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False Claims Act: 2012 Year-In-Review – Part I

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This is Part I of a two-part False Claims Act 2012 Year-In-Review. This article first summarizes the key provisions of the FCA that every company working with the government should know. Next, it discusses federal legislative and regulatory developments, noteworthy federal settlements, judgments, and complaints in key business sectors. From there, the article analyzes the most important federal FCA decisions of 2012 and covers state and local developments. Finally, all of the information is synthesized to identify some key trends in the FCA arena and offer some practical recommendations for 2013.

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

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as well as a number of states amending their FCAs to make them hew more closely to the federal statute.[2]

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

Companies should pay attention to these developments and strengthen their internal compliance programs to resolve potential problems early and internally—before they lead to protracted litigation and potentially hefty damages awards and penalties.

This False Claims Act 2012 Year-In-Review first summarizes the key provisions of the FCA that every company working with the government should know. Next, it discusses federal legislative and regulatory developments, and then noteworthy federal settlements, judgments, and complaints in key business sectors. From there, the article analyzes the most important federal FCA decisions of 2012. Then it covers state and local developments. Finally, all of the information is synthesized to identify some key trends in the FCA arena and offer some practical recommendations for 2013.

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OVERVIEW OF THE FALSE CLAIMS ACT

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

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

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

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

In 2009, the Fraud Enforcement and Recovery Act ("FERA") amended several FCA provisions, including:

- expanding liability for "reverse" false claims by imposing liability for knowingly or recklessly retaining overpayments from the government, even in the absence of any false statement;
- creating liability for claims presented to entities administering government funds;
- permitting the government's complaint to relate back to the filing of the relator's complaint, which allows the DOJ to conduct longer investigations; and
- expanding the anti-retaliation provisions to cover contractors and agents in addition to employees.[12]

The March 2010 healthcare reform legislation, the Patient Protection and Affordable Care Act ("PPACA"), also made important changes to the FCA, primarily by significantly narrowing the public-disclosure bar against relators' *qui tam* actions. Because of the PPACA:

- defendants can no longer use certain types of public sources (such as state and local administrative reports) to demonstrate that a relator's claim was publicly disclosed prior to the complaint;
- public disclosure is now an affirmative defense (rather than a jurisdictional bar) and dismissal is forbidden if the government opposes it;
- the definition of "original source" allows the relator to have "independent knowledge that materially adds to the publicly disclosed allegations" (instead of "direct knowledge"); and
- a company must report and return a Medicare or Medicaid overpayment within 60 days of discovery to avoid FCA liability.[13]

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

FEDERAL LEGISLATIVE AND REGULATORY UPDATE

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

Medicaid Service proposed a regulation governing overpayments.[19] The proposed rule would require that an overpayment be reported and returned within 60 days of discovery, or by the date a cost report is due, if that date is later. Under the PPACA, a person retaining an overpayment past this deadline faces FCA liability. The comment period has expired, but a final rule has not yet been enacted.

- On June 18, the HHS Office of Inspector General ("OIG") issued a notice requesting comments on how to revise the healthcare provider self-disclosure protocol, which has been in place since 1998 and was designed to expedite the investigation of potential fraud.[20] The OIG's notice sought comments on "how best to revise the Protocol to address relevant issues and to provide useful guidance to the healthcare industry." One significant comment coming from the American Bar Association's health law section and other organizations asked that any new rule clarify whether the self-disclosure would affect FCA liability.[21] The comment period has expired, but a final rule has not yet been enacted.

