

False Claims Act: 2013 Year-in-Review

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LITIGATION/CONTROVERSY

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INTRODUCTION: HIGHLIGHTS AND TRENDS

The False Claims Act (FCA) saw another year of increased activity in 2013, with new qui tam suits hitting an all-time high of 753, a rise of more than 100 over 2012. For fiscal year 2013—October 1, 2012 to September 30, 2013—the federal government brought in \$3.8 billion, the fourth year in a row of more than \$3 billion in recoveries. As in the past, the healthcare and pharmaceuticals sector accounted for the biggest share, with \$2.6 billion recovered. Procurement saw a jump, more than doubling to \$890 million. Financial institutions remained a substantial target, and both the government and relators were increasingly bringing claims against recipients of grant and loan funds as well as contractors.¹

Activity at the State level also increased in 2013. More than a dozen states updated their own false claims laws to match the amendments made to the federal FCA in 2009 and 2010. At least seven states that lack general false claims act statutes had bills pending as the year closed. Wyoming added a Medicaid-only false claims law, and several others expanded the scope of their existing false claims statutes. Both attorneys general and relators made vigorous use of state false claims laws in 2013, often in multi-state suits. Plaintiffs most frequently targeted companies in the health care and pharmaceuticals sector, but financial institutions also faced claims, with 12 states, for example, joining the federal government in bringing claims for more than half a billion dollars against the credit rating agency Standard & Poor's.

Efforts to make the FCA both more effective and fairer through forward-looking compliance measures rather than litigation gained steam near the end of the year. As top Justice Department (DOJ) officials have stated, “[l]itigation to recover the costs of fraud is a far inferior option to preventing fraud in the first place.”² In October 2013, the U.S. Chamber of Commerce's Institute for Legal Reform issued a white paper, *Fixing the False Claims Act: The Case for Compliance-Focused Reforms*, laying out just such a compliance-focused approach.³ The paper, which was co-authored by two leaders of WilmerHale's FCA practice, proposed amending the FCA to provide incentives for companies to adopt “state-of-the-art” compliance programs. The proposed reforms include:

- a re-calibrated damages multiplier that would hold defendants liable for treble damages only if they acted with specific intent to defraud, and reduced damages multipliers for reckless conduct and those who self-disclose FCA violations; and eliminating redundant civil monetary penalties except where the government has not suffered actual harm;
- a bar on most qui tam actions where the company has already disclosed substantially the same allegations to an appropriate government official;
- a bar, with limited exceptions, on qui tam actions filed by employees who did not first report the alleged misconduct internally; and
- an end to the use of mandatory and permissive exclusion and debarment for companies certified as having state-of-the-art FCA compliance programs.

Additional Cross-Cutting Highlights and Trends

- Two FCA issues that have divided the lower courts reached the Supreme Court in 2013, and the Court sought the views of the Solicitor General, suggesting it considers the issues raised to be important. In *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171 (4th Cir. 2013), cert. filed, No. 12-1497 (June 24, 2013), the issues are (i) whether the Wartime Suspension of Limitations Act tolls the statute of limitations for civil FCA cases, even ones in which the government has not intervened, and (ii) whether the first-to-file bar applies once the earlier-filed case is no longer pending. The question presented in *Nathan v. Takeda Pharmaceuticals of North America, Inc.*, 707 F.3d 451 (4th Cir. 2013), cert. filed, No. 12-1349 (May 10, 2013), is whether Federal Rule of Civil Procedure 9(b) requires an FCA complaint to include examples of specific false claims presented to the government, or whether allegations of a fraudulent scheme that reasonably imply the submission of false claims suffice.

- In 2013, the Fifth, Sixth and Eighth Circuits adopted the requirement that false certification claims are cognizable under the FCA only to the extent that the certifications were prerequisites for payment—a position now endorsed by a majority of the circuits. These precedents should aid FCA defendants seeking to distinguish actionable false claims from instances of regulatory noncompliance.
- In both the procurement and healthcare/pharmaceuticals sectors, claims based on alleged violations of price reduction or so-called “most favored customer” clauses continued to be frequent.
- More district courts addressed whether the 2010 amendment of the FCA’s public disclosure bar made it non-jurisdictional and, if so, what the procedural significance of that change would be.⁴
- The government increasingly argued that the measure of single damages in many FCA cases should be the full value of the contract or grant at issue, without regard to the value of goods or services provided by the defendant company.
- The government is increasingly asking courts to re-seal complaints if relators amend them to make substantially new allegations, though district courts have divided in their reception of the government’s requests.⁵

Healthcare and Pharmaceuticals

- The government has continued to pursue “misbranding plus” cases, notwithstanding the Second Circuit’s 2012 decision in *United States v. Caronia*, 703 F.3d 149, in which the court held that truthful, non-misleading speech by sales representatives is not enough, standing alone, to support a misdemeanor misbranding prosecution. Several large FCA settlements this year involved claims that misbranded drugs were introduced into interstate commerce: Wyeth’s \$490.9 million settlement was the largest FCA off-label marketing settlement of 2013, but the government also secured multi-million dollar settlements from Johnson & Johnson, Par Pharmaceuticals, and ISTA Pharmaceuticals, all of which related to the off-label promotion of prescription drugs.
- The government aggressively pursued alleged kickback schemes involving patient referrals and inducements to doctors to purchase certain medical devices or to prescribe particular drugs.
- The government increased scrutiny of current good manufacturing practices (cGMP) in 2013, as evidenced by the May 2013 settlement with Ranbaxy, USA, which paid \$500 million to resolve FCA and criminal allegations related to violations of cGMP at two Indian facilities.

Procurement

- Government enforcement in the procurement sector made false certifications concerning disadvantaged business status a particular focus. DOJ entered into settlements with at least three companies that secured contracts by representing that they were, or were affiliated with, disadvantaged businesses.
- Both relators and the government also focused on certifications with respect to compliance with the requirements of the Trade Agreements Act, including its country-of-origin mandates.

Financial Institutions

- Financial institutions that issued loans backed by various government guarantee or support programs, including those run by the Small Business Administration (SBA) and Federal Housing Administration (FHA) were increasingly frequent FCA defendants.

FEDERAL LEGISLATIVE AND REGULATORY DEVELOPMENTS

After a few years of fairly intensive legislative and regulatory activity, the pace slowed in 2013. That said, both Congress and the Department of Health and Human Services (HHS) saw some noteworthy activity.

➤ Congress

- In the House, on August 1, 2013, Rep. Coble (R-NC) introduced H.R. 2931, the Fairness in Health Care Claims, Guidance, and Investigations Act, which was referred to the House Judiciary Committee, where no action has been taken.⁶
 - The bill would amend the FCA to include special rules for the investigation and litigation of false claims submitted with respect to federal health care programs. The bill would prohibit an FCA action against a health care provider or supplier (1) unless the amount of damages alleged to have been sustained by the government is a material amount; (2) if a claim is submitted in good faith reliance on erroneous information or written statements of federal policy provided by a federal agency or in good faith reliance on an audit or review by an agency of the entity submitting the claim or retaining an overpayment; or (3) if a claim is submitted in substantial compliance with a model compliance plan issued by the Secretary of Health and Human Services (HHS). The legislation would also raise the standard of proof to clear and convincing evidence.
- In February 2013, the Health Subcommittee of the House Energy & Commerce Committee held a hearing on “Fostering Innovation to Fight Waste, Fraud, and Abuse in Health Care.” One of the witnesses made a series of recommendations regarding the FCA, including that Congress ensure that counsel for relators have ready access to CMS data; that the pleading standards for FCA cases be adjusted to allow more cases to proceed; and that states be encouraged to enact their own FCAs.⁷ No action appears to have been taken to date.
- The Senate considered amending the Program Fraud Civil Remedies Act, which has been in place since 1986 as an administrative process designed to address false claims under \$150,000.⁸ The proposal, which originated with the Administration, would increase the claim threshold to \$500,000 and streamline the process. The House failed to include this proposal in its version of the National Defense Authorization Act (NDAA), and the Senate Armed Services Committee ultimately reported a revised version of the NDAA (S. 1197) that did not include this provision. Whether Congress will revisit this proposal in its next session bears watching.
- In August 2013, Sen. Warren (D-MA) sought information from DOJ concerning the release of potential FCA liability related to Federal Housing Administration (FHA) insurance payments in the \$25 billion global mortgage servicer settlement entered into by the federal government, 49 state attorneys general, and five major banks in 2012.⁹
- In January 2013, Sen. Grassley (R-IA), ranking member on the Senate Judiciary Committee and a leading supporter of the FCA, wrote to the Acting Treasury Secretary criticizing the Internal Revenue Service’s (IRS) proposed regulations implementing 2006 amendments to the IRS’s whistleblower program.¹⁰

➤ HHS

- On October 30, 2013, responding to an inquiry from Representative Jim McDermott (D-WA), HHS Secretary Kathleen Sebelius explained that she had determined that “Qualified Health Plans, other programs related to the Federally-facilitated Marketplace, and other programs under Title I of the Affordable Care Act [(ACA)]” do not constitute “federal health care programs” for purposes of § 1128B of the Social Security Act, 42 U.S.C. § 1320a-7b, which codifies both the Anti-Kickback Statute (AKS) and criminal false claims provisions.¹¹ Secretary Sebelius explained that

her determination covered “State-based and Federally-facilitated Marketplaces; the cost-sharing reductions and advance payments of the premium tax credit[s]; Navigators for the Federally-facilitated Marketplaces and other federally funded consumer assistance programs; consumer-oriented and operated health insurance plans; and the risk adjustment, reinsurance, and risk corridors programs.” Secretary Sebelius indicated that HHS had “consult[ed] with the Department of Justice,” suggesting the government will be unlikely to bring or intervene in support of FCA claims based on alleged AKS violations related to ACA Title I programs.

- HHS’s Office of the Inspector General (OIG) issued updated guidelines for evaluating state false claims legislation to reflect amendments made to the federal FCA in 2009 and 2010 through the Fraud Enforcement and Recovery Act, the Affordable Care Act, and the Dodd-Frank Wall Street Reform and Consumer Protection Act.¹² The updated guidelines govern HHS OIG’s consideration of whether state laws meet the requirements of section 1909(b) of the Social Security Act, which created a financial incentive for states to enact legislation that establishes liability to States for false or fraudulent claims to Medicaid programs. Further discussion appears in the section below on State and Local Developments.
- In April 2013, following a notice-and-comment process,¹³ HHS OIG issued an Updated Provider Self-Disclosure Protocol (SDP).¹⁴ The Protocol, originally established in 1998, sets out a process for health care providers “to voluntarily identify, disclose, and resolve instances of potential fraud involving the Federal health care programs” and thus “to resolve the provider’s liability under OIG’s civil monetary penalty (CMP) authorities.”¹⁵ In response to a number of commenters’ request that the Updated Protocol address the relevance of the process for related FCA investigations, the Updated Protocol states:

In some cases, disclosing parties may request release under the FCA, and in other cases, DOJ may choose to participate in the settlement of the matters. If DOJ participates in the settlement, the matter will be resolved as DOJ determines is appropriate consistent with its resolution of FCA cases, which could include a calculation of damages resulting from violations of the AKS based on paid claims. OIG will advocate that the disclosing party receive a benefit from disclosure under the SDP and the matter be resolved consistent with OIG’s approach in similar cases. However, DOJ determines the approach in cases in which it is involved.¹⁶

The Updated Protocol also notes that OIG will similarly advocate for disclosing parties to receive a benefit when disclosing potentially criminal conduct.¹⁷

- In April 2013, HHS’s Centers for Medicare and Medicaid Services (CMS) proposed a rule designed to increase payouts to whistleblowers who identify fraud in Medicare.¹⁸ CMS proposed to raise the ceiling for whistleblower payouts to 15% of amounts collected up to \$66 million, i.e., nearly \$10 million, from 10% or \$1,000, whichever is less. CMS also proposed to expand the grounds for denying Medicare enrollment to providers and suppliers. CMS received more than one hundred comments, and has yet to publish a final rule. At least one commenter, the U.S. Chamber Institute for Legal Reform, raised the concern that the “revised reward scheme would establish incentives that are skewed overwhelmingly in favor of direct reporting to CMS, without requiring any attempts to correct errors independently between the beneficiary and supplier or provider.”¹⁹

FEDERAL SETTLEMENTS, JUDGMENTS, AND COMPLAINTS FILED

➤ Healthcare and Pharmaceuticals

Healthcare and Pharmaceuticals Settlements

- **Johnson & Johnson:** In November, Johnson & Johnson and its subsidiaries agreed to pay approximately \$2.2 billion dollars to resolve criminal and civil allegations of kickbacks and off-label marketing. The civil settlements, which resolve multiple qui tam actions, were handled by the U.S. Attorney's Offices for the Northern District of California, the District of Massachusetts, and the Eastern District of Pennsylvania. Among the civil allegations were that Johnson & Johnson had marketed the antipsychotic drug Risperdal for off-label uses, downplayed Risperdal's side effects, and paid kickbacks to both physicians and the long-term care pharmacy Omnicare to induce prescriptions of Risperdal. Omnicare settled the kickback matter in 2009 for \$98 million.²⁰ The civil settlements also resolved allegations that Johnson & Johnson had promoted the drug Invega for off-label uses and made false statements about its safety, and that its subsidiary Scios had promoted the heart drug Natrecor for an off-label use. In October 2011, Scios pled guilty to one count of misbranding and paid an \$85 million criminal fine.²¹ The government also filed a criminal information in the Eastern District of Pennsylvania alleging that Johnson & Johnson subsidiary Jansen Pharmaceuticals had marketed Risperdal for off-label uses in elderly dementia patients. Jansen agreed to plead guilty to one misdemeanor count of misbranding. As part of the global settlement, which includes \$118 million that Johnson & Johnson paid to Texas in 2012 to resolve similar allegations, the Company entered into a corporate integrity agreement with the OIG. This global settlement is in addition to a \$1.2 billion fine imposed by the Circuit Court of Arkansas after a jury found the Company had violated the state's Medicaid fraud law.²² That case is on appeal before the Arkansas Supreme Court.
- **Ranbaxy USA:** In May, Ranbaxy USA, a subsidiary of Indian generic manufacturer Ranbaxy Laboratories, agreed to pay \$500 million to resolve criminal and civil allegations related to violations of current Good Manufacturing Practices (cGMP) at two Indian facilities. The FCA portion of the settlement, which resolved a qui tam action filed in Maryland, was \$350 million. Approximately \$118.2 million of the civil settlement is to be returned to state Medicaid programs. Ranbaxy agreed to pay an additional criminal fine and forfeiture of \$150 million, and to plead guilty to one felony count of introducing adulterated goods into interstate commerce, two felony counts of failure to submit field alert reports to the Food and Drug Administration (FDA), and four felony counts of false statements to the FDA.²³ According to DOJ, the settlement represented the largest drug safety settlement with a generic drug manufacturer as of the date of its entry. Ranbaxy USA is the second settlement to link FCA claims to cGMP violations, the first being a \$600 million settlement with GlaxoSmithKline in 2010.²⁴ Ranbaxy USA is the first FCA settlement in which DOJ pursued cGMP violations at a foreign manufacturing facility.
- **Wyeth:** In July, Wyeth agreed to pay \$490.9 million to resolve criminal and civil allegations that it promoted its drug Rapamune for off-label uses. The civil portion of the settlement, \$257.4 million, resolved two qui tam actions in the Western District of Oklahoma. In addition to criminal fines and forfeiture of \$233.5 million, Wyeth also agreed to plead guilty to one misdemeanor count of introducing a misbranded drug into interstate commerce. Pfizer, which acquired Wyeth in 2009, is subject to a 2009 CIA with the HHS OIG.²⁵
- **Omnicare:** In October, Omnicare agreed to resolve a qui tam action filed in the Northern District of Ohio for \$120 million. The relator alleged that Omnicare had provided nursing homes with discounts in return for referrals.²⁶ In July, Omnicare settled a separate qui tam suit in the Southern District of Illinois, in which the relator alleged that Omnicare had violated the FCA and various state laws by engaging in a kickback scheme to lock in favorable contracts with customers. The government declined to intervene and the terms of the settlement were not disclosed. The company, which is the largest nursing home pharmacy in the United States, also disclosed in April that DOJ is investigating potential FCA and AKS violations.²⁷

