

Federal Civil Enforcement

Expert Analysis

Under Sessions-Led Justice Department, FCA Enforcement Likely to Continue Apace

During President Barack Obama's tenure, False Claims Act (FCA) enforcement increased dramatically, as it has under every president since Ronald Reagan. Practitioners have nevertheless wondered whether we can expect a similarly robust FCA agenda from President Donald Trump. The recent confirmation of Sen. Jefferson Beauregard Sessions III, a former prosecutor and conservative lawmaker, as attorney general may suggest a comparably aggressive approach to FCA enforcement. Attorney General Sessions publicly supported the law at his confirmation hearing and as a Senator. Moreover, FCA enforcement, generally a bipartisan issue, coincides with the Republican Party platform of curtailing waste, fraud, and abuse. President Trump's nomination of Rod J. Rosenstein, the U.S. Attorney for the District of Maryland, for the position of Deputy Attorney



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General, also indicates that the Justice Department's FCA policy will resemble current approaches, given

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Rosenstein's own extensive prosecutorial experience, including in bringing FCA actions. As a result, of all the changes that Sessions is expected to bring to the Justice Department, FCA litigation may be one of the aspects of the preceding administration that he will embrace.

Since the FCA was modernized in 1986, FCA recoveries have multiplied under each new president. For example, the Justice Department's average annual recoveries were \$264 million

under George H.W. Bush, \$800 million under Clinton, and approximately \$1.8 billion under George W. Bush. President Obama's Justice Department recovered an annual average of nearly \$4 billion in FCA settlements and judgments. There is good reason to expect the new administration to continue the trend.

During the Senate Judiciary Committee hearing on his confirmation in January, Attorney General Sessions stated that "this government must improve its ability to protect the United States Treasury from fraud, waste and abuse We cannot afford to lose a single dollar to corruption I will make it a high priority of the Department of Justice to root out and prosecute fraud in federal programs and to recover monies lost due to fraud and false claims, as well as contracting fraud and issues of that kind."¹ Sessions was also questioned about his commitment to the FCA by Sen. Charles Grassley, longtime champion of the law and architect of its 1986 amendments. Grassley asked Sessions whether he would "pledge to

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vigorously enforce the False Claims Act and devote adequate resources to investigating and prosecuting False Claims Act cases.”² Sessions affirmed the FCA’s qui tam provisions as a “valid and an effective method of rooting out fraud and abuse,” noting that he “filed one myself one time as a private lawyer.”³ According to Sessions, “these are important issues” that have “saved this country lots of money and probably has caused companies to be more cautious because they can have a whistleblower that would blow the whistle on them if they try to do something that’s improper. So, I think it’s been a very healthy thing and ... I do support that act.”⁴

Senator Grassley further questioned whether Sessions would provide Congress with statistics “as to how many [FCA cases] are under seal and the average length of seal time[.]”⁵ Grassley had previously expressed concern about prolonged extensions to the FCA’s seal provision.⁶ Sessions noted that such extensions, “sometimes they’re awfully a long time,” perhaps indicating that intervention times will decrease under his leadership.⁷

The following week, Attorney General Sessions responded to additional questions from Sen. Jeff Flake and demonstrated familiarity with the boundaries of the law as recently interpreted by the Supreme Court. Senator Flake noted that under Obama, “the Department of

Justice for the first time used the Act to bring claims against lenders for technical violations of Federal Housing Administration (FHA) guidelines.”⁸ Flake asked whether Sessions would only pursue FCA cases in which “the individual *knowingly* uses a false record or *knowingly* makes a false statement that is material to a false claim?”⁹ Sessions affirmed he would “faithfully enforce 31 U.S.C. §3729 and *Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), the most recent

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False Claims Act decision issued by the U.S. Supreme Court implicated by this question.”¹⁰

Sessions also demonstrated support for the FCA as a senator. During a hearing before the Senate Judiciary Committee in 2009, then-Sen. Sessions expressed concerns over health care fraud costs to the government, stating: “Health care fraud is viewed as a lucrative business for criminals[.]”¹¹ Sessions noted that when he was U.S. Attorney for the Southern District of Alabama, that office, “formed a ... medical care fraud task force.”¹² When members of the committee noted that FCA enforcement had been key to rooting

out fraud in the private sector, an area of explicit concern for Sessions during the hearing, he stated: “whistleblowers can be a critical—a part of discovering frauds that may be of massive nature I think it’s a legitimate part of our enforcement effort.”¹³ He also pressed for action on health care fraud, noting the need for “really capable people who know about these cases, have experience in it, to actually ramrod the effectiveness of these efforts ... it takes sustained effort and support from the top”¹⁴ Based on these comments, there is no reason to believe that health care fraud litigation, in particular, under the FCA will diminish under Sessions.

