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EXPERT ANALYSIS

On FCA Enforcement, Sessions DOJ Might Be More Friendly Than It First Appears

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When then-U.S. Sen. Jeff Sessions testified before the Senate Judiciary Committee for his confirmation hearing to become attorney general, his prepared remarks included forceful comments about the need to combat fraud on the federal government:

> This government must improve its ability to protect the United States Treasury from fraud, waste and abuse. This is a federal responsibility. We cannot afford to lose a single dollar to corruption, and you can be sure if I'm confirmed, 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.

Following these remarks, Sessions faced pointed questions about his plans for the False Claims Act, which imposes treble damages and civil penalties on any person who "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" by the United States.

The statute empowers private whistleblowers to bring lawsuits on the government's behalf and to share in any recovery. Whistleblowers file these so-called qui tam lawsuits under seal, during which time the Justice Department has an opportunity to investigate their allegations.

While the statute provides for a 60-day sealing period, the government routinely requests — and courts routinely grant — extensions of the seal. Qui tam cases can remain under seal for years to enable the government to complete its investigation and decide whether to intervene in the lawsuit.

During the Sessions hearing, Iowa Republican Charles Grassley, chairman of the Judiciary Committee and longtime advocate for whistleblowers, asked about the length of time that FCA cases remain under seal.

Grassley also asked whether, as attorney general, Sessions would provide timely updates to Congress on this issue. Grassley expressed his hope that these updates would "keep people within (DOJ) more responsive and responsible."

Sessions said he understood Grassley's concerns, acknowledged that FCA cases are sometimes under seal for "an awfully long time," and agreed to provide the requested reports to Congress.

Following the hearing, whistleblower groups and their lawyers trumpeted Sessions' remarks, stating that he "pledged his support for the FCA" and expressed "the importance of supporting whistleblowers."[1]

However, if the Sessions DOJ takes steps to meaningfully reduce sealing periods, doing so would not necessarily benefit qui tam plaintiffs.

QHP losses were larger than amounts paid into the program by profitable QHPs, and Congress did not appropriate additional ACA funds to cover the QHPs' losses.

To understand why, it is helpful to consult the DOJ's court filings in cases where the government has declined to intervene.

In these filings, the government often emphasizes that its declination "should not be interpreted as a comment on the merits of plaintiff's claims."[2]

Instead, "The Justice Department may have myriad reasons for permitting the private suit to go forward," including "limited prosecutorial resources."[3]

It stands to reason that these resource constraints may also explain the length of time it takes for the government to complete FCA investigations.

A meaningful reduction in sealing times could result in more declinations by federal prosecutors simply because they lack the resources to complete their investigations within the allotted time.

Historically, a government decision not to intervene has been the death knell for false-claims actions.

According to statistics published by the DOJ, the dollar amount of settlements and judgments in qui tam actions where the government declined to intervene accounts for only 8 percent of total recoveries in these actions over the past 10 years.[4]

In other words, a whistleblower's prospects of success decrease dramatically when the government refuses to join the case.

Earlier unsealing has other potential benefits for FCA defendants as well.

First, unsealing triggers the public disclosure bar, which may prevent subsequent whistleblowers from bringing substantially similar cases.

Unlike the first-to-file bar, which applies only when a related action is "pending," the public disclosure bar applies in perpetuity.

Moreover, earlier unsealing would mitigate an imbalance currently experienced by many FCA defendants.

While the seal is in place, the government and whistleblowers have an opportunity to build their cases without the defendant's knowledge, giving plaintiffs a substantial advantage.

A defendant who is forced to defend against an FCA lawsuit after a substantial period under seal may encounter significant hurdles locating crucial witnesses and documents. A shorter sealing period puts plaintiffs and defendants on more equal footing.

From the perspective of FCA defendants, there may be other potentially encouraging news coming out of the early days of the Sessions DOJ.

