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False Claims Act: 2012 Year-in-Review– Part II

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This is the second part of a two-part article, "False Claims Act 2012 Year-in-Review." Here, 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.

FEDERAL CASE LAW DEVELOPMENTS

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

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

The First Circuit held that the *McDonnell Douglas* burden-shifting framework, developed for Title VII claims applies to claims, brought under the FCA's anti-retaliation provision. This is the first published opinion by a federal appellate court to adopt the *McDonnell Douglas* framework in this context. The framework previously had been applied only in an unpublished Sixth Circuit opinion[74] and several district court opinions.

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

About the Case

The relator filed a *qui tam* action against his employer, Aggregate Industries, Inc., alleging that it provided substandard concrete materials for

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

The First Circuit reversed, holding that the relator had presented sufficient evidence of retaliation to survive summary judgment. In so holding, the court of appeals ruled that, since the relator did not present direct evidence of retaliation, it was appropriate to analyze the sufficiency of the evidence by applying the burden-shifting framework set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green.*[75] Under this framework, a relator first must set forth a *prima facie* case of retaliation. The burden then shifts to the defendant to articulate a legitimate, non-retaliatory reason for the adverse employment action. If the defendant produces evidence of a legitimate reason for the action, the relator then assumes the further burden of proving that the proffered reason is a pretext to mask retaliation. Using this framework, the court held that the relator had presented sufficient evidence to create an issue of fact as to whether the proffered reason for termination—the relator's

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refusal to take a drug test—was pretextual.

The First Circuit also rejected Aggregate Industries' argument that the relator's execution of a settlement agreement was not protected by the FCA's anti-retaliation provision. Aggregate Industries noted that the anti-retaliation provision only protects lawful acts done "in furtherance of" an FCA action, 31 U.S.C. § 3730(h)(1), and argued that the execution of a settlement agreement is not activity "in furtherance of" an FCA action, but rather is conduct that ends an FCA action. The First Circuit rejected this construction of the statute, holding that the "execution of the settlement agreement was surely conduct in furtherance of [the prior *qui tam*] action."[76]

Implications for Future False Claims Act Cases

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

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

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

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

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

About the Case

A relator filed a *qui tam* action against Cornell University Medical College and a Cornell professor, alleging that Cornell's initial application and

several renewal applications under the T32 grant program, administered by the National Institutes of Health (the "NIH"), contained material misrepresentations about the training program funded by the grant. The jury found the defendants liable for fraud in relation to three renewal applications.

The Second Circuit affirmed. The court of appeals ruled that the jury had sufficient evidence to conclude that the allegedly false statements were material to the government's decision to fund Cornell's fellowship program. The court held that "the test for materiality is an objective one. It does not require evidence that a program officer relied upon the specific falsehoods proven to have been false…in order for them to be material. The fact-finder must determine only whether the proven falsehoods have a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[77]

As to damages, the Second Circuit held that the district court did not err in calculating damages as the total amount paid by the government: "[W]here the government has provided funds for a specified good or service only to have [a] defendant substitute a non-conforming good or service, a court may…calculate damages to be the full amount of the grant payments made by the government after the material false statements were made."[78] The court held that this method of calculation is appropriate where the government receives no tangible benefit from the non-conforming goods or services. Such is the case where grant funds are used in a manner other than as represented to the government, because the government receives something qualitatively different than what was bargained for and "entirely [loses] its opportunity to award the grant money to a recipient who would have used the money as the government intended."[79]

Implications for Future False Claims Act Cases

Feldman holds that the materiality of a misrepresentation should be judged against an objective standard and that the absence of a government decision-maker's subjective reliance on the misstatement is not dispositive. The Second Circuit's affirmance of damages equal to the entire amount paid by the government is difficult to square with the traditional FCA and contract damages calculation of the amount the government paid minus the value it received. The government is more frequently arguing that it received no value at all, and the *Feldman* court is the latest to accept this argument.[80]

United States v. Caronia, 703 F.3d 149, 2012 WL 5992141 (2d Cir. 2012)

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

About the Case

Under the FDCA, drugs must be approved by the FDA for specific uses before they can be sold in interstate commerce.[81] Once approved for any use, they may be prescribed by physicians for unapproved, or "off-label," uses as well.[82] The FDCA prohibits introducing drugs into interstate commerce that are "misbranded," which means, among other things, lacking directions for the drug's use that would enable a layperson to use the drug safely and for its intended uses.[83] In recent years, the government has reached major settlements with pharmaceutical companies based, in part, on allegations of off-label promotion.

