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LITIGATION/CONTROVERSY

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False Claims Act: 2015 Year-in-Review

TABLE OF CONTENTS

I. Introduction: Highlights and Trends 1

II. Federal Legislative and Regulatory Developments 3

Congress 3

Department of Justice 5

Department of Health and Human Services 6

Department of State 7

Department of Defense 7

Office of Special Counsel 7

Compliance Standards Projects 7

III. Federal Case Law Developments 8

Supreme Court Decided Case: (1) Tolling of Statute of Limitations; (2) First-to-File Bar 8

Supreme Court Pending Cases: (1) Implied Certification; (2) Seal Requirement; (3) Scienter; (4) Rule 9(b); (5) Fraudulent Inducement 9

D.C. Circuit: (1) Privileged Status of Internal Investigations; (2) Scienter – Effect of Ambiguities in Underlying Legal Requirements or Contractual Specifications 12

First Circuit: Implied Certification Liability 15

Second Circuit: [None] 16

Third Circuit: Public Disclosure Bar - Retroactivity of 2010 Amendments 16

Fourth Circuit: (1) Implied Certification; (2) Public Disclosure Bar; (3) Calculation of Damages; (4) Advice-of-Counsel Defense 16

Fifth Circuit: (1) Seal Provision; (2) Scienter and Corporate "Collective Knowledge"; (3) Additional Post-Trial Discovery 19

Sixth Circuit: (1) Public Disclosure Bar; (2) Calculation of Damages 19

Seventh Circuit: (1) Rule 9(b) – Collective Pleading in Multi-Defendant Cases; (2) Implied Certification 22

Eighth Circuit: (1) Implied Certification and Fraudulent Inducement; (2) Relator's Statutory Share of Settlement 23

Ninth Circuit: (1) Definition of "Original Source;" (2) Viability of Relator after Criminal Conviction 24

Tenth Circuit: [None] 25

Eleventh Circuit: (1) News Media and the Public Disclosure Bar; (2) Compliance Efforts and the Recklessness Standard 25

IV. Federal Settlements, Interventions, and Complaints 27

Healthcare and Pharmaceuticals 27

Procurements and Grants 30

Financial Institutions 34

V. State and Local Developments 37

VI. About WilmerHale's False Claims Act Practice 40

I. Introduction: Highlights and Trends

In 2015, the Justice Department (DOJ) continued to give high priority to False Claims Act (FCA) investigations, bringing in nearly $3.6 billion in settlements and judgments. Healthcare cases accounted for approximately $2 billion and Defense Department cases approximately $259 million, leaving roughly $1.35 billion from other kinds of procurement and financial sector matters. While this past year's total was lower than those for the last three years—2012 ($5 billion), 2013 ($3.8 billion), 2014 ($5.8 billion)—it remained substantially higher than for any year before those three. In 2015, more than 630 qui tam suits were filed.[1]

The most unusual aspect of this year's numbers was the division between government-initiated cases, qui tam cases in which the government intervened, and qui tam cases in which the government declined to intervene. For the first time since DOJ began compiling statistics 28 years ago, recoveries from qui tam cases in which the government declined to intervene topped those from government-initiated cases—indeed, nearly doubled them, $1.15 billion to $670 million. Recoveries in non-intervened cases, which typically amount to no more than a tenth of recoveries in qui tam cases the government joins and often amount to much less than that, this year totaled fully 65% of the value of government-intervened recoveries. The enormous spike in recoveries in non-intervened qui tam cases arose in part because of one particularly large settlement in a non-intervened case, but it also reflected the increasing commitment of qui tam relators and their counsel to pursue cases even in the absence of government support.

More Individual Defendants, More Criminal Cases, More Data-Driven Investigations

In 2015, the Justice Department's leadership made clear that FCA investigations will increasingly focus on individual as well as organizational defendants and pursue potential criminal as well as civil liability. The "Yates Memo," issued by Deputy Attorney General Sally Quillian Yates in September, instructed prosecutors to focus on potentially culpable individuals in corporate investigations. That directive has already shifted how many Assistant U.S. Attorneys approach FCA investigations, placing the burden on them to justify any decision not to name individual as well as organizational defendants. For FCA cases, it also reinforced points made by Assistant Attorney General Leslie Caldwell, head of the Criminal Division, in a speech to Taxpayers Against Fraud in September 2014 emphasizing the Criminal Division's heightened attention to FCA prosecutions. Caldwell explained that DOJ had established a procedure so that the Civil Division would share all new qui tam complaints with the Criminal Division as soon as the cases are filed.

In October, 2015, Acting Assistant Attorney General for the Civil Division Ben Mizer described the Department's increased use of data analytics to identify patterns of healthcare and other fraud. Mizer explained that the practice has enhanced the Department's ability both to identify potential frauds for further investigation and to support cases already being investigated or litigated.

Increased Penalties on the Way

In the Bipartisan Budget Act of 2015, signed into law on November 2, 2015, Congress mandated increases in FCA penalties for the first time since 1999, when they were set at their current levels of $5,500-$11,000 per false claim. The Budget Act requires the Justice Department to issue regulations by July 1, 2016, increasing those penalties by the percentage the Consumer Price Index (CPI) has risen since the penalties were last adjusted. If the Justice Department imposes the greatest increase possible, civil monetary penalties under the FCA would rise approximately 40 percent, to roughly $7,700-$15,400 per false claim. Thereafter the penalties will be automatically adjusted annually based on increases in the CPI.

Supreme Court To Consider Implied Certification Liability

At the tail end of the year, the Supreme Court granted certiorari in *Universal Health Services v. United States ex rel. Escobar* to address whether the FCA permits implied certification liability and, if so, whether such liability extends only to certifications concerning requirements that are express conditions of payment. Given that many of the federal courts of appeals have accepted implied certification liability for

many years, rejection of that form of liability by the Supreme Court could substantially curtail new FCA claims.

D.C. Circuit Clarifies FCA Exposure Arising from Ambiguous Legal Requirements or Contractual Specifications

In *United States ex rel. Purcell v. MWI Corp.*, the D.C. Circuit issued an important decision clarifying the application of the FCA's scienter requirement in the face of ambiguous legal requirements or contractual specifications. The court reiterated that the FCA does not reach claims based on "reasonable but erroneous interpretations of a defendant's legal obligations," and held that, in the absence of clarifying guidance from the government, a defendant may not be liable under the FCA for a reasonable interpretation of an ambiguous requirement—but also held that whether the government had issued guidance that should have warned a defendant away from its interpretation may present a factual question that precludes resolution of the issue as a matter of law.

Eleventh Circuit Cites Defendant's Substantial Internal Compliance Efforts as Barrier to FCA Liability

In *Urquilla-Diaz v. Kaplan University*, the Eleventh Circuit held that the relator failed to satisfy the FCA's scienter requirement under the reckless disregard standard, pointing to record evidence that the defendant took significant steps to comply with the relevant regulations—including basing its policies on others that the government had previously approved, conducting compliance trainings, and hiring outside counsel to review its policies and compliance training materials. Recent district court decisions within the Eleventh Circuit underscore that the case provides a strong defense for defendants who can demonstrate significant compliance efforts in the face of complex regulatory schemes, and especially defendants that seek the advice of counsel to validate their policies and training materials.

Leading Government Liability Theories

Both relators and the government pursued a wide range of liability theories in 2015, but some appeared with increasing frequency and are likely to remain common in 2016. In healthcare cases, claims resting on alleged unnecessary care, improper coding of procedures and medications, and Stark Law and Anti-Kickback Statute violations were particularly frequent. The government's emphasis on data analytics will likely keep those kinds of claims coming in 2016. Procurement cases featured various kinds of record-keeping failures, such as alleged miscoding of labor categories and mishandling of government property; alleged violations of "best price" guarantees; and alleged failures to comply with "Buy American" requirements. Many of the settlements and government-initiated complaints in the financial sector involved improperly originated mortgage loans submitted for government insurance under the Department of Housing and Urban Development's (HUD) Direct Endorsement Lender (DEL) program. The Justice Department also obtained settlements from financial institutions based on alleged false claims in Small Business Administration (SBA), Treasury Department, and Export-Import Bank programs.

New York Tax FCA Upheld

The New York False Claims Act (NYFCA) is the only state false claims law that expressly includes tax fraud claims. The tax provision—which was added to the NYFCA in 2010—passed its first major test in October when the New York Court of Appeals, in *New York v. Sprint Nextel Corp*., held that New York's tax fraud law is not preempted by the federal Mobile Telecommunications Sourcing Act, and that retroactive application of the NYFCA is not barred by the federal Constitution's Ex Post Facto Clause. This may open the way to many more tax cases under the NYFCA and may inspire other states to follow New York's lead in authorizing such suits.

II. Federal Legislative and Regulatory Developments

This past year saw increased congressional and regulatory activity concerning false claims, including enactment of legislation increasing the penalties under the FCA and establishing a whistleblower reward program for automobile defects. The formation of a Whistleblower Protection Caucus in the Senate signaled an increased focus in that chamber on whistleblower-protection efforts. At the same time, some legislators and regulatory officials drew on themes WilmerHale attorneys have been articulating for several years urging less reliance on after-the-fact litigation and more on incentivizing companies to adopt effective compliance programs to prevent fraud up front.[2]

➢ Congress

- The Bipartisan Budget Act of 2015, signed by President Obama on November 2, 2015, mandates increases in various civil monetary penalties, including the penalties under the FCA. The FCA's civil penalties were last increased in 1999 to their current levels of $5,500-$11,000 per false claim. The Budget Act requires the Justice Department to issue new regulations by July 1, 2016, increasing those penalties by the percentage the Consumer Price Index has risen since the penalties were last adjusted. Agencies have discretion to increase the penalties by less than the mandated amount, but to do so must undergo a burdensome process, including OMB Director approval. If the Justice Department imposes the greatest increase possible, civil monetary penalties under the FCA could rise approximately 40 percent. Thereafter the penalties will be automatically adjusted annually based on increases in the Consumer Price Index.[3]

- On December 4, 2015, President Obama signed the Fixing America's Surface Transportation Act (FAST Act). The Act, which focuses on improving the nation's surface transportation infrastructure and enhancing highway and motor vehicle safety, includes a provision creating whistleblower incentives and protections for employees and contractors of motor vehicle manufacturers, part suppliers, or dealerships who provide the Secretary of Transportation with information relating to any motor vehicle defect, noncompliance, or any violation of any notification or reporting requirement that is likely to cause unreasonable risk of death or serious injury. The Act requires that in most instances whistleblowers report the information internally before divulging it to the federal government. The Act provides for rewards on the model of the IRS's tax whistleblower program and does not create a qui tam mechanism.[4]

House of Representatives

- On February 6, 2015, Representatives Chris Van Hollen (D-Md.), Rep. Peter Welch (D-Vt.), Janice Schakowsky (D-Ill.), Kathy Castor (D-Fla.), and John Conyers (D-Mich.) introduced the Medical Innovation Act. The bill would require certain drug manufacturers that have entered into a settlement agreement with a federal agency regarding specified violations, including FCA violations, to make payments to the Department of Health and Human Services (HHS). The payments would be used by the Food and Drug Administration (FDA) and the National Institutes of Health (NIH) to support research activities.[5]

- On February 27, 2015, Representative Jim McDermott (D-Wash.) introduced the Medicaid Physician Self-Referral Act of 2015 (H.R. 1083), which would make the so-called Stark Law apply to Medicaid as it does to Medicare. The Stark Law prohibits physicians from referring patients to medical facilities in which the physician or his or her immediate family members have a financial interest. The amendment would (1) make it clear that the Stark Law applies with equal force to Medicaid-designated health services, and (2) explicitly apply the FCA to violations of the self-referral provision for both Medicare- and Medicaid-designated services.[6]

- In May 2015, Representative Alan Grayson (D-Fla.) proposed an amendment to the National Defense Authorization Act that would have created a program fraud civil remedies statute for the Department of Defense (DoD) and NASA. The amendment was not included in the bill as passed by the House.[7]

- On July 10, 2015, the House passed the 21st Century Cures Act. Section 4006 would add new FCA-like penalty provisions to Section 1128A of the Social Security Act, 42 U.S.C. § 1320a–7a, imposing new civil monetary penalties for violations related to grants, contracts, or other agreements for which the Secretary of HHS provides funding. The civil monetary penalty provision would permit HHS to impose penalties without court proceedings, and would permit HHS to exclude offenders from all Medicare and Medicaid programs in the same proceeding.[8]

Senate

- On January 29, 2015, Senators Elizabeth Warren (D-MA), Ben Cardin (D-MD), Sherrod Brown (D-OH), and Tammy Baldwin (D-WI) introduced the Medical Innovation Act, which is identical to the House version. The bill would require certain drug manufacturers that have entered into a settlement agreement with a federal agency regarding specified violations, including FCA violations, to make payments to HHS. The payments would be used by the FDA and NIH to support research activities.[9]

- On February 9, 2015, Senators Jack Reed (D-RI) and Chuck Grassley (R-IA) introduced the Government Settlement Transparency & Reform Act, which would amend the tax code to deny tax deductions for certain fines and penalties related to a violation or investigation into the potential violation of any law. Amounts paid as restitution or to come into compliance with any law that was violated or otherwise involved in the investigation may still be deductible. The bill would also require the government and any settling party to reach a pre-filing agreement on how the settlement payments are to be allocated (e.g., as penalty or restitution) for tax purposes.[10]

- On June 4, 2015, Senator Claire McCaskill (D-MO) proposed amendments to the National Defense Authorization Act—not included in the enacted version of the Act—that would have made permanent a temporary provision enacted in January 2013 that prohibits retaliation against employees of government contractors for disclosing to various investigatory bodies information an employee "reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, … or a violation of law, rule, or regulation related to a Federal contract … or grant."[11] The temporary provision is set to expire in January 2017. The amendments also would have extended protections to contractors of intelligence community elements, which are not covered by the existing provision.[12]

- On October 1, 2015, Senators Ron Johnson (R-WI) and Kelly Ayotte (R-NH) introduced the Dr. Chris Kirkpatrick Whistleblower Protection Act. If enacted, the bill would expedite investigations of instances in which federal employees are fired for whistleblowing, ensure that managers who retaliate against whistleblowers are held accountable, and enhance protections for federal whistleblowers.[13]

- Led by Senator Chuck Grassley (R-IA), the Senate engaged in a number of activities focused on whistleblower protection:

    - On February 25, 2015, a bipartisan group of senators launched the Whistleblower Protection Caucus to foster discussion of issues affecting the treatment of whistleblowers. The founding members of the caucus are Senators Chuck Grassley (R-IA) (chairman), Ron Wyden (D-OR) (vice-chairman), Ron Johnson (R-WI), Mark Kirk (R-IL), Deb Fischer (R-NE), Thom Tillis (R-NC), Barbara Boxer (D-CA), Claire McCaskill (D-MO), Tammy Baldwin (D-WI), and Ed Markey (D-MA).[14] Senators John Boozman (R-AR) and Tom Carper (D-DE) joined the caucus in April.[15]

    - On March 4, 2015, the Senate Judiciary Committee held a hearing titled *Whistleblower Retaliation at the FBI: Improving Protections and Oversight*.[16]

    - In May 2015, the GAO delivered a report, *DOD Needs to Enhance Oversight of Military Whistleblower Reprisal Investigations*, finding that DoD did not have adequate measures to oversee military whistleblower reprisal investigations. The report was requested by Senators Chuck Grassley (R-IA), Kirsten Gillibrand (D-NY), and Claire McCaskill (D-MO).[17]