- **Shire:** In February, Shire announced that it had reached an agreement in principle with the U.S. Attorney's Office for the Eastern District of Pennsylvania to resolve civil liability related to the company's marketing practices for the drugs Adderall XR, Vyvanse, Daytrana, Lialda, and Pentasa. Shire recorded a \$57.5 million charge for the anticipated settlement in the fourth quarter of 2012.²⁸
- **C.R. Bard:** In May, C.R. Bard agreed to resolve a qui tam action filed in the Northern District of Georgia for \$48.26 million. The government intervened and alleged that C.R. Bard had paid kickbacks to hospitals and physicians in the form of grants, rebates, conference fees, marketing assistance, and free medical equipment to induce purchase of C.R. Bard's brachytherapy seeds. C.R. Bard also agreed to pay an additional \$2.2 million to resolve related criminal allegations and entered into a non-prosecution agreement with the government.²⁹
- **Ensign:** In November, The Ensign Group agreed to resolve two qui tam actions in the Central District of California for \$48 million. The settlement resolves allegations that the nursing home provider had submitted claims to Medicare for unnecessary rehabilitation services and for rehabilitation services not actually provided. The company also executed a five-year CIA with the HHS OIG.³⁰
- **Par Pharmaceuticals:** In March, Par agreed to pay \$45 million to resolve criminal and civil allegations related to its promotion of the drug Megace ES for unapproved uses. The FCA portion of the settlement, which resolves three qui tam actions filed in New Jersey, amounted to \$22.5 million. Par also agreed to pay an additional \$22.5 million in criminal fines and forfeiture, to plead guilty to misdemeanor misbranding, and to enter into a five-year CIA with the HHS OIG.³¹
- **CareFusion:** In April, CareFusion announced that it had reached an agreement in principle with the U.S. Attorney's Office for the District of Kansas to settle allegations related to its CholraPrep marketing practices and its relationships with healthcare professionals. CareFusion also announced that it had entered into a non-prosecution agreement regarding these matters. The company recorded a \$41 million charge in connection with the anticipated settlement agreement.³²
- **Kyphoplasty Settlements:** In June, the U.S. Attorney's Office for the Western District of New York announced that 55 hospitals in 21 states had agreed to pay a collective \$34 million to resolve FCA allegations related to kyphoplasty, a procedure used to treat compression spinal fractures. The government alleged that the hospitals had billed Medicare for kyphoplasty on an inpatient basis when it was safe and effective to perform the procedure on an outpatient basis. Fifty-one of the settling hospitals were defendants in a qui tam action. Nationwide, DOJ has settled kyphoplasty FCA allegations with over 100 hospitals.³³
- **ISTA Pharmaceuticals:** In May, ISTA agreed to pay \$33.5 million to resolve criminal and civil allegations that the company had promoted Xibrom for off-label uses and had provided kickbacks to induce physicians to prescribe Xibrom. The civil portion of the settlement, \$15 million, resolved two qui tam actions in the Western District of New York. In connection with the settlement, ISTA pled guilty to two felonies: conspiracy to introduce a misbranded drug into interstate commerce and conspiracy to violate the AKS. ISTA, which was acquired by Baush+Lomb (B+L) in June 2012, also agreed to its exclusion from federal health care programs for fifteen years and to transfer all of its assets to B+L. The HHS OIG said that it agreed to the divestiture because "B+L did not have a corporate relationship with ISTA during the improper conduct . . . [B+L] acquired ISTA more than a year after the improper conduct ended, and B+L did not hire any of ISTA's executives or senior management."³⁴ As a condition of ISTA's criminal plea, B+L agreed to maintain a compliance and ethics program, which requires B+L to make annual compliance certifications to the government.³⁵

- **Boston Scientific:** In October, Boston Scientific and its Guidant subsidiaries agreed to pay \$30 million to resolve a qui tam action in the District of Minnesota, alleging that Guidant had knowingly sold defective heart devices to hospitals that implanted such devices in Medicare beneficiaries.³⁶ In 2010, Guidant pled guilty to making a materially false statement to the FDA and to failing to notify the FDA of a correction to one of its devices. The criminal fine and forfeiture was \$296 million and Guidant was placed on probation for three years.³⁷
- **Dr. Steven J. Wassermann:** In February, a Florida dermatologist agreed to pay \$26.1 million to resolve a qui tam action in the Middle District of Florida, alleging that he had entered into a kickback scheme with a pathology laboratory and had billed Medicare for medically unnecessary procedures. According to DOJ, this is one of the largest FCA settlements ever reached with an individual.³⁸
- **Shands Healthcare:** In August, Shands agreed to pay \$26 million to settle allegations that it violated the FCA by billing on an inpatient basis procedures that should have been billed on an outpatient basis. The settlement resolved a qui tam action in the Middle District of Florida filed by the president of a consulting company that had audited Shands' hospitals, at their request, in 2006.³⁹
- **Intermountain Health Care:** In April, Intermountain Health Care, the largest health system in Utah, agreed to pay \$25.5 million to resolve allegations that it had violated the FCA by maintaining prohibited financial arrangements with physicians. The settlement followed a self-disclosure by Intermountain.⁴⁰
- **Amgen:** In April, Amgen agreed to pay \$24.9 million to resolve FCA allegations that it had provided kickbacks to long-term care pharmacies to induce them to switch patients from a competitor drug to an Amgen's Aranesp. The settlement resolved a qui tam action filed in South Carolina.⁴¹ DOJ noted in its press release that the alleged kickbacks were paid to Omnicare, PharMerica, and Kindred. In July, Amgen agreed to pay \$15 million to resolve a separate qui tam action in the Central District of California that alleged Amgen had paid kickbacks to induce doctors to prescribe Xgeva.⁴² In December 2012, Amgen paid \$762 million to resolve criminal and civil liability related to off-label promotion and false pricing allegations. At that time, Amgen also entered into a CIA with the HHS OIG.⁴³
- **Genzyme:** In December, Genzyme agreed to pay \$22.28 million to resolve two qui tam actions in the Middle District of Florida related to its promotion of Septrafilm, a surgical adhesion barrier. The government, which intervened in both actions, alleged that Genzyme had marketed Septrafilm for uses that were not approved by the FDA and thus not reimbursable by federal health care programs.⁴⁴
- **MedCath:** In September, MedCath agreed to pay approximately \$6.1 million to resolve allegations that six of the company's former hospitals billed Medicare for implantable cardioverter defibrillators (ICDs) that were implanted in violation of Medicare guidelines.⁴⁵ The settlement is part of DOJ's long-term, nationwide investigation into hospitals that improperly billed Medicare for ICDs.⁴⁶ Hundreds of hospitals are under investigation. In August 2012, DOJ sent a "Resolution Model" to hospitals with instructions to perform self-audits and to estimate damages.⁴⁷
- **Trans1:** In July, medical device manufacturer Trans1 agreed to pay \$6 million to resolve allegations that it had violated the FCA by counseling hospitals and doctors to use inaccurate billing codes for Trans1's minimally-invasive spine procedures, paying kickbacks to physicians, and marketing a device for unapproved uses. The settlement resolves a qui tam action in the District of Maryland. Trans1 also entered into a CIA with the HHS OIG.⁴⁸

- **Abbott Laboratories:** In December, Abbott agreed to pay \$5.475 million to resolve allegations that the company violated the FCA by paying kickbacks to induce purchases of its carotid, biliary, and peripheral vascular products. The settlement resolves an Eastern District of Tennessee qui tam action in which the government intervened.⁴⁹
- **Mallinckrodt:** In July, Mallinckrodt agreed to pay \$3.5 million to resolve a qui tam action in the Northern District of California. The government, which intervened in the case, alleged that the company had provided physicians with kickbacks to induce them to prescribe Mallinckrodt drugs.⁵⁰
- **Pfizer:** In August, Pfizer settled a qui tam action that had been pending for 10 years with relator (and former Pfizer executive) Peter Rost. At the time of settlement, the District of Massachusetts had dismissed Rost's lawsuit and an appeal had been briefed and argued in the First Circuit. Rost alleged that Pfizer had provided kickbacks to physicians to induce purchases of the drug Genotropin and had marketed Genotropin for off-label uses. The settlement amount was not disclosed.⁵¹

Healthcare and Pharmaceuticals Judgments

- **Tuomey Healthcare System:** In October, the U.S. District Court for the District of South Carolina entered a revised judgment of \$237.5 million in a qui tam action against Tuomey. Earlier this year, the jury had found that Tuomey violated both the Stark Law and the FCA by entering into improper financial arrangements with physicians in a case prosecuted by the U.S. Attorney's Office for the Eastern District of North Carolina. Tuomey has appealed.⁵²

Healthcare and Pharmaceutical Complaints

- **Novartis:** In April, the government intervened in two qui tam actions against Novartis in the Southern District of New York. In the first, *United States ex rel. Bilotta v. Novartis Pharmaceuticals*, the government alleged the company conducted a speaker program in which it had improperly paid physicians honoraria to promote Novartis medications at events attended by other physicians.⁵³ In the second suit, in which the relator's identity has not been revealed, the government alleged that Novartis, by way of discounts and rebates, had paid kickbacks to at least twenty pharmacies as inducements for the pharmacies to switch patients from competitors' kidney transplant drugs to Novartis' Myfortic.⁵⁴

Novartis has denied the allegations and is litigating both cases, stating that the wide ranging allegations regarding its speaker programs are without merit and that the Myfortic lawsuit is a significant expansion of the AKS which threatens to undermine pharmaceutical discounting practices that benefit both consumers and payers, including the Government. In the speaker program case, after an initial court conference on Novartis' intention to file a motion to dismiss, the government filed a new complaint. Novartis has pending a motion to dismiss that new complaint.

- **PharMerica:** In August, the government intervened in *United States ex rel. Denk v. PharMerica Corporation*, an action in the Eastern District of Wisconsin, and alleged that PharMerica, a long-term care pharmacy, had caused false claims to be submitted to Medicare by dispensing controlled substances without valid prescriptions.⁵⁵
- **IPC The Hospitalist:** In December, the United States intervened in *United States ex rel. Oughatiyan v. IPC The Hospitalist Company*, an action pending in the Northern District of Illinois. The relator alleges that the company, one of the largest providers of hospitalist physician services in the nation, encouraged its physicians to bill for more expensive levels of medical services than they actually performed.⁵⁶ The United States had not yet filed its complaint in intervention by the end of 2013.

- **Health Management Associates:** In December, the United States intervened in a number of qui tam actions pending against Health Management Associates and its subsidiaries in the Middle District of Florida, the Southern District of Florida, the Northern District of Georgia, the Northern District of Illinois, and the District of South Carolina.⁵⁷ The relators' complaints allege that the company improperly admitted patients that should have been treated on an outpatient basis and provided improper financial incentives to physicians and physician groups in violation of the AKS and the Stark Law. The government has stated that it will renew a request to the Judicial Panel on Multidistrict Litigation to consolidate the actions.⁵⁸

➤ **Procurement and Grants**

Procurement and Grants Settlements

- **Westland Meat Co. et al.:** In November, DOJ announced that several former National School Lunch Program beef suppliers, including Westland Meat Co., M&M Management, and Cattleman's Choice, as well as several affiliated individuals, agreed to settle FCA allegations for violating various U.S. Department of Agriculture (USDA) regulations. The suppliers were alleged to have handled cattle in an inhumane manner, circumvented appropriate inspection of non-ambulatory disabled cattle, and made false representations regarding eligibility to process beef. The settlement involves allegations first brought in a qui tam action by the Humane Society of the United States. The government intervened in the suit and brought additional claims. Under the settlement, Westland and its owner paid \$240,000, and Westland will enter into a consent judgment worth \$155.68 million. M&M Management and Cattleman's Choice paid a total of approximately \$2.45 million. Two other defendants previously settled allegations for \$304,130. The Humane Society will receive approximately \$600,000 as its relator's share.⁵⁹
- **RPM International Inc. et al.:** In August, DOJ announced that RPM International Inc. and its subsidiary Tremco Inc. paid \$60.9 million to resolve FCA allegations in connection with two General Services Administration (GSA) Multiple Award Schedule contracts. DOJ alleged that, from January 2002 to March 2011, Tremco knowingly violated its contractual obligations to provide GSA with current, accurate, and complete information about its commercial sales practices, to report changes in discounts to comparable commercial customers (i.e., its "basis of award" customer), and to pass discounts provided to such customers on to the government. The allegations were initially made in a qui tam suit by a former Tremco vice president, who will receive more than \$10.9 million as his share of the government's recovery.⁶⁰
- **Infosys Corporation:** In October, Infosys agreed to pay \$34 million to resolve allegations that the company had failed to maintain accurate immigration records, sent foreign employees to perform activities in the United States that were inappropriate for the types of visas on which they travelled, and made false statements to consular officials. The settlement resolved an FCA action by the U.S. Attorney's Office for the Eastern District of Texas. In the settlement agreement, Infosys did not admit liability.⁶¹
- **CH2M Hill Hanford Group Inc. et al.:** In March, DOJ announced that CH2M Hill Hanford Group Inc. (CHG) and its parent company, CH2M Hill Companies Ltd., agreed to pay \$18.5 million to resolve civil and criminal FCA claims of inflated hours reporting for hazardous waste cleanup work at the U.S. Department of Energy's (DOE) Hanford Nuclear Site. CHG also committed an additional \$500,000 towards accountability systems, consented to a corporate monitor, and agreed to continue actively cooperating in ongoing fraud investigations.⁶²

- **Science Applications International Corporation:** In June, DOJ announced that Science Applications International Corporation (SAIC) had paid \$11.75 million to settle FCA claims as a sub-grantee to grants offered by three government agencies. From 2002 to 2012, the New Mexico Institute of Mining and Technology received six federal grants from DOJ, the Department of Homeland Security (DHS), and the Federal Emergency Management Agency (FEMA) to train first responders to prevent and respond to terrorist attacks involving explosive devices. DOJ alleged that SAIC's cost proposal represented that SAIC would use more expensive personnel than it intended and ultimately used. No determination of liability was made in this case, as the settlement resolved allegations only.⁶³
- **Northrop Grumman Corp.:** In December, DOJ announced that Northrop Grumman paid \$11.4 million to settle allegations that it had violated the Federal Acquisition Regulations (FAR) and FCA based on its failure to comply with a 2002 settlement agreement with the Defense Contract Management Agency (DCMA). DOJ alleged that Northrop Grumman had failed to honor a commitment in the 2002 settlement agreement to limit the amount of deferred compensation for key employees that it would include in proposals for subsequent contracts. The contracting officer demanded that Northrop Grumman should be assessed a penalty equal to twice the amount of unallowable costs claimed for FAR violations. Northrop Grumman appealed this decision to the U.S. Court of Federal Claims. DOJ responded with counterclaims adding the alleged FCA violation, on the grounds that Northrop Grumman improperly passed along these unallowable costs in indirect rates applicable to hundreds of contracts since 2004 and induced the Government to pay more than \$1.9 million in unallowable costs. The settlement agreement provided that the claims settled were based only on allegations and did not include a determination of liability.⁶⁴
- **Gallup Organization:** In July, the U.S. Attorney's Office for the District of Columbia announced that the Gallup Organization had agreed to pay \$10.5 million to settle allegations that it violated the FCA and the Procurement Integrity Act under several contracts and subcontracts. A qui tam complaint filed in November 2012 alleged that Gallup knowingly overstated its estimated labor hours in proposals to the U.S. Mint and State Department for contracts and task orders awarded without competition, leading to inflated prices. The settlement also resolved allegations that Gallup had engaged in improper employment negotiations with a then-official at FEMA in order to obtain a FEMA subcontract at an inflated price, as well as other FEMA funding following subcontract award. The relator, Gallup's former Director of Client Services, received nearly \$2 million as his share of the settlement.⁶⁵
- **CA, Inc.:** In November, the U.S. Attorney's Office for the Eastern District of New York announced that CA, Inc., a software and information technology company, agreed to pay \$8 million to settle FCA allegations related to GSA and Defense Department (DoD) contracts. The government alleged that, between 2001 and 2010, federal agencies purchased software maintenance services from CA, including upgrades and technical assistance, under a GSA blanket purchase agreement (BPA). According to the government, CA knowingly double-billed agencies by charging periods of software maintenance for which agencies had already paid. The government further alleged that CA improperly steered DoD customers away from BPA purchases and toward purchases under more costly contracts. The settlement resolved claims filed in a qui tam suit, which also made claims on behalf of several states. The state claims were settled under a separate agreement.⁶⁶

