Hogan Lovells

False Claims Act Focus:

Enforcement developments in the financial services industry

2013

Contents

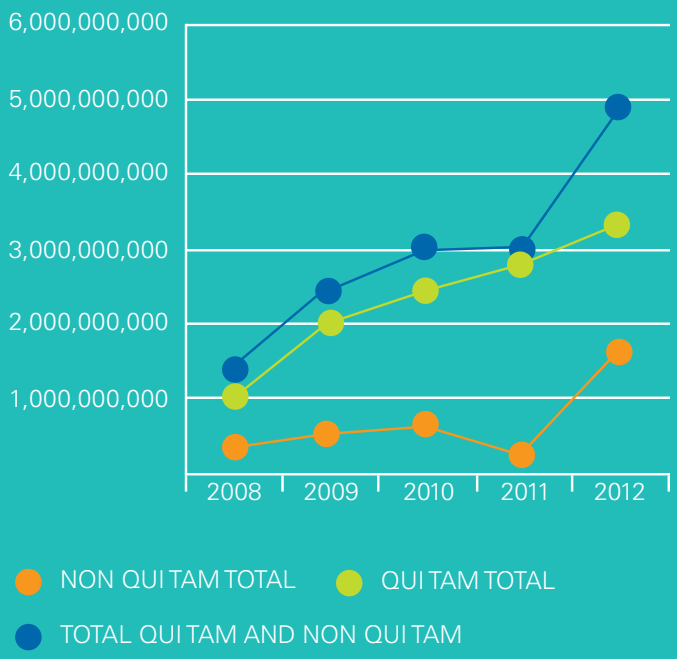
Introduction

The Eric Holder Justice Department (DOJ) demonstrated in its first four years the scope and intensity with which it will use its most potent tool for fighting fraud against its business partners in the financial service industry—the Civil False Claims Act (FCA). In 2012, with the help of its interagency Financial Fraud Enforcement Task Force,[1] it reaped record-setting damage recoveries.[2] This occurred after the DOJ twice convinced a friendly Congress to enhance the already hefty FCA tool.[3]

FCA liability now exists for any claim submitted to recipients of government funds[4] to be spent on government objectives, no matter how many steps removed they are from a government transaction.[5]

DOJ SOURCE

Dollar Recoveries to USA in False Claims Act Cases



Penalties can be imposed on a recipient of government funds for no conduct at all—for failing to act after realizing (or even recklessly failing to realize) that the government has overpaid for goods or services.[6]

As it eliminated defenses courts had developed since the 1986 FCA amendments, Congress delegated more authority to private citizen "relators." Whistleblowers have an ever-growing prominence in defining enforcement priorities. Of the top 30 FCA recoveries in 2012, 28 were whistleblower initiated.[7] Five of the six financial sector cases in this category were whistleblower initiated.[8]

New leadership in the Consumer Protection Division of the Justice Department has turned to other strong civil

1 DOJ formed the Task Force in 2009 to "investigate and prosecute significant financial crimes, ensure just and effective punishment for those who perpetrate financial crimes, combat discrimination in the lending and financial markets, and recover proceeds for victims of financial crimes." Its members include representatives from a range of federal agencies, regulatory authorities, inspectors general, and state and local law enforcement. Press Release, United States Attorney's Office, S.D.N.Y., U.S. Dep't of Justice, Manhattan U.S. Attorney Sues Flagstar Bank for Fraudulent Mortgage Lending Practices and Settles for $132.8 Million and Other Concessions (Feb. 24, 2012), http://www.justice.gov/usao/nys/pressreleases/February12/flagstarbanksettlement.html.

2 See Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Acting Associate Attorney General Tony West Speaks at Pen and Pad Briefing Announcing Record Civil FY 2012 Recoveries (Dec. 4, 2012), http://www.justice.gov/iso/opa/asg/speeches/2012/asg-speech-1212041.html.

3 *Fraud Enforcement Recovery Act of 2009* (FERA), Pub.L.No. 111-21, 123 Stat. 1617 (2009); *Patient Protection and Affordable Care Act of 2010 (PPACA)* Pub.L. No. 111-148, 124 Stat. 119 (2010).

4 "[A]ny request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property." 31 U.S.C. §3729(b)(2)(A).

