



The False Claims Act: 2019 Takeaways and 2020 Trends

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About PilieroMazza

PilieroMazza – a business law firm – serves as a strategic partner to government contractors and commercial businesses from across the United States.

We deliver results for our clients by implementing legal and business solutions that take the client's best interests into consideration. Moreover, PilieroMazza's efficient operational structure and lean approach to staffing matters translates into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

PilieroMazza is privileged to represent clients in the following areas:

- Audits & Investigations
- Business & Corporate Law
- Cybersecurity & Data Privacy
- False Claims Act
- Government Contracts Law
- Mergers & Acquisitions
- Intellectual Property & Technology Rights
- Labor & Employment Law
- Litigation & Dispute Resolution
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Matthew Feinberg is an accomplished litigator with over a decade of experience in all aspects of state and federal civil and appellate litigation, in addition to alternative dispute resolution. His advocacy for corporate clients -- from local small businesses to publicly traded companies -- gives him a unique perspective on successful litigation strategies for achieving the best possible outcome for our clients.

Mr. Feinberg has significant first-chair trial and appellate experience over a wide range of practice areas, including labor and employment, wage and hour disputes, corporate defense litigation, class actions, shareholder direct and derivative litigation, securities fraud defense, government and private sector contracts, commercial transactions, restaurant and hospitality litigation, and appeals.

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Jackie Unger represents clients in a wide variety of government contracting and commercial litigation matters, in addition to general business issues. She represents clients in bid protests at the Government Accountability Office and the Court of Federal Claims, size and status protests before the Small Business Administration, and counseling clients on matters of regulatory compliance. Ms. Unger counsels clients on FAR and small business regulatory compliance issues and strategies for small and large businesses. She also assists in the pursuit of construction claims, including delays and differing site conditions.

What is the False Claims Act?

- The False Claims Act is the Government's primary vehicle for recovering public funds obtained or retained by fraud
 - A "Claim" is a request for money or property made to the Government
 - Some Common Types of False Claims:
 - Money obtained or retained as a result of a material false statement to the Government (e.g., a false invoice submitted to the Government)
 - False certification or representation accompanying a request for payment to the Government (e.g., a false certification of size or status on a small business set-aside contract)

Year-In-Review Statistics – FY19

- Total Monetary Recoveries: \$3.05 Billion (+5% over FY18)
 - Government-Initiated Matters: \$844 Million (+10% over FY18)
 - Qui Tam-Initiated Matters: \$2.21 Billion (+0.3% over FY18)
- Total Matters Initiated: 782 (+1.7% over FY18)
 - Government-Initiated Matters: 146 (+19% over FY18)
 - One of the highest annual totals since 1997
 - Qui Tam-Initiated Matters: 636 (-1.5% from FY18)
 - Lowest annual total since 2011

Year-In-Review Statistics – FY19

- KEY TAKEAWAYS:

- Large increase in Government-initiated matters and decrease in qui tam-initiated matters indicates Government is likely relying more on audits and investigations than whistleblowers
- Expect additional increases in FY20

- RECOMMENDATIONS:

- Take subpoenas, civil investigative demands, requests for information, and other inquiries from the Government, including Offices of Inspectors General very seriously
- Increase compliance efforts and internal audit procedures
- But, don't ignore employee complaints, notices, and reports

Industry-Specific Statistics – FY19

- Healthcare Industry Is Major Target
 - Total Recoveries: \$2.6 Billion (85% of total recoveries)
 - Total New Matters: 505 (65% of total new matters)
- Defense Industry is Emerging Target
 - Total Recoveries: \$252 Million (+135% over FY18)

Industry-Specific Statistics – FY19

■ KEY TAKEAWAYS:

- Companies working in the healthcare industry must be hyper-vigilant given significant annual FCA enforcement
- Companies operating in the defense industry must be cognizant of increased scrutiny by DOJ and OIG

■ RECOMMENDATIONS:

- Implement compliance programs, audit procedures
- Ensure strict compliance with cybersecurity requirements

Small Business Procurement Fraud

- FCA Does Not Publish Specific Annual Statistics Regarding Small Business Procurement Fraud in its Annual Report
- But . . .
 - FY19 Saw Largest Small Business Procurement Fraud Settlement in History: \$36 Million
 - FCA Lawyers are Seeing Increase in Small Business Program Investigations (HUBZone, Affiliation, etc.)

