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FCA In 2015: 10 Qui Tam Highlights From The Past Year

Law360, New York (December 22, 2015, 11:10 AM ET) --


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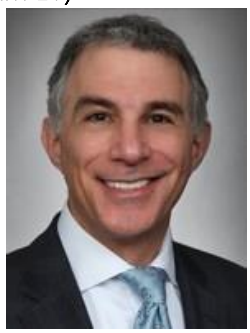
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As 2015 comes to an end, we look back and see many of the themes that have become familiar to False Claims Act practitioners and followers: The U.S. Department of Justice announced recoveries in the billions; health care, government contracts, and financial services companies continued to be FCA favorite targets; barriers to bringing and prosecuting FCA cases seemed to shrink a little bit more; the DOJ's arsenal for proving FCA liability seemed to grow and may now even include statistical sampling; and the DOJ once more threatened individual liability would come to the forefront.

But there were also new developments that suggest 2016 will be a busy year for FCA watchers: The U.S. Supreme Court was unusually active and will be again in 2016 when it takes up the implied certification theory; although 2015 saw a decrease in total fines and the number of cases filed over 2014, the DOJ continued to recover billions of dollars in FCA fines, demonstrating that the FCA remains a thriving source of litigation risk; courts increasingly seemed to recognize how hard it is to make sense of the regulatory web that trips up many companies in the FCA context; and at least one company found a way to avoid being put out of business by an FCA verdict. Here is a quick look at what the FCA brought us in 2015.

Qui Tam Recoveries Down, Relator Recoveries Up

In December, the DOJ announced federal False Claims Act recoveries for fiscal 2015. Although overall recoveries exceeded $3.5 billion, annual recoveries were down significantly from 2014, when the federal government recovered approximately $5.7 billion from False Claims Act cases. In addition to a decrease in overall penalties, 2015 saw a decrease in the overall number of cases filed (737) over 2014 and the lowest number of cases filed since 2010. Nevertheless, whistleblower activity continues to be the lifeblood of the government's False Claims Act enforcement activity. Of the $3.5 billion recovered in fiscal year 2015, more than $2.8 billion resulted from cases filed by a whistleblower under the FCA's qui tam provisions. Notably, over $1 billion of those recoveries came from cases where the DOJ chose not to intervene, and, as a result, FCA whistleblowers shared in more of the DOJ's recoveries than any year prior. The DOJ awarded $597 million to qui tam relators in FCA matters, up almost $100 million from fiscal 2014.

In a trend that bears watching in 2016, for the first time ever, relator awards in cases where the federal government declined to intervene (approximately $335 million) exceeded relator awards in cases where the federal government did intervene (approximately $263 million). It remains to be seen whether whistleblower's growing ability to recover greater sums, even without the DOJ intervening, will encourage increased qui tam activity in the coming year.

Health Care, Government Contracts, Financial Services Continue to Top FCA Penalties

Health care ($1.9 billion), government contracts ($1.1 billion), and housing and mortgage fraud ($365 million) continue to be the most prolific areas for qui tam recoveries. The federal government has recovered nearly $16.5 billion from the health care industry since July 2009. Similarly, the DOJ has recovered nearly $4 billion from public procurement settlements since January 2009. In additional to individual health care providers and pharmaceutical companies, traditionally the biggest targets for FCA scrutiny, hospitals were a prolific source of FCA enforcement focus in 2015. The DOJ has also noted that many of its 2015 health care-related FCA settlements involved violations of the Stark Law, which prohibits certain financial relationships between doctors and hospitals. Hospital systems, nursing homes and rehabilitation facilities are likely to continue to draw FCA scrutiny in the coming year.

Supreme Court Takes Up Implied Certification

On Dec. 4, just in time to make the 2015 year-in-review, the Supreme Court took up the much-debated implied certification theory of FCA liability by granting certiorari in Universal Health Services Inc. v. Escobar, 780 F.3d 504, 512 (1st Cir. 2015) cert. granted in part, No. 15-7, 2015 WL 4078340 (U.S. Dec. 4, 2015).

The implied certification theory of liability allows the government to hold an FCA defendant liable under the theory that the defendant impliedly certified compliance with all statutory, regulatory, and contractual provisions that were preconditions to being paid by the federal government every time the defendant submitted a claim for payment, even if those provisions did not expressly state that they were a precursor to being paid. By taking up the case, the Supreme Court will review the questions of whether the implied certification theory "is viable" and if it is, whether or not a defendant can be held liable under the FCA for submitting a false claim pursuant to provisions that did not expressly state compliance was a condition of payment.

