
Regulatory Oversight Podcast: 12 Days of Regulatory Insights - Day 4: A Focus on the FCA**Speakers: Amy Williams, Allison O'Neil, Dan Waltz****Date Aired: December 10, 2024****Daniel Waltz:**

Hello and welcome back to the special holiday edition of our *Regulatory Oversight* podcast, the "12 Days of Regulatory Insights." These 12 episodes are focused on key highlights and trends from this past year in various areas and designed to keep you informed and engaged during this festive season. I'm Dan Waltz, a member of our Regulatory Investigations Strategy and Enforcement Practice, and nationally recognized state attorney's general team. Before we get started today, I wanted to remind all our listeners to visit and subscribe to our blog at [RegulatoryOversight.com](https://www.regulatoryoversight.com) so you can stay up to date on developments and changes in the regulatory landscape.

Today, I'm joined by my colleague Amy Williams and Allison O'Neill, co-chair of Locke Lord's White Collar Defense & Investigations Practice Group, to discuss recent False Claims Act enforcement actions by regulators at both the federal and state levels. Amy is a partner in the firm's Regulatory Investigations Strategy and Enforcement Practice Group and focuses her practice on consumer financial services, government enforcement, and bankruptcy. She regularly represents banks and other financial institutions in connection with False Claims Act actions, internal investigations, subpoena responses, and government investigations. Allison's practice focuses on white collar investigations, internal investigations, employment matters, complex business litigation and crisis management. Her clients are companies and individuals facing False Claims Act investigations, FCPA investigations, and internal investigations related to employment matters and compliance. Amy and Allison, thank you for joining me today.

Allison O'Neill:

Thanks, Dan.

Amy Williams:

Thanks, Dan.

Daniel Waltz:

I'd like to start off with just a couple of questions for you both. Allison, can we start with you?

Allison O'Neill:

Sure.

Daniel Waltz:

What is the False Claims Act?

Allison O'Neill:

Well, Dan simply put, the False Claims Act imposes liability on persons and companies who defraud the government. It is the federal government's primary litigation tool in combating fraud.

Daniel Waltz:

And what are some key features of the False Claims Act?

Allison O'Neill:

There are a couple of key features and there's some interesting background and history on the False Claims Act that we have today. It was originally derived from the Middle Ages actually in England. In 1318, King Edward II offered a third of the recovery to any relator when they successfully sued government officials who were moonlighting as wine merchants. So it has kind of this fun historical background and it's where the idea of the common informant was derived from.

Daniel Waltz:

So who is the relator?

Allison O'Neill:

The relator comes from the qui tam provision, and this allows for individuals who aren't affiliated with the government called relators to file actions on behalf of the government. This is sort of commonly referred to as whistleblowers, particularly when the relator is employed by the organization accused in the suit. Dan, it's a big dollar industry as well.

Daniel Waltz:

So you just said big dollars. What kind of penalties can a contractor face under the FCA?

Allison O'Neill:

The damages are real. There are civil penalties per violation, plus three times the amount of damages the government sustains. They're the cost associated with bringing the action, and every year the federal government recovers billions with a B under this act. The real damage to the organization though might not be these penalties. It might be the fact that they faced debarment. There's the PR aspect of it, and as I alluded to before, there's real dollars involved for the whistleblower who may receive up to a third of the recovery as well.

Daniel Waltz:

All right, so Amy, Allison just told us about the False Claims Act. Do states have False Claims Act also?

Amy Williams:

Yes, Dan, they sure do. States began enacting their own FCAs in the late 1980s, and today over two thirds of them have a False Claims Act statute. Some of those statutes only apply to healthcare related claims, but most of them apply broadly just like the federal statute.

Daniel Waltz:

So I assume someone has to enforce the False Claims Act. Who does that at the state level?

Amy Williams:

So at the state level, a number of states also have relator provisions that allow the whistleblowers to bring suit, but the primary enforcement agency at most states is the Office of the Attorney General.

Daniel Waltz:

Are the state False Claims Acts any different than the federal False Claims Act?

Amy Williams:

Most of the state statutes are modeled off of the federal statute, but it's always important to check the language of the statute. For example, states are sometimes slow to amend their statutes to catch up with the federal statute if it gets amended. And there are also unique variations in some states in terms of what is covered by the statute and defenses.

Daniel Waltz:

I think I've heard about something like that. Specifically, California's version of the False Claims Act has a third party beneficiary provision that I've heard reference to. Can you tell me what that means?