LATEST DEVELOPMENTS IN FEDERAL SETTLEMENTS, JUDGMENTS, AND COMPLAINTS FILED

Healthcare

Healthcare Settlements

- *GlaxoSmithKline LLC*: In July, GlaxoSmithKline LLC agreed to pay $3 billion to resolve criminal and civil allegations that the company had unlawfully promoted certain prescription drugs, failed to report certain safety data to the FDA, and engaged in false price reporting practices in violation of the FCA. The civil settlement required GSK to pay $2 billion to resolve civil liability under the FCA related to the off-label promotion of certain drugs and the payment of kickbacks to health care providers. As part of the settlement, GSK entered into a five-year Corporate Integrity Agreement ("CIA") with the HHS OIG, under which GSK executives must forfeit up to three years of annual performance pay if found to be involved in significant misconduct or aware of unreported employee violations.[22]

- *Abbott Laboratories, Inc.:* In May, Abbott reached a $1.5 billion criminal and civil settlement with the federal government, 45 states, and the District of Columbia. Abbott agreed to pay FCA civil damages of $800 million to resolve allegations that the company promoted Depakote for off-label uses.[23]
- *Amgen, Inc.*: On December 19, Amgen agreed to pay $762 million to resolve criminal and FCA liability arising from its sale and promotion of certain drugs. In the civil settlement, Amgen agreed to pay the U.S. and the states $612 million to resolve allegations that Amgen caused false claims to be submitted to Medicare, Medicaid, and other government insurance programs arising out of: (1) the promotion of Aranesp, Enbrel, and Neulasta for off-label uses and doses that were not approved by the FDA and not properly reimbursable by federal insurance programs; (2) the offering of illegal kickbacks to influence health care providers to select its products for use; and (3) false price reporting practices involving several of its drugs.[24]
- *McKesson Corporation*: In April, McKesson Corporation, a large drug wholesaler, agreed to pay more than $190 million in FCA civil damages to resolve allegations that it had inflated pricing information for a large number of prescription drugs and thereby had caused Medicaid to overpay for those drugs. The settlement only resolved the federal government's FCA claims, leaving state governments to negotiate with McKesson to resolve claims based on the states' shares of the Medicaid overpayments.[25]
- *WellCare Health Plans, Inc.*: In April, WellCare Health Plans, Inc., a managed care organization, agreed to pay $137.5 million to the federal government and nine states to resolve four lawsuits alleging FCA violations. The lawsuits claimed that WellCare had falsely inflated claimed expenses in order to avoid returning money to Medicaid and related state programs, knowingly retained overpayments, falsified data to misrepresent the medical conditions of patients and the treatments they received, and engaged in marketing abuses.[26]
- *Sanofi-Aventis*: On December 19, Sanofi-Aventis U.S., Inc. and Sanofi-Aventis U.S. LLC agreed to pay $109 million to resolve allegations that they violated the FCA by giving physicians free units of Hyalgan, a knee

injection, in violation of the Anti-Kickback Statute, to induce them to purchase and prescribe the product. The settlement also resolves allegations that the companies caused government programs to pay inflated amounts for Hyalgan and a competing product by submitting false average sales price reports for Hyalgan that failed to account for free units distributed contingent on Hyalgan purchases.[27]

- *Boehringer Ingelheim Pharmaceuticals, Inc.*: In October, Boehringer Ingelheim Pharmaceuticals, Inc. reached a $95 million settlement to resolve allegations that it had improperly promoted the stroke-prevention drug, Aggrenox; the chronic obstructive pulmonary disease drugs, Atrovent and Combivent; and the hypertension drug, Micardis. The settlement resolved allegations that Boehringer promoted the drugs for off-label uses, promoted the use of Combivent and Atrovent at doses exceeding those covered by federal health care programs, made unsubstantiated claims about the efficacy of Aggrenox, and paid kickbacks to health care professionals to induce them to prescribe the drugs. The federal government's share of the settlement was more than $78 million.[28]
- *Mylan, Inc.*: In February, generic drug manufacturer, Mylan, Inc. agreed to pay $57 million to settle state and federal FCA claims related to drug pricing. The United States will receive $22.2 million in the settlement although it had declined to intervene in the suit, which was brought by Ven-A-Care of the Florida Keys, Inc., a specialty pharmacy and repeat relator. Ven-A-Care alleged that Mylan had defrauded the United States and California by falsely reporting inflated drug prices, thereby causing Medicaid to reimburse for the drugs at fraudulently high rates. The settlement concludes the Ven-A-Care multi-district litigation, in which the company collected more than $400 million in whistleblower fees.[29]
- *DaVita, Inc.:* In July, DaVita, Inc., the largest operator of dialysis clinics in the United States, agreed to pay $55 million to settle a *qui tam* lawsuit. The suit alleged that DaVita fraudulently billed the federal government for free supplies of Epogen, an anemia drug manufactured by Amgen. The United States declined to intervene in the suit.[30]
- *Healthpoint Ltd.*: Healthpoint Ltd. and DFB Pharmaceuticals agreed to pay the federal government and 16 states up to $48 million to resolve