- **General Electric Aviation Systems:** In June, DOJ announced that General Electric Aviation Systems (GEAS) had agreed to pay \$6.58 million to resolve FCA allegations arising from multiple DoD contracts for the manufacturing and delivery of external fuel tanks (EFTs) for Navy fighter jets. In March 2008, a GEAS-manufactured EFT failed government testing, which spurred investigations. Based on the results of the investigations, DOJ alleged that GEAS had failed to comply with contract specifications and to undertake proper quality control procedures in connection with 641 EFTs delivered to the Navy between June 2005 and February 2008. The settlement also resolved allegations that, between June 2010 and June 2011, GEAS had falsely represented to another government contractor that it had performed complete inspections of 228 drag beams for Army Blackhawk helicopters and that such items conformed to contract specifications. The claims resolved by the settlement are only allegations; there has been no determination of liability.⁶⁷
- **Axway, Inc.:** In October, the U.S. Attorney's Office for the District of Maryland announced that Axway, Inc., had agreed to pay \$6.2 million to settle allegations that it and its predecessors (Valicert, Inc. and Tumbleweed Communications Corporation) provided the GSA with defective pricing information to obtain a GSA Multiple Award Schedule contract for software licenses and related services. The government alleged that, during the initial negotiation of the contract, Valicert had knowingly provided GSA with commercial pricing information that was not current, accurate, and complete, resulting in the award of a contract to Valicert that included pricing that was less advantageous to the government than would have been negotiated had the company provided accurate disclosures. The government further alleged that when the contract was renewed in 2007, Tumbleweed again failed to provide accurate and complete commercial pricing disclosures. Finally, the settlement resolved additional allegations that Tumbleweed and Axway had failed to comply with the price reduction clause of the contract.⁶⁸
- **Science Applications International Corporation:** In July, SAIC agreed to pay \$5.75 million to resolve allegations that it had provided false information to GSA contracting officials to induce them to award the BPA to SAIC. The claims were originally made in a qui tam suit by a retired Air Force officer, who received nearly \$1 million under the settlement. The claims resolved in this case were allegations only, and there was no determination of liability.⁶⁹
- **CDW-Government LLC:** In March, DOJ announced that CDW-Government LLC had agreed to pay \$5.66 million to resolve allegations that it submitted false claims in connection with a GSA contract. The government alleged that, between 1999 and 2001, CDW-Government improperly had (i) charged government purchasers for shipping, (ii) sold products to the government that were manufactured in China and other countries for which sales are restricted under the Trade Agreements Act, and (iii) underreported sales to avoid paying the GSA's Industrial Funding Fee, which is based on total GSA contract sales. The allegations arose from a qui tam suit filed by a former CDW-Government sales representative, who received over \$1.5 million in connection with the settlement.⁷⁰
- **Corning Incorporated:** In March, DOJ announced that Corning had agreed to pay \$5.65 million to settle allegations of FCA violations related to the provision of laboratory research products to federal government customers through the GSA Multiple Award Schedule program. The settlement resolved allegations that, in contract negotiations and administration, Corning had failed to comply with its obligation to provide GSA with "current, accurate, and complete" information about its commercial sales practices, such as discounts offered to other customers, and had made false statements to GSA about its sales practices and discounts. The claims were initially made in qui tam suit by a former Corning sales representative, who received \$904,000 as his share of the recovery.⁷¹

- **Conax Florida Corp. et al.:** In August, DOJ announced that Conax Florida Corp. and its parent, Cobham PLC, agreed to pay \$2 million and to provide the government with \$2.4 million worth of replacement parts in order to resolve allegations that Conax had submitted false claims for improperly tested components used by aircrew members of the U.S. military and the National Aeronautics Space Administration (NASA) in the event of a crash. The allegations were initially made in a qui tam suit filed by two former Conax employees, who received a combined bounty of up to \$810,000.⁷²
- **FreshPoint Inc.:** In November, DOJ announced that FreshPoint Inc. had agreed to pay \$4.2 million to resolve allegations that it had overcharged DoD for produce purchases under 15 contracts. The government had alleged that, for nearly two years, FreshPoint had improperly inflated its prices.⁷³
- **ATI Enterprises Inc.:** In August, DOJ announced that ATI Enterprises Inc., a company that owns a chain of schools, agreed to pay \$3.7 million to resolve FCA allegations that it had misrepresented its job placement statistics in order to maintain its eligibility to participate in federal financial aid programs. The government further alleged that, by inducing students to enroll through these fraudulent practices, ATI Enterprises had falsely increased its enrollment numbers and, as a result, the amount of aid that it received under federal student aid programs.⁷⁴
- **Contrack International Inc.:** In July, DOJ announced that Contrack International Inc. had agreed to pay \$3.5 million to resolve FCA allegations in connection with contracts with the U.S. Agency for International Development (USAID) for infrastructure construction projects in Egypt in the 1990s under which bidders were required to be prequalified and, in some cases, establish that they were U.S. companies. The contract was ultimately performed by a joint venture partnership between Contrack, Washington Group International, Inc., and Misr Sons Development S.A.E. (an Egyptian company), and the government alleged that the joint venture partners evaded the prequalification requirement by concealing the identity of the joint venture partners, which prevented USAID from accurately evaluating their qualifications. As a result, the government claimed that Contrack and its partners received contracts for which they were ineligible.⁷⁵
- **AT&T:** In November, AT&T agreed to pay \$3.5 million to resolve FCA allegations that it had knowingly overbilled the Telecommunications Relay Services (TRS) Fund, which is administered by the Federal Communication Commission (FCC) and compensates IP Relay service providers for placing calls on behalf of hearing- or speech-impaired individuals in the United States. According to the allegations, from December 2009 through December 2011, as many as 80% of the calls for which AT&T claimed reimbursement were ineligible because the calls did not originate in the U.S. or were not placed by hearing- or speech-impaired individuals. The claims resolved by the settlement are allegations only, and there has been no determination of liability.⁷⁶
- **American Systems Corporation et al.:** In March, three CIA contractors, American Systems Corporation, Anixter International Inc., and Corning Cable Systems LLC, agreed to pay \$3 million to resolve allegations that each company violated the FCA and the AKS. DOJ alleged that the three companies, who were working together on a contract bid, had provided CIA employees and outside consultants with meals, entertainment, gifts, and tickets to sporting and other events in an effort to influence contract specifications that would favor the three contractors in the award. The settlement also resolved allegations that the companies improperly received source selection information from a CIA employee to whom they had provided gratuities. The claims were initially brought in a qui tam suit by a former Anixter sales representative, who received \$585,000 as his share of the recovery.⁷⁷

- **TesTech, Inc. et al.:** In June, DOJ announced that TesTech, Inc., its owner Sherif Aziz, CESO Testing Technology, Inc., CESO International, LLC, CESO, Inc., and their owners David and Shery Oakes, had agreed to pay \$2.88 million to resolve allegations that they had falsely claimed disadvantaged business status on various federally-funded transportation projects. The allegations resolved by the settlement were initially made in a qui tam suit by a former TesTech employee, who received more than \$500,000 as part of the settlement.⁷⁸
- **Kuchera Defense Systems, Inc.:** In April, the U.S. Attorney's Office for the Western District of Pennsylvania announced that Kuchera Defense Systems, Inc. (KDS), and its owners, William Kuchera and Ronald Kuchera, agreed to pay a combined \$2.7 million to resolve civil FCA claims. The Kucheras also pled guilty to criminal fraud and conspiracy charges. According to the allegations, KDS, a DoD contractor, had submitted cost certifications containing expressly unallowable expenses, including a private aircraft lease, personal vacations, car leases, improvements on a private residence, and lobbying fees, inflating overhead costs and other expenses billed to DoD.⁷⁹
- **Iraqi Consultants and Construction Bureau:** In November, DOJ announced that Iraqi Consultants and Construction Bureau (ICCB) paid \$2.7 million to resolve allegations that it had paid bribes to an Army Corps of Engineers procurement official in order to obtain information that gave it a competitive advantage in bidding on several DoD construction contracts in Iraq. The government further alleged that the ICCB, a construction company headquartered in Baghdad, had knowingly overcharged the government for services provided under the resulting contract.⁸⁰
- **American Commercial Colleges Inc.:** In May, DOJ announced that American Commercial Colleges Inc. (ACC) had agreed to pay the United States up to \$2.5 million, plus interest, to resolve allegations of FCA violations premised on false certifications of compliance with federal student aid program eligibility requirements. DOJ alleged that ACC had violated the "90/10 Rule," which requires for-profit colleges to obtain at least 10% of their annual revenues from sources other than Title IV student aid programs. Under the terms of the agreement, ACC will pay \$1 million, plus interest, over 5 years, and could be further obligated to pay an additional \$1.5 million. The relators, both former directors of ACC campuses, will receive \$170,000 of the first \$1 million, and an additional \$225,000 if ACC is obligated to pay the full \$1.5 million contingent portion of the settlement.⁸¹
- **Macalan Group Inc.:** In September, DOJ announced that security contractor Macalan Group Inc. (formerly known as NEK Advanced Securities Inc.) agreed to pay \$2.08 million to resolve allegations that it had submitted invoices that claimed excessive or unallowable costs, including equipment leasing fees, in connection with a contract with the Joint Improvised Explosive Device Defeat Organization. In resolving the allegations, Macalan also agreed to relinquish outstanding invoices worth \$744,969.⁸²
- **CyTerra Corporation:** In July, DOJ announced that CyTerra Corporation agreed to pay \$1.9 million to resolve FCA allegations arising from its failure to provide the Army with "accurate, complete, and current" cost or pricing data during the negotiation of contract modifications related to its sales of mine detectors, in violation of the Truth in Negotiations Act. The claims were initially made in a qui tam suit by two former CyTerra executives, who received a combined \$361,000 from the settlement.⁸³

- **LG Chem Michigan, Inc.:** The U.S. Attorney's Office for the Western District of Michigan announced in November that auto supplier LG Chem Michigan, Inc. (LGCMI) agreed to pay \$1.2 million to resolve allegations that the company had improperly sought and obtained federal funds to pay employees. In 2010, DOE awarded LGCMI a grant worth more than \$150 million under the American Recovery and Reinvestment Act to construct and operate a lithium-ion battery manufacturing plant in Michigan. According to the government's allegations, during the first three quarters of 2012, before LGCMI transitioned battery production from foreign sources to the Michigan plant, LGCMI submitted claims to obtain the federal share of wages and benefits paid to domestic workers who were engaged in non-work activities such as watching movies, playing games, and performing volunteer work. LGCMI had previously refunded nearly \$850,000 to DOE based on the same allegations.⁸⁴
- **Caddell Construction:** In March, DOJ announced that Caddell Construction agreed to pay \$1.15 million to resolve allegations that Caddell had falsely reported that it hired and mentored a Native American-owned company to work on a construction contract as part of DoD's Mentor-Protégé and Indian Incentive Programs. The Mentor-Protégé Program reimburses companies for time and cost of mentoring small disadvantaged businesses, and the Indian Incentive Program provides contractors with a rebate for subcontracting with Native American-owned businesses. The government alleged that Mountain Chief, the Native American-owned business that Caddell allegedly mentored and subcontracted with, was merely a "pass-through" entity established to claim payments under the programs. Caddell's former director of business development and Mountain Chief's former president have also been indicted on related charges.⁸⁵
- **Kleinberg Electric Inc.:** In June, the U.S. Attorney's Office for the Southern District of New York announced that Kleinberg Electric Inc. had agreed to pay \$936,000 to settle allegations that it had engaged in fraudulent conduct designed to take advantage of the Disadvantaged Business Enterprise (DBE) Program in order to secure a subcontract on a federally-funded project. The government alleged that Kleinberg caused the prime contractor to falsely represent to the Metropolitan Transportation Authority that Kleinberg had paid hundreds of thousands of dollars to DBE to perform work on the contract, when the DBE did not actually perform a "commercially useful function" as required under the program's regulations.⁸⁶
- **Sherman-Dixie Concrete Industries, Inc.:** In July, the U.S. Attorney's Office for the Middle District of Tennessee announced that Sherman-Dixie Concrete Industries, Inc., had agreed to pay \$664,581 to settle allegations that it had submitted claims for payment for products that did not meet required specifications. While the products were provided for projects primarily administered by the Tennessee Department of Transportation, a large portion of the funding was provided by the Federal Highway Administration.⁸⁷
- **Hanson Pipe & Precast:** In June, the U.S. Attorney's Office for the Middle District of Tennessee announced that Hanson Pipe & Precast agreed to pay \$500,000 to settle allegations that it had submitted claims for payment to the government for products that did not meet required contractual specifications. While the products were provided for projects primarily administered by the Tennessee Department of Transportation, a large portion of the funding was provided by the Federal Highway Administration.⁸⁸

- **Larry Lehmann:** In August, DOJ announced that Larry Lehmann, a Texas businessman, agreed to pay \$400,000 to settle allegations in connection with the FCC E-rate Program, which subsidizes eligible equipment and services to make Internet access and networking more affordable for public schools and libraries. Lehmann was the CEO and managing partner of Acclaim Professional Services, which provided E-rate funded equipment and services to the Houston Independent School District (HISD) from 2004-2006. DOJ contended that, in violation of E-rate competitive bidding requirements and HISD procurement rules, Lehmann had provided gifts and loans to various HISD employees, including an HISD employee involved in the procurement and administration of HISD's E-rate projects. DOJ further alleged that Lehmann had helped devise a scheme in which HISD costs could be passed through the E-rate Program by outsourcing HISD employees to Acclaim. Finally, DOJ alleged that, with Lehmann's approval, Acclaim had hidden the cost of these employees in E-rate Program invoices by rolling them into the cost of eligible goods and services.⁸⁹
- **Granite Construction Company:** In February, Granite Construction Company agreed to pay \$367,500 to settle allegations that it had overcharged the government for construction projects funded by the Department of Transportation and the Army Corps of Engineers from 2006-2008. DOJ alleged that Granite had sought price increases in the form of change orders and requests for equitable adjustments that were inflated because it claimed higher rates for general liability and workman's compensation insurance than the rates that were the company actually incurred.⁹⁰
- **Giga Inc.:** In December, Giga Inc., agreed to pay \$300,000 to settle claims that it had sold to the GSA Chinese-made boots, in violation of the Trade Agreements Act.⁹¹
- **Advanced Device Technology Inc.:** In April, Advanced Device Technology Inc. (ADT) agreed to pay over \$230,000 to resolve allegations that it overbilled the U.S. Army Space and Missile Defense Command under a contract for the development of infrared sensor and infrared camera equipment. Under the contract's "level of effort" clause, ADT was required to spend a specified minimum amount of labor hours on specific portions of the contract, which the government alleged ADT had not done.⁹²

Procurement and Grants Complaints

- **Lance Armstrong et al.:** In February, DOJ announced that it was intervening in an FCA suit against Lance Armstrong, Johan Bruyneel, Tailwind Sports LLC, and Tailwind Sports Corporation for submitting false claims to the U.S. Postal Service (USPS) in connection with its sponsorship of Armstrong and Tailwind's professional bicycle racing team. The suit alleges that, contrary to the sponsorship agreement, Armstrong and other riders used performance-enhancing substances. The suit also alleges that Bruyneel knew that the team members were using such substances, and facilitated the practice. The claims were originally made in a qui tam suit by Floyd Landis, a former rider and teammate of Armstrong's on the USPS-sponsored team. DOJ's intervention in the suit came after Armstrong admitted in a televised interview that he had used banned substances.⁹³
- **United States Investigations Services LLC:** In October, DOJ announced that it was intervening in an FCA suit against United States Investigations Services LLC (USIS). The suit alleged that USIS had failed to perform quality control reviews in connection with its background investigations pursuant to a contract for the Office of Personnel Management (OPM). The relator's complaint alleged that, starting in 2008, USIS engaged in a practice referred to internally as "dumping," whereby a USIS computer program would automatically release to OPM background investigations that had not gone through the full review process and thus were not complete in order to meet revenue targets and maximize profits. The initial qui tam suit was brought by a former USIS employee.⁹⁴

- **TAB Construction Co. Inc.:** In December, DOJ announced that it had filed a complaint against TAB Construction Co. Inc. (TAB), and its owner, William E. Richardson III, for allegedly making false statements to the SBA to obtain certification as a Historically Underutilized Business Zone (HUBZone) company. The government's complaint further alleges that TAB used its fraudulently procured HUBZone certificate to obtain four U.S. Army Corps of Engineers' contracts worth several million dollars. The government's complaints also asserts claims under FIRREA.⁹⁵
- **Washington Closure Hanford LLC et al.** The U.S. Attorney's Office for the Eastern District of Washington announced in December that it had filed an FCA suit against Washington Closure Hanford LLC (WCH), Federal Constructors Inc., and others, alleging that WCH falsely claimed credit for awarding tens of millions of dollars of federal subcontracts to small businesses, including woman-owned small businesses. WCH is a DOE prime contractor at the Hanford Nuclear Site.⁹⁶

➤ **Financial Institutions**

Historically, FCA claims have been most common in the healthcare and procurement sectors. In recent years, however, the financial industry has seen a significant increase in FCA activity, which seems likely to continue for some time.

