PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 7 **NUMBER 2** **February 2021**

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at 516-771-2169
Email: ..... heidi.a.litman@lexisnexis.com
Outside the United States and Canada, please call . . . . . (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at . . . . . (800) 833-9844
Outside the United States and Canada, please call . . . . . (518) 487-3385
Fax Number . . . . . (800) 828-8341
Customer Service Website . . . . . http://www.lexisnexis.com/custserv/

For information on other Matthew Bender publications, please call

Your account manager or . . . . . (800) 223-1940
Outside the United States and Canada, please call . . . . . (937) 247-0293

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)
ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT'S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).
Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT'S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW BENDER

(2021–Pub.4938)

Editor-in-Chief, Editor & Board of Editors

Pratt's Government Contracting Law Report is published 12 times a year by Matthew Bender & Company, Inc. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 646.539.8300. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

2020 Civil False Claims Act Update—Part I

By Scott F. Roybal and Matthew Lin*

This first part of a two-part article begins by briefly reviewing the basic elements of the False Claims Act and its qui tam *provisions, recent Justice Department enforcement statistics, and developments in the Justice Department's approach to dismissal based on the Granston Memorandum. The second part of the article, which will appear in an upcoming issue of* Pratt's Government Contracting Law Report*, will discuss the circuit courts' continued analysis of the False Claims Act's materiality standard under* Escobar*, the U.S. Court of Appeals for the Sixth Circuit's holding on the public disclosure bar, the U.S. Court of Appeals for the Fifth Circuit's holding on the use of statistics to plead false claims, and potential developments related to COVID-19 and the CARES Act.*

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 Department of Justice ("DOJ") enforcement statistics. This article then discusses a number of FCA developments:

- Developments in the DOJ's approach to dismissal based on the Granston Memorandum;
- Circuit courts' continued analysis of the FCA's materiality standard under *Escobar*;
- The U.S. Court of Appeals for the Sixth Circuit's holding on the public disclosure bar;
- The U.S. Court of Appeals for the Fifth Circuit's holding on the use of statistics to plead false claims; and
- Potential developments related to COVID-19 and the CARES Act.

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

* Scott F. Roybal is a partner at Sheppard, Mullin, Richter & Hampton LLP and practice group leader of the Government Contracts, Investigations & International Trade Practice Group. Matthew Lin is an associate at the firm focusing on government investigations and enforcement actions. Based in the firm's Los Angeles office, the authors may be reached at sroybal@sheppardmullin.com and mlin@sheppardmullin.com, respectively.

[1] 31 U.S.C. § 3729 *et seq.*

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

The FCA provides for up to treble damages and penalties of between $11,665 and $23,331 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 10 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.

---

[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).

[3] 31 U.S.C. § 3729(b).

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

[5] DOJ Office of Public Affairs, *Fraud Statistics—Overview* (January 9, 2020).

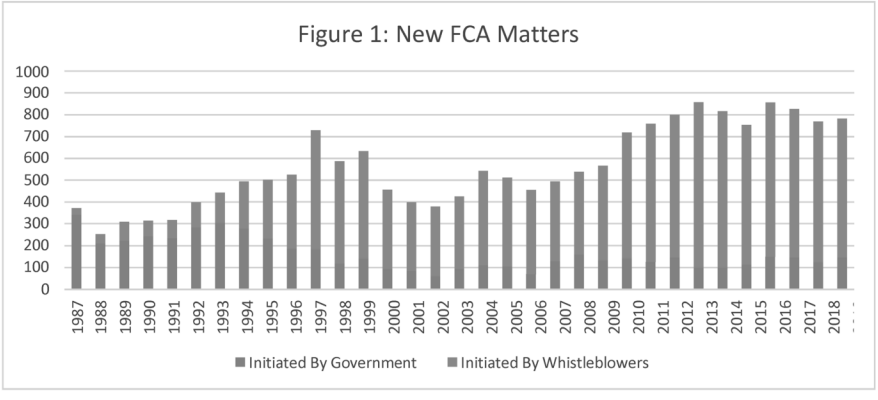
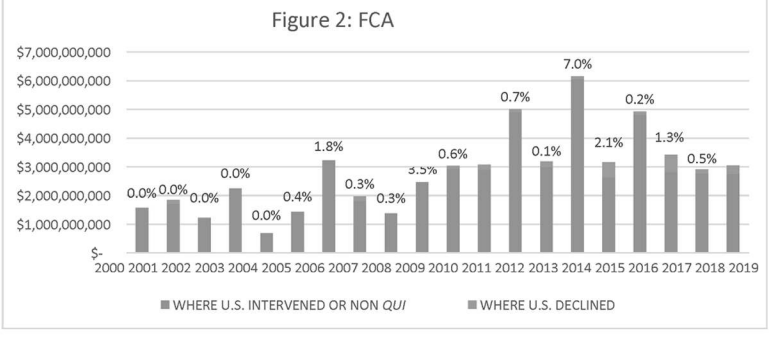