The Escobar case presents the Supreme Court with the opportunity to resolve a deep and long-standing circuit split in which almost every circuit has spoken, with most (First, D.C., Second, Third, Sixth, Ninth, Tenth and Eleventh Circuits) recognizing the theory to some extent. Only the Fifth and Seventh Circuits have declined to adopt the theory. The Seventh Circuit, also in 2015, joined the Fifth Circuit in United States v. Sanford-Brown, Ltd., No. 14-2506, 2015 WL 3541422 (7th Cir. June 8, 2015), affirming summary judgment for the defendants and noting that it would be "unreasonable for us to hold that an institution's continued compliance with the thousands of pages of federal statutes and regulations incorporated by reference ... are conditions of payment for purposes of liability under the FCA."[1] Oral argument in Escobar is expected in March or April 2016, with a decision likely by the middle of next year.

Supreme Court Addresses First-To-File Bar, But Questions Remain

Also in 2015, the Supreme Court issued a unanimous decision in Kellogg Brown & Root Services Inc. v. United States ex rel. Carter, No. 12-1497, ("KBR"), resolving a circuit split regarding the FCA's "first-to-file" bar in the relator's favor. The court held that a qui tam plaintiff is not precluded by the first-to-file bar from bringing a claim that has already been the subject of litigation if the first-filed action has been abandoned or voluntarily dismissed. KBR's effects are already being seen. Shortly after the KBR decision was issued, the D.C. Circuit resurrected a qui tam suit that had earlier been dismissed because the relator had filed a first suit and then filed a second suit alleging a wider, nationwide scheme involving the same conduct.[2]

As qui tam plaintiffs are likely to see the KBR decision as a broadening of their ability to file FCA suits, 2016 is likely to bring to the forefront a number of thorny issues left open by KBR. These include (1) the effects of res judicata and whether or not a previously dismissed case can be refiled and relitigated, as long as it is filed within the FCA's six-year statute of limitations; (2) how broadly courts are willing to interpret the Supreme Court's view of a "pending" earlier case, including whether an earlier-filed case is "pending" after initial dismissal while it winds through the successive appeals and amended complaints that are typical in FCA litigation; (3) whether an earlier case, even if it is no longer "pending," provides the defendant with a "public disclosure" defense; and (4) the effect of KBR on settlements with qui tam and government plaintiffs, particularly in light of the increase in settlements in cases in which DOJ has not intervened.

The Yates Memo — What Does It All Mean?

In September 2015, Deputy Attorney General Sally Quillian Yates issued her memo titled "Individual Accountability for Corporate Wrongdoing," which included six "key steps" to strengthen the DOJ's pursuit of individual corporate wrongdoing. Yates noted that some of the measures described in the memo were new, while others reflected best practices that are already employed by many federal prosecutors.

In November, the DOJ announced revisions to the United States Attorneys' Manual as a result of the Yates memo. Language from both the Yates Memo and the revisions to the USAM highlight the need for corporations seeking cooperation credit to identify all individuals involved in or responsible for the misconduct at issue and to provide the DOJ with all facts relating to that conduct.

Not surprisingly, there has been considerable debate in the last third of 2015 regarding how much of an impact the Yates memo will have on the DOJ's investigation and prosecution of cases, which includes cases involving the criminal provisions of the FCA. There is a spectrum of differing views regarding whether the language of the Yates memo and the new revisions to the USAM reflect a change to DOJ policy or whether the steps outlined in the Yates memo simply recognize long-standing practices employed by federal prosecutors in criminal investigations. This debate will, undoubtedly, continue into 2016 as cases come to resolution and the actual influence of the Yates memo is evaluated.

Statistical Sampling — the Wave of the FCA Future?

2015 also saw a new wave of arguments around statistical sampling and a handful of decisions in which courts allowed plaintiffs to use statistical sampling to establish liability, as well as damages. Using statistical sampling to establish damages has raised concerns for FCA defendants for some time, particularly in the health care context, and the use of these methods to establish liability is certainly not a welcome development in FCA litigation. Although these methods provide courts with a way to review claims in cases where looking at each claim is untenable, they also raise questions of how a plaintiff can meet its burden of proving that each FCA violation is supported by a false claim, which is a statutory precursor to recovery.

