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Focus

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FEATURE COMMENT: 2018 Civil False Claims Act Update

The Civil False Claims Act, 31 USCA § 3729 et seq., 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 Feature Comment begins by briefly reviewing the basic elements of the FCA and its qui tam provisions, and recent Department of Justice enforcement statistics. It then discusses various FCA developments: (1) DOJ's apparent tempered approach to the FCA, (2) updates to the U.S. Attorney's Manual, (3) lower courts' application of the U.S. Supreme Court's decision in *Escobar*, and (4) disagreement regarding the statute of limitations for non-intervened cases.

Basic Elements of the FCA and Qui Tam Provisions—The FCA makes it unlawful for a person knowingly to: (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. 31 USCA §§ 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); 41 GC ¶ 317. A person acts "knowingly" under the FCA if he or she acts with "actual knowledge, deliberate ignorance or reckless disregard of the truth or falsity of information." 31 USCA § 3729(b). However, mistakes and ordinary negligence are not actionable. *U.S. v. Sci. Applications Int'l Corp.*, 626 F.3d 1257 (D.C. Cir. 2010), 653 F. Supp. 2d 87 (D.D.C. 2009).

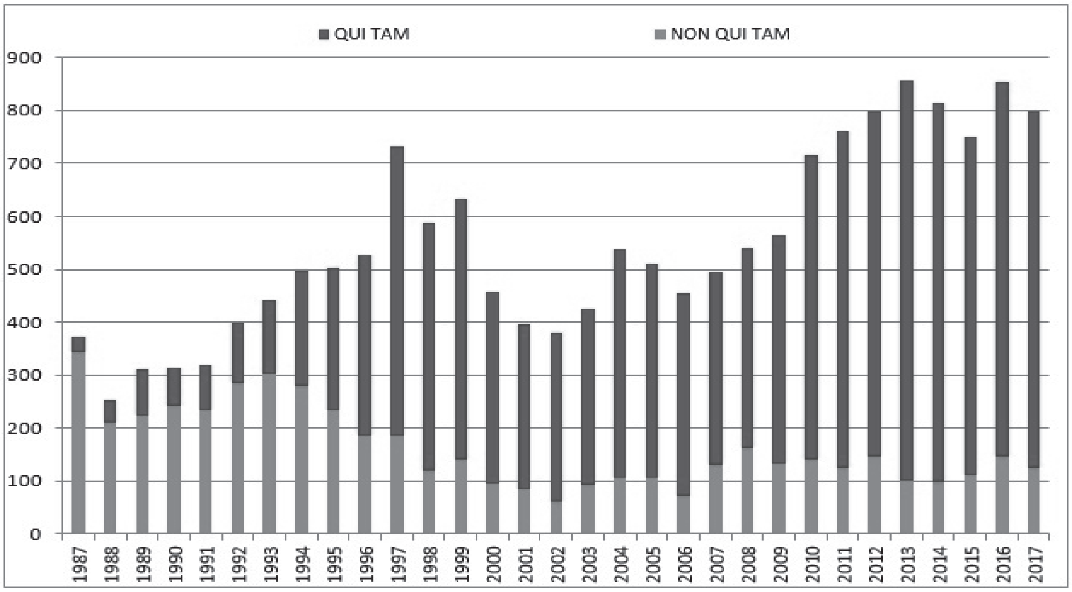
The FCA provides for up to treble damages and penalties of between $10,781.40 and $21,562.80 per violation. Violators are also subject to administrative sanctions, including suspension or debarment from participating in Government contracts. The FCA statute of limitations is no less than six years and, 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 at least 60 days, and the Government must investigate the allegations 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 the case, and between 25 and 30 percent if the Government declines.