Figure 2 shows annual recoveries by the government in FCA cases and compares recoveries coming from *qui tam* cases where the government declined to intervene versus non-*qui tam* cases or *qui tam* cases where the government intervened.[6] Over the past five years, the government has recovered more than $17 billion. Predictably, the bulk of the recoveries came in non-*qui tam* cases and *qui tam* cases where the government intervened.



The Biden administration is unlikely to affect the DOJ's use of the FCA to combat fraud, waste, and abuse. As can be seen in Figure 1, the DOJ has consistently used the FCA as its primary anti-fraud enforcement tool over the last 20 years, across multiple presidential administrations. This trend is especially likely to continue as a result of the massive federal stimulus issued

[6] *Id.*

through the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"). The impact of the CARES Act on FCA enforcement will be discussed in the second part of this article, which will appear in an upcoming issue.

THE DOJ CONTINUES TO DISMISS CASES UNDER THE GRANSTON MEMORANDUM

On January 10, 2018, the Director of the Fraud Section of the DOJ's Civil Division, Michael Granston, issued an internal memorandum (the "Granston Memo") regarding factors to consider in evaluating dismissal pursuant to 31 U.S.C. § 3730(c)(2)(A), which allows the government to dismiss an FCA action despite the objections of the relator initiating the action so long as the relator is notified of the government's motion and has been provided with the opportunity for a hearing on the motion. The Granston Memo stated that "even in non- intervened cases, the government expends significant resources in monitoring these cases . . . [and] if the cases lack substantial merit, they can generate adverse decisions that affect the government's ability to enforce the FCA." The Granston Memo thus advised government attorneys to consider, when evaluating a recommendation to decline intervention in a *qui tam* action, "whether the government's interests are served, in addition, by seeking dismissal pursuant to 31 U.S.C. § 3730(c)(2)(A)."

The Granston Memo listed seven factors for the DOJ's consideration when deciding whether to exercise its dismissal authority, including:

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.

On March 1, 2019, Michael Granston clarified how the DOJ will apply the Granston Memo during a keynote speech at an FCA conference hosted by the Federal Bar Association in Washington, D.C., Granston explained that "[i]n evaluating whether a case lacks substantial merit, the government will look beyond merely whether a *qui tam* relator has survived, or can survive, a motion to dismiss," instead scrutinizing the likelihood of actually proving a violation. He further warned *qui tam* defendants that the "pursui[t] [of] undue or expensive discovery will not constitute a successful strategy for getting the government to exercise its dismissal authority," and stated that the government would use other mechanisms to respond to these discovery tactics.