Of course, Sessions has an extensive prosecutorial background, having served as Attorney General of Alabama from 1995 until 1997, and as U.S. Attorney for the Southern District of Alabama from 1981 to 1993. Nevertheless, review of his record is inconclusive on the specific issue of FCA enforcement. Alabama lacks a state counterpart to the federal FCA from which to evaluate how Sessions, as Alabama Attorney General, may have enforced a similar statute. While Sessions was U.S. Attorney for the Southern District of Alabama, he does not appear to have brought or intervened in any FCA cases. Though the FCA was not amended to make it easier to file cases until 1986, well into Sessions’s tenure as U.S. Attorney, other U.S. Attorneys within

Alabama do appear to have sued under the FCA during this time.¹⁵

President Trump's nomination of Rosenstein for the position of Deputy Attorney General further signals a likely continuation of the status quo in the government's approach to the FCA. Given the Deputy Attorney General's role in running the daily operations of the Justice Department, if confirmed, Rosenstein could help shape the department's FCA enforcement policies. As the longest serving U.S. Attorney at the Justice Department, Rosenstein was nominated to that position during George W. Bush's second term and served throughout Obama's tenure. During the Clinton administration, Rosenstein, a Republican, served critical Justice Department roles. If confirmed, he is unlikely to press for dramatic changes to the government's current FCA agenda.

Under Rosenstein's leadership, the U.S. Attorney's Office for the District of Maryland has brought or intervened in numerous FCA cases and has obtained significant recovery amounts.¹⁶ Just this month, that Office settled a case against a health services contractor alleging double-billing under the FCA for \$3.818 million.¹⁷ In May 2013, the office obtained approximately \$350 million for the government and a relative under the FCA and state laws in the civil portion of a case against a generic pharmaceutical company arising from allegations that the

company distributed adulterated drugs.¹⁸ As Rosenstein noted: "This is the largest false claims case ever prosecuted in the District of Maryland."¹⁹

Given Rosenstein's record and Attorney General Sessions' public support for the FCA, we are unlikely to see a dramatic decrease in government FCA litigation under President Trump. While FCA enforcement can affect business interests, it is commensurate with the Republican agenda of rooting out waste and abuse that Sessions advocated as a senator. That makes the FCA a logical cudgel for a conservative attorney general like Sessions to use in tackling fraud.

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1. Hearing before Senate Judiciary Committee on Nomination of Jeff Sessions to be Attorney General, 115th Cong. 11 (2017) (statement of Sen. Sessions, Nominee).
 2. Id. at 117 (statement of Sen. Grassley, Chairman, Senate Judiciary Comm.).
 3. Id. (statement of Sen. Sessions).
 4. Id.
 5. Id. at 117 (statement of Sen. Grassley, Chairman, Senate Judiciary Comm.).
 6. See, e.g., "Written Questions of Senator Chuck Grassley to Elena Kagan to be Solicitor General, U.S. Department of Justice," (2010); "Written Questions of Senator Chuck Grassley to Dawn Johnsen to be Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice," (2009).
 7. Hearing before Senate Judiciary Committee on Nomination of Jeff Sessions to be Attorney General, 115th Cong. 117 (2017) (statement of Sen. Sessions, Nominee).
 8. Nomination of Sen. Jeff Sessions to be Attorney General of the United States, Questions for the Record (2017).
 9. Id.
 10. Id.

11. Hearing Before the Senate Judiciary Committee on Health Care Fraud, 111th Cong. 3 (2009) (statement of Sen. Sessions, Ranking Member, Senate Judiciary Comm.).

12. Id.

13. Id. at 4.

14. Id. at 10.

15. See, e.g., *United States ex rel. Luther v. Consol. Indus.*, 720 F. Supp. 919 (N.D. Ala. 1989); *United States v. Killough*, 625 F. Supp. 1399 (M.D. Ala. 1986).

16. See, e.g., Press Release, U.S. Attorney's Office for the District of Maryland, PNC Bank to Pay \$9.5 Million for Failing to Engage in Prudent Underwriting Practices for Loans Guaranteed by the U.S. Small Business Administration (Aug. 16, 2016); Press Release, U.S. Attorney's Office for the District of Maryland, Medical Device Manufacturer NuVasive Inc. to Pay \$13.5 Million to Settle False Claims Act Allegations (July 30, 2015); Press Release, U.S. Attorney's Office for the District of Maryland, Defense Contractor Agrees to Pay \$13.7 Million to Settle Allegations Of Over-billing (Oct. 7, 2014); Press Release, U.S. Attorney's Office for the District of Maryland, U.S. Renal Care To Pay \$7.3 Million To Resolve False Claims Act Allegations (May 21, 2013); Press Release, U.S. Attorney's Office for the District of Maryland, Hospice of Arizona and Related Entities to Pay \$12 Million To Resolve False Claims Act Allegations Filed in Maryland (March 20, 2013).

17. *United States ex rel. James J. Kerr, Jr. v. Comprehensive Health Services*, No. RDB-14-1769 (D. Md.).

18. *United States ex rel. Thakur v. Ranbaxy Labs.*, No. JFM-07-962 (D. Md.).

19. Press Release, U.S. Department of Justice, Generic Drug Manufacturer Ranbaxy Pleads Guilty and Agrees to Pay \$500 Million to Resolve False Claims Allegations, cGMP Violations and False Statements to the FDA (May 13, 2013).