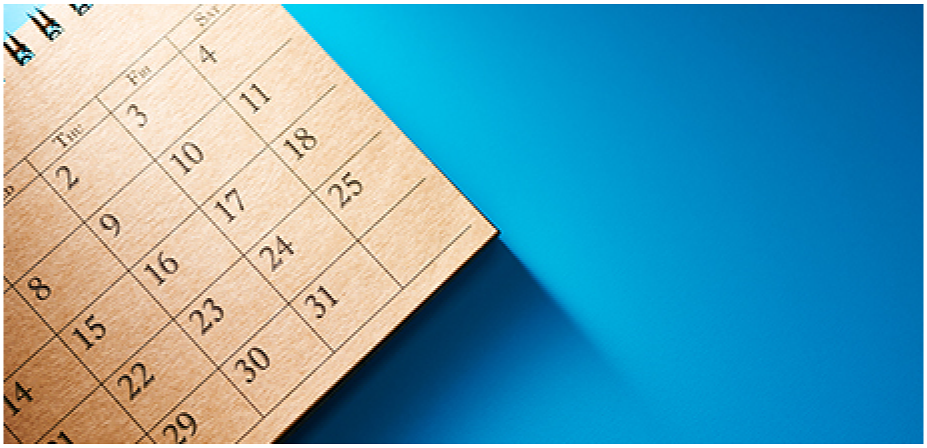

False Claims Act: 2016 year in review and 2017 look ahead

February 28, 2017

As we reported in December, 2016 was a year in which the Department of Justice (DOJ) once again recovered billions of dollars in settlements and judgments arising out of False Claims Act (FCA) cases.

2017 will likely keep pace, particularly because the penalty assessment per claim under the statute has increased for violations occurring after November 2, 2015. For penalties assessed by the DOJ after August 1, 2016, but prior to February 3, 2017, the minimum penalty per violation is $10,781 and the maximum is $21,563[1]. For penalties assessed by the DOJ after February 3, 2017, the minimum penalty per violation is $10,957 and the maximum is $21,916. This adjustment essentially doubles the per violation penalty under Section 3729 of the FCA.

Because the FCA continues to be a key enforcement tool for the federal government, and the increase in penalty escalates the risk for potential defendants, the evolution of judicial interpretation of the FCA is of critical importance. We have highlighted a few issues to watch in 2017 and will continue to provide updates throughout the year.

Developments in FCA jurisprudence in 2016 and their effects on the FCA landscape in 2017

Implied certification theory

Perhaps the most significant decision in 2016 was the U.S. Supreme Court's ruling affirming the viability of implied certification theory as a basis for FCA liability in Universal Health Services, Inc. v. United States ex. rel Escobar. As we discussed in June, the Court unanimously held that implied certification may support FCA liability only when a plaintiff can establish that: (1) the claim does not merely request payment but also makes specific representations about goods or services provided; and (2) the failure to disclose noncompliance with material statutory, regulatory or contractual requirements makes those representations misleading half-truths. That is, the defendant must knowingly have violated a requirement that the defendant knew to be material to the government's decision to pay its claim.

While the Supreme Court's decision was intended to resolve a circuit split, application of the implied certification theory of liability by the lower courts in the wake of Escobar shows that the ruling did not provide adequate clarification. Two circuit court decisions demonstrate the potential split that may emerge.

United States v. Sanford-Brown, Ltd., No. 14-2506 (7th Cir. Oct. 24, 2016)

Pre-Escobar, the Seventh Circuit rejected implied certification as a theory of liability. In Sanford-Brown, the relator alleged that the Sanford Brown College made a false implied certification to the U.S. Department of Education by signing a contract that stated it would comply with all applicable regulations. The district court and Seventh Circuit ruled in favor of the college on the basis that the college's contractual right to payment was not conditioned on the regulation at issue. The case was appealed, and, in light of Escobar, the Supreme Court remanded Sanford-Brown to the Seventh Circuit. On remand, the Seventh Circuit affirmed its decision by finding that the requisite materiality was not proven, because there was no evidence that the government's payment decision would have been different with accurate information. The Seventh Circuit further explained that the government's right to decline payment was not enough to impose liability. Accordingly, the Seventh Circuit's interpretation appears to be consistent with the Supreme Court's clarification. The same cannot be said, however, for an Eighth Circuit decision issued around the same time.

