

Civil settlements and judgments under the FCA

922

New FCA cases filed

73%

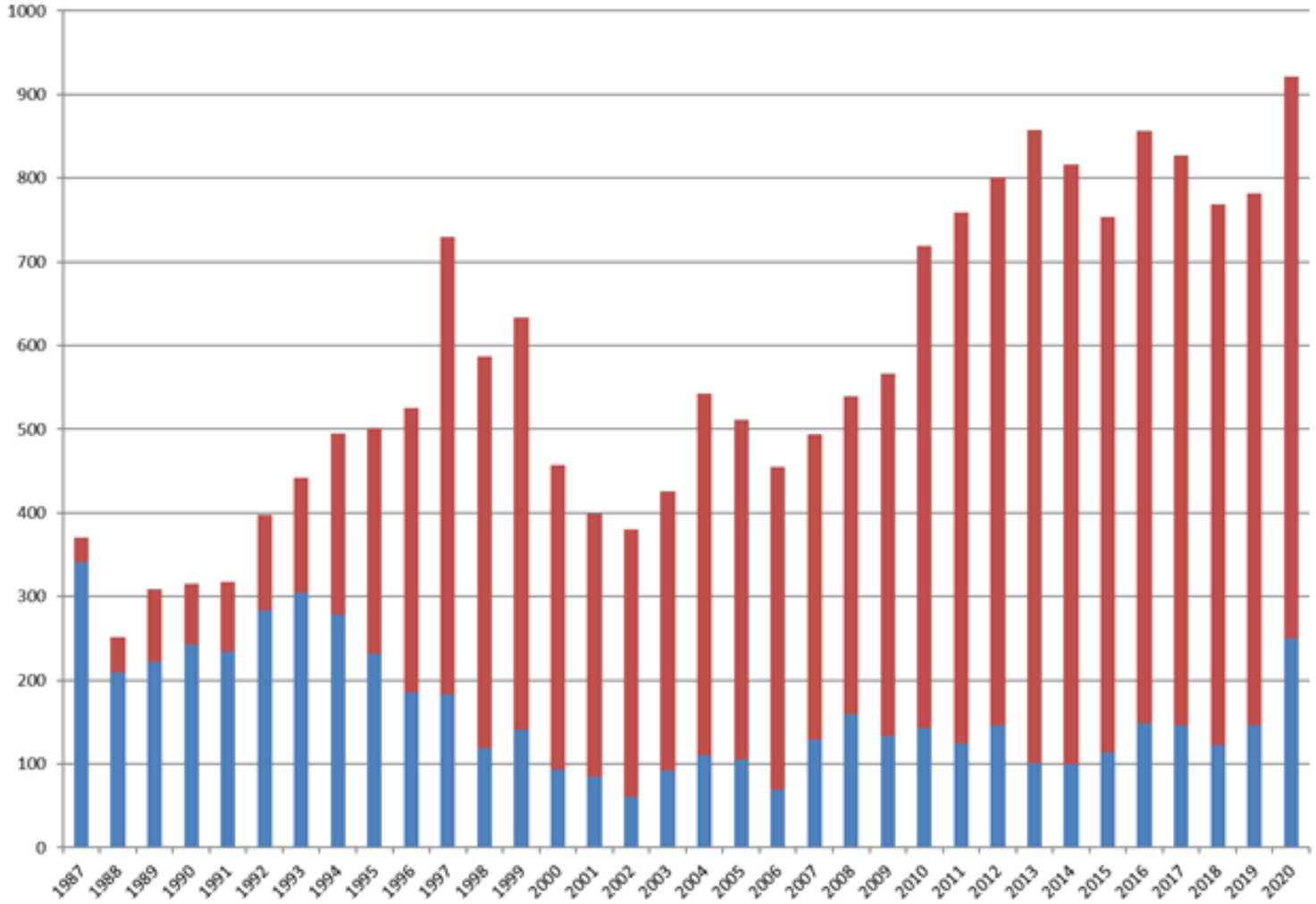
New FCA cases initiated by a whistleblower