Small Business Procurement Fraud

- KEY TAKEAWAYS:

- Small business programs are fertile ground for FCA enforcement, and increased enforcement can be expected in FY20 and beyond

- RECOMMENDATIONS:

- Establish internal audit processes to ensure small business program compliance
- Stay up to date on size standards, yearly revenues, and employee size requirements

What else happened in FY19?

- Cybersecurity Cases Make Their Debut
- Supreme Court Clarifies Statute of Limitations
- DOJ Announces Formal Cooperation Credit Guidelines
- DOJ Exercises Authority Under Granston Memo

Cybersecurity

- 2 Landmark Cybersecurity False Claims Act Cases in 2019
 - *United States ex rel. Markus v. AeroJet RocketDyne Holdings, Inc.*
 - *United States ex rel. Glenn v. Cisco Systems, Inc.*
- 3 Key Takeaways:
 - FCA Liability Possible For Failure to Comply With Cybersecurity Requirements Imposed on Contractors
 - FCA Liability Possible For Failure to Ensure Government is Able to Comply with Cybersecurity Requirements Imposed on the Government
 - These Were the First; Certainly Not the Last

Statute of Limitations

- *Cochise Consultancy, Inc. v. United States ex rel. Hunt*
- Clarified statute of limitations for FCA cases brought by individuals where the government declines to intervene:
 - Civil actions must be brought either (1) within 6 years of when the alleged violation occurred; or (2) 3 years after the official of the United States charged with responsibility to act in the circumstances knew or should have known the relevant facts, but not more than 10 years after the violation
- Changes 4th Circuit law – Maryland, Virginia, North Carolina, South Carolina, West Virginia
- Likely will increase number of qui tam suits filed and increase scope of discovery in qui tam litigation

Cooperation Credits

- DOJ announced formal guidelines for giving companies credit for voluntarily disclosing potential FCA violations and cooperating with FCA investigation
 - Timely voluntary self-disclosure
 - Making available or turning over wrongdoers
 - Implementing remedial measures
 - To earn the maximum cooperation credit, defendant “generally should undertake a timely self-disclosure that includes identifying all individuals involved in or responsible for the misconduct, provide full cooperation with the government’s investigation, and take remedial steps designed to prevent and detect similar wrongdoing in the future.”

Granston Memo

- False Claims Act gives Government the Authority to Seek Dismissal of Qui Tam Litigation
- Granston Memo is Informal 2018 DOJ Guidance That Instructed DOJ Attorneys to Consider Broader Implications of Individual Cases When Determining Whether to Intervene
- DOJ Has Increased Use of Granston Memo and Has Had Success
- Expect DOJ to Continue to Seek Dismissal of Frivolous Qui Tam Litigation Moving Forward

DOJ's Procurement Collusion Strike Force

- Partnership among prosecutors from DOJ's Antitrust Division and 13 U.S. Attorneys' Offices, and investigators from FBI, DoD OIG, and other OIGs
- Purpose is to deter, detect, investigate, and prosecute antitrust crimes which undermine competition in government procurement
- Focused on criminal per se antitrust violations, **but**
 - All types of procurement fraud will be investigated
 - Not limited to domestic federal contracts
- Focusing on outreach and training within government and industry groups
- What should government contractors be doing?
 - Review procurement practices to protect against collusion
 - Ensure effective compliance program is in place

What about COVID-19?

- False Claims Act was created in 1863 in response to widespread fraud arising out of national crisis – the Civil War
- Historically, False Claims Act enforcement actions spike during and after periods of national crisis (Hurricane Katrina, 2008 Financial Crisis, for example)
- Expect massive Government spending to be combat COVID-19, leading to more contracting opportunities, rushed procurements, and more opportunity for an FCA violation
- March 16, 2020 – Attorney General announced that Justice Department will prioritize investigations and prosecutions related to COVID-19

What about COVID-19?

■ KEY TAKEAWAYS:

- Recipients of federal grant and bailout dollars
 - Qui Tam Plaintiffs and Government are expected to heavily scrutinize how grant and bailout funds are being spent
- Small Business Set-Aside Programs
 - During a public health crisis, companies are changing rapidly due to new hires, layoffs, etc., potentially impacting HUBZone qualification, small business employee standards, etc.

■ RECOMMENDATIONS:

- Implement compliance programs to ensure federal dollars are spent for the reasons they were distributed and to confirm contractors meet size and status requirements

Questions?



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