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Editor's Note: Looking Back, and Ahead
Victoria Prussen Spears 75

2021 False Claims Act Review and Outlook
Scott F. Roybal and Matthew T. Lin 77

OIG Joint Venture Advisory Opinion Does Not Consider Multiple Court Decisions That Undermine the Conclusions in Its Opinion
Robert S. Salcido 87

Cybersecurity Provisions Proliferate in the National Defense Authorization Act
Christopher R. Hebdon, Kate M. Growley, Evan D. Wolff, Maida Oringher Lerner and Michael G. Gruden 101

Third Circuit Rules on Government Motions to Dismiss FCA Cases, Favoring Seventh Circuit Approach
John M. Hindley, Debra E. Schreck and Michael A. Rogoff 107

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2021 False Claims Act Review and Outlook

By Scott F. Roybal and Matthew T. Lin*

This article begins by briefly reviewing the basic elements of the False Claims Act and its qui tam provisions, and recent U.S. Department of Justice enforcement statistics. It then discusses a number of FCA developments.

The Civil False Claims Act ("FCA")[1] was enacted in 1863 in response to allegations of fraud in Civil War procurements. The FCA has since become the government's weapon of choice to combat fraud. This article begins by briefly reviewing the basic elements of the FCA and its qui tam provisions, and recent U.S. Department of Justice ("DOJ") enforcement statistics. It then discusses a number of FCA developments, including:

(1) Recent litigation regarding the government's authority to dismiss qui tam actions under 31 U.S.C. § 3730(c)(2)(A);

(2) The U.S. Supreme Court's denial of certiorari on key FCA issues;

(3) Changes in white collar enforcement policy under the Biden administration;

(4) Senator Chuck Grassley's proposed amendments to the FCA; and

(5) FCA enforcement against COVID-19 pandemic relief fraud.

BASIC ELEMENTS OF THE FCA AND QUI TAM PROVISIONS

The FCA makes it unlawful for a person to knowingly: (1) present or cause to be presented to the government a false or fraudulent claim for payment, or (2) make or use a false record or statement that is material to a claim for payment.[2] A person acts "knowingly" under the FCA if he or she acts with "actual knowledge, deliberate ignorance or reckless disregard of the truth or

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[1] 31 U.S.C. § 3729 et seq.

[2] 31 U.S.C. §§ 3729(a)(1)(A)–(B) (2009); *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037 (9th Cir. 2012); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999).

falsity of information."[3] Mistakes and ordinary negligence, however, are not actionable under the FCA.[4]

The FCA provides for up to treble damages and penalties of between $11,803 and $23,607 per violation. Violators are also subject to administrative sanctions, including suspension or debarment from participating in government contracts. The FCA has a lengthy statute of limitations of no less than six years and, in some cases, up to 10 years after a violation has been committed.

The FCA permits private citizens, known as qui tam relators, to bring cases on behalf of the government. In qui tam cases, the complaint and a written disclosure of all relevant evidence known to the relator must be served on the U.S. Attorney for the judicial district of the court where the case was filed as well as on the U.S. Attorney General. The qui tam complaint is then ordered sealed for a period of at least 60 days, and the government is required to investigate the allegations contained therein and decide whether to intervene. If the government declines to intervene, the relator may proceed with the complaint on behalf of the government. The complaint must be kept confidential and is not served on the defendant until the seal is lifted. Relators may receive a "whistleblower bounty" of between 15 and 25 percent of the recovery if the government intervenes in their cases and between 25 and 30 percent if the government declines.

DOJ REPORTS HUNDREDS OF FCA CASES AND BILLIONS OF DOLLARS IN RECOVERIES

Figure 1 shows new FCA cases per year, which show a steady increase in qui tam-driven cases.[5] Well over 700 FCA cases have been filed each year for the past 12 years and 85 percent of those cases have been qui tam cases. Many qui tam cases remain under seal for years pending the DOJ's intervention decision. In 2020, there was a notable uptick in new FCA cases brought by both the government and qui tam relators, possibly linked to the outpouring of federal funds and the potential for pandemic relief fraud. However, there was a drop back to the norm in 2021 in FCA cases brought by both the government and qui tam relators, likely indicating that the 2020 spike was a unique immediate result of the COVID-19 pandemic and related federal stimulus.