- On June 11, 2015, the Homeland Security and Governmental Affairs Committee held a hearing on retaliation against federal agency whistleblowers.[18]

- On July 22, 2015, the Senate unanimously passed the Criminal Antitrust Anti-Retaliation Act. If enacted, the bill would prohibit employers from retaliating against an employee who provides information to the Justice Department regarding conduct that violates the criminal antitrust laws. The bill was based on recommendations from a GAO report released in July 2011, and was introduced by Senators Chuck Grassley (R-IA) and Patrick Leahy (D-VT).[19]

- On July 30, 2015, the Senate honored whistleblowers with a celebration of National Whistleblower Day. Senators Chuck Grassley (R-IA), Ron Wyden (D-OR), Ron Johnson (R-WI), Tammy Baldwin (D-WI), Thom Tillis (R-NC), and Mark Kirk (R-IL) and Representative Jackie Speier (D-CA) delivered remarks at an event hosted by the National Whistleblower Center. The Senate passed a resolution marking July 30th as National Whistleblower Appreciation Day.[20]

- On October 29, 2015, the GAO delivered a report, *IRS Whistleblower Program*, finding that the tax whistleblower program has helped the IRS collect almost $2 billion in additional revenue since 2011. The GAO found gaps in IRS procedures to protect whistleblowers, however, and recommended that Congress consider providing whistleblowers with legal protections against retaliation from employers. The report was requested by Senators Orrin Hatch (R-UT) and Chuck Grassley (R-IA), and Representative Peter Roskam (R-IL).[21]

➢ **Department of Justice**

- On May 19, 2015, Leslie R. Caldwell, Assistant Attorney General for the Criminal Division, gave a speech at the Compliance Week Conference in which she emphasized that the Justice Department's Criminal Division considers the adequacy of a company's compliance program and internal investigation when it decides whether and how to prosecute a company. Caldwell noted that the Department also considers a company's decision to disclose criminal misconduct, and that to receive cooperation credit a company must provide a full accounting of the known facts and affirmatively identify responsible individuals in a timely way. She also described hallmarks of effective compliance programs that the Department looks for in making charging decisions.[22]

- On September 9, 2015, Deputy Attorney General Sally Quillian Yates issued a policy memorandum for federal prosecutors intended to further the Department's effort to hold individuals accountable for corporate wrongdoing. The new policy has six components:

    - (1) To be eligible for any cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct;

    - (2) Both criminal and civil corporate investigations should focus on potentially responsible individuals from the inception of the investigation;

    - (3) Criminal and civil attorneys handling corporate investigations should be in routine communication with one another;

    - (4) Absent extraordinary circumstances, resolution of a matter with respect to a company will not necessarily provide protection from criminal or civil liability for individuals;

    - (5) Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires; declinations as to individuals in such cases must be memorialized; and

- (6) Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.[23]

- On October 22, 2015, Benjamin C. Mizer, Principal Deputy Assistant Attorney General for the Civil Division, gave a speech at the Pharmaceutical Compliance Congress and Best Practices Forum in which he described the Department's increased use of data analytics to identify patterns of healthcare fraud. Mizer explained that the practice has enhanced the Department's ability both to identify potential frauds for further investigation and to support cases already being investigated or litigated. Mizer also addressed the Department's renewed commitment to ensuring that individuals who engage in fraud are held accountable. Consistent with principles outlined in the Yates Memo, he emphasized that companies wanting cooperation credit will be required to identify all individuals involved in wrongdoing, the Department will focus from the outset of an investigation on individuals, and the criminal and civil sides of the Department will work in collaboration toward the enforcement goal.[24]

- The Justice Department hired Hui Chen, effective November 3, 2015, as a full-time compliance expert in the Fraud Section. Chen will provide assistance to prosecutors in evaluating the adequacy of compliance programs and in developing appropriate benchmarks for evaluating corporate compliance and remediation measures as part of resolutions.[25] The Department emphasized, however, that retention of a compliance counsel is not an indication that the Department is moving toward recognizing or instituting a "compliance defense."[26]

➢ **Department of Health and Human Services**

- On February 3, 2015, the Center for Medicare & Medicaid Services' final rule (published December 5, 2014), "Requirements for the Medicare Incentive Reward Program and Provider Enrollment," became effective. The rule, among other things, expands the instances in which a felony conviction can serve as a basis for denial or revocation of a provider's or supplier's enrollment, and enables CMS to revoke Medicare billing privileges if it determines that the provider or supplier has a pattern or practice of submitting claims that fail to meet Medicare requirements.[27]

- On April 20, 2015, HHS's Office of Inspector General (OIG), in collaboration with the American Health Lawyers Association, the Association of Healthcare Internal Auditors, and the Health Care Compliance Association, released a joint educational resource to assist governing boards of health care organizations to carry out their compliance oversight obligations. The guidance recommends, among other things, that compliance and general counsel functions should be separate and that healthcare boards consult regularly with regulatory, compliance, or legal experts or consider adding such a person to the board. The report is important because it is the first guidance on the issue in over ten years.[28]

- HHS's OIG announced on June 30, 2015 that it was creating a litigation team focused on seeking civil monetary penalties and excluding individuals and organizations from Medicare and Medicaid. The team is headed by Robert M. Penezic, an OIG deputy branch chief. The team's mission will be to ramp up civil enforcement actions initiated by the OIG, pursue cases that arise from FCA investigations and referrals to the OIG, and monitor corporate integrity agreement (CIA) obligations.[29]

- On October 29, 2014, HHS's OIG issued a notice in the Federal Register that it was considering revising the non-binding criteria it uses in deciding whether to exclude entities from participating in the federal healthcare programs for engaging in certain conduct such as violating of the FCA. The Office requested comments and recommendations on how to revise the criteria, including, in particular, whether there should be differences in the criteria for individuals and entities and whether and how to consider a defendant's existing compliance program.[30] The Office did not take any further action on this matter in 2015, and the topic does not appear on HHS's Spring 2015 or Fall 2015 regulatory agenda or in the HHS OIG's FY 2015 and FY 2016 work plans.[31]

- **Department of State**

- In March 2015, the State Department's OIG issued a report finding that all of the thirty contractors with the largest dollar volume of Department of State contracts used a confidentiality agreement or policy, and that some of those policies might have a chilling effect on employees who were considering whether to report fraud, waste, or abuse to the government.[32]

- **Department of Defense**

- The Defense Department acted on February 5, 2015 and October 29, 2015 to prohibit the Department from spending fiscal year 2015 or 2016 appropriated funds on contractors that require employees to sign confidentiality agreements. Contractors cannot require employees or subcontractors to sign new confidentiality agreements and must notify employees that current agreements are no longer in effect. The federal government is empowered to seek "any available remedies" against noncompliant contractors.[33]

- **Office of Special Counsel**

- The Office of Special Counsel issued a notice of proposed rulemaking on January 22, 2015 to revise its regulations to expand who may file a whistleblower disclosure with the Office. The revision would allow employees of federal contractors, subcontractors, and grantees to disclose wrongdoing within the federal government if they work at or on behalf of a U.S. government component for which the Office has jurisdiction to accept disclosures.[34]

- **Compliance Standards Projects**

- In May 2015, the Ethics & Compliance Initiative established a Blue Ribbon Panel to consider the principles and practices of high-quality organizational ethics and compliance programs. The Blue Ribbon Panel includes Lanny Breuer, Gary Grindler, Paul McNulty, Michael Oxley, Larry Thompson, and other senior practitioners who lead internal ethics and compliance programs at organizations of varying industries, sizes, and sectors; academics; legal experts; and former government enforcement officials. The panel released a discussion draft of the panel's report, *Principles and Practices of High-Quality Ethics & Compliance Programs*, on December 2, 2015. The report identifies five principles common to high-quality ethics and compliance programs:

    - Ethics and compliance is central to business strategy;
    - Ethics and compliance risks are owned, managed, and mitigated;
    - Leaders across the organization build and sustain a culture of integrity;
    - The organization protects, values, and encourages the reporting of concerns and suspected wrongdoing; and
    - The organization takes action and holds itself accountable when wrongdoing occurs.

  The report also describes supporting objectives and practices organizations can use to implement these principles.[35]

- Work began in 2015 on the American Law Institute's new Principles of the Law: Compliance, Enforcement, and Risk Management for Corporations, Nonprofits and Other Organizations. The project aims to provide "a set of recommended standards and best practices on the law of compliance and risk management," and is expected to have four parts: compliance, enforcement, risk management, and governance.[36] Geoffrey Miller, professor at New York University School of Law, is the reporter for the project.

III. Federal Case Law Developments

Supreme Court

- **Decided Case: (1) Tolling of Statute of Limitations; (2) First-to-File Bar**

***Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015)**

The Supreme Court resolved two important questions, holding that (1) the Wartime Suspension of Limitations Act (WSLA), 18 U.S.C. § 3287, applies only to criminal cases, and (2) the FCA's first-to-file bar, 31 U.S.C. § 3730(b)(5), ceases to apply once the earlier-filed action that might have created the bar has been dismissed.

About the Case

The relator, Carter, alleged that Kellogg Brown & Root Services (KBR) fraudulently billed the government for water purification services performed in Iraq in 2005. He filed his original complaint in 2006, and the government declined to intervene. In 2010, the government informed the parties about an earlier-filed qui tam complaint asserting similar claims, leading the district court to dismiss Carter's suit. After a series of dismissals and filings, Carter re-filed his complaint in 2011. Two other relators had since filed related cases, however, and the district court dismissed Carter's suit with prejudice on first-to-file grounds. The district court also ruled that the WSLA applies only to criminal cases. It therefore concluded that the WSLA did not suspend the six-year limitations period for civil FCA claims, rendering all but one of Carter's claims time-barred.

The Fourth Circuit reversed, holding that the FCA's first-to-file bar does not block qui tam suits filed after the first-filed action is no longer pending and that the WSLA tolls the FCA's statute of limitations for civil as well as criminal claims. The Fourth Circuit held that the suit should not have been dismissed with prejudice and that Carter should have been permitted to re-file because the previously pending actions supporting dismissal had been dismissed.

The Supreme Court reversed the Fourth Circuit's WSLA holding. "The text, structure, and history of the WSLA," the Court concluded, "show that the Act applies only to criminal offenses." The Court held that the term "offense" as used in Title 18 refers to criminal violations, and that any ambiguity must be resolved in favor of a narrower definition. Accordingly, the Court found all but one of Carter's claims to be time-barred. The Court's reasoning and holding drew no distinction between qui tam suits and civil FCA claims instituted by the government.

As to the first-to-file bar, the Court held that a qui tam suit ceases to be "pending" once it has been dismissed. The Court rejected KBR's interpretation of the bar "as short-hand for the first filed action," concluding that under that interpretation, a first-filed suit, even if it was not dismissed on the merits, would bar all subsequent suits based on the same underlying facts, a result that Congress likely did not intend. The Court held that Carter's remaining live claim was not barred by the first-to-file bar as the related suits had been dismissed.

On remand, the district court dismissed Carter's request to amend his complaint and, instead, dismissed his entire action under the first-to-file bar without prejudice to Carter's filing of a new complaint.[37]

Implications for Future FCA Cases

By limiting the WSLA to criminal cases, the Supreme Court's decision protects defendants in civil FCA cases from potentially indefinite tolling of the Act's limitations period.

The Supreme Court's first-to-file decision, however, means that defendants could be subjected to follow-on suits based on the same underlying facts as earlier-filed actions once those actions have been dismissed. While defendants may raise other defenses to follow-on suits—such as claim preclusion or the public-disclosure bar—the potential for follow-on suits may increase uncertainty regarding whether to

settle first-filed qui tam suits, and if so, for what amount.

- **<u>Pending Cases</u>: (1) Implied Certification; (2) Seal Requirement; (3) Scienter; (4) Rule 9(b); (5) Fraudulent Inducement**

***Universal Health Services v. United States ex rel. Escobar*, No. 15-7, *certiorari granted* (Dec. 4, 2015)**

This case, accepted for review by the Supreme Court on December 4, 2015, presents two questions: (1) whether the FCA permits implied certification liability and (2) if so, whether such claims are limited to requirements that are expressly made conditions of payment by the government. It will likely be argued at the March sitting and decided by the end of June.

About the Case

The relators are the parents of a woman who died of a seizure after being treated by allegedly unlicensed and unsupervised staff at a provider of mental health services. The premise of the claim is that because the provider allegedly failed to hire and supervise its staff properly, in violation of state regulations, its submission of reimbursement claims to the state Medicaid agency violated both the FCA and its state counterpart.

The district court dismissed the action. Drawing a distinction between conditions of *payment* and conditions of *participation*, the court held that only noncompliance with statutory or regulatory conditions of *payment* could render a contractor's claims for payment actionably false. The conditions at issue in this case, the district court held, were conditions of the defendant's participation in the relevant program, not conditions of its receiving payments.

The First Circuit reversed, holding that "any payment/participation distinction is not relevant here," because "the provisions at issue in this case clearly impose conditions of payment." In a footnote, the court observed that "[a]lthough the record is silent as to whether [the mental health center] explicitly represented that it was in compliance with conditions of payment when it sought reimbursement from" the state Medicaid agency, the First Circuit has "not required such 'express certification' in order to state a claim under the FCA."

Universal Health Services, the owner of the mental health center, petitioned for certiorari, and the Supreme Court granted on two questions: (1) "[w]hether the 'implied certification' theory of legal falsity under the FCA—applied by the First Circuit below but recently rejected by the Seventh Circuit—is viable"; and (2) if so, "whether a government contractor's reimbursement claim can be legally 'false' under [the implied certification] theory if the provider failed to comply with a statute, regulation, or contractual provision that does not state that it is a condition of payment, as held by the First, Fourth, and D.C. Circuit; or whether liability for a legally 'false' reimbursement claim requires that the statute, regulation, or contractual provision *expressly* state that it is a condition of payment, as held by the Second and Sixth Circuits."

Implications for Future FCA Cases

Many of the courts of appeals have accepted implied certification liability for many years, and implied certification claims have become common in FCA litigation.[38] The Seventh Circuit's recent rejection of implied certification liability in *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696 (7th Cir. 2015), *see infra* at p. 22, created a clear Circuit split and so opened the door to what could be a major curtailment of FCA claims.

If the Court reverses the First Circuit, the effect of its ruling will depend on whether it takes a broad or narrow approach. The narrower approach to reversal would be to hold, in answering the second question presented, that only non-compliance with *express* conditions of payment can substantiate implied certification liability. The broader approach would be to hold, in answering the first question presented, that non-compliance with even *express* conditions of payment cannot serve as a predicate to liability absent a defendant's express certification of compliance.

***State Farm Fire and Casualty Company v. United States ex rel. Rigsby*, No. 15-513, *petition for certiorari pending*, call for the views of the Solicitor General ordered (Jan. 11, 2016)**

This case presents two questions: (1) "[w]hat standard governs the decision whether to dismiss a relator's claim for violation of the FCA's seal requirement, 31 U.S.C. § 3730(b)(2)?"; and (2) "[w]hether and under what standard a corporation or other organization may be deemed to have 'knowingly' presented a false claim, or used or made a false record, in violation of section 3729(a) of the FCA based on the purported collective knowledge or imputed ill intent of employees other than the employee who made the decision to present the claim or record found to be false." On January 11, 2016, the Court issued an order calling for the views of the Solicitor General (CVSG). A CVSG indicates the Court is considering seriously whether to grant the petition. The Solicitor General's Office aspires to respond to CVSG orders within 90 days, but often does not meet that self-imposed deadline.

