

# False Claims Act Alert

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LITIGATION/CONTROVERSY

## False Claims Act: 2012 Year-In-Review

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## INTRODUCTION

The upward trends in False Claims Act (FCA) enforcement that we described in our 2011 Year in Review continued in 2012. In the fiscal year that ended on September 30, 2012, the U.S. Department of Justice (DOJ) secured \$4.9 billion in FCA settlements and civil judgments, beating the previous record by more than \$1.7 billion. Federal FCA recoveries since January 2009 add up to \$13.3 billion, which is the largest four-year total in DOJ history.<sup>1</sup> Large settlements came not only in the healthcare sector as in past years but also from financial institutions in areas such as mortgage fraud. *Qui tam* relators and the DOJ continued the push to expand FCA liability by arguing that claims become false if the company submitting them violated a regulatory or contract requirement connected with the goods or services that are being reimbursed by the government, since the claims carry a false “implied certification” of regulatory and contract compliance, thereby converting regulatory and contract terms into major punishments. There was also a high level of state FCA activity this year, including an Arkansas case in which a pharmaceutical company was ordered to pay \$1.19 billion for violating the state’s Medicaid FCA, as well as a number of states amending their FCAs to make them hew more closely to the federal statute.<sup>2</sup>

This ongoing growth means that companies doing business with the government must remain vigilant in their efforts to avoid liability. The boundaries of the FCA will continue to be tested. As recently as December 4, Attorney General Eric Holder and other DOJ top officials reiterated the Obama Administration’s ongoing commitment to vigorous enforcement of the FCA.<sup>3</sup> And, as we describe in our section on Trends in 2012 and Tips for 2013, whistleblower activity is at an all-time high.

Companies should pay attention to these developments and strengthen their internal compliance programs to resolve potential problems early and internally—before they lead to protracted litigation and potentially hefty damages awards and penalties. To help our clients stay ahead of the curve, WilmerHale provides updates about significant changes in FCA law, analyzing what these developments mean as a practical matter, and suggesting compliance tips to avoid potential liability. At the end of each year, we look back, identify major developments over the past 12 months, and translate these into compliance tips and other recommendations for the coming year.

Here is our False Claims Act 2012 Year-In-Review. First, we summarize the key provisions of the FCA that every company working with the government should know. Next, we discuss federal legislative and regulatory developments, and then noteworthy federal settlements, judgments, and complaints in key business sectors. From there, we analyze the most important federal FCA decisions of 2012. Then we turn to state and local developments. Finally, we synthesize all of this information to identify some key trends in the FCA arena and offer some practical recommendations for clients for 2013.

## OVERVIEW OF THE FALSE CLAIMS ACT

The False Claims Act was passed during the Civil War to combat fraud against the government. The Act imposes liability on any person or corporation who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment” to the federal government.<sup>4</sup> The FCA’s scope is remarkably broad. Any company that does business with the government—even indirectly—may face FCA damages and penalties.

Traditionally, a company violates the FCA when it knowingly and materially misrepresents the nature of a good or service that it provides to the government, and that misrepresentation—either in contractual language or other communications—leads to a government payment. A company also can be liable for conspiring to present a false claim to the government or causing a third party to submit a false claim.<sup>5</sup> In addition, companies can incur “reverse” false claims liability if they improperly conceal, avoid or decrease an obligation to pay the government.<sup>6</sup>

An FCA case can originate in two ways. First, the United States itself can bring a case. Second, a private litigant (called a “relator”) can bring an action on behalf of the United States under the FCA’s *qui tam* provision.<sup>7</sup> Relators can receive between 15 and 30 percent of any judgment or settlement in the government’s favor.<sup>8</sup> When a relator files a *qui tam* case, the case remains under seal while the DOJ investigates the claim. Following the investigation, the DOJ can intervene as a plaintiff, settle with the defendant, decline to intervene but allow the relator to pursue the case, or move to dismiss the case.<sup>9</sup>

FCA damages and penalties can be enormous. Standard damages are treble the loss suffered by the government. However, if the company voluntarily discloses a violation as described in the Act, damages are reduced from treble to double.<sup>10</sup> Not only do companies face treble damages, but they also face a civil penalty of \$5,500 to \$11,000 per “false claim”<sup>11</sup>—which can become numerous if, for example, companies submit regular invoices to the government for ongoing services. Due to the damages and penalties at stake, FCA claims are most commonly filed against companies that receive substantial and regular government payments, such as health care and defense companies.

In 2009, the Fraud Enforcement and Recovery Act (FERA) amended several FCA provisions, including: (1) expanding liability for “reverse” false claims by imposing liability for knowingly or recklessly retaining overpayments from the government, even in the absence of any false statement; (2) creating liability for claims presented to entities administering government funds; (3) permitting the government’s complaint to relate back to the filing of the relator’s complaint, which allows the DOJ to conduct longer investigations; and (4) expanding the anti-retaliation provisions to cover contractors and agents in addition to employees.<sup>12</sup>

The March 2010 healthcare reform legislation, the Patient Protection and Affordable Care Act (PPACA), also made important changes to the FCA, primarily by significantly narrowing the public-disclosure bar against relators’ *qui tam* actions. Because of the PPACA: (1) defendants can no longer use certain types of public sources (such as state and local administrative reports) to demonstrate that a relator’s claim was publicly disclosed prior to the complaint; (2) public disclosure is now an affirmative defense (rather than a jurisdictional bar) and dismissal is forbidden if the government opposes it; (3) the definition of “original source” allows the relator to have “independent knowledge that materially adds to the publicly disclosed allegations” (instead of “direct knowledge”); and (4) a company must report and return a Medicare or Medicaid overpayment within 60 days of discovery to avoid FCA liability.<sup>13</sup>

Also in 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act strengthened the FCA provisions prohibiting retaliation against whistleblowers, expanding protected conduct to include employees’ lawful efforts to investigate or stop FCA violations.<sup>14</sup>

## FEDERAL LEGISLATIVE AND REGULATORY UPDATE

- In a year of little bipartisan agreement and legislative activity, legislators came together to pass legislation expanding protection for federal whistleblowers. On November 27, President Obama signed the Whistleblower Protection Enhancement Act of 2012 into law, strengthening existing protections for federal workers who disclose evidence of fraud, abuse, or waste encountered in the course of their employment.<sup>15</sup> The new law clarifies the scope of protected disclosures, expands the class of persons protected, and alters the process of seeking relief for violations. Among the more significant provisions are: the Act extends protection beyond the first government worker to make a disclosure, protects employees who disclose evidence that scientific or technical data has been censored, and brings Transportation Security Administration employees under federal whistleblower protection. The Act creates Whistleblower Protection Ombudsmen in federal agencies and codifies a requirement that agencies notify their employees that their non-disclosure policies are superseded by whistleblower rights and other statutory rights. It also broadens the penalties for retaliation against whistleblowers, provides compensatory damages in administrative hearings, and expands appellate jurisdiction (for a two-year trial period) over whistleblower administrative actions beyond the United States Court of Appeals for the Federal Circuit.<sup>16</sup>
- Beyond this legislation, the FCA and healthcare fraud continued to generate discussion in Congress. A bipartisan group of six senators from the Senate Finance Committee wrote an open letter, dated May 2, soliciting ideas from the healthcare community on how best to combat Medicare and Medicaid fraud.<sup>17</sup> The American Hospital Association (AHA) response stated that the FCA is an “extremely punitive” tool that should not be relied upon to prevent mistakes.<sup>18</sup> Instead, the AHA suggested eliminating overlap in existing integrity oversight, limiting the access of the DOJ and government auditors to treatment decisions, and improving the process for returning overpayments that resulted from mistakes.

- In the regulatory realm, the U.S. Department of Health and Human Services (HHS) proposed two new regulations as it prepared to implement the PPACA. On February 16, HHS's Center for Medicare and Medicaid Service proposed a regulation governing overpayments.<sup>19</sup> The proposed rule would require that an overpayment be reported and returned within sixty days of discovery, or by the date a cost report is due, if that date is later. Under the PPACA, a person retaining an overpayment past this deadline faces FCA liability. The comment period has expired, but a final rule has not yet been enacted.
- On June 18, the HHS Office of Inspector General (OIG) issued a notice requesting comments on how to revise to the healthcare provider self-disclosure protocol, which has been in place since 1998 and was designed to expedite the investigation of potential fraud.<sup>20</sup> The OIG's notice sought comments on "how best to revise the Protocol to address relevant issues and to provide useful guidance to the healthcare industry." One significant comment coming from the American Bar Association's health law section and other organizations asked that any new rule clarify whether the self-disclosure would affect FCA liability.<sup>21</sup> The comment period has expired, but a final rule has not yet been enacted.

## LATEST DEVELOPMENTS IN FEDERAL SETTLEMENTS, JUDGMENTS, AND COMPLAINTS FILED

### Healthcare

#### *Healthcare Settlements*

- **GlaxoSmithKline LLC:** In July, GlaxoSmithKline LLC agreed to pay \$3 billion to resolve criminal and civil allegations that the company had unlawfully promoted certain prescription drugs, failed to report certain safety data to the FDA, and engaged in false price reporting practices in violation of the FCA. The civil settlement required GSK to pay \$2 billion to resolve civil liability under the FCA related to the off-label promotion of certain drugs and the payment of kickbacks to health care providers. As part of the settlement, GSK entered into a five-year Corporate Integrity Agreement (CIA) with the HHS OIG, under which GSK executives must forfeit up to three years of annual performance pay if found to be involved in significant misconduct or aware of unreported employee violations.<sup>22</sup>
- **Abbott Laboratories Inc.:** In May, Abbott reached a \$1.5 billion criminal and civil settlement with the federal government, 45 states, and the District of Columbia. Abbott agreed to pay FCA civil damages of \$800 million to resolve allegations that the company promoted Depakote for off-label uses.<sup>23</sup>
- **Amgen Inc.:** On December 19, Amgen agreed to pay \$762 million to resolve criminal and FCA liability arising from its sale and promotion of certain drugs. In the civil settlement, Amgen agreed to pay the U.S. and the states \$612 million to resolve allegations that Amgen caused false claims to be submitted to Medicare, Medicaid, and other government insurance programs arising out of: (1) the promotion of Aranesp, Enbrel, and Neulasta for off-label uses and doses that were not approved by the FDA and not properly reimbursable by federal insurance programs; (2) the offering of illegal kickbacks to influence health care providers to select its products for use; and (3) false price reporting practices involving several of its drugs.<sup>24</sup>
- **McKesson Corporation:** In April, McKesson Corporation, a large drug wholesaler, agreed to pay more than \$190 million in FCA civil damages to resolve allegations that it had inflated pricing information for a large number of prescription drugs and thereby had caused Medicaid to overpay for those drugs. The settlement only resolved the federal government's FCA claims, leaving state governments to negotiate with McKesson to resolve claims based on the states' shares of the Medicaid overpayments.<sup>25</sup>
- **WellCare Health Plans Inc.:** In April, WellCare Health Plans Inc., a managed care organization, agreed to pay \$137.5 million to the federal government and nine states to resolve four lawsuits alleging FCA violations. The lawsuits claimed that WellCare had falsely inflated claimed expenses in order to avoid returning money to Medicaid and related state programs, knowingly retained

overpayments, falsified data to misrepresent the medical conditions of patients and the treatments they received, and engaged in marketing abuses.<sup>26</sup>

- **Sanofi-Aventis:** On December 19, Sanofi-Aventis U.S. Inc. and Sanofi-Aventis U.S. LLC agreed to pay \$109 million to resolve allegations that they violated the FCA by giving physicians free units of Hyalgan, a knee injection, in violation of the Anti-Kickback Statute, to induce them to purchase and prescribe the product. The settlement also resolves allegations that the companies caused government programs to pay inflated amounts for Hyalgan and a competing product by submitting false average sales price reports for Hyalgan that failed to account for free units distributed contingent on Hyalgan purchases.<sup>27</sup>
- **Boehringer Ingelheim Pharmaceuticals, Inc.:** In October, Boehringer Ingelheim Pharmaceuticals, Inc. reached a \$95 million settlement to resolve allegations that it had improperly promoted the stroke-prevention drug, Aggrenox; the chronic obstructive pulmonary disease drugs, Atrovent and Combivent; and the hypertension drug, Micardis. The settlement resolved allegations that Boehringer promoted the drugs for off-label uses, promoted the use of Combivent and Atrovent at doses exceeding those covered by federal health care programs, made unsubstantiated claims about the efficacy of Aggrenox, and paid kickbacks to health care professionals to induce them to prescribe the drugs. The federal government's share of the settlement was more than \$78 million.<sup>28</sup>
- **Mylan, Inc.:** In February, generic drug manufacturer, Mylan, Inc., agreed to pay \$57 million to settle state and federal FCA claims related to drug pricing. The United States will receive \$22.2 million in the settlement although it had declined to intervene in the suit, which was brought by Ven-A-Care of the Florida Keys Inc., a specialty pharmacy and repeat relator. Ven-A-Care alleged that Mylan had defrauded the United States and California by falsely reporting inflated drug prices, thereby causing Medicaid to reimburse for the drugs at fraudulently high rates. The settlement concludes the Ven-A-Care multi-district litigation, in which the company collected more than \$400 million in whistleblower fees.<sup>29</sup>
- **DaVita, Inc.:** In July, DaVita, Inc., the largest operator of dialysis clinics in the United States, agreed to pay \$55 million to settle a *qui tam* lawsuit. The suit alleged that DaVita fraudulently billed the federal government for free supplies of Epogen, an anemia drug manufactured by Amgen. The United States declined to intervene in the suit.<sup>30</sup>
- **Healthpoint Ltd.:** Healthpoint Ltd. and DFB Pharmaceuticals agreed to pay the federal government and sixteen states up to \$48 million to resolve allegations that they caused false claims to be submitted to Medicare and Medicaid for Xenaderm, a drug that was ineligible for reimbursement by those programs. Healthpoint was alleged to have promoted Xenaderm, a prescription skin ointment, for treatment of nursing home patients' bed sores without obtaining FDA approval or conducting required clinical studies. Healthpoint allegedly misrepresented the regulatory status of Xenaderm in its quarterly reports to the government, thereby causing the government to pay false claims. The settlement requires Healthpoint and DFB to pay \$28 million, plus \$20 million if there is a change in ownership of Healthpoint or DFB in the next three years.<sup>31</sup>
- **Orthofix Inc. and Orthofix International NV:** In June, medical device manufacturer, Orthofix Inc., agreed to pay \$34 million to resolve various federal FCA allegations. The government alleged that Orthofix improperly waived patient co-payments, paid kickbacks to physicians and their staffs to induce them to use Orthofix products, caused the submission of falsified certificates of medical necessity, and failed to advise patients of their right to rent rather than buy Orthofix products.<sup>32</sup> Meanwhile, in November, Orthofix Inc.'s parent company, Orthofix International NV, agreed to pay \$30 million to settle allegations that its subsidiary, Blackstone Medical, Inc., paid kickbacks to spinal surgeons to induce them to implant Orthofix-manufactured products. The kickbacks were paid through compensated travel and entertainment, sham consulting agreements, sham royalty agreements, and sham research grants.<sup>33</sup>

## Healthcare Judgments

- **United States ex rel. Jamison v. McKesson Corp.:** In September, after a fourteen-day bench trial, the U.S. District Court for the Northern District of Mississippi entered judgment in favor of McKesson Corporation and Beverly Enterprises, Inc., along with several of their subsidiaries. The United States had alleged that a McKesson subsidiary had paid kickbacks to win a contract to provide Medicare billing services to the Beverly nursing home chain. The government had also claimed that Beverly sought to induce McKesson to offer its billing services at a loss to obtain another lucrative Beverly contract. The court found that the government failed to put on sufficient proof that McKesson's subsidiary violated the Anti-Kickback Statute by offering its services below fair market value, below actual costs, or at a discount in order to induce Beverly to award it the billing contract.<sup>34</sup>
- **United States ex rel. Polansky v. Pfizer, Inc.:** In November, the U.S. District Court for the Eastern District of New York entered judgment for Pfizer, Inc. in a *qui tam* suit that alleged the company had engaged in off-label marketing of cholesterol drug, Lipitor. The relator alleged that Pfizer had violated the FCA by marketing Lipitor for use in patients who did not fall within the federal National Cholesterol Education Program (NCEP) guidelines. The court held that the NCEP guidelines were advisory, not mandatory, and therefore Pfizer did not violate the FCA by marketing Lipitor to patients who fell outside these guidelines.<sup>35</sup>
- **United States ex rel. Ge v. Takeda Pharmaceutical Co.:** Also in November, the U.S. District Court for the District of Massachusetts entered judgment in favor of defendant, Takeda Pharmaceutical Co., in a *qui tam* suit alleging that the company had defrauded the federal government by underreporting complications linked to diabetes drug, Actos, and heartburn medication, Prevacid. The court held that the relator plausibly claimed that the drug company underreported the complications, but failed to show that this underreporting caused the federal and state governments to reimburse for false claims. The relator's factual allegations did not support her assertion that the FDA would have withdrawn approval for the drugs if the adverse complications had been reported.<sup>36</sup>

## Healthcare Complaint

- **Vascular Solutions Inc.:** In August, the U.S. District Court for the Western District of Texas unsealed a *qui tam* complaint against Vascular Solutions Inc. alleging that the company had defrauded federal and state government health programs of \$20 million by paying kickbacks and engaging in off-label promotion of its endovenous laser therapy products. According to the complaint, Vascular Solutions allegedly encouraged doctors to use its Vari-Lase product in unapproved procedures, told doctors how to maximize their billing for off-label uses, encouraged doctors to reuse products improperly, and improperly provided free supplies to doctors. The United States intervened in the suit in August.<sup>37</sup>

## Mortgage Lending

While the majority of FCA recoveries continue to come from the healthcare sector, government investigations of alleged fraud in the housing and mortgage industries have accounted for an unprecedented \$1.4 billion in settlements and judgments this past year. The trend of increased government scrutiny of the lending industry, including through FCA investigations and lawsuits, seems likely to continue.