5 Claim can be presented to any recipient so long as the claimed money or property "is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government — (I) provides, or has provided any portion of the money or property requested or demanded; or (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested." Id. at § 3729(b)(2)(A)(i)-(II).

6 FERA added to the definition of "obligation" the act of "retention of any overpayment." ACA added to the definition of "overpayment" "any funds a person receives or retains … to which the person, after applicable reconciliation, is not entitled.Any overpayment retained by a person after the deadline for reporting and returning the overpayment … is an obligation." Finally, an overpayment must be reported "by the later of …60 days after the date on which the overpayment was identified…".

7 See Top 30 False Claims Act Settlements of FY 2012, http://taf.org/blog/fy-2012-record-year-fca-recoveries. 412 of 436 new FCA matters in 2012 were qui tam. See Fraud Statistics, U.S. Dep't of Justice (Oct. 24, 2012), http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.

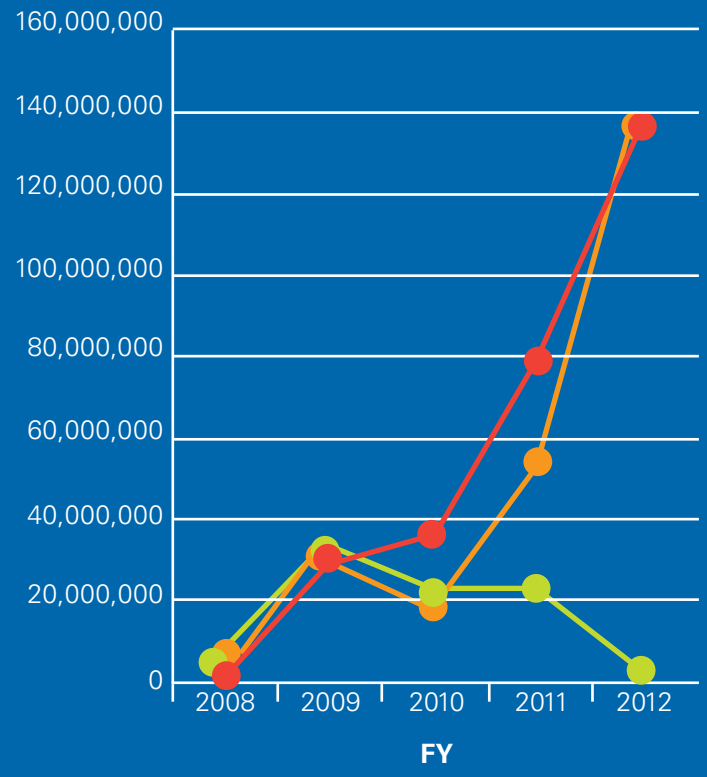
8 Id.

enforcement tools, pairing them with civil FCA claims where federal guarantees stood behind losses DOJ viewed as associated with fraudulent activity. If federal loan guarantees do not provide the jurisdictional basis for a FCA claim, DOJ has looked to the Anti-Fraud Injunction Act, 18 U.S.C. §1345, which allows equitable remedies, such as consumer restitution and changes in business practices. Its standard of proof is only a preponderance of the evidence that a fraud on a bank or wire or mail fraud occurred. Thus, false loan documents, inflated appraisals, and false financial submissions during the origination of any loans or during their sale on the secondary market become actionable.

DOJ has even dusted off the Financial Institution Reform Enforcement and Recovery Act of 1989 (FIRREA),[9] enacted after the 1980s savings and loan debacle, to augment its FCA jurisdiction. It is using this tool to address allegedly fraudulent lending practices where there is no federal insurance or loan guarantee and to issue civil subpoenas in investigations where the remedy could be civil penalties of up to US$1 million per violation. The FIRREA statute of limitations is 10 years.[10]

Civil settlements under the FCA are no longer a way to "agree to disagree" and compensate government programs with damages and penalties. Prosecutors at least in some districts are now requiring admission of facts in civil settlements that establish liability under regulatory regimes and the FCA. Such settlements will undoubtedly have a ripple effect on other aspects of business and other follow-on litigation frequently triggered by government investigations and prosecutions.

Relator Awards in False Claims Act Cases



DOJ SOURCE

9 12 U.S.C. §1833(a).

10 Id.

Recommendations to reduce risk

The fundamental lesson of the enforcement trends and actions we summarize here is that every aspect of business must have compliance review, lest the FCA treble damages and civil penalties, FIRREA civil penalties, or the significant cost and reach of a federal monitor enter the risk equation. This is the new reality of a market with pervasive federal loan insurance and federal secondary market participation.