Amy Williams:

Sure, and there are in fact about a half a dozen states including California and Massachusetts, that impose liability on the beneficiaries of even an inadvertent false claim or overpayment if that beneficiary fails to disclose the false claim to the state after finding out about it. In California, beneficiaries are required to disclose these discoveries within a reasonable time and in Massachusetts the provision is even stricter and it requires disclosure within 60 days of the date the problem is identified. This of course, serves up a good deal of uncertainty around what level of awareness might trigger a disclosure requirement, and in addition, it's worth noting that the concept of who is a beneficiary has been broadly construed by the courts. And in particular, parent companies, corporate affiliates and private equity investors are often the target of these beneficiary laws.

Daniel Waltz:

Interesting. Sounds like there are two enforcement levels here. We have the federal False Claims Act and the state False Claims Act. Is it possible for a contractor to be subject to double enforcement under both federal and state acts at the same time?

Amy Williams:

It certainly is. If a state statute has a relator and a qui tam provision and there are facts relating to both federal and state fraud, that can absolutely happen.

Allison O'Neill:

Amy, have you seen examples of a federal government stepping aside because they feel that the fraud is being addressed at the state level where a relator may lose out on the investigative tools of the federal government when they bring a dual action both under the state and federal statute?

Amy Williams:

Yeah. Sure, Allison. We've seen it happen. The relator then really is only working with the enforcers at the state level to try to investigate and pursue the action.

Daniel Waltz:

Well, thank you both for that insight and background. I'd like to now talk about some recent examples so we can understand how the False Claims Act are actually put into play. Allison, I'm sure you saw the \$950 million settlement with Raytheon in October of this year. That settlement resolved allegations of violations of the False Claims Act and the Foreign Corrupt Practices Act. I have a couple of questions for you about that settlement. First, practically about your practice, in addition to False Claims Act investigations, enforcement, and litigation, your practice involves the Foreign Corrupt Practices Act right?

Allison O'Neill:

Yes.

Daniel Waltz:

Can you tell us real quickly what the Foreign Corrupt Practices Act is?

Allison O'Neill:

Sure. The Foreign Corrupt Practices Act or as it's known FCPA, makes it unlawful for a person, a US person or company to offer pay or promise to pay money or really to do anything of a value to a foreign official for the purposes of obtaining or retaining business. The FCPA is one of the most far-reaching statutes that could apply to a US parent company in which it's foreign subsidiary is interacting with foreign officials abroad.

Daniel Waltz:

And is there any interplay or overlap between the FCPA and the FCA? Do they relate to one another at all?

Allison O'Neill:

They sure do, and I'll give you an example. If a government contractor bribes a foreign official, for example, and thereby commits an FCPA violation, a relator might file an FCA action. Those are tongue twisters once said back to back, but a relator could file an FCA action since any following financial gains that occur from the FCPA violation may now also be considered FCA violations.

Daniel Waltz:

That's interesting. I never considered the interplay between those, but that's exactly what happened in Raytheon, isn't it?

Allison O'Neill:

That's right.

Daniel Waltz:

Can you tell us a little bit about the Raytheon settlement and what lessons contractors can take from it?

Allison O'Neill:

Sure, and I think there's a lot of lessons in the FCA space that are coming out of Massachusetts. Amy and I were commenting on that earlier today. Raytheon will enter into a three-year deferred prosecution agreement, which is sometimes called a DPA in connection with information that was filed in a Massachusetts court charging Raytheon with two counts of major fraud against the United States. As part of the resolution, Raytheon admitted to engaging in two separate schemes to defraud the Department of Defense in connection with provision of the defense articles and services, including the Patriot Act.

Daniel Waltz:

That sounds like a pretty important settlement. What other federal FCA cases are on your radar?

Allison O'Neill:

Quite a few, Dan. There's a lot of talk in this space about whether it is the death of the qui tam action. There is a recent case out of Florida where Judge Kathryn Mizelle held that the qui tam provision of the FCA violates the appointment clause of the US Constitution because FCA relators who are acting as officers of the United States who require presidential appointment in order to carry out their duties. There was a lot of chatter at the time of that decision in

September of this year. In fact, we wrote a quick study about it on October 4th, 2024. Practitioners in this space continue to watch and see what will fall as a result of this and other cases.

Daniel Waltz:

Sounds like an important space to watch.

Allison O'Neill:

Sure is.

Daniel Waltz:

Amy, I want to turn to you. Can you discuss a recent example of state level False Claims Act enforcement?