On January 27, 2012, the DOJ announced the formation of the Residential Mortgage-Backed Securities (RMBS) Working Group, which is charged with investigating misconduct in the mortgage-backed securities market.<sup>38</sup> The RMBS Working Group has since launched a website that encourages whistleblowers to report any suspected fraud, noting that "substantial financial rewards may be available."<sup>39</sup> The DOJ has requested an additional \$55 million for fiscal year 2013 to combat financial and mortgage fraud.<sup>40</sup> Of this total, approximately \$17.6 million is earmarked for increasing civil enforcement efforts, with \$7 million going to the Civil Division in order "to continue to obtain recoveries from individuals

and companies who have defrauded the government by violating the terms of Federal contracts, grants, loans, and subsidies.”<sup>41</sup>

Below we briefly describe some of the most significant settlements and complaint announcements in the past year.

### *Mortgage Settlements*

- **Five Largest Mortgage Servicers:** In February, the DOJ, the Department of Housing and Urban Development (HUD), and 49 state attorneys general announced a \$25 billion settlement with the nation’s five largest mortgage servicers. The omnibus settlement resolved numerous claims, including claims under the FCA, related to the servicers’ origination, servicing and other lending practices.<sup>42</sup> On April 4, the U.S. District Court for the District of Columbia approved the settlement and entered consent judgments against each of the defendants.<sup>43</sup> Whistleblowers in these actions received approximately \$46.5 million as their share of the recoveries. The DOJ stated that this settlement “preserves extensive claims related to mortgage securitization activities” that will be the focus of the RMBS Working Group’s activities.<sup>44</sup>
- **Countrywide Financial Corporation:** Approximately \$1 billion of the February settlement resolved an investigation by the U.S. Attorney’s Office for the Eastern District of New York into the conduct of Countrywide Financial Corporation. This settlement resolved allegations that Countrywide approved loans insured by the Federal Housing Administration (FHA) for home buyers who did not meet FHA eligibility criteria and originated FHA-backed mortgage loans based upon inflated home appraisals. Half of the \$1 billion was paid directly to the FHA, while the remaining half of the settlement funded a loan-modification program for Countrywide borrowers with underwater mortgages.<sup>45</sup>
- **CitiMortgage, Inc.:** Also in February, the U.S. Attorney’s Office for the Southern District of New York filed and simultaneously settled a suit against CitiMortgage for \$160 million. The government contended that CitiMortgage failed to comply with the quality-control procedures of the FHA’s Direct Endorsement Lender (DEL) Program. The government’s complaint followed a *qui tam* lawsuit that had been filed against CitiMortgage in August 2011. The whistleblower received approximately \$31 million as her share of the government’s recovery.<sup>46</sup>
- **Flagstar Bancorp, Inc.:** Also in February, the U.S. Attorney’s Office for the Southern District of New York announced a \$132.8 million settlement with Flagstar, a DEL Program participant. The settlement resolved the government’s allegations that the bank had made false certifications to HUD, causing the FHA to accept loans for government insurance that were not eligible under the FHA’s standards.<sup>47</sup>
- **MortgageIT and Deutsche Bank AG:** In May, the U.S. Attorney’s Office for the Southern District of New York settled with another DEL Program participant, this time for more than \$202 million. The settlement resolved the government’s allegations that Deutsche Bank and its subsidiary submitted false certifications and failed to abide by DEL program requirements in connection with their origination of FHA-backed loans.<sup>48</sup>
- **Six Banks Regarding Loans to Veterans:** JP Morgan Chase settled, and another five banks have said that they will settle, a lawsuit alleging that they improperly charged borrowers who are veterans hidden fees on refinanced home loans backed by the Veterans Administration. The Northern District of Georgia case started as a *qui tam* suit and the DOJ intervened. JP Morgan Chase settled in March, reportedly for \$45 million, and the parties advised the court at a conference in September that the following other banks have agreed to settle, reportedly for a total of another \$116.7 million as follows: Countrywide Home Loans, Inc., \$45 million; PNC Bank, \$38 million; First Tennessee Bank, \$16 million; SunTrust Mortgage, \$10.2 million; and CitiMortgage, \$7.5 million. Wells Fargo and Mortgage Investors Corporation are also defendants in the case and have filed motions to dismiss.<sup>49</sup>

- **Regions Financial Corp.:** In September, Regions Financial Corp. settled, for an undisclosed amount, the relators' claims in a *qui tam* FCA suit, in which the government had intervened.<sup>50</sup> The suit alleged that the defendant had undervalued a promissory note, which was secured by a mortgage on an apartment complex in order to qualify for financial relief under the Troubled Asset Relief Program.<sup>51</sup>

### *Mortgage Complaints*

- **Allquest Home Mortgage Corp. (formerly Allied Home Mortgage Corp.):** On November 1, 2011, the U.S. Attorney's Office for the Southern District of New York announced it had intervened in a *qui tam* mortgage-fraud suit against Allquest, its chief executive officer, and its executive vice president, under the FCA and the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA). The complaint alleged, among other conduct, that Allquest operated "shadow" branch offices that were not approved by HUD but from which Allquest would originate and submit FHA loans, that when Allquest sought approval from HUD of new branches, it supplied fraudulent information, and that Allquest failed to adopt sufficient quality-control measures.<sup>52</sup> Following a transfer of venue in August of this year, the case remains pending in the Southern District of Texas.<sup>53</sup>
- **Wells Fargo & Co.:** In October, the U.S. Attorney's Office for the Southern District of New York and HUD announced a civil fraud suit pursuant to the FCA and FIRREA against Wells Fargo. The government alleges that Wells Fargo, a DEL lender, engaged in improper origination and underwriting practices with respect to FHA loans, failed to implement sufficient quality-control measures, and concealed improperly certified loans in violation of the self-reporting requirements of the DEL program.<sup>54</sup> On November 1, Wells Fargo moved for declaratory and injunctive relief to prevent the United States from pursuing its action on the basis that the February 2012 global mortgage settlement included a release of these claims.<sup>55</sup> The motion remains pending.
- **Bank of America Corp.:** In October, the U.S. Attorney's Office for the Southern District of New York intervened in a *qui tam* case against Bank of America seeking over \$1 billion in damages. The government alleges that the defendant engaged in a multi-year mortgage fraud scheme against Fannie Mae and Freddie Mac, in which the bank allegedly designed a program to process loans at high speed without adequate quality checkpoints.<sup>56</sup>

### Procurement and Other

#### *Procurement and Other Settlements*

- **W.W. Grainger Inc.:** On December 26, national hardware distributor W.W. Grainger Inc. agreed to pay the United States \$70 million to resolve allegations that it submitted false claims under contracts with the General Services Administration (GSA) and the U.S. Postal Services (USPS). Grainger contracted to sell hardware and other supplies to government customers through the GSA's Multiple Award Schedule program, which is a streamlined process for government procurement of commonly used commercial goods and services, and which requires contractors to disclose their commercial pricing policies and practices to assist the government in negotiating the contract. The settlement resolved allegations that Grainger did not provide the GSA with current, accurate, and complete information about its commercial sales practices, including discounts afforded to other customers. The settlement also resolved allegations that Grainger failed to provide the requisite "most-favored customer" pricing under two USPS contracts for sanitation and maintenance supplies.<sup>57</sup>
- **Harbert Corporation, et al:** In March, Harbert Corporation and several affiliated companies agreed to pay \$47 million to settle allegations that they submitted, and caused others to submit, false claims to the U.S. Agency for International Development. Harbert was part of a joint venture that bid on, and was ultimately awarded, a contract to build a sewer system in Egypt. The Government contended that Harbert entered into agreements with other potential bidders, who agreed either not to bid or to bid intentionally high in return for a payoff, to ensure that the joint venture would win the bid.<sup>58</sup>

- **ATK Launch Systems Inc.:** In April, ATK Launch Systems Inc. agreed to pay nearly \$37 million to resolve an FCA action arising out of a Department of Defense (DOD) contract for the purchase of illumination flares used by the Army and Air Force for operations in Iraq and Afghanistan. The Government alleged that ATK knowingly sold defective flares that could not satisfy a contractually specified test. The settlement included \$21 million in damages and nearly \$16 million of in-kind services to fix the flares remaining in the Government's inventory.<sup>59</sup>
- **Maersk Line Ltd.:** In January, the DOJ announced that Maersk Line Ltd. agreed to pay \$31.9 million to resolve FCA allegations that it knowingly overcharged the DOD to transport thousands of shipping containers in Afghanistan and Iraq. The Government asserted that Maersk inflated its invoices by allegedly billing in excess of the contractual rate, billing for delivery delays improperly attributed to the Government, billing for container GPS-tracking and security services that were either not provided or only partially provided, and failing to credit the Government for rebates received by Maersk's subcontractors. The relator who brought the *qui tam* case is a former industry insider, who will receive \$3.6 million from the suit. He was also the relator in a case against another shipping company, which resulted in a \$26.3 million settlement in 2009.<sup>60</sup>
- **Calnet Inc.:** In June, Calnet Inc. agreed to pay \$18.1 million to settle allegations that it submitted false claims to the DOD under three contracts for the provision of translation and linguist services at Guantanamo Bay and other DOD facilities. The Government alleged that Calnet submitted inflated claims for payment by overstating its provisional overhead rates on the contracts.<sup>61</sup>
- **Lockheed Martin Corporation:** In March, Lockheed Martin Corporation agreed to pay \$15.85 million to resolve allegations that it mischarged for perishable tooling equipment used under numerous Government contracts. The claims arose from allegations that a Lockheed subcontractor, Tools & Metals Inc. (TMI), inflated the costs of the tools sold to Lockheed for use on military aircraft. The Government alleged that Lockheed improperly passed these costs onto the Government. A former president of TMI received a seven-year prison sentence after pleading guilty to related criminal charges. The Government then brought FCA claims against Lockheed, claiming that Lockheed failed to properly oversee TMI's charging practices and mishandled information after learning about those practices.<sup>62</sup>
- **Technological Research and Development Authority:** In November, the Florida Technological Research and Development Authority (TRDA) agreed to pay \$15 million and wind down operations to resolve FCA allegations in connection with federal grants. TRDA was established by the Florida state legislature to own and operate incubator facilities intended to support small businesses by providing low-rent office space and business-development assistance. TRDA agreed with the Melbourne Airport Authority (MAA) to use federal grant funds to build an office building at the airport to be used as TRDA's headquarters and incubator facility. The Government alleged that the construction of the building was both outside the scope of the federal grants to TRDA and contrary to the terms of a grant awarded jointly to TRDA and MAA. MAA and the Melbourne International Airport agreed to pay \$4 million to resolve FCA claims against them based on the same events.<sup>63</sup>
- **Louis Dreyfus Energy Services:** In July, Louis Dreyfus Energy Services agreed to pay more than \$4 million to settle allegations that it violated the FCA by failing to pay amounts owed for natural gas that it had acquired from the Department of the Interior (DOI). Louis Dreyfus held a contract with DOI to purchase natural gas at a price associated with the delivery of the gas to a fixed point along a gas pipeline. After the contracts were executed, the company requested and received a discounted price. The Government alleged, however, that the discount should have applied only when constraints in the pipeline prevented Louis Dreyfus from transporting gas through the pipeline. The settlement also resolved related administrative claims by DOI's Office of Natural Resources Revenue.<sup>64</sup>
- **Gunnison Energy Corporation, SG Interests I Ltd., and SG Interests VII Ltd.:** In February, the United States announced its first-ever settlement of FCA and antitrust claims based on bid-rigging in Bureau of Land Management (BLM) mineral-rights lease auctions, settling claims with Gunnison Energy Corporation (GEC) and SG Interests I Ltd. and SG Interests VII Ltd. (jointly,

SGI) for \$550,000. The Government alleged that GEC and SGI agreed not to compete in bidding for four natural gas leases sold at auction by BLM, and that SGI made false statements to the Government and falsely certified that it was not engaged in collusive bidding.<sup>65</sup> For more information about the implications of this matter, see WilmerHale's Client Alert at <http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=10050>.

#### *Procurement and Other Dismissal*

- **United States ex rel. Hepburn v. Northrop Grumman Systems Corp., No. 11-302, 2012 WL 5877545 (M.D. Fla. Nov. 20, 2012):** Also in November, Northrop Grumman Systems Corporation obtained the dismissal of a *qui tam* suit related to the company's development of a laser-targeting device for the U.S. Navy. The U.S. District Court for the Middle District of Florida dismissed the case with prejudice, concluding that the relator's amended complaint failed to state a claim. The relator, a former Northrop Grumman engineer, alleged that the company impermissibly altered the testing protocol for the laser-targeting device and that the modified testing protocol concealed a defect. The court dismissed the case with prejudice upon Northrop Grumman's motion arguing that the contract did not impose the obligations the relator alleged and that the relator was essentially asking the court to imply terms into the contract. The relator also brought retaliation claims under the FCA and the Florida Whistleblower Act; Northrop Grumman successfully moved to compel arbitration of those claims pursuant to the company's dispute-resolution policy for employment-related claims. WilmerHale represented Northrop Grumman.

#### *Procurement and Other Complaints*

- **American Commercial College Inc.:** In February, the United States intervened in an FCA suit against American Commercial College Inc. (ACC) a company that operated for-profit colleges in Texas.<sup>66</sup> The suit alleges that ACC falsely certified compliance with the "90/10 Rule," a federal regulation that prohibits a for-profit college or university from obtaining more than 90% of its yearly tuition from federal Department of Education student aid.<sup>67</sup>
- **ATI Enterprises Inc.:** In August, the DOJ announced that it would intervene and file an amended complaint in an FCA suit against ATI Enterprises Inc., another company that operates private for-profit schools. The complaint alleged that, from 2007 through 2010, ATI knowingly misrepresented job placement statistics in order to maintain state licenses that were required for the company to be eligible to provide financial aid guaranteed by the U.S. Government. The complaint further alleged that ATI employees enrolled ineligible students, kept students enrolled who should have been dropped due to poor grades or attendance, and made misrepresentations to students regarding their future employability.<sup>68</sup>
- **The Gallup Organization:** Also in August, the DOJ announced that it would intervene in a *qui tam* suit against The Gallup Organization (Gallup), alleging that Gallup violated the FCA by making false claims for payment under contracts for polling services furnished to federal agencies. The relator alleged that Gallup gave the Government inflated estimates of the number of hours needed to perform its services. In its notice of intervention, the Government made new assertions that Gallup had improperly negotiated an employment contract with a Federal Emergency Management Agency (FEMA) official who oversaw Gallup performance while Gallup was seeking additional FEMA funding.<sup>69</sup>
- **CH2M Hill Hanford Group Inc.:** In September, the DOJ announced that it would intervene in a *qui tam* lawsuit against CH2M Hill Hanford Group Inc. for false claims submitted under a Department of Energy (DOE) contract. CH2M had contracted to manage and clean more than 170 underground storage tanks containing mixed radioactive and hazardous waste at DOE's Hanford Nuclear Site. The suit alleges that CH2M employees overstated their hours and that CH2M's management knowingly condoned this practice. Eight former CH2M employees, including the relator, pled guilty to felony charges stemming from the fraud. The Government indicated that it intends to file a motion to dismiss the relator from the action under a statute that bars recovery by a relator who is convicted of criminal conduct arising from his or her role in the FCA violation.<sup>70</sup>

- **Triple Canopy Inc.:** In October, the DOJ announced that it filed an FCA complaint against Triple Canopy Inc. arising out of a contract with the Joint Contracting Command in Iraq/Afghanistan to provide security services in Iraq. The Government alleged that Triple Canopy knowingly billed the Government for hundreds of foreign nationals hired as security guards, even though these guards could not meet required firearm proficiency tests.<sup>71</sup>
- **Kellogg, Brown & Root Services Inc. and First Kuwaiti Trading Company:** In November, the DOJ filed a complaint against Kellogg, Brown & Root Services Inc. (KBR) and First Kuwaiti Trading Company for submitting inflated claims for the delivery and installation of trailers to house troops in Iraq.<sup>72</sup> KBR was the Army's primary logistics-support contractor in Iraq. KBR awarded a subcontract to First Kuwaiti to provide over 2,000 trailers. First Kuwaiti presented two claims to KBR contending that Government-caused delays in providing military escorts for convoys into Iraq entitled the company to additional funds for increased costs. KBR allegedly agreed to pay First Kuwaiti \$48.8 million and passed the additional cost to the Government. The Government alleged that First Kuwaiti knowingly inflated its crane and truck costs and misrepresented the cause of its delay and that KBR knew the costs were improper when it charged the costs to the Government. In addition to the FCA charges, the Government included claims against KBR under the antifraud section of the Contract Disputes Act and for breach of contract.