About the Case

This case involves insurance claims related to Hurricane Katrina. The relators, independent claims adjusters who provided State Farm with adjustment services in the wake of the hurricane, allege that State Farm defrauded the government by directing claims adjusters to misclassify wind damage (which would be covered by State Farm) as flood damage (which would be covered by the government). A jury found in favor of the relators.

The Fifth Circuit reversed in part (ordering that the relators be allowed to take further discovery to pursue additional claims) but otherwise affirmed in a decision discussed more fully below, *see infra* at p. 19. The Fifth Circuit held that the district court had properly declined to dismiss the action notwithstanding the relators' violations of the FCA's seal requirement, 31 U.S.C. § 3730(b)(2), which provides that relators must serve a qui tam complaint on the government and that the complaint must remain sealed (to permit the government to investigate the allegations) until the court orders otherwise. The relators in this case disclosed the existence of the case to several news outlets and a Member of Congress. The Fifth Circuit also rejected State Farm's argument that the relators had failed to show that it *knowingly* submitted any false claims.

State Farm is seeking certiorari on the seal and scienter issues. The question of when a seal violation warrants dismissal is the subject of an acknowledged split of authority, which the Solicitor General has previously identified as certworthy. The Fifth Circuit here adopted the Ninth Circuit's balancing test, weighing the "purpose of qui tam actions ... to encourage more private false claims litigation" against the government's need for "'an adequate opportunity to fully evaluate the private enforcement suit.'" *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245 (9th Cir. 1995). The Sixth Circuit, by contrast, has held that *any* violation of the seal requirement mandates dismissal. *United States ex rel. Summers v. LHC Grp. Inc.*, 623 F.3d 287, 299 (6th Cir. 2010). The Second and Fourth Circuits have adopted their own balancing tests, closer to the Fifth and Ninth Circuits' approach than to the Sixth's.

On the scienter issue, State Farm argues that the Fifth Circuit wrongly allowed liability absent proof that any State Farm employee knew the claims being submitted were false. The question presented is "[w]hether and under what standard a corporation or other organization may be deemed to have 'knowingly' presented a false claim, or used or made a false record, in violation of section 3729(a) of the FCA based on the purported collective knowledge or imputed ill intent of employees other than the employee who made the decision to present the claim or record found to be false."

The petition has drawn heavy amicus support, with briefs in support of certiorari from the American Tort Reform Association, the Academy Advisors, the Washington Legal Foundation and Allied Educational Foundation, the U.S. Chamber of Commerce, and the National Association of Criminal Defense Lawyers.

Implications for Future FCA Cases

Supreme Court review of the seal issue, while helpful in resolving a clear and acknowledged circuit split, would likely be of limited practical effect given that most relators respect the FCA's seal requirement. Supreme Court review of the scienter issue could have far reaching effects depending on how the Court defines the standard for establishing corporate knowledge in FCA cases.

AT&T v. United States ex rel. Heath*, No. 15-363, *petition for certiorari pending

This case presents the question "[w]hether a relator asserting a claim under the False Claims Act can satisfy Federal Rule of Civil Procedure 9(b)'s particular pleading requirement without setting forth specific facts regarding at least one allegedly false or fraudulent claim submitted to the government." The Court appears to be holding this petition pending its decision in the *Universal Health Services* case.

About the Case

This case involves the federal government's "E-Rate" program, which entitles certain schools and libraries to receive telecommunications services at subsidized rates. Telecommunications companies participating in the program must offer their services at or below the "lowest corresponding price," defined as the "lowest price that a service provider charges to non-residential customers who are similarly situated." 47 C.F.R. § 54.511(b), 54.500(f).

The relator, a telecommunications consultant, alleges that AT&T systematically failed to offer E-Rate services at the lowest corresponding price. But the complaint does not identify a single false claim allegedly submitted by AT&T. The district court dismissed the action as jurisdictionally barred by the first-to-file rule and thus did not reach AT&T's argument that Rule 9(b) required dismissal because of the complaint's failure to identify a particular false claim. The D.C. Circuit reversed on the first-to-file issue (holding that the bar was not jurisdictional and, at any rate, did not apply) but proceeded to conduct the Rule 9(b) analysis in the first instance, holding that the complaint *was* sufficient for the case to proceed.

AT&T now seeks certiorari on "[w]hether a relator asserting a claim under the False Claims Act can satisfy Federal Rule of Civil Procedure 9(b)'s particular pleading requirement without setting forth specific facts regarding at least one allegedly false or fraudulent claim submitted to the government." AT&T alleges an entrenched and acknowledged split between the D.C., First, Third, Fifth, Seventh, Ninth, and Tenth Circuits—which hold that a relator need not plead the details of individual false claims in order to survive dismissal under Rule 9(b)—and the Fourth, Sixth, Eighth, and Eleventh Circuits, which in some cases have required relators to plead such specifics. The Solicitor General has previously recognized this tension as certworthy in an appropriate case.

The petition has drawn significant amicus support, with briefs in support of certiorari from the Coalition for Government Procurement, CTIA – The Wireless Association, the U.S. Chamber of Commerce, DRI – The Voice of the Defense Bar, and the National Association of Manufacturers.

Implications for Future FCA Cases

A grant of certiorari in this case could have enormous consequences for the day-to-day practice of FCA litigation, because Rule 9(b) often supplies a central defense in FCA actions and because relators may in many cases find it difficult to allege the specifics of particular false claims prior to discovery. A ruling against AT&T could extinguish defendant-friendly law in four Circuits, whereas a ruling in favor of AT&T could make the law substantially friendlier to defendants in seven other Circuits.

Weston Educational, Inc. v. United States ex rel. Miller*, No. 15-404, *petition for certiorari pending

This petition presents the question "whether an FCA fraudulent inducement claim may survive summary judgment based on generally alleged bad acts suggesting the breach of an implied promise but absent evidence of a regulatory violation and any evidence showing the government might not have entered into the" relevant agreement.

About the Case

The relators in this case are two former employees of Heritage College, a for-profit educational institution owned by defendant Weston Educational. Heritage entered into a Program Participation Agreement (PPA) with the Department of Education, to receive federal funds under Title IV of the Higher Education Act of 1965. The PPA includes various record-keeping obligations. Claiming that Heritage falsified students' grade and attendance records in order to remain eligible for funding, relators allege FCA liability under a theory of fraudulent inducement. They say Heritage signed the PPA without intending to comply with its

obligation to maintain such "records as may be necessary to ensure proper and efficient administration of funds."

The district court determined that Heritage made no such promise and that any promise it made was immaterial to the disbursement of funds. The Eighth Circuit reversed, determining that the evidence at summary judgment was sufficient to create a genuine dispute of material fact as to whether Heritage "knew it had to keep accurate grade and attendance records and intended not to do so." And any such falsehood, the court concluded, was material: "Heritage could not have executed the PPA without stating it would maintain adequate records. … And without the PPA, Heritage could not have received any Title IV funds."

Heritage now seeks certiorari, presenting the question "whether an FCA fraudulent inducement claim may survive summary judgment based on generally alleged bad acts suggesting the breach of an implied promise but absent evidence of a regulatory violation and any evidence showing the government might not have entered into the PPA." The petition argues that by treating every requirement of the PPA as an implied condition of federal funding, the Eighth Circuit's decision "further exposes all government contractors to FCA liability for fraudulent inducement on the basis of implied promises or terms and allegations of general bad acts."

Implications for Future FCA Cases

The Supreme Court will likely hold this case for *Universal Health Services*, *see supra* at p. 9, which presents the question whether implied certification liability is permissible under the False Claims Act. This case raises similar concerns about the breadth of potential exposure for federal contractors who breach the terms of their agreements with the government.

D.C. Circuit: (1) Privileged Status of Internal Investigations; (2) First-to-File Bar as Non-jurisdictional; (3) Rule 9(b) – Allegations of Specific False Claims Not Required; (4) Scienter – Effect of Ambiguities in Underlying Legal Requirements or Contractual Specifications

***In re Kellogg Brown & Root, Inc.*, 796 F.3d 137 (D.C. Cir. 2015)**

For the second time in just over a year, the D.C. Circuit granted the extraordinary remedy of a writ of mandamus to protect a company's assertion of privilege over materials relating to an internal investigation. Agreeing with an amicus brief in which WilmerHale argued against the lower court ruling, the Court vacated the denial of the privilege and warned, "[i]f allowed to stand, the District Court's rulings would ring alarm bells in corporate general counsel offices throughout the country." 796 F.3d at 151.

About the Case

***The 2014 Decision* – KBR I**

KBR, a defense contractor, had conducted an internal investigation into allegations that it defrauded the United States by inflating costs and accepting kickbacks while administering military contracts in Iraq. In connection with a qui tam suit against KBR, the relator sought documents related to the company's investigation, which KBR opposed on the basis of the attorney-client privilege. After the district court rejected KBR's assertion of privilege, the company sought a writ of mandamus, which the D.C. Circuit granted. *See In re Kellogg Brown & Root, Inc*., 756 F.3d 754 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 1163 (2015).

The court of appeals analyzed and rejected four justifications the district court had asserted in ordering the documents produced. First, with respect to the district court's finding that KBR's internal investigation was conducted by in-house counsel, the D.C. Circuit clarified that the Supreme Court's seminal decision recognizing the corporate privilege in *Upjohn* "does not hold or imply that the involvement of outside counsel is a necessary predicate for the privilege to apply," and that "a lawyer's status as in-house counsel 'does not dilute'" the force of the privilege. 756 F.3d at 758. Second, the court of appeals rejected the district court's reliance on the fact that the interviews had been conducted by non-attorneys, observing that "communications made by and to non-attorneys serving as agents of attorneys in internal investigations are routinely protected by the attorney-client privilege." *Id*. Third, the D.C. Circuit concluded

that KBR's failure to inform employees that the purpose of the interview was to assist the company in obtaining legal advice was of no moment, as "nothing in *Upjohn* requires a company to use magic words to its employees" to establish the privilege in an internal investigation and, in any event, employees were told not to discuss the interviews without the approval of the legal department. *Id*. Finally, the D.C. Circuit held that "[s]o long as obtaining or providing legal advice was one of the significant purposes of the internal investigation," the privilege applies, "even if there were also other purposes for the investigation and even if the investigation was mandated" by DoD regulation. *Id*. at 758-59.

***The 2015 Decision* – KBR II**

On remand, the district court found that the "same contested documents" were discoverable because KBR had "impliedly waived" the attorney-client privilege and work product protections. 796 F.3d at 140-41. Once again, the company sought a writ of mandamus, which the D.C. Circuit granted. WilmerHale again supported the petitioner in *KBR II* on behalf of a coalition of business associations concerned with the uncertainty engendered by the district court's opinion.

KBR II has three principal holdings. The first concerns the interplay between the privilege and Federal Rule of Evidence 612, which provides that where a witness uses a writing to refresh his memory before testifying, an adverse party may have the writing produced "if the court decides that justice requires" production. The district court had concluded that certain documents generated by KBR's investigation must be produced under Rule 612 on the ground that the company had waived privilege and work product protections when its 30(b)(6) witness had "reviewed the documents in preparation for his deposition" on the topic of the internal investigation. 796 F.3d at 143. Rejecting this conclusion, the D.C. Circuit held that the district court's reasoning would allow the privilege "to be defeated routinely by a counter-party noticing a deposition on the topic of the privileged nature of the internal investigation," thereby "potentially upend[ing] certain settled understandings and practices about the protections" governing internal investigations. *Id*. at 144-45.

Second, *KBR II* addressed whether the company had effected an "at issue" waiver or "implied waiver" by making certain references to its internal investigation in a summary judgment brief. In a footnote in its summary judgment filing, KBR described aspects of its investigation process without explicitly revealing its findings. The brief stated that the company (1) generally reported findings of wrongdoing to the government, (2) had investigated the plaintiff's allegations of kickbacks, but (3) had made no report of misconduct to the government. The district court found that KBR had implicitly argued that its investigation had found no wrongdoing, and thus had "actively sought a positive inference in its favor based on what . . . the [investigation] documents show." *Id.* at 142. Acknowledging that the issue of implied waiver presented "a more difficult question," the D.C. Circuit nevertheless rejected the district court's finding because (1) KBR did not intend to make an "unconditional disclosure" of the results of its investigation, *id.* at 147; (2) KBR's reference to its investigation was only a "recitation of facts in the motion's introduction, not in an argument or claim concerning the privileged documents' contents," *Id*. at 148; and (3) as the movant for summary judgment, all inferences based on the contents of the privileged documents were to be drawn against KBR. *Id*.

Third, the district court had concluded that substantial portions of the investigation-related documents constituted fact work product, and that the relator had made an adequate showing to overcome the work product protection. The D.C. Circuit agreed with the district court that not "everything in an internal investigation is attorney-client privileged," and that pure fact work product may be discoverable upon a showing of "substantial need" and "undue hardship." *Id*. at 148, 150. It nevertheless concluded that the lower court had incorrectly compelled production of documents—including a report summarizing employee statements—that went well beyond pure fact work product and implicated both privileged materials and the mental impressions of investigators. *Id*. at 149-50.

Implications for Future FCA Cases

This pair of decisions helpfully clarifies the scope of the corporate privilege and its potential waiver in internal investigations. The recent decision in *KBR II*, in particular, is an important reminder to remain vigilant about inadvertently effecting an implied waiver of a company's privilege. Although the D.C. Circuit ultimately upheld KBR's assertion of the privilege, it observed that the company's discussion of its internal investigation in a filing, albeit brief, presented a relatively close call. A description of a privileged

investigation in the course of litigation may be perceived—as it was by the district court—as implicitly trying to convey the investigation's conclusions. In that regard, *KBR II* reinforces the need to consider carefully how privileged materials—whether arising from an internal investigation or otherwise—are used in litigation or in discussions with the government.

***United States ex rel. Heath v. AT&T, Inc.*, 791 F.3d 112 (D.C. Cir. 2015), *pet. for cert. filed* Sept. 21, 2015 (No. 15-363)**

The D.C. Circuit held that (i) the FCA's first-to-file bar is not jurisdictional; (ii) the particular case at issue was not subject to the bar because it alleged a materially broader fraud than what was alleged in the first-filed action, and (iii) the relator satisfied Rule 9(b)'s pleading requirements, even though he did not allege specific facts regarding the submission of a particular false claim. As discussed above, *see supra* at p. 11, a petition for certiorari is pending on the third holding, raising the question whether a relator must allege specific facts regarding at least one false or fraudulent claim submitted to the government to satisfy Rule 9(b)—an issue on which the circuits are divided.

About the Case

This case involves the federal government's "E-Rate" program, which entitles certain schools and libraries to receive telecommunications services at subsidized rates. Companies participating in the program must offer their services at or below the "lowest price that a service provider charges to non-residential customers who are similarly situated," 47 C.F.R. § 54.511(b), 54.500(f). The relator alleged that AT&T systematically failed to offer E-Rate services at the required price, but he did not identify a specific false claim that resulted from the alleged failure. The district court dismissed the action as jurisdictionally barred by the first-to-file bar without reaching AT&T's alternative argument that Rule 9(b) also required dismissal.

The D.C. Circuit reversed on the first-to-file issue. It first held that the bar was not jurisdictional, and, further, that it did not apply because the two actions were not "related" within the meaning of the first-to-file bar. 791 F.3d at 121. The court distinguished the earlier action as alleging a narrow scheme by rogue employees of a corporate subsidiary involving specific misrepresentations, in contrast to the later-filed action, which alleged fraud and concealment arising from what the court characterized as "a centralized and nationwide corporate policy of failing to enforce known statutory pricing requirements." *Id.* at 115, 121-22.