Amy Williams:

This summer there was an interesting settlement in California that arose out of a qui tam lawsuit, and in that case, the defendant, Invitation Homes was a corporate landlord that rents out single family residential properties. The qui tam plaintiff was a venture fund and it had developed machine learning in order to scan public records and rental listings to discover or allege that the defendant had engaged in hundreds of unpermitted renovations of these homes. And the fact that they weren't permitted had cost cities and counties potentially millions of dollars. So the case involved twin themes, if you will, of both money that should have been paid to city and local government and wasn't, and a consumer protection aspect to it because of the allegation that failing to get permits led to potentially unsafe renovations of these homes. The case ultimately settled this summer for nearly \$20 million, and it is an interesting interaction between consumer protection and fraud allegations and also an instance in which in this case, more than 30 cities and counties joined a qui tam lawsuit in order to pursue it.

Daniel Waltz:

Well, thank you both, Amy, Allison very much for those interesting examples. I'm sure that leads to the follow-up question for our listeners. What's on the horizon as far as False Claims Act's enforcement is concerned? And specifically, do you think that uncertainty at the federal level of government will increase state level False Claims Act enforcement?

Allison O'Neill:

I do. I think we are already headed that way with Justice Thomas recently suggesting that the False Claim Act may be unconstitutional in his decision in the Polanski case, and I think our recent election results only had us further in that direction. States will be stepping up to fill what they feel is a void on fraud prosecutions under the Trump administration. We've seen this before where state AGs became incredibly active. We have a number of state AGs already making official statements and press statements indicating that they're prepared to work with Trump, but if need be, they will step up. Amy, I'm sure you've seen examples of this as well.

Amy Williams:

Sure, Allison. And I think what we're going to see is an amplification of a pattern that we've already seen before right? In this landscape, if the federal government is not being as active, the states are going to step in to fill what they perceive to be a void. There's also a consumer protection connection here. Linking this back to the California settlement that I mentioned, there is a pattern where the State Attorney General's offices will look for False Claims Act violations that also have a consumer aspect to them, and I think we can expect states to continue to pursue those sorts of investigations.

Allison O'Neill:

I couldn't agree more. I think we're seeing an increased use of the FCA in different contexts, and I think we'll continue to see that under this administration at the state level. Many people have sort of referred to the FCA as the RICO of 20 years ago.

Daniel Waltz:

So it sounds like things have changed significantly from the days of the False Claims Act and wine purchases, and it sounds like we're also then seeing an increase in the use of False Claims Act and use of False Claims Act in ways that are new. Amy, this question is for you. Given the changing landscape under False Claims Act enforcement, what are some areas that you expect to see as an increased area of focus under False Claims Act enforcement for 2025 and beyond?

Amy Williams:

Some of the areas that I think we can continue to see focus probably at both the state and the federal level would be in the healthcare space, the cybersecurity space, and also an increased interest in pursuing companies who are investing in companies who are committing False Claims Act violations.

Daniel Waltz:

When you talk about investors, are you talking about private equity?

Amy Williams:

That's exactly what I'm talking about, Dan. There has been an uptick in cases targeting private equity investors in contractors or in the healthcare space over alleged False Claims Act violations. Private equity firms are an attractive target in part due to the fact that they have deep pockets. Allison, what have you seen in this space?

Allison O'Neill:

Well, there is the Massachusetts South Bay case where I think it highlights some of the due diligence that private equity needs to be thinking about both pre and post acquisition.

Amy Williams:

That's right, and this brings into play the importance of those due diligence on the front end by investors and careful consideration has to be given to how involved in the operation of a portfolio company is an investor going to be, and are they paying attention to the compliance risks associated with an investment.

Daniel Waltz:

Amy and Allison, as we enter the final minutes of this podcast, I just wanted to check with you both and see if you have any final thoughts for the landscape of false claims enforcement in 2025 and moving forward.

Allison O'Neill:

Well, I think predictions are a difficult thing, Dan, but my prediction is that the FCA isn't going away. Enforcement priorities might shift post January 20th, but it'll be interesting to see how both state and federal governments continue to utilize the FCA in order to make recoveries. It is a billion-dollar industry for our federal government.

Amy Williams:

Allison, I agree with you. It's hard to predict where the focus of enforcement actions will come, but pursuing alleged fraud on the government has been a mainstay of enforcement agencies regardless of administrations over the years. So I think on both state and the federal level, we're going to see creative attempts to continue to use these statutes to pursue actions against defendants.

Daniel Waltz:

Amy and Allison, I think that brings this to an end for today's podcast, but I want to thank you again for joining me today. I know I enjoyed our conversation. I know our listeners enjoyed your valuable insights as well. I'm excited to see how the landscape under the False Claims Act litigation changes at both the state and federal levels and 2025 and moving forward. I want to thank our audience for tuning into this special holiday series. Tune in for our next episode as we continue our "12 Days of Regulatory Insights" series. Please make sure to subscribe to this podcast by Apple Podcast, Google Play, Stitcher, or whatever platform you use. We look forward to the next time.

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