## FEDERAL CASE LAW DEVELOPMENTS

### First Circuit – Retaliation: Burden-Shifting and Settlement Agreement as Protected Activity

#### ***Harrington v. Aggregate Industries Northeast Region, Inc.*, 668 F.3d 25 (1st Cir. 2012)**

The First Circuit held that the *McDonnell Douglas* burden-shifting framework developed for Title VII claims applies to claims brought under the FCA's anti-retaliation provision. This is the first published opinion by a federal appellate court to adopt the *McDonnell Douglas* framework in this context. The framework previously had been applied only in an unpublished Sixth Circuit opinion<sup>73</sup> and several district court opinions.

The *Harrington* court also held that an employee's execution of a settlement agreement as a relator in a prior *qui tam* action constitutes protected activity that falls within the scope of the FCA's anti-retaliation provision.

#### About the Case

The relator filed a *qui tam* action against his employer, Aggregate Industries, Inc., alleging that it provided substandard concrete materials for use on the "Big Dig" project in Boston. After the United States intervened, the case settled and the relator received a portion of the settlement proceeds. Several days after he signed the settlement agreement, the relator was fired by Aggregate Industries because of his refusal to take a drug test. Following his termination, the relator sued under the FCA's anti-retaliation provision, 31 U.S.C. § 3730(h). After discovery, the district court granted summary judgment in favor of Aggregate Industries, holding that the relator had failed to present evidence of a causal connection between the settlement of the *qui tam* action and his termination.

The First Circuit reversed, holding that the relator had presented sufficient evidence of retaliation to survive summary judgment. In so holding, the court of appeals ruled that, since the relator did not present direct evidence of retaliation, it was appropriate to analyze the sufficiency of the evidence by applying the burden-shifting framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this framework, a relator first must set forth a *prima facie* case of retaliation. The burden then shifts to the defendant to articulate a legitimate, non-retaliatory reason for the adverse employment action. If the defendant produces evidence of a legitimate reason for the action, the relator then assumes the further burden of proving that the proffered reason is a pretext to mask retaliation. Using this framework, the Court held that the relator had presented sufficient evidence to create an issue of fact as to whether the proffered reason for termination—the relator's refusal to take a drug test—was pretextual.

The First Circuit also rejected Aggregate Industries' argument that the relator's execution of a settlement agreement was not protected by the FCA's anti-retaliation provision. Aggregate Industries noted that the anti-retaliation provision only protects lawful acts done "in furtherance of" an FCA action, 31 U.S.C. § 3730(h)(1), and argued that the execution of a settlement agreement is not activity "in furtherance of" an FCA action, but rather is conduct that ends an FCA action. The First Circuit rejected this construction of the statute, holding that the "execution of the settlement agreement was surely conduct in furtherance of [the prior *qui tam*] action." 668 F.3d at 32.

#### Implications for Future False Claims Act Cases

The First Circuit's decision in *Harrington* helps clarify the burdens of proof and production borne by relators and defendants in claims of retaliation. Furthermore, the *Harrington* decision holds that the execution of settlement agreements constitutes protected conduct under the FCA. Thus, an employer may continue to face the risk of a retaliation suit if an adverse employment action is taken against a relator after a settlement agreement has been signed.

#### **Second Circuit – (1) Materiality; Damages for Non-Conforming Goods and Services; (2) Off-Label Marketing and First Amendment**

##### ***U.S. ex rel. Feldman v. van Gorp*, 697 F.3d 78 (2d Cir. 2012)**

The Second Circuit held that the test for determining the materiality of a misrepresentation is an objective one that does not require proof that a government official subjectively found a misrepresentation to be material.

The court of appeals also held that where the recipient of a government grant uses the funds in a manner other than as represented to the government, a court may calculate FCA damages as the full amount of the grant payments made by the government after material false statements were made without offsetting the value of goods or services the government received.

#### About the Case

A relator filed a *qui tam* action against Cornell University Medical College and a Cornell professor, alleging that Cornell's initial application and several renewal applications under the T32 grant program administered by the National Institutes of Health (the "NIH") contained material misrepresentations about the training program funded by the grant. The jury found the defendants liable for fraud in relation to three renewal applications.

The Second Circuit affirmed. The court of appeals ruled that the jury had sufficient evidence to conclude that the allegedly false statements were material to the government's decision to fund Cornell's fellowship program. The court held that "the test for materiality is an objective one. It does not require evidence that a program officer relied upon the specific falsehoods proven to have been false . . . in order for them to be material. The fact-finder must determine only whether the proven falsehoods have a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 697 F.3d at 95 (internal quotations omitted).

As to damages, the Second Circuit held that the district court did not err in calculating damages as the total amount paid by the government: "[W]here the government has provided funds for a specified good or service only to have [a] defendant substitute a non-conforming good or service, a court may . . . calculate damages to be the full amount of the grant payments made by the government after the material false statements were made." 697 F.3d at 80. The court held that this method of calculation is appropriate where the government receives no tangible benefit from the non-conforming goods or services. Such is the case where grant funds are used in a manner other than as represented to the government, because the government receives something qualitatively different than what was bargained for and "entirely [loses] its opportunity to award the grant money to a recipient who would have used the money as the government intended." 697 F.3d at 88.

## Implications for Future False Claims Act Cases

*Feldman* holds that the materiality of a misrepresentation should be judged against an objective standard and that the absence of a government decision-maker's subjective reliance on the misstatement is not dispositive. The Second Circuit's affirmation of damages equal to the entire amount paid by the government is difficult to square with the traditional FCA and contract damages calculation of the amount the government paid minus the value it received. The government is more frequently arguing that it received no value at all, and the *Feldman* court is the latest to accept this argument.<sup>74</sup>

### ***United States v. Caronia*, No. 09-5006-cr, 2012 WL 5992141 (2d Cir. Dec. 3, 2012)**

In a decision with potentially important implications for the pharmaceutical industry and for government regulation of commercial speech more generally, a divided Second Circuit panel vacated the conviction of a pharmaceutical sales representative for conspiracy to introduce a misbranded drug into interstate commerce in violation of the Food, Drug and Cosmetics Act (FDCA) on the ground that his conviction rested solely on speech promoting an FDA-approved prescription drug for off-label uses. While not an FCA decision, it clearly has ramifications for FCA cases alleging off-label marketing

#### About the Case

Under the FDCA, drugs must be approved by the FDA for specific uses before they can be sold in interstate commerce.<sup>75</sup> Once approved for any use, they may be prescribed by physicians for unapproved, or "off-label," uses as well.<sup>76</sup> The FDCA prohibits introducing drugs into interstate commerce that are "misbranded," which means, among other things, lacking directions for the drug's use which would enable a layperson to use the drug safely and for its intended uses.<sup>77</sup> In recent years, the government has reached major settlements with pharmaceutical companies based in part on allegations of off-label promotion.

According to the Second Circuit, the evidence showed that Caronia promoted a particular drug's use for unapproved indications and unapproved populations. 2012 WL 5992141, at \*\*4-5. The jury convicted him of conspiring to introduce a misbranded drug into interstate commerce. The district court rejected his contention that his conviction was inconsistent with the First Amendment.

The Second Circuit threw out Caronia's conviction. Applying the principle of constitutional avoidance, the majority (Judges Chin and Raggi) interpreted the FDCA as not criminalizing a pharmaceutical sales representative's truthful, non-misleading speech promoting an approved drug's off-label use because a contrary reading would raise serious questions about the FDCA's consistency with the First Amendment. Invoking *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), the majority applied heightened scrutiny to the government's reading of the FDCA because it imposed speech restrictions that were both content-based, distinguishing speech about FDA-approved uses of drugs from speech about off-label uses, and speaker-based, targeting one category of speakers, namely, pharmaceutical manufacturers, while allowing others to speak freely. 2012 WL 5992141, at \*\*10-13. The majority also concluded that a criminal prohibition of off-label promotion by pharmaceutical sales representatives could not be justified even under the "less rigorous intermediate" four-part test for commercial speech established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557 (1980). 2012 WL 5992141, at \*\*13-15. The majority assumed without deciding, though, that speech promoting off-label uses could be used as evidence of the drug's intended uses and thus as part of the evidence demonstrating that a defendant contributed to misbranding by selling a drug intended for an unapproved use for which there were no adequate directions on the label. *Id.* at \*8 & n.9, \*15. The majority left unclear where the dividing line lies between such a prosecution theory and the theory presented and rejected in *Caronia*. It concluded "simply that the government cannot prosecute pharmaceutical manufacturers and their representatives under the FDCA for speech promoting the lawful, off-label use of an FDA-approved drug." *Id.*

## Implications for Future False Claims Act Cases

The exact breadth of *Caronia*'s implications are uncertain because it left open the possibility that speech promoting off-label uses could still be used to support a misbranding charge, as evidence of a drug's

intended use for purposes not approved by the FDA. But, at a minimum, the decision establishes that truthful, non-misleading speech by sales representatives, standing alone, is not enough to support a misdemeanor misbranding prosecution in one important region of the country. The decision paves the way for First Amendment challenges to off-label marketing allegations in FCA cases, as well as other types of federal regulation of commercial speech.

For more information about the implications of this decision, see WilmerHale's Client Alert at <http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=10737418721>.

#### **Fourth Circuit – (1) Whether a State-Affiliated Entity Is a “Person”; (2) Application of the Excessive Fines Clause to FCA Civil Penalties**

##### ***Oberg v. Kentucky Higher Education Student Loan Corp.*, 681 F.3d 575 (4th Cir. 2012)**

The Fourth Circuit held that the arm-of-the-state analysis used in the Eleventh Amendment context provides the appropriate legal framework for determining whether a state-affiliated entity is a “person” subject to the FCA.

##### About the Case

The relator alleged that appellees—four corporate entities created by their respective states—defrauded the U.S. Department of Education by inflating the number of loan portfolios eligible for federal student loan interest subsidies. 681 F.3d at 577-78. The district court dismissed the claims against all four appellees based on state statutory provisions which, in its view, demonstrated each entity's status as a “state agency” and thus not a “person” subject to FCA liability. *Id.*

The Fourth Circuit vacated and remanded, stating that “the critical inquiry is whether appellees are truly subject to sufficient state control to render them a part of the state, and not a ‘person,’ for FCA purposes.” *Id.* at 579. The Court explained that, while the FCA requires statutory interpretation, there is a “virtual coincidence of scope” between the FCA inquiry and the Eleventh Amendment inquiry. *Id.* at 580. The Fourth Circuit held that its own four-factor Eleventh Amendment test would apply, and remanded the case for the district court to apply that analysis to each of the appellees. *Id.* at 581.<sup>78</sup>

##### Implications for Future False Claims Act Cases

The Fourth Circuit joined the Fifth, Ninth, and Tenth Circuits in holding that the test for determining personhood under the FCA is the same as the test for applying Eleventh Amendment sovereign immunity to state-affiliated entities.<sup>79</sup> In so holding, the Fourth Circuit endorsed a fact-sensitive inquiry to determine whether a state-affiliated entity is a proper defendant under the FCA.

##### ***United States ex rel. Bunk v. Birkart Globistics, GmbH & Co., et al.*, 2012 WL 488256 (E.D. Va. 2012)**

The district court held that the court could not impose any civil penalty in an FCA case, despite a jury finding of liability, because the statutory minimum penalty violated the Eighth Amendment's Excessive Fines Clause. The case is currently pending on appeal before the Fourth Circuit.

##### About the Case

The relator alleged that the defendants had violated the FCA by engaging in bid-rigging on contracts to transport military household goods. *Id.* at \*3. While the relator initially alleged damages, he did not seek to prove damages at trial. *Id.* The jury found the defendants liable for submitting 9,136 false invoices. *Id.*

In the district court's view, FCA precedent required treating each invoice as a separate false claim and imposing a civil penalty within the statutory range of \$5,500 to \$11,000 for each invoice. *Id.* at \*4. Since the defendants had submitted 9,136 invoices, the court found that it was obligated to assess a total civil penalty of at least \$50,248,000. *Id.*

The court then considered whether a \$50 million civil penalty would violate the Eighth Amendment's Excessive Fines Clause. The court determined that, in this case, the Government did not suffer any

economic harm, and the number of invoices alone was not reflective of the defendants' culpability. *Id.* at \*7. Given these considerations, the court held that the \$50 million civil penalty would be "grossly disproportionate" to any harm suffered by the Government. *Id.*

In post-trial briefing, the relator and the United States argued that the penalty could be reduced to \$24 million by counting only a portion of the invoices. *Id.* at \*14. The court, however, rejected this argument, both because, in its view, the \$24 million figure would "not result from any principled application of the FCA," and because a \$24 million civil penalty would still be constitutionally excessive. *Id.*

Finally, the court considered whether it had the discretion to impose a constitutionally permissible penalty, but it concluded that it lacked the discretion to do so. *Id.* at \*12. In the court's view, the FCA "does not grant the court authority to impose a total penalty below the amount derived" from the statute itself. *Id.*

The plaintiffs appealed to the Fourth Circuit and the appeal is pending. The Pharmaceutical Research and Manufacturers of America (PhRMA), represented by WilmerHale, submitted an *amicus* brief in support of defendants-appellees in order to emphasize that courts, through proper application of Eighth Amendment principles, should prevent the imposition of penalties that irrationally exceed the harm actually suffered by the government.

#### Implications for Future False Claims Act Cases

The *Bunk* decision is the latest contribution to the growing debate on whether and, if so, how, the Excessive Fines Clause applies to civil penalties under the FCA. The *Bunk* decision is particularly noteworthy in its rejection of the notion that an otherwise constitutionally excessive fine may be brought within constitutional bounds by reducing the number of false claims. The *Bunk* decision is one example of cases in which courts are increasingly troubled by the imposition of penalties that are grossly disproportionate to actual harm to the government.

#### **Fifth Circuit – Government Employees as Relators and as Original Sources**

##### ***Little v. Shell Exploration & Production Co.*, 690 F.3d 282 (5th Cir. 2012)**

The Fifth Circuit held that a federal government employee can sue under the *qui tam* provisions of the FCA. However, the Court also ruled that a federal employee will not qualify as an original source of publicly disclosed information if the employee's position involves auditing or investigating the misconduct at issue.

#### About the Case

Two auditors employed by the U.S. Interior Department's Minerals Management Service (MMS) brought an FCA action alleging that Shell took unauthorized deductions for expenses to gather and store oil. The district court granted summary judgment in favor of Shell, finding both that (1) the relators were not permitted to sue under the FCA because they were federal employees; and (2) the suit was barred by the FCA's public-disclosure bar.

The Fifth Circuit reversed and remanded. The Fifth Circuit joined the Tenth and Eleventh Circuits in holding that a federal employee may bring a *qui tam* action under the FCA.<sup>80</sup> The court found that nothing in the FCA's text suggests that Congress intended to exclude federal employees from the definition of a "person" in the provision authorizing *qui tam* actions, 31 U.S.C. § 3730(b)(1). The court contrasted § 3730(b)(1)'s unqualified language with the express bar on certain kinds of actions by military personnel in 31 U.S.C. § 3730(e). 690 F.3d at 287.