To reduce the risk of liability under the FCA, we recommend that clients:

- study the requirements DOJ, the Office of the Comptroller of the Currency (OCC), and the Federal Reserve Board imposed on institutions engaged in the same business as you;
- probe functions to determine whether the risks addressed by previous prosecutions exist within your own organization;
- rank the risks in scope and financial impact;
- focus on enhancement of policies and procedures on the high-risk areas;
- train employees on these enhanced policies and rules;
- create and publicize internal hotlines for reporting violations of policies and rules;
- train human relations staff to work with compliance staff when breach of rules are reported;
- treat internal reporters with respect;
- implement protocols for responding to compliance issues raised; and
- follow up to evaluate whether improvement is genuine, measurable and visible.

Financial services industry enforcement activity

A. New lawsuits filed

Enforcement activity likely will continue in the residential mortgage loan industry in the coming year. Still pending since their 2012 filing are two cases using the FCA and FIRREA in ways that could define future DOJ use of these statutes in the financial services sector.

The United States Attorney's Office for the Southern District of New York (SDNY) sued two of the largest banks in the country under the FCA and FIRREA. One involved the underwriting and quality reporting to the U.S. Department of Housing and Urban Development (HUD) in the Direct Endorsement Lender (DEL) program for Federal Housing Administration (FHA) loans.[11] Oral argument on motions to dismiss the complaints occurred on April 17, 2013. The second lawsuit alleges that residential loans sold to Fannie Mae and Freddie Mac originated with a process called the "Hustle," which eliminated quality checkpoints, and then quality reports concealed the rate of their default. On May 8, 2013, the court granted the motions to dismiss the FCA counts, but let stand the FIRREA claims. An opinion is forthcoming.[12]

B. Record settlements involving mortgage lenders

Other regulators echoed the FCA focus on the financial sector. In January 2013, the OCC settled with four banks to resolve a troubled foreclosure review of millions of loan files for US$8.5 billion. Payments to homeowners began in April 2013. The Federal Reserve Board also announced in January that two other institutions agreed to pay US$557 million in cash payments and other assistance to help mortgage borrowers.

The DOJ's settlements last year included one in which the United States Attorney's Office for the Eastern District of New York and 49 state attorneys general reached a US$25 billion package of FCA consent decrees against five mortgage lenders.[13]

11 *U.S. v. Wells Fargo,* No. 12-7527 (S.D.N.Y.).

12 *U.S. v. Bank of America, Countrywide, Financial, and Countrywide Home Loans*, No. 12-1422 (S.D.N.Y. May 8, 2013).

13 Consent Judgment, *U.S. v. Bank of America Corp, et al.*, 12-361 (D.D.C. April 4, 2012).

The deals resolved claims of underwriting and origination fraud on mortgage loans insured by the FHA.[14] The banks agreed to provide loan modifications, delay and defer foreclosures, and implement new servicing standards designed to prevent "robo-signing." Compliance with the consent decrees is overseen by a committee of state attorneys general, state financial regulators and federal officials, and an individual monitor for each bank.

The SDNY settled significant claims against a large mortgage company and two banks. The first case recovered US$158.3 million under the FCA and FIRREA for alleged interference with quality control and with adverse findings in order to reduce defect rates on HUD-insured and other mortgages.[15] The second, filed and settled for US$132.8 million, alleged that the bank wrongly approved residential home mortgage loans as eligible for HUD insurance. In another FHA Direct Endorsement Lender case, the SDNY settled a civil FCA complaint for US$202.3 million. Again, origination, quality control, and early default review were in issue.

In each of these SDNY cases, the Justice Department made an unusual demand that the banks admit key facts it had alleged in its fraud complaints, including that they violated FHA regulations, they falsely certified to HUD about borrower eligibility, and they failed to review material underwriting conditions, such as borrower income, assets, and credit, on loans they approved for FHA insurance.

C. FCA court decisions in financial services industry

Courts have offered guidance in the past year on the pleading standard and subject matter jurisdiction requirements of False Claims Act litigation brought against mortgage lenders and student loan companies. Whistleblowers had far less success under the FCA in cases they pursued against mortgage lenders after the government declined to intervene.