According to the Second Circuit, the evidence showed that Caronia promoted a particular drug's use for unapproved indications and unapproved populations.[84] The jury convicted him of conspiring to introduce a misbranded drug into interstate commerce. The district court rejected his contention that his conviction was inconsistent with the First Amendment.

The Second Circuit threw out Caronia's conviction. Applying the principle of constitutional avoidance, the majority (Judges Chin and Raggi) interpreted the FDCA as not criminalizing a pharmaceutical sales representative's truthful, non-misleading speech promoting an approved drug's off-label use because a contrary reading would raise serious questions about the FDCA's consistency with the First Amendment. Invoking *Sorrell v. IMS Health, Inc.*,[85] the majority applied heightened scrutiny to the government's reading of the FDCA because it imposed speech restrictions that were both content-based, distinguishing speech about FDA-approved uses of drugs from speech about off-label uses, and speaker-based, targeting one category of speakers, namely, pharmaceutical

manufacturers, while allowing others to speak freely.[86] The majority also concluded that a criminal prohibition of off-label promotion by pharmaceutical sales representatives could not be justified, even under the "less rigorous intermediate" four-part test for commercial speech established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*[87] The majority assumed, though without deciding, that speech promoting off-label uses could be used as evidence of the drug's intended uses and, thus, as part of the evidence demonstrating that a defendant contributed to misbranding by selling a drug intended for an unapproved use for which there were no adequate directions on the label.[88] The majority left unclear where the dividing line lies between such a prosecution theory and the theory presented and rejected in *Caronia.* It concluded "simply that the government cannot prosecute pharmaceutical manufacturers and their representatives under the FDCA for speech promoting the lawful, off-label use of an FDA-approved drug."[89]

Implications for Future False Claims Act Cases

The exact breadth of *Caronia*'s implications are uncertain because it left open the possibility that speech promoting off-label uses could still be used to support a misbranding charge, as evidence of a drug's intended use for purposes not approved by the FDA. However, at a minimum, the decision establishes that truthful, non-misleading speech by sales representatives, standing alone, is not enough to support a misdemeanor misbranding prosecution in one important region of the country. The decision paves the way for First Amendment challenges to off-label marketing allegations in FCA cases, as well as other types of federal regulation of commercial speech.

Fourth Circuit—(1) Whether a State-Affiliated Entity Is a "Person"; (2) Application of the Excessive Fines Clause to FCA Civil Penalties

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

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

About the Case

The relator alleged that appellees—four corporate entities created by their respective states—defrauded the U.S. Department of Education by inflating the number of loan portfolios eligible for federal student-loan interest subsidies. The district court dismissed the claims against all four appellees based on state statutory provisions which, in its view, demonstrated each entity's status as a "state agency" and, thus, not a "person" subject to FCA liability.[90]

The Fourth Circuit vacated and remanded, stating that "the critical inquiry is whether appellees are truly subject to sufficient state control to render them a part of the state, and not a 'person,' for FCA purposes."[91] The court explained that, while the FCA requires statutory interpretation, there is a "virtual coincidence of scope" between the FCA inquiry and the Eleventh Amendment inquiry.[92] The Fourth Circuit held that its own four-factor Eleventh Amendment test would apply, and remanded the case for the district court to apply that analysis to each of the appellees.[93]

Implications for Future False Claims Act Cases

The Fourth Circuit joined the Fifth, Ninth, and Tenth Circuits in holding that the test for determining personhood under the FCA is the same as the test for applying Eleventh Amendment sovereign immunity to state-affiliated entities.[94] In so holding, the Fourth Circuit endorsed a fact-sensitive inquiry to determine whether a state-affiliated entity is a