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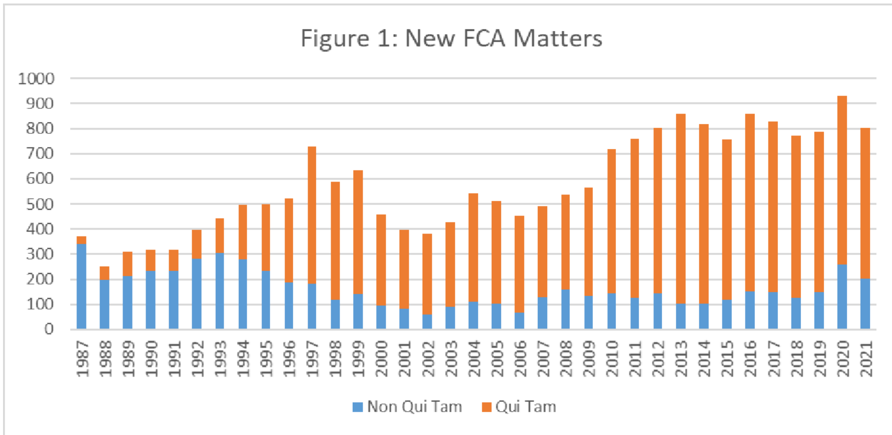
[3] 31 U.S.C. § 3729(b).

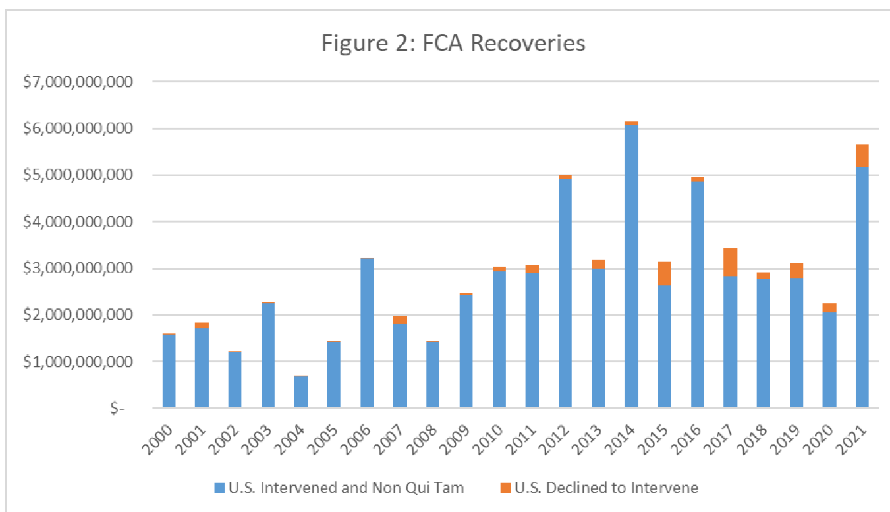
[4] *U.S. v. Science Applications Int'l Corp.*, 626 F.3d 1257 653 F. Supp. 2d 87 (D.D.C. 2009).

[5] DOJ Office of Public Affairs, *Fraud Statistics—Overview* (February 1, 2022).



While FCA filings were down in 2021, DOJ collected over $5.6 billion in settlements and judgments in 2021, the largest amount since 2014. Figure 2 shows annual recoveries by the government in FCA cases and compares recoveries coming from qui tam cases where the government declined to intervene versus non-qui tam cases or qui tam cases where the government intervened.[6] Predictably, the bulk of the recoveries came in non-qui tam cases and qui tam cases where the government intervened. The massive increase in recoveries in 2021 mostly came from settlement and judgments from the health care industry, and especially drug and pharmaceutical companies in cases related to prescription opiates.

[6] *See id.*



LITIGATION SURROUNDING THE GRANSTON MEMORANDUM AND THE GOVERNMENT'S DISMISSAL AUTHORITY UNDER 31 U.S.C. § 3730(c)(2)(A)

FCA Section 3730(c)(2)(A)[7] allows the government to dismiss a qui tam action over the objection of the relators. Rarely used until recent years, Section 3730(c)(2)(A) has become an increasingly common method of ending qui tam FCA cases. In 2018, Michael D. Granston, then Director of the Commercial Litigation Branch, Fraud Section, issued a memorandum (the "Granston Memo") outlining seven factors for the government to consider when dismissing qui tam actions:

(1) Curbing meritless qui tam actions;

(2) Preventing parasitic or opportunistic qui tam actions;

(3) Preventing interference with agency policies and programs;

(4) Controlling litigation brought on behalf of the United States;

(5) Safeguarding classified information and national security interests;

(6) Preserving government resources; and

(7) Addressing egregious procedural errors.