1. Measure of Damages under the FCA

The government has pressed for years to recover treble the entire value of the contract affected by violations of the FCA. The 7th U.S. Circuit Court of Appeals is the most recent circuit court to reject the government's "gross damages" theory when it joined several other circuit courts to apply the "net trebling" method. It stated that the FCA does not specify either a gross or a net trebling, nor does it signal a departure from the norm. If goods delivered under a contract are not as promised, damages are the difference between the contract price and the value received—a civil litigation principal of mitigation of damages that is almost universal. Thus, the court limited damages from a mortgage company CEO's false statements in federal loan guarantee applications to the difference between the value of the loans guaranteed and paid on the one hand, and the collateral the government realized from its sale on the other. It then trebled that net amount.[16]

14 The consent agreements with JPMorgan Chase & Co., Wells Fargo & Company, Citigroup Inc., and Ally Financial Inc. contained provisions requiring each bank to determine whether any service members were the victims of a wrongful foreclosure in violation of the Servicemembers Civil Relief Act, and to pay any such victim a minimum amount of US$116,785.

15 See Press Release, United States Attorney's Office, S.D.N.Y., U.S. Dep't of Justice, Manhattan U.S. Attorney Files and Simultaneously Settles Fraud Lawsuit Against CitiMortgage, Inc., for Reckless Mortgage Lending Practices (Feb. 15, 2012), http://www.justice.gov/usao/nys/pressreleases/February12/citimortgageincsettlementpr.pdf.

16 *U.S. v. Anchor Mortgage Corp.*, No. 10-3122, 2013 WL 1150213 (7th Cir. Mar. 21, 2013); *Accord, U.S. v. United Technologies Corp.*, 626 F. 3d 313, 321-22 (6th Cir. 2010); *U.S. v. Science Applications Int'l Corp.*, 626 F. 3d 1257, 1279 (D.C. Cir. 2010); *U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F. 3d 908, 923 (4th Cir. 2003); *Commercial Contractors, Inc. v. U.S.*, 154 F. 3d 1357, 1372 (Fed. Cir. 1998); *contra, U.S. ex rel. Feldman v. Von Corp*, 697 F. 3d 78 (2d Cir. 2012); *U.S. v. Eghbal*, 548 F. 3d 1281, 1285 (9th Cir. 2008).

2. Eleventh Amendment bar to claims against state agency

In a qui tam action against the Kentucky Higher Education Student Loan Corporation, the 4th U.S. Circuit Court of Appeals held that the Eleventh Amendment bar of suits against states could apply to state agencies and lending authorities under the arm-of-the-state analysis depending upon: "(1) whether any judgment against the entity as defendant will be paid by the State … (2) the degree of autonomy exercised by the entity … (3) whether the entity is involved with state concerns as distinct from non-state concerns; and (4) how the entity is treated under state law …"[17] On remand, the district court found each of the four state student loan agencies who were defendants to be an arm of the state and that the Eleventh Amendment dismissed relator's claims.[18]

3. Lack of subject matter jurisdiction

The FCA's first-to-file rule allows only the first whistleblower jurisdiction to pursue a claim and recover a share with the government.[19] The FCA also deprives courts of jurisdiction over claims substantially the same as allegations publicly disclosed unless the whistleblower is the original source of the published information.[20]

a. Second relator claims could survive

Courts uniformly read the FCA first-to-file bar as applicable only while the first-filed qui tam action is pending. But dismissal of the first action may cure this jurisdictional bar to a second-filed action. A federal district court in March refused to dismiss a second-to-file relator's claims, even though his original complaint was filed when a first-filed claim with similar allegations was pending.[21] The court examined the rulings of several Courts of Appeals and held that second-filed actions could or should be dismissed only without prejudice where there is a possibility that the second relator could file an amended complaint after the first-filed complaint was dismissed.[22] Because this relator filed an amended complaint after the first-to-file complaint was dismissed, the court allowed it to stand. Relying on the Supreme Court's observation in another FCA context that an amended complaint is "jurisdictionally relevant,"[23] the court said dismissal would serve no purpose because the relator could file a jurisdictionally compliant complaint the next day.

17 *U.S. ex. rel. Oberg v. Kentucky Higher Education Student Loan Corp., et al.*, 681 F.3d 575, 580-81 (4th Cir. 2012).

