

Daily Journal

www.dailyjournal.com

WEDNESDAY, MARCH 31, 2021

PERSPECTIVE

COVID relief will spur False Claims Act enforcement

By James Zelenay Jr., Nick Hanna and Sean Twomey

The False Claims Act is the federal government's primary civil enforcement tool for combatting fraud in connection with government programs. Over the last decade, the U.S. Department of Justice has recovered more than \$40 billion under the statute. And 2020, the year of the COVID-19 pandemic, saw an unprecedented number of new FCA cases filed — over 900. This is a glimpse of what is on the horizon.

The FCA effectively applies to any program in which government dollars are spent, whether Medicare, Medicaid, defense contracting, or infrastructure. The statute provides for significant civil liability — including treble damages, up to more than \$20,000 in monetary penalties per false claim, and attorney fees and costs — for the knowing submission of false or fraudulent claims for payment to the government or a government agency in connection with a government-funded or supported program. Further, the majority of states, including California, have their own analogue FCA statutes that cover fraud in relation to state or local spending.

FCA claims may be brought not only by the government, but also private whistleblowers, known as “relators,” who sue on the government's behalf in what are known as qui tam actions. Whistleblowers are incentivized to bring these suits because the FCA provides the whistleblower a “bounty” of up to 30% of the government's recovery in any successful suit.

FCA enforcement has always been at its zenith following emergency government spending in times of crisis. The FCA itself is the product of such a crisis: Congress enacted the statute during the Civil War to combat suppliers defrauding the Union

Army by providing defective weapons and other substandard goods. FCA enforcement activity likewise spiked in the wake of recent events triggering emergency government spending, such as the wars in Iraq and Afghanistan, Hurricane Katrina and other natural disasters, and the 2008 financial crisis. In connection with the 2008 financial crisis, a DOJ task force charged with rooting out fraud in federally insured mortgage and lending programs led to then-record-setting annual FCA recoveries, in amounts of over \$6 billion per year.

Government spending in connection with COVID-19 relief is certain to spur the same result — and it has already started.

DOJ issued a press release on March 26 outlining its ongoing efforts to combat fraud in government programs. This includes criminal charges in schemes relating to COVID fraud amounting to over \$569 million nationwide. The types of cases DOJ has prosecuted include: (i) attempts to sell fake and unlawful cures, treatments, and personal protective equipment, (ii) misappropriation of COVID-relief loan program proceeds (i.e., funds obtained by fake or shell companies, or funds used for prohibited or ineligible purposes, such as to buy luxury goods), and (iii) misappropriation of federal COVID-related unemployment insurance benefits.

DOJ also has reached its first settlement of a civil case charging fraud in connection with a Coronavirus Aid, Relief, and Economic Security Act loan program requiring participants to make representations and certifications. In that case, the government pursued FCA claims against a company that allegedly falsely certified it was not in bankruptcy. FCA enforcement efforts also are underway at the state level. For example, Indiana filed a lawsuit under its FCA against a product supplier involv-

ing claims relating to false representations about the brand and quality of N-95 masks offered for sale, and Massachusetts settled a state FCA suit relating to alleged false claims involving misrepresentations about the antiviral properties of hand sanitizer sold to the state. California, meanwhile, announced the establishment of a new enforcement division to combat fraud in the state's health care programs. Additionally, recent media reports estimate that California has paid more than \$10 billion in fraudulent claims relating to state COVID unemployment relief.

This is just the tip of the iceberg. Over the last year, the federal government has enacted emergency spending measures totaling in excess of \$5 trillion. The landmark legislation includes the CARES Act, the largest emergency stimulus package in history. The latest round of COVID-related funding includes the \$1.9 trillion relief bill signed into law by President Joe Biden in early March 2021. And now the Biden administration is reportedly preparing a \$3 trillion infrastructure package.

Government spending programs often mandate certifications of eligibility — setting the stage for FCA suits relating to false or fraudulent representations made by participants. Further, the COVID relief legislation creates several new oversight mechanisms, including (i) a regulatory committee — comprised of inspectors general of numerous government agencies — whose mission is to prevent and detect fraud, waste, abuse, and mismanagement, (ii) a special COVID-relief inspector general position, and (iii) a COVID-relief congressional oversight commission. In an early March speech, Biden pledged his administration would provide “fastidious oversight” to ensure that the COVID “relief arrives quickly, equitability and efficiently with no waste or fraud.” And Biden's recently con-

firmed Attorney General Merrick Garland is noted to have held an expansive view of the FCA's reach during his time as a federal circuit judge.

The data from 2020 also is compelling. Not only were a record-number 900-plus cases filed, but the federal government itself filed twice as many cases (over 250) as in typical past years. While many of the cases filed in 2020 remain confidential and under seal, pending the government's decision as to whether to intervene, it is not a stretch to surmise that many of the newly filed cases have to do with alleged COVID-funding relief fraud — and that many more are on the way.

DOJ further has made clear its intent to aggressively target COVID-related fraud. Under the previous administration, DOJ announced a focus on COVID-19-related fraud, taking steps that included establishing a national system for whistleblowers to report suspected fraud. And in its March DOJ announcement, the DOJ within Biden's administration announced it was engaged in a “historic level of enforcement action” in combatting COVID-19-related fraud.

Finally, FCA cases promote themselves — as more and more cases get filed, and more and more recoveries are announced, more and more whistleblowers (and plaintiffs' lawyers) come forward with additional claims. As a result, 2020 is more of a preview of what is to come than an isolated event.

If you or your company have received any government funding, particularly in connection with any COVID relief programs, it is critical to keep the following in mind:

Prevention. Most whistleblowers complain internally before going to an attorney to file suit. A strong HR and compliance program helps prevent FCA cases before they start. It also serves as compelling evidence your company is doing the right thing.

Investigation. If there is an allegation of wrongdoing, conducting a prompt investigation — even before the government reaches out— is essential. Doing so will put you in a position to understand what occurred, correct any errors, and prepare a response.

Avoid government intervention and attempt to convince the government to dismiss. Each year approximately 90% or more of recoveries come from cases brought by the government or in which the government intervened. It is therefore critical to attempt to convince the government not to take over a matter, or even to dismiss the case based on DOJ's guidance.

Attack the pleadings. Once the case is at issue, attempt to dismiss the case at the pleadings stage. Plaintiffs' counsel may try to get these cases to discovery, to leverage a settlement and impose crippling discovery costs. ■

James Zelenay Jr. is a partner in Gibson Dunn's Los Angeles office and practices in the Litigation Department. He has extensive experience in defending clients involved in white collar investigations, assisting clients in responding to government subpoenas, and in government civil fraud litigation.



Nick Hanna is a litigation partner in Gibson Dunn's Los Angeles office and co-chairs the firm's global White Collar Defense and Investigations Practice Group.



Sean Twomey is an associate at Gibson Dunn and focuses on complex commercial cases, appellate law, sports law, and health care compliance, enforcement, and litigation.