In 2012, the federal government and 49 state attorneys general announced a \$25 billion settlement with the nation's five largest mortgage servicers (National Mortgage Settlement). The National Mortgage Settlement resolved numerous claims, including claims under the FCA, related to the participating banks' origination, servicing, and other mortgage-lending-related practices.⁹⁷ However, the National Mortgage Settlement did not absolve the participating banks of all FCA liability arising from their mortgage businesses, and the precise contours of the FCA release in the National Mortgage Settlement remains disputed.⁹⁸ As a result, the participating banks continued to face mortgage-related FCA litigation in 2013. Additionally, 2013 saw mortgage-related FCA cases involving smaller financial institutions and FCA cases involving commercial loans guaranteed by the Small Business Administration (SBA).

Financial Institutions Settlements

- **JPMorgan Chase:** On November 19, DOJ announced that it and several states had reached a \$13 billion settlement with JPMorgan Chase to resolve civil claims related to its residential mortgage-backed securities (RMBS)-related business.⁹⁹ The settlement agreement contains a broad release of FCA liability arising from JPMorgan Chase's RMBS-related conduct, but explicitly exempts seven pending qui tam suits from its scope.¹⁰⁰
- **PNC Bank N.A.:** In September, DOJ announced a \$7.1 million settlement with PNC Bank N.A. to resolve claims that PNC had failed to engage in prudent underwriting practices when issuing loans guaranteed by the SBA. The government alleged that the bank had relied on unaudited financial statements when issuing the loans and failed to check whether the information contained in the financial statements was accurate. The claims settled by this agreement are allegations only; there has been no determination of liability.¹⁰¹

Financial Institutions Judgments

- **Bank of America & Countrywide Financial:** On May 8, Judge Rakoff of the U.S. District Court for the Southern District of New York dismissed FCA claims against Bank of America in a lawsuit concerning the allegedly fraudulent sale of defective mortgages to Fannie Mae and Freddie Mac.¹⁰² The United States had intervened in the suit. Judge Rakoff explained that dismissal of the FCA claims was warranted because the Amended Complaint failed to plead with sufficient particularity that defective loans were sold to Fannie Mae and Freddie Mac after May 20, 2009, the date on which the Fraud Enforcement and Recovery Act of 2009 (FERA) made the FCA applicable to claims submitted to those entities.¹⁰³ Judge Rakoff, however, refused to dismiss claims arising under the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA), and in October, a jury found Bank of America and Countrywide liable for violations of FIRREA.¹⁰⁴

- **Wells Fargo Bank:** On September 24, Judge Furman of the U.S. District Court for the Southern District of New York denied Wells Fargo's motion to dismiss a suit alleging that it had engaged in fraud in its participation in the FHA's Direct Endorsement Lender Program.¹⁰⁵ The government alleged that Wells Fargo represented that thousands of mortgages were eligible for FHA insurance when they were not. In denying the motion to dismiss, the court held, among other things, that (1) the consent judgment entered into by Wells Fargo as part of the National Mortgage Settlement did not bar the suit; and (2) the Wartime Suspension of Limitations Act tolled the FCA's statute of limitations, rendering all of the claims timely.

Financial Institutions Complaints

- **Golden First Mortgage Corp.:** On April 4, the U.S. Attorney for the Southern District of New York filed suit against Golden First Mortgage, alleging violations of the FCA and FIRREA. The suit alleges that Golden First engaged in fraud in its participation in the FHA's Direct Endorsement Lender Program, resulting in at least \$12 million in losses.¹⁰⁶ Golden First has filed a motion to dismiss.
- **Pinnacle Bank:** On September 27, DOJ announced that it would intervene in a qui tam suit against Pinnacle Bank.¹⁰⁷ The suit alleges that Pinnacle violated the FCA by withholding material information from and making materially false certifications to the SBA with regard to the funding of an SBA "504" loan.¹⁰⁸

FEDERAL CASE LAW DEVELOPMENTS

Supreme Court - (1) Statute of Limitations; First-to-File Bar; (2) Rule 9(b) and Presentment; (3) Alternate Remedy and Public Disclosure Bar

The Supreme Court decided no FCA cases in 2013, but at the end of the year three petitions for certiorari in FCA cases were pending at the Court. In two of the cases, the Court has called for the views of the Solicitor General—a sign that the Court considers the issues raised to be important. The petition in *Kellogg Brown & Root, Inc. v. United States ex rel. Carter*, No. 12-1497, presents two questions: (i) whether the Wartime Suspension of Limitations Act (WSLA) suspends the running of the limitations period in civil FCA cases, even qui tam ones in which the government does not intervene, and (ii) whether the FCA's first-to-file bar applies even when the first-filed case is no longer pending. The second, in *United States ex rel. Nathan v. Takeda Pharmaceuticals of North America, Inc.*, No. 12-1349, raises the question whether relators must identify particular false claims that were submitted to the government to satisfy the Rule 9(b) pleading standard, or whether they may instead rely on broader allegations of a fraudulent scheme from which the submission of false claims may reasonably be inferred. The third petition, in *United States ex rel. Newell v. St. Paul, Minnesota*, No. 13-650, is perhaps as interesting for the context from which it emerges—the government's controversial settlement of a Fair Housing Act case while it was pending at the Court—as it is for the issues raised: (i) whether the government's settlement of a non-FCA case in conjunction with its decision not to intervene in an FCA case constitutes an "alternate remedy" entitling the relator to a share of any proceeds the government received, and (ii) whether the public disclosure bar is triggered by disclosure of facts more general than the specific instances of false claims alleged by the relator.

***United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171 (4th Cir. 2013), cert. filed sub nom. *Kellogg Brown & Root, Inc. v. United States ex rel. Carter*, No. 12-1497 (June 24, 2013).**

A divided panel of the Fourth Circuit held that (1) the WSLA suspends the six-year statute of limitations in civil FCA cases during the pendency of hostilities in Iraq, even in qui tam suits in which the government has not intervened; and (2) the FCA's first-to-file bar does not preclude a later action based on the same facts when the earlier-filed suit has already been dismissed.

About the Case

Relator Carter filed suit against the Halliburton Company, KBR, Inc., Kellogg Brown & Root Services, Inc., and Service Employees International, Inc., alleging that the defendants had fraudulently billed the government for services provided to the military during the war in Iraq. 710 F.3d at 174-75. The district court dismissed the suit, holding that it was barred by the FCA's first-to-file bar, 31 U.S.C. § 3730(b)(5); that it was filed outside of the FCA's six-year limitations period; and that the WSLA did not toll the limitations period during the Iraq War.

The Fourth Circuit reversed the district court on each ground. On the first, the court of appeals held that the WSLA suspends the civil FCA's limitations period, even in qui tam suits in which the government has not intervened. Congress enacted the WSLA in 1942 to codify temporary measures that had been put in place to protect the government from increased fraud during World Wars I and II. See *Bridges v. United States*, 346 U.S. 209, 217 (1953). In 2008, Congress expanded the WSLA by (1) extending the tolling of the limitations period from three to five years after the end of hostilities, and (2) broadening its application from declared wars to all authorized military conflicts. See Pub. L. No. 110-329, § 8117, 122 Stat. 3574, 3647 (2008). The WSLA now provides that "[w]hen the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces, . . . the running of any statute of limitations applicable to any offense (1) involving fraud or attempted fraud against the United States or any agency thereof . . . shall be suspended until 5 years after the termination of hostilities as proclaimed by a Presidential proclamation . . . or by a concurrent resolution of Congress." 18 U.S.C. § 3287.¹⁰⁹

The dissenting judge noted that the WSLA makes no reference to the FCA, and that the FCA is silent on whether its statute of limitations is suspended during wartime. 710 F.3d at 188-95. The dissent also

argued that applying the WSLA to actions in which there is no government intervention does not serve the WSLA's purpose of ensuring "the ability of law enforcement to effectively police fraud against the government during the fog of war." *Id.* at 192. Since the decision, one district court has adopted the dissent's reasoning and declined to apply the WSLA to an FCA suit not connected to the war effort and in which the United States had declined to intervene, but another district court has held that it applies all civil fraud claims, even those unconnected to the war effort.¹¹⁰

The Fourth Circuit also reversed the district court's ruling that the relator's claims were subject to dismissal under the FCA's first-to-file bar. The court of appeals held that even though two prior cases based on the same facts were pending at the time the *Carter* action was filed, dismissal was correct. But the dismissal should have been without prejudice, the court explained, because once those earlier cases had been dismissed they were no longer "pending" and therefore no longer a bar to Carter's ability to file his claims. This first-to-file bar holding deepens an emerging circuit split. The Fourth Circuit's decision comports with decisions by the Seventh and Tenth Circuits in allowing suit under these circumstances.¹¹¹ Other courts, including the Ninth Circuit, have held or indicated that a case would be barred under the circumstances of this case.¹¹²

Implications for Future FCA Cases

Under the broadest reading of the majority's opinion in *Carter*, potential FCA defendants could face what is, for all practical purposes, statutes of limitations that have been tolled since 2001 and will not begin to run until after the end of hostilities in Afghanistan and Iraq. While *Carter*'s facts were limited to alleged false claims squarely connected to the war effort, companies operating outside of the defense industry should take note as well—courts could follow the lead of district courts that have held the WSLA applicable to claims not arising out of a war or conflict. The Fourth Circuit's interpretation of the first-to-file bar would allow relators to avoid the bar simply by waiting to file suit until similar pending actions are dismissed, transforming the bar into a "one-case-at-a-time" rule.

***United States ex rel. Nathan v. Takeda Pharm. N.A., Inc.*, 707 F.3d 451 (4th Cir. 2013), cert. filed No. 12-1349 (May 10, 2013).**

Reaffirming the requirement that relators must plead false claims with particularity, the Fourth Circuit held that alleging a fraudulent scheme is insufficient where the scheme alleged need not necessarily have led to the presentment of a false claim.

About the Case

The relator, a sales manager for Takeda Pharmaceuticals, brought a qui tam action against Takeda alleging that it caused false claims to be presented to the government by marketing a pharmaceutical to physicians at higher doses than had been approved by the FDA. The district court dismissed the complaint with prejudice, finding that its allegations lacked the particularity required by Rule 9(b).

The Fourth Circuit affirmed, holding that the relator had failed to allege that specific false claims were actually presented to the government for payment. 707 F.3d at 458-61. The court rejected the argument that it suffices to allege the existence of a fraudulent scheme supporting the inference that false claims were presented to the government. *Id.* at 456. Instead, the court held that Rule 9(b) requires that a "relator plead facts plausibly alleging that particular, identifiable false claims actually were presented to the government for payment." *Id.* Thus, where "a defendant's actions, as alleged and as reasonably inferred from the allegations, *could have led, but need not necessarily have led,* to the submission of false claims, a relator must allege with particularity that specific false claims actually were *presented to the government . . .*" *Id.* at 457 (emphasis added).

In reviewing the relator's allegations, the court found that they fell short of this standard. For example, the relator had alleged that that Takeda promoted its pharmaceutical to rheumatologists who did not treat an FDA-approved condition, but had failed to allege that these rheumatologists actually wrote any off-label

prescriptions. *Id.* at 458-59. Similarly, the relator had alleged that 98 physicians submitted claims for reimbursement after being marketed 60 mg. pills, which are approved only for certain conditions, but had failed to allege that 60 mg. dosages were actually prescribed for off-label uses. *Id.* at 459.

Implications for Future FCA Cases

The Fourth Circuit's decision will make it more difficult for relators to survive a motion to dismiss where they can allege only a fraudulent scheme and cannot allege facts substantiating that false claims were actually submitted to the government as a result.

***United States ex rel. Fredrick Newell v. City of St. Paul, Minnesota*, 728 F.3d 791 (8th Cir. 2013), cert. filed, No. 13-650 (November 26, 2013).**

The Eighth Circuit held that the United States did not pursue an "alternate remedy," as defined in the FCA, when it agreed not to intervene in a qui tam case against the City of St. Paul as part of an alleged deal in which the City agreed to resolve a controversial fair housing case.

About the Case

In 2008 Newell brought a qui tam suit against the City, alleging that it had forged compliance documents in order to receive low-income housing funds. Newell alleges that in spite of a recommendation for intervention from DOJ's Civil Fraud Section, the United States declined to intervene in his qui tam suit as part of a deal with the City in which it agreed to settle *Magner v. Gallagher*, a case testing the availability of disparate impact fair housing claims that was pending before the Supreme Court.

Newell sought to maintain his action against the City, but both the district court and Eighth Circuit determined that he was blocked by the public disclosure bar. The FCA provides that the government "may elect to pursue its claim through any alternate remedy available to the [g]overnment, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section." 31 U.S.C. § 3730(c)(5). Both the district court and the court of appeals rejected Newell's contention that the government's arrangement with the City constituted an "alternate remedy" and that he was therefore entitled to a portion of any proceeds the government recovered from the arrangement. 728 F.3d at 798.

Implications for Future FCA Cases

Although it arose in an unusual context, the case highlights the complicated litigation that can surround settlements negotiated directly with the government without the involvement of the relator. The Eighth Circuit's holding that general public disclosures of the alleged fraud preclude qui tam litigation over specific instances of fraud is useful for defendants facing qui tam suits where the general nature of the alleged fraud has been publicly disclosed.

First Circuit - (1) Rule 9(b) Pleading Standards; (2) First-to-File Bar; (3) District Court's Discretion to Limit Discovery

***U.S. ex rel. Ge v. Takeda Pharmaceutical Co. Ltd.*, 737 F.3d 116 (1st. Cir. 2013)**

The First Circuit affirmed the district court's dismissal of a relator's complaint for failure to identify specific claims presented to the government for reimbursement. The First Circuit avoided ruling on the district court's additional basis for dismissing, namely that the relator had not adequately established that compliance with FDA adverse event reporting requirements was a material precondition to the payment.