Having found that the relators were permitted to sue under the FCA, the Fifth Circuit remanded for the district court to determine whether the action was barred by the FCA's public-disclosure bar, 31 U.S.C. § 3730(e)(4). The Fifth Circuit ruled that, if the *qui tam* action was found to be based upon publicly disclosed information, the relators could not, as a matter of law, overcome the public-disclosure bar by demonstrating that they were original sources of that information. In order to qualify as an original source, a relator must have direct and independent knowledge of the allegations underlying the complaint and

must have voluntarily provided the information to the government. The Fifth Circuit joined the Ninth Circuit in holding that “the fact that a relator ‘was employed specifically to disclose fraud is sufficient to render his disclosures nonvoluntary.’” 690 F.3d, at 294 (citing *United States ex rel. Fine v. Chevron, U.S.A.*, 72 F.3d 740, 744 (9th Cir.1995) (*en banc*)).

#### Implications for Future False Claims Act Cases

The *Little* decision increases the number of circuits in which federal employees may bring *qui tam* actions under the FCA. This raises the possibility that information voluntarily disclosed to the government by the subject of an investigation may be used by government employees as the basis of *qui tam* actions.

#### **Sixth Circuit – (1) FERA Retroactivity; (2) Doctrine of Primary Jurisdiction; Davis-Bacon Act; (3) Scienter and Corporate Structure**

##### ***Sanders v. Allison Engine Company, Inc.*, Nos. 10-3818, 10-3821, 2012 WL 5373532 (6th Cir. Nov. 2, 2012) (unpub.)**

In an unpublished opinion, the Sixth Circuit joined the Second and Seventh Circuits in holding that the term “claim” in the retroactivity provision of the Fraud Enforcement and Recovery Act of 2009 (FERA) refers to a civil action or case, not a demand for payment. The Sixth Circuit also held that retroactive application of FERA’s amendment to the FCA’s presentment requirement does not violate the *Ex Post Facto* Clause of the U.S. Constitution.

#### About the Case

In *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 668-69 (2008), the Supreme Court held that FCA liability under 31 U.S.C. § 3729(a)(2) requires intent to present a false claim to the government. In response to the Supreme Court’s decision, Congress included in FERA an amendment of § 3729 removing reference to presentment to the government. Congress provided that the changes to the presentment requirement “shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act . . . that are pending on or after that date.” Pub. L. No. 111-21, 123 Stat. 1617 § 4(f)(1) (2009). After FERA’s enactment, the *Allison Engine* defendants filed a motion seeking to prohibit application of the amended § 3729. The district court granted the motion, finding that “claim” in the retroactivity provision means a demand for payment and that no claim in that sense was pending on June 7, 2008. The court held that a contrary reading would violate the Constitution’s *Ex Post Facto* Clause.

The Sixth Circuit reversed. It concluded that Congress intended “claim” in the retroactivity provision to mean a civil action or case. The Court reasoned that a demand for payment is never made “under the FCA,” as the retroactivity provision puts it; rather, “the FCA (and its liability standards) only apply after an allegedly fraudulent request for payment is made and a civil action pursuant to the FCA is filed.” 2012 WL 5373532, at \*6.

Having determined that FERA mandates application of the § 3729 amendment to all cases pending on June 7, 2008, the court analyzed whether such retroactive application would violate the *Ex Post Facto* Clause, which prohibits, among other things, punishing an act that was not punishable when committed. The court explained that the *Ex Post Facto* clause generally does not apply to civil sanctions such as those available under the FCA, unless there is clear proof that the statute “is so punitive either in purpose or effect as to negate the” classification of the statute as civil. *Id.* at \*9 (citing *Smith v. Doe*, 538 U.S. 84, 92 (2003)). While the court acknowledged that certain factors weigh in favor of finding the FCA to be punitive in purpose and effect, such factors were insufficient to overcome Congress’s denomination of the FCA as a civil remedial scheme.

#### Implications for Future False Claims Act Cases

The federal courts of appeals remain fairly evenly split as to the meaning of the word “claim” in FERA’s retroactivity provision, with the Second, Sixth, and Seventh Circuits finding the word to mean a civil case or action<sup>81</sup> and the Ninth and Eleventh Circuits finding the word to mean a demand for payment.<sup>82</sup>

### ***US ex rel. Wall v. Circle C Construction*, 697 F.3d 345 (6th Cir. 2012)**

The Sixth Circuit held that the doctrine of primary jurisdiction did not bar an FCA suit alleging Davis-Bacon Act violations.

#### About the Case

The district granted summary judgment against a government contractor for submitting payroll certifications that falsely attested that a sub-contractor's employees were paid the prevailing wages required by the Davis-Bacon Act. The district court rejected the defendant's argument that FCA liability for Davis-Bacon Act violations was prohibited by the doctrine of primary jurisdiction, which generally requires courts to refer a matter to an appropriate regulatory agency "whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." 697 F.3d, at 352 (citing *Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459, 466 (6th Cir.2010)).

The Sixth Circuit affirmed the lower court's decision, finding that the doctrine of primary jurisdiction did not bar an FCA suit alleging Davis-Bacon Act violations where: (1) the government was not aware of the conduct at issue until after the relator filed his complaint, and thus the government did not deliberately bypass administrative procedures; (2) determining whether the defendant acted with the requisite intent to defraud the government did not require technical, agency-specific expertise; and (3) the regulations at issue explicitly provide that the falsification of payroll certifications may subject the contractor to FCA liability. The Court held that while issues related to the classification of employees may be complex enough to require the expertise of the Department of Labor, no such expertise is needed when the only issue is whether a defendant misrepresented the amount of money paid to employees.

#### Implications for Future False Claims Act Cases

The *Wall* case indicates that while the doctrine of primary jurisdiction may provide a defense to some FCA claims, it is not a shield in every case in which a regulatory agency has some enforcement responsibility.

### ***U.S. ex rel. Williams v. Renal Care Group, Inc.*, 696 F.3d 518, 521 (6th Cir. 2012)**

The Sixth Circuit held that the creation of a subsidiary for the sole purpose of taking advantage of loopholes in certain Medicare regulations did not occasion FCA liability, where the defendant had determined in good faith that its conduct was permitted by the applicable regulations.

#### About the Case

Relators brought an action against Renal Care Group, Inc. (RCG), its subsidiary, Renal Care Group Supply Company (RCGSC), and the entities' successor. The United States ultimately intervened. At its core, the complaint alleged that RCG created RCGSC as a sham entity for the sole purpose of taking advantage of loopholes in Medicare regulations in order to increase reimbursement revenue. The district court granted summary judgment in favor of the United States, finding, among other things, that the defendants acted with reckless disregard of Medicare regulations.

The Sixth Circuit reversed and entered summary judgment in favor of the defendants. In a strongly worded opinion, the court held that the United States had failed to provide evidence that the defendants knowingly presented false claims to the government.

First, as to falsity, the court held that it was unclear whether there was anything improper about creating a subsidiary that was eligible to take advantage of higher Medicare reimbursements. The court cautioned that a business should not "be punished solely for seeking to maximize profits." 696 F.3d at 528. The court rejected the government's argument that RCG's subsidiary was an alter-ego of RCG, observing that "[t]he corporate form need not be disregarded when its adoption was meant to 'secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal

person.” *Id.* (citations omitted). The court concluded that the United States had failed to identify any legislative purpose violated by the creation of RCGSC.

Second, the court held that, even if the regulations ultimately prohibited using a wholly owned subsidiary to take advantage of higher Medicare payments, the United States had not shown that the defendants had acted with the requisite knowledge of their claims’ falsity. The United States alleged that “the regulations were clear that wholly-owned subsidiaries were ineligible” to take advantage of the higher Medicare payments and that RCG acted with “reckless disregard” of those regulations by having its subsidiary seek such payments. *Id.* at 530-31. However, the Sixth Circuit held that the evidence indicated that RCG consistently sought clarification of the regulations from counsel and the government, followed industry practice in trying to sort through ambiguous regulatory language, and was forthright with the government about RCGSC’s structure. The court found that to “deem such behavior ‘reckless disregard’ of controlling statutes and regulations imposes a burden on government contractors far higher than what Congress intended when it passed” the FCA. *Id.* at 531.

#### Implications for Future False Claims Act Cases

The approach taken in *Renal Care Group* sets an important precedent indicating that businesses should not incur FCA liability merely for using a particular corporate structure to maximize profits from government-administered programs, at least where the governing regulations are ambiguous. *Renal Care Group* also demonstrates the importance of taking and documenting proactive measures to ensure compliance with government regulations. Should a company later be subject to suit under the FCA, those efforts may be useful in demonstrating lack of scienter.

#### **Seventh Circuit – FCA Retaliation Claim; Corporate Knowledge**

##### ***Halasa v. ITT Educ. Servs., Inc.*, 690 F.3d 844 (7th Cir. 2012)**

The Seventh Circuit held that an employee’s FCA retaliation claim failed because the employee did not present any evidence that his protected conduct was connected to his employer’s termination decision. In reaching this holding, the court articulated a view of the doctrine of corporate constructive knowledge with potential implications outside the limited context of FCA retaliation suits.

#### About the Case

The relator filed a lawsuit against his former employer, ITT Educational Services, Inc., alleging that he was fired in violation of the FCA, 31 U.S.C. § 3730(h), “after identifying and reporting several irregularities in the way ITT was handling its federally subsidized loans and grants for students.” 690 F.3d at 846. The employer moved for summary judgment on various grounds, including that the employee failed to present evidence that he was fired because he engaged in protected conduct under the FCA, an essential element of an FCA retaliation claim.

The district court agreed with the employer, granting its motion for summary judgment, and the Seventh Circuit affirmed. As the Seventh Circuit stated, to survive a motion for summary judgment on an FCA retaliation claim, an employee must point to evidence showing (1) that he engaged in protected conduct; and (2) that he was fired “‘because of’” that conduct. *Id.* at 847 (quoting 31 U.S.C. § 3730(h)(1)). The Seventh Circuit assumed, without deciding, that the employee’s evidence was sufficient to permit a finding that he engaged in “efforts to stop” potential FCA violations, a type of protected conduct under the 2009 amendment to the FCA. *Id.* at 848. The Seventh Circuit concluded, however, that the employee’s retaliation claim failed because he presented no evidence to show that his protected conduct was connected to his employer’s termination decision. Specifically, there was no evidence in the record that the four executives involved in the decision to fire the employee had any knowledge of his protected FCA conduct.

The employee’s failure to present such evidence was fatal because “it is the decisionmakers’ knowledge that is crucial.” *Id.* The court of appeals rejected the employee’s request that it “impute to [the employer] (and its agents) any knowledge that [a lower-level supervisor] gained when [the employee] reported potential violations.” *Id.* That argument, the court noted, “seriously misunderstands the way liability rules

work in the corporate setting,” and would ultimately “defeat the specific statutory requirement that an employee’s termination be ‘because of’ her protected conduct.” *Id.* The court made clear that, apart from narrow exceptions not at issue (like the “cat’s paw” theory of liability), “companies are not liable under the False Claims Act for every scrap of information that someone in or outside the chain of responsibility might have.” *Id.*

#### Implications for Future False Claims Act Cases

The Seventh Circuit’s decision in *Halasa* rejected an argument that could have resulted in a significant expansion of FCA retaliation liability in the corporate setting and reaffirmed the general rule that a firing official’s knowledge of protected FCA conduct is crucial to establishing liability.

#### **Eighth Circuit – No FCA Liability Based on Reasonable Application of GAAP**

***U.S. ex rel. Raynor v. National Rural Utilities Co-op. Finance, Corp., et al.*, 690 F.3d 951 (8th Cir. 2012)**

The Eighth Circuit held that a defendant does not make a false claim for purposes of the FCA when he or she complies with a reasonable interpretation of Generally Accepted Accounting Principles (GAAP).

#### About the Case

The relator filed a *qui tam* action alleging that the National Rural Utilities Co-op. Finance Corp. (National Rural) and a number of its officers conspired to receive federal funds in violation of the FCA. One of the relator’s allegations was that National Rural should not have received federal funding because the financial statements it submitted to obtain these funds did not comply with GAAP.

The district court granted the defendants’ motion to dismiss, holding that the relator’s allegations failed to meet the heightened pleading requirements of Rule 9(b), and further, that the relator did not allege a false claim because he did not allege that the defendants’ accounting practices failed to comply with any reasonable application of GAAP. On appeal, the Eighth Circuit adopted and expanded on this reasoning.

With regard to the relator’s accounting-fraud allegations, the court emphasized that GAAP are merely a set of generalized principles, rather than hard-and-fast rules. The court explained that because GAAP permits a range of acceptable methods, a relator that fails to allege facts showing that the defendant’s accounting methods were beyond the scope of any reasonable application of GAAP fails to state a claim under the FCA. Further, the court noted that even if the relator had alleged violations of GAAP, these violations “alone [would] not demonstrate knowing fraud.” 690 F.3d at 957.

#### Implications for Future False Claims Act Cases

This decision provides strong support for defendants faced with FCA claims predicated on alleged GAAP non-compliance.

#### **Ninth Circuit – (1) FCA Liability for Cost Estimates in Bids for Government Contracts; Government Knowledge Defense; (2) Public-Disclosure Bar: What Constitutes Public Disclosure**

***United States ex rel. Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037 (9th Cir. 2012)**

The Ninth Circuit held that making false estimates or fraudulently underbidding on a government contract can result in FCA liability.

#### About the Case

The government solicited bids for work on a particular program on a cost-reimbursement-plus-fee basis. *Id.* at 1041. The contract was awarded on the basis of “best value,” which took factors other than cost into account. *Id.* at 1042. After a competitive bid process, the government selected Lockheed Martin’s amended proposal, which the contractor had reduced from its initial proposal to present its best and final

offer. *Id.* at 1042. In its acceptance memorandum, the government noted that although the defendant's final proposal was unrealistically low, it thought that the proposal offered the best overall value, even knowing that there were risks of cost growth beyond the estimate. *Id.* at 1042.

In his *qui tam* complaint, the relator, a Lockheed Martin engineer, made several allegations of fraud under the FCA, including that Lockheed Martin knowingly underbid the contract, utilized freeware that did not convey intellectual property rights, and employed improper testing procedures. *Id.* at 1041. In support of these claims, the relator offered evidence purportedly showing that the defendant had manipulated its bid by artificially deflating expected costs, knowing that costs would exceed the estimates. *Id.* at 1042. The relator also alleged that he was involuntarily terminated after investigating the alleged fraud, which he argued violated the retaliation provisions of the FCA. *Id.* at 1041. The case was initially filed in federal court in Maryland, but it was later transferred to California based on *forum non conveniens*. *Id.* at 1044. The transferee district court granted summary judgment in favor of the defendant on all claims. *Id.* at 1044.

In addressing the FCA claim based on the allegedly false estimates, the Ninth Circuit adopted a potentially broad fraudulent-inducement theory. Rejecting the defendant's argument that bids are inherently subjective, the court held that knowingly submitting false estimates can be a source of FCA liability. *Id.* at 1049. The court relied heavily upon the Supreme Court's decision in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), in which the Court held that contractors were liable under the FCA for obtaining contracts through collusive bidding based on fraudulent inducement. *Hooper*, 688 F.3d at 1048. The court also looked to decisions from the First and Fourth Circuits, which had held that false estimates, even when based on opinions, can be the basis for FCA liability.

Applying this law to the facts, the Ninth Circuit held the evidence offered by the relator was sufficient to create a disputed issue of material fact as to whether the defendant's bid was knowingly or recklessly based on a false estimate of costs. In particular, the court found persuasive evidence indicating that the defendant had instructed employees to decrease costs in the bid without regard to the actual expected costs of performing the work. Thus, the court reversed the district court and remanded this FCA claim for trial. *Id.* at 1050.

Addressing the other alleged FCA violations, the court held that the evidence supporting the claims of fraudulent use of freeware and defective testing procedures was insufficient to survive summary judgment because the government had knowledge of and had approved the conduct. *Id.* at 1050-51. Although careful to note that the government-knowledge defense is not an automatic bar to FCA claims, the court held that the government's knowledge of the conduct here showed that the defendant did not knowingly submit a false claim. *Id.* at 1051.

Finally, the court also held that the longer statute of limitations from Maryland, the transferor jurisdiction, would apply to the relator's FCA retaliation claim. *Id.* at 1045-46. In *Van Dusen v. Barrack*, the Supreme Court instructed in diversity cases after a transfer pursuant to 28 U.S.C. § 1404(a) for *forum non conveniens*, the transferee district court should apply the same substantive law that the transferor district court would have applied had the case not been moved. 376 U.S. 612, 639 (1964). The application of *Van Dusen* to federal causes of action that direct courts to adopt the most closely analogous state statute of limitations, such as the FCA, is an issue over which circuits have diverged. In this case, the Ninth Circuit joined the Fifth, Seventh, and Tenth Circuits in holding that where a federal cause of action is transferred for *forum non conveniens* the transferee district court must apply the statute of limitations that would have applied in the transferor district. *Hooper*, 688 F.3d at 1046. Thus, here, Maryland's longer statute of limitations applied, and the court reversed the district court's dismissal of this claim. *Id.* at 1046.

