

4 Industries Facing New Heat From The False Claims Act

By Dietrich Knauth

Law360, New York (April 09, 2013, 9:36 PM ET) -- When Lance Armstrong can be caught up in a False Claims Act suit for violating the terms of his U.S. Postal Servicesponsorship deal, attorneys are well-aware that the FCA can reach far beyond its traditional focus on defective military goods. But what industries will it strike next?

The False Claims Act has traditionally applied to defense contractors, and the U.S. Department of Justice has used the law to attack fraud in the health care industry. But as more and more private whistleblowers are drawn to the qui tam awards under the FCA, they have pursued aggressive arguments for fraud in other areas, pushing the law's reach into almost any industry where the government spends money.

"We're really beginning to see a sharp increase in the number of relator cases, and I think it is due in large part because of the expansion of the False Claims Act and the number of recent large settlements, which naturally attract publicity and attract new whistleblowers," said Andy Liu, co-chair of the False Claims Act Practice at Crowell & Moring LLP. "

Here are four areas that should look out for increased False Claims Act scrutiny:

Banking and Finance

The DOJ has already begun to turn the FCA against financial services companies that have committed mortgage and bank fraud. Banks made up two of the top 10 FCA settlements in 2012, and after Bank of America paid \$1 billion to end a lawsuit over alleged mortgage fraud, whistleblowers are sure to take notice, attorneys say.

"Anything from loan origination to loan servicing — banking is going to be absolutely red hot," said Ruben Guttman, a director at Grant & Eisenhofer PA.

The financial collapse of 2009 threw America's economy into a ditch, and banks' risky financial shenanigans have invited government payback and created many whistleblowers who are familiar with some of the potentially fraudulent practices involved in creating products like mortgage-backed securities, Guttman said.

"These cases are absolutely ripe for litigation," he said. "You can follow the chain of mortgage-backed securities from the origination to assignment to securitization, and you can find wrongdoing at every step. It's hard for the government to ignore it."

Ginny Gibson, a partner at Hogan & Lovells and a former federal prosecutor, said the DOJ could hit banks with a one-two punch after trotting out an older and somewhat neglected statute, the Financial Institutions Reform, Recovery and Enforcement Act of 1989, to complement its FCA allegations. FIRREA, enacted after the savings and loan crisis of the 1980s, provides penalties of up to \$1 million for making false statements to a federally insured financial institution.

"That combined arsenal will make those cases harder for defendants to challenge," Gibson said.

Stimulus Projects and Alternative Energy

While most of the \$787 billion included in the 2009 financial stimulus bill has already been spent, attorneys expect stimulus-related whistleblower suits to continue to come to light, especially because of the delay between the time a suit is filed and the time it is unsealed — typically after the DOJ decides whether or not to intervene.

"I don't think all the stimulus fund cases have seen the light of day yet," Gibson said.

Renewables and energy projects, which received a large portion of the stimulus funds, will be a likely target for whistleblowers, she said.

McKenna Long & Aldridge LLP partner Gail D. Zirkelbach said contractors must also be wary of potential FCA liability related to energy efficiency clauses in contracts for construction or other work, especially in light of some courts' acceptance of the theory of 'implied certification.' Those courts have found that no express statement of compliance must be made in order to trigger the FCA, and that the mere act of submitting a claim for payment constitutes an implied certification that the contractor has complied with contract terms and applicable regulations.

"With the move toward green contracting and all the subsidies and breaks that are being given for increased energy efficiency, reduced energy consumption, or using building materials that are recycled or reused or in some way green, there are potential liabilities," Zirkelbach said. "A lot of these green programs require contractors to make certifications about energy efficiencies ... and to the extent that you have companies that cut corners or arguably cut corners, you have a whole new area where people can be bring FCA cases."

Cloud Computing and Counterfeit Electronics

The government's push toward cloud computing is also ripe for FCA scrutiny. The government hopes to save money by consolidating agencies' servers and moving data storage to the cloud, but the certifications required — especially regarding the protection of government data — could be rife with pitfalls.

With cloud computing and other new data-storage technologies, companies may be eager to get into a new market and may fail to understand and comply with the requirements of the Federal Information Security Management Act or other regulations, Zirkelbach said. A data breach could thus be doubly dangerous for a cloud computing contractor, which would suffer all the liabilities normally associated with a breach and the additional threat of trebled damages under the FCA.

"The cloud isn't perfect. It's a lot more easily attackable than your noncloud-based computing," Zirkelbach said. "The potential to have a FISMA violation, the potential to lose data, is larger in that arena than [in] some of the more traditional computer based solutions."

In the tech sphere, contractors may also see more scrutiny of counterfeit electronic parts as the government tries to use contractors to weed out potentially hackable or defective parts from its systems, Liu said.

“Counterfeit parts have received increased attention in the last few years. I haven't seen any cases on it yet, but I suspect that in the next years we'll begin to see whistleblower cases in that area,” Liu said. “Separate and apart from the new rules for [U.S.] Department of Defense weapons systems, often you have certifications of compliance that the contractor is supplying components that meet certain standards.”

Health Care

While health care has historically been an obvious target for the DOJ, there is no sign that the government's enforcement appetite has waned.

The DOJ's persistence in health care has made it easier for whistleblowers to bring cases, Guttman said. Many health care fraud schemes, including off-label marketing, doctor kickbacks and inflated charges, have been well-established by earlier litigation and thus are easier for whistleblowers to spot.

Guttman expects the DOJ to keep health care fraud firmly in its sights, while shifting its focus towards holding more doctors accountable for schemes like off-label marketing.

“On health care, I'm betting on more individual liability,” he said. “You can keep pushing these settlements into the billions, but the way you really change corporate behavior is by holding individuals accountable.”

Hospitals could be another target for the DOJ, which has traditionally focused more of its attention on medical devices and pharmaceuticals, according to Gibson. Just last week, the DOJ reached a **\$25.5 million settlement** with Utah's largest health system, Intermountain Health Care Inc., over alleged violations of the False Claims Act and Stark Law through improper employment agreements with referring doctors.

"I think that is indicative of increased activity and interest. I don't think the government is as willing to give hospitals a pass as it has been in the past," Gibson said.

Medical device makers and pharmaceutical companies, the DOJ's traditional targets for health care fraud enforcement, will likely see continued pressure as well. While drug and medical device cases may have reached their saturation point in terms of the number of cases, litigation in that area will continue to grow more mature and more complex, Gibson said.

Drug companies are pushing back against the damages theories used in off-label marketing cases and have scored some victories that will bring out additional defenses for companies in the DOJ's sights, she said.

"I don't think there will be more cases, because there are already so many, but they will be more complex," Gibson said.

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