18 Memorandum Opinion, *U.S. ex. rel. Oberg v. Pennsylvania Higher Education Authority, et al.,* No. 01-90 (E.D.V.A. Dec. 5, 2012).

19 31 U.S.C. 3730 (e)(3).

20 31 U.S.C. 3730(e)(4).

21 *U.S. ex rel. Palmieri v. Alpharma, Inc.*, __ F. Supp. 2d __, 2013 WL 821965 (D. Md. March 5, 2013).

22 *U.S. ex rel. Chovanec v. Apria Healthcare Gp. Inc.*, 606 F. 3d 361, 362 (7th Cir. 2010). See also *U.S. ex rel Batiste v. SLM Corp.*, 659 F. 3d 1204, 1211 (D.C. Cir. 2011) (dismissing second-filed complaint and observing relator failed to seek leave to amend his complaint after the first-filed complaint was dismissed); and *In re Natural Gas Royalties*, 566 F. 3d 956, 961 (10th Cir. 2009).

23 *Rockwell International Corp. v. U.S.*, 549 U.S. 457, 127 S.Ct. 1397 (2007).

It remains to be seen whether other circuits will agree with this generous interpretation for relators. The D.C. U.S. Circuit Court of Appeals dismissed a second-to-file whistleblower suit, even though the first-filed suit had been dismissed eighteen months before.[24] Both relators alleged Sallie Mae Corporation fraudulently administered loans under the Federal Family Education Loan Program. The court found that both alleged the "same material elements of fraud," and that the first equipped the government to investigate. But it also noted that the relator had failed to seek leave to amend after the first complaint was dismissed.

b. Burden shifted to show claims not based on public disclosure; particularity required

In another student loan FCA complaint, the 4th Circuit held that the relators failed to establish that the complaint was not based in part on public disclosures, including U.S. Securities and Exchange Commission filings.[25] The court also affirmed that the allegations not previously disclosed to the public were insufficiently particular to show any false certifications to the government. The complaint had alleged that a student loan lender and servicer had caused false statements to get insurance guaranty payments for loans made as a result of unlawful inducements, deceptive exit counseling, deceptive direct mail solicitation, bonus-compensated recruiters, and violations of the single holder rule.

24 *U.S. ex rel. Batiste v. SLM Corp.*, 659 F. 3d at 1211. 21

25 *U.S. ex. rel. Jones v. Collegiate Funding Services*, 469 Fed. Appx. 224, 256-57 (4th Cir. 2012).

FCA court decisions of note in other industries

A. Pleading fraud with particularity

Over the last decade, the federal appellate courts have struggled with how to apply Rule 9(b)'s particularity pleading requirement to FCA cases. Some courts have held that a relator must plead the details of an actual false claim or representative false claims.[26] The 1st U.S. Circuit Court of Appeals initially took that position,[27] only to retreat and later allow a relator to rely on "factual or statistical evidence to strengthen the inference of fraud beyond possibility without providing details as to each claim" in circumstances where the claims were submitted by a third party, not the defendant.[28] Still other courts adopted a broader formulation when first addressing Rule 9(b) in the FCA context.[29]

In January, the 4th Circuit tried to harmonize these various pronouncements on what it takes to satisfy Rule 9(b) in pleading a FCA complaint.[30] The relator alleged that off-label promotion occurred in violation of the Food and Drug Administration (FDA) rules. It argued it is sufficient under Rule 9(b) to allege the existence of a fraudulent scheme in violation of the FDA rules because of the inference that false claims were presented to the government for payment as a result. The court rejected this argument. It agreed with the 11th U.S. Circuit Court of Appeals' statement in *Clausen* that "the particularity requirement of Rule 9(b) 'does not permit a False Claims Act plaintiff merely to describe a private scheme in detail but then to allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted, were likely submitted or should have been submitted to the Government.'"[31]

The 4th Circuit explained that cases like *Grubbs* and *Duxbury* that appear to have adopted a more lenient 9(b) standard did so where the particular facts and nature of the scheme alleged necessarily led to a plausible inference that false claims were submitted. The court aligned the various applications of Rule 9(b), saying: "when a defendant's actions, as alleged and as reasonably inferred from the allegations, could have led, but need not necessarily have led, to the submission of false claims, a relator must allege with particularity that specific false claims actually were presented to the government for payment."[32] The court "acknowledge[d] the practical challenges that a relator may face in cases … in which a relator may not have independent access to records such as prescription invoices, and where privacy laws may pose a barrier to obtaining such information without court involvement," but it nevertheless held that "our pleading requirements do not permit a relator to bring an action without pleading facts that support all the elements of a claim."[33]

This decision is indicative of the challenge courts face in applying Rule 9(b) to relators' complaints, and it tries to carve a middle road that remains faithful to the requirement in all fraud cases—not just FCA cases—that a plaintiff must plead all elements of a cause of action with particularity to survive dismissal.