#### Implications for Future False Claims Act Cases

Understanding the implications of this case is important for any company that regularly bids on government contracts. The decision is the most recent in a growing line of cases recognizing the broad scope of fraudulent-inducement claims. Although building on existing case law, *Hooper* is a powerful reminder that contractors should be mindful of potential FCA exposure when submitting estimates of prospective costs in bidding for government contracts.

This decision does not, however, present all bad news for defendants. The case reinforces the vitality of the government knowledge defense by holding that full disclosure and approval of planned conduct within the scope of a contract should normally defeat an FCA claim. Thus, in this regard, the case provides a blueprint for companies who are proactively trying to avoid protracted FCA litigation.

***Berg v. Honeywell Int'l Inc.*, No. 11-35001, 2012 U.S. App. LEXIS 25897 (9th Cir. Dec. 19, 2012) (unpub.)**

In an unpublished decision, the Ninth Circuit held that the FCA's public-disclosure bar did not bar the filing of a *qui tam* action where the factual basis of the suit was published in a government report that had not been disclosed to the public.

About the Case

The Relators filed a *qui tam* action alleging that Honeywell International Inc. intentionally miscalculated energy baselines to obtain additional payments under the energy-savings incentives in its 1997 Energy Savings Performance Contract (ESPC) with the U.S. Army for the installation of certain systems on military bases. *United States of America ex rel. Berg v. Honeywell Int'l, Inc.*, No. 07-cv-00215, slip op. at 2 (D. Alaska Dec. 20, 2010). In 2003, the United States Army Audit Agency (AAA) issued internal reports concluding that Honeywell overstated the baseline energy costs in the contract. *Id.* at 3. In 2005, the Government Accountability Office (GAO) published a similar report, which generally discussed problems in ESPCs, concluding that many contractors were inaccurately calculating baseline costs. *Id.* at 4. The district court applied the FCA's public-disclosure bar in effect at the time (*i.e.*, prior to the 2010 amendments) and dismissed the action, reasoning that it did not have subject matter jurisdiction because the AAA and GAO reports were publicly disclosed prior to the filing of the relators' suit and contained the same information as alleged in the complaint.

The Ninth Circuit reversed, holding that publication of the AAA and GAO reports did not constitute a public disclosure. *Honeywell*, 2012 U.S. App. LEXIS 25897, at \*2-5. As to the AAA reports, although they were available to the public and could have been obtained through a Freedom of Information Act (FOIA) request, no member of the public actually requested the reports prior to the filing of the suit. *Id.*, at \*3-5. The court relied upon its previous decision in *United States ex re. Schumer v. Hughes Aircraft Co.*, stating that “[i]n the FOIA context, information cannot be deemed disclosed until a member of the public requests the information and *receives it* from the government . . . . Only then is the information *actually*, rather than *theoretically* or *potentially*, available to the public.” *Id.*, at \*3 (quoting *Schumer*, 63 F.3d 1512, 1520 (9th Cir. 1995)). This approach is in line with other courts, as several other circuits have also held that information that is potentially available to the public, but not actually disclosed, does not constitute a public disclosure.<sup>83</sup>

The Ninth Circuit also held that the AAA reports were not publicly disclosed when the government provided them to EMP2, a private company hired to audit ESPC contracts. *Honeywell*, 2012 U.S. App. LEXIS 25897, at \*4-5. The court again relied on *Schumer*, which distinguished a public disclosure from “the release of information within a private sphere.” *Id.*, at \*4 (quoting *Schumer*, 63 F.3d at 1520). The court held that because EMP2 was acting on behalf of the government and had “an incentive to keep confidential the information learned during the audit,” the disclosure of the AAA reports to EMP2 was not a public disclosure. *Honeywell*, 2012 U.S. App. LEXIS 25897, at \*4-5.<sup>84</sup>

The court held that the GAO report was not a public disclosure because it did specifically name contractors or locations, *id.*, at \*5, but contained only generalized information on conduct similar to that alleged in the suit. Therefore, it did not contain sufficient information to allow the government to pursue an investigation against the defendants. *Id.*, at \*5 (citing *United States v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1019 (9th Cir. 1999)).

Implications for Future False Claims Act Cases

The *Honeywell* decision is only the most recent appellate case to touch upon one of the most hotly contested areas of FCA law: the relationship between FOIA requests and the public-disclosure bar of the FCA. This decision is relatively narrow though, and it closely follows previous Ninth Circuit decisions

setting out the distinction between information that is actually available versus potentially available to the public.

### **Tenth Circuit – Retaliatory Discharge**

#### ***McBride v. Peak Wellness Ctr., Inc.*, 688 F.3d 698 (10th Cir. 2012)**

In order to establish a retaliatory discharge claim, a whistleblower must show that clear notice of an intention to bring or assist in an FCA action was provided to the employer prior to the alleged retaliatory act.

#### **About the Case**

A business manager brought a retaliatory discharge claim against her former employer alleging, among other things, that she was discharged because she was considering bringing an FCA suit based on potential regulatory violations. The business manager's job responsibilities included monitoring the use of federal funds and coordinating periodic audits.

In affirming summary judgment for the employer, the Tenth Circuit held that "in order to overcome the presumption that they are merely acting in accordance with their employment obligations" an employee must show that the employer was on notice that the former employee was either (1) taking action in furtherance of an FCA lawsuit or (2) assisting in an FCA action brought by the government. 688 F.3d at 704 (citation omitted).

#### **Implications for Future False Claims Act Cases**

The Tenth Circuit's decision strengthens a company's ability to defend a retaliatory discharge claim by a putative whistleblower: an employer must be on notice of a threat to bring or assist in an FCA action prior to the supposed retaliatory act.

### **D.C. Circuit – (1) Public-Disclosure Bar; (2) Fairness Hearings Before Settlement**

#### ***United States ex rel. Davis v. District of Columbia*, 679 F.3d 832 (D.C. Cir. 2012)**

Under the statutory language prior to the 2010 FCA amendments, the DC Circuit held that the public-disclosure bar does not prevent a relator from bringing suit where the allegations were contained in a public auditor report if the relator is an "original source" with direct and independent knowledge of the allegations.

#### **About the Case**

The relator alleged that the DC school system failed to maintain supporting documentation for a Medicaid reimbursement claim. The relator had direct knowledge of the lack of documentation because his firm was involved with the claims process. Before the relator filed his complaint, a government audit report disclosed the lack of documentation. The district court concluded that because the information was publicly disclosed before the lawsuit was filed, the relator could not proceed with his action as an "original source" and dismissed the action.

Reversing that decision, the DC Circuit held that to qualify as an "original source" relators are not required to provide the information to the government before a public disclosure; they are, however, required to provide the information prior to filing the lawsuit. 679 F.3d at 837-39. Relying on the Supreme Court's statements in *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007), that an "original source" must provide information to the government on which the *relator's* allegations are based, *id.* at 470-72, the DC Circuit concluded that even though the complaint's allegations were publicly disclosed in the audit report, the relator had provided the government his direct and independent knowledge before filing suit and was therefore an "original source" able to pursue an FCA action. 679 F.3d at 837-39.

Notably, the DC Circuit also held that damages were inappropriate because there was no allegation that the government received less value than it paid. *Id.* at 839-40. The relator alleged neither that the school system failed to provide any of the claimed services nor that it exaggerated costs—only that the school system failed to maintain documentation. The court noted, however, that statutory penalties would be appropriate if a violation was proven on remand.

#### Implications for Future False Claims Act Cases

Because this case was decided under statutory language that pre-dated the 2010 amendments, its precedential value will be reduced over time. Nevertheless, it shows the court's willingness to expand the "original source" exception and allow a case to proceed where the allegations were publicly disclosed and where there are no damages.

#### ***United States ex rel. Schweizer v. Océ N.V.*, 677 F.3d 1228 (D.C. Cir. 2012)**

The United States cannot settle an FCA action over a relator's objection without a judicial finding, made after a hearing, that the proposed settlement is fair, adequate, and reasonable.

#### About the Case

Although the government initially declined to intervene, it subsequently moved to dismiss the case as part of a negotiated settlement with the defendant. The district court dismissed the case over the relator's objection. The DC Circuit rejected relator's argument that the government was not allowed to dismiss an action after it had initially declined to intervene. 677 F.3d at 1233. The court held, however, that 31 U.S.C. § 3730(c)(2)(B) required that the district court hold a fairness hearing and could not approve dismissal without findings that "the proposed settlement is fair, adequate and reasonable under all the circumstances." 677 F.3d at 1233-34. In requiring a fairness hearing, the DC Circuit rejected the government's argument that it had an unfettered right to dismiss an FCA action without any court oversight.

#### Implications for Future False Claims Act Cases

This decision will complicate defendants' efforts to settle FCA actions with the government over relators' objections, thereby strengthening the hands of relators in settlement dynamics.

## **STATE AND LOCAL DEVELOPMENTS**

### Legislative Developments

There was a lot of state and local FCA legislative activity in 2012 and we expect it to continue into 2013. Enduring a prolonged economic downturn, state and local governments undoubtedly hope to emulate the federal government's FCA successes. States are also incentivized by the 2005 federal Deficit Reduction Act (DRA), which encourages states to fight Medicaid fraud by allowing a state, if it has enacted an FCA that is at least as effective as the federal FCA, to keep 10% of what would otherwise be the federal share of Medicaid funds the state recovers.<sup>85</sup> A number of states passed or improved their FCAs in the years immediately following the DRA, but the 2009 and 2010 amendments strengthening the federal FCA rendered many state FCAs DRA-non-compliant and the states were given until March 31 or August 13, 2013, to bring their FCAs back into alignment.<sup>86</sup> Accordingly, several states amended their FCAs during 2012 as described below. (Unless otherwise noted below, the federal government has not yet decided whether the newly amended FCAs satisfy the DRA.)

- **California:** On September 28, 2012, the governor signed an amendment strengthening California's FCA. The amendment expands the "original source" exception to the public-disclosure bar, allowing a person who "has knowledge that is independent of, and materially adds to, the publicly disclosed allegations or transactions" to satisfy the original-source exception even if the person's information was not the basis for the investigation that led to the public disclosure. The amendment permits an individual who "planned and initiated" the FCA violation to recover a portion of the proceeds from the judgment. The amendment also allows an employee to seek

reinstatement, special and punitive damages, and back pay if they experience retaliation for filing an FCA matter. Finally, the amendment increased the civil penalties for FCA violations.<sup>87</sup>

- **District of Columbia:** In November, the District of Columbia amended its Medicaid-only FCA to conform to the federal amendments.<sup>88</sup>
- **Georgia:** In April, Georgia substantially expanded the scope of its FCA. Before, Georgia's FCA covered only false claims submitted under the state's Medicaid program. However, the amended FCA applies to all industries that conduct business within the state. Georgia also adopted the federal amendments to the FCA, including the expanded definition of the original-source exception to the public-disclosure bar and protections for individuals who face retaliation from their employer for initiating an FCA claim.<sup>89</sup>
- **Hawaii:** In July, Hawaii adopted the federal amendments to its FCA.<sup>90</sup>
- **Massachusetts:** In July, the Massachusetts legislature also adopted the federal amendments to its FCA.<sup>91</sup>
- **Rhode Island:** In June, Rhode Island expanded its FCA to allow municipalities, in addition to the Attorney General, to bring FCA actions through their city or town solicitors or duly appointed legal counsel.<sup>92</sup>
- **Tennessee:** In April, Tennessee modified its Medicaid-only FCA, attempting to reflect the scope of the federal amendments.<sup>93</sup> On November 20, however, the federal government issued a determination that Tennessee's amended FCA does not conform to the federal requirements. In order to remain eligible for the 10% incentive under the DRA, Tennessee must further revise its FCA by August 31, 2013.<sup>94</sup>
- **Washington:** In March, Washington modified its Medicaid-only FCA to track the federal amendments.<sup>95</sup> On November 20, the federal government confirmed that Washington's amendments conform to the DRA and Washington remains eligible for the 10% incentive.<sup>96</sup>
- Other states that do not currently have FCAs have proposed such legislation, including **Arizona, Kentucky, and Maine.**<sup>97</sup>
- **New York City:** This year, New York City saved and amended its FCA, remaining one of only a few metropolitan areas that have their own FCAs (others include Chicago, Philadelphia, and Allegheny County, Pennsylvania). Enacted in 2005, the New York City FCA (NYC FCA), expired on June 1, 2012.<sup>98</sup> On June 20, the mayor signed into law a permanent NYC FCA that is more closely aligned with the federal FCA and the New York State FCA (NYS FCA).<sup>99</sup> The new NYC FCA is generally similar to the federal and NYS FCAs (minus the NYS FCA's tax-fraud provision, which is discussed below), although the NYC FCA does not allow a whistleblower to sue without the permission of the city's chief lawyer.<sup>100</sup> The NYC FCA now has a public-disclosure bar comparable to the federal and NYS FCAs, exempting claims by "an original source of the information" and allowing the city's chief lawyer to waive the bar "in his or her absolute discretion,"<sup>101</sup> and the NYC FCA's whistleblower awards now conform to the federal and NYS FCAs.<sup>102</sup> New York City also simultaneously enacted two other laws that could bolster the NYC FCA's effectiveness: the first extends whistleblower protections to officers and employees of city contractors and subcontractors, and the second requires city contractors and subcontractors to post information about whistleblower protections.<sup>103</sup>

#### Noteworthy Settlements

- **Texas Settlement with Janssen Pharmaceuticals:** In January, Johnson & Johnson subsidiary Janssen Pharmaceuticals agreed to pay \$158 million to resolve Medicaid fraud claims in Texas. The complaint stemmed from a whistleblower lawsuit filed in 2004. It alleged that the Texas Medicaid program excessively reimbursed pharmacies that dispensed Risperdal, an antipsychotic medication, to Medicaid patients because Johnson & Johnson overstated Risperdal's efficacy.<sup>104</sup>

- **Multistate Settlement with Johnson & Johnson:** In August, Johnson & Johnson reached a \$181 million settlement with 36 other states and the District of Columbia stemming from allegations that it improperly marketed and advertised Risperdal and Invega, another antipsychotic drug.<sup>105</sup>
- **Multistate Settlement with McKesson Corporation:** In July, McKesson Corporation agreed to pay 30 states over \$151 million in a Medicaid fraud settlement under state FCAs. McKesson allegedly reported inflated pricing information for over 1,400 prescription drugs. These prescription drugs include Adderall, Prozac, and Ritalin. New York received \$64 million, the largest individual state portion of the settlement.<sup>106</sup>
- **California and Federal Settlement with Senior Care Action Network:** On August 23, the Senior Care Action Network (SCAN) reached a \$323 million settlement with California and the federal government over excess payments to Medicare and Medi-Cal, California's Medicaid program. The settlement resolves state and federal FCA claims, including those brought by a former employee of SCAN. The complaint alleged that SCAN failed to prove contractually required information to the California Department of Health Services, which prevented the department from revising capitation rates for SCAN. California will receive \$190.47 million of the settlement, while the federal government will receive \$133.2 million.<sup>107</sup>
- **New York Settlement with Compass Group USA:** On September 19, New York State reached an \$18 million NYS FCA settlement with food services provider Compass Group USA, Inc., for improperly overcharging 39 New York schools and school districts. Compass received discounts from its food vendors but did not pass on those savings to New York's schools, as required by law. As part of the settlement, Compass adopted a code of conduct requiring it to work diligently to comply, ahead of the statutory time tables, with the enhanced nutritional standards of the Healthy, Hunger-Free Kids Act passed by the U.S. Congress on January 25, 2012.<sup>108</sup>

#### Noteworthy Judgments and Complaints

- **Arkansas Judgment against Johnson & Johnson:** In April, an Arkansas judge ordered Johnson & Johnson to pay more than \$1.2 billion based on the marketing of Risperdal after a jury found that Johnson & Johnson minimized and concealed the dangers associated with the antipsychotic drug. Roughly \$1.19 billion was a penalty for nearly 240,000 violations of Arkansas's Medicaid FCA. Johnson & Johnson has appealed the judgment.<sup>109</sup> The Arkansas attorney general recently asked for \$181 million in attorneys' fees and expenses for the law firm that represented Arkansas in the case.<sup>110</sup>
- **Louisiana Verdict against Johnson & Johnson Affirmed:** In August, a Louisiana appeals court upheld a 2010 verdict against Johnson & Johnson for \$258 million under the state's Medicaid-only FCA. That verdict also stemmed from the marketing and advertising of Risperdal, as well as Invega.<sup>111</sup>
- **Illinois and Minnesota *Qui Tam* Suits Filed against MetLife and Prudential:** Whistleblower suits filed in Illinois and Minnesota claimed that MetLife and Prudential failed to turn over unclaimed life insurance benefits to the state. The suits were filed on behalf of the states by Total Assets Recovery Services, an investigative company based in Michigan. They allege that MetLife and Prudential failed to comply with state requirements to notify state agencies when life insurance benefits went unclaimed.<sup>112</sup>
- **New York's Aggressive Use of Its FCA's Tax Provision:**
  - In 2010, the 2007 NYS FCA was expanded, by an amendment sponsored by NY Attorney General Eric Schneiderman (who was then a state senator), to encompass false filings relating to New York State and local taxes where the net income or sales of the defendant is at least \$1 million for any taxable year and the damages sought exceed \$350,000.<sup>113</sup> This provision is apparently unique among the federal, state, and local

FCAs, although the IRS does have a whistleblower program.<sup>114</sup> On April 19, 2012—after more than a year of preparatory activity demonstrating his commitment to enforcing the NYS FCA’s tax provision and working with whistleblowers<sup>115</sup>—the AG publicly invoked the NYS FCA’s tax provision for the first time, suing Sprint Nextel Corp. for over \$300 million based on alleged underpayment of sales taxes. The AG’s complaint, which superseded a whistleblower’s *qui tam* complaint, alleges that Sprint Nextel, in an attempt to gain an unfair advantage over its competitors, was and is under-collecting sales taxes on flat-rate access charges for wireless calling plans and thus underpaying such taxes to the New York State and local governments.<sup>116</sup> Sprint Nextel moved to dismiss the complaint, arguing among other things that retroactive application of the NYS FCA violates the *Ex Post Facto* Clause of the U.S. Constitution.<sup>117</sup> The motion is pending.