About the Case

The relator, a former Takeda employee, alleged that Takeda had failed to disclose adequately to FDA the risks associated with four of its drugs, causing false claims by patients and physicians to be submitted for payment to Medicare and Medicaid. The district court dismissed under Rule 9(b) for failure to plead fraud with sufficient particularity and under Rule 12(b)(6) for failure to state a claim. With regard to the 12(b)(6) ground, the district court held that the relator had not established that compliance with FDA's adverse event reporting requirements was a "material precondition" to payment of the claims at issue.

Although the government had declined to intervene, DOJ filed an amicus brief in the First Circuit arguing, among other things, that failure to report adverse events may be material to the government's payment decisions under Medicare and Medicaid. The court of appeals declined to address the issue, affirming dismissal instead under Rule 9(b). The court concluded that the relator had made "no effort to identify specific entities who submitted claims or government program payers, much less times, amounts, and circumstances." 737 F.3d at 124.

Implications for Future FCA Cases

The First Circuit's decision makes clear that when a relator alleges that a defendant has engaged in conduct that caused third parties to make false claims to the government, the relator must identify specific claims that were fraudulently submitted with particularity to satisfy the requirements of Rule 9(b). Although the court of appeals did not address the issue of alleged failures in FDA adverse event reporting, other relators will likely try to use that issue as a basis for FCA claims.

***United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28 (1st Cir. 2013)**

On an issue that has divided the circuits, the First Circuit held that a complaint that fails to satisfy Federal Rule of Civil Procedure 9(b) may nonetheless trigger the FCA's first-to-file bar, 31 U.S.C. § 3730(b)(5), precluding subsequent qui tam litigation where the earlier-filed case puts the government on notice of the "essential facts" of the alleged fraud. The First Circuit joined the D.C. Circuit on this issue, rejecting the Sixth Circuit's view that an earlier-filed suit must satisfy Rule 9(b) to trigger the FCA's first-to-file bar.

About the Case

The relator alleged a kickback scheme involving the promotion of cardiac management devices. The district court dismissed the complaint under the FCA's first-to-file bar. On appeal, the relator argued that the earlier-filed complaint should not trigger the bar because the complaint failed to meet the pleading standards of Rule 9(b).

The First Circuit held that the first-to-file bar precludes litigation on a later-filed complaint even if the later-filed complaint incorporates different details as long as the first complaint alleges the same "essential facts." In the First Circuit's view, a complaint that puts the government on sufficient notice to investigate potential fraud, even if it fails to meet Rule 9(b)'s heightened pleading standards, suffices to trigger the bar because subsequent actions would do "nothing to help reduce fraud of which the government is already aware." 718 F.3d at 36.

Implications for Future FCA Cases

The First Circuit's decision deepens a circuit split regarding the FCA's first-to-file bar, increasing the prospects for Supreme Court review of this important issue.

***United States ex rel. Duxbury v. Ortho Biotech Prods. L.P.*, 719 F.3d 31 (1st Cir. 2013)**

The First Circuit affirmed a district court's order strictly limiting a relator's discovery to a narrow set of claims that had survived a previous order of dismissal, precluding the relator from seeking discovery (i)

into a “nationwide” fraud where his allegations concerned only the vicinity in which he worked, or (ii) into the defendant’s conduct after the relator had left the company about which the relator lacked any personal knowledge.

About the Case

The First Circuit’s decision followed an appeal from the entry of summary judgment in favor of the defendant in a long-running case in which the relator alleged that Ortho Biotech Products, L.P. offered improper kickbacks in the promotion of its drug Procrit. The First Circuit previously affirmed dismissal of two counts of Duxbury’s FCA action for lack of subject-matter jurisdiction, but it remanded a portion of the case back to the district court, rejecting the lower court’s prior conclusion that certain of Duxbury’s kickbacks allegations for the period 1992-1998 were not pled with sufficient particularity under Rule 9(b).

On remand, Ortho moved to limit the scope of discovery in light of the narrow nature of the remaining claim, the FCA’s statute of limitations, and the FCA’s public disclosure bar. In granting Ortho’s motion, the court precluded discovery concerning the period after the relator had left the company, finding that he lacked independent knowledge for that period, as required to overcome the FCA’s public disclosure bar. The court also found that the relator had direct and independent knowledge of Ortho’s activities only in a particular region of the United States and limited discovery to that geographic area. After discovery was complete, the parties stipulated that discovery had failed to reveal any evidence to support the remaining allegations. Thereafter, the district court granted Ortho’s motion for summary judgment.

Duxbury appealed, arguing that the district court abused its discretion by (a) limiting the scope of discovery for the kickback claims and (b) improperly finding that it lacked subject-matter jurisdiction over certain claims based on the direct and independent knowledge requirement of the public disclosure bar. Without ruling on the district court’s subject-matter jurisdiction, the First Circuit held that the district court did not abuse its discretion in limiting the scope of discovery and observed that the relator was not entitled to engage in a “fishing expedition” into purely speculative fraud claims. 719 F.3d at 39.

Implications for Future FCA Cases

The First Circuit’s decision offers a model for FCA defendants seeking to limit discovery following rulings that substantially narrow the scope of the claims they face.

Second Circuit - (1) Ethical Constraints on Attorneys as Qui Tam Relators; (2) FCA’s Preemption of State Rules of Professional Conduct

***United States ex rel. Fair Laboratory Practices Associates v. Quest Diagnostics Inc.*, 734 F.3d 154 (2d Cir. 2013)**

The Second Circuit upheld dismissal of a qui tam suit on the ground that one of the relators, the defendant’s former general counsel, violated his duty of confidentiality under the New York Rules of Professional Conduct.

About the Case

The named relator, Fair Laboratory Practices Associates (FLPA), filed a qui tam action against the clinical laboratory company Quest Diagnostics and its subsidiary, Unilab Corporation, alleging that the defendants had violated the AKS by engaging in a “pull-through” scheme in which they charged customers below-cost rates in exchange for referrals of lab tests reimbursable by Medicare and Medicaid, for which they billed much higher prices. FLPA was a general partnership formed by three former Unilab executives, including Unilab’s former general counsel, Mark Bibi, for the purpose of bringing the qui tam action.

Unilab allegedly instituted the “pull-through” scheme while Bibi was general counsel. In 1999, the HHS OIG issued advisory guidance stating that when companies offered prices below cost, it would infer the existence of a pull-through scheme. FLPA alleged that after Bibi expressed his doubts about the legality of the company’s pricing, he was “frozen out” by management and left the company as a result. FLPA alleged that both Unilab and its eventual owner, Quest Diagnostics, continued to operate the pull-through scheme for several years after Bibi’s departure.

The Second Circuit affirmed the district court’s dismissal of the action. The court of appeals first held that the FCA does not preempt state professional ethics rules. The Second Circuit stated that “[n]othing in the [FCA] evinces a clear legislative intent to preempt state statutes and rules that regulate an attorney’s disclosure of client confidences,” 734 F.3d at 163, and it explained that although the FCA permits relators to bring qui tam suits, “it does not authorize [such] person[s] to violate state laws in the process.” *Id.* (quotation omitted).

The court next addressed whether Bibi’s conduct violated the New York State Rules of Professional Conduct. The court analyzed Rule 1.9(c), which prohibits lawyers from using confidential information “to the disadvantage” of a former client and more generally from revealing confidential information about former clients. *Id.* at 158. After concluding that the information at issue was covered by the Rule, the court considered whether disclosure was permissible under Rule 1.6(b)(2), which permits the disclosure of confidential information “to the extent that the lawyer reasonably believes necessary . . . to prevent the client from committing a crime” *Id.* (quoting N.Y. Rule 1.6(b)(2)). The court ultimately concluded that Bibi could not reasonably have believed such disclosures were necessary to prevent the commission of a crime, given that the disclosures were much broader than needed and that Bibi had means of exposing the alleged fraud besides filing a qui tam suit. *Id.* at 164–66.

Finally, the Second Circuit concluded that the district court did not abuse its discretion in dismissing the complaint and disqualifying FLPA, FLPA’s counsel, and the individual relators from bringing the current qui tam suit, or any subsequent action based on the same facts, given their receipt of confidential client information from Bibi. *Id.* at 20–25.

Implications for Future FCA Cases

The decision underscores the potential dangers of an attorney’s disclosure of a former client’s confidential information. With regard to the FCA specifically, at least in the Second Circuit it is unlikely that an attorney may act as a relator in a suit against a former client using confidential information gained during the representation. More broadly, the preemption holding could have implications for both Dodd-Frank whistleblower claims and the Sarbanes-Oxley attorney reporting rules.

Third Circuit

[None]

Fourth Circuit - (1) Wartime Suspension of Limitations Act; (2) First-to-File Bar; (3) Rule 9(b) Pleading Standards; (4) Excessive Fines Clause; (5) Res Judicata

As noted above, the Fourth Circuit rendered two major FCA decisions this year from which petitions for certiorari are pending at the Supreme Court and as to which the Court has asked for the views of the Solicitor General. The cases, *United States ex rel. Carter v. Halliburton Co.*, 710 F.3d 171 (4th Cir. 2013), and *United States ex rel. Nathan v. Takeda Pharmaceuticals of North America, N.A., Inc.*, 707 F.3d 451 (4th Cir. 2013), are summarized in the Supreme Court section above.

***United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, --- F.3d ----, 2013 WL 6671270 (4th Cir. Dec. 19, 2013)**

Acknowledging the application of the Excessive Fines Clause to the FCA, the Fourth Circuit held that a court has discretion to accept a penalty less than the FCA's statutorily prescribed amounts to avoid running afoul of the Clause.

About the Case

The relators alleged the defendants filed a false certificate of independent pricing when one of them bid for a contract to transport military household goods between U.S. military installations in different countries. See *United States ex rel. Bunk v. Gosselin World Wide Moving, Inc.*, --- F.3d ----, 2013 WL 6671270, at *1–2 (4th Cir. Dec. 19, 2013). Although initially seeking damages, at trial the relators sought only statutory penalties. *Id.* at *6; 31 U.S.C. § 3729 (providing for penalties of between \$5,500 and \$11,000, as adjusted for inflation). The parties stipulated that Gosselin had filed 9,136 invoices under the contract, and the jury found Gosselin liable. *Gosselin*, 2013 WL 6671270, at *5–6. Based on the number of invoices, the district court held that it was required to assess a civil penalty of no less than \$50,248,000, which it held was unconstitutionally excessive. *Id.* at *6. Although the relators offered to accept a settlement of \$24 million, the district court found that it lacked discretion under the FCA to accept a lesser penalty, and it awarded no penalties against the defendants for these claims. *Id.*

The Fourth Circuit acknowledged that the enormous penalties in many FCA cases are “a monster of our own creation,” because courts have insisted on treating each invoice as a separate “claim” for purposes of counting up penalties. *Id.* at *12. But it held that the plaintiff in an FCA case has “unbounded” discretion to pursue a lesser judgment than that to which it may be entitled and, by exercising that discretion, may avoid a judgment that would violate the Excessive Fines Clause. *Id.* at *10–13. The court analyzed the proposed reduced penalty of \$24 million under the framework set forth in *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). The panel held that in determining whether a particular FCA penalty is constitutionally excessive, courts may look beyond economic harm and “must consider the award’s deterrent effect on the defendant and on others perhaps contemplating a related course of fraudulent conduct.” *Gosselin*, 2013 WL6671270, at *14–15.

Implications for Future FCA Cases

This decision is the most recent in a growing debate on whether, and if so how, the Excessive Fines Clause applies to civil penalties under the FCA. See, e.g., *Hays v. Hoffman*, 325 F.3d 982, 992 (8th Cir. 2003) (analyzing FCA judgment under Excessive Fines Clause); *United States v. Mackby*, 261 F.3d 821, 829–31 (9th Cir. 2001) (same). While acknowledging that the Excessive Fines Clause establishes an external limit on the size of FCA penalties, the decision affords relators and the government considerable discretion in ensuring that penalty amount remain within constitutional bounds.

***United States ex rel. May v. Purdue Pharma L.P.*, --- F.3d. ----, 2013 WL 6501327 (4th Cir. Dec. 12, 2013)**

The Fourth Circuit held that a dismissal based on a release barring a former employee’s claims did not preclude the former employee’s wife and another former employee from suing on nearly identical claims. The Fourth Circuit also held that the 2010 amendments to the FCA’s public disclosure bar do not apply to suits filed after they took effect where the suits challenge conduct pre-dating the amendments.

About the Case

Years ago, a former Purdue employee brought an FCA action against Purdue. The district court dismissed the case based on a release the employee had signed before leaving the company, and the Fourth Circuit affirmed. The former employee’s wife and a former colleague then brought an FCA action raising essentially the same allegations as the dismissed suit. See *United States ex rel. May v. Purdue*

Pharma L.P., --- F.3d. ---, 2013 WL 6501327, at *1-*8 (4th Cir. Dec. 12, 2013). The district court granted Purdue's motion to dismiss on res judicata grounds. *Id.* at *2.

The Fourth Circuit reversed. It held that the release executed by the former employee was personal to him and thus the dismissal of the earlier action did not preclude the former employee's wife and colleague from bringing the present action. *Id.* at *3-4. The Fourth Circuit also held that the pre-2010 version of the public disclosure bar applied to this action because the conduct in question occurred before the amendment was enacted. *Id.* at *5-7. Because the Fourth Circuit's established interpretation of the pre-2010 version of the bar—which differs from all other circuits—permits dismissal only when the “relator's knowledge of the fraud alleged was *actually derived* from the public disclosure *itself*,” *id.* at *8 (emphasis in original) (citing *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1348 (4th Cir. 1994)), the court remanded to the district court to determine if that standard was satisfied. *Id.* at *8-9.

Implications for Future FCA Cases

The Fourth Circuit's holding that releases of claims are personal to the individual who makes the release and so normally do not provide a basis for dismissal of a later filed case with similar allegations on the basis of res judicata weakens the usefulness of such releases. But in most circuits, the public disclosure bar should still enable the earlier action to be used as basis to have the later action dismissed. The Fourth Circuit's holding that the pre-2010 version of the public disclosure bar continues to govern suits that concern pre-2010 conduct, even if filed after the amendments took effect, makes the Fourth Circuit a friendly forum for relators litigating over older claims.

Fifth Circuit - Implied Certification

***United States ex rel. Steury v. Cardinal Health Inc.* 735 F.3d 202 (5th Cir. 2013)**

The Fifth Circuit held that an alleged false certification must be a condition for payment in order to provide the basis for an FCA claim.

About the Case

The relator, a former Cardinal Health salesperson, alleged that Cardinal had knowingly sold defective medical devices to the Department of Veterans Affairs (VA). In her complaint, she alleged that the knowing sale of a defective product violated a material condition of Cardinal Health's VA contract—the warranty of merchantability.

The district court dismissed, and the Fifth Circuit affirmed. Although the court of appeals was silent as to whether it would generally recognize implied false certification theories, it reiterated that false certification claims, implied or express, are cognizable only when a contractor's compliance with the certification at issue is a prerequisite for payment. Because the relator failed to allege that “the contractual merchantability provision, whether express or implied, was a condition without which the government would not have paid Cardinal [Health],” the court upheld the district court's dismissal. 735 F.3d at 207.

Implications for Future FCA Cases

While avoiding a definitive ruling on the cognizability of implied false certification claims, the Fifth Circuit followed the majority of circuits in requiring that a certification be a prerequisite for payment to support an FCA claim.

Sixth Circuit - Implied Certification

***United States ex rel. Hobbs v. MedQuest Associates, Inc.*, 711 F.3d 707 (6th Cir. 2013)**

The Sixth Circuit reversed a district court's grant of summary judgment against the defendants because the Medicare regulatory violations upon which the FCA claims were based were not conditions of payment.