B. The FCA can reach an estimate as a "claim"

A prevailing defense argument that an opinion is a prediction and cannot constitute a false claim under the FCA failed and was reversed on appeal to the 9th U.S.

26 See e.g., *U.S. ex rel. Clausen v. Lab. Corp. of Am.,* 290 F.3d 1301, 1313 (11th Cir. 2002); *U.S. ex rel. Joshi v. St. Luke's Hosp., Inc.,* 441 F.3d 552, 557 (8th Cir. 2006).

27 See *U.S. ex rel. Karvelas v. Melrose Wakefield Hosp.*, 360 F.3d 220 (1st Cir. 2004).

28 See *U.S. ex rel. Duxbury v. Ortho Biotech Products, L.P.*, 579 F.3d 13, 29 (1st Cir. 2009).

29 See e.g., *U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009) (holding that FCA claims under Rule 9(b) may "survive by alleging particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted").

30 *U.S. ex rel. Nathan v. Takeda Pharmaceuticals North America,* Inc. — F.3d — , 2013 WL 136030 (4th Cir. Jan. 11, 2013).

31 Id. at *4 (quoting *Clausen*).

32 2013 WL 136030, at *5 (emphasis in original).

33 Id.

Circuit Court of Appeals. The court held[34] that an estimate of future costs in a bid for an Air Force contract can constitute a false claim within the meaning of the FCA. In doing so, the court relied upon evidence that at the time of the bid the defendant knew the costs it would charge the government if it won the contract were higher than those it stated in the bid. In reversing the district court's grant of summary judgment, the 9th Circuit became the third of its fellow courts, after the 1st Circuit and 4th Circuit, to extend the reach of the definition of "claim" in this fashion.

Other industries whose transactions include elements of "opinion" should take note and include compliance assessments in these areas. For example, lending decisions and financing activities are not necessarily beyond the reach of whistleblower claims where they value property securing federally insured loans; where they assess borrowers' ability to repay a loan; and where they classify risk of loss for loans auctioned, offered on the secondary market, or securitized.

34 *U.S. ex rel. Hooper v. Lockheed Martin Corp.*, 688 F. 3d 1037, 1048-49 (9th Cir. 2012). *Accord, U.S. v. Loughren v. Unum Group*, 613 F.3d 300, 310-12 (1st Cir. 2010); and *U.S. ex rel. Harrison v. Savannah River Co.*, 176 F.3d 776, 784-6 (4th Cir. 1999).

Conclusion

The FCA's force, enhanced by the Fraud Enforcement Recovery Act of 2009 and the Patient Protection and Affordable Care Act of 2010, must be reckoned with. Robust compliance processes and reviews are the best defense.

Contributions provided by: Virginia "Ginny" Gibson

Our team

Hogan Lovells lawyers have extensive experience handling every stage of litigation and investigations under the False Claims Act (FCA), in cases filed under both federal and state law, and in cases prosecuted by the government and those pursued by private qui tam relators. We have successfully defended individuals and corporations in a wide range of industries, including financial services, technology, government contracts, health care, energy, and education.

One key to our success is our team of skilled white collar litigators, many of whom formerly were trial attorneys in the fraud section at the U.S. Department of Justice, United States Attorneys, or Assistant U.S. Attorneys who have handled hundreds of significant FCA matters.

Our trial attorneys collaborate closely with the lawyers in our nationally and internationally recognized regulatory groups who have unparalleled knowledge of the administrative and regulatory frameworks that FCA actions frequently involve. Many of our regulatory lawyers formerly held high level positions at federal agencies, and often participated directly in the relevant regulatory and legislative processes. This partnership creates highly focused teams uniquely positioned to articulate and advocate our interpretation of the applicable regulations credibly in FCA cases.

For more information, please contact one of our Investigations, White Collar and Fraud members, or the person with whom you usually deal.

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