Having held that the first-to-file bar did not apply, the D.C. Circuit then conducted the Rule 9(b) analysis in the first instance, holding that the complaint satisfied the Rule 9(b) requirements: "In short, Rule 9(b)'s requirements of particularity as to who (AT&T), what (detailed identification of a centralized and institutionalized failure to comply with the lowest-corresponding price requirement…), where (through nineteen subsidiaries and their interactions with E-Rate schools and libraries across the Country), and when (1997 to 2009) have been satisfied." *Id.* at 124.

Implications for Future FCA Cases

The D.C. Circuit's first-to-file ruling operates to narrow the application of the bar where the second-filed action alleges fraud that is materially broader than that alleged in the first—particularly where the first-filed action alleges isolated misconduct at a subsidiary and the later-filed conduct alleges more systematic fraud at a corporate parent. As the D.C. Circuit explained, "the lesser fraud does not, without more, include the greater." 791 F.3d at 122. The D.C. Circuit has aligned itself with those circuits applying a less stringent view of the Rule 9(b) requirements; the implications of the Supreme Court's potential resolution of the circuit split on Rule 9(b) are discussed above, *see supra* at p. 11.

***United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281 (D.C. Cir. 2015)**

The D.C. Circuit vacated a jury verdict, holding that the defendant's certifications of compliance with an ambiguous contractual requirement did not create FCA liability because its interpretation of the disputed term was reasonable and the government had neither clarified the term nor warned the defendant away from its otherwise reasonable interpretation.

About the Case

The relator alleged FCA violations arising out of certifications that MWI made to the Export-Import Bank to secure loan financing in connection with its sale of water pumps to Nigeria. As part of the loan agreement, MWI certified to the Bank that it paid only "regular commissions" to its sales agent. The relator alleged that MWI's payment of nearly $30 million to a Nigerian sales agent was not regular in the industry and thus failed to comply with this certification. MWI defended the commission on the ground that it was regular in light of its practice with the particular sales agent in question, and that neither the Bank nor any other government official had provided a contrary definition of the term. The district court acknowledged the Bank's lack of guidance as to the meaning of "regular commissions" during the period in question but nonetheless concluded that "regular commissions" must be consistent with "industry-wide" benchmarks. 807 F.3d at 285. The district court concluded that because the term was not "so ambiguous," MWI had thus been on notice that "regular commissions" might encompass an industry-wide rather than an intra-firm or individual-agent standard. *Id*. The government ultimately prevailed at trial.

The D.C. Circuit reversed the jury's verdict in favor of the government, holding that, "[a]bsent evidence that the Bank, or other government entity, had officially warned MWI away from its otherwise facially reasonable interpretation of [an] undefined and ambiguous term, the FCA's objective knowledge standard … did not permit a jury to find that MWI 'knowingly' made a false claim." *Id*. at 284.

In doing so, the court delineated which aspects of the scienter inquiry were questions of law and which were questions of fact, explaining that while the "interpretive questions" of (a) whether a requirement is ambiguous and (b) whether a defendant's interpretation is objectively reasonable are questions of law for the court, a factual question may exist as to (c) whether the defendant had been warned away from its preferred interpretation so as to satisfy the FCA's scienter requirement. *Id*. at 288.

The D.C. Circuit reiterated its position that "the FCA does not reach an innocent, good-faith mistake about the meaning of an applicable rule or regulation. … [n]or does it reach those claims made based on reasonable but erroneous interpretations of a defendant's legal obligations." *Id*. at 287-88.

Implications for Future FCA Cases

The court re-emphasized that FCA liability is precluded when a defendant adopts a reasonable interpretation of an ambiguous regulatory or contractual provision. However, the court clarified that if the government ultimately issues guidance about the provision in question, fact questions may arise as to when such guidance was issued and whether it was sufficient to warn the defendant away from its interpretation. As a practical matter, organizations facing ambiguous legal requirements should be very attentive to any guidance from the government and should consider sharing their interpretation with the government in writing.

First Circuit: Implied Certification Liability

***United States ex rel. Escobar v. Universal Health Services, Inc*., 780 F.3d 504 (1st Cir. 2015), *cert. granted in part* (Dec. 4, 2015)**

As discussed above, *see supra* at p. 9, the Supreme Court granted certiorari to the First Circuit to review two questions: (1) "[w]hether the 'implied certification' theory of legal falsity under the FCA—applied by the First Circuit below but recently rejected by the Seventh Circuit—is viable"; and (2) if so, "whether a government contractor's reimbursement claim can be legally 'false' under [the implied certification] theory if the provider failed to comply with a statute, regulation, or contractual provision that does not state that it is a condition of payment, as held by the First, Fourth, and D.C. Circuit; or whether liability for a legally 'false' reimbursement claim requires that the statute, regulation, or contractual provision expressly state that it is a condition of payment, as held by the Second and Sixth Circuits."

About the Case

The relators are the parents of a woman who died of a seizure after being treated by allegedly unlicensed and unsupervised staff at a provider of mental health services. The premise of their claims is that because the provider allegedly failed to hire and supervise its staff properly, in violation of state

regulations, its submission of reimbursement claims to the state Medicaid agency violated both the FCA and its state equivalent.

The district court dismissed the case. Drawing a distinction between conditions of payment and conditions of participation, the court held that only noncompliance with statutory or regulatory conditions of payment could render a contractor's claims for payment actionably false. The conditions at issue in this case, the district court determined, were conditions of the defendant's participation in the relevant program, not conditions of its receiving payments.

The First Circuit reversed, holding that "any payment/participation distinction is not relevant here," because "the provisions at issue in this case clearly impose conditions of payment." 780 F.3d at 513. In a footnote, the court observed that "[a]lthough the record is silent as to whether [the mental health center] explicitly represented that it was in compliance with conditions of payment when it sought reimbursement from" the state Medicaid agency, the First Circuit has "not required such 'express certification' in order to state a claim under the FCA." *Id*. at 513, n.14.

Implications for Future FCA Cases

The viability and scope of the implied certification theory of liability are now before the Supreme Court.

Second Circuit: [None]

Third Circuit: Public Disclosure Bar - Retroactivity of 2010 Amendments

***United States ex rel. Judd v. Quest Diagnostics, Inc*., No. 14-3156, 2015 WL 5025447 (3d Cir. Aug. 26, 2015)**

The Third Circuit affirmed dismissal of the majority of a relator's FCA claims due to the public disclosure bar and FRCP 9(b). In doing so, the panel declined to apply the 2010 amendment to the public disclosure bar retroactively.

About the Case

Relator James Judd alleged that Quest Diagnostics engaged in a "kickback scheme" to induce healthcare providers to refer their patients to Quest in return for benefits including free medical and office supplies, substance abuse and diagnostic laboratory testing performed by Quest at discounted rates, and free access to Quest's patient database. 2015 WL 5025447 at *1. Judd was at least the fourth relator to have brought suit related to Quest's alleged practices. Noting this, the district court dismissed Judd's claims on the basis of the FCA's public disclosure bar and for failure to meet the pleading requirement of FRCP 9(b). *Id.* at *2.

On appeal, the Third Circuit agreed with the district court's determination that Judd's claims were previously disclosed and further declined to apply the 2010 amendments to the FCA's public disclosure bar retroactively. *Id.*

Implications for Future FCA Cases

The Third Circuit joined a number of other circuits in holding that the pre-2010 bar applies to claims arising from conduct that predated the amendments.

Fourth Circuit: (1) Implied Certification; (2) Public Disclosure Bar; (3) Calculation of Damages; (4) Advice-of-Counsel Defense

***United States v. Triple Canopy, Inc.*, 775 F.3d 628 (4th Cir. 2015), *pet. for cert. filed* (June 5, 2015) (No. 14-1440)**

The Fourth Circuit held that the government sufficiently alleged a false claim based on the implied certification theory of liability where the government alleged that the defendant knowingly withheld

information regarding its noncompliance with a certain contractual provision, even where that provision was not an express condition of payment.

About the Case

Triple Canopy's contract with the government identified 20 "responsibilities" that it was tasked with fulfilling in providing security services to an airbase in Iraq—but nothing in the contract expressly conditioned payment on fulfillment of these responsibilities. One responsibility was to ensure that Triple Canopy's guards met a marksmanship requirement. After Triple Canopy learned that its guards were unable to satisfy that requirement, a supervisor directed the creation of false scorecards showing qualifying marksmanship scores.

The relator filed a qui tam action and DOJ intervened, alleging FCA violations based on an implied certification theory of liability. The government argued that Triple Canopy violated the FCA by submitting invoices for the guards' services when it knew the guards had not satisfied the marksmanship requirement—even though Triple Canopy did not expressly certify compliance with that requirement on its invoices.

The Fourth Circuit—while emphasizing the distinction between ordinary breach of contract actions and claims cognizable under the FCA—held that "the Government pleads a false claim when it alleges that [a] contractor, with the requisite scienter, made a request for payment under a contract and 'withheld information about its noncompliance with material contractual requirements.'" 775 F.3d at 636. The Fourth Circuit determined that the marksmanship requirement was material, and concluded that the government sufficiently alleged that Triple Canopy knowingly made a material false statement that resulted in payment.

A certiorari petition is currently pending. The Supreme Court appears to be holding the petition pending its review of *Universal Health Services, see supra* at p. 9, which raises questions similar to those raised in the *Triple Canopy* petition regarding the viability and scope of the implied certification theory.

Implications for Future FCA Cases

Triple Canopy explicitly adopts the implied certification liability in the Fourth Circuit, at least for cases involving instances of knowing noncompliance with contractual provisions a court deems to be material to the government's decision to pay. The Supreme Court's review of *Universal Health Services* will determine the extent to which this theory survives as a basis for FCA claims.

***United States* ex rel. *Wilson v. Graham County Soil & Water Conservation*, 777 F.3d 691 (4th Cir. 2015)**

The Fourth Circuit rejected the Seventh Circuit's approach to the public disclosure bar, joining five circuits in holding that a public disclosure requires that there be some act of disclosure outside of the government.

About the Case

The relator alleged, inter alia, that the defendants submitted fraudulent invoices in connection with a USDA program to help counties cover recovery costs after a storm caused significant damage in North Carolina. After two appeals and two trips to the Supreme Court, a district court dismissed the relator's remaining FCA claims pursuant to the FCA's public disclosure bar. The district court concluded that the relator's claims were based on two audit reports (one by county auditors, and one by the USDA); that those reports constituted public disclosures because they had been distributed to public officials responsible for policing the type of fraud alleged by the relator; and that the relator was not the original source of her claims.

The Fourth Circuit reversed. The issue, which the court previously had not addressed, was whether a disclosure to a public official, rather than to the public at large, triggered the public disclosure bar. The Fourth Circuit held that it did not: "Today we too reject the Seventh Circuit's view, holding instead that a public disclosure requires that there be some act of disclosure outside of the government.'' 777 F.3d at 697 (citations and internal quotations omitted). The court further held that the "theoretical" availability of

the audit reports to the public via a public records request did not trigger the public disclosure bar. *Id.* at 699.

Implications for Future FCA Cases

The Fourth Circuit's decision narrows the reach of the public disclosure bar and deepens the circuit split on the type of public disclosures that trigger it. As discussed below, *see infra* at p. 19, the Sixth Circuit also rejected the Seventh Circuit's construction of the public disclosure bar, instead holding that a disclosure outside of the government is required.

***United States ex rel. Drakeford v. Tuomey*, 792 F.3d 364 (4th Cir. 2015)**

The Fourth Circuit upheld a judgment of $237.5 million against Tuomey Healthcare System based on underlying violations of the Stark Law that resulted in 21,730 false claims for medical services. The court held, among other things, that the jury reasonably rejected Tuomey's advice-of-counsel defense because it concluded that Tuomey did not rely on counsel's advice in good faith when it relied only on favorable opinions and ignored negative opinions; the court also rejected various challenges to the size of the damages award.

About the Case

The government intervened in a qui tam suit against a community healthcare provider, alleging that Tuomey entered into employment contracts with physicians in violation of the Stark Law and then knowingly submitted false claims for reimbursement to Medicare. A jury determined that Tuomey had violated both the Stark Law and the FCA. As required by the FCA, the district court trebled actual damages and added a civil penalty, resulting in a $237.5 million judgment. Tuomey appealed on multiple grounds.

Tuomey argued that no reasonable jury could have found that it knowingly violated the FCA because it reasonably relied on counsel's advice. The Fourth Circuit rejected this argument, explaining that the record was "replete with evidence" that Tuomey had "shopped for legal opinions approving of the employment contracts, while ignoring negative assessments[.]" *Id.* at 380. The majority acknowledged the concurring opinion's suggestion that the advice-of-counsel defense should be particularly robust in light of the complexities of the Stark Law (which the concurrence described as "a booby trap rigged with strict liability and potentially ruinous exposure—especially when coupled with the False Claims Act," *id.* at 395), but concluded that "it is for Congress to consider whether changes to the Stark Law's reach are in order." *Id.* at 390.

The Fourth Circuit also rejected each of Tuomey's challenges to the size of the judgment. In particular, the court held that the proper measure of damages was the sum total of all claims paid by the government—not, as Tuomey argued, the difference between the amount of claims paid and the value of services rendered. The court explained that compliance with the Stark Law is a condition of the government's reimbursement of claims, and that because Tuomey failed to satisfy that condition, the government was entitled to recover the full amount of each of the 21,730 false claims submitted, trebled, plus $5500 in statutory damages for each claim. The court also rejected Tuomey's challenges under the Eighth Amendment's Excessive Fines Clause and the Fifth Amendment's Due Process Clause.

Implications for Future FCA Cases

The decision highlights that a corporate defendant may have difficulty raising a successful advice-of-counsel defense where it receives differing legal opinions and chooses to rely on a favorable—but ultimately incorrect—legal opinion with no attempt to reconcile it with the unfavorable ones.
This decision also illustrates the massive exposure faced by organizations subject to the Stark Law, or other comparable obligations that operate as conditions of the government's payment of claims.

Fifth Circuit: (1) Seal Provision; (2) Scienter and Corporate "Collective Knowledge"; (3) Additional Post-Trial Discovery

***United States ex rel. Rigsby v. State Farm Fire & Cas.*, 794 F.3d 457 (5th Cir.2015), *pet. for cert. filed* (Oct. 20, 2015) (No. 15-513)**

The Fifth Circuit upheld a jury verdict against State Farm, holding that the insurer had "knowingly" presented a false claim even if the individual employees who submitted the claim were not aware that it was false. The court also joined the Second and Ninth Circuits in holding that a violation of the FCA's seal provision does not automatically mandate the dismissal of a claim. Finally, the court concluded that the relators were permitted to conduct additional post-trial discovery to identify new FCA claims.

About the Case

The relators alleged that State Farm submitted false claims on government-backed flood policies arising out of damage caused by Hurricane Katrina. A jury returned a verdict in the relators' favor.

On appeal, State Farm argued that the relators failed to prove the requisite degree of scienter because the individual employees who submitted the claim at issue were not aware that it was false. The Fifth Circuit disagreed, explaining that the FCA provides for liability where a defendant knowingly "causes to be presented" a false claim or knowingly causes a false record to be made or used. The court determined that there was evidence that at least one supervisor perpetrated a scheme intended to result in the submission of false claims. The court rejected what it characterized as State Farm's "constricted theory of FCA liability," which it believed would "enable managers at an organization to concoct a fraudulent scheme—leaving it to their unsuspecting subordinates to carry it out on the ground—without fear of reprisal." 794 F.3d at 479.