89%

Overall federal recovery from cases in which the government intervened

Source: U.S. Dep't of Justice, "Fraud Statistics – Overview" (Jan. 14, 2021)

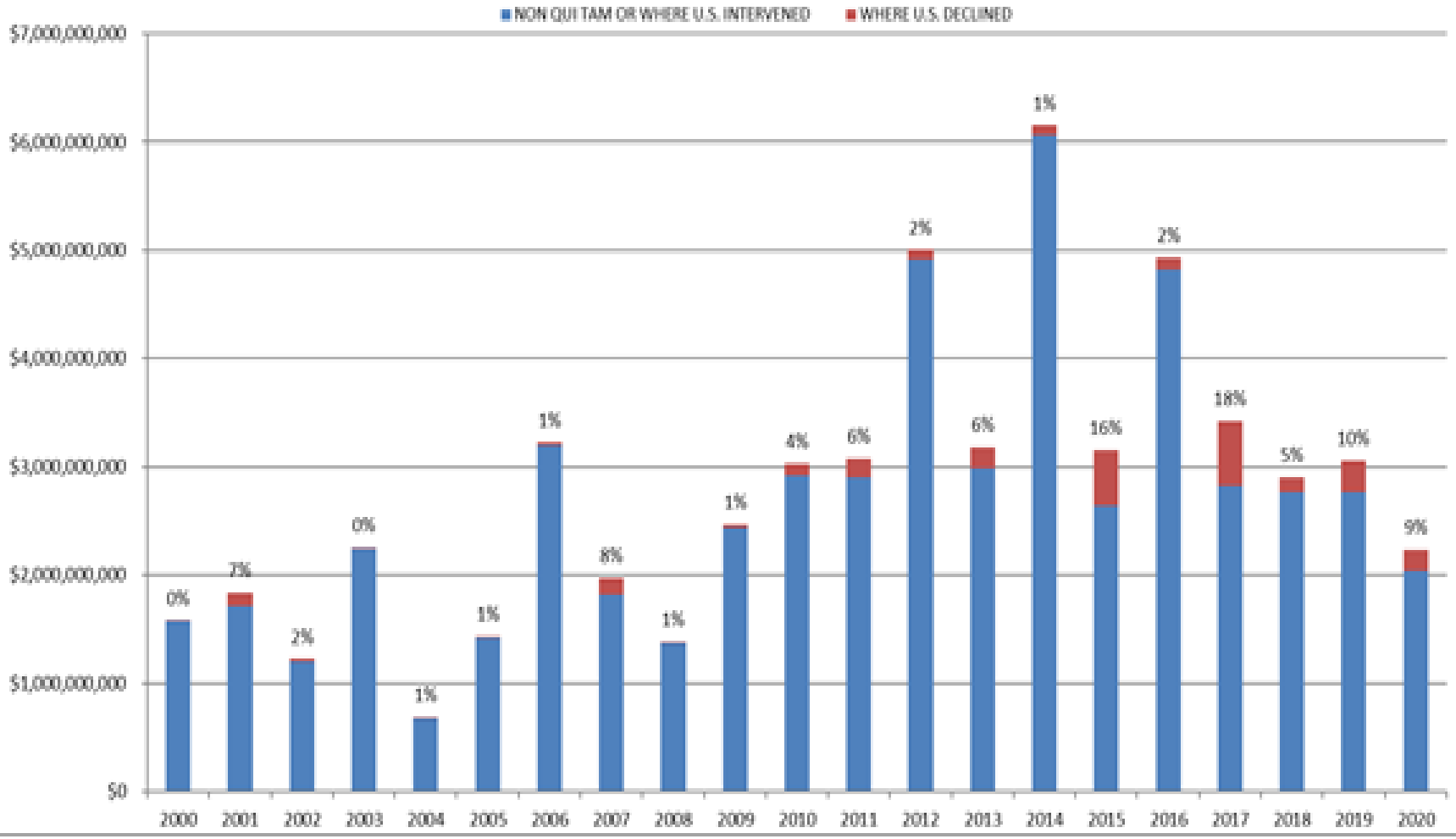
Number of New FCA Suits (FFY 1987–2020)



