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The Expanding Scope of False Claims Enforcement Activity

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▶Michael Vernick, government contracts partner with Akin Gump, discusses various aspects of the False Claims Act, including the potential for increased enforcement activity under the Biden administration, especially actions related to the CARES Act, and how companies and institutions can mitigate whistleblower and compliance related risks.

CCBJ: Your decision to join Akin Gump after a long career with Hogan Lovells was a momentous career move at what feels like a momentous time in your practice, particularly as the False Claims Act (FCA) seems poised to become an even more powerful civil enforcement tool in the government's arsenal. So, why Akin and why now?

Michael Vernick: I have nothing but good things to say about Hogan Lovells and my former colleagues, but the opportunity to join Akin Gump was one that was simply too exciting to pass up. As you said, much of my practice focuses on False Claims Act matters, specifically in the areas of education, life sciences and government procurement. Akin Gump has a topflight white collar and investigations practice, with incredible depth across the entire country. It's just an ideal platform for the work I do and the clients I support. Ultimately, what drew me to Akin Gump was a chance to join a team that can combine vast FCA experience with underlying regulatory expertise, particularly when it comes to higher education and government procurement.

Another key factor for me was that over the past couple of years I've been very active in matters related to allegations of foreign influence over U.S. government–sponsored research, and Akin Gump has a global reach, particularly in China where many of these cases are focused. Akin's global reach has really enhanced my ability to support university and research institute clients on cross-border investigations.

The Department of Justice's FCA recoveries dropped to $2.2 billion in 2020, the lowest level since 2008. Yet at the same time, new FCA cases increased from 786 new matters in 2019 to 922 new matters in 2020. Tell us about your practice in 2020 and how you navigated what must have been a very uncertain and stressful year. Did your approach to counseling clients change?

A large part of the reason that FCA cases have continued to increase is that we are seeing an ever greater number of whistleblower/qui tam cases being filed. In fact, regarding the stats you just mentioned, the Department of Justice (DOJ) announced that more than 670 of the FCA suits filed in 2020 were qui tam cases. As DOJ noted that's an average of more than a dozen whistleblower cases filed per week. So one of the things we did in 2020, given the significant increase in FCA cases, and whistleblower cases in particular, was to spend a lot of time working with clients on compliance programs, specifically helping them navigate potential whistleblower situations and reducing the risk of a case being filed.

Even so, sometimes organizations get sued and have a FCA case to manage. A critical part of FCA defense is the investigation phase of the matter during which DOJ decides whether it is going to intervene. In 2020, as we do generally, we worked very hard to persuade the Justice Department not to intervene in our clients' matters. Now, even if you succeed in persuading DOJ