allegations that they caused false claims to be submitted to Medicare and Medicaid for Xenaderm, a drug that was ineligible for reimbursement by those programs. Healthpoint was alleged to have promoted Xenaderm, a prescription skin ointment, for treatment of nursing home patients' bed sores without obtaining FDA approval or conducting required clinical studies. Healthpoint allegedly misrepresented the regulatory status of Xenaderm in its quarterly reports to the government, thereby causing the government to pay false claims. The settlement requires Healthpoint and DFB to pay $28 million, plus $20 million if there is a change in ownership of Healthpoint or DFB in the next three years.[31]

- *Orthofix, Inc. and Orthofix International NV*: In June, medical device manufacturer, Orthofix, Inc. agreed to pay $34 million to resolve various federal FCA allegations. The government alleged that Orthofix improperly waived patient co-payments, paid kickbacks to physicians and their staffs to induce them to use Orthofix products, caused the submission of falsified certificates of medical necessity, and failed to advise patients of their right to rent rather than buy Orthofix products.[32] Meanwhile, in November, Orthofix, Inc.'s parent company, Orthofix International NV, agreed to pay $30 million to settle allegations that its subsidiary, Blackstone Medical, Inc., paid kickbacks to spinal surgeons to induce them to implant Orthofix-manufactured products. The kickbacks were paid through compensated travel and entertainment, sham consulting agreements, sham royalty agreements, and sham research grants.[33]

Healthcare Judgments

- *United States ex rel. Jamison v. McKesson Corp.*: In September, after a 14-day bench trial, the U.S. District Court for the Northern District of Mississippi entered judgment in favor of McKesson Corporation and Beverly Enterprises, Inc., along with several of their subsidiaries. The United States had alleged that a McKesson subsidiary had paid kickbacks to win a contract to provide Medicare billing services to the Beverly nursing home chain. The government had also claimed that Beverly sought to induce McKesson to offer its billing services at a loss to obtain another lucrative Beverly contract. The court found that the government failed

to put on sufficient proof that McKesson's subsidiary violated the Anti-Kickback Statute by offering its services below fair market value, below actual costs, or at a discount in order to induce Beverly to award it the billing contract.[34]

- *United States ex rel. Polansky v. Pfizer, Inc.*: In November, the U.S. District Court for the Eastern District of New York entered judgment for Pfizer, Inc. in a *qui tam* suit that alleged the company had engaged in off-label marketing of cholesterol drug, Lipitor. The relator alleged that Pfizer had violated the FCA by marketing Lipitor for use in patients who did not fall within the federal National Cholesterol Education Program ("NCEP") guidelines. The court held that the NCEP guidelines were advisory, not mandatory, and therefore Pfizer did not violate the FCA by marketing Lipitor to patients who fell outside these guidelines.[35]
- *United States ex rel. Ge v. Takeda Pharmaceutical Co.*: In November, the U.S. District Court for the District of Massachusetts entered judgment in favor of defendant, Takeda Pharmaceutical Co., in a *qui tam* suit alleging that the company had defrauded the federal government by underreporting complications linked to diabetes drug, Actos, and heartburn medication, Prevacid. The court held that the relator plausibly claimed that the drug company underreported the complications, but failed to show that this underreporting caused the federal and state governments to reimburse for false claims. The relator's factual allegations did not support her assertion that the FDA would have withdrawn approval for the drugs if the adverse complications had been reported.[36]

Healthcare Complaint

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

tors to reuse products improperly, and improperly provided free supplies to doctors. The United States intervened in the suit in August.[37]