United States ex rel. Miller v. Weston Educational, Inc., No. 14-1760 (8th Cir. Oct. 19, 2016)

Where the Seventh Circuit has employed a narrow construction of materiality, the Eighth Circuit has employed a broad construction. The issue in Miller was whether Heritage College violated the FCA by agreeing to keep accurate student records relating to financial aid funds when it allegedly had no intention of doing so. The district court ruled in favor of Heritage, finding no causal link between the promise to keep accurate records and government's decision to pay. The Eighth Circuit reversed, finding that Heritage's promise to keep accurate records was material to the government's decision to pay. The case was appealed to the Supreme Court and remanded for proceedings in accordance with Escobar. On remand, the Eight Circuit reached the same conclusion. The Eighth Circuit's decision was based upon its finding that the government conditioned participation in the financial aid program on compliance with record-keeping. The court focused on promises made by Heritage when it entered into the agreement, not on whether those promises were also material to the government's payment decisions. Thus, it appears that the line is indeed blurred between conditions of payment and conditions of participation.

In addition to issues concerning materiality, district courts also appear to be divided over whether Escobar requires specific misrepresentations to support an implied certification claim.

In United States ex. rel. Panarello v. Kaplan Early Learning Co., the magistrate judge found that Escobar could not be read to impose the requirement of a specific misrepresentation — such as a specific payment code — in every case[2]. A district court in California adopted this same conclusion[3]. While both district courts certified the question to the Second and Ninth Circuits, respectively, their decision demonstrates the growing debate on interpretation of implied certification theory requirements following Escobar.

Although the issue of implied certification as a viable theory of liability was settled in 2016, the matter of precisely how to apply this theory will likely evolve in 2017.

Public disclosure bar

Cause of Action v. Chicago Transit Authority, 815 F.3d 267 (7th Cir. 2016).

A 2016 Seventh Circuit decision appears to have expanded the public disclosure bar — to the benefit of putative defendants. In Cause of Action v. Chicago Transit Authority, a nonprofit government watchdog group initiated a qui tam action that the Chicago Transit Authority had been misreporting data to the Federal Transportation Administration in order to secure greater grant allocations. The district court dismissed the action based upon the public disclosure rule, and the Seventh Circuit affirmed. The Seventh Circuit concluded that information is considered a public disclosure where the facts disclosing the fraud are in the government's possession; for example, information in the possession of a public official with managerial responsibility constitutes a public disclosure. The Seventh Circuit's decision on this issue is at odds with the First and Fourth Circuits, which hold that public disclosure requires an act of disclosure outside of the government. Whether this reasoning will take hold outside of the Seventh Circuit remains to be seen.

Sampling and extrapolation

United States ex rel. Michaels v. Agape Senior Cmty., Inc., No. 15-2145 (4th Cir. Feb. 14, 2017).

As we previously reported, the Fourth Circuit agreed to address the issue of whether statistical sampling of claims and extrapolation of that sampling can be used to prove liability under the FCA. The Fourth Circuit recently issued its opinion in this case, though the issue of statistical sampling as a basis for proving liability remains open for interpretation. The Fourth Circuit held that the district court improvidently granted the interlocutory appeal on the issue of statistical sampling, because the issue presented a mixed question of law and fact. Accordingly, putative defendants must wait and see whether plaintiffs may add this tool to their FCA toolbox or not.

Relaxed pleading in favor of a “strong inference”

United States ex rel. Prather v. Brookdale Senior Living Cmtys., Inc., No. 15-6336, 838 F.3d 750 (6th Cir. Sep. 30, 2016).

In Brookdale, the Sixth Circuit reversed and remanded a district court’s dismissal finding that an exception to the FCA’s requirement of specific examples of false claim submissions exists. Specifically, because the relator had personal knowledge of Brookdale’s billing practices and was able to provide details that supported a “strong inference” that false claims had been submitted, her allegations were deemed sufficient to meet the FCA pleading standard. It remains to be seen whether other circuits will follow the Sixth Circuit, thereby creating a trend of easing the pleading standard in certain instances where a “strong inference” can be found based upon the facts alleged.

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1 28 CFR 85.3(a)(9)

2 No. 11-cv-00353, 2016 U.S. Dist. LEXIS 158193 (W.D.N.Y. Nov. 14, 2016)

3 Rose v. Stephens Institute, 2016 U.S. Dist. LEXIS 128269 (N.D. Cal. 2016)