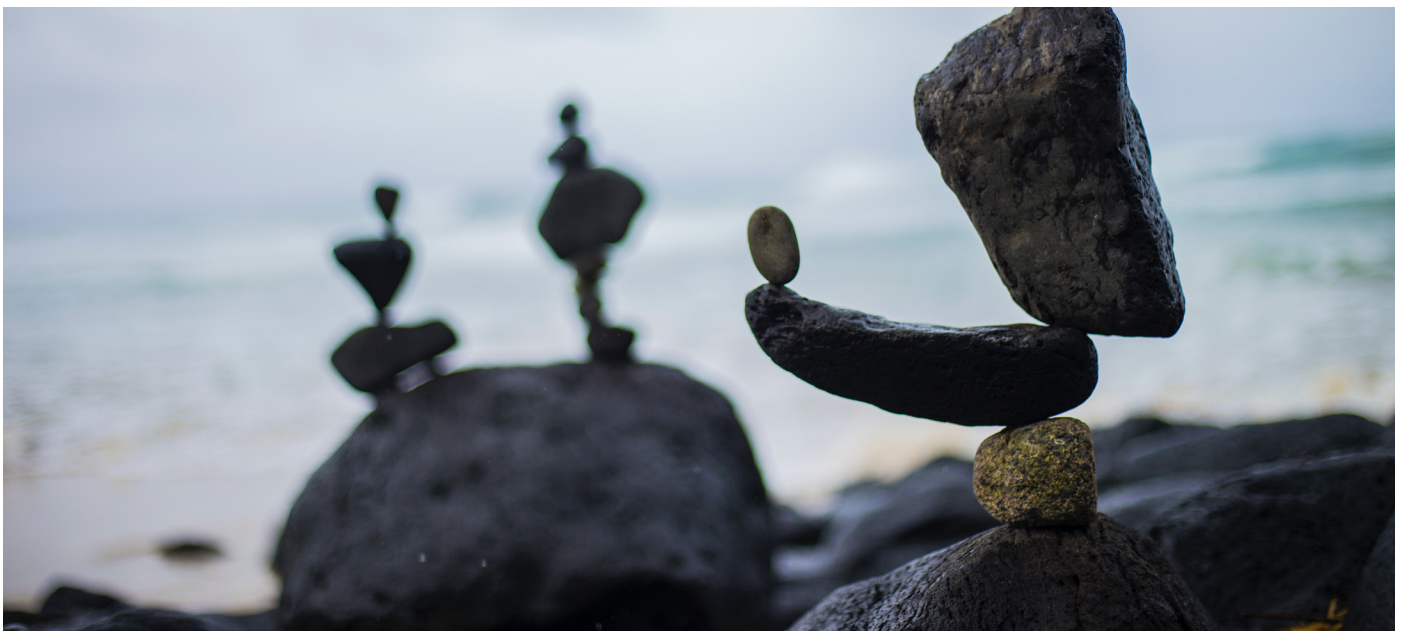
to decline the case, that doesn't necessarily mean that the matter is going to go away, because the relater can proceed without the Justice Department. But if you're able to persuade the DOJ not to intervene, it's generally a real step in the right direction.

Early signs suggest a resurgence of FCA and related activity in the offing. Tell us what you and your team at Akin are seeing in that area now, and what you expect to see as the Biden administration settles in.

I agree, I do think we're going to see increased FCA activity under the Biden administration. I think they've been pretty clear that they are going to aggressively pursue FCA cases and when that is combined with, among other factors, the very substantial government spending related to the pandemic I suspect we'll see more FCA activity. DOJ has also touted its use of data analytics to detect potential fraud in the healthcare space; it would not be surprising to see that approach applied more broadly.

In addition to the traditional areas of healthcare and government procurement, cybersecurity is a developing area of FCA risk. U.S. government contractors are becoming subject to an ever increasing number of cybersecurity requirements and certifications. As a result, cyber is an area that we've really been focusing on with our government contractor clients, in terms of helping them understand and navigate an ever evolving array of contractual obligations that drive FCA risk.

In addition to cybersecurity, I think we're also going to see an emphasis on FCA enforcement related to the pandemic, particularly with respect to some of the Coronavirus Aid, Relief, and Economic Security (CARES) Act money.



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Finally, educational and research institutions have been subjected to a steady stream of FCA cases over the last decade. It's likely we will continue to see robust enforcement activity there, whether it's related to CARES Act funding, or related to foreign influence, or more traditional charging issues around U.S. government grants and contracts.

In recent years, there seems to have been an expansion of the number of industries targeted for FCA enforcement, such as those arising from the opioid crisis and the individuals pursued. What does this mean for your practice? For example, are you representing more private equity clients caught up in FCA enforcement actions against their portfolio companies?

There does tend to be an industry-centric focus for FCA activity. We've talked about a few of them already – health care, life sciences, education and government procurement.

What many of these targeted areas have in common is a complex series of underlying statutes and regulations. Our team has really benefitted from our deep understanding of those requirements. I mentioned previously the cybersecurity requirements applicable to U.S. government contractors, which is a perfect example because the underlying regulatory requirements are rather complicated. And they are constantly evolving. So we've been working with clients across all sectors of the government contracting space to help them deal with the risk that comes with meeting those requirements and will be able to leverage our regulatory expertise in the event they get caught up in an FCA case.

Similarly, when we talk about the education industry, we continue to see active False Claims Act cases related to research funding. We've really been able to help our clients in that space by being able to bring to bear tremendous underlying knowledge about what can and can't be charged to government grants, administrative requirements, and scientific obligations.

