

DOJ Seems Gun-Shy With New FCA Penalty Firepower

By Jeff Overley

Law360 (August 21, 2019, 7:55 PM EDT) -- Three years after a dramatic doubling of potential False Claims Act penalties, many defense attorneys have yet to see their worst fears realized, and there are signs the U.S. Department of Justice may be wary of wielding its new punitive powers.

The pumped-up penalties that took effect in August 2016 sent chills down the spines of defense lawyers by taking the FCA's already severe liability risks and making them twice as tough. Under the revision, the anti-fraud law's longtime maximum penalty of \$11,000 for every instance of bogus billing essentially became its new minimum, and the new maximum penalty soared to more than \$21,500. Subsequent adjustments for inflation have raised those numbers further.

How False Claims Act Penalties Have Climbed

After several decades of stability, the FCA's per-claim penalties nearly doubled three years ago and have continued rising, spurring debate about litigation risks and potentially excessive fines.



Note: Figures reflect penalties enforced by the Department of Justice

Given that FCA cases — particularly those involving health care — often implicate thousands of billing claims, many observers fretted that the government could strong-arm companies into unreasonable settlements, since defendants would otherwise have to roll the dice on a trial with potentially existential stakes.

But a number of lawyers tell Law360 that the government hasn't been terribly aggressive with the steeper fines, which apply to violations as far back as November 2015.

"Surprisingly, it has been our experience that these concerns have not yet been realized," Timothy Wombles, a Florida-based associate at Nelson Mullins Broad and Cassel, told Law360. "We have not been faced with cases where the DOJ is seeking the maximum penalties when negotiating settlements for False Claims Act cases."

That doesn't mean the government isn't telling FCA targets that they could, in theory, be on the hook for a cataclysmic judgment. But the same attorneys say there's little indication that the government is actually using its great power irresponsibly.

"Does the increase in penalties affect settlement negotiations? Absolutely," Derek Adams, an FCA defense lawyer at Feldesman Tucker Leifer Fidell LLP, told Law360. "Is DOJ using it to coerce parties into unfair settlements? I certainly don't believe so."

The big boost to FCA penalties stems from a congressional budget deal in 2015. The DOJ in mid-2016 floated an interim final rule with details on the increase, and when it cemented that rule earlier this year, it made clear that government lawyers have wiggle room to pursue fewer and smaller penalties than the FCA allows.

"This rule does not require the department to seek the maximum number or amount of penalties that may be available in any particular case," the DOJ wrote in April.

The government added that it "believes that a fair result can be achieved" by considering the distinct circumstances of a given case, assessing the severity of any regulatory violations and crediting "any mitigating factors" that may exist.

"The comments speak to the enormous discretion which rests with DOJ to decide when, and how aggressively, to demand penalties," said Jacob T. Elberg, a Seton Hall University School of Law associate professor who previously handled FCA cases at the U.S. Attorney's Office for the District of New Jersey.

In a curious development, the DOJ has not yet adjusted the penalties for inflation in 2019 — an annual obligation that it carried out early in 2017 and 2018. The inaction is especially notable because at least one other agency with a role in investigating FCA cases — the Railroad Retirement Board — applied an inflation adjustment in February for 2019 and now lists FCA penalties that are stiffer than the ones listed by the DOJ.

"It's a bit of a mystery that DOJ has not yet issued a final rule increasing FCA penalties for 2019," Christian Sheehan, a senior associate at Arnold & Porter, told Law360. "While DOJ has historically been slower on the draw than some other agencies, it has not been this slow."

Speaking on condition of anonymity, a source with direct knowledge of the DOJ's rulemaking process told Law360, "We do not currently have any estimate as to when the next inflation adjustment will be published."

The FCA's penalties are distinct from the law's damages, which can be triple the amount of any actual loss suffered by taxpayers. The penalties are intended to have a deterrent effect, but the government nonetheless has some good reasons to show restraint.

Most prominently, it's possible that over-the-top penalties could run afoul of the Eighth Amendment's prohibition on "excessive fines." A handful of court rulings have suggested that penalties can exceed damages many times over but testing the boundaries too aggressively could spawn a constitutional ruling that diminishes the DOJ's penalty prerogatives.

"As they say in Texas, 'Pigs get fat, hogs get slaughtered,'" Nichols Liu LLP partner Bob Rhoad told Law360. "The government would prefer to get fat on big FCA settlements, rather than slaughtered by a precedential court ruling rendering the pursuit [or] imposition of excessive penalties unconstitutional."

The DOJ also doesn't necessarily gain much in settlement talks by threatening the stiffest possible penalties if a case goes to trial, given that many businesses already viewed the FCA's older, smaller penalties as mortal dangers.

"Even under the old penalty regime, the theoretical liability was already ruinous," said Sidley Austin LLP partner Scott D. Stein. "Putting someone into insolvency four to five times over doesn't really change the calculus."

Of course, not every FCA case is a potential corporate death sentence, nor does every case implicate an immense number of billing claims. Particularly in the defense industry, cases may involve lucrative contracts that aren't accompanied by the sky-high numbers of claims often seen in health care cases with myriad patients or prescriptions.

In those situations, it may well make sense for the government to chase every last dollar authorized by the FCA's penalty structure.

"You definitely can't say with a broad brush that the maximum is a meaningless number and the government could never get it," Elberg said. "In small-claim, large-dollar-value cases, there's definitely the potential that it could apply."

The fact that the heftier penalties only cover violations since November 2015 is also important. FCA cases usually aren't launched until several years after alleged misconduct started, and the cases remain under seal while the government investigates, so it may be too early to know with certainty how the new penalties will play out.

"There hasn't been much opportunity for [plaintiffs] to capitalize on the increases or for defendants to challenge them," Morgan Lewis & Bockius LLP partner Douglas Baruch told Law360. "We should expect that dynamic to change as time moves on."

--Editing by Jill Coffey.