Mortgage Lending

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

On January 27, 2012, the DOJ announced the formation of the Residential Mortgage-Backed Securities ("RMBS") Working Group, which is charged with investigating misconduct in the mortgage-backed securities market.[38] The RMBS Working Group has since launched a website that encourages whistleblowers to report any suspected fraud, noting that "substantial financial rewards may be available."[39] The DOJ has requested an additional $55 million for fiscal year 2013 to combat financial and mortgage fraud.[40] Of this total, approximately $17.6 million is earmarked for increasing civil enforcement efforts, with $7 million going to the Civil Division in order "to continue to obtain recoveries from individuals and companies who have defrauded the government by violating the terms of Federal contracts, grants, loans, and subsidies."[41]

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

Mortgage Settlements

- *Five Largest Mortgage Servicers*: In February, the DOJ, the Department of Housing and Urban Development ("HUD"), and 49 state attorneys general announced a $25 billion settlement with the nation's five largest mortgage servicers. The omnibus settlement resolved numerous claims, including claims under the FCA, related to the servicers' origination, servicing and other lending practices.[42] On April 4, the U.S. District Court for the District of Columbia approved the settlement and entered consent judgments against each of the defendants.[43] Whistleblowers in these

actions received approximately $46.5 million as their share of the recoveries. The DOJ stated that this settlement "preserves extensive claims related to mortgage securitization activities" that will be the focus of the RMBS Working Group's activities.[44]

- *Countrywide Financial Corporation*: Approximately $1 billion of the February settlement resolved an investigation by the U.S. Attorney's Office for the Eastern District of New York into the conduct of Countrywide Financial Corporation. This settlement resolved allegations that Countrywide approved loans insured by the Federal Housing Administration ("FHA") for home buyers who did not meet FHA eligibility criteria and originated FHA-backed mortgage loans based upon inflated home appraisals. Half of the $1 billion was paid directly to the FHA, while the remaining half of the settlement funded a loan-modification program for Countrywide borrowers with underwater mortgages.[45]
- *CitiMortgage, Inc.*: Also in February, the U.S. Attorney's Office for the Southern District of New York filed and simultaneously settled a suit against CitiMortgage for $160 million. The government contended that CitiMortgage failed to comply with the quality-control procedures of the FHA's Direct Endorsement Lender ("DEL") Program. The government's complaint followed a *qui tam* lawsuit that had been filed against CitiMortgage in August 2011. The whistleblower received approximately $31 million as her share of the government's recovery.[46]
- *Flagstar Bancorp, Inc.*: Also in February, the U.S. Attorney's Office for the Southern District of New York announced a $132.8 million settlement with Flagstar, a DEL Program participant. The settlement resolved the government's allegations that the bank had made false certifications to HUD, causing the FHA to accept loans for government insurance that were not eligible under the FHA's standards.[47]
- *MortgageIT and Deutsche Bank AG*: In May, the U.S. Attorney's Office for the Southern District of New York settled with another DEL Program participant, this time for more than $202 million. The settlement resolved the government's allegations that Deutsche Bank and its subsidiary submitted false certifications and failed to abide by DEL program requirements in connection with their origination of FHA-backed loans.[48]

- *Six Banks Regarding Loans to Veterans*: JP Morgan Chase settled, and another five banks have said that they will settle, a lawsuit alleging that they improperly charged borrowers who are veterans hidden fees on refinanced home loans backed by the Veterans Administration. The Northern District of Georgia case started as a *qui tam* suit and the DOJ intervened. JP Morgan Chase settled in March, reportedly for $45 million, and the parties advised the court at a conference in September that the following other banks have agreed to settle, reportedly for a total of another $116.7 million as follows: Countrywide Home Loans, Inc., $45 million; PNC Bank, $38 million; First Tennessee Bank, $16 million; SunTrust Mortgage, $10.2 million; and CitiMortgage, $7.5 million. Wells Fargo and Mortgage Investors Corporation are also defendants in the case and have filed motions to dismiss.[49]
- *Regions Financial Corp.*: In September, Regions Financial Corp. settled, for an undisclosed amount, the relators' claims in a *qui tam* FCA suit, in which the government had intervened.[50] The suit alleged that the defendant had undervalued a promissory note, which was secured by a mortgage on an apartment complex in order to quality for financial relief under the Troubled Asset Relief Program.[51]