- A second, and more sweeping, use of the NYS FCA’s tax provision came to light in September 2012, when the media reported that AG Schneiderman had served subpoenas in July on at least a dozen private equity firms as part of a TPB investigation into the propriety of what one article described as “a widely used tax strategy that saved these firms hundreds of millions of dollars.”<sup>118</sup> According to media reports, the AG is looking into whether the firms (1) converted into fund assets the fees they collect for managing investors’ money, resulting in the fees being taxed at the much lower rate for capital gains, rather than the rate for ordinary income, (2) deferred payouts of the converted fees in ways that improperly reduced their tax liabilities, and (3) treated management fees as a return of invested capital not subject to taxation.<sup>119</sup> The AG’s “probe of tax practices at private-equity firms is based on information from a whistleblower, according to a person familiar with the matter.”<sup>120</sup>
- A prominent whistleblowers’ attorney has said that he and others already have large tax cases, and he predicted that the NYS FCA’s tax provision and AG Schneiderman’s “aggressive” enforcement efforts (combined with gridlock under the IRS whistleblower program) will make New York an important forum.<sup>121</sup>
- **Retroactive Application of New Mexico FCA Held Unconstitutional:** A New Mexico intermediate appellate court held on December 26 that retroactive application of that state’s FCA, the Fraud Against Taxpayers Act,<sup>122</sup> violates the federal and state *Ex Post Facto* Clauses. The decision contains a fairly extensive discussion of the issue.<sup>123</sup>

## TRENDS IN 2012 AND TIPS FOR 2013

### Increasing Whistleblower Awards, Activity, and Protections

In announcing record FCA recoveries in the 2012 fiscal year, the DOJ highlighted the particularly significant—and increasing—role that whistleblowers have played in litigation under the statute. Relators brought a record-setting 647 federal *qui tam* suits last year. Of the record \$4.9 billion recovered to the U.S. Treasury in FY2012, \$3.3 billion stemmed from whistleblower suits.<sup>124</sup> “Since 1986, whistleblowers have been awarded nearly \$4 billion, with \$439 million in awards in fiscal year 2012.”<sup>125</sup> And in the first part of this year, the SEC received more than 3,000 whistleblower tips as part of the Dodd-Frank Whistleblower Program which, like the FCA, can enrich whistleblowers up to 30 percent of any amount collected.<sup>126</sup> Congress’s enactment of additional federal legislative protections for government-employee whistleblowers, states’ amendment of their FCAs to conform to the more whistleblower-friendly provisions of the federal statute, as well as notable whistleblower developments in the courts, suggest that this upward trend in whistleblower activity is likely to continue.

### *Notable Recoveries*

This significant year for whistleblowers saw one set of *qui tam* plaintiffs associated with settlements that surpassed the billion-dollar mark, significant new activity by relators in the mortgage-services sector, and a non-FCA whistleblower become a multi-millionaire for reporting fraud in which he participated and for which he served prison time. This year’s most significant whistleblower recoveries include the following:

- In July, GlaxoSmithKline agreed to pay \$2 billion to resolve civil liability under the FCA. Of that amount, four whistleblowers who brought two *qui tam* lawsuits will receive a 15 to 25 percent share of about \$1.017 billion and whistleblowers who brought two other *qui tam* suits will receive a share of about \$250 million.<sup>127</sup>
- Abbott Laboratories, Inc. agreed in May to pay \$800 million to resolve FCA claims related to off-label marketing. Whistleblowers will receive \$84 million from the federal share of this settlement amount.<sup>128</sup>
- In February's \$25 billion settlement with the five largest mortgage-service providers, \$220 million went to settle FCA *qui tam* lawsuits, including \$46.5 million for the relators. In announcing the settlement, the Attorney General touted a new website through which additional whistleblowers in the mortgage-servicing arena are invited to come forward.<sup>129</sup>
- Despite serving forty months in federal prison for his role in the underlying fraud, former UBS banker Bradley Birkenfeld obtained a \$104 million award from the IRS's non-FCA whistleblower program in September for reporting tax evasion at the bank.<sup>130</sup>

### *Legislative Protection for Whistleblowers*

As described above, President Obama signed the Whistleblower Protection Enhancement Act of 2012 into law on November 27, broadening existing protections for federal workers who disclose evidence of fraud.

### *Whistleblower-Friendly Developments in the Courts*

Courts reviewing whistleblower suits in 2012 eased whistleblowers' ability to litigate their claims and further opened the door for federal employee whistleblowers. The D.C. Circuit announced a significant procedural victory for whistleblowers in *United States ex rel. Schweizer v. Océ N.V.*, 671 F.3d 1228 (D.C. Cir. 2012), curtailing the power of the government and the defendant to settle a case over the relator's objection. In such circumstances, the government must now convince the court "after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." *Id.* at 1237 (citing 31 U.S.C. § 3720(c)(2)(B)). It handed whistleblowers another win in *United States ex rel. Davis v. District of Columbia*, 679 F.3d 832 (D.C. Cir. 2012), holding that a relator can qualify as an original source as long as the relator provides information to the government prior to filing suit, even if there has already been some public disclosure of relevant information. *Id.* at 838. Further expanding the population of potential relators, in *Little v. Shell Exploration & Production Co.*, 690 F.3d 282 (5th Cir. 2012), the Fifth Circuit joined the Tenth and Eleventh Circuits in holding that a government employee can sue under the FCA's *qui tam* provisions.

### Other Key Developments and Trends in 2012

- *Ongoing DOJ Involvement After Declining To Intervene.* Under pressure from courts to make intervention decisions with regard to *qui tams* more quickly, the DOJ is increasingly seeking to keep its options open even after declining to intervene.<sup>131</sup> When declining intervention, the DOJ now regularly states that it is not intervening "*at this time*"—suggesting it could decide to intervene later. It has also filed statements of interest in connection with motions to dismiss that ask courts to dismiss the case without prejudice to the United States. Accordingly, companies must be prepared for ongoing DOJ investigations and interest even after a formal declination.
- *Focus on the Pharmaceutical Industry.* As in the last several years, the DOJ continues to focus on the pharmaceutical industry.
  - As described above, 2012 saw a large number of significant settlements with pharmaceutical companies. The federal exclusion regime, pursuant to which the government can exclude pharmaceutical and other companies from federal healthcare programs, fuels these huge settlements, imposing tremendous, unsustainable costs on healthcare manufacturers and the U.S. economy. Such enforcement almost invariably

avoids the courts, and therefore companies and individuals lack clear rules for compliance, while those who can risk testing the government's case are often quite successful, demonstrating the weakness of the government's cases. Magnifying the enormous leverage afforded by the threat of exclusion is the fact that numerous pharmaceutical and medical device companies sell a significant portion of their products to beneficiaries of federal healthcare programs—and exclusion therefore could be a death blow for a company. At the same time, exclusion is a sub-optimal outcome even for the government, because it would have the effect of depriving program participants of access to valuable medications and devices. In "The Exclusion Illusion: Fixing a Flawed Health Care Fraud Enforcement System," WilmerHale lawyers propose a better way: Take exclusion off the table as a penalty option when a company has instituted a corporate integrity program that complies with comprehensive, rigorous standards certified by a third-party organization. David W. Ogden & Elisebeth Collins Cook, *The Exclusion Illusion: Fixing a Flawed Health Care Fraud Enforcement System*, U.S. Chamber Institute for Legal Reform, Oct. 2012, available at <http://www.wilmerhale.com/files/upload/The%20Exclusion%20Illusion.pdf>.

- The Department of Health and Human Services has indicated that it intends to increase scrutiny of the pharmaceutical industry in 2013, including by auditing several companies regarding their drug pricing policies.<sup>132</sup> Such audits could translate into additional FCA cases in the future, including those that focus on Medicare fraud or off-label marketing.
- *Use of Debarments and Suspensions of Government Contractors.* Agencies have come under increasing pressure to use debarment and suspension as an additional way of punishing government contractors. Suspension or disbarment can be devastating to those companies that conduct significant government business, and can be imposed on those who violate the FCA or who merely fail to disclose "credible evidence" of a violation of the FCA.<sup>133</sup> Congress has been pushing agencies to make more aggressive use of suspension and disbarment, including by requesting that GAO investigate the Defense Department's processes for identifying companies subject to disbarment or suspension.<sup>134</sup> In the current environment, it is more important than ever for Companies to be alert to disclosure obligations and evaluate the risk of debarment along with other possible outcomes of fraud allegations.
- *Continued Expansion of the Implied-Certification Theory of FCA Liability.* Last year's Year in Review noted an expansion of the implied-certification theory of FCA liability, with the First and Third circuits joining six others that had previously embraced the theory. That trend continued in 2012, with *qui tam* relators and the DOJ pursuing cases based on implied certification. Recent assertions of the false-certification theory demonstrate a willingness by the DOJ to pursue the FCA's treble damages and penalties over what often appear to be mere differences in the interpretation of contractual terms or regulatory requirements. The DOJ settled or intervened in false-certification cases in a variety of sectors throughout the year, and examples are discussed throughout this Year in Review, including the Flagstar Bancorp settlement, the complaint against Wells Fargo Bank, the settlement with Gunnison Energy Corporation, and the intervention in the suit against American Commercial College Inc. The D.C. District Court in particular has been accepting of these cases,<sup>135</sup> and rulings favorable to the Government promise heightened risk for contractors operating in contractual or regulatory gray areas.
- *Push for Broader Settlements.* As the DOJ has become more aggressive in pursuing implied-certification theories of FCA liability, companies negotiating settlements with the DOJ have sought greater protection from potential FCA claims. The most noteworthy example of this trend is the national mortgage settlement described above, which included a broad settlement of FCA claims based on certain covered conduct. Such settlements are likely to be tested in the coming years.

#### Tips for 2013

- *Arbitration of Retaliation Claims.* Many relators bring *qui tam* suits that include claims that they were illegally retaliated against in connection with their whistleblowing, in violation of the FCA.

Such retaliation claims can proceed even if the underlying suit proves meritless. These claims may be subject to arbitration under certain circumstances, however, based on the terms of the employee's contract. *United States ex rel. Hepburn v. Northrop Grumman Systems Corp.*, No. 11-302, 2012 WL 5877545 (M.D. Fla. Nov. 20, 2012), discussed above, is one recent example of a court enforcing an arbitration clause. Companies should review their employment agreements to ensure that retaliation-based claims are subject to arbitration, thereby speeding resolution and reducing the costs associated with litigating *qui tams*.

- *FCA Compliance Programs.* With heightened FCA enforcement activity by the DOJ, increased awareness in the relators' bar of sizeable recent settlements, and continued fallout from the financial crisis, companies who do business with the government are increasingly asking what they can do to reduce or mitigate their potential FCA exposure. While any company that does business with the government faces potential FCA liability, companies may find it is a good time to review their FCA compliance programs and consider implementing additional measures to limit risk.
  - *Basic Steps.* Any company can implement these relatively low-cost methods to reduce or mitigate potential FCA exposure: (1) Hold regular, companywide fraud prevention training, which can be stand-alone or added to existing training programs; (2) Maintain an internal whistleblower hotline, including a system to investigate issues and to protect whistleblowers from retaliation; (3) Issue regular reminders of company email use policies to prevent casual and careless statements that could be misinterpreted or taken out of context; and (4) Deliberately handle employee separations by conducting detailed exit interviews for high-risk employees and carefully crafting severance packages.
  - *Maintain Positive Employee Relations.* Good morale and company loyalty may be the best means to prevent disaffected employees from filing *qui tam* complaints that lead to frivolous but expensive litigation. Employee benefits, such as employee assistance programs to provide aid for dealing with personal issues, may mitigate incentives to bring frivolous suits.
  - *Risk-Based Strategies.* In addition to the basic steps, companies facing moderate potential FCA liability may consider incorporating risk-based FCA strategies in their operations. For example, acting deliberately when dealing with ambiguous laws, regulations, and government contracts; seeking expert opinions as necessary; and maintaining meticulous records of the company's decision making process. Formal risk assessments should also consider the potential FCA implications of decisions made in uncertain regulatory regimes.
  - *An Advanced Program.* Companies with a high risk of FCA liability, such as pharmaceutical companies, financial institutions, and those in other heavily regulated industries, are increasingly considering targeted, intensive efforts for high-risk lines of business (generally those involving government programs, government-guaranteed products, or government contracts). Employees in these high-risk lines of business may receive specific, recurring anti-fraud training. These lines of business may also be subject to heightened oversight by companies' legal and compliance departments. Finally, organizations within these companies may be tasked with a systematic, periodic review of risks based on trends in FCA enforcement and/or audits of particular business activities.

Any or all of these steps can help to create an effective compliance program and legal strategy that will help prevent FCA allegations, limit potential damages if a suit is filed, and serve as a positive equitable factor in the eyes of the DOJ or a court.

## CONCLUSION

FCA activity promises to continue unabated into 2013. We will continue to track and alert you to important developments as they occur.

## ABOUT WILMERHALE'S FALSE CLAIMS ACT PRACTICE

With a team of veteran litigators and former Justice and Defense Department lawyers, WilmerHale brings unparalleled knowledge and experience to defending against allegations of fraud, and in particular FCA matters. We regularly represent clients in sectors of the economy facing the greatest FCA activity, including pharmaceutical and health care, defense, government procurement, information technology and financial services. Our team includes lawyers who were directly responsible for the litigation, management and settlement of major FCA investigations and cases during periods of government service and who now defend against them. We approach each matter with a deep understanding of the government's objectives, and we have obtained favorable resolutions of numerous matters without a formal action being filed.

We have been able to obtain early dismissal or resolution of suits brought by qui tam plaintiffs and the government by focusing on precedent-setting legal defenses, including innovative uses of the public-disclosure bar. By conducting credible internal investigations and negotiating with the DOJ, we have also helped clients avoid criminal prosecution and accomplish appropriate civil resolutions of parallel criminal, civil and administrative proceedings. If a case goes to trial, we have experienced courtroom advocates who have tried and won FCA cases before juries.

