

Morgan Lewis

FAST BREAK: **FCA HARDBALL**

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Agenda

- *Cochise* – Why expanded limitations in *qui tam* cases are problematic
- New DOJ Enforcement Policies – Do they level the playing field?
- Relator Pursuit of Non-Intervened Claims – Should relators be able to pursue non-intervened allegations when DOJ is settling the covered conduct?
- Covered Conduct and Global Releases – Do companies get what they think they paid for?

New Frontier in Declined Qui Tams

- In May 2019, the Supreme Court ruled in *Cochise Consultancy v. United States ex rel. Hunt* that relators enjoy the same three-year tolling period in declined *qui tam* cases that the government does in intervened cases.
- 31 USC 3731(b) – A civil action may not be brought after the later of:
 - 6 years from the date the FCA violation occurred
 - 3 years from the date when “facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances,” but in no event later than 10 years from the date the FCA violation occurred

New Frontier in Declined Qui Tams

- *Cochise* effectively extends the SOL period for declined *qui tams*
 - Effect on seal durations and partial interventions?
 - *U.S. ex rel. Martin v. Life Care Centers of Am., Inc.*, 912 F. Supp. 2d 618, 623 (E.D. Tenn. 2012)
 - *United States ex rel. Bennett v. Biotronik, Inc.*, 876 F.3d 1011, 1020 (9th Cir. 2017)
 - Relator settlement leverage?
 - Increased likelihood of relator pursuing declined *qui tams* ?
- However, Supreme Court declined to allow relators to serve as responsible government officials

New DOJ Enforcement Policies

- Just before the *Cochise* decision, DOJ announced an update to its FCA policies, which included specific sections on:
 - Cooperation credit
 - Preservation of documents and information
 - Identification of individuals
 - Voluntary disclosures of unrelated conduct
 - Facilitating review of information through special or propriety technology
 - Corrective Action
 - Root cause analysis
 - Appropriate disciplinary action
 - Implementing or improving compliance programs

New DOJ Enforcement Policies

- Additionally, DOJ issued updated guidelines on how its prosecutors are to evaluate corporate compliance programs when conducting criminal investigations
- What do these revised policies mean?
 - Is DOJ changing its approach to FCA enforcement?
 - Placing the onus of ensuring compliance on companies?
 - Is this a leveling of the playing field or simply creating extra leverage for DOJ?

In Hot Pursuit of Declined Qui Tams

- Under the FCA, relators may have the option of pursuing a *qui tam* in the event that DOJ declines to intervene
 - Now subject to DOJ approval
 - DOJ declines approximately 75-80% of filed *qui tams*, meaning there are hundreds of cases filed each year where relators must proceed alone
- What about partial intervention?
 - If DOJ agrees to pursue some, but not all, of relator's claims and a settlement occurs, is the relator allowed to separately pursue the non-intervened claims?
 - Should they be?
 - *United States ex rel. Bennett v. Biotronik, Inc.*, 876 F.3d 1011, 1020 (9th Cir. 2017)
 - *United States ex rel. Brooks v. Stevens-Henager College, Inc.*, 359 F.Supp.3d 1088 (D. Utah 2019)

In Hot Pursuit of Declined Qui Tams

- During settlement process, DOJ outlines conduct to be covered by settlement release
 - Causes of action for which DOJ or others may no longer pursue FCA or administrative law claims
 - What if there are other payors (e.g., Medicaid) with claims based on the same conduct?
 - Global settlement considerations?
- Risks associated with *qui tam* relator moving forward on non-intervened claims
 - Extended litigation
 - Potential for expanded discovery
 - Could DOJ rejoin the fray?

Covered Conduct and Releases

- DOJ generally releases specified covered conduct over a certain period of time
 - Is the case extrapolated?
 - Does public disclosure bar prevent parasitic claims for similar, but not exactly the same, conduct?
 - What is the value of a release in an age of seal extensions, particularly if CMS/contractors are unlikely to independently reopen claims?
 - Is negotiation of a specified release as important as the money value of the settlement itself?

Covered Conduct and Releases

- Ability to Pay and Payment Over Time considerations
 - Is it worth it for DOJ to open up a company's books?
 - Importance of determining actual liability before engaging in ability to pay process
 - No ability of FCA defendant to control outcome of the process
- Other settlement considerations
 - Posture and tactics in negotiating settlement amount
 - Relator retaliation claims
 - “Collateral consequences” from affiliated regulatory agencies

Reference Links

- [Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases \(July 2018\)](#)
- [Deputy Attorney General Rod Rosenstein Delivers Remarks to the New York City Bar White Collar Crime Institute \(May 2018\)](#)
- [Evaluation of Corporate Compliance Programs Guidance Document \(April 2019\)](#)
- [False Claims Act Statute of Limitations Destined for Timely Supreme Court Review \(January 2019\)](#)
- [Supreme Court Clarifies FCA Statute of Limitations \(May 2019\)](#)
- [Guidelines for Taking Disclosure, Cooperation, and Remediation into Account in False Claims Act Matters](#)
- [Supreme Court Expands Whistleblower Ability to Bring FCA Cases \(May 2019\)](#)

Thanks!



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A former Assistant US Attorney and US Department of Justice (DOJ) Healthcare Fraud Coordinator, Katie McDermott represents healthcare and life sciences clients throughout the United States in government investigations and litigation matters relating to criminal, civil, and administrative allegations, including violations of the False Claims Act and its whistleblower provisions. Katie also advises on corporate compliance matters relating to internal investigations, voluntary government disclosures, consent decrees, and corporate integrity agreements.

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Matthew J.D. Hogan brings his experience as a former federal prosecutor to his representation of clients in connection with government investigations and white collar defense. Matt's practice focuses on assisting organizations and individuals targeted in government investigations and related litigation. He represents clients in a wide array of white collar matters, internal investigations, False Claims Act litigation, and other complex matters involving federal and state investigations and litigation. He has worked with boards of directors, audit committees, and corporate leadership to conduct internal investigations and he is an active member of the firm's crisis management practice.

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Jacob Harper advises stakeholders across the healthcare industry, including hospitals, health systems, large physician group practices, practice management companies, hospices, chain pharmacies, manufacturers, and private equity clients, on an array of healthcare regulatory, transactional, and litigation matters. His practice focuses on compliance, fraud and abuse, and reimbursement matters, self-disclosures to and negotiations with OIG and CMS, internal investigations, provider mergers and acquisitions, and appeals before the PRRB, OMHA, and the Medicare Appeals Council.

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Please join us for next month's webinar:

Fast Break: Physician Fee Schedule Update

Featuring Eric Knickrehm

➤ Thursday August 22, 2019 3:00 PM (EST)