About the Case

The relator alleged that MedQuest violated the FCA by failing to comply with two Medicare regulatory requirements: (1) using physicians not approved by Medicare to supervise diagnostic tests; and (2) failing to register a new facility with Medicare, opting instead to submit reimbursement claims under the former owner's payee ID number.

Reversing the district court's grant of summary judgment, the Sixth Circuit held that MedQuest—which court of appeals described as “sometimes skirt[ing] and appear[ing] to have often ignored applicable regulations in the conduct of its centers”—should not be subjected to the FCA's penalties for violating regulations that were not conditions of payment for the services performed under the Medicare program. 711 F.3d at 713. Having determined that MedQuest's regulatory violations were not of the sort that would “tend to influence CMS's decision to pay on the claims,” but were rather indicative of failing to comply “with technical and local program requirements,” the court concluded that such violations were insufficient to trigger the FCA's “hefty fines and penalties.” *Id.* at 717.

Implications for Future FCA Cases

The Sixth Circuit's opinion provides strong support for the view that the FCA should not be employed simply to enforce compliance with regulatory schemes. Only regulatory requirements that are prerequisites for payment should provide grounds for FCA claims.

Seventh Circuit - Methodology for Trebling Damages

***United States v. Anchor Mortgage Corporation*, 711 F.3d 745 (7th Cir. 2013)**

The Seventh Circuit adopted the “net trebling” approach to calculating FCA damages.

About the Case

After a bench trial, the district court found that a brokerage company and its CEO provided false information in connection with certain applications for FHA mortgage loan guarantees. The court awarded \$2.7 million in damages by trebling the total amount the government paid to lenders under the guarantees (i.e., the gross), rather than first subtracting the amounts the government realized from selling off the properties securing the loans (i.e., the net).

In an opinion authored by Chief Judge Easterbrook, the Seventh Circuit reversed and—following the Second, Sixth, D.C. and Federal Circuits—applied a net trebling methodology. Interpreting the FCA's damages provision, 31 U.S.C. § 3729(a), the court of appeals reasoned that “net loss is the norm in civil litigation” and that “[m]itigation of damages is almost universal.” 711 F.3d at 749.

It is also worth noting that the Seventh Circuit stated that the district court should have deducted the value of properties the government had not yet sold so as to avoid “manipulat[ing]” the damages result through an agency's choice about “when (or if) to sell” collateral properties. *Id.* at 751. On remand, the parties were directed to address the value of any remaining unsold collateral, which was to be incorporated into the damages calculation on the net trebling basis discussed above.

Implications for Future FCA Cases

In addition to resolving the methodology to be employed in the Seventh Circuit on a defendant-friendly net basis, the decision provides strong authority for defendants arguing that damages should be trebled only after deducting the value the government actually received.

Eighth Circuit - (1) Fraud-in-the-Inducement (2) Implied Certification; (3) Relators' Shares of FCA Settlements

In re Baycol Products Litigation, 732 F.3d 869 (8th Cir. 2013)

The Eighth Circuit held that an alleged FCA violation based on a fraud-in-the-inducement theory was sufficiently pleaded under Federal Rule of Civil Procedure 9(b), even though the claims for payment submitted under the alleged fraudulently induced contracts were not themselves false or fraudulent.

About the Case

A former Bayer Healthcare employee brought an FCA suit against Bayer, the marketer of a cholesterol-lowering drug called Baycol. The relator alleged that Bayer had misrepresented the drug's side effects, thus (1) fraudulently causing the government to reimburse the cost of Baycol prescriptions through Medicare and Medicaid; and (2) fraudulently inducing DoD to enter into two contracts for the purchase of Baycol. 732 F.3d at 871. The district court dismissed both claims under Rule 9(b) because they were not tied to specific fraudulent claims for payment that were submitted to the government. *Id.* at 875-76.

The Eighth affirmed as to the Medicare and Medicaid claim, but reverse as to the DoD claim. The court of appeals explained that claims under a fraud-in-the-inducement theory "focus on the false or fraudulent statements that induced the government to enter into the contract at the outset." *Id.* at 876. The court held that "when a relator alleges liability under a theory of fraud-in-the-inducement, claims for payment subsequently submitted under a contract initially induced by fraud do not have to be false or fraudulent in and of themselves in order to state a cause of action under the FCA." *Id.* The court found that the relator had sufficiently alleged that DoD would not have contracted with Bayer but for Bayer's alleged misrepresentations and that the government had made payments on those allegedly fraudulently induced contracts.

Implications for Future FCA Cases

The Eighth Circuit's opinion reaffirms the availability of the fraud-in-the-inducement theory as a basis for FCA claims.

United States ex rel. Ketroser v. Mayo Foundation, 729 F.3d 825 (8th Cir. 2013)

The Eighth Circuit held that a claimant's technical violation of Medicare regulations did not support an FCA claim where the violation was based on a reasonable interpretation of the regulations and where compliance with such regulations was not a material condition of payment.

About the Case

Relators alleged that Mayo billed Medicare for surgical pathology services without preparing a written service report, which relators claimed the Medicare regulations required. The Eighth Circuit affirmed the district court's dismissal of relators' complaint and concluded that "[r]elators [had] alleged nothing more than regulatory noncompliance," 729 F.3d at 829. Moreover, the court noted that the regulations did not clearly require written reports and found that Mayo's reasonable interpretation of the regulation as not requiring a written report undermined the scienter necessary for an FCA claim. The court emphasized that the "FCA may not properly be used to impose an onerous and costly burden on the healthcare system

without plausible evidence that Medicare would consider such redundant reports to be a material condition of payment,” *id.* at 832.

Implications for Future FCA Cases

The Eighth Circuit’s decision provides strong authority for defendants seeking to distinguish mere regulatory noncompliance from false claims supporting FCA liability, particularly where a defendant reasonably interpreted ambiguous regulations.

***United States ex rel. Roberts v. Accenture, LLP*, 707 F.3d 1011 (8th Cir. 2013)**

The government settled a qui tam suit but objected to the relators’ sharing in the settlement funds apportioned to one of the government’s claims, which the government argued was unrelated to a more general claim in the relators’ complaint. The Eighth Circuit affirmed the relators’ entitlement to a share in the settlement funds over the government’s objections.

About the Case

Two relators alleged that the Hewlett-Packard Company (HP) defrauded the government on computer equipment contracts by (1) providing kickbacks to consultants for referrals, and (2) failing to disclose accurate information on HP’s best prices. The relators collaborated with government investigators and attorneys, e.g., by hosting electronic documents for review and drafting administrative subpoenas. HP, after responding to the subpoenas, ultimately admitted that it had breached a pricing clause of a particular government contract (the “35F contract”), which the relators’ complaint had not identified. The government and HP eventually entered into a \$55 million settlement agreement, which attributed \$9 million to the kickbacks and \$46 million to HP’s defective pricing under the 35F contract.

In FCA cases where the government “proceeds with an action brought by a [relator],” the FCA affords the relator a 15-25% share of the proceeds depending upon the relator’s contribution to prosecuting the action. 31 U.S.C. § 3730(d)(1). Here, when the relators moved for a share of the settlement with HP, the government argued that the relators were not entitled to any of the \$46 million allocated to HP’s defective pricing, on the ground that the settled claim differed from the one the relators had originally alleged, and that, moreover, the relators’ defective pricing allegations did not satisfy Rule 9(b)’s pleading requirements.

The district court rejected the government’s arguments, noting that HP had initiated its audit only after learning of relators’ allegations and responding to the subpoenas. The district court then awarded the relators 15% of the \$46 million pricing settlement (along with 21% of the \$9 million kickback settlement).

Affirming the district court’s judgment, the Eighth Circuit found no clear error in the district court’s determination that the relators’ allegations were related to the claim ultimately settled. The court also rejected the government’s argument that the relators’ allegations concerning a particular claim must satisfy Rule 9(b) for that particular claim to be part of “the action” in which the government intervened. 31 U.S.C. § 3730(d)(1). In the end, the relators obtained \$8.8 million for their role in this action.

Implications for Future FCA Cases

By affirming the relators’ share of the defective pricing settlement over the government’s objections, the Eighth Circuit signaled a strong pro-relator leaning when it comes to awards for filing FCA claims.

Ninth Circuit

[None]

Tenth Circuit - Liability of State Employees

***United States ex rel. Jones v. University of Utah Health Sciences Center*, No. 2:11cv1200, 2013 WL 5372609 (D. Utah Sept. 24, 2013)**

The district court held that a state employee may be sued under the FCA in his individual capacity based on conduct performed in his official capacity.

About the Case

The relators brought this qui tam action alleging that the University of Utah Health Sciences Center, the University of Utah Orthopedic Surgery Department, and Dr. Timothy Beals, had submitted false claims to Medicaid for three surgical procedures performed by Dr. Beals on the relators' daughter. *United States ex rel. Jones v. University of Utah Health Sciences Center*, No. 2:11cv1200, 2013 WL 5372609, at *1 (D. Utah Sept. 24, 2013). The relators alleged that postoperative care of their daughter was provided entirely by a surgery resident, not by Dr. Beals, but that the defendants billed Medicaid for postoperative care by Dr. Beals. *Id.*

The district court held that the relators could not assert claims against the University of Utah Health Sciences Center, the University of Utah Orthopedic Surgery Department, and Dr. Beals in his official capacity because they are state entities and thus not "persons" under the FCA. *Id.* at *2; see *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000) (state or state agency not a "person" under FCA and thus not subject to liability in qui tam suits).

But the district court permitted the relators to amend their complaint to assert FCA claims against Dr. Beals in his individual capacity. 2013 WL 5372609, at *6. Looking at the language of the FCA, the court found that it applies to "any person" who submits a false claim or causes a false claim to be submitted and thus does not contain an exclusion for state employees. *Id.* The court rejected the reasoning of the Eighth Circuit in *United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa*, 269 F.3d 932, 937 (8th Cir. 2001), which held that a state employee may be sued under the FCA only if the employee was acting "outside of his official duties." *Id.* The district court found that the Eighth Circuit's holding amounted to granting absolute immunity to state employees for all conduct within the scope of their official duties and was thus contrary to the Supreme Court's public-employee-immunity jurisprudence. *Id.*

The court also rejected the requirement imposed by some district courts that a state employee must personally benefit in order to be sued in an individual capacity under the FCA. 2013 WL 5372609, at *5; see, e.g., *Alexander v. Gilmore*, 202 F. Supp. 2d 478, 482 (E.D. Va. 2002). Again, the court found that this reasoning would result in state employees being absolutely immune from FCA liability provided that they did not personally profit from the submission of false claims. *Id.*

Implications for Future FCA Cases

This case is significant for its apparent end-run around the Eleventh Amendment and the Supreme Court's holding in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), that states and state agencies are not "persons" under the FCA and thus are not subject to liability under the Act. Even though the court held that Dr. Beals could not be sued in his official capacity because he stood in the shoes of the state, the court found that he could be sued individually for the exact same conduct that he had engaged in in his official capacity.

Eleventh Circuit

[None]

D.C. Circuit - (1) Fair, Adequate, and Reasonable Settlements; (2) Scienter for Corporate Defendants; (3) Public Disclosure Bar

***United States ex rel. Schweizer v. Océ North America, Inc.*, --- F. Supp. 2d ---, Civ. No. 06-648 (RCL), 2013 WL 3776260 (D.D.C. July 19, 2013)**

As a matter of first impression in the D.C. Circuit, Judge Lamberth of the U.S. District Court for the District of Columbia articulated the principles for reviewing settlements of FCA cases by the government over the relator's objection to determine whether the settlement is "fair, adequate, and reasonable," and whether a relator is entitled to discovery to contest that finding.

About the Case

The relator filed a three-count qui tam complaint alleging that the defendants submitted false claims by breaching terms of contracts with the GSA requiring the seller to provide government customers with the same discount offered to certain preferred private sector purchasers and requiring the seller to sell the government only goods made in the United States or other designated countries. *United States ex rel. Schweizer v. Océ North America, Inc.*, --- F. Supp. 2d ---, Civil No. 06-648 (RCL), 2013 WL 3776260, at *7 (D.D.C. July 19, 2013) (*Schweizer II*).

The government declined to intervene after conducting an extensive investigation of the claims, but "remained an active participant in the settlement discussions." *Id.* (quoting *Schweizer v. Océ North America, Inc.*, 677 F.3d, 1228, 1231-32 (D.C. Cir. 2012)) (*Schweizer I*). Ultimately, the government—but not the relator—reached an agreement with the defendants to settle the two substantive counts, which the district court dismissed without further inquiry. *Schweizer II*, at *7. The D.C. Circuit remanded with instructions to consider whether the settlement agreement was "fair, adequate, and reasonable" after a hearing. *Id.* at *8.

On remand, the district court addressed two questions of first impression in the D.C. Circuit: (1) what principles govern the determination that an FCA settlement over a relator's objection is "fair, adequate, and reasonable"; and (2) whether a relator is entitled to discovery into the merits of the settling claims in order to contest the settlement's fairness. *Id.* at *8-9. As to the first, the district court followed other courts in adopting the five factors that govern judicial review of class-action settlements: (a) whether the settlement is the result of arm's-length negotiations; (b) the terms of the settlement in relation to the strengths of the plaintiffs' case; (c) the status of the proceedings at the time of settlement; (d) the reaction of the relator; and (e) the opinion of experienced counsel. *Id.* at *8 (citing *In re LivingSocial Mktg. & Sales Practice Litig.*, No. 11-cv-0745, 2013 WL 1181489, at *7) (D.D.C. Mar. 22, 2013)). The court also held that relators are not entitled to discovery to challenge the fairness determination as of right, though such discovery could be appropriate in a particular case. *Schweizer II* at *9.

Implications for Future FCA Cases

Defendants facing relators with unreasonable settlement demands can sometimes reach a favorable resolution directly with the government, over the relator's objections. Defendants negotiating such a settlement should do so with foreknowledge of the factors the court will consider when reviewing the decision.

***United States v. Science Applications International Corporation*, --- F.Supp.2d ---, Civ. No. 04-1543, 2013 WL 3791423 (D.D.C. July 22, 2013)**

On remand from a widely-cited decision by the D.C. Circuit rejecting the "collective knowledge" theory of scienter, Judge Roberts of the U.S. District Court for the District of Columbia clarified that a plaintiff can still prevail on an FCA claim by establishing that a corporate defendant had constructive knowledge where the defendant's structures and processes were such that it could not learn whether its claims or statements were false.

About the Case

The United States sued Science Applications International Corporation (SAIC), alleging that SAIC failed to disclose organizational conflicts of interest as required under two contracts with the Nuclear Regulatory Commission (NRC). *United States v. SAIC*, --- F.Supp.2d ---, Civ. No. 04-1543, 2013 WL 3791423, at *1 (D.D.C. July 22, 2013) (*SAIC I*). SAIC appealed following an unfavorable jury verdict. *Id.* The D.C. Circuit rejected a “collective knowledge” theory of scienter, a form of “constructive knowledge” where corporate knowledge is inferred “by piecing together scraps of innocent knowledge held by various corporate officials, even if those officials never had contact with each other or knew what the others were doing in connection with a claim for government funds.” *United States v. SAIC*, 626 F.3d 1257, 1266 (D.C. Cir. 2010) (*SAIC I*). FCA defendants have widely relied upon this 2010 decision to support motions to dismiss and for summary judgment where the relator has not alleged or discovered facts to show that any particular person within a corporation had all the knowledge necessary to know of a claim’s falsity.

On remand, SAIC sought summary judgment on the scienter question. *SAIC II* at *1, *14. Despite SAIC’s success on appeal, the district court denied the motion. *Id.* at *9-*13. The court held that, even where no single corporate official had all the information necessary to know whether a claim was false, the relator can still establish scienter by demonstrating that the corporate defendant’s structures or processes were such that the defendant could not learn whether its claims or related statements were false. *Id.* at *8, *13. The district court determined that SAIC’s system for tracking organizational conflicts was such that a jury could find that the system did not allow SAIC to determine the truth or falsity of its claims or statements. *Id.* at *13.