The Trump administration's pick to serve as principal deputy assistant attorney general in the DOJ's civil division — tasked with enforcing the FCA — is Chad Readler, a former law firm partner who has been active in Ohio politics. The PDAAG is the second-in-command in the civil division, and Readler is currently serving as the acting head of the division until the Senate confirms a permanent replacement.

In 2013 Readler wrote a newspaper column in Cleveland's The Plain Dealer warning against creeping "overcriminalization" on the federal level. Discussing a proposed Ohio statute modeled on the FCA, he wrote, "Federal law can provide an ill-advised model for Ohio to follow."

Readler was critical of FCA enforcement that imposed "quasi-criminal" penalties for technical violations of complicated federal regulations.

He went on to note that the FCA has "come under criticism for ensnaring people who may not have entirely understood" their regulatory obligations.[5]

Readler is not alone in criticizing efforts to leverage the FCA to combat regulatory violations as opposed to intentional fraud. Just last year, for example, the U.S. Supreme Court noted that

the FCA is "not 'an all-purpose antifraud statute,' ... or a vehicle for punishing garden-variety breaches of contract or regulatory violations."[6]

These remarks are consistent with a decision by the 4th U.S. Circuit Court of Appeals noting that, while "the correction of regulatory problems is a worthy goal," such a theory is "not actionable under the FCA in the absence of actual fraudulent conduct."[7]

More recently, a federal judge in the Central District of California sympathized with an FCA defendant accused of engaging in off-label drug promotion, describing the applicable regulations as "such a complicated maze one would be forgiven for thinking it was designed to house a Minotaur."[8]

Accordingly, there appears to be support in the federal courts — and possibly now in the DOJ's civil division — for reining in more expansive applications of the FCA.

While only time will tell how the Trump administration's Justice Department will enforce the FCA, the outlook may not be as grim for defendants as the plaintiffs' bar has suggested. Earlier unsealing and a focus on actual, intentional fraud may result in substantial benefits to defendants.

NOTES

[1] Mary Jane Wilmoth, *Senator Sessions Questioned on Whistleblowers,* The Whistleblower Blog (Jan. 12, 2017), http://bit.ly/2oQNgwi.

[2] United States' Statement of Interest Addressing Merck's Motion to Dismiss at 1-2 n.1, *U.S. ex rel. Krahling v. Merck & Co.,* No. 10-cv-4374 (E.D. Pa. May 20, 2013), ECF No. 54.

[3] *Id.* (quoting *U.S. ex rel. Atkins v. McInteer,* 470 F.3d 1350, 1360 n.17 (11th Cir. 2006)).

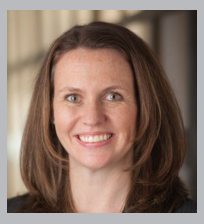
[4] Fraud Statistics – Overview, Civil Division, U.S. Department of Justice (Dec. 13, 2016), http://bit.ly/2kkoene.

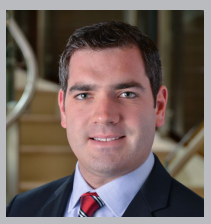
[5] Chad Readler, *Federal overcriminalization hurts Ohioans,* The Plain Dealer July 20, 2013, http://bit.ly/2otshDW.

[6] *Universal Health Servs. Inc. v. U.S. ex rel. Escobar,* 136 S. Ct. 1989, 2003 (2016) (quoting *Allison Engine Co. v. U.S. ex rel. Sanders,* 553 U.S. 662, 672 (2008)).

[7] *U.S. ex rel. Rostholder v. Omnicare Inc.,* 745 F.3d 694, 702 (4th Cir. 2014) (quoting *Mann v. Heckler & Koch Def. Inc.,* 630 F. 3d 338, 346 (4th Cir. 2010)).

[8] *U.S. ex rel. Brown v. Celgene Corp.,* No. 10-cv-3165, 2016 WL 7626222, at *9 (C.D. Cal. Dec. 28, 2016).



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