The Fifth Circuit also joined the Second and Ninth Circuits in holding that a violation of the FCA's seal requirement does not automatically require dismissal.

The relators sought further discovery into the alleged scheme in order to identify additional false claims. The Fifth Circuit reversed the district court's denial of that request. The opinion emphasizes, however, "that our decision hinges in large part on the idiosyncratic nature of this case—seldom will a relator in an FCA case present an already-rendered jury verdict in her favor while seeking further discovery." 794 F.3d at 469-70. The court explained that the jury's findings and the relators' allegations supported a "high probability that State Farm submitted more than one false claim" and thus provided sufficient justification to permit additional limited discovery. *Id.* at 469.

State Farm's certiorari petition, *see supra* at p. 10, was considered at the Supreme Court's January 8, 2016 conference, and, on January 11, the Court issued an order calling for the views of the Solicitor General. The petition presents two questions: (1) what standard governs the decision whether to dismiss an FCA claim for a seal violation, and (2) whether and under what standard a defendant may be deemed to have knowingly presented a false claim, or used or made a false record, based on the "collective knowledge" or ill intent of employees other than those who presented the claim or record found to be false.

Implications for Future FCA Cases

The Supreme Court's impending consideration of this case will determine its implications on the scienter and seal issues.

Sixth Circuit: (1) Public Disclosure Bar; (2) Calculation of Damages

***United States v. Chattanooga-Hamilton Cty. Hosp. Auth.*, 782 F.3d 260 (6th Cir.), *cert. denied*, 136 S. Ct. 218 (2015)**

The Sixth Circuit jointed a growing list of circuits holding that the public disclosure bar is triggered only by disclosures outside the government; disclosures to the government or its agents in the course of an administrative audit and investigation are insufficient.

About the Case

The relator alleged that the defendant hospital submitted false claims to Medicare, Medicaid, and Tricare. *Id.* at 263. The suit followed an administrative audit and investigation by the HHS OIG, in which the defendant had retained Deloitte to conduct an independent audit of its billing practices; the government investigation was closed following the defendant's voluntary refund of $477,140 in overpayments.

Applying the pre-2010 version of the statute, the district court concluded that a public disclosure of the fraud occurred during the course of the investigation and audit. *Id.* at 267.

On appeal, the hospital asserted that the Sixth Circuit should follow *United States ex rel. Mathews v. Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999), which held that a public disclosure occurs when fraud is disclosed to a "competent public official who has managerial responsibility for that very claim." 782 F.3d at 267. The Sixth Circuit rejected the Seventh Circuit's standard, holding instead that an affirmative act of disclosure to the public *outside the government* is required for a claim to be barred. *Id.* In doing so, the Sixth Circuit joined all of the other circuits that have addressed the issue. *Id.* at 268 (citing cases from the First, Fourth, Ninth, Tenth, and D.C. Circuits).

The Sixth Circuit also rejected the hospital's alternative argument that a public disclosure outside the government occurred when the government disclosed information to AdvanceMed, a private Medicare Part A Program Safeguard Contractor, that served as the government's agent in investigating the hospital. *Id.* at 269. The court held that disclosures to a third party contractor are not "public" when a contractor acts "on behalf of the government as part of the administrative audit and investigation." *Id.* Likewise, the Sixth Circuit rejected the hospital's argument that disclosures made to an auditor (here, Deloitte) during the course of an internal investigation are "public." *Id.* at 270.

Implications of the Case

The Sixth Circuit follows the First, Fourth, Ninth, Tenth, and D.C. Circuits in rejecting the Seventh Circuit's position in *Bank of Farmington* with respect to the scope of the public disclosure bar.

***United States v. United Techs. Corp.*, 782 F.3d 718 (6th Cir. 2015)**

The Sixth Circuit reversed a $657 million judgment against United Technologies arising from Pratt & Whitney's sale of F-15 and F-16 engines to the Air Force in the 1980s because the judgment below failed to account for the fair market value of what the government received (measured by an analysis of comparable sales) in calculating the government's actual damages, as required by the FCA.

About the Case

The United States alleged that Pratt & Whitney violated the FCA and the Truth in Negotiation Act by submitting false cost estimates to the Air Force in connection with a competitive contract for engine production, under which the Air Force ordered engines from both Pratt & Whitney and GE Aircraft. 782 F.3d at 721. In an earlier decision, the Sixth Circuit upheld the district court's determination that Pratt & Whitney had violated the FCA and was liable for $7 million in statutory damages, but vacated the district court's determination that the government suffered no actual damages. *United States v. United Techs. Corp.*, 626 F.3d 313, 320–21 (6th Cir. 2010). This appeal arose from the district court's $657 million damages award on remand.

There were two principal issues on appeal: (1) whether the Armed Services Board of Contract Appeals' (ASBCA) decision that the Air Force had relied on competition between GE Aircraft and Pratt & Whitney in evaluating the companies' prices precluded a finding that the Air Force had relied upon misrepresentations by the latter as a basis for FCA liability, and (2) if not, whether the district court had properly calculated the government's damages. On the first issue, the Sixth Circuit held that ambiguities in the ASBCA's decision meant that it had no issue-preclusive effect. On the second, it held that the district court erred "by presuming that the amount overpaid is equal to the fraudulent amount quoted," *id.* at 732, explaining that "[w]hen the government gets what it paid for despite a contractor's misstatements, it has suffered no actual damages," *id.* at 731. Accordingly, it held that a court must evaluate the "fair

market value" of what the government received—which in this case required a comparison to the engines provided by GE Aircraft during the period in question. *Id.*

The Sixth Circuit remanded the case to the district court to determine whether the government should be provided another opportunity to prove damages.

Implications for Future FCA Cases

The decision underscores the importance of the damages calculation in FCA litigation. The Sixth Circuit stated that a "comparable sales" analysis remains the preferred benchmark for determining fair market value, and that it could be applied to determine the government's actual damages "even though the market for fighter jet engines is heavily regulated (many markets are), it has two sellers, and it results in few sales per year." *Id.* at 731.

***United States ex rel. Antoon v. Cleveland Clinic Found.*, 788 F.3d 605 (6th Cir. 2015)**

The Sixth Circuit affirmed the dismissal of a qui tam suit on the ground that it was subject to the public disclosure bar. It held that: (1) the pre-2010 version of the public disclosure bar applied when relator's claim arose before the enactment of the 2010 amendments, even where the complaint was filed after 2010; (2) the original source exception did not require the relator to disclose his/her allegations *to DOJ* prior to filing (disclosure to another federal agency may be sufficient); (3) a relator need not have first-hand knowledge of the fraud to qualify as an original source; and (4) a relator who lacks knowledge of the essential elements of an FCA claim and offers only suspicion and speculation cannot qualify as an original source.

About the Case

The relator alleged that a hospital, surgeon, and medical device manufacturer violated the FCA because the doctor who submitted the bill to Medicare for the relator's surgery allegedly delegated the surgery to a resident. *Id.* at 609. The district court dismissed the suit on the ground that it failed to state a claim and that the public disclosure bar deprived it of jurisdiction. The Sixth Circuit affirmed the dismissal on public disclosure grounds.

As an initial matter, the Sixth Circuit held that the pre-2010 version of the public disclosure bar applied to the relator's claims, which arose in 2007 and 2008 before the 2010 amendments were enacted, even though the case was filed after the amendments took effect. *Id.* at 615. The court concluded that the relators' allegations had been publicly disclosed through his prior state-court malpractice case, news coverage of that case and the related CMS investigation, and information gleaned through FOIA requests. The Sixth Circuit held that the relator did not qualify as an original source. It held that the relator satisfied the requirement of disclosing his allegations to the federal government by directing their complaints to CMS (ruling that a disclosure to DOJ is not required). It further held that a relator may satisfy the requirement of having "direct" knowledge even where he/she lacks first-hand knowledge of the fraud. A relator, for instance, "may rely in part on research or on information already in the public domain" to prove an alleged fraud. *Id.* at 618. Thus, "direct" knowledge is "knowledge gained by the relator's own efforts and not acquired from the labor of other people." *Id.* at 619. However, the Sixth Circuit held that the relator in the present case nevertheless failed to prove any direct knowledge because his claim that the doctor never performed the surgery rested on "mere suspicion" and rested on inferences from his own medical records that were "largely speculative." *Id.* at 620.

Implication for Future Cases

The case highlights that a relator may not qualify as an original source where he/she lacks substantive knowledge of the essential elements of the alleged FCA violation and relies only on speculation and inference drawn from publicly disclosed materials.

Seventh Circuit: (1) Rule 9(b) – Collective Pleading in Multi-Defendant Cases; (2) Implied Certification

***United States v. Sanford-Brown, Ltd.*, 788 F.3d 696 (7th Cir. 2015)**

The Seventh Circuit rejected the implied certification theory of liability—expressly disagreeing with those circuits that have recognized it—in a qui tam suit alleging noncompliance with certain laws and regulations incorporated by reference into a Program Participation Agreement (PPA) with the Department of Education. The court also provided helpful clarity on the need for defendant-specific allegations in multi-defendant FCA cases.

About the Case

The relator alleged that a for-profit educational institution violated the FCA through its noncompliance with numerous federal regulations that it was obligated to follow under its PPA with the U.S. Secretary of Education. 788 F.3d at 701-02. The United States declined to intervene, and the district court issued a number of threshold rulings under the public disclosure bar and Rule 9(b) that narrowed the case. The district court then granted summary judgment to the defendants.

As an initial matter, the Seventh Circuit affirmed the district court's ruling that certain claims made by the relator did not survive the public disclosure bar, *id.* at 703, and that the relator's practice of directing his allegations at "defendants" generally failed to satisfy Rule 9(b), *id.* at 706. On the latter, the Seventh Circuit explained: "To comply with Rule 9(b) in a multiple-defendant case…, the plaintiff must plead sufficient facts to notify *each* defendant of his alleged participation in the scheme." *Id.* at 705 (emphasis added).

On the merits, the relator—supported by the United States as *amicus curiae*—argued that that the requirements of Title IV of the Higher Education Act incorporated by reference into the PPA were conditions of payment under the Agreement, and that the defendants' noncompliance with those requirements while the PPA was in place supported the imposition of FCA liability for claims submitted by the defendants and students. *Id.* at 708. The Seventh Circuit rejected this use of the PPA as a "false record" under 31 U.S.C. § 3729(a)(1)(B), concluding that the relator failed to prove that the defendant "knowingly entered into the PPA to defraud the government (thereby creating a 'false record') and then planned to 'use' the PPA thereafter to submit poisoned (and therefore, false) claims for payment." *Id.* at 709.

The Seventh Circuit also held that there could be no recovery under the implied certification theory of liability for the presentment of false claims under 31 U.S.C. § 3729(a)(1)(A). It explained: "[W]e conclude that it would be … unreasonable for us to hold that an institution's continued compliance with the thousands of pages of federal statutes and regulations incorporated by reference into the PPA are conditions of payment for purposes of liability under the FCA. Although a number of circuits have adopted this so-called doctrine of implied certification, we decline to join them[.]" *Id.* at 711-12. The Seventh Circuit further explained that "[t]he FCA is simply not the proper mechanism for government to enforce … conditions of participation contained in—or incorporated by reference into—a PPA," and that instances of noncompliance are "for the agency—not a court—to evaluate and adjudicate." *Id.* at 712.

Implications for Future Cases

The decision deepens the circuit split on the viability and scope of the public disclosure bar. The Supreme Court's decision in *Universal Health Services v. United States ex rel. Escobar* later this term is expected to clarify the issues. *See supra* at p. 9.

Eighth Circuit: (1) Implied Certification and Fraudulent Inducement; (2) Relator's Statutory Share of Settlement

***United States ex rel. Miller v. Weston Educational, Inc.*, 784 F.3d 1198 (8th Cir. 2015), *pet. for cert. filed* (Sept. 28, 2015) (No. 15-404)**

The Eighth Circuit reversed a grant of summary judgment and accepted the relators' theory of fraudulent inducement based on implied certification.

About the Case

The relators are two former employees of Heritage College, a for-profit educational institution owned by defendant Weston Educational. Heritage entered into a Program Participation Agreement (PPA) with the Department of Education, to receive federal funds under Title IV of the Higher Education Act of 1965. The PPA includes various record-keeping obligations. Claiming that Heritage falsified students' grade and attendance records in order to remain eligible for funding, relators allege FCA liability under a theory of fraudulent inducement. They say Heritage signed the PPA without intending to comply with its obligation to maintain such "records as may be necessary to ensure proper and efficient administration of funds."

The district court determined that Heritage made no such promise and that any promise it made was immaterial to the disbursement of funds.

The Eighth Circuit reversed, determining that the evidence at summary judgment was sufficient to create a genuine dispute of material fact as to whether Heritage "knew it had to keep accurate grade and attendance records and intended not to do so." And any such falsehood, the court concluded, was material: "Heritage could not have executed the PPA without stating it would maintain adequate records. … And without the PPA, Heritage could not have received any Title IV funds."

Implications for Future FCA Cases

A petition for certiorari is pending, *see supra* at pp. 11-12, which the Court may hold pending its decision in *Universal Health Service*'s on the viability and scope of implied certification liability, *see supra* at p. 9.

***United States ex rel. Rille v. PricewaterhouseCoopers LLP*, 803 F.3d 368 (8th Cir. 2015)**

The Eighth Circuit adopted the rule followed in the Sixth Circuit that a relator is not entitled to a share of the proceeds of a claim that is settled by the government after intervention when that claim does not overlap factually with the claim originally brought by the relator.

About the Case

Relators alleged that several government contractors violated the FCA by engaging in a kickback scheme. 803 F.3d at 370. After intervening, the government reached a settlement with two of the defendants. *Id.* Following the settlement, the relators moved to recover a share of the proceeds. *Id.* at 371. The government objected on the ground that the relators' complaint did not plead the conduct—namely, a fraudulent pricing scheme—that formed the basis of the settlement. *Id.* The district court rejected the government's argument and awarded the relators a percentage of the entire settlement proceeds. *Id.*

The Eighth Circuit reversed, holding that the plain language of Section 3730(d)(1) limits a relator's right to recovery to the specific claim brought by the relator—and that a relator cannot recover proceeds from a factually distinct claim later added by the government. *Id.* at 372. The Court noted that it would be inconsistent with the purpose of the Act to permit a relator to receive a share of the proceeds on a claim for which the relator played no role. The Court remanded for additional findings of fact with respect to the scope of the overlap between the settlement agreement and the relator's complaint, if any, under the correct legal standard.

Implications for Future FCA Cases

The Eighth Circuit foreclosed a relator's ability to share in the proceeds of a settlement when the government intervenes and settles on the basis of a different factual theory than the one initially advanced in the relator's complaint. Interestingly, this rule incentivizes the government to articulate a theory for settlement that is distinct from the relator's complaint, thereby creating a potential conflict between relators and the government.

Ninth Circuit: (1) Definition of "Original Source;" (2) Viability of Relator after Criminal Conviction

***United States ex rel. Hartpence v. Kinetic Concepts, Inc.,* 792 F.3d 1121 (9th Cir. 2015)**

The Ninth Circuit abrogated a 1992 decision by holding that there are *only* two requirements to determine whether a plaintiff is an "original source"—(1) he must voluntarily inform the government of the facts that underlie the allegations of his complaint; and (2) he must have direct and independent knowledge of those allegations. The Court eliminated an additional third requirement—that the relator must have "had a hand in the public disclosure." 792 F.3d at 1122-23.