Implications for Future False Claims Act Cases

The D.C. Circuit’s rejection of the collective knowledge theory has strengthened corporate defendants’ motions to dismiss and for summary judgment by requiring relators and the government to demonstrate at least one individual knew the elements of the fraud. See *SAIC I* at 1266. Relators have often responded by arguing that the defendant had constructive knowledge—that is, acted with reckless disregard—because of lax compliance systems, and their arguments in this regard will be strengthened by this decision.

***United States ex rel. Oliver v. Philip Morris USA Inc.*, --- F.Supp.2d ---, Civ. No. 08-0034, 2013 WL 2637032 (D.D.C. June 13, 2013)**

Continuing the recent trend in the D.C. Circuit, Judge Kollar-Kotelly of the U.S. District Court for the District of Columbia applied a broad construction to the FCA’s public disclosure bar, expansively interpreting the “news media” and “civil hearing” channels by which public disclosures can be made.

About the Case

The relator, president of a tobacco company, filed this qui tam action alleging that the defendant had falsely certified that it was providing the military with the best price for cigarettes under a “most favorable customer” clause in the relevant contract. *United States ex rel. Oliver v. Philip Morris USA Inc.*, --- F.Supp.2d ---, Civil Action No. 08-0034, 2013 WL 2637032, at *1 (D.D.C. June 13, 2013).

The defendant moved to dismiss on the ground that the alleged fraud was publicly disclosed when the defendant produced an internal memorandum in a RICO action against several large tobacco companies, and the memo was uploaded to a publicly available, fully searchable online database created pursuant to a settlement between the defendant and 46 state attorneys general requiring public access to documents produced in tobacco and health litigation. *Id.* at *4-5. The document was separately stored in a searchable public archive of documents relating to tobacco litigation hosted by the University of California. *Id.* at *5.

The court, following a recent trend toward expansive application of the public disclosure bar, e.g., *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011) (public disclosure bar's "broad sweep" extends to federal agencies written responses to Freedom of Information Act and records produced with those responses); *United States ex rel. Doe v. Staples*, 932 F. Supp. 2d 34, (D.D.C. 2013) (reports produced by U.S. International Trade Commission and made available on Internet are administrative reports subject to public disclosure bar); *United States ex rel. Green v. Service Contract Educ. and Training Trust Fund*, 843 F. Supp. 2d 20, 32 (D.D.C. 2012) (construing term "news media" to include "readily accessible websites"), held that the discovery material was publicly disclosed in a "civil hearing" because it was civil discovery material posted to a searchable database and was thus analogous to a public filing. *Oliver*, 2013 WL 2637032, at *6. The court also held, in the alternative, that the document was publicly disclosed in the "news media" because it was available on the Internet. *Id.*

Implications for Future FCA Cases

The public disclosure bar is one of the most powerful tools available to FCA defendants to secure dismissal of claims at an early stage. Following the Supreme Court's decision in *Schindler Elevator*, the D.C. district court and other courts, e.g., *United States ex rel. Rosner v. WB/Stellar IP Owner, L.L.C.*, 739 F. Supp. 2d 396 (S.D.N.Y. 2010) (publicly available database on city agency's website is administrative report subject to public disclosure bar), are increasingly sympathetic to broad readings of the public disclosure bar. This decision holding that a single document produced in a very large litigation can vitiate an FCA action favors defendants defending against suits based on information in the public domain.

STATE AND LOCAL DEVELOPMENTS

State Legislative Activity

State and local legislatures were quite active in 2013 in expanding the reach of false claims laws. In 2005, Congress enacted the Deficit Reduction Act (DRA), which encourages states to fight Medicaid fraud by allowing a state to keep 10% of what would otherwise be the federal share of Medicaid funds recovered, if the state has enacted a false claims statute that is at least as effective as the federal FCA.¹¹³ Following amendments in 2009 and 2010 that strengthened the federal FCA, many states were given until March or August of 2013 to update their false claims laws and bring them back into alignment with the federal statute. Accordingly, a number of states amended their false claims statutes this year, and many states have had their FCAs certified as satisfying the DRA.

- Fourteen states have been certified by the HHS OIG as DRA-compliant. Eleven of those states—**California, Colorado, Delaware, Hawaii, Illinois, Massachusetts, Minnesota, Montana, Rhode Island, Tennessee, and Texas**—were certified by the OIG in 2013.¹¹⁴
- Following previous guidance from the OIG, **Nevada** has amended its FCA to track the federal amendments.¹¹⁵ The OIG has not yet determined whether these amendments satisfy the DRA.
- In addition, two states—**Florida** and **Indiana**—amended their FCAs to substantially track the amendments to the federal FCA, but included or omitted language in ways that do not precisely track the federal amendments.¹¹⁶
 - Contrary to the OIG’s recommendations in 2011, Florida did not remove language from its false claims statute providing that “no court shall have jurisdiction” over a qui tam action “where the relator is an employee or former employee of the State and the action is based, in whole or part, upon information obtained in the course or scope of State employment” or “where the relator obtained the information from an employee or former employee of the State who was not acting in the course or scope of State employment.”
 - And, contrary to the provision in the federal FCA that permits a court to dismiss a claim that has been publically disclosed *unless* dismissal is opposed by the government, Indiana’s amended false claims law provides that, if the public disclosure bar potentially applies, “the court shall consider, but is not bound by, any objection brought by the attorney general or the inspector general.”
 - The OIG has not determined whether these amended FCAs satisfy the DRA.
- Five states—**Georgia, Michigan, New York, Virginia, and Wisconsin**—missed the OIG’s 2013 deadlines. Notably, Georgia amended its FCA in 2012, but in April 2013, the OIG determined that the amendments were not sufficient to satisfy the DRA. The OIG gave Georgia an August 2013 deadline to further amend its FCA, but it made no amendments before the deadline expired.¹¹⁷

Other significant state legislative developments include:

- In May, **Nebraska** amended its False Medicaid Claims Act to expand liability for subcontractors or other intermediaries, such as managed care organizations, who file false claims. It also amended its FCA to redefine the term “claim” and define the terms “material” and “obligation” to track the federal amendments, along with other clarifying edits.¹¹⁸
- In July, **Wyoming** enacted a new Medicaid-only false claims law. The Wyoming law is enforceable by the attorney general or district attorney, but does not have a qui tam provision.¹¹⁹

- Other states that do not currently have false claims statutes, including **Alabama, Michigan, Missouri, Pennsylvania, and South Carolina**, saw proposed legislation introduced in 2013.¹²⁰ Bills introduced in 2012 in **Arizona** and **Kentucky** remain pending,¹²¹ and pending bills in **Maine, Mississippi**, and **New Mexico** died.¹²²

Noteworthy State Settlements or Judgments

As in previous years, the most significant state FCA awards or settlements have continued to be based on alleged fraud in Medicaid programs. Pharmaceutical companies in particular have been involved in a number of these settlements, most of which were based on alleged inflated pricing or illegal marketing or kickback schemes. States have also continued to join forces with DOJ, either individually or in multi-state efforts. Some of the more significant state FCA settlements in 2013 include:

- **California settled with Adventist Health for \$14.1 million.** In May, Adventist Health System/West and its affiliated hospital, White Memorial Medical Center, reached a \$14.1 million settlement to resolve claims that they improperly compensated physicians for patient referrals, and, as a result, violated the federal and California FCAs. The allegations stemmed from a qui tam complaint filed in 2008. Approximately \$11.5 million of the settlement is to be paid to the federal government, with \$2.6 million to be paid to California.¹²³
- **Georgia settled with Emory University for \$1.5 million.** In August, Emory University agreed to pay \$1.5 million to settle claims that it billed Medicare and Medicaid for clinical trial services that were not permitted by the Medicare and Medicaid rules. Approximately \$1.4 million of the settlement is to be paid to the federal government, with the remainder to be paid to Georgia.¹²⁴
- **New Jersey settled with Cooper Health for \$12.6 million.** In January, the Cooper Health System, an integrated healthcare-delivery system operating in New Jersey and Pennsylvania, agreed to pay \$12.6 million to resolve allegations that it improperly compensated physicians for patient referrals, and, as a result, violated the federal and New Jersey FCAs. Approximately \$10 million is to be paid to the federal government, with \$2 million to be paid to New Jersey.¹²⁵
- **New York settled with Stericycle for \$2.4 million.** In January, Stericycle, Inc., one of the nation's largest medical waste disposal companies, agreed to pay \$2.4 million to settle claims that it improperly overcharged nearly 1,000 New York government entities by implementing a plan to impose automatic price increases without notice and in violation of contract terms. The case arose out of a qui tam complaint filed by a former Stericycle employee.¹²⁶
- **New York settled with St. Luke's-Roosevelt Hospital for \$2.3 million.** In February, Continuum Health Partners, Inc. and St. Luke's-Roosevelt Hospital agreed to pay \$2.3 million to settle claims under the New York and federal FCAs that the hospital was improperly double-billing Medicaid and Medicare for outpatient psychiatric services. Approximately \$1 million of the settlement will go to New York.¹²⁷
- **Texas settled with Pfizer and Endo Pharmaceuticals for \$36.34 million.** In February, Pfizer and Endo Pharmaceuticals agreed to pay a combined total of \$36.34 million to resolve allegations that they had inflated the prices of various generic drugs sold to Texas's Medicaid program. The case arose out of a qui tam lawsuit brought by a pharmacy.¹²⁸
- **Texas settled with Children's Physician Services of South Texas and Radiology Associates for \$2.3 million.** In March, Children's Physician Services of South Texas and Radiology Associates agreed to pay \$2.3 million to resolve allegations under the Texas and federal FCAs that they had double-billed for the professional interpretation of genetic ultrasounds. The settlement arose out of a qui tam lawsuit filed in 2008 by a former revenue manager and coding compliance officer with Radiology Associates.¹²⁹

- **Texas settled with Major Pharmaceuticals, Inc. for \$5 million.** In September, Major Pharmaceuticals, Inc. agreed to pay \$5 million to resolve allegations that it had inflated drug prices to Texas's Medicaid program. The case arose out of a qui tam lawsuit, brought by a pharmacy.¹³⁰
- **Virginia settled with McKesson Corp. for \$37 million.** In October, McKesson Corp. agreed to pay \$37 million to resolve Medicaid fraud claims in Virginia. McKesson allegedly had reported inflated pricing information for over 400 prescription drugs, including Adderall, Prozac, and Ritalin. Virginia declined to join last year's \$151 million settlement between McKesson and 29 other states.¹³¹

Noteworthy State Complaints

Two state complaints unsealed or filed in 2013 have already gathered attention:

- **California files \$538 million lawsuit against Standard & Poor's (S&P) for its credit ratings of mortgage-backed securities.** In February, California joined DOJ, 12 other states, and the District of Columbia in announcing lawsuits related to allegedly inflated credit ratings of mortgage-backed securities prior to the burst of the housing bubble. California's suit (unlike the other suits) brought claims under the state's FCA, alleging that the inflated ratings amounted to a fraud upon California's public employee retirement funds that caused losses of more than \$538 million.¹³² In August, the state court denied S&P's motion to dismiss the case, and in November, it denied S&P's motion to strike under California's anti-SLAPP statute.¹³³
- **Louisiana files lawsuit against 38 pharmaceutical companies.** In October, 38 pharmaceutical companies, including Abbott Laboratories Inc., Mylan Inc. and Warner Chilcott Corp., removed to federal court a suit brought by State of Louisiana alleging that the companies collected Medicaid reimbursements for drugs that had not been approved by the FDA. Louisiana alleges that the defendants used phony drug codes to give the impression that unapproved prescription medicines, over-the-counter drugs, and dietary supplements had been approved by the FDA.¹³⁴

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, financial services, energy, and information technology. 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 Group 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 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 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 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.
- 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.

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¹ All statistics in this paragraph are drawn from two Justice Department documents: Civil Division, U.S. Dep't of Justice, *False Claims Act Statistics*, available at http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf; Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Justice Department Recovers \$3.8 Billion from False Claims Act Cases in Fiscal Year 2013* (Dec. 20, 2013), available at <http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html>.

² Stuart F. Delery, Acting Assistant Att'y Gen'l, Remarks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 7, 2012), <http://www.justice.gov/iso/opa/civil/speeches/2012/civ-speech-1206071.html>; see *id.* ("The Department is well aware of the fact that litigation can only plausibly reach a fraction of the fraud committed against U.S. Government programs—which likewise makes the prevention of fraud a more potent tool for protecting the interests of the United States than efforts to undo the damage of completed schemes."); see also Tony West, Assistant Att'y General, Remarks at the 12th Annual Pharmaceutical Regulatory and Compliance Congress (Nov. 2, 2011), <http://www.justice.gov/iso/opa/civil/speeches/2011/civ-speech-111102.html> ("I've often said we can't enforce our way out of the health care fraud challenge. That's why we also seek to promote a culture of compliance by emphasizing deterrence. A comprehensive approach to health care fraud requires preventative efforts and strong compliance programs like those many of you currently promote; it requires guidance and dialogue between government and the private sector.").

³ See U.S. Chamber Institute for Legal Reform, *Fixing the False Claims Act: The Case for Compliance-Focused Reforms* (Oct. 2013), available at http://instituteforlegalreform.com/uploads/sites/1/Fixing_The_FCA_Pages_Web.pdf and <http://www.wilmerhale.com/pages/publicationsandnewsdetail.aspx?NewsPubId=10737422474>.

⁴ Most concluded that is no longer jurisdictional. See *United States v. Kiewit Pac. Co.*, No. 12-cv-02698, 2013 U.S. Dist. LEXIS 153135, 2013 WL 5770514, at *15 (N.D. Cal. Oct. 24, 2013) (citing as establishing the majority rule *Ping Chen ex rel. United States v. EMSL Analytical, Inc.*, No. 10-cv-7504-RA, 2013 U.S. Dist. LEXIS 117030, 2013 WL 4441509, at *8-9 (S.D.N.Y. Aug. 16, 2013)); *United States ex rel. Paulos v. Stryker Corp.*, No. 11-cv-0041-W-ODS, 2013 U.S. Dist. LEXIS 82294, 2013 WL 2666346, at *3 (W.D. Mo. June 12, 2013); *United States ex rel. Fox Rx, Inc. v. Omnicare, Inc.*, No. 11-cv-962-WSD, 2013 U.S. Dist. LEXIS 75696, 2013 WL 2303768, at *8 n.16 (N.D. Ga. May 17, 2013); *United States v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, No. 10-cv-322, 2013 U.S. Dist. LEXIS 105584, 2013 WL 3912571, at *7 n.6 (E.D. Tenn. Jul. 29, 2013)). But see *United States ex rel. Beauchamp v. Academi Training Ctr., Inc.*, 933 F. Supp. 2d 825, 838 (E.D. Va. 2013) (maintaining disclosure bar is jurisdictional).

⁵ See, e.g., *United States ex rel. Griffith v. Conn*, Civ. No. 11-157, 2013 WL 3935074 (E.D. Ky. 2013) (denying government's request to re-seal complaint that relator had substantially amended);

⁶ H.R. 2931, 113th Cong. (1st Sess. 2013), available at <http://www.gpo.gov/fdsys/pkg/BILLS-113hr2931ih/pdf/BILLS-113hr2931ih.pdf>.

⁷ *Fostering Innovation to Fight Waste, Fraud, and Abuse in Health Care: Hearing Before the Subcomm. on Health of the H. Comm. on Energy and Commerce*, 113th Cong. (2013) (testimony of Thomas M. Greene, Managing Partner, Greene LLP, at 5), available at <http://docs.house.gov/meetings/IF/IF14/20130227/100329/HMTG-113-IF14-Wstate-GreeneT-20130227.pdf>.