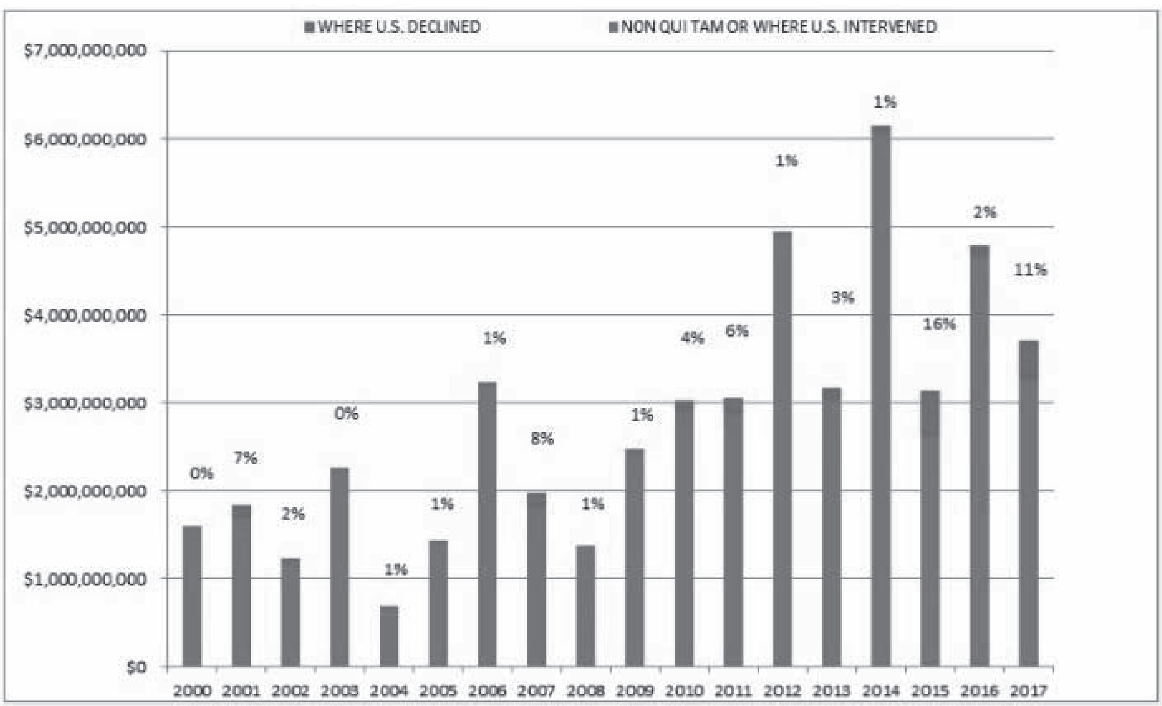
DOJ Reports Thousands of FCA Cases and Billions of Dollars in Recoveries—Chart 1 shows recent FCA trends, including a steady increase in qui tam-driven cases, as reported by the DOJ Office of Public Affairs. Well over 700 FCA cases have been filed each year for the last five years, and 85 percent of those cases have been qui tam cases. Many qui tam cases remain under seal for years pending DOJ's intervention decision.

Chart 2 shows annual recoveries by the Government in FCA cases, and compares recoveries coming from qui tam cases in which the Government declined to intervene versus non-qui tam cases or qui tam cases in which the Government intervened, as reported by DOJ. Over the last five years, the Government has recovered more than $20 billion. Predictably, the bulk of the recoveries came in non-qui tam cases and qui tam cases in which the Government intervened.

— CHART 1 —



— CHART 2 —



DOJ's Apparent Tempered Approach to the FCA—*Granston Memorandum*: On January 10 Michael Granston, the director of DOJ's Civil Fraud Section, issued a memo directing that Government lawyers, in evaluating whether to intervene in qui tam FCA cases, should "consider whether the Government's interests are served ... by seeking dismissal [of the underlying case]." The Granston memo states that DOJ "has seen record increases in qui tam actions" filed under the FCA, and although the "number of filings has increased substantially over time," DOJ's "rate of intervention has remained relatively static."

The Granston memo further states that dismissal of non-intervened cases is "an important tool to advance the Government's interests, preserve limited resources, and avoid adverse precedent." The Granston memo provides seven factors that Government attorneys should consider when evaluating a non-intervened case:

1. lacks merit,
2. duplicates preexisting complaint or Government investigation,
3. interferes with Government priorities,
4. creates bad precedent for the Government,
5. threatens national security,
6. costs more to litigate than the Government is likely to recover, and
7. impedes the Government's ability to conduct a proper investigation.

Importantly, some district courts have held that the Government may dismiss FCA cases at will. See, e.g., *U.S. ex rel. Maldonado v. Ball Homes, LLC*, 2018 WL 3213614 (E.D. Ky. June 29, 2018) (explaining that the "Government has virtually unfettered discretion to dismiss a False Claims Act case"). Other district courts have held that the Government must show something akin to "good cause." See, e.g., *U.S. v. Acad. Mort. Corp.*, 2018 WL 3208157 (N.D. Cal. June 29, 2018) (denying the Government's motion to dismiss because the "complaint had not been fully investigated" by the Government).

The impact of the Granston memo and diverse interpretation by district courts regarding the showing that the Government must make to dismiss a non-intervened case over a relator's objection was recently highlighted in *U.S. ex rel. Toomer v. TerraPower, LLC*, 2018 WL 4934070 (D. Idaho Oct. 10, 2018). In *Toomer*, the relator alleged that the defendant, a nuclear technology designer, developed a device to reduce failures of nuclear fuel rods, while working under a cooperative research and development agreement (CRADA) with the Government, and did not disclose the device to the Government as required so that the relator could reap unjust profits.

