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Expert Analysis

DOJ Gives Mixed Messages On False Claims Act Enforcement

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On Dec. 21, 2017, the Department of Justice published its annual False Claims Act year-in-review, outlining the statistics of its False Claims Act bounties from the prior year. The publication serves as a reminder and warning to health care companies and government contractors that reckless mismanagement will prove costly. And the eye-popping numbers serve as a siren song for would-be whistleblowers to come forward with their inside information of wrong doing. Lawyers and executives study this announcement, and others like it, as a forewarning about where the Government will focus its efforts next. But, at the same time, there have also been some unmistakably discordant notes in the messages from the DOJ and other branches of government about the dangers of excessive enforcement under the False Claims Act.

DOJ Annual Review

In the Annual Review for 2017, the DOJ announced that it collected over $3.7 billion in settlements and judgments under the false claims, bringing total collections to $56 billion since Congress reformed the False Claims Act in 1986. In glowing terms, the DOJ release described the year's cases as "a message to those who do business with the government that fraud and dishonesty will not be tolerated." And indeed it is.

The DOJ's focus remains on the health care industry, with $2.4 billion collected from drug companies, hospitals, pharmacies, laboratories and doctors. The Government touted that its use of the False Claims Act, its "primary civil remedy to redress false claims for government funds," prevents billions more in losses avoided "by deterring others who might otherwise try to cheat the system."

The DOJ highlighted housing and mortgage fraud with total settlements and judgments of $543 million. Over half of this collection was a $296 million jury verdict against Allied Home Mortgage for falsely certifying home mortgages as FHA-insurance eligible. The Allied Home case involved allegations familiar to other DOJ mortgage fraud cases: false certification of low quality loans coupled with inadequate quality control procedures. The DOJ reported two settlements of $65 million and $89 million with mortgage originators who manufactured deficient mortgages but certified them as eligible for federal insurance under FHA guidelines.

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Companies were not the only entities caught in the DOJ's civil fraud dragnet. The DOJ's release described multiple cases where it held individuals, not just companies, responsible for causing the False Claims Act violations. These included owners and executives of eClinicalWorks and the owner of Life Care Centers of America. The DOJ also secured

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multiple eight-figure settlements from physicians.

The DOJ described a robust pipeline of future matters, with 669 new cases filed under the False Claims in 2017. Whistleblowers largely sourced the DOJ False Claims Act docket: $3.4 billion of the $3.7 billion collected in 2017 related to whistleblower lawsuits and the DOJ paid relators $392 million for their tips.

Ben Carson Goes to Congress

The DOJ's annual announcement was shadowed, though, by some inconsistent messaging that portends a more complicated enforcement framework. Indeed, it appears that some in the Trump Administration believe that the DOJ's False Claims Act activities have gone too far and that the executive branch should contain the excesses of DOJ's False Claims Act practice.

On Nov. 17, 2017, U.S. Department of Housing and Urban Development (HUD) Secretary, Ben Carson, testified before the House Financial Service Committee at a hearing on HUD oversight. In his prepared statement, Secretary Carson articulated a continued vision where HUD encourages homeownership through its mortgage insurance program. Among other things, he lauded an increased role for private sector innovation, and described a HUD review to reduce regulatory burdens in compliance with President Trump's executive orders.

Things got interesting for False Claims Act watchers nearly three hours into Secretary Carson's testimony. Congressman Roger Williams, a Republican representing Austin, Tex., mentioned his general support for anti-fraud enforcement, and then pivoted to report complaints by "mortgage lenders who are being subjected to extended costly investigations and then lawsuits by the Department of Justice for their participation in the FHA program." Secretary Carson's response revealed that he shared the concerns that enforcement activity was over-deterring and dissuading legitimate actors from participating in government programs. He added that HUD and DOJ are actively seeking to fix the perceived problem:

> There are so many traps involved. When people do things that are really nonmaterial mistakes and then they find themselves in the difficulty that would even drive them away from being involved in the first place. I've talked to AG Sessions about that and my staff and staff from DOJ are working on those regulatory barriers that are precluding people from wanting to get involved.

The DOJ's mixed messages on False Claims Act enforcement, reflect tension in the government ranks over proper deterrence and over-deterrence. This creates defense opportunities for companies and their lawyers caught in civil investigations.

Media sources focused on the housing industry widely reported Secretary Carson's comments. Indeed, it marked a sharp departure at least in tone from the DOJ's emphasis on deterring mortgage fraud during the Obama administration.