⁸ 31 U.S.C. § 3801 *et seq.*

⁹ Letter from Sen. Elizabeth Warren to Attorney Gen. Eric Holder (Aug. 21, 2013), available at <http://www.warren.senate.gov/files/documents/EW%20Ltr%20to%20DOJ%20on%20Mortgage%20Settlement%202013-8-21.pdf>.

¹⁰ Letter from Sen. Charles E. Grassley to Acting Sec'y Neal S. Wolin, *et. al.* (Jan. 28, 2013), available at <http://www.grassley.senate.gov/about/upload/WB-Regs.pdf>. President Obama separately proposed anti-retaliation protection for tax fraud whistleblowers, through an amendment to section 7623 of the tax code. Office of Mgmt. & Budget, Exec. Office of the President, *Budget of the United States Government, Fiscal Year 2014*, at 212 (2013), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/budget.pdf>.

¹¹ Representative McDermott's letter and Secretary Sebelius's response can be found here: http://mcdermott.house.gov/index.php?option=com_content&view=article&id=723:hhs-to-mcdermott-qualified-health-plans-are-not-federal-health-care-programs&catid=25:press-releases&Itemid=20. Secretary Sebelius's determination prompted an inquiry from Senator Grassley (R-IA), which can be found here: <http://www.grassley.senate.gov/issues/loader.cfm?csModule=security/getfile&pageid=47404>.

¹² U.S. Dep't of Health & Human Services, Office of Inspector General, *OIG Guidelines for Evaluating State False Claims Acts* (Mar. 15, 2013), available at <https://oig.hhs.gov/fraud/docs/falseclaimsact/guidelines-sfca.pdf>. This update followed OIG's assessment of the sufficiency of current state laws and the grant of a grace period for states to conform their FCA. See WilmerHale, *The False*

Claims Act: 2011 Year-In-Review, Jan. 6, 2012, at 4, available at http://www.wilmerhale.com/uploadedFiles/WilmerHale_Shared_Content/Files/Editorial/Publication/False%20Claims%20Act%202011%20Year-In-Review.pdf.

¹³ See 77 Fed. Reg. 36281 (June 18, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-06-18/pdf/2012-14585.pdf>.

¹⁴ U.S. Dep't of Health & Human Services, Office of Inspector General, *OIG's Provider Self-Disclosure Protocol* (Apr. 17, 2013), available at <https://oig.hhs.gov/compliance/self-disclosure-info/files/Provider-Self-Disclosure-Protocol.pdf>.

¹⁵ *Id.* at 1.

¹⁶ *Id.* at 13.

¹⁷ *Id.*

¹⁸ Medicare Program: Requirements for the Medicare Incentive Reward Program and Provider Enrollment, 78 Fed. Reg. 25013 (proposed Apr. 29, 2013), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-04-29/pdf/2013-09991.pdf>.

¹⁹ U.S. Chamber Institute for Legal Reform, Comment re CMS-6045-P: Medicare Program; Requirements for the Medicare Incentive Reward Program and Provider Enrollment, at 2, June 28, 2013, available at <http://www.regulations.gov/#!documentDetail;D=CMS-2013-0080-0101>.

²⁰ Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Nation's Largest Nursing Home Pharmacy and Drug Manufacturer to Pay \$112 Million to Settle False Claims Act Cases* (Nov. 3, 2009), available at <http://www.justice.gov/opa/pr/2009/November/09-civ-1186.html>.

²¹ Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Johnson & Johnson Subsidiary Scios Pleads Guilty to Misbranding Heart Failure Drug Natrecor* (Oct. 5, 2011), available at <http://www.justice.gov/opa/pr/2011/October/11-civ-1323.html>.

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¹⁰⁰ See Settlement Agreement between the United States, California, Illinois, Massachusetts, and JPMorgan Chase & Co. (Nov. 19, 2013), available at <http://www.justice.gov/iso/opa/resources/69520131119191246941958.pdf>. Two of the exempted cases remain under seal. The remaining exempted cases are: *United States ex rel. Owens v. Goldman Sachs*, No. 1:13-cv-01373 (D.N.J. Mar. 6, 2013); *United States ex rel. Adams v. Wells Fargo Bank*, No. 2:11-cv-00535 (D. Nev. Apr. 23, 2012); *United States ex rel. Hastings v. Wells Fargo Bank, NA Inc.*, No. 2:12-cv-03624 (C.D. Cal. Apr. 26, 2012); *United States ex rel. Szymoniak v. American Home Mortg. Servicing Inc.*, No. 0:10-cv-01465 (D.S.C. June 4, 2010); *United States ex rel. Szymoniak v. ACE Sec. Corp.*, No. 0:13-cv-00464 (D.S.C. Nov. 12, 2010).

¹⁰¹ Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Pittsburgh-based Bank to Pay U.S. for Failing to Engage in Prudent Underwriting Practices on SBA Loan Guarantees* (Jan. 25, 2013), available at <http://www.justice.gov/opa/pr/2013/January/13-civ-109.html>.

¹⁰² See Lystra Batchoo, *Judge Rakoff Allows Suit Against Bank of America Under FIRREA Statute*, Securities and Financial Sector Legal Review, Kelley Drye & Warren LLP (May 9, 2013), available at <http://www.financiallegalreview.com/2013/05/09/judge-rakoff-questions-government-use-of-firrea-statute/>.

¹⁰³ *United States v. Countrywide Fin. Corp.*, 2013 WL 4437232, at *28-29 (S.D.N.Y. Aug. 16, 2013).

¹⁰⁴ See Shayndi Raice, *BofA Liable for Fraud for Countrywide Program – Jury*, Wall St. J., Oct. 23, 2013, available at <http://online.wsj.com/article/BT-CO-20131023-711431.html>.

¹⁰⁵ *United States v. Wells Fargo Bank*, No. 12-CV-7527, 2013 WL 5312564 (S.D.N.Y. Sept. 24, 2013).

¹⁰⁶ Press Release, U.S. Attorney's Office, S.D.N.Y., *Manhattan U.S. Attorney Files Mortgage Fraud Lawsuit Against Golden First Mortgage Corp. and David Movtady for Fraudulently Certified Loans* (Apr. 4, 2013), available at <http://www.justice.gov/usao/nys/pressreleases/April13/GoldenFirstPR.php>.

¹⁰⁷ Press Release, U.S. Attorney's Office, D. Wyo., *U.S. Government Intervenes in False Claims Lawsuit Against Pinnacle Bank* (Sept. 27, 2013), available at http://www.justice.gov/usao/wy/news/2013/09september/13-064_sep27.html.

¹⁰⁸ *Id.*

¹⁰⁹ In over 50 years, no court had applied the WSLA to toll the limitations period in a civil FCA suit. In August 2012, however, in a case brought directly by the United States, a District Judge in the Southern District of Texas held that the WSLA applies to civil FCA claims, regardless of whether those claims arise from a contract related to the hostilities. See *United States v. BNP Paribas SA*, 884 F. Supp.2d 589 (S.D. Tex. 2012).

¹¹⁰ Compare *United States ex rel. Emanuele v. Medicor Assocs.*, 2013 WL 3893323, at *4–7 (W.D. Pa. Jul. 26, 2013) (adopting *Carter* dissent's reasoning and holding claims time barred) with *United States v. Wells Fargo Bank, N.A.*, 2013 WL 5312564, at *10–14 (S.D.N.Y. Sept. 24, 2013) (tolling statute of limitations for FCA-based mortgage fraud claims).

¹¹¹ See *United States ex rel. Chovanec v. Apria Healthcare Group, Inc.*, 606 F.3d 361, 365 (7th Cir. 2010); *In re Natural Gas Royalties Qui Tam Litig.*, 566 F.3d 956, 964 (10th Cir. 2009).

¹¹² See *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1188 (9th Cir. 2001); *United States ex rel. Shea v. Verizon Bus. Network Servs., Inc.*, 904 F. Supp.2d 28, 35 (D.D.C. 2012).

¹¹³ See 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).

¹¹⁴ See Office of the Inspector General, U.S. Dep't of Health & Human Servs., *State False Claims Act Reviews*, available at <http://oig.hhs.gov/fraud/state-false-claims-act-reviews/index.asp> (last visited Dec. 31, 2013).

¹¹⁵ See S. 437, 77th Sess. (Nev. 2013), available at <http://www.leg.state.nv.us/Session/77th2013/Reports/history.cfm?ID=1000>.

¹¹⁶ See H.R. 935, 2013 Leg. Reg. Sess. (Fla. 2013), available at <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0935er.docx&DocumentType=Bill&BillNumber=0935&Session=2013>; H.R. 1297, 2013 Leg. Reg. Sess. (Fla. 2013), available at <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h1297er.docx&DocumentType=Bill&BillNumber=1297>

[7&Session=2013](http://www.in.gov/legislative/bills/2013/SE/SE0559.1.html); S.B. 559, 118th Gen. Assemb., 2013 First Reg. Sess. (Ind. 2013), available at <http://www.in.gov/legislative/bills/2013/SE/SE0559.1.html>.

¹¹⁷ See Office of the Inspector General, U.S. Dep't of Health & Human Servs., State False Claims Act Reviews, <http://oig.hhs.gov/fraud/state-false-claims-act-reviews/index.asp> (last visited Jan. 3, 2013).

¹¹⁸ See L.B. 277, 103rd Leg. (Neb. 2013), available at <http://nebraskalegislature.gov/FloorDocs/Current/PDF/Slip/LB277.pdf>.

¹¹⁹ See S. 0083, 62nd Leg., Gen. Sess. (Wyo. 2013), available at <http://legisweb.state.wy.us/2013/Enroll/SF0083.pdf>.

¹²⁰ See S. 183, Reg. Sess. (Ala. 2013), available at <http://alisondb.legislature.state.al.us/acas/ACASLoginE.asp?SESSION=1061>; H.R. 4010 (Mich. 2013), available at [https://www.legislature.mi.gov/\(S\(dtib4e55ln4egxz5odgmov55\)\)/mleg.aspx?page=getObject&objectName=2013-HB-4010](https://www.legislature.mi.gov/(S(dtib4e55ln4egxz5odgmov55))/mleg.aspx?page=getObject&objectName=2013-HB-4010); H.R. 839 (Mo. 2013), available at <http://www.house.mo.gov/billsummary.aspx?bill=HB839&year=2013&code=R>; H.R. 1493, Reg. Sess. (Pa. 2013), available at <http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?year=2013&sind=0&body=H&type=B&bn=1493>; S. 073, 120th Gen. Assemb. (S.C. 2013), available at http://www.scstatehouse.gov/sess120_2013-2014/bills/73.htm.

¹²¹ H.R. 2844, 50th Leg., 2d Reg. Sess. (Ariz. 2012), available at <http://www.azleg.gov/legtext/50leg/2r/bills/hb2844p.pdf>; H.R. 401, 2012 Reg. Sess. (Ky. 2012), available at <http://www.lrc.ky.gov/record/12RS/hb401.htm>.

¹²² L.Doc. 1796, 125th Leg., 2d Reg. Sess. (Me. 2012), available at http://www.mainelegislature.org/legis/bills/display_ps.asp?LD=1796&snum=125; H.R. 1436 (Miss. 2013), available at <http://billstatus.ls.state.ms.us/2013/pdf/history/HB/HB1436.xml> (died in Committee on Feb. 5, 2013); S. 133, 2013 Reg. Sess. (N.M. 2013), available at <http://www.nmlegis.gov/lcs/legislation.aspx?chamber=S&legtype=B&legno=133&year=13>; S. 153, 2013 Reg. Sess. (N.M. 2013), available at <http://www.nmlegis.gov/lcs/legislation.aspx?chamber=S&legtype=B&legno=153&year=13>; but see L.D. 1388, 126th Me. Leg., First Reg. Sess. (Me. 2013), available at http://www.mainelegislature.org/legis/bills/display_ps.asp?id=1388&PID=1456&snum=126 (enacted legislation amending Maine FCA to clarify that a person must knowingly make false statements or submit false documents to be liable under the act).

¹²³ See Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Adventist Health Pays United States and State of California \$14.1 Million to Resolve False Claims Act Allegations* (May 3, 2013), available at <http://www.justice.gov/opa/pr/2013/May/13-civ-507.html> [*United States ex rel. Hector Luque et al. v. Adventist Health et al.*, Case No. 08-1271 (E.D. Cal.)].

¹²⁴ See Press Release, U.S. Attorney's Office, N.D. Ga., *Emory University to Pay \$1.5 Million to Settle False Claims Act Investigation* (Aug. 28, 2013), available at <http://www.justice.gov/usao/gan/press/2013/08-28-13b.html> [*United States and State of Georgia ex rel. Elizabeth Elliott v. Emory University, et al.*, No.09-3569 (N.D. Ga. Dec. 18, 2009)].

¹²⁵ See Press Release, U.S. Attorney's Office, D.N.J., *Major New Jersey Hospital Pays \$12.5 Million to Resolve Kickback Allegations* (Jan. 24, 2013), available at <http://www.justice.gov/usao/nj/Press/files/Cooper%20Settlement%20PR.html> [*United States and the State of New Jersey ex rel. Depace v. Cooper Health Sys.*, No. 08-5626 (D.N.J. Nov. 12, 2008)].

¹²⁶ See Press Release, N.Y. State Office of the Att'y Gen., *A.G. Schneiderman Announces \$2.4 Million Settlement with Stericycle for Overcharging NY State and Local Entities* (Jan. 8, 2013), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-24-million-settlement-stericycle-overcharging-ny-state-and>.

¹²⁷ See Press Release, U.S. Attorney's Office, S.D.N.Y., *Manhattan U.S. Attorney Files and Simultaneously Settles Lawsuit Against St. Luke's-Roosevelt Hospital Center for Fraudulently Billing Medicare and Medicaid* (Feb. 7, 2013), available at <http://www.justice.gov/usao/nys/pressreleases/February13/StLukesRooseveltSettlementPR.php>.

¹²⁸ See Press Release, Tex. Office of Att'y Gen., *Attorney General Abbott Recovers \$36.34 Million for State of Texas, U.S.* (Jan. 4, 2013), available at <https://www.oag.state.tx.us/oagnews/release.php?id=4262>.

¹²⁹ See Press Release, Tex. Office of Att'y Gen., *Health Care Fraud Settlement Reached in State and Federal Investigation* (Mar. 6, 2013), available at <https://www.oag.state.tx.us/oagnews/release.php?id=4315>.

¹³⁰ See Press Release, Tex. Office of Att'y Gen., *State of Texas, U.S. to Share in \$5 Million Recovery of Medicaid Funds* (Sept. 4, 2013), available at <https://www.oag.state.tx.us/oagnews/release.php?id=4511>.

¹³¹ See Press Release, Commonwealth of Va. Office of the Att'y Gen., *Cuccinelli Announces \$37 million Virginia Medicaid Fraud Settlement with McKesson Corp. for Inflating Prices of 400+ Drugs* (Oct. 18, 2013), available at http://www.oag.state.va.us/Media%20and%20News%20Releases/News_Releases/Cuccinelli/101813_McKesson_Corp.html.

¹³² See Press Release, Cal. Office of Att’y Gen., *Att’y Gen. Kamala D. Harris Sues Standard & Poor’s for Inflated Ratings that Caused Investors to Lose Billions* (Feb. 5, 2013), available at <http://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-sues-standard-poor%E2%80%99s-inflated-ratings-caused>.

¹³³ See *Judge Allows California Case Against Standard & Poor’s to Proceed*, Reuters (Aug. 15, 2013), <http://www.reuters.com/article/2013/08/15/mcgrawhill-sandp-lawsuit-idUSL4N0GG0OZ20130815>.

¹³⁴ See Andrew Scurria, *38 Drugmakers Tricked State Medicaid Agency, La. Says*, Law360 (Oct. 16, 2013), <http://www.law360.com/articles/480650/38-drugmakers-tricked-state-medicaid-agency-la-says>.

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