The Government declined to intervene and moved to dismiss the case. The Government argued that the lawsuit was premature because the Government was awaiting a decision on a patent application that the defendant submitted for the device; if the application were to be denied, the Government would not have suffered any damages and therefore could be forced to incur unnecessary litigation costs. The Government further argued that the lawsuit could impair the important work being done by the defendant, and that it had plenty of time to file a lawsuit because the CRADA remained in effect until 2023.

The district court agreed and dismissed the case with prejudice as to the relator, but without prejudice as to the Government. The district court took a middle ground, explaining that the Government was not required to "fully investigate" an alleged FCA violation before moving to dismiss the case, and the Government's investigation in this case was "adequate" because the U.S. Attorney's Office (1) met with the relator and his counsel twice; (2) reviewed e-mails, notes and other relevant documents provided by the relator and the defendant; (3) toured the relevant facilities; (4) met with the defendants' relevant personnel; and (5) discussed the allegations with subject matter experts within the Government. The district court further explained that the benefits of terminating the lawsuit at this juncture outweigh the benefits of allowing the relator to proceed with the lawsuit.

Brand Memorandum: On January 25 then-Associate Attorney General Rachel Brand issued a memo that prohibits Government attorneys from using noncompliance with Government agencies' own "guidance documents as a basis for proving violations of applicable law [in civil cases] ... to effectively convert agency guidance documents into binding rules." The Brand memo builds on a November 2017 pronouncement by then-Attorney General Jeff Sessions that prohibited Government attorneys from issuing "guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch," without adhering to the stringent rulemaking processes required by the Administrative Procedure Act.

Although the Brand memo is a powerful tool for FCA defendants that cuts to the heart of agency guidance being used as law, the memo contains important caveats. It states that DOJ may continue to use agency guidance to "simply explain or paraphrase legal mandates from existing statutes or regulations." The Brand memo further states that DOJ may use agency guidance as evidence that "the party had the requisite knowledge of the [particular] mandate." Moreover, the memo applies only to DOJ. The Brand memo does not, and cannot, control how the courts or Government agencies will utilize agency guidance, and there has not been sufficient time to see how the memo plays out in this regard. These considerations make the memo's impact uncertain.

2018 Updates to the U.S. Attorney's Manual—On September 25 DOJ issued an updated version of the U.S. Attorney's Manual, now called the Justice

Manual. The manual sets forth DOJ's policies and procedures for investigations and prosecutions, and is a primary resource for Government attorneys. Although it is an internal document that does not have the effect of law, it is nonetheless important because it guides Government attorneys in their day-to-day decision-making processes.

These updates are the first significant revisions to the manual in over 20 years. As Deputy Attorney General Rod Rosenstein explained, DOJ's policies and procedures are "spread among various sources," including the manual, DOJ memos, and DOJ speeches and articles. Rosenstein's "administrative goal" was to streamline all of DOJ's policies and procedures into the manual and limit DOJ's use of memos, speeches and articles to announce new policies and procedures going forward; new policies and procedures will primarily take the form of updates to the manual.

True to Rosenstein's word, the updates mostly reflect a consolidation effort and are generally unsurprising. There are, however, a few updates worth noting:

1. The manual fully incorporates the Granston memo regarding DOJ's dismissal of non-intervened cases, as discussed above.
2. The manual states that DOJ will not keep settlements confidential, and press releases describing the settlements are non-negotiable. The manual further states that defendants will not have an opportunity to comment on press releases before publication.
3. The manual places a greater emphasis on prosecutors' consideration of the impacts on victims when making charging, plea and sentencing decisions.
4. Curiously, the manual makes no mention of the Brand memo that prohibited Government attorneys from using noncompliance with Government agencies' guidelines as a basis for proving violations of law, as discussed above. The reasoning behind this glaring omission is unclear.

Lower Courts' Continued Application of *Escobar*—*Summary of the* Escobar *Decision*: The U.S. Supreme Court's unanimous decision in *Universal Health Servs., Inc. v. U.S. ex rel. Escobar*, 136 S. Ct. 1989 (2016), affirmed the FCA's implied false certification theory in certain circumstances. Implied false certification theory posits that the submission of a claim for payment or approval is treated as an implied certification that the company submitting the claim has complied with all statutory, regulatory and contractual requirements, even if the claim does not contain an express certification of compliance with those requirements, so long as those requirements are material to the claim. Failure to comply with any such requirement makes the claim false.