Mortgage Complaints

- *Allquest Home Mortgage Corp. (formerly Allied Home Mortgage Corp.)*: On November 1, 2011, the U.S. Attorney's Office for the Southern District of New York announced it had intervened in a *qui tam* mortgage-fraud suit against Allquest, its chief executive officer, and its executive vice president, under the FCA and the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"). The complaint alleged, among other conduct, that Allquest operated "shadow" branch offices that were not approved by HUD but from which Allquest would originate and submit FHA loans, that when Allquest sought approval from HUD of new branches, it supplied fraudulent information, and that Allquest failed to adopt sufficient quality-control measures.[52] Following a transfer of venue in August of this year, the case remains pending in the Southern District of Texas.[53]

- *Wells Fargo & Co.*: In October, the U.S. Attorney's Office for the Southern District of New York and HUD announced a civil fraud suit pursuant to the FCA and FIRREA against Wells Fargo. The government alleges that Wells Fargo, a DEL lender, engaged in improper origination and underwriting practices with respect to FHA loans, failed to implement sufficient quality-control measures, and concealed improperly certified loans in violation of the self-reporting requirements of the DEL program.[54] On November 1, Wells Fargo moved for declaratory and injunctive relief to prevent the United States from pursuing its action on the basis that the February 2012 global mortgage settlement included a release of these claims.[55] The motion remains pending.
- *Bank of America Corp.*: In October, the U.S. Attorney's Office for the Southern District of New York intervened in a *qui tam* case against Bank of America seeking over $1 billion in damages. The government alleges that the defendant engaged in a multi-year mortgage fraud scheme against Fannie Mae and Freddie Mac, in which the bank allegedly designed a program to process loans at high speed without adequate quality checkpoints.[56]

Procurement and Other

Procurement and Other Settlements

- *W.W. Grainger, Inc.*: On December 26, national hardware distributor W.W. Grainger, Inc. agreed to pay the United States $70 million to resolve allegations that it submitted false claims under contracts with the General Services Administration ("GSA") and the U.S. Postal Services ("USPS"). Grainger contracted to sell hardware and other supplies to government customers through the GSA's Multiple Award Schedule program, which is a streamlined process for government procurement of commonly used commercial goods and services, and which requires contractors to disclose their commercial pricing policies and practices to assist the government in negotiating the contract. The settlement resolved allegations that Grainger did not provide the GSA with current, accurate, and complete information about its commercial sales practices, including discounts afforded to other customers. The settlement also resolved

allegations that Grainger failed to provide the requisite "most-favored customer" pricing under two USPS contracts for sanitation and maintenance supplies.[57]

- *Harbert Corporation, et al*: In March, Harbert Corporation and several affiliated companies agreed to pay $47 million to settle allegations that they submitted, and caused others to submit, false claims to the U.S. Agency for International Development. Harbert was part of a joint venture that bid on, and was ultimately awarded, a contract to build a sewer system in Egypt. The government contended that Harbert entered into agreements with other potential bidders, who agreed either not to bid or to bid intentionally high in return for a payoff, to ensure that the joint venture would win the bid.[58]
- *ATK Launch Systems, Inc.*: In April, ATK Launch Systems, Inc. agreed to pay nearly $37 million to resolve an FCA action arising out of a Department of Defense ("DOD") contract for the purchase of illumination flares used by the Army and Air Force for operations in Iraq and Afghanistan. The government alleged that ATK knowingly sold defective flares that could not satisfy a contractually specified test. The settlement included $21 million in damages and nearly $16 million of in-kind services to fix the flares remaining in the government's inventory.[59]
- *Maersk Line Ltd.*: In January, the DOJ announced that Maersk Line Ltd. agreed to pay $31.9 million to resolve FCA allegations that it knowingly overcharged the DOD to transport thousands of shipping containers in Afghanistan and Iraq. The government asserted that Maersk inflated its invoices by allegedly billing in excess of the contractual rate, billing for delivery delays improperly attributed to the government, billing for container GPS-tracking and security services that were either not provided or only partially provided, and failing to credit the government for rebates received by Maersk's subcontractors. The relator who brought the *qui tam* case is a former industry insider, who will receive $3.6 million from the suit. He was also the relator in a case against another shipping company, which resulted in a $26.3 million settlement in 2009.[60]
- *Calnet, Inc.*: In June, Calnet, Inc. agreed to pay $18.1 million to settle allegations that it submitted false claims to the DOD under three contracts