Regarding private equity clients and their portfolio companies, I would say that given that they tend to touch so many different sectors, they face a unique type of FCA risk. We've found that PE clients can benefit not only from FCA experience when they do get sued but also from our ability to help them develop sound compliance programs that can be used to mitigate risk regardless of the sector in which their portfolio companies operate.

There has been quite a bit written about the U.S. Supreme Court's 2016 opinion in the Escobar case – Universal Health Services, Inc. v. United States ex. rel. Escobar – in which the court adopted the implied false certification theory of liability under the FCA. What has the impact of Escobar been on clients, and what do you expect from the circuit courts as the law continues to evolve?

Escobar was and remains a very significant False Claims Act case. While it did uphold the implied false certification theory of FCA liability, it also has some language in it that has been helpful to False Claims Act defendants.

For example, one element of the FCA is the materiality of the claim. Escobar explained that the FCA's materiality test is one that is "rigorous and demanding." It also includes some language explaining that if the government knew about allegedly problematic conduct and paid the claim anyway, that's an indication that any noncompliance wasn't material. So while Escobar did uphold the implied certification theory, it also provides defense counsel with some important arrows for their quiver.

When it comes to the circuit courts, not surprisingly, there are some inconsistencies in terms of how they apply Escobar. Those variances arise in a number of different and elements of the FCA, including materiality and the viability of a specific implied certification cause of action. It will be interesting to see if the Supreme Court steps in and provides some clarification for the lower courts on how to apply Escobar.

Given all of the government action arising from the global pandemic, particularly measures adopted in the CARES Act, it's easy to envision FCA enforcement activity related to relief efforts. What have you seen so far, and what do you expect to see in the next couple of years?

I do think we're going to see FCA activity related to the CARES Act. We've already seen some activity related to the Paycheck Protection Program (PPP), and we're likely going to see more in the future.

One interesting aspect of PPP that we'll see play out is whether either the DOJ or the relaters bar begin to

develop strategies that are more focused on lenders than borrowers, where they may be able to achieve greater recoveries by virtue of lenders having made large numbers of PPP loans.

More generally, the CARES Act was an incredibly broad statute that provided support to a variety of different sectors of the economy, and I don't think we're going to see FCA enforcement being limited to PPP. For example, the CARES Act made millions of dollars available to universities. Some of those funds were to help students, and some were made available to the institutions themselves. There was a fair amount of controversy about whether universities with particularly large endowments should be taking that CARES money. Some did, some didn't. Those that did accept the CARES Act funds had to make relatively broad certifications about what they were going to use the money for, what they were going to do in terms of keeping employees on board and avoiding layoffs, etc. Given the politically charged nature of the decision to accept those funds, along with the broad certifications, I wouldn't be surprised if to see some false claims activity there as well.

More than half of the FCA settlements and judgments reported by the government in 2020 arose from lawsuits under the qui tam provisions of the FCA. During the same period, the government paid out $309 million to individuals who exposed fraud and false claims by filing actions. Given the expansion of these suits and the government's very active encouragement of whistleblowers, how do you counsel clients to help assure that they do not become the headline of the next DOJ press release?

Mitigating whistleblower risk is something that we spend a lot of time working with clients on. We take great pride in our ability to help clients develop and implement effective compliance programs. We try to do that in a way that really focuses on identifying and removing barriers to compliance rather than just writing policies and procedures.

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What we have found over the years when it comes to trying to mitigate whistleblower risk is that it really is important to work with clients to identify those barriers to compliance. They could be anything. It could be an antiquated financial system that makes it difficult to bill accurately. It could be reporting lines that create challenges for employees and may make them feel uncomfortable in their ability to do their jobs. We work with clients and really dig in to help them identify those challenges to institutional compliance. It's a practical way to reduce FCA risk, because if those barriers to compliance are addressed it means the company or institution has removed some of the reasons why employees may opt to cut corners or behave in a noncompliant way, which in turn reduces their whistleblower risk. ■

Michael Vernick is a partner with Akin Gump. He leads the firm's government contracts group and focuses his practice on the higher education and health care and life sciences sectors. His FCA experience extends into all aspects of higher education and United States government research funding, contracts and grants. Reach him at mvernick@akingump.com.