The Supreme Court in *Escobar* explained that the claim for payment submitted by the company made "specific representations" about the services rendered by referencing payment codes that correspond to professional counseling services, but failed to disclose that the persons performing the services were untrained and unlicensed as required by the contract. The Supreme Court explained that such "half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations" under the FCA.

Apart from the implied false certification theory, the Supreme Court in *Escobar* also offered guidance on the FCA's "materiality" standard. The Court stated that expansive arguments of liability are disfavored, and that a "rigorous" and "demanding" fact-based analysis must be used. The Supreme Court added that the FCA is not "a vehicle for punishing garden-variety breaches of contract or regulatory violations," and "[m]ateriality ... cannot be found where noncompliance is minor or insubstantial." The Court explained that Government knowledge and course of dealing are highly relevant in assessing materiality, and materiality cannot be legislated:

> [I]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material. Or, if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that the requirements are not material.

The Supreme Court rejected the position that any requirement is material so long as the company knows that the Government *could* refuse payment if it were aware of noncompliance.

Ninth Circuit Clarifies Requirements for Implied False Certification Theory: The U.S. Court of Appeals for the Ninth Circuit recently applied *Escobar* in *U.S. ex rel. Rose v. Stephens Inst.*, 901 F. 3d 1124 (9th Cir. 2018); 60 GC ¶ 288. In *Rose*, the defendant was an art college with students who receive federal student aid from the Department of Education. The college was alleged to have violated federal rules, which prohibit giving admissions personnel financial incentives for enrolling more students, when it gave its admissions personnel with the highest enrollment numbers annual salary raises of $30,000. The district court had previously denied the college's motion for summary judgment pre-*Escobar*, and then certified the case for interlocutory appeal post-*Escobar*.

The college did not expressly certify its compliance with the prohibition on financial incentives. Nonetheless, the Ninth Circuit found that the college could still be liable under *Escobar*'s implied false certification theory. The Ninth Circuit explained that the specific representations the college made that each student receiving financial aid was an "eligible borrower" who was "accepted for enrollment in an eligible program" were just the types of misleading half-truths that *Escobar* sought to discourage.

In doing so, the Ninth Circuit helped define the outer limits of implied false certification theory after *Escobar*. The Ninth Circuit explained that implied false certification theory applies only if both (1) the claim for payment contains specific misrepresentations about the contracted-for goods or services, and (2) those representations amount to misleading half-truths regarding compliance with statutory, regulatory or contractual requirements. Notably, the Ninth Circuit's decision in *Rose* is at odds with decisions by other circuits. See, e.g., *U.S. ex rel. Badr v. Triple Canopy, Inc.*, 857 F.3d 174, 178 n.3 (4th Cir. 2017) (two-part test is not mandatory; only one prong must be satisfied).

FCA defendants will rely on *Rose* because it clarifies, at least in the Ninth Circuit, that plaintiffs must show (1) that specific representations were made in the claim for payment, and (2) those representations amount to half-truths regarding compliance with requirements. In other words, implied false certification theory does not apply, and related FCA claims will fail, where there is a straight-forward claim for payment that does not contain any specific representations, even if there was noncompliance.

*Supreme Court May Soon Address FCA Materiality Standard Post-*Escobar: The Ninth Circuit's seminal post-*Escobar* FCA materiality case is *U.S. ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890 (9th Cir. 2017); 59 GC ¶ 236. In *Gilead*, the relator alleged that the defendant, a prescription drug manufacturer, misrepresented the source of the active ingredients for its HIV drugs to get the Food and Drug Administration to approve the drugs. The relator further alleged that the defendant concealed information about quality issues when it later obtained FDA approval to use that source. FDA approval is required for Government reimbursement of claims.

The Ninth Circuit rejected the argument that continued FDA approval and Government reimbursement for the drugs meant that any false statements were immaterial, and reversed and remanded the district court's dismissal of the case for failure to state a claim. The Ninth Circuit reconciled the case with *Escobar*, which held that continued reimbursement was strong evidence of immateriality, stating, "there are many reasons the FDA may choose not to withdraw a drug approval, unrelated to the concern that the government paid out billions of dollars for nonconforming and adulterated drugs." The Ninth Circuit added that there was a dispute between the parties about "exactly what the government knew and when," which made it premature to decide if reimbursement was paid despite knowledge of noncompliance.