Federal circuit courts of appeal are mostly split into two camps with respect to the role of the judiciary in reviewing dismissals of qui tam cases under Section 3730(c)(2)(A).

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[7] "The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion."

First, the U.S. Court of Appeals for the Ninth Circuit's standard, articulated in *United States v. Baird-Neece Packing Corp.*,[8] requires the government to (1) identify a valid government purpose, and (2) demonstrate a rational relation between dismissal and accomplishment of that purpose.

Second, the U.S. Court of Appeals for the District of Columbia Circuit standard, articulated in *Swift v. United States*,[9] gives the government virtually "unfettered" discretion to dismiss qui tam cases under Section 3730(c)(2)(A).

Circuit courts continued to weigh in on the standards of review in 2021. In *U.S. ex rel. Health Choice Alliance LLC et al. v. Eli Lilly & Co. Inc. et al.*,[10] relators accused Bayer Corp. and Eli Lilly & Co. Inc. of participating in a kickback scheme to induce medical providers to prescribe their products. The government declined to intervene and, one year later, moved to dismiss the case under Section 3730(c)(2)(A), citing its two-year investigation into the relators' case. The district court granted the motion over relators' objections. The U.S. Court of Appeals for the Fifth Circuit chose not to adopt outright the District of Columbia Circuit's or the Ninth Circuit's standard, but determined that the Ninth Circuit's more stringent standard would have been satisfied because (1) the government established a relationship to a government purpose (dismissing an unmerited case to avoid costs of prosecution), and (2) the relators could not show that the dismissal was "fraudulent, arbitrary and capricious, or illegal."

The U.S. Court of Appeals for the Third Circuit added its own opinion on reviewing dismissals in 2021. In *Polansky v. Exec. Health Res. Inc*,[11] a relator brought an action against a healthcare company alleging that it overbilled Medicare by certifying inpatient services that should have been provided on an outpatient basis. The government declined to intervene and, seven years later, move to dismiss the action over the relator's objection. The Third Circuit held that the government was required to intervene in the case before it could dismiss an action under Section 3730(c)(2)(A), but nonetheless reviewed the government's motion to dismiss as a de facto motion to intervene without remanding the case to the district court. The Third Circuit also held that the government did not need to intervene at the first available opportunity.

The Third Circuit rejected both the District of Columbia Circuit's and Ninth Circuit's standards and applied the standard of review under Fed. R. Civ. P. 41(a) (Dismissal of Actions), which gave the district court a "broad grant of

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[8] 151 F.3d 1139 (9th Cir. 1998).

[9] 318 F.3d 250 (D.C. Cir. 2003).

[10] 4 F.4th 255 (5th Cir. 2021).

[11] 17 F.4th 376 (3d Cir. 2021).

discretion" to shape the proper terms of dismissal. In this case, Rule 41(a) permitted voluntary dismissal of the action without a court order by the plaintiff (government) as the notice of dismissal was filed before the opposing party served either an answer or a motion for summary judgment.

The new standards articulated by the Third and Fifth Circuits—in addition to the Supreme Court's denial of certiorari on the issue (discussed below)—continue to muddy the waters with respect to a judiciary's role in reviewing the government's dismissal authority under Section 3730(c)(2)(A). Nonetheless, all circuit courts appear to give a degree of discretion to the government, although the level of discretion varies among the circuits.

SUPREME COURT DENIALS OF CERTIORARI IN IMPORTANT FCA MATTERS

The Supreme Court chose not to weigh in on the FCA this year, but its denials of certiorari in key FCA cases are still significant for the confusion they leave in the lower courts.

First, the Supreme Court refused to grant certiorari in *United States ex rel. Cimznhca, LLC v. UCB, Inc.*,[12] on the government's authority to dismiss qui tam suits under 31 U.S.C. § 3730(c)(2)(A) and the role of the court in reviewing such dismissals. As discussed above, circuits primarily fall into two camps when reviewing government dismissals of qui tam cases under Section 3730(c)(2)(A): (1) the Ninth Circuit's "rational relation" standard, and (2) the D.C. Circuit's "unfettered discretion" standard. The U.S. Court of Appeals for the Seventh Circuit further complicated the issue by rejecting both of those standards.

In *Cimznhca*, the Seventh Circuit ruled that the government must first intervene, but otherwise held that its standard was "much nearer" to the District of Columbia Circuit's standard giving near unfettered discretion. This apparent third standard for reviewing dismissals under Section 3730(c)(2)(A) gave the Supreme Court a ripe opportunity to resolve the issue, but its denial of certiorari leaves the split in place.