Our FCA Practice includes:

- A former Deputy Attorney General of the United States, who in that capacity had ultimate oversight over the DOJ's Civil Frauds Unit and considered major interventions and settlements. She also had served as General Counsel of the Department of Defense, responsible for overseeing all litigation, including FCA litigation.
- A former Deputy Attorney General of the United States in the Obama Administration, who supervised all of the DOJ's litigating and law enforcement components (including the DOJ's Civil Fraud unit and the U.S. Attorneys' Offices) and co-led (with the Deputy Secretary of HHS) the Administration's "HEAT" initiative against health care fraud. He also served as Assistant Attorney General for the Civil Division, where he directly supervised FCA enforcement for the United States; and as Deputy General Counsel for the Department of Defense, where he supervised all litigation at DoD, including FCA and government-contracts litigation.
- A former First Assistant U.S. Attorney and Deputy Chief of the Civil Division of the Boston U.S. Attorney's Office, one of the most active offices in the country, where she litigated and supervised major FCA actions.
- A former Deputy Assistant Attorney General and Principal Deputy Associate Attorney General of the DOJ, who in those capacities worked closely with the Civil Frauds Unit on several high-profile matters, and who in the latter capacity considered major interventions and settlements proposed by that unit.
- A former Assistant Attorney General for Legal Policy, who worked extensively on behalf of the Department of Justice negotiating amendments proposed by Congress to the FCA.
- A former Deputy U.S. Attorney for the Southern District of New York, who participated in the creation of the S.D.N.Y.'s Civil Frauds Unit in March 2010 and oversaw that Unit's civil fraud actions in the financial services and healthcare sectors, including actions under the FCA.
- A former Chief of Staff and Assistant Secretary for the United States Department of the Interior, who, in response to the Deepwater Horizon incident, acted as lead negotiator of the Natural Resource Damage Assessment team. He also served as the U.S. Attorney for Colorado.
- A former New York State Executive Deputy Attorney General, who supervised enforcement of the New York State False Claims Act, participated in drafting its implementing regulations, and supervised the state's enforcement of the federal FCA in Medicaid-fraud matters.

- Numerous lawyers with FCA trial experience, as well as litigators who specialize in handling government contracts litigation, including bid protests, disputes concerning performance or payment, and suspension and debarment proceedings.

For questions about any information discussed in this alert or regarding the False Claims Act, please contact any members of our practice group, who would be happy to assist you.

FOR MORE INFORMATION ON THIS OR OTHER FALSE CLAIMS ACT MATTERS, CONTACT:

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<sup>1</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Justice Department Recovers Nearly \$5 Billion in False Claims Act Cases in Fiscal Year 2012* (Dec. 4, 2012), available at <http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html>.

<sup>2</sup> See Taxpayers Against Fraud, *Record Year for False Claims Act Recoveries* (Oct. 22, 2012), available at <http://www.taf.org/press-releases/record-year-false-claims-act-recoveries>; *Katie Thomas, J. & J. Fined \$1.2 Billion in Drug Case*, N.Y. Times, Apr. 11, 2012, available at [http://www.nytimes.com/2012/04/12/business/drug-giant-is-fined-1-2-billion-in-arkansas.html?\\_r=0](http://www.nytimes.com/2012/04/12/business/drug-giant-is-fined-1-2-billion-in-arkansas.html?_r=0).

<sup>3</sup> Press Release, *supra* n.1.

<sup>4</sup> 31 U.S.C. § 3729(a)(1)(A).

<sup>5</sup> *Id.*

<sup>6</sup> 31 U.S.C. § 3729(a)(1)(G).

<sup>7</sup> 31 U.S.C. § 3730(b), (e)(4). The latter provision attempts to encourage whistleblowers to disclose non-public violations while also preventing opportunistic individuals from filing cases based on information available to the public.

<sup>8</sup> 31 U.S.C. § 3730(d).

<sup>9</sup> 31 U.S.C. § 3730(b)(4), (c)(2)(A).

<sup>10</sup> 31 U.S.C. § 3729(a)(1)-(2).

<sup>11</sup> 31 U.S.C. § 3729(a)(1).

<sup>12</sup> Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617; 31 U.S.C. §§ 3729(a)(1)(G), 3729(b)(2)(A)(ii), 3730(h), 3731(c).

<sup>13</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); 31 U.S.C. § 3730(e)(4); 42 U.S.C. § 1320a-7j(d). This year, the Supreme Court affirmed the constitutionality of the PPACA. *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012).

<sup>14</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); 31 U.S.C. § 730(h)(1).

<sup>15</sup> S. 743, 112th Congress (2012) (enacted), available at <http://www.gpo.gov/fdsys/pkg/BILLS-112s743enr/pdf/BILLS-112s743enr.pdf>.

<sup>16</sup> For further discussion of the Whistleblower Protection Enhancement Act of 2012, see WilmerHale's Client Alert, available at <http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=10737418720>.

<sup>17</sup> Letter from Sens. Baucus, et al., to Members of the Health Care Community (May 2, 2012), available at <http://www.finance.senate.gov/newsroom/ranking/release/?id=d2527088-4f4c-434f-863f-5e980aaa2637>.

<sup>18</sup> Letter from American Hosp. Ass'n to Chairman Baucus, et al. (June 26, 2012), available at <http://www.aha.org/advocacy-issues/letter/2012/120626-aha-finance-com-resp-let.pdf>.

<sup>19</sup> 77 Fed. Reg. 9179 (Feb. 16, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-02-16/pdf/2012-3642.pdf>.

<sup>20</sup> 77 Fed. Reg. 36281 (June 18, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-06-18/pdf/2012-14585.pdf>.

<sup>21</sup> Letter from David L. Douglass, Chair, American Bar Association Health Law Section, to Kenneth D. Kraft, Office of Inspector General, Department of Health and Human Services (Aug. 17, 2012), available at [http://www.americanbar.org/content/dam/aba/administrative/healthlaw/hls\\_sdp\\_comments\\_2012\\_final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/healthlaw/hls_sdp_comments_2012_final.authcheckdam.pdf).

<sup>22</sup> Melissa Maleske, Inside Counsel, *GSK agrees to unprecedented settlement, corporate integrity agreement* (Aug. 23, 2012), available at <http://www.insidecounsel.com/2012/08/23/gsk-agrees-to-unprecedented-settlement-corporate-integrity-agreement>; Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data* (July 2, 2012), available at <http://www.justice.gov/opa/pr/2012/July/12-civ-842.html>.

<sup>23</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Abbott Labs to Pay \$1.5 Billion to Resolve Criminal & Civil Investigations of Off-label Promotion of Depakote* (May 7, 2012), available at <http://www.justice.gov/opa/pr/2012/May/12-civ-585.html>.

<sup>24</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Amgen Inc. Pleads Guilty to Federal Charge in Brooklyn, NY.; Pays \$762 Million to Resolve Criminal Liability and False Claims Act Allegations* (Dec. 19, 2012), available at <http://www.justice.gov/opa/pr/2012/December/12-civ-1523.html>.

<sup>25</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *McKesson Corp. Pays U.S. More Than \$190 Million to Resolve False Claims Act Allegations* (Apr. 26, 2012), available at <http://www.justice.gov/opa/pr/2012/April/12-civ-539.html>.

<sup>26</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Florida-Based Wellcare Health Plans Agrees to Pay \$137.5 Million to Resolve False Claims Act Allegations* (Apr. 3, 2012), available at <http://www.justice.gov/opa/pr/2012/April/12-civ-425.html>.

<sup>27</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Sanofi US Agrees to Pay \$109 Million to Resolve False Claims Act Allegations of Free Product Kickbacks to Physicians* (Dec. 19, 2012), available at <http://www.justice.gov/opa/pr/2012/December/12-civ-1526.html>.

<sup>28</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Boehringer Ingelheim to Pay \$95 Million to Resolve False Claims Act Allegations* (Oct. 25, 2012), available at <http://www.justice.gov/opa/pr/2012/October/12-civ-1291.html>; Corporate Integrity Agreement Between the Office of Inspector General of the Department of Health and Human Services and Boehringer Ingelheim Pharmaceuticals, Inc. (Oct. 22, 2012), available at [https://oig.hhs.gov/fraud/cia/agreements/Boehringer\\_Ingelheim\\_Pharmaceuticals\\_10222012.pdf](https://oig.hhs.gov/fraud/cia/agreements/Boehringer_Ingelheim_Pharmaceuticals_10222012.pdf).

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- <sup>42</sup> Press Release, U.S. Dep't of Justice, Office of Public Affairs, *Federal Government and State Attorneys General Reach \$25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses* (Feb. 9, 2012), available at <http://www.justice.gov/opa/pr/2012/February/12-ag-186.html>.
- <sup>43</sup> See Consent Judgments, *United States v. Bank of Am. Corp.*, No. 12-cv- 00361 (D.D.C. Apr. 4, 2012), ECF Nos. 10, 11, 12, 13, 14.
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- <sup>50</sup> See Order Approving Stipulation of Dismissal, *United States ex rel. Garcia v. Regions Fin. Corp.*, No. 09-cv-21402 (S.D. Fla. Sept. 21, 2012).
- <sup>51</sup> See Amended Complaint, *United States ex rel. Garcia v. Regions Fin. Corp.*, No. 09-cv-21402 (S.D. Fla. May 26, 2009).
- <sup>52</sup> Press Release, U.S. Atty's Office, S.D.N.Y., *Manhattan U.S. Attorney Sues Allied Home Mortgage, CRO, and Executive Vice President for Fraudulent Lending Practices Currently Associated with \$834 Million in Insurance Claims Paid by HUD* (Nov. 1, 2011), available at <http://www.justice.gov/usao/nys/pressreleases/November11/alliedhomemortgage.html>.
- <sup>53</sup> See Order, *United States v. Americus Mortg. Corp.*, No. 11-05443 (S.D.N.Y. Aug. 21, 2012).
- <sup>54</sup> Press Release, U.S. Atty's Office, S.D.N.Y., *Manhattan U.S. Attorney Files Mortgage Fraud Lawsuit against Wells Fargo Bank, N.A. Seeking Hundreds of Millions of Dollars in Damages for Fraudulently Certified Loans* (Oct. 9, 2012), available at <http://www.justice.gov/usao/nys/pressreleases/October12/WellsFargoLawsuitPR.html>.
- <sup>55</sup> See Defendant's Motion to Enforce the Consent Judgment, *United States v. Bank of America*, No. 12-00361 (D.D.C. Nov. 1, 2011).

- <sup>56</sup> Press Release, U.S. Atty's Office, S.D.N.Y., *Manhattan U.S. Attorney Sues Bank of America for over \$1 Billion for Multi-Year Mortgage Fraud against Government Sponsored Entities Fannie Mae and Freddie Mac* (Oct. 24, 2012), available at <http://www.justice.gov/usao/nys/pressreleases/October12/BankofAmericanSuit.php>.
- <sup>57</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Illinois-based Hardware Distributor W.W. Grainger Pays US \$70 Million to Resolve False Claims Act Allegations* (Dec. 26, 2012), available at <http://www.justice.gov/opa/pr/2012/December/12-civ-1545.html>.
- <sup>58</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Harbert Companies Agree to Pay \$47 Million to Resolve False Claims Act Allegations* (Mar. 20, 2012), available at <http://www.justice.gov/opa/pr/2012/March/12-civ-341.html>.
- <sup>59</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *ATK Launch Systems Inc. Settles False Claims Product Substitution Case for Nearly \$37 Million* (Apr. 23, 2012), available at <http://www.justice.gov/opa/pr/2012/April/12-civ-520.html>.
- <sup>60</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Maersk Line to Pay US \$31.9 Million to Resolve False Claims Allegations for Inflated Shipping Costs to Military in Afghanistan and Iraq* (Jan. 3, 2012), available at <http://www.justice.gov/opa/pr/2012/January/12-civ-002.html>.
- <sup>61</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Virginia-based Defense Contractor Calnet to Pay \$18.1 Million to Resolve False Claims Act Lawsuit* (June 1, 2012), available at <http://www.justice.gov/opa/pr/2012/June/12-civ-706.html>.
- <sup>62</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Lockheed Martin Corporation Reaches \$15.85 Million Settlement with U.S. to Resolve False Claims Act Allegations* (Mar. 23, 2012), available at <http://www.justice.gov/opa/pr/2012/March/12-civ-367.html>.
- <sup>63</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Florida's Technological Research and Development Authority Pays \$15 Million to Resolve False Claims Allegations* (Nov. 20, 2012), available at <http://www.justice.gov/opa/pr/2012/November/12-civ-1397.html>.
- <sup>64</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Louis Dreyfus Energy Services Pays \$4 Million to Resolve Allegations That It Violated the False Claims Act* (July 3, 2012), available at <http://www.justice.gov/opa/pr/2012/July/12-civ-848.html>.
- <sup>65</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Justice Department Settlement Requires Gunnison Energy and SG Interests to Pay the United States a Total of \$550,000 for Antitrust and False Claims Act Violations* (Feb. 15, 2012), available at <http://www.justice.gov/opa/pr/2012/February/12-at-219.html>.
- <sup>66</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *United States Intervenes in Suit Against American Commercial College Inc. Alleging False Claims Act Violations* (Feb. 28, 2012), available at <http://www.justice.gov/opa/pr/2012/February/12-civ-261.html>.
- <sup>67</sup> 34 C.F.R. §§ 668.14(16), 668.28.
- <sup>68</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Government Files Complaint Against Dallas Area-Based For-profit Chain of Schools for False Claims Act Violations* (Aug. 30, 2012), available at <http://www.justice.gov/opa/pr/2012/August/12-civ-1068.html>.
- <sup>69</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *US Government Joins False Claims Act Lawsuit Against the Gallup Organization* (Aug. 22, 2012), available at <http://www.justice.gov/opa/pr/2012/August/12-civ-1036.html>.
- <sup>70</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *U.S. Government Intervenes in False Claims Suit Against CH2M Hill Hanford Group* (Sept. 28, 2012), available at <http://www.justice.gov/opa/pr/2012/September/12-civ-1774.html>.
- <sup>71</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *United States Sues Virginia-based Contractor for False Claims Under Contract for Security in Iraq* (Oct. 31, 2012), available at <http://www.justice.gov/opa/pr/2012/October/12-civ-1300.html>.
- <sup>72</sup> Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *United States Sues Houston-based KBR and Kuwaiti Subcontractor for False Claims on Contracts to House American Troops in Iraq* (Nov. 19, 2012), available at <http://www.justice.gov/opa/pr/2012/November/12-civ-1386.html>.
- <sup>73</sup> See *Scott v. Metropolitan Health Corp.*, Nos. 05-1948, et al., 2007 WL 1028853 (6th Cir. Apr. 3, 2007) (unpub.).
- <sup>74</sup> E.g., *United States ex rel. Longhi v. United States*, 575 F.3d 458, 473 (5th Cir. 2009) ("The Government's benefit of the bargain was to award money to eligible deserving small businesses. . . . In a case such as this, where there is no tangible benefit to the government and the intangible benefit is impossible to calculate, it is appropriate to value damages in the amount the government actually paid to the Defendants."); see also *United States v. Rogan*, 517 F.3d 449, 453 (7th Cir. 2008); *United States v. Mackby*, 339 F.3d 1013 (9th Cir. 2003).
- <sup>75</sup> 21 U.S.C. § 355(a)-(d).
- <sup>76</sup> See *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001) (citing 21 U.S.C. § 396).
- <sup>77</sup> See 21 U.S.C. § 331(a); 21 C.F.R. § 201.5.
- <sup>78</sup> That test considers the following factors: "(1) whether any judgment against the entity as defendant will be paid by the State or whether any recovery by the entity as plaintiff will inure to the benefit of the State; (2) the degree of autonomy exercised by the entity, including such circumstances as who appoints the entity's directors or officers, who funds the entity, and whether the State retains a veto over the entity's actions; (3) whether the entity is involved with state concerns as distinct from non-state concerns, including local concerns; and (4) how the entity is treated under state law, such as whether the entity's relationship with the State is sufficiently close to make the entity an arm of the State." 681 F.3d at 580.

<sup>79</sup> See *Stoner v. Santa Clara Cnty. Office of Educ.*, 502 F.3d 1116, 1121-22 (9th Cir. 2007); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 718 (10th Cir. 2006); *United States ex rel. Adrian v. Regents of Univ. of Cal.*, 363 F.3d 398, 401-02 (5th Cir. 2004).

<sup>80</sup> See *United States ex rel. Holmes v. Consumer Ins. Grp.*, 318 F.3d 1199 (10th Cir. 2003); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991).

<sup>81</sup> See *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 113 (2d Cir. 2010), *rev'd on other grounds*, 131 S. Ct. 1885 (2011); *United States ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 822 n.2 (7th Cir. 2011); see also *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 267 n.1 (5th Cir. 2010) (concluding that amended § 3729(a)(1)(B) applies to complaint pending on June 7, 2008); *Gonzalez v. Fresenius Med. Care N. Am.*, 689 F.3d 475 & n.4 (5th Cir. 2012) (noting that district court applied pre-amendment version of § 3729(a) because no "claims" were pending on June 7, 2008).

<sup>82</sup> See *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1051 n.1 (9th Cir. 2011); *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1327 n.3 (11th Cir. 2009).