The Sixth Circuit took a similar approach in *U.S. ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 892 F.3d 822 (6th Cir. 2018). In *Prather*, the relator alleged that the defendant, a home health care provider, did not timely obtain provider-physician certifications that were required for Government reimbursement. The district court dismissed the complaint for failure to state a claim. Although the timing requirement was an express condition of payment, the district court found that the relator failed to identify any prior instances in which the Government denied reimbursement for similar violations, and therefore the Government did not view these types of violations as material. The Sixth Circuit reversed. It explained,

> Prather made no allegations regarding the government's past practice with respect to claims that the government knew [it] did not comply with [the requirement]. Rather, she only alleged facts regarding the government's reactions to claims submitted by the defendants ... Without allegations regarding past government action taken in response to known noncompliance with [the requirement], this factor provides no support for the conclusion that the timing requirement is material.
>
> In its analysis, the district court went one step further and drew a negative inference from the

> absence of any allegations about past government action. It held that Prather's "inability to point to a single instance where Medicare denied payment based on violation of [the requirement], or to a single other case considering this precise issue, weighs strongly in favor of a conclusion that the timing requirement is not material" .... This is one step too far.

Gilead and *Prather* represent departures from what seemed to be an emerging consensus that *Escobar*'s materiality standard required evidence showing the Government's decision to pay a claim would likely have been different had it known about the defendant's alleged noncompliance. See, e.g., *U.S. v. Sanford-Brown, Ltd.*, 840 F.3d 445 (7th Cir. 2016) (affirming dismissal because the Government had "already examined" the alleged noncompliance "multiple times over and concluded that neither administrative penalties nor termination was warranted"); 58 GC ¶ 388; *U.S. ex rel. D'Agostino v. ev3, Inc.*, 845 F.3d 1 (1st Cir. 2016) (affirming dismissal because "the fact that CMS has not denied reimbursement ... in the wake of D'Agostino's allegations casts serious doubt on the materiality of the fraudulent representations ... [and] in the six years since D'Agostino surfaced the alleged fraud, the FDA has apparently demanded neither recall nor relabeling of Onyx—this notwithstanding the agency's option [to do so]"); *Abbott v. BP Exploration & Prod., Inc.*, 851 F.3d 384 (5th Cir. 2017) (affirming dismissal because the fact that no action was taken against the defendant, after both a congressional and a Department of the Interior investigation into the alleged noncompliance, was "strong evidence" of immateriality); *U.S. ex rel. Swoben v. Scan Health Plan*, 2017 WL 456722 (C.D. Cal. Oct. 5, 2017) (holding that the relator did not adequately allege materiality because the complaint failed to allege that the Government would not have made payments to the defendant had it known about the alleged noncompliance).

Notably, in April 2018, the Supreme Court invited the Solicitor General's Office to file a brief "expressing the views of the United States" regarding the Ninth Circuit's decision in *Gilead*. This indicates that the Supreme Court is considering granting certiorari for the case to address the circuit split regarding FCA materiality post-*Escobar*.

Circuit Split Regarding Statute of Limitations for Non-Intervened Cases—The FCA requires that cases be brought within the later of "6 years after the date on which the violation ... is committed," or "3 years after the date when facts material to the right of action are known or reasonably should have been known by the *official of the United States* charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed" (emphasis added). In *U.S. ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081 (11th Cir. 2018); 60 GC ¶ 129, the relator filed his case more than six years after the alleged fraud occurred, but less than three years after disclosing the alleged fraud to the Government. The Government declined to intervene. The defendant subsequently moved to dismiss the case, arguing that the case was time-barred because it was brought more than six years after the date that the alleged violations occurred, and the longer 10-year statute of limitations does not apply to non-intervened cases. The district court agreed.

The Eleventh Circuit reversed. The Eleventh Circuit joined the Ninth Circuit in holding that the longer, not-to-exceed 10 years, statute of limitations applies regardless of whether the Government intervenes. See *U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211 (9th Cir. 1996); 38 GC ¶ 532. Other circuits have held the opposite. See, e.g., *U.S. ex rel. Sikkenga v. Regence BlueCross BlueShield of Utah*, 472 F.3d 702 (10th Cir. 2006).

Importantly, the Eleventh Circuit clarified that the potential 10-year limitations period begins to run when the responsible Government official knew or reasonably should have known about the material facts, and that the longer limitations period is not triggered by the relator's knowledge. This is at odds with *Hyatt*, in which the Ninth Circuit held that the longer limitations period was triggered by the relator's knowledge. This all creates a circuit split that is ripe for the Supreme Court to address.

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This Feature Comment was written for The Government Contractor by Sheppard Mullin partner Scott Roybal (sroybal@sheppardmullin.com), Practice Group Leader of the firm's Government Contracts, Investigations & International Trade Practice Group, and associate Joseph Barton (jbarton@sheppardmullin.com).