In September, the Fourth Circuit agreed to hear an interlocutory appeal on the use of statistical sampling as a way to prove FCA liability.[3] This is the first time a court of appeals will consider the issue of statistical sampling in an FCA case. Although the government declined to intervene in the case, it rejected a settlement between the relator plaintiffs and the defendant using, as a basis for its objection, a form of statistical sampling that the court had rejected for use at the trial of the case. The district court sought guidance from the Fourth Circuit on two questions: (1) whether the government can veto a settlement in an FCA case in which it has not intervened and (2) whether the relators can use statistical sampling to prove liability and damages. We will be watching to see what the Fourth Circuit has to say in 2016.

The Public Disclosure Bar Narrows

2015 brought a series of cases involving the FCA's public disclosure bar, which precludes plaintiffs from bringing cases based on information that is substantially similar to information already in the public domain, unless the relator qualifies as an "original source" of that information. The Fourth and Sixth Circuits[4] addressed the question of whether a disclosure within the government can qualify as a public disclosure that bars an FCA action. Both courts rejected this position and joined the First, Ninth, Tenth, Eleventh and D.C. Circuits, all of which have held that the public disclosure bar requires that the disclosure that triggers the bar must be made outside the government. To date, the Seventh Circuit, in a much-criticized opinion, is the only circuit that recognizes disclosure of an alleged fraud to a competent public official with responsibility for the claim as a public disclosure that can trigger the FCA's statutory bar.[5]

The Ninth Circuit also weighed in on the public disclosure bar in 2015, unanimously reversing[6] the trial court and resurrecting two FCA actions in a case that, although interpreting the pre-2010 version of the FCA, now interprets the public disclosure bar's original source exception consistently with other circuits: for the exception to apply, the whistleblower must notify the government before filing the suit and must have direct and independent knowledge of the allegations. As decisions interpreting both the public disclosure bar and its original source exception tend to be fact-intensive, there is every expectation that there will be many opportunities for courts to review the scope of both doctrines in 2016.

Defendants Find Refuge in the Morass of Government Regulations

As government regulations continue to proliferate, leaving companies with the increasingly hazardous task of ensuring compliance with a complex web of statutory and regulatory requirements or face the stiff penalties of the FCA, a handful of cases in 2015 demonstrated that the government's regulatory tangle can sometimes be used to a company's advantage. In a number of recent cases, courts have credited, either on summary judgment or in post-trial relief, arguments that defendants did not submit false claims because applicable regulations were ambiguous or silent. As a result, the courts found that the defendants adopted a plausible interpretation of the regulation and therefore either did not violate the regulation knowingly or did not violate it at all.

In February 2015, a district court granted a motion to dismiss, finding that the relators could not meet Rule 9(b)'s pleading requirements because they could not show that the defendants' interpretation of the relevant Medicare guidelines was unreasonable.[7] In June, a district court granted summary judgment, holding that the relator had the burden of showing that there was no reasonable interpretation of the ambiguous regulatory language and crediting the defendant's interpretation as plausible. The court rejected the government's argument that, in order to determine whether the defendant had acted "knowingly" under the FCA, the court should consider if the defendant had taken reasonable steps to verify its interpretation of the regulation was correct.[8] A month later, in July, a district court entered partial summary judgment for an FCA defendant, holding that a reasonable interpretation of a complex regulatory scheme, even if incorrect, should not create FCA liability unless the plaintiff could show reckless disregard.[9]

In one of the most significant of these cases, the D.C. Circuit reversed a multimillion-dollar jury verdict for the government and remanded the case to the district court with instructions to enter final judgment for the defendant.[10] In a unanimous panel decision, the D.C. Circuit held that there can be no violation of the FCA where the law or regulation at issue is ambiguous and the defendant, in the absence of guidance from the government to the contrary, interprets the language of the statute in a reasonable manner.

New Whistleblower Retaliation Risk

The FCA's anti-retaliation provision, 33 U.S.C. 3730(h), protects former employees who are fired because of lawful acts taken in furtherance of an action brought under the FCA or efforts to stop violations of the FCA. While the bar for bringing a retaliation claim under the FCA is low, the federal government in 2015 took even more steps to make it easier for former employees to bring such actions in various whistleblower contexts, including the FCA context.

In April, the U.S. Securities and Exchange Commission issued a cease-and-desist order to KBR Inc., alleging that a standard KBR confidentiality agreement violated the Dodd-Frank Act's whistleblower protections. The provision prohibited employees who participated in internal reviews from discussing their internal interview with anyone unless he or she obtained prior consent from KBR's internal legal department. KBR paid $130,000 to settle the matter.