for the provision of translation and linguist services at Guantanamo Bay and other DOD facilities. The government alleged that Calnet submitted inflated claims for payment by overstating its provisional overhead rates on the contracts.[61]

- *Lockheed Martin Corporation*: In March, Lockheed Martin Corporation agreed to pay $15.85 million to resolve allegations that it mischarged for perishable tooling equipment used under numerous government contracts. The claims arose from allegations that a Lockheed subcontractor, Tools & Metals, Inc. ("TMI"), inflated the costs of the tools sold to Lockheed for use on military aircraft. The government alleged that Lockheed improperly passed these costs onto the government. A former president of TMI received a seven-year prison sentence after pleading guilty to related criminal charges. The government then brought FCA claims against Lockheed, claiming that Lockheed failed to properly oversee TMI's charging practices and mishandled information after learning about those practices.[62]
- *Technological Research and Development Authority*: In November, the Florida Technological Research and Development Authority ("TRDA") agreed to pay $15 million and wind down operations to resolve FCA allegations in connection with federal grants. TRDA was established by the Florida state legislature to own and operate incubator facilities intended to support small businesses by providing low-rent office space and business-development assistance. TRDA agreed with the Melbourne Airport Authority ("MAA") to use federal grant funds to build an office building at the airport to be used as TRDA's headquarters and incubator facility. The government alleged that the construction of the building was both outside the scope of the federal grants to TRDA and contrary to the terms of a grant awarded jointly to TRDA and MAA. MAA and the Melbourne International Airport agreed to pay $4 million to resolve FCA claims against them based on the same events.[63]
- *Louis Dreyfus Energy Services*: In July, Louis Dreyfus Energy Services agreed to pay more than $4 million to settle allegations that it violated the FCA by failing to pay amounts owed for natural gas that it had acquired from the Department of the Interior ("DOI"). Louis Dreyfus

held a contract with DOI to purchase natural gas at a price associated with the delivery of the gas to a fixed point along a gas pipeline. After the contracts were executed, the company requested and received a discounted price. The government alleged, however, that the discount should have applied only when constraints in the pipeline prevented Louis Dreyfus from transporting gas through the pipeline. The settlement also resolved related administrative claims by DOI's Office of Natural Resources Revenue.[64]

- *Gunnison Energy Corporation, SG Interests I Ltd., and SG Interests VII Ltd.*: In February, the United States announced its first-ever settlement of FCA and antitrust claims based on bid-rigging in Bureau of Land Management ("BLM") mineral-rights lease auctions, settling claims with Gunnison Energy Corporation ("GEC") and SG Interests I Ltd. and SG Interests VII Ltd. (jointly, "SGI") for $550,000. The government alleged that GEC and SGI agreed not to compete in bidding for four natural gas leases sold at auction by BLM, and that SGI made false statements to the government and falsely certified that it was not engaged in collusive bidding.[65]

Procurement and Other Dismissal

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

Grumman successfully moved to compel arbitration of those claims pursuant to the company's dispute-resolution policy for employment-related claims.[66]