About the Case

In a suit alleging Medicare fraud, the district court held that the relators failed to qualify as "original sources" under the pre-2010 version of the public disclosure bar because they had not shown that they had a hand in public disclosures of their claims that preceded the filing of relator's complaint. *Id.* at 1126. On appeal, the panel *sua sponte* called for the case to be heard *en banc* to review the "hand in the public disclosure" rule adopted by the court in *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992). *Id.*

En banc, the Court held that the *Wang* rule was no longer valid. *Id.* at 1128. Construing the plain language of the statute, the Court held that the original source exception has two, and only two, requirements: (1) the relator must voluntarily provide the information underlying his complaint to the government before filing; and (2) he must have direct and independent knowledge of that information. *Id.*

The Court also found support for abrogating *Wang* in the Supreme Court's decision in *Rockwell International Corp. v. United States*, 549 U.S. 457 (2007). *Id.* In 1992, the *Wang* Court construed "information" in the original source exception to refer to the information that underlies the public disclosure. *Id.* at 1129. In the 2007 *Rockwell* decision, however, the Supreme Court clarified that "information" refers to the information that underlies the allegations in relator's complaint, not the information that underlies a public disclosure of those allegations. *Id.* Because the rationale for the *Wang* rule relied in part upon an interpretation of "information" that the Supreme Court later rejected, the Court found an additional basis to overrule *Wang*.

Implications for Future FCA Cases

The Ninth Circuit revisited its idiosyncratic application of the public disclosure bar and relaxed the criteria for a relator to qualify as an original source when pursuing publicly disclosed fraud allegations. The decision brings the court into line with other circuits, including the Fourth and Eighth Circuits, that had expressly declined to adopt the rule that a relator could not qualify as an original source unless the relator was also the one to publicly disclose the fraud.

***United States ex rel. Schroeder v. United States,* 793 F.3d 1080 (9th Cir. 2015), *pet. for cert. filed* (Oct. 20, 2015) (No. 15-513)**

The Ninth Circuit held that the FCA requires dismissal of a relator convicted of conspiracy in the fraud alleged in the complaint, even if the relator played only a minor role and did not plan or initiate the fraudulent scheme.

About the Case

A relator submitted false time cards and received at least $50,000 for falsely claimed overtime hours while working for a contractor to the Department of Energy (DOE). 793 F.3d at 1081. After the DOE OIG learned of the fraud from an anonymous source, it launched an investigation and filed criminal complaints, and the relator pled guilty to a felony count of conspiracy to commit fraud. *Id.* Before the criminal complaint was filed, the relator filed an FCA complaint against his employer alleging the time card fraud. *Id.* at 1082. The government intervened, and the district court dismissed the action based on the relator's criminal conviction. *Id.*

The Ninth Circuit affirmed, holding that the plain language of Section 3730(d)(3) requires dismissal of any relator who is "convicted of criminal conduct arising from his or her role in the violation" of the statute. *Id.* at 1083. The Court noted that the provision has no exceptions for minor participants. *Id.* The Court rejected relator's argument that it is inappropriate to allow more culpable fraud participants (planners and initiators who do not incur criminal liability) to collect an award while barring those who may be less culpable (minor participants who are convicted of the offense) from receiving anything. *Id.* The Court noted that these concerns gave way to the deterrent effect of preventing criminally culpable individuals from gaining anything by their fraud.

Implications for Future FCA Cases

The Ninth Circuit reaffirmed that, although the FCA is designed to incentivize individuals to uncover fraud, the statute reflects Congress's attempt to find an appropriate balance to prevent private recovery for certain classes of lawsuits. A relator's criminal conviction for the conduct is a flat bar to recovery.

Tenth Circuit: [None]

Eleventh Circuit: (1) News Media and the Public Disclosure Bar; (2) Compliance Efforts and the Recklessness Standard

***United States ex rel. Osheroff v. Humana Inc.,* 776 F.3d 805 (11th Cir. 2015)**

The Eleventh Circuit held that advertisements and publicly available websites qualify as news media for purposes of the public disclosure bar.

About the Case

The relator brought a qui tam action against several medical clinics and insurers alleging claims based on information gathered, in part, from newspaper advertisements and several of the clinics' websites. The district court dismissed the claims for lack of jurisdiction, holding that they were barred by the public disclosure bar. On appeal, the Eleventh Circuit affirmed the district court's dismissal, concluding, however, that the amended public disclosure bar was not jurisdictional, but rather created grounds for dismissal for failure to state a claim. 776 F.3d, at 810. Applying that bar, the Court held that the websites and advertisements relied upon by the relator as a factual basis for the claims qualified as "news media." *Id*. at 813.

Implications for Future FCA Cases

This case provides legal support for defendants seeking to dismiss FCA claims under the public disclosure bar that are based on factual information available from advertisements and websites.

***Urquilla-Diaz v. Kaplan University*, 780 F.3d 1039 (11th Cir. 2015)**

The Eleventh Circuit affirmed the district court's grant of summary judgment, concluding that the relator failed to provide evidence creating a genuine issue of fact as to whether the defendant showed a reckless disregard when making certifications about its compliance with certain federal provisions.

About the Case

Three relators brought a qui tam action alleging that an educational institution falsely certified that it was in compliance with various federal statutes and regulations to receive federal financial-aid funding. Among other issues, the Eleventh Circuit affirmed summary judgment against one of the relators, holding that the relator failed to present a genuine issue of material fact as to whether the defendant acted with reckless disregard for the truthfulness of its certifications to the government regarding its compliance with the relevant law. 780 F.3d at 1062. In doing so, the Court pointed to the record evidence that the educational institution took significant steps to comply with the relevant regulations—including, basing its policies on others that the Equal Employment Opportunity Commission had previously approved, conducting compliance trainings, and hiring outside counsel to review its policies and compliance training materials. *Id*. at 1060-62. The Court conceded that the institution's actions may not have resulted in full compliance, but nevertheless found that its compliance efforts established as a matter of law on summary judgment that the FCA's recklessness standard for making a false certification was not satisfied. *Id*. at 1062.

Implications for Future FCA Cases

As subsequent unreported district court decisions in the Eleventh Circuit demonstrate, the *Urquilla-Diaz* decision provides a strong defense for defendants that can demonstrate significant compliance efforts in the face of complex regulatory schemes, and especially defendants that seek the advice of counsel to validate their policies and training materials. *See e.g.*, *United States ex rel. Saldivar v. Fresenius Medical Care*, No. 1:10-cv-01614, 2015 WL 7293156, at *32 (N.D. Ga. Oct. 30, 2015) ("Courts may consider a variety of evidence [when assessing recklessness] including whether the defendant sought, received, and followed legal advice, whether the defendant acted in conformity with others in the industry, and whether the defendant reasonably believed that its interpretation was consistent with the government's."); *United States ex rel. Phalp v. Lincare Holdings, Inc.*, No. 10-cv-21094, 2015 WL 4528955 (S.D. Fla. July 13, 2015) ("A reasonable, but erroneous interpretation of a complex statutory or regulatory scheme should not, without facts demonstrating reckless disregard, create [FCA] liability."). On the other hand, defendants that fail to demonstrate compliance efforts risk allegations that their lack of diligence may, in itself, evidence of recklessness. *See Saldivar*, 2015 WL 7293156, at *33 ("[A] defendant's lack of diligence in the face of ambiguity could suggest recklessness.").

IV. Federal Settlements, Interventions, and Complaints

- **Healthcare and Pharmaceuticals**

Healthcare and Pharmaceuticals Settlements

- **DaVita Healthcare Partners, Inc.:** In June, DOJ announced that DaVita Healthcare Partners, the largest United States provider of dialysis services, agreed to pay $450 million to resolve FCA allegations that it billed the government for unnecessary and avoidable medical waste. The settlement resolved allegations in a qui tam action filed in the Northern District of Georgia. The government did not intervene.[39] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Novartis AG:** In November, DOJ announced that Novartis AG agreed to pay $370 million plus $20 million in forfeitures to settle allegations that it paid pharmacies kickbacks to increase sales of Novartis drugs. As part of the settlement, Novartis agreed to forfeit $20 million pursuant to the federal civil forfeiture statute and to extend its HHS OIG CIA by five years. The settlement resolved a qui tam action filed in the Southern District of New York.[40]

- **457 Hospitals:** In October, DOJ announced that 457 hospitals agreed to pay $250 million to resolve allegations that the hospitals submitted claims for insertion of implantable cardiac defibrillators (ICDs) when the hospitals allegedly knew that the circumstances under which they performed these procedures made them ineligible for Medicare coverage. Most, but not all, of the hospitals, were named in a qui tam action filed in the Southern District of Florida.[41] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Millennium Health:** In October, DOJ announced that Millennium Health, formerly Millennium Laboratories, agreed to pay approximately $237 million to resolve FCA allegations that it submitted claims for medically unnecessary urine drug tests and genetic tests and provided physicians with free medical supplies in exchange for referrals. The government alleged that Millennium violated the Stark Law and the Anti-Kickback Statute by providing physicians with free urine test cups on the condition that the physicians return the urine specimens to Millennium for testing. The government also alleged that Millennium prompted the use of "custom profiles" that were not tailored to individual patient needs, resulting in excessive tests. As part of the settlement, which arose under eight separate qui tam actions filed in the District of Massachusetts, Millennium also agreed to enter into a CIA with HHS OIG and to pay $19.2 million to CMS to resolve administrative actions in connection with the company's billing practices.[42] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Adventist Health System:** In September, DOJ announced that Adventist Health System agreed to pay $115 million to resolve allegations that it paid physicians bonuses that improperly took into account the value of the patient referrals and that it submitted claims to Medicare containing improper coding modifiers. The settlement resolved two qui tam actions filed by former Adventist employees in the Western District of North Carolina.[43] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Community Health Systems Professional Services Corporation:** In February, DOJ announced that Community Health Systems Professional Services Corporation (CHSPSC) and three affiliated New Mexico hospitals agreed to pay $75 million to resolve FCA allegations that the company and hospitals made improper donations to county governments in New Mexico. The donations were then used by the state of New Mexico to satisfy its Medicaid obligations pursuant to a federal matching program known as the Sole Community Provider program. Federal law required that New Mexico's costs for the program be funded by state or local governments rather than hospitals. The settlement resolved allegations in a qui tam action filed by a former CHSPSC revenue manager in the District of New Mexico.[44] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Tuomey Healthcare System:** In October, DOJ announced that Tuomey Healthcare System agreed to pay $72.4 million to satisfy a $237 million judgment entered against Tuomey for FCA violations premised on Stark Law violations. In May 2013, a jury in the District of South Carolina found that Tuomey violated the FCA and the Stark Law by entering into contracts that required physicians to refer patients to Tuomey in exchange for compensation that exceeded the fair market value of physicians' services. The Fourth Circuit affirmed the $237 million judgment in July 2015. In the October 2015 settlement agreement, DOJ acknowledged that Tuomey is unable to pay the judgment in full, and the settlement was contingent on Tuomey's sale to Palmetto Health, a non-profit healthcare system. Tuomey also entered into a five-year CIA with HHS OIG. The settlement resolved a qui tam action filed in the District of South Carolina by a physician who declined to enter into the type of contract at issue.[45]

- **North Broward Hospital District:** In September, DOJ announced that North Broward Hospital District agreed to pay $69.5 million to settle allegations that it paid nine of its referring physicians above the fair market value of their services and based their compensation, in part, on the value of their referrals, in violation of the Stark Law. The settlement resolved a qui tam action filed in the Southern District of Florida.[46] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Accredo Health Group:** In May, DOJ announced that Accredo Health Group agreed to pay approximately $60 million to resolve allegations that it accepted kickbacks from Novartis in the form of patient referrals and other benefits in exchange for recommending that patients order refills of the Novartis drug Exjade. The settlement resolved a qui tam action filed in the Southern District of New York.[47]

- **Health Diagnostic Laboratory Inc. and Singulex Inc.:** In April, DOJ announced that two cardiovascular testing disease laboratories, Health Diagnostics Laboratory Inc. (HDL) and Singulex Inc., agreed to pay over $48 million to resolve allegations that the laboratories paid physicians referral fees and waived patient co-pays and deductibles in order to induce patient referrals, and that they billed federal health care programs for unnecessary testing. HDL agreed to pay the government $47 million, and Singulex agreed to pay the government $1.5 million. The settlements resolved allegations in related qui tam actions filed in the District of South Carolina and the District of Columbia. As a part of the settlement agreements, HDL and Singulex entered into CIAs with HHS OIG. DOJ also announced that it intervened in the same qui tam lawsuits as to Berkley Heartlab Inc., BlueWave Healthcare Consultants Inc. (a marketing company), and three individuals for their involvement in a similar scheme to induce patient referrals by paying kickbacks to physicians.[48] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Daiichi Sankyo:** In January, DOJ announced that Daiichi Sankyo Inc. agreed to pay $39 million to resolve FCA allegations that Daiichi paid kickbacks to physicians. Among other allegations, the government asserted that Daiichi paid physicians kickbacks in the form of speaker fees for speaking to the physician's own staff in his/her own office and for speaking about duplicative topics at Daiichi-paid dinners. The settlement resolved allegations in a qui tam action filed by a former Daiichi sales representative in the District of Massachusetts. As a part of the settlement, Daiichi agreed to enter into a five-year CIA with HHS OIG.[49] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **32 Hospitals**: In December, DOJ announced that 32 hospitals from 15 states agreed to pay $28 million to resolve allegations that the hospitals billed Medicare for inpatient kyphoplasty procedures that could have been performed as less expensive outpatient procedures. All but three of the hospitals were named in a qui tam action filed in the Western District of New York. DOJ has now reached settlement agreements with 130 hospitals as well as Medtronic Spine in connection with the improper billing of kyphoplasty procedures.[50] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Columbus Regional Healthcare System:** In September, DOJ announced that Columbus Regional agreed to pay $25 million to resolve allegations that it compensated a referring

physician above the fair market value of his services, based in part on hospital referrals, in violation of the Stark Law, and that it misrepresented on its reimbursement claims the level of services actually provided. As part of the settlement, Columbus Regional agreed to pay up to $10 million in additional contingent payments and entered into a CIA with HHS OIG. The referring physician agreed to pay $425,000 to resolve the allegations. The settlements resolve two qui tam actions filed in the Middle District of Georgia by a former Columbus Regional executive.[51] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **PharMerica Corp.:** In May, DOJ announced that PharMerica Corp. agreed to pay $23.5 million to resolve FCA allegations that it submitted claims for improperly dispensed drugs and an additional $8 million to resolve allegations that it violated the Controlled Substance Act by distributing Schedule II narcotics without obtaining prescriptions. The settlement resolved a qui tam action filed by a former PharMerica employee in the Eastern District of Wisconsin. As part of the settlement, PharMerica entered into a five-year CIA with HHS OIG.[52] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Citizens Medical Center:** In April, DOJ announced that Citizens Medical Center, a county-owned hospital in Texas, agreed to pay $21.7 million to resolve allegations that it entered into improper financial relationships with physicians in violation of the Stark Law by paying several cardiologists above the fair market value of their services to induce surgical and other hospital referrals. The government also alleged that the hospital paid bonuses to emergency room physicians based on the number of patients they referred to the hospital. The settlement resolved allegations in a qui tam action filed by three individuals in the Southern District of Texas.[53] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Medical Center of Central Georgia:** In April, DOJ announced that Medical Center of Central Georgia (MCCG), the second-largest hospital in Georgia, agreed to pay $20 million to resolve allegations that it billed Medicare for inpatient services that should have been billed as outpatient or observation services. As part of the settlement, MCCG entered into a five-year CIA with HHS OIG. There was no qui tam complaint in this matter and the investigation was led by the U.S. Attorney's Office for the Northern District of Georgia.[54] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **University of Florida:** In November, DOJ announced that the University of Florida agreed to pay $19.9 million to resolve FCA allegations that the university misused grant funds provided by HHS, including by overcharging grants for salary costs of employees, charging the grants for administrative costs in violation of federal regulations, and inflating costs for services performed by an affiliated entity, Jackson Healthcare Inc. There was no qui tam complaint in this matter and the investigation was led by the Civil Division and the HHS OIG.[55] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **21st Century Oncology:** In December, DOJ announced that 21st Century Oncology agreed to pay $19.75 million to resolve allegations that it encouraged physicians to order medically unnecessary urine tests and paid physicians bonuses as an incentive for ordering such tests. The settlement resolved allegations in a qui tam action filed by a former 21st Century Oncology employee in the Middle District of Florida.[56] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Westchester Medical Center:** In May, DOJ announced that Westchester County Health Care Corporation agreed to pay $18.8 million to resolve allegations that it maintained improper financial relationships with a cardiology practice, in violation of the Stark Law and the Anti-Kickback Statute, and that it submitted claims for costs that it did not incur. Specifically, the government alleged that the hospital advanced cardiologists funds for the purpose of opening a practice that would generate referrals to the hospital, that the hospital entered into sham consulting agreements with the cardiologists, and that the hospital allowed the cardiology practice to use hospital fellows free of charge. The settlement resolved allegations in a qui tam complaint filed in the Southern District of New York.[57]