Various agencies are similarly taking the position that confidentiality agreements that restrict employees' ability to report fraud are not permissible. Among the agencies likely to use such provisions in the FCA context is the U.S. Department of Defense, which recently revised the Defense Federal Acquisition Regulation Supplement to prohibit contractors from requiring employees or subcontractors to sign confidentiality agreements that restrict their ability to report fraud, waste, or abuse, or to cooperate with law enforcement investigations.

Under the new regulation, DOD contractors must notify their employees and subcontractors that such confidentiality agreements are invalid. DOD contractors must also represent, in all solicitations with a DOD agency, that they do not require their employees or contractors to sign or comply with these types of confidentiality agreements. In addition to making it easier for employees to bring actions under the FCA, or anti-retaliation actions in the aftermath of bringing a qui tam case, a contractor's failure to comply with the new DOD provisions could render the contractor ineligible to receive any contract funded by fiscal year 2015 and 2016 appropriations. Moreover, the DOD revisions are not likely to be the last such expanded whistleblower protections we see.

Excessive Fines Challenge Redux

Recognizing that the FCA's treble damages provisions strike fear in the heart of every potential FCA defendant, we close our 2015 highlights with what we hope may be a bit of a silver lining. Earlier this year, we reported on the Fourth Circuit's affirming a jury verdict in U.S. ex rel. Drakeford v. Tuomey, No. 13-2219, 2015 WL 4036166 (4th Cir. July 2, 2015). The $237 million verdict threatened to put Tuomey, a nonprofit hospital in Sumter, South Carolina, out of business and raised significant questions about the constitutionality of the FCA damage award under the Excessive Fines Clause. Indeed, in a concurring opinion, Judge James A. Wynn Jr. of the Fourth Circuit panel that heard the case wrote to "emphasize the troubling picture this case paints: An impenetrably complex set of laws and regulations that will result in a likely death sentence for a community hospital in an already medically underserved area."[11]

Furthermore, in concluding that the damages award was within a constitutionally acceptable range, the Fourth Circuit never discussed the fact that the size of the award was likely to have a crippling effect on the hospital itself. The circuit court also did not have trouble deeming the entire relator's award to be part of the compensatory damages, which were deducted from the damages total before the court calculated the ratio of compensatory to punitive damages in order to determine if the fine was constitutionally excessive. Nevertheless, it seems that 2015 brought some relief for Tuomey. In October, Toumey Healthcare System agreed to settle the case with the government for $72.4 million — less than one-third of the original $237 million jury verdict — putting an end to the decade-long case that included, in addition to multiple appeals, three separate jury trials.

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This article is part of a monthly column by Morrison & Foerster discussing issues related to False Claims Act litigation and enforcement. To read previous articles, click here.

[1] United States v. Sanford-Brown, Ltd., No. 14-2506, 2015 WL 3541422, *2 (7th Cir. June 8, 2015).

[2] See United States ex rel. Todd Heath v. AT&T, Inc., No. 14-7094, 2015 U.S. App. LEXIS 10547 (June 23, 2015).

[3] See United States ex rel. Michaels v. Agape Senior Community, Inc., et al., No. 15-238 (L) (0:12-cv-03466-JFA) (4th. Cir. Sept. 29, 2015).

[4] United States ex rel. Wilson v. Graham Cnty. Soil & Water Conservation Dist., 777 F.3d 691 (4th Cir. 2015); United States v. Chattanooga-Hamilton Cnty Hosp. Auth., 782 F.3d 260, 264 (6th Cir. 2015).

[5] See United States ex rel. Mathews v. Bank of Farmington, 166 F.3d 853 (7th Cir. 1999).

[6] See United States ex rel. Hartpence v. Kinetic Concepts, Inc., No. 12-55396 (9th Cir. July 2015).

[7] See United States v. Space Coast Med. Assocs., L.L.P., 94 F. Supp. 3d 1250 (M.D. Fla. 2015).

[8] See United States ex rel. Donegan v. Anesthesia Assocs., No. 4:12-CV-0876-DGK, 2015 WL 3616640 (W.D. Mo. June 9, 2015).

[9] See United States ex rel. Phalp v. Lincare Holdings, Inc., No. 10-cv-21094-KMW, 2015 WL 4528955 (S.D. Fla. July 13, 2015).

[10] United States ex rel. Purcell v. MWI Corp., Civ. No. 14-5210, slip. op. (D.C. Cir. Nov. 24, 2015).

[11] Tuomey, 2015 WL 4036166, at *19.