<sup>83</sup> *United States v. A.D. Roe Co., Inc.*, 186 F.3d 717, 723 (6th Cir. 1999); *United States v. Bank of Farmington*, 166 F.3d 853, 860 (7th Cir. 1999), *overruled on other grounds by Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907 (7th Cir. 2009); *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1520 (10th Cir. 1996); *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 652 (D.C. Cir. 1994); but see *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1158 (3d Cir. 1991) (holding that all discovery materials, even when not filed with court, are publicly disclosed because materials are potentially available to public); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993) (adopting *Stinson* approach); *United States ex rel. Paranich v. Sorgnard*, 396 F.3d 326, 333-34 (3d Cir. 2005) (questioning *Stinson* in light of more recent cases, but not overruling it).

<sup>84</sup> See also *Seal 1 v. Seal A*, 255 F.3d 1154, 1161-62 (9th Cir. 2001) (public disclosure occurs where "outsider" with "significant incentive" to use allegations to own advantage receives information).

<sup>85</sup> 42 U.S.C. §1396h (if state FCA meets certain requirements, federal share of Medicaid-fraud amounts recovered by state action shall be decreased by 10 percent).

<sup>86</sup> Office of Inspector Gen., U.S. Dep't of Health and Human Servs., *State False Claims Act Reviews*, available at <https://oig.hhs.gov/fraud/state-false-claims-act-reviews/index.asp>.

<sup>87</sup> See A.B. 2492, 2011-2012 Leg., 2d Sess. (Cal. 2012) (enacted), available at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_2451-2500/ab\\_2492\\_bill\\_20120416\\_amended\\_asm\\_v98.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_2451-2500/ab_2492_bill_20120416_amended_asm_v98.html).

<sup>88</sup> See B19-0224, 2012 Sess. (D.C. 2012) (enacted), available at <http://dcclims1.dccouncil.us/images/00001/20121113164311.pdf>.

<sup>89</sup> See H.B. 822, 151st Gen. Assemb., 2d Sess. (Ga. 2012) (enacted), available at <http://www.legis.ga.gov/legislation/en-US/display/20112012/HB/822>.

<sup>90</sup> See H.B. 1181, 2011-2012 Sess. (Haw. 2012) (enacted), available at [http://www.capitol.hawaii.gov/session2012/bills/HB1181\\_SD1.htm](http://www.capitol.hawaii.gov/session2012/bills/HB1181_SD1.htm).

<sup>91</sup> See FY 2013 Final Budget, Ch. 139, 187th Gen. Ct., 2d Sess. (Mass. 2012) (enacted), available at [http://www.mass.gov/bb/gaa/fy2013/os\\_13/h22.htm](http://www.mass.gov/bb/gaa/fy2013/os_13/h22.htm).

<sup>92</sup> See S. 2659, 2012 Sess. (R.I. 2012) (enacted), available at <http://webserver.rilin.state.ri.us/BillText12/SenateText12/S2659.pdf>.

<sup>93</sup> See H.B. 2378, 107th Gen. Assemb., 2d Sess. (Tenn. 2012) (enacted), available at <http://www.tn.gov/sos/acts/107/pub/pc0806.pdf>.

<sup>94</sup> See Letter from Daniel R. Levinson, Inspector Gen., to Robert E. Cooper, Jr., Att'y Gen. of Tenn. (Nov. 20, 2012), available at <https://oig.hhs.gov/fraud/docs/falseclaimsact/Tennessee.pdf>.

<sup>95</sup> See E.S.S.B. 5978, 62nd Leg., 2012 Reg. Sess. (Wash. 2012) (enacted), available at <http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bills/Senate%20Passed%20Legislature/5978-S.PL.pdf>.

<sup>96</sup> See Letter from Daniel R. Levinson, Inspector Gen., to Robert McKenna, Att'y Gen. of Wash. (Nov. 20, 2012), available at <https://oig.hhs.gov/fraud/docs/falseclaimsact/Washington.pdf>.

<sup>97</sup> See, e.g., H.B. 2844, 50th Leg., 2d Reg. Sess. (Ariz. 2012) (unenacted), available at <http://www.azleg.gov/legtext/50leg/2r/bills/hb2844p.pdf>; H.B. 401, 2012 Reg. Sess. (Ky. 2012) (unenacted), available at <http://www.lrc.ky.gov/record/12RS/hb401.htm>; L.D. 1796, 125th Leg., 2d Reg. Sess. (Me. 2012) (unenacted), available at [http://www.mainelegislature.org/legis/bills/display\\_ps.asp?LD=1796&snum=125](http://www.mainelegislature.org/legis/bills/display_ps.asp?LD=1796&snum=125).

<sup>98</sup> N.Y. City Local Law 53 § 4 (2005), available at <http://www.nyc.gov/html/law/downloads/pdf/false1.pdf>.

<sup>99</sup> N.Y. City Admin. Code § 7-801, *et seq.* (2102), available at <http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=@PLADC07C8+&LIST=LAW+&BROWSE R=EXPLORER+&TOKEN=51861664+&TARGET=VIEW>; N.Y. City Local Law 34 (2012), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1105375&GUID=C503029E-5EBE-4327-AAF8-55A42D619105&Options=ID|Text|&Search=false+claims>.

<sup>100</sup> N.Y. City Admin. Code § 7-804(b)(2) (2012).

<sup>101</sup> *Id.* § 7804(d)(3). *Cf.* 31 U.S.C. § 3730(e)(4)(A); N.Y. State Fin. Law §190(9)(b).

<sup>102</sup> N.Y. City Admin. Code § 7-804(i). *Cf.* 31 U.S.C. § 3730(d); N.Y. State Fin. Law § 190(6).

<sup>103</sup> N.Y. City Local Law 33 (2012), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1102945&GUID=5B432406-E65F-46E8-98C1-4D47D1FD2F97&Options=ID|Text|&Search=816>; N.Y. City Local Law 30 (2012), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=842800&GUID=BF4712F4-625A-4279-9BE3-533045F74284&Options=ID|Text|&Search=479>.

<sup>104</sup> See Press Release, Office of the Att'y Gen. of Tex., *Texas Attorney General Secures \$158 Million Agreement with Drug Maker Over Medicaid Fraud Allegations* (Jan. 19, 2012), available at <https://www.oag.state.tx.us/oagnews/release.php?id=3956>; see *Johnson & Johnson Form 10-Q* at 29 (Nov. 9, 2012) (“In January 2012, JPI settled a lawsuit filed by the Attorney General of Texas.”), available at <http://www.investor.jnj.com/secfiling.cfm?filingID=200406-12-140>.

<sup>105</sup> See Press Release, N.Y. State Office of the Att'y Gen., *A.G. Schneiderman Settles \$181 Million Deceptive Marketing Case with Janssen Pharmaceuticals and Johnson & Johnson* (Aug. 30, 2012), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-settles-181-million-deceptive-marketing-case-janssen-pharmaceuticals> see *Johnson & Johnson Form 10-Q* at 30 (Nov. 9, 2012) (“In September 2012, JPI settled with 36 of the states and the District of Columbia non-Medicaid claims in connection with the sales and marketing of RISPERDAL © and INVEGA © for a total of approximately \$181 million, an amount which had been previously accrued.”)

<sup>106</sup> See Press Release, N.Y. State Office of the Att'y Gen., *A.G. Schneiderman Announces \$151 Million Settlement with Drug Distributor McKesson for Medicaid Fraud* (July 21, 2012), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-151-million-settlement-drug-distributor-mckesson-medicaid>.

<sup>107</sup> See Press Release, State of Cal. Dep't of Justice, Office of the Att'y Gen., *Attorney General Kamala D. Harris Announces Largest Medi-Cal Settlement in California History* (Aug. 23, 2012), available at <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-largest-medi-cal-settlement>.

<sup>108</sup> Press Release, N.Y. State Office of the Att'y Gen., *A.G. Schneiderman Announces \$18 Million Settlement With Compass Group USA For Overcharging NYS School Lunch Programs* (Sept. 19, 2012), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-18-million-settlement-compass-group-usa-overcharging-nys>.

<sup>109</sup> See Katie Thomas, *J. & J. Fined \$1.2 Billion in Drug Case*, N.Y. Times, Apr. 11, 2012, available at [http://www.nytimes.com/2012/04/12/business/drug-giant-is-fined-1-2-billion-in-arkansas.html?\\_r=0](http://www.nytimes.com/2012/04/12/business/drug-giant-is-fined-1-2-billion-in-arkansas.html?_r=0) *Johnson & Johnson Form 10-Q* at 29 (Nov. 9, 2012) (“In April 2012, in the lawsuit brought by the Attorney General of Arkansas, the jury found against both JPI and Johnson & Johnson, and the Court imposed penalties in the amount of approximately \$1.2 billion. JPI and Johnson & Johnson have filed an appeal and believe that they have strong arguments supporting the appeal.”), available at <http://www.investor.jnj.com/secfiling.cfm?filingID=200406-12-140>.

<sup>110</sup> *Ark. seeks \$181M in legal fees for Risperdal case*, [www.nbc40.net](http://www.nbc40.net), Dec. 13, 2012, available at <http://www.nbc40.net/story/20335422/ark-seeks-181m-in-legal-fees-for-risperdal-case>.

<sup>111</sup> See Sophia Pearson, *et al.*, *Johnson & Johnson Agrees to Settle Five Risperdal Suits*, Bloomberg, Oct. 4, 2012, available at <http://www.bloomberg.com/news/2012-10-04/johnson-johnson-agrees-to-settle-five-risperdal-suits.html>.

<sup>112</sup> Karen Gullo, *MetLife, Prudential Accused of Fraud in Illinois Suit*, Bloomberg, Jan. 24, 2012, available at <http://www.bloomberg.com/news/2012-01-24/metlife-prudential-accused-of-fraud-in-illinois-suit-correct.html>; Jennifer Bjourhus, *Lawsuit Seeks Millions from Insurers in Policy Claims*, Star Tribune, Mar. 23, 2012, available at <http://www.startribune.com/business/144055476.html?refer=y>.

<sup>113</sup> N.Y. State Fin. Law §189(4)(a) (tax provision), available at [http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=\\$\\$STF189\\$\\$@TXSTF0189+&LIST=LAW+&BROWSER=EXPLORER+&TOKEN=37582607+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$STF189$$@TXSTF0189+&LIST=LAW+&BROWSER=EXPLORER+&TOKEN=37582607+&TARGET=VIEW); see generally N.Y. State Fin. Law §187, *et seq.*, available at <http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=@SLSTF0A13+&LIST=LAW+&BROWSER=EXPLORER+&TOKEN=37582607+&TARGET=VIEW>.

<sup>114</sup> 2010 N.Y. Sess. Laws Ch. 379 § 3 (McKinney), available at <http://ssl.csg.org/dockets/2012cycle/32B/32Bbills/1332b06nywhistleblowerfraud.pdf>; Press Release, N.Y. State Sen. Eric T. Schneiderman, *Senator Eric T. Schneiderman Shepherds Historic Anti-Fraud Taxpayer Protection Measure Through Legislature* (July 1, 2010), available at <http://www.nysenate.gov/press-release/senator-eric-t-schneiderman-shepherds-historic-anti-fraud-taxpayer-protection-measure->.

<sup>115</sup> Less than a month into his term as AG, he created the Taxpayer Protection Bureau (TPB), dedicated to enforcing the amended NYS FCA, including against “large-scale tax cheats.” Press Release, N.Y. State Office of the Att'y Gen., *A.G. Schneiderman Launches New Initiative to Bolster Recovery of Taxpayer Dollars & Fight Government Fraud* (Jan. 27, 2011), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-launches-new-initiative-bolster-recovery-taxpayer-dollars-fight>. In June 2011, his office presented a full-day NYS FCA conference, featuring tax officials and whistleblowers’ attorneys speaking on panels like “Tax Fraud and the New York False Claims Act: The New Frontier” and “New Paradigm of Public-Private Partnerships with NY OAG.” See *NY Attorney General to Host False Claims Conference*, Corporate Crime Reporter, May 26, 2011, available at <http://www.corporatecrimereporter.com/falseclaimsnys05262011.htm>.

<sup>116</sup> Superseding Complaint, *State of New York ex rel. Empire State Ventures v. Sprint Nextel*, No. 103917-2011 (N.Y. Sup. Ct., N.Y. Cnty. Apr. 19, 2012), available at <http://www.ag.ny.gov/sites/default/files/press-releases/2012/Sprint-Complaint.pdf>; Press Release, N.Y. State Office of the Att'y Gen., *A.G. Schneiderman Files Groundbreaking Tax Fraud Lawsuit Against Sprint for Over \$300 Million* (Apr. 19, 2012), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-files-groundbreaking-tax-fraud-lawsuit-against-sprint-over-300-million>.

<sup>117</sup> Memorandum of Law in Support of Defendants’ Motion to Dismiss, *State of New York ex rel. Empire State Ventures v. Sprint Nextel*, No. 103917-2011, at 21-23 (N.Y. Sup. Ct., N.Y. Cnty. June 14, 2012), <https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=YAYG/Z4jNMD3pMhpls40IQ==&system=prod>.

- <sup>118</sup> Karen Freifeld & Greg Roumeliotis, *Bain Capital Among Private Equity Firms Probed Over Tax Strategy*, Reuters, Sept. 1, 2012, available at [http://www.huffingtonpost.com/2012/09/01/bain-investigation-private-equity-taxes\\_n\\_1849570.html](http://www.huffingtonpost.com/2012/09/01/bain-investigation-private-equity-taxes_n_1849570.html).
- <sup>119</sup> E.g., *id.*; Nicholas Confessore, et al., *Inquiry on Tax Strategy Adds to Scrutiny of Finance Firms*, N.Y. Times, Sept. 1, 2012, available at <http://www.nytimes.com/2012/09/02/business/inquiry-on-tax-strategy-adds-to-scrutiny-of-finance-firms.html>.
- <sup>120</sup> Reed Albergotti & Laura Saunders, *Global Finance: Informer Sparked New York Probe – Attorney General Is Looking at How Buyout Firms Handled Management Fees, Tax Implications*, Wall Street Journal, Sept. 13, 2012, at C3.
- <sup>121</sup> John Phillips: *The False Claims Act and How to Save \$500 Billion*, Corporate Crime Reporter, Aug. 6, 2012, available at <http://www.corporatecrimereporter.com/?s=%22john+phillips%22>.
- <sup>122</sup> N.M. Stat. Ann. §§ 44-9-1 to -14 (2007).
- <sup>123</sup> *New Mexico ex rel. Foy v. Austin Capital Mgmt., Ltd.*, No. 31, 421 (N.M. Ct. App. Dec. 26, 2012).
- <sup>124</sup> See Press Release, *supra* n.1.
- <sup>125</sup> Press Release, *supra* n.1.
- <sup>126</sup> Press Release, U.S. Securities & Exchange Commission, *SEC Receives More than 3,000 Whistleblower Tips in FY 2012* (Nov. 15, 2012), available at <http://www.sec.gov/news/press/2012/2012-229.html>.
- <sup>127</sup> Richard Blackden, *Glaxo whistleblowers to share \$250m windfall*, The Telegraph, July 4, 2012, available at <http://www.telegraph.co.uk/finance/newsbysector/pharmaceuticalsandchemicals/9374104/Glaxo-whistleblowers-to-share-250m-windfall.html>; *Whistleblowers played major role in Glaxo case, leading to Glaxo's record settlement*, PR Newswire, July 12, 2012, available at <http://www.prnewswire.com/news-releases/whistleblowers-played-major-role-in-glaxo-case-leading-to-glaxos-record-settlement-161074325.html>; see Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *GlaxoSmithKline to Plead Guilty and Pay \$3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data* (July 2, 2012), available at <http://www.justice.gov/opa/pr/2012/July/12-civ-842.html>.
- <sup>128</sup> See Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Abbott Labs to Pay \$1.5 Billion to Resolve Criminal & Civil Investigations of Off-label Promotion of Depakote* (May 12, 2012), available at <http://www.justice.gov/opa/pr/2012/May/12-civ-585.html>.
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- <sup>131</sup> See, e.g., *United States ex rel. Martin v. Life Care Ctrs. of Am., Inc.*, No. 08-cv-251, 2012 WL 6084626, at \*5-7 (E.D. Tenn. Nov. 15, 2012) (government's conduct in requesting extensions of sealing deadline for four years had "stretched the FCA's 'under-seal' requirement to its breaking point," and noting that future requests to extend seal "in this action and other qui tam cases before this Court . . . will be met with significant scrutiny").
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- <sup>133</sup> 73 Fed. Reg. 67064 (Nov. 12, 2008), available at <http://www.gpo.gov/fdsys/pkg/FR-2008-11-12/html/E8-26953.htm>.
- <sup>134</sup> U.S. Gov't Accountability Office, GAO-12-932, Report to U.S. Senate Committee on Armed Services, *Suspension And Debarment:] DOD Has Active Referral Processes, But Action Needed to Promote Transparency* (Sept. 2012), available at <http://gao.gov/assets/650/648577.pdf>.
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