- **NuVasive Inc.:** In July, DOJ announced that NuVasive Inc. agreed to pay $13.5 million to resolve allegations that it caused physicians to submit false claims by promoting its CoRoent System for unapproved surgical uses. The settlement also resolves allegations that NuVasive paid physicians kickbacks, including speaker fees and honoraria, in exchange for using the CoRoent System. The settlement resolved allegations in a qui tam action filed in the District of Maryland by a former NuVasive sales representative.[58] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Pediatric Services of America Healthcare:** In August, DOJ announced that Pediatric Services of America Healthcare and related entities agreed to pay $6.8 million to resolve allegations that the company failed to return overpayments to federal health care programs, submitted claims for home nursing care with insufficient documentation, and submitted claims that overstated services provided. DOJ stated that this settlement represents the "first settlement under the False Claims Act involving a health care provider's failure to investigate credit balances on its books to determine whether they resulted from overpayments made by a federal health care program," as required under section 6402 of the Affordable Care Act. The settlement resolved allegations in two qui tam actions filed by former employees in the Northern and Southern Districts of Georgia.[59] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Medtronic Inc.:** In April, DOJ announced that Medtronic agreed to pay $4.4 million to resolve allegations that it sold products to the Department of Veterans Affairs (VA) and DoD that were not compliant with the Trade Agreements Act (TAA) because they originated in China and Malaysia rather than the United States or another TAA-designated country. The settlement resolved allegations in a qui tam complaint filed in the District of Minnesota.[60] Additionally, in February, DOJ announced that Medtronic agreed to pay $2.8 million to resolve FCA allegations that it promoted an unapproved investigational medical procedure known as SubQ stimulation. The settlement resolved allegations in a qui tam action filed by a former Medtronic employee in the Western District of New York.[61] The claims resolved by these settlements were allegations only, and there was no determination of liability.

Healthcare and Pharmaceuticals Interventions

- **HCR ManorCare:** In April, the United States filed a consolidated intervening complaint against HCR ManorCare, one of the country's largest operators of skilled nursing facilities, in three qui tam actions filed in the Eastern District of Virginia. The government alleged that HCR ManorCare submitted claims for medically unnecessary rehabilitation therapy services and set billing goals designed to increase revenues without regard to patients' medical needs. The government also alleged that the company threatened to terminate employees who did not administer treatments that qualified for the highest Medicare reimbursements.[62] The lawsuit contains allegations only, and there has been no determination of liability.

- **Liberty Ambulance Services, Inc.:** In June, DOJ intervened in a qui tam action filed in the Middle District of Florida against Liberty Ambulance Services. Liberty Ambulance allegedly engaged in a ten-year scheme through which it billed federal healthcare programs for medically unnecessary ambulance transports and directed employees to submit false statements to justify these transports. Additionally, Liberty Ambulance allegedly offered heavily discounted rates to private payers, including hospitals and nursing homes, in exchange for exclusive access to their Medicare and Medicaid patient population.[63] The lawsuit contains allegations only, and there has been no determination of liability.

➢ **<u>Procurements and Grants</u>**

Procurements and Grants Settlements

- **Carahsoft Technology Corporation and VMWare:** In June, DOJ announced a $75.5 million settlement with VMWare and its reseller, Carahsoft, to resolve allegations that they misrepresented their commercial pricing practices and overcharged the government on VMware

software products and related services on GSA contracts. The companies allegedly concealed their commercial pricing practices, allegedly enabling them to overcharge the government for VMware's products and services from 2007 through 2013. The allegations arose from a qui tam suit filed by a former VMWare employee, whose share of the settlement has not yet been determined.[64] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **U.S. Investigations Services Inc. (USIS) and Altegrity:** DOJ announced in August that USIS and its parent company, Altegrity, agreed to settle allegations that USIS deliberately circumvented contractually required quality reviews of completed background investigations in order to increase the company's revenues and profits on a contract for background investigations that USIS held with the U.S. Office of Personnel Management (OPM). The companies agreed to forgo their right to collect payments that they claim were owed by OPM, valued at least at $30 million. As part of the resolution, the whistleblower received a payment of $6 million.[65] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **United Parcel Service Inc. (UPS):** In May, UPS agreed to pay $25 million to resolve allegations that it submitted false claims to the federal government in connection with its delivery of Next Day Air overnight packages. UPS allegedly engaged in practices that concealed its failure to comply with its delivery guarantees, which deprived federal customers of the ability to request refunds for the late delivery of packages. The relator, a former UPS employee, received $3.75 million as his share of the settlement.[66] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **The Boeing Company:** DOJ announced in October that Boeing agreed to pay $18 million to settle allegations that it improperly charged labor costs under contracts with the Air Force for the maintenance and repair of C-17 Globemaster aircraft. The government alleged that the company knowingly charged the United States for time its mechanics spent on extended breaks and lunch hours, and not on maintenance and repair work properly chargeable to the contracts. The whistleblower in the qui tam suit will receive an undetermined share.[67] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **NetCracker Technology Corp. and Computer Sciences Corp. (CSC):** In November, DOJ announced that NetCracker agreed to pay $11.4 million and CSC agreed to pay $1.35 million to resolve allegations that NetCracker, a subcontractor to CSC, improperly used individuals without security clearances on a Defense Information Systems Agency (DISA) contract. A former NetCracker employee was the relator in the qui tam suit and received $2.4 million as his share of the settlement.[68] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **APL Limited:** DOJ announced in October that APL agreed to pay $9.8 million to settle allegations that the company billed DoD for performing tracking services, despite knowing that the tracking devices completely or partially failed to transmit data, or were not affixed to shipping containers. APL is also alleged to have attached a single satellite tracking device to two shipping containers despite being required to affix one device to every container.[69] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Pitney Bowes Presort Services Inc.:** In October, Pitney Bowes agreed to pay $9.4 million to settle allegations that they underpaid postage by claiming discounts to which they were not entitled. Pitney Bowes is alleged to have claimed discounted postage rates for mail that failed to comply with the Postal Service's Move Update standard, which requires that mail be updated with change-of-address information provided by the Postal Service.[70] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Bollinger Shipyards:** DOJ announced in December that Bollinger Shipyards agreed to pay $8.5 million to resolve allegations that it misrepresented the longitudinal strength of patrol boats delivered to the Coast Guard that resulted in the boats buckling and failing once they were put into service. The government alleged Bollinger made false representations in its engineering

calculations by running the calculations three times and only providing the Coast Guard with the highest, and most inaccurate, of the three calculations.[71] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **LB&B Associates Inc., Lily A. Brandon, and F. Edward Brandon:** In July, DOJ announced that LB&B Associates and its principals agreed to pay $7.8 million to resolve allegations that they made false statements to obtain contracts through the SBA 8(a) Business Development Program for Small Disadvantaged Businesses. The government alleged that in seeking certification under the 8(a) Program, LB&B falsely represented that Lily Brandon—who satisfied the criteria for a socially and economically disadvantaged person under the program—controlled the operations of LB&B, when she did not. Two former employees of LB&B were the whistleblowers and recovered a total of $1.5 million of the settlement.[72] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **PC Specialists Inc., doing business as Technology Integration Group (TIG):** DOJ announced in August that TIG agreed to pay $5.9 million to settle allegations that the company inflated the price of Dell computers sold through a reseller. The government alleged that TIG knowingly inflated the amounts it charged the reseller by failing to give credits for rebates and discounts it received from Dell as required by its contract. The whistleblower in this case was a former TIG executive; his share of the settlement has not been determined.[73] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Sandia Corporation:** In August, DOJ announced that Sandia agreed to pay $4.7 million to resolve allegations that Sandia violated the Byrd Amendment and the FCA by using federal funds for activities related to lobbying Congress and federal agencies to obtain a renewal of its contract with the DOE's National Nuclear Security Administration to operate the Sandia National Laboratories. Sandia is a wholly owned subsidiary of Lockheed Martin Corporation.[74] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **L-3 Communications Corporation, Vertex Aerospace LLC, and L-3 Communications Integrated Systems LP (collectively L-3):** In September, L-3 agreed to pay $4.63 million to settle allegations that the companies inflated labor hours for time spent by independent contractors at the military's Continental U.S. Replacement Centers (CRC). The government alleged that L-3 billed for each individual based not on the actual time that individual spent at the CRC, but instead on the earliest arrival or latest departure time of any other individual who also processed through the center that same day. The whistleblower in the qui tam suit was a former L-3 independent contractor and will receive $800,000.[75] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Parsons Government Services Inc.:** In September, Parsons agreed to pay $3.8 million to settle allegations that the company knowingly mischarged DOE for ineligible or inflated short-term and long-term employee relocation costs in connection with its contract at the DOE Savannah River Site. The government alleged that Parsons sought and obtained reimbursement for certain relocation expenses even for employees it knew did not qualify for these payments under the terms of the contract.[76] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **PAE Government Services Inc. (PAE) and RM Asia (HK) Limited (RM Asia):** DOJ announced in September that PAE and RM Asia agreed to pay $1.45 million to resolve allegations that the companies engaged in a bid-rigging scheme for a U.S. Army contract for services in Afghanistan. The government alleged that the companies funneled subcontracts to companies owned by the former managers and their relatives by using confidential bid information to ensure that their companies would win the contracts. The allegations arose from a qui tam suit filed by a former PAE employee, whose share of the settlement was $261,000.[77] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Gilbane Building Company:** In March, DOJ announced that Gilbane agreed to pay $1.1 million to resolve allegations that W.G. Mills Incorporated—a company with which Gilbane merged in

November 2010—violated the FCA by creating a front company, Veterans Constructors Incorporated (VCI), to obtain a Coast Guard contract that was set aside for service-disabled, veteran-owned small businesses. The government alleged that VCI's affiliation with W.G. Mills rendered it ineligible to be awarded the set-aside contract.[78] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **DRS Technical Services, Inc.:** DOJ announced in December that DRS Technical Services agreed to pay $1 million to settle allegations that its employees engaged in labor mischarging on Army contracts. DRS employees allegedly were directed to record more time for labor hours than was actually worked. After discovering the improper conduct through its internal compliance program, DRS disclosed this to the U.S. government under the FAR Mandatory Disclosure Rule.[79] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **The Informatics Applications Group, Inc. (TIAG):** In May, TIAG agreed to pay $400,000 to settle allegations that, while performing a government contract, certain TIAG employees utilized the government's network for prohibited purposes, including to access information that they deemed to be useful to TIAG's efforts to obtain other government contracts.[80] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Air Ideal Inc. and Kim Amkraut:** In April, DOJ announced that Air Ideal and its majority owner agreed to pay $250,000, as well as five percent of Air Ideal's gross revenues over the next five years, to resolve allegations that they fabricated the location of Air Ideal's office to obtain certification as a Historically Underutilized Business Zone company. Air Ideal is alleged to have then used its fraudulently procured certification to obtain set-aside contracts from the government. The whistleblower in this case will receive $42,500.[81] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Sterling Biomedical LCC and Dr. Michael Szycher:** In September, Sterling Biomedical and its CEO agreed to pay $200,000 to resolve allegations that they submitted false claims for National Science Foundation (NSF) grants. This settlement resolves allegations that Szycher misrepresented the size and assets of Sterling and its ability to perform the proposed research, as well as fraudulently represented to NSF that he had completed research when he had not.[82]

- **Tri-State Construction:** In July, Tri-State Construction agreed to pay $140,000 to settle allegations that it was renting a specialized machine from a certified Disadvantaged Business Enterprise (DBE), when in fact it owned the machine itself. Tri-State attempted to use a lease/purchase agreement to make it appear, consistent with DBE set-aside requirements for federally funded highway projects, that a DBE owned the machine.[83] The claims resolved by the settlement were allegations only, and there was no determination of liability.

Procurements and Grants Complaints

- **BAE Systems Tactical Vehicle Systems LP (BAE):** In June, DOJ announced that it filed a complaint against BAE for knowingly overcharging the Army for materials under a military truck contract. The government alleged that BAE inflated the price of the Family of Medium Tactical Vehicles contract by concealing cost and pricing data on numerous parts and materials during contract negotiations, despite having certified that the data it had disclosed was accurate, complete and current under the Truth in Negotiations Act.[84] The lawsuit contains allegations only, and there has been no determination of liability.

- **URS Federal Services, Inc. and Yang Enterprises:** In September, the U.S. Attorney's Office for the Middle District of Florida announced that it had filed suit against URS Federal Services and its subcontractor, Yang Enterprises, alleging that they had submitted more than a thousand claims for undocumented and unreasonable early replacement of car tires while maintaining a fleet of vehicles for NASA at Kennedy Space Center.[85] The lawsuit contains allegations only, and there has been no determination of liability.

- **Strock Contracting, Inc., Lee Strock, Kenneth Carter and Cynthia Ann Golde:** DOJ announced in October that it had filed a complaint against a contracting company, its owners and an employee, alleging that they submitted false claims for federal contracts intended for service-disabled, veteran-owned small businesses. The government alleges that Veteran Enterprises Company, Inc., which was awarded the contracts, was actually a sham business controlled by Strock Contracting and the individual defendants.[86] The lawsuit contains allegations only, and there has been no determination of liability.

- **Inchcape Shipping Services Holdings Limited:** In November, DOJ announced it had intervened in a complaint against Inchcape Shipping Services for knowingly overbilling the Navy by submitting invoices that overstated the quantity of goods and services provided, billing at rates in excess of applicable contract rates, and double-billing for certain goods and services. The qui tam suit was brought by three former employees.[87] The lawsuit contains allegations only, and there has been no determination of liability.