FFY 2020: 922 new FCA suits • 672 *qui tam* • 250 non-*qui tam*

Source: DOJ, "Fraud Statistics – Overview"

Recoveries through Settlements & Judgments (FFY 2000–2020)



FFY 2020: >$2.2B • $2.04B intervened & non-*qui tam* • $193M declined

Source: DOJ, "Fraud Statistics – Overview"

The CARES Act

- The **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
  - Key programs:
    - Paycheck Protection Program (PPP) – Small Business Administration (SBA) loan program (ended on May 31, 2021)
    - Main Street Lending Program (Federal Reserve)
  - Created Pandemic Response Accountability Committee (PRAC) and Special Inspector General for Pandemic Recovery (SIGPR)
    - SIGPR empowered to conduct audits and investigations into CARES Act relief programs

DOJ Enforcement Priorities in the COVID-19 Era

- DOJ has made clear that it sees the FCA as a prime tool for addressing fraud in COVID-19 stimulus programs
- Then-Principal Deputy Assistant Attorney General Ethan Davis gave a speech in June 2020 that made DOJ's focus on the programs clear:
  - "Going forward, the Civil Division will make it a priority to use the False Claims Act to **combat fraud** in the Paycheck Protection Program"
  - "We will use the False Claims Act to hold accountable those who knowingly attempt to skirt th[e] requirements" of the **Main Street Credit Facility**
  - "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:** "[Y]ou 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"

DOJ Enforcement Priorities in the COVID-19 Era

- In February 2021, Acting Assistant Attorney General Brian Boynton reiterated the Civil Division's focus on COVID-related enforcements in a speech to the Federal *Qui Tam* Bar:
  - "[T]he False Claims Act will play a **significant role** in the coming years as the government grapples with the consequences of this pandemic"
  - "The vast majority of the funds distributed under these programs have gone to eligible recipients. Unfortunately, however, some individuals and businesses applied for – and received – payments to which they were not entitled. . . . [T]he inevitable fraud schemes . . . resemble misconduct that the False Claims Act has long been used to address"
  - "The Civil Division is working closely with various Inspector Generals and other agency stakeholders to identify, monitor, and investigate the misuse of critical pandemic relief monies, and **we expect this collaborative effort to translate into significant cases and recoveries**"
- In March, DOJ confirmed that "whistleblower complaints have been on the rise" during the COVID-19 pandemic
- On May 17, the Attorney General established the COVID-19 Fraud Enforcement Task Force to marshal the resources of the Department of Justice in partnership with agencies across government to enhance efforts to combat and prevent pandemic-related fraud

First PPP Civil Settlement: SlideBelts, Inc. (E.D. Cal.)

- In January 2021, DOJ reached the **first civil settlement involving the Paycheck Protection Program**
  - Under the terms of the settlement, SlideBelts, Inc. and its President & CEO, Brigham Taylor, admitted to violations of the FCA and the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) based on allegations the company "made false statements to federally insured banks that [it] was not in bankruptcy in order to influence those banks to approve, and the Small Business Administration (SBA) to guarantee" a PPP loan
    - DOJ may bring FIRREA claims along with FCA charges as they only need to be proven by a preponderance of the evidence and involve a longer statute of limitations (10 v. 6 years)
  - Under the settlement, SlideBelts, Inc. and Taylor agreed to pay a combined $100,000 in damages and penalties, in addition to returning the PPP funds the company received
  - According to the settlement agreement, while the Government viewed SlideBelts and its President as liable for over $4 million, the Company's financial condition was a considerable factor in lowering the settlement amount

Other PPP-Related Enforcements

- In addition to SlideBelts, Inc., DOJ has reached **one FCA settlement related to the PPP**:
  - *U.S. ex rel. Hablitzel v. All in Jets, LLC and Seth A. Bernstein,* No. 20-cv-61410 (S.D. Fla.)
    - Seth A. Berstein, owner of the jet charter company All in Jets LLC dba JetReady, agreed to pay $287,055 to settle claims that he misappropriated proceeds from a PPP loan he obtained on behalf of that business
    - Berstein applied for and received a PPP loan totaling $1,173,382, of which he spent $98,929 on personal expenses within a day of receiving the funds. JetReady filed for bankruptcy shortly thereafter
  - In addition to the FCA, DOJ has used a number of civil and criminal legal theories (*e.g.*, fraudulent scheme, wire fraud, bank fraud, false statements) to fight fraudulent applications for and use of PPP funds