Second, the Supreme Court denied certiorari on the issue of whether FCA liability can be predicated on a claim that is objectively false based on verifiable facts, or whether dueling expert opinion based on professional judgment can suffice to establish falsity. The Supreme Court specifically denied certiorari from

[12] 970 F.3d 835 (7th Cir. 2020).

the Third Circuit in *United States v. Care Alternatives*,[13] and the Ninth Circuit in *Winter ex rel. United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc.*[14]

However, the U.S. Court of Appeals for the Eleventh Circuit had previously addressed in the issue in *United States v. AseraCare, Inc.*[15] In *AseraCare*, the government alleged that hospice facilities billed Medicare based on erroneous clinical judgments that some patients were terminally ill, and asserted that the patients were not terminally ill based on the opinion of a single expert witness. The Eleventh Circuit held that claims could not be deemed false under the FCA based solely on disagreements between medical experts as to a medical provider's clinical judgment because the FCA requires "objective falsehood."

The Third Circuit disagreed in *Care Alternatives,* holding that a jury could consider expert testimony challenging a physician's medical opinion in order to determine falsity and that a difference in medical opinion is enough evidence to create a triable dispute of fact regarding FCA falsity. The Ninth Circuit also disagreed in *Winter* and, following the Third Circuit, held that "objective falsehood" is not required and that a jury may consider a battle of the experts when deciding whether a certification of medical necessity is false. The Supreme Court ultimately denied certiorari in *Care Alternatives* and *Winter*, leaving a circuit split in place over whether expert testimony alone can establish a false certification of medical necessity.

CHANGES IN ENFORCEMENT POLICY UNDER THE BIDEN ADMINISTRATION

In 2021, the DOJ announced stronger enforcement policies with respect to corporate cases. On October 28, 2021, Deputy Attorney General ("DAG") Lisa Monaco announced tougher enforcement policies for white collar cases during the American Bar Association's 36th National Institute on White Collar Crime. She effectively announced a return of the Yates Memorandum, whereby companies must turn over all nonprivileged information on individuals involved in wrongdoing in order to receive cooperation credit. In addition, companies cannot limit disclosures of persons or management they deem substantially involved in the misconduct.

The DOJ will also consider all prior corporate wrongdoing when considering resolution, even if prior wrongdoing was unrelated to the instant matter. Such prior wrongdoing could include a company's full civil, criminal, and regulatory record. In practical terms, the DOJ's consideration of unrelated prior wrong-

[13] 952 F.3d 89 (3d Cir. 2020).

[14] 953 F.3d 1108 (9th Cir. 2020).

[15] 938 F.3d 1278 (11th Cir. 2019).

doing may limit the availability of non-prosecution agreements and deferred prosecution agreements for repeat offenders. While not explicit in DAG Monaco's announcement, this policy will likely include a tougher stance on companies seeking to settle civil FCA matters.

On July 1, 2021, Attorney General ("AG") Merrick Garland announced a policy allowing the DOJ to issue guidance documents and to use guidance documents from other agencies in support of enforcement actions. Agency guidance documents do not have the force and effect of law, and two prior DOJ memoranda under the Trump administration previously restricted the publication and reliance on agency enforcement policies. AG Garland rescinded these two memoranda and allowed the DOJ to now rely on agency policy and guidance documents in certain circumstances.

The memorandum stated that the DOJ's own guidance documents may set forth the DOJ's interpretation of binding regulations, statutes, and constitutional provisions, but that such documents should be labeled as guidance and cite the legal authority being described. In the enforcement context, agency guidance documents "may be entitled to deference or otherwise carry persuasive weight with respect to the meaning of applicable legal requirements," and that DOJ attorneys may cite to the guidance if relevant to claims or defenses in enforcement actions. While the memorandum did not mention the FCA explicitly, this memorandum suggests that the DOJ may use agency guidance documents to establish FCA elements such as whether a defendant "knowingly" violated the law, where such laws were interpreted in public non-binding agency guidance documents.

PROPOSED AMENDMENTS TO THE FCA

On July 26, 2021, Senator Chuck Grassley and a bipartisan group of senators introduced the False Claims Amendments Act of 2021, which proposed substantial changes to the FCA aimed at addressing its so-called "loopholes." Senator Grassley has long been among the strongest supporters of the FCA on Capitol Hill, and is responsible for key amendments strengthening FCA enforcement in 1986 and 2010. If history is any indication, Senator Grassley's support for the bill indicates a likely adoption of the amendments or some form of them. Key changes to the FCA include the following.

