

Federal Bar Association Qui Tam Conference

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Year in Review

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The Year in Review panel – now in its second year – aims to provide an overview of the critical developments in False Claims Act (FCA) case law and government policy over the previous year.

The FCA is responsible for returning approximately \$50 billion to the United States government since their 1986 Amendments. The unique nature of the FCA - particularly its *qui tam* provisions that allow private whistleblowers to stand in the shoes of the United States and reap a reward for bringing an action – requires regular analysis and clarification by United States courts. The Department of Justice also plays a critical role in setting policy relevant to FCA enforcement.

2018 was no different than previous years. Courts addressed both substantive and procedural aspects of the FCA in circuits across the country. Courts continued to analyze the meaning of the Supreme Court’s 2016 *Escobar* decision, as well as new developments in the elements of falsity, scienter, and damages. The Department of Justice also announced several significant new policy changes that our panelists will address.

I. Substantive Law

A. Falsity

1. United States ex rel. Polukoff v. St. Mark’s Hospital, 895 F.3d 730 (10th Cir. 2018)

a) “Medical judgment” can be false; fact that a statement is the speakers’ opinion does not disqualify it from forming the basis of FCA liability

2. United States ex rel. Berg v. Honeywell International, Inc., 740 Fed. App'x 535 (9th Cir. 2018)-
 - a) If information is revealed to government, even if ultimately incorrect, it is not false for FCA purposes
3. United States ex rel. Rose v. Stephens Institute, 909 F. 3d 1012 (9th Cir. 2018), amending and superseding 901 F.3d 1124 (9th Cir. 2018)
 - a) Concluding it was bound by prior Ninth Circuit decisions that appear to require *Escobar*'s two conditions to prove falsity unless and until en banc court interprets *Escobar* differently).

B. Scienter

1. United States ex rel. Streck v. Allergan, No. 17-1014, 2018 WL 3949031 (3d Cir. 2018)(defendant's interpretation of regulation was not objectively unreasonable)
2. United States ex rel. Harper v. Muskingum Watershed Conservancy District, 739 Fed. App'x 330 (6th Cir. 2018) (relators failed to adequately plead that defendant was aware of an obligation and that it had violated it)
3. United States ex rel. Berkowitz v. Automation Aids, Inc., 896 F.3d 834 (7th Cir. 2018) (failure to adequately plead that defendants acted with reckless disregard of the truth or falsity of the information provided to the government)

C. Materiality

1. United States ex rel. Rose v. Stephens Institute, 909 F. 3d 1012 (9th Cir. 2018), amending and superseding 901 F.3d 1124 (9th Cir. 2018) (reasonable trier of fact could find incentive compensation ban was material because payment conditioned on compliance, past government enforcement and substantial size of the payments)
2. United States ex rel. Prather v. Brookdale Senior Living Communities, Inc., 892 F.3d 822 (6th Cir. 2018) (Prather II) (designation of requirement as a condition of payment is a relevant factor, and requirement went to the heart of the bargain; no negative inference should be drawn from absence of allegations about government's past practice; government non intervention is not relevant to materiality)
3. United States ex rel. Rukch v. Sales Rehabilitation, 304 F.Supp.3d 1258 (M.D. Fla. 2018) (government leniency towards practices showed government did not view disputed conduct as material), *appeal pending*, No. 18-10500 (11th Cir.)

D. Damages

1. United States v. Nowak, 2018 WL 4205540 (N.D. Ill 2018)(damages equal to the entire amount the government paid where defendant's conduct obscured that it was not eligible to receive reimbursement at all) (reconciling *Rogan* and *Anchor Mortgage*).
2. United States ex rel. Landis v. Tailwind Sports Corp., 324 F.Supp.3d 67 (D.D.C. 2018)(holding that relator did not provide evidence to substantiate that negative consequences of agreement outweighed benefit to the government).

II. Procedural

A. 9(b)

1. United States ex rel. Silingo v. WellPoint, Inc., 904 F.3d 667 (9th Cir. 2018) (plaintiff need not plead representative examples; must provide reliable indicia leading to a strong inference that claims were submitted; need not distinguish the role of each defendant when all had the same role)
2. United States ex rel. Grant v. United Airlines, Inc., No. 17-2151 (4th Cir. 2019) (affirming dismissal for failure to allege specifics of false claims presented for payment)
3. Carrell v. AIDS Healthcare Foundation, Inc., 898 F.3d 1267 (11th Cir. 2018)(insufficient indicia of reliability that false claims were submitted)
4. United States ex rel. Vatan v. QTC Medical Services, Inc., 721 F3d. Appx. 662 (9th Cir. 2018)(relator not required to plead specifics of defendant's contract; required to allege facts of which relator reasonably has knowledge)

B. First to File

1. United States ex rel. Wood v. Allergan, Inc., 899 F.3d 163 (2d Cir. 2018) (cannot overcome first-to-file bar by amending complaint after first-filed complaint is dismissed)

C. Public Disclosure

1. United States ex rel. Silver v. Omnicare, Inc., 903 F.3d 78 (3d Cir. 2018)(public disclosure bar not triggered by reliance on public information that by itself would not have plausibly support inference that fraud was in fact occurring)

D. Statute of Limitations

1. United States ex rel. Hunt v. Cochise Consultancy, Inc., 887 F.3d 1081, (11th Cir.), cert granted, Cochise Consultancy Inc. v. United States ex rel. Hunt, 2018 WL 4385694 (U.S. 2018).(addressing whether tolling provision in 31 U.S.C. §3731 applies in nonintervened qui tam cases).

E. Dismissal

1. United States ex rel. Vaughn v. United Biologics, LLC, 907 F.3d 187 (11th Cir. 2018) (requirement that Attorney General and Court give written consent to relator's dismissal and provide reasons does not entitle defendant to a written explanation of reasons; "written" modifies consent).
2. United States ex rel. Thrower v. Academy Mortgage Corp., 2018 WL 4053484 (N.D. Cal. 2018)(denying government motion to dismiss where failed to submit evidence that it fully investigated relator's amended complaint)
3. United States ex. rel. Toomer v. TerraPower LLC, 2018 WL 4934070 (D. Idaho 2018)(granting motion to dismiss where government demonstrated valid government purpose and rational relationship between dismissal and that purpose)

III. Policy Developments

A. Granston Memo on DOJ authority to dismiss (2018)

1. Amicus Brief of the United States in Gilead Sciences, Inc. v. United States ex rel. Campie, No. 17-936 (S.Ct)(noting that if the case is remanded to district court the government will move to dismiss)

B. Brand Memo on Reliance on Sub-Regulatory Guidance (1/25/18)

1. DOJ Implementation: <https://www.justice.gov/jm/1-20000-limitation-use-guidance-documents-litigation>

C. Yates Memorandum on Individual Accountability (2015)

1. DOJ Revisions to Justice Manual 2018
<https://www.justice.gov/jm/jm-4-3000-compromising-and-closing#4-3.100>