False Claims Act: 2015 year in review and 2016 look ahead

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2015 Department of Justice recoveries

On December 3, 2015, the Department of Justice (DOJ) announced that it recovered more than $3.5 billion in settlements and judgments from civil cases involving fraud and false claims against the government. [1] Of the $3.5 billion recovered, $1.9 billion came from cases involving allegations of health care fraud for "allegedly providing unnecessary or inadequate care, paying kickbacks to health care providers to induce the use of certain goods and services, or overcharging for goods and services paid for by Medicare, Medicaid, and other federal health care programs." [2]

The second largest category of recovery, totaling $1.1 billion, related to settlements and judgments for cases alleging false claims for payment under government contracts. [3]

Of the total $3.5 billion, more than $2.8 billion related to lawsuits filed under the qui tam provisions of the False Claims Act (FCA).

The DOJ's press release includes additional information and statistics concerning fiscal year 2015. It is apparent that the FCA remains an important tool for the U.S. government and that qui tam actions continue to play a prominent role in FCA

litigation. The pervasiveness of whistleblower actions highlights the continuing need for companies to focus on compliance and review the policies and procedures in place for reporting self-auditing.

2015 case developments

The following cases resulted in significant decisions affecting the FCA litigation landscape:

Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter, No. 12-1497, 575 U.S. ___ (2015)

On May 26, 2015, the U.S. Supreme Court unanimously decided that the Wartime Suspension of Limitations Act (WSLA) does not toll the statute of limitations for civil actions under the FCA. Instead, the Court held that the WSLA, which tolls claims for "any offense" involving fraud against the federal government, applies only to criminal offenses. The Court's decision on this issue is favorable to companies that conduct business with the federal government because, under the DOJ interpretation of the WSLA, the FCA would be tolled such that the DOJ or relators could bring actions going back as far as 1996.

The Court's decision also resolved a circuit split on the "first to file" bar requirement of the FCA. Under § 3730(b)(5), "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." The Court determined that the word "pending" did not encompass a dismissed FCA case. Consequently, a later FCA action is not barred because an earlier, dismissed FCA action was brought based upon the same underlying facts. Thus, although the decision on the WSLA was favorable to companies, the decision on the "first to file" bar empowers relators and increases the risk that companies may face allegations based on the same facts more than one time.

In re: Kellogg Brown & Root, No. 14-5319, (D.C. Cir. Aug. 11, 2015)

In its August 11, 2015, decision, the D.C. Circuit Court issued an opinion recognizing attorney-client privilege and work product protection for internal investigations conducted in response to allegations of fraud under the FCA.

Granting Kellogg Brown & Root's (KBR) petition for a writ of mandamus, the circuit court vacated two district court orders that would have required KBR to turn over opinion work product and divulge the contents of attorney-client communications. Attorney-client privilege in the context of investigations for compliance and suits brought under the FCA was an unsettled area of law.

This decision represented a victory for government contractors, health care entities and financial institutions, among others. Companies trying to investigate potential violations can now do so with a bit more clarity and guidance as to how the attorney-client privilege applies and what is protected by the work product doctrine. This case

made clear the need to involve in-house counsel with the investigative process and to document that non-attorneys were acting under the direction and supervision of an attorney in order to provide legal advice to the company. Another precaution that companies should take — which the lawsuit highlighted — is to refrain from making public statements, including in pleadings, that internal investigations resulted in no wrongdoing, in order to avoid any potential privilege waiver issues.

The D.C. Circuit's reasoning is helpful given the lack of consensus among jurisdictions. Perhaps the decision may signal a trend that other courts will follow.

United States ex rel. Purcell v. MWI Corp., No. 14-5210, (D.C. Cir. Nov. 2015)

In a unanimous panel decision, the D.C. Circuit reversed a jury verdict for the government, finding that there can be no violation of the FCA where: (1) the law or regulation at issue is ambiguous, (2) the defendant's interpretation of that language is reasonable and (3) the agency issued no formal guidance indicating that the defendant's interpretation is wrong. The D.C. Circuit's decision is favorable to companies because it reinforces the principle that the FCA is not intended to reach innocent, good-faith mistakes about the meaning of a rule or regulation.

2016 cases to watch

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

As previously mentioned, the U.S. Supreme Court granted certiorari in this case, arising from the First Circuit, to review whether the implied false certification theory of legal falsity under the FCA is a viable theory of liability. If the Court determines it is a viable theory, the Court must also determine whether under the implied certification theory. a claim can be legally false if the provider failed to comply with a statute, regulation or contractual provision that does not explicitly state it is a condition of payment.

The Court's decision in this case will significantly affect investigation and litigation under the FCA, particularly in health care matters.

United States ex rel. Michaels et al. v. Agape Senior Community, Inc.

On September 29, 2015, the Fourth Circuit Court of Appeals agreed to hear an appeal that will address the issue of whether statistical sampling of claims and extrapolation of that sampling can be used to prove liability under the FCA.

If the DOJ and relators are allowed to prove liability by taking a relatively small sample of claims and demonstrating falsity and knowledge only as to that sample and then be permitted to extrapolate that finding to tens of thousands of claims, defendants in such cases would be faced with astronomical liability on claims that were never actually identified or necessarily proven false.

The outcome of this issue is particularly important to those in the health care

industry, given that providers may submit many claims for reimbursement to Medicare or Medicaid.

FCA review and forecast

As the DOJ 2015 recovery press release demonstrates, FCA enforcement continues unabated. Throughout 2015, court decisions affecting key issues in FCA litigation were handed down — some favoring the DOJ and relators; some favoring defendants. An important ruling in defendants' favor was the finding that internal investigations may be protected by attorney-client privilege and attorney work product doctrine, providing an explanation of what defendants should do to ensure they do not waive these critical privileges.

In the year ahead, the U.S. Supreme Court's ruling on the issue of whether implied certification theory is viable under the FCA will considerably affect the future of FCA litigation. Implied certification theory has gained momentum among the circuits, albeit in varying degrees, and the Court's ruling will determine just how broad the scope of the FCA should be. The spotlight on implied certification further underscores the prominence of qui tam actions and the need for companies to be proactive with their compliance programs.

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[1] Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Recovers Over $3.5 Billion From False Claims Act Cases in Fiscal Year 2015 (Dec. 3, 2015), available at http://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015.

[2] Id.

[3] Id.