Circuit courts have generally refused to rein in the DOJ's dismissal authority under the Granston Memo, and the U.S. Supreme Court has so far refused to consider the issue. On April 6, 2020, the Supreme Court denied certiorari in the case of *U.S. ex rel. Schneider et al. v. JPMorgan Chase Bank NA et al.*,[7] which could have resolved a circuit split over the DOJ's power to dismiss FCA suits filed by whistleblowers. In that case, the relator brought an FCA case against JPMorgan Chase Bank for abdicating its responsible mortgage lending obligations under a prior settlement. Following the dismissal and appeal of a separate issue on the pleadings, the DOJ stepped in, moving to dismiss the suit, which the district court granted. The relator moved for affirmative relief in the U.S. Court of Appeals for the D.C. Circuit, arguing that the dismissal was arbitrary and capricious, but the D.C. Circuit rejected this argument in a one-page order finding that the relator presented no evidence of fraud or exceptional circumstances.

Schneider illustrates the deference some circuit courts give to the DOJ when it moves to dismiss FCA cases under 31 U.S.C. § 3730(c)(2)(A). Despite the fact that the Granston Memo was issued in 2018, circuit courts have long disagreed on the amount of justification the DOJ must provide when moving to dismiss FCA cases. For example, the U.S. Courts of Appeals for the Ninth and Tenth Circuits have adopted a two-step analysis to test the DOJ's justification for dismissal, requiring "(1) identification of a valid government purpose; and (2) a rational relationship between dismissal and accomplishment of the purpose."[8] In contrast, the D.C. Circuit, as stated by the D.C. Circuit in *Schneider*, gives the government "an unfettered right" to dismiss *qui tam* actions, and has expressly refused to adopt the Ninth Circuit's stricter standard.[9]

On August 4, 2020, the Ninth Circuit held that the government had no right to immediately appeal a district court's refusal to allow it to dismiss under 31 U.S.C. § 3730(c)(2)(A). In *United States v. United States ex rel. Thrower*,[10] the U.S. District Court for the Northern District of California had denied the government's motion to dismiss after concluding that it had failed to meet its burden of demonstrating a valid governmental purposes related to the dismissal, and that it had failed to fully investigate the allegations of the amended complaint. The government then sought immediate appeal under the collateral

---

[7] U.S., No. 19-678.

[8] *United States v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998); *Ridenour v. Kaiser Hill Co., L.L.C*, 397 F.3d 925, 936 (10th Cir. 2005) (same).

[9] *See Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003).

[10] No. 18-16408 (9th Cir. Aug. 4, 2020).

order doctrine, but the Ninth Circuit dismissed the appeal, holding that jurisdictional question had not been decided by the Supreme Court, that the collateral review doctrine did not apply because the district court's order did not resolve important questions separate from the merits, and because the interests implicated by an erroneous denial of the government's motion were insufficient to justify an immediate appeal.

Senator Chuck Grassley of Iowa has expressed particular interest in curbing the DOJ's dismissal authority. Grassley is a longtime proponent of whistleblower rights and author of the 1986 amendments to the FCA, which significantly expanded the share of FCA recoveries for relators and protections against whistleblower retaliation. In a July 30, 2020 address from the Senate floor, Senator Grassley criticized the DOJ's growing exercise of its dismissal authority, specifically noting that the FCA has "never been more important than it is right now," in reference to the COVID-19 pandemic and the CARES Act. The DOJ had issued a response to prior complaints by Senator Grassley, stating in a December 19, 2019 letter that "neither the government, the taxpayers, nor future whistleblowers benefit when poorly devised cases proceed."

Senator Grassley also announced proposed amendments to the FCA that would reverse the Granston Memo and partially reverse the Supreme Court's ruling in *Escobar*, which allows for the dismissal of FCA cases if the government had knowledge of the fraud. Grassley's proposal would require the DOJ to state its reasons for seeking dismissal of *qui tam* cases and give relators a chance to respond before the court decides. Senator Grassley has yet to release a public version of his proposed bill.

* * *

The second part of this article, which will appear in an upcoming issue of *Pratt's Government Contracting Law Report*, will discuss the circuit court's continued analysis of the FCA's materiality standard under *Escobar,* the U.S. Court of Appeals for the Sixth Circuit's holding on the public disclosure bar, the U.S. Court of Appeals for the Fifth Circuit's holding on the use of statistics to plead false claims, and potential developments related to COVID-19 and the CARES Act.