- *Materiality*: (1) Government/relator may establish "materiality" by preponderance of evidence, and (2) defendant may only rebut materiality by clear and convincing evidence. These changes are a clear response to the materiality standard under *Universal Health Services, Inc. v. U.S. ex rel. Escobar* and its progeny, which Senator Grassley has long objected to as gutting the FCA.

- *Discovery on Government*: Any party propounding discovery on the government must pay the government's expenses in responding to discovery (including costs and attorney's fees), unless the party can show that information sought is relevant, proportionate, and not unduly burdensome. This amendment is aimed, in part, at defendants that propound extensive amounts of discovery on government agencies to defend against qui tam relator allegations in which the DOJ does not intervene. Agencies are often frustrated responding to prolonged and extensive discovery demands, especially when the DOJ has declined intervention.
- *Government Dismissal Authority*: Relators are entitled to a hearing before involuntary dismissal by government, requires government to demonstrate reasons for dismissal, and allows relator to contest reasons. This is clearly a direct response to the Granston Memo and circuit court precedent allowing the government to dismiss FCA actions over objections by relators with little to no judicial review.
- *FCA Retaliation*: Specifies that whistleblower protections apply to "current or former" employees, contractors, or agents.

FCA ENFORCEMENT AGAINST PANDEMIC RELIEF FRAUD

For nearly two years, members of the white collar bar have written about the impending flood of white collar prosecution as a result of the COVID-19 pandemic, the CARES Act, and other pandemic response from the federal government. Trillions of dollars were spent by the federal government in pandemic relief, often rushed with opaque qualifications for receipt. Numerous enforcement bodies were created to address pandemic relief fraud, including the Special Inspector General for Pandemic Recovery, Congressional oversight committees, and task forces within the DOJ and related agencies. The DOJ initially brought a flurry of criminal charges against obvious pandemic fraudsters based on misrepresentations in relief applications, such as fraudulent Paycheck Protection Program ("PPP") applications, and for misuse of funds.

Many observers noted that wrongful or deceitful applications for pandemic relief funds would also result in civil liability under the FCA, given that misrepresenting qualifications for pandemic relief would be false claims for government funds. As noted above in DOJ's 2020 enforcement statistics, there was an uptick in new FCA filings in 2020 by both the government and qui tam relators. There is every reason to believe this trend continued during 2021.

Given that the vast majority of qui tam actions remain backlogged under seal for several years while DOJ and other investigative agencies conduct their investigations, it is not surprising that there was not an immediate and

corresponding uptick in FCA recoveries in 2021. That correlation likely will play out over the next several years. In the meantime, however, the few FCA cases that were brought to light by the government in 2021 related to COVID-19 shed light on what can be expected regarding future enforcement.

On January 13, 2021, the DOJ announced its first FCA settlement related to COVID-19. SlideBelts Inc., an internet retail company, and its CEO Brigham Taylor agreed to pay $100,000 in damages and penalties to resolve allegations that they committed fraud when applying for a $350,000 PPP loan while in bankruptcy. SlideBelts and Taylor admitted to making false statements to banks that SlideBelts was not in bankruptcy—as required to qualify for PPP funds—when in fact it was in bankruptcy. SlideBelts and Taylor repaid the entire $350,000 PPP loan, and paid an additional $100,000 to settle claims under the FCA and the Financial Institutions Reform, Recovery, and Enforcement Act ("FIRREA").

On August 27, 2021, the DOJ announced another FCA settlement based on false claims for PPP funds. A former employee of JetReady, a Florida jet charter company, brought a qui tam complaint against the company alleging that Seth A. Bernstein, JetReady's owner, had applied for and received a $1,173,382 PPP loan in April 2020 and diverted $98,929 for personal use. Bernstein agreed to pay $287,055 to settle the claims under the FCA.

Despite the expected modest rollout of publicly announced FCA claims related to COVID-19 in 2021, there is reasonable certainty of voluminous audits and FCA enforcement actions already underway and on the horizon based on false claims for pandemic relief.

Recipients of the PPP and other forms of pandemic relief funds would be prudent to conduct reasonable due diligence of their applications for the PPP and other relief funds, use of such funds under the required terms and conditions, and related loan forgiveness representations to correct or clarify any misrepresentations or false certifications in order to mitigate potential enforcement in the near future.