Procurement and Other Complaints

- *American Commercial College, Inc.*: In February, the United States intervened in an FCA suit against American Commercial College, Inc. ("ACC") a company that operated for-profit colleges in Texas.[67] The suit alleges that ACC falsely certified compliance with the "90/10 Rule," a federal regulation that prohibits a for-profit college or university from obtaining more than 90 percent of its yearly tuition from federal Department of Education student aid.[68]
- *ATI Enterprises, Inc.*: In August, the DOJ announced that it would intervene and file an amended complaint in an FCA suit against ATI Enterprises, Inc., another company that operates private for-profit schools. The complaint alleged that, from 2007 through 2010, ATI knowingly misrepresented job placement statistics in order to maintain state licenses that were required for the company to be eligible to provide financial aid guaranteed by the U.S. government. The complaint further alleged that ATI employees enrolled ineligible students, kept students enrolled who should have been dropped due to poor grades or attendance, and made misrepresentations to students regarding their future employability.[69]
- *The Gallup Organization*: Also in August, the DOJ announced that it would intervene in a *qui tam* suit against The Gallup Organization ("Gallup"), alleging that Gallup violated the FCA by making false claims for payment under contracts for polling services furnished to federal agencies. The relator alleged that Gallup gave the government inflated estimates of the number of hours needed to perform its services. In its notice of intervention, the government made new assertions that Gallup had improperly negotiated an employment contract with a Federal Emergency Management Agency ("FEMA") official who oversaw Gallup performance while Gallup was seeking additional FEMA funding.[70]

- *CH2M Hill Hanford Group, Inc.*: In September, the DOJ announced that it would intervene in a *qui tam* lawsuit against CH2M Hill Hanford Group, Inc. for false claims submitted under a Department of Energy ("DOE") contract. CH2M had contracted to manage and clean more than 170 underground storage tanks containing mixed radioactive and hazardous waste at DOE's Hanford Nuclear Site. The suit alleges that CH2M employees overstated their hours and that CH2M's management knowingly condoned this practice. Eight former CH2M employees, including the relator, pled guilty to felony charges stemming from the fraud. The government indicated that it intends to file a motion to dismiss the relator from the action under a statute that bars recovery by a relator who is convicted of criminal conduct arising from his or her role in the FCA violation.[71]
- *Triple Canopy, Inc.*: In October, the DOJ announced that it filed an FCA complaint against Triple Canopy, Inc. arising out of a contract with the Joint Contracting Command in Iraq/Afghanistan to provide security services in Iraq. The government alleged that Triple Canopy knowingly billed the government for hundreds of foreign nationals hired as security guards, even though these guards could not meet required firearm proficiency tests.[72]
- *Kellogg, Brown & Root Services, Inc. and First Kuwaiti Trading Company*: In November, the DOJ filed a complaint against Kellogg, Brown & Root Services, Inc. ("KBR") and First Kuwaiti Trading Company for submitting inflated claims for the delivery and installation of trailers to house troops in Iraq.[73] KBR was the Army's primary logistics-support contractor in Iraq. KBR awarded a subcontract to First Kuwaiti to provide over 2,000 trailers. First Kuwaiti presented two claims to KBR contending that government-caused delays in providing military escorts for convoys into Iraq entitled the company to additional funds for increased costs. KBR allegedly agreed to pay First Kuwaiti $48.8 million and passed the additional cost to the government. The government alleged that First Kuwaiti knowingly inflated its crane and truck costs and misrepresented the cause of its delay and that KBR knew the costs were improper when it charged the costs to the government. In addition to the FCA charges, the government included claims against KBR

under the antifraud section of the Contract Disputes Act and for breach of contract.

NOTES

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[3] Press Release, *supra* n.1.

[4] 31 U.S.C. § 3729(a)(1)(A).

[5] *Id.*

[6] 31 U.S.C. § 3729(a)(1)(G).

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

[8] 31 U.S.C. § 3730(d).

[9] 31 U.S.C. § 3730(b)(4), (c)(2)(A).

[10] 31 U.S.C. § 3729(a)(1)-(2).

[11] 31 U.S.C. § 3729(a)(1).

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

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

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

[15] S. 743, 112th Congress (2012) (enacted), *available at* http://www.gpo.gov/

fdsys/pkg/BILLS-112s743enr/pdf/BILLS-112s743enr.pdf.

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

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

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