Implications for *Qui Tam* Activity

- SBA now maintains a database of PPP loan-level data
  - Last updated July 1, 2021
  - Public resource—anyone can download; no FOIA required
- 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
  - Lender names

- Lenders can expect this public data to serve as a starting point for *qui tam* relators and law firms looking for allegations of potential fraud

Potential Risk Areas for Lenders

- False certifications / false statements
  - Lender status and eligibility
  - Underwriting requirements
    - Lenders are permitted to rely on certain certifications by borrowers, but lenders still must obtain those certifications and certify that they have received them
  - Determinations of borrower eligibility for loan forgiveness
- Reverse false claims
  - Retention of processing fees from SBA
  - Retention of improperly forgiven loan amounts

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Key Industry Developments and Hot Topics

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 governments

FCA and Private Equity

- In a speech to the U.S. Chamber of Commerce in June 2020, Principal Deputy Assistant Attorney General Ethan Davis specifically mentioned possible enforcement efforts against private equity firms that invest in companies receiving CARES Act funds:
  - "When a private equity firm invests in a company in a highly-regulated space like health care or the life sciences, **the firm should be aware of laws and regulations** designed to prevent fraud. 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**"
- DOJ has yet to announce an enforcement action against a private equity firm for PPP loan activity. However, there are a number of recent examples of DOJ holding private equity firms accountable for conduct by an underlying portfolio company:
  - 2019: DOJ announced civil FCA settlement with a private equity firm based on alleged prescription-referral kickbacks paid by a compounding pharmacy "managed" by the firm
  - 2020: DOJ announced a settlement with a private equity firm regarding alleged improper sales and promotional practices by a medical device company between 2006 and 2012, even though the firm did not acquire the company until 2012
  - 2021: DOJ announced an FCA settlement with a private investment company for alleged patient-referral kickbacks paid by an EEG testing company that had a management agreement with the investment company

FCA and Private Equity

U.S. ex rel. Martino-Fleming v. South Bay Mental Health Center

- In May 2021, the District of Massachusetts issued the first opinion to hold at the dispositive motion stage that **a private equity fund and its principals can act with the requisite scienter and cause the submission of false claims as a result of conduct by a healthcare provider portfolio company**
- In *U.S. ex rel. Martino-Fleming v. South Bay Mental Health Center,* the *qui tam* relator sued the provider and its private equity fund owner, alleging that South Bay provided services by unqualified employees
- The court previously denied the private equity fund defendants' motion to dismiss, holding that a private equity fund can be liable "where the submission of false claims by another entity was the foreseeable result of a business practice"
    - The court held that the relator adequately alleged that the private equity fund caused the submission of false claims based on allegations that the fund's members and principals formed a majority of the Board and were directly involved in South Bay's operations
- The parties cross-moved for partial summary judgment, and the court rejected the private equity fund's arguments as to the scienter and causation elements of the FCA
    - The court found that the evidence suggested the fund was aware of South Bay's extensive compliance failures and that ultimately the fund "had the power to fix the regulatory violations which caused the presentation of false claims but failed to do so"

FCA and Private Equity

- These prior enforcement actions and the court's recent decision in *Martino-Fleming* suggest that future DOJ prosecutions and *qui tam* suits against private equity funds under the FCA will turn not just on a private equity firm's involvement in and oversight of the portfolio company's activity and operations, but also on a private equity firm's purported notice of potentially problematic conduct
- DOJ may even seek to hold a private equity firm liable for a portfolio company's conduct pre-dating their acquisition of the company if DOJ believes the conduct could have been discoverable with due diligence