Since its creation eight years ago, the DOJ's Financial Fraud Enforcement Task Force has been at the forefront of policing private mortgage origination activities related to federal programs. While perhaps the most explicit, Secretary Carson's comments are not the first hint that changes are afoot. In October 2017, Deputy Attorney General Rod Rosentstein Secretary Carson's told the U.S. Chamber Institute for Legal Reform that the DOJ was "reviewing the mandate of the Financial Fraud Enforcement Task Force to evaluate whether it continues to meet current needs." Secretary Carson's comments suggest that "regulatory reform" may lead to a retrenchment in enforcement activity against mortgage lenders.

DOJ Encourages More Dismissals

One such step would be to contain the threat of suits by private actors. On Jan. 10, 2018, the DOJ issued an internal, subsequently leaked memorandum that suggested government lawyers should take a more active role in opposing private false claims suits.

The January 10th memo concerns a heretofore little-used provision of the False Claims Act that grants the DOJ the ability to petition a judge to dismiss a qui tam action even where private whistleblowers wish to litigate a case on their own.

The False Claims Act authorizes whistleblowers to stand in the government's shoes as relators and act as private prosecutors in bringing civil fraud cases. The Government may intervene in a case and take charge of a litigation. Where the DOJ does not intervene, the private whistleblower may litigate the case independently on the Government's behalf. Often, private whistleblowers voluntarily dismiss their cases when the Government declines to interview. The DOJ reports 700 such dismissals since Jan. 1, 2012.

But sometimes the whistleblower presses on without the Government's assistance. Title 31 United States Code §3730(c)(2)(A) authorizes the

Government to "dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." But to date, the DOJ has rarely used this authority.

The DOJ's reluctance to challenge meritless cases has become increasingly concerning to federal contractors as relators have shown greater appetite for litigating cases in the wake of non-intervention decisions.

Enter the DOJ's new guidance. The January 10th memo provides a framework for evaluating when to dismiss a case. It encourages more active use of the DOJ dismissal authority to advance the government's interest, preserve limited resources, and avoid adverse precedent. The DOJ notes that while the number of filed qui tam cases has steadily increased, the number in which the DOJ intervened had remained static.

The memo offers a fascinating survey of over two dozen cases where the Government has sought dismissal in the last 20 years, suggesting that lawyers more readily rely on such factors in seeking dismissals:

(1) The DOJ should take an interest in curbing meritless qui tams, such as those with facially deficient allegations, flawed legal theories, or claims unsupported by the government's investigation.

(2) The DOJ should dismiss cases to prevent parasitic actions where relator's allegations follow on extensive government investigations and "add no useful information to the investigation."

(3) Preventing interference with agency policies and programs. The memo highlights examples where a qui tam could delay important government projects by diverting agency resources or where the lawsuit can economically devastate a critical government contractor.

(4) Controlling litigation brought on the United State's behalf. Litigation based on bad facts can generate bad precedent, so the DOJ should consider dismissal to prevent adverse decisions that impact other litigations.

(5) Safeguarding classified information and national security interests. The DOJ identified instances where the litigation of a whistleblower suit constituted "an unacceptable risk to national security" resulting from the potential disclosure of national security information.

(6) Preserving government resources. Litigation is not the only cost borne by the Government. In declined cases, the DOJ may need to monitor the litigation, respond to discovery requests, or potentially indemnify a defendant's legal costs.

(7) Addressing egregious procedural errors. At times, relators' behavior frustrates the DOJ's ability to conduct proper investigations, warranting dismissal.

Agency Guidance Documents

On Jan. 25, 2018, the DOJ issued another "regulatory reform" memorandum, again creating opportunities for those faced with aggressive False Claims Act investigations. The memorandum prohibits DOJ litigators from using violations of agency "guidance documents" as the basis for civil enforcement actions, on the grounds that rules may bind only where they have undergone the notice-and-comment rulemaking process. The memorandum noted that prohibition applies both to the use of DOJ guidance and other agency's guidance in affirmative litigation.

The memorandum gives private actors an asymmetrical advantage. It prohibits DOJ litigators from using agency guidance as a sword. But private parties may use it as a shield to defends against False Claims Act cases. Private parties are free to argue that favorable agency guidance proves the false statements at issue were not material—a concept that "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Universal Health Servs. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016).

Conclusion

The DOJ's mixed messages on False Claims Act enforcement, reflect tension in the government ranks over proper deterrence and over-deterrence. This creates defense opportunities for companies and their lawyers caught in civil investigations.