➢ **Financial Institutions**

While 2015 did not see the mega-settlements of the year before, the government showed its continuing focus on financial institutions. The vast majority of settlements and government-initiated complaints in 2015 involved improperly originated mortgage loans submitted for government insurance under HUD's Direct Endorsement Lender (DEL) program. DOJ also obtained settlements from financial institutions based on alleged false claims in SBA, Treasury Department, and Export-Import Bank programs. According to DOJ, it has recovered $5 billion in housing and mortgage FCA cases from January 2009 to the end of fiscal year 2015 (September 30), including this past year's recoveries of $365 million.[88]

Financial Institutions Settlements

- **First Tennessee Bank N.A.:** In June, DOJ announced a $212.5 million settlement with First Tennessee Bank N.A., to resolve allegations that it knowingly originated and underwrote defective FHA-insured mortgage loans in the DEL program.[89] As part of the settlement, First Tennessee admitted that from 2006 to 2008, it repeatedly certified for Federal Housing Administration (FHA) insurance mortgages that did not meet HUD underwriting requirements, and that it became aware of this fact no later than early 2008.

- **MetLife Home Loans LLC:** In February, DOJ announced a $123.5 million settlement with MetLife Home Loans LLC to resolve FCA allegations against its predecessor, MetLife Bank N.A.[90] The government alleged that MetLife Bank knowingly originated and underwrote defective mortgage loans insured under the DEL program. As part of the settlement, MetLife Home Loans admitted that, between September 2008 and March 2012, its predecessor certified for FHA insurance a number of mortgages that did not meet HUD underwriting requirements and was aware of high numbers of loans with "significant" errors.

- **Fifth Third Bancorp:** In October, DOJ announced an $85 million settlement with Fifth Third Bancorp (FTB), resolving claims arising from FTB's origination of FHA-insured residential mortgage loans insured through the DEL program.[91] FTB admitted that, from 2003 to 2013, its quality-control programs identified over 1,400 materially defective loans that it failed to report to HUD, notwithstanding the duty to do so. In addition to agreeing to pay $85 million to resolve liability as to over 500 loans already in default, FTB agreed to indemnify HUD for any future losses on remaining loans that have yet to default.

- **Franklin American Mortgage Co.:** In December, DOJ announced a $70 million settlement to resolve allegations that Franklin American Mortgage Co. knowingly originated and underwrote defective FHA-insured DEL mortgage loans from 2006 to 2012.[92] As part of the settlement, Franklin American admitted that it used junior underwriters to perform certain underwriting tasks, set quotas and incentives regarding the number of applications underwriters needed to review per day, and reported few deficiencies to HUD notwithstanding audits that identified substantial numbers of deficient loans.

- **Walter Investment Management Corp.:** In September, DOJ announced a $29 million settlement with Walter Investment Management Corp. (WIMC) to resolve allegations that, through subsidiaries, WIMC violated the FCA in connection with a HUD program to insure "reverse" mortgage loans.[93] The government alleged that, from 2009 to 2015, WIMC and its subsidiaries failed to disclose that WIMC had not met a 30-day appraisal deadline and therefore was ineligible for certain interest payments. The government also alleged that, from 2010 to 2014, WIMC and its subsidiaries submitted false claims for the reimbursement of unlawful referral fees by falsely representing them to be lawful sales commissions. The settlement resolved allegations brought by a relator in the Middle District of Florida,[94] who will receive a $5.15 million share of the recovery. The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **EDF Resource Capital Inc.:** In August, DOJ announced a $6 million settlement with EDF Resource Capital Inc. and its CEO, Frank Dinsmore, to resolve allegations that they failed to remit payments owed to the SBA.[95] EDF was a local lender responsible for arranging, servicing and collecting on small business loans guaranteed in part by the SBA. The government alleged that EDF failed to maintain an adequate loan loss reserve fund as required by law and knowingly concealed from the SBA hundreds of troubled loans in order to avoid this obligation. It also alleged that EDF failed to remit certain payments to the SBA to satisfy loss-sharing obligations. The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **One Financial**: In October, DOJ announced a $4 million settlement with the estate and trusts of the late Layton P. Stuart, former owner and president of One Financial Corporation and its subsidiary, One Bank & Trust N.A.[96] The settlement resolved the government's complaint, filed in July,[97] that Stuart and One Financial made false statements about the financial condition of One Financial and One Bank to obtain Troubled Asset Relief Program (TARP) funds. The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Hencorp Becstone Capital L.C.:** In March, DOJ announced a $3.8 million settlement with Hencorp Becstone Capital L.C. to resolve allegations that it made false statements and claims to the Export-Import Bank of the United States in order to obtain loan guarantees.[98] The government alleged that Hencorp, a company providing financial services to Latin American businesses, recklessly outsourced credit review functions to a Peruvian-based agent, who in turn used false documentation to obtain Export-Import Bank guarantees on fictitious transactions and diverted loan proceeds to his own benefit. The relators who filed the original FCA action (unsealed upon announcement of the settlement) received $608,000.[99] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **CommerzBank AG:** In July, CommerzBank AG and affiliates agreed to pay $867,000 (of which $260,000 went to the relator), to settle FCA claims that had been unsealed after the government declined to intervene in March.[100] The complaint alleged that the defendants had engaged in unlawful gold trading with the Central Bank of Iran, which allegedly used the gold trade to circumvent U.S. sanctions.[101] It further alleged that defendants failed to disclose this gold trading while securing a $350 million loan from the Federal Reserve Board.

Financial Institutions Complaints

- **PNC Financial Services Group, Inc. and Fifth Third Bancorp:** On February 2, an FCA complaint was unsealed in the Western District of Michigan against PNC Financial Services Group, Inc. and Fifth Third Bancorp, after the government declined to intervene.[102] The relator alleges that defendants made false representations and omissions relating to environmental and other adverse liabilities from their participation in a Grand Rapids redevelopment project while seeking TARP funding from the Treasury Department.

- **Quicken Loans, Inc.:** On April 23, the United States filed in the District Court for the District of Columbia a complaint alleging that Quicken Loans, Inc. improperly originated and underwrote FHA-insured mortgages in the DEL program from 2007 to 2011.[103] The complaint alleges, *inter*

alia, that Quicken requested specific inflated appraisal values in violation of FHA rules, permitted its managers to violate FHA rules to approve loans, regularly misrepresented or miscalculated borrower incomes, pressured underwriters to approve more loans, and ignored red flags indicating a borrower would not be able to repay.

Less than a week before the government's complaint was filed, on April 17, Quicken filed its own preemptive suit against the federal government in the Eastern District of Michigan, alleging that it is the target of a "political agenda" by DOJ to pressure high-profile lenders into admitting FCA violations.[104] It seeks rulings that DOJ and HUD cannot determine loan compliance using a "sampling" methodology and that its loans from 2007 to 2011 were originated properly under FHA guidance. The government's motion to dismiss was granted on December 31. The government's FCA action in D.D.C. had been stayed pending resolution of that motion.

- **Rainy Day Foundation, Inc.:** On September 28, the United States filed in the Eastern District of New York a complaint against the Rainy Day Foundation, Inc., a purported charitable fund, several mortgage lenders participating in the FHA DEL program, and associated individuals and entities.[105] The complaint alleges that the defendant mortgage lenders' loans went into "early payment default" (i.e., default within two years of origination) at more than twice the average rate of other lenders. Allegedly aware that the government treats high early payment default rates as a signal of potentially poor underwriting standards, the lenders allegedly funneled their own money to otherwise defaulting or delinquent borrowers, via the defendant Rainy Day Foundation, to ensure that the borrowers would not default until after this early monitoring period. The complaint alleges that defendants caused the United States to pay over $5.6 million in false claims.

- **Ocean Bank:** On November 20, an FCA complaint was unsealed in the Southern District of Florida against Ocean Bank and the Florida Business Development Corporation, after the government declined to intervene.[106] Relators allege that defendants violated the FCA by operating a Ponzi scheme in connection with SBA loan guarantee programs.

V. State and Local Developments

State Legislative Activity

- 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.[107] 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 to bring them back into alignment with the federal statute. Several states have since amended their false claims statutes, and the HHS OIG has issued determinations on whether the state laws are DRA-compliant. In 2015, **Vermont** was certified as DRA-compliant by the OIG. The OIG has certified a total of 19 states as DRA-compliant to date (still well below the 28 that had reached DRA-compliance before the 2009 and 2010 FCA amendments).[108]

- On May 12, 2015, **Maryland** Governor Larry Hogan signed into law an expansion of the Maryland False Claims Act. The prior version of the law was limited to Medicaid and healthcare fraud. The new law covers any claims made to the state or local governments. The law does not allow qui tam relators to continue litigation if the government decides not to intervene. The expansion became effective June 1, 2015.[109]

- On May 18, 2015, **Vermont** Governor Peter Shumlin signed into law a state false claims act similar to the federal FCA. The law contains a retroactivity clause allowing suits to be brought relating to fraud that occurred up to 10 years before the law's enactment, though the retroactivity clause will not take effect until March 15, 2016.[110]

- On July 12, 2015, **Wisconsin** Governor Scott Walker signed into law a budget that included a rider repealing Wisconsin's 2007 False Claims for Medical Assistance Act.[111]

- On May 14, 2015, the **New Jersey** General Assembly passed a bill that would allow for retroactive application of the state false claims act. The bill has been referred to the Senate Judiciary Committee.[112]

- A bill introduced in December 2014 that would create a **South Carolina** false claims act remains pending in the state Senate Committee on Judiciary.[113]

- A bill was introduced and remains pending in the **Washington** Senate that would reauthorize the state FCA, which is currently set to expire on June 30, 2016.[114]

Noteworthy State Settlements or Judgments

As in prior years, the most significant state false claims settlements in 2015 concerned alleged Medicaid fraud, typically involving allegations of inflated pricing or kickback schemes. States have also continued to join forces with the federal government, either individually or in multi-state efforts. Some of the more significant state FCA settlements in 2015 include:

- **California settled with Office Depot for $68.5 million.** In January, Office Depot agreed to pay California $68.5 million to settle allegations that it overcharged California agencies for office and school supplies, in violation of contractual requirements that it provide the "best prices available" for such products.[115]

- **Several states settled with DaVita Healthcare Partners for $22 million.** In January, DaVita Healthcare Partners agreed to pay five states $22 million to settle allegations that it had engaged in a kickback scheme with physicians and physician groups whereby the company would buy or sell shares in dialysis clinics at prices that were manipulated to make the transactions financially attractive for the physicians and generate patient referrals to DaVita's dialysis centers. This settlement followed a related $389 million settlement with the federal government announced in October 2014.[116]

- **Washington settled with Sea Mar Community Health Centers for $3.35 million.** In January, Sea Mar Community Health Centers agreed to pay $3.35 million to Washington to settle allegations that it improperly billed Medicaid for thousands of dental appointments.[117]

- **Texas settled with Glenmark Generics Inc. for $13.725 million.** In April, pharmaceutical product manufacturer Glenmark Generics Inc. agreed to pay $13.725 million to Texas and $11.25 million the federal government to settle allegations that it had fraudulently reported inflated drug prices to the Medicaid program.[118]

- **Several states settled with Accredo Health Group for $60 million.** In May, specialty pharmacy Accredo Health Group agreed to pay $14.9 million to several states and $45 million to the federal government to settle allegations that it had engaged in a kickback scheme with Novartis Pharmaceuticals involving the drug Exjade. This preceded a related $390 million settlement involving Novartis announced in November 2015, discussed below.[119]

- **D.C. settled with Chartwells and Thompson Hospitality Services for $19.4 million.** In June, Chartwells and Thompson Hospitality Services agreed to pay $19.4 million to the District of Columbia to settle allegations that the companies had made false claims in connection with food services contracts with D.C. Public Schools.[120]

- **New York settled with Trinity Homecare for $2.5 million.** In June, Trinity Homecare, a pharmacy primarily owned by Walgreen Co., agreed to pay $2.5 million to New York to settle allegations that it had overcharged Medicaid and engaged in improper drug delivery practices with respect to drugs prescribed for hemophilia patients.[121]

- **New York settled with Trinity Homecare for $22.4 million.** In July, Trinity Homecare entered into a another settlement agreement with New York, this time agreeing to pay $22.4 million to settle allegations that it had improperly procured prescriptions and falsely billed Medicaid for Synagis, an injectable drug for premature infants.[122]

- **New York settled with SpecialCare Hospital Management for $8 million.** In August, SpecialCare Hospital Management agreed to pay New York and the federal government $8 million to resolve allegations that it had defrauded Medicaid and Medicare by illegally referring patients to unlicensed drug and alcohol treatment programs in exchange for kickbacks.[123]

- **Several states settled with Novartis Pharmaceuticals for $83 million.** In November, Novartis Pharmaceuticals agreed to pay $390 million to 41 states and the federal government to settle allegations that it had paid kickbacks to three pharmacies to encourage them to push Medicaid patients to order refills of the drug Exjade.[124]

- **Several states settled with Millennium Health for $256 million.** In November, Millennium Health agreed to pay $256 million to 49 states, the District of Columbia, and the federal government to settle allegations that it had billed Medicare, Medicaid, and other federal healthcare programs for medically unnecessary urine drug and genetic testing, and for providing free items to physicians who agreed to refer expensive laboratory testing business to Millennium.[125]

Noteworthy State Complaint

- **Washington files suit against dental services provider.** In September, Washington Attorney General Bob Ferguson announced a civil suit against CareOne Dental Corporation and its owner, alleging that the defendants had systematically billed Medicaid for non-covered services that they misrepresented in their billings, for “upcoded” services, and for services they did not provide. The suit claims $1 million in single damages.[126]

New York's FCA and Tax Fraud

New York remains at the forefront of developing and expanding false claims law at the state level. The New York False Claims Act (NYFCA) is the only state false claims law that expressly includes tax fraud claims. The tax provision—which was added to the NYFCA in 2010—recently passed its first major test in *New York v. Sprint Nextel Corp.*, the first ever tax enforcement action filed under the NYFCA. [127] New York Attorney General Eric Schneiderman filed a $300 million tax false claims suit against Sprint in 2012 for failing to pay roughly $100 million in state taxes on sales of wireless phone services between 2005 and 2011. In October 2015, New York's highest court affirmed the denial of Sprint's motion to dismiss, holding that New York's tax fraud law is not preempted by the federal Mobile Telecommunications Sourcing Act, and that retroactive application of the NYFCA is not barred by the Ex Post Facto Clause of the U.S. Constitution.

VI. About WilmerHale's False Claims Act Practice

With a team of veteran litigators and former Justice and Defense Department lawyers, WilmerHale brings unparalleled 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, when in government service, were directly responsible for the management, litigation and settlement of major FCA investigations and cases. We thus 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 relators and the government by focusing on precedent-setting legal defenses, including innovative uses of the public disclosure and first-to-file bars. By conducting credible internal investigations and negotiating with 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 prepared to take the case to a jury.

Our FCA Group includes:

- A former Deputy Attorney General of the United States in the Obama Administration, who supervised all of DOJ's litigating and law enforcement components (including 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 DoD, where he supervised all litigation at DoD, including FCA and government-contracts litigation.
- A former Deputy Attorney General of the United States in the Clinton Administration, who in that capacity had ultimate oversight over DOJ's Civil Frauds Unit and considered major interventions and settlements. She also had served as General Counsel of DoD, responsible for overseeing all litigation, including FCA litigation.
- A former General Counsel of DoD in the Obama Administration, responsible for overseeing all litigation, including FCA and other procurement-related legal work.
- 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 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 DOJ 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 jury 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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