DOJ-HUD Memorandum of Understanding

- HUD Secretary Ben Carson promised in May 2018 to "seek[] to limit the use of the False Claims Act as a tool of last resort"
- In October 2019, DOJ and HUD signed a Memorandum of Understanding setting forth guidance on the appropriate use of the FCA to enforce violations of FHA regulatory requirements
  - Secretary Carson's public remarks regarding the MOU called the FCA a "monster" that drove banks away following the financial crisis but that now "has been slayed"
- Key takeaways from the MOU:
  - Referral to DOJ for pursuit of FCA claims when two conditions are met—the violations reach a certain level of seriousness (based on volume or value of loans), and there are aggravating factors
  - In investigating, litigating, and settling FCA cases, DOJ will solicit HUD's views, including on whether the alleged violations are material to the agency
  - HUD will recommend dismissal of *qui tam* suits under defined circumstances (e.g., lack of materiality)

Recent Enforcement Activity

- Recent trends suggest that HUD has moved away from the FCA as an enforcement tool
- There are fewer reported settlements compared to prior years, with only one notable FCA resolution over the last year:
  - On October 28, 2020, Guild Mortgage Company agreed to pay $24.9 million to resolve allegations that it violated the FCA by falsely certifying compliance with underwriting requirements for HUD- and FHA-insured loans

- *United States v. James B. Nutter & Company*, 4:20-cv-00874-RK (W.D. Mo.)
  - On September 25, 2020, DOJ filed suit against Nutter Home Loans, asserting claims, under the FCA and FIRREA, that Nutter Homes forged annual certifications of compliance with HUD's requirements, forged signatures on documents required for loan approval, and used unqualified underwriters to approve FHA insured Home Equity Conversion Mortgages
  - On June 14, 2021, Judge Ketchmark denied Nutter Home Loans' motion to dismiss, rejecting the Nutter Homes' argument that the complaint failed to allege falsity, materiality, causation, and scienter, and finding that DOJ had adequately pled "the 'who, what, where, when, and how' of [Nutter Homes'] misconduct"
  - No settlement has yet been reported, and the parties are now in early stages of discovery

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Compliance Best Practices

Minimizing Exposure

- Set a compliance-focused "**tone from the top**"
- Adopt and implement **reasonable compliance policies and controls**
  - 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
- **Audit, monitor, and test** the compliance program's effectiveness
- **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 a 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

Questions?

Upcoming Webcasts & Contact Information

Upcoming White Collar Webcasts

- **October 14** | **The False Claims Act – 2021 Update for Government Contractors** | 12:00 – 1:30 pm ET
  To register, please click here.

- **October 18** | **Negotiating Closure of Government Investigations: NPAs, DPAs, and Beyond** | 12:00 – 2:00 pm ET To register, please click here.

- **October 19** | **The False Claims Act – 2021 Update for Drug and Device Manufacturers** | 12:00 – 1:30 pm ET To register, please click here.

- **October 21** | **Spoofing: What it is, where it's going** | 12:00 – 1:30 pm ET
  To register, please click here.

- **October 26**| **False Claims Act – 2021 Update for Health Care Providers** | 12:00 – 1:30 pm ET
  To register, please click here.

FCA Publications and Recent Recorded Webcasts

FCA Publications

- **Private Equity Firms and PPP Fraud Liability Under the False Claims Act** (September 23, 2021)

https://www.gibsondunn.com/private-equity-firms-and-ppp-fraud-liability-under-the-false-claims-act/

- **Surge in False Claims Act Enforcement Continues** (August 16, 2021)

https://www.gibsondunn.com/surge-in-false-claims-act-enforcement-continues/

- **2021 Mid-Year False Claims Act Update** (July 26, 2021)

https://www.gibsondunn.com/2021-mid-year-false-claims-act-update/

Recent Recorded Webcasts

- **National Security Enforcement: Developments and Trends** (September 14, 2021)

https://www.gibsondunn.com/webcast-national-security-enforcement-developments-and-trends/

- **Economic Espionage and Intellectual Property Theft: Trends and Developments with Threats and Enforcement** (September 23, 2021)

https://www.gibsondunn.com/webcast-economic-espionage-and-intellectual-property-theft-trends-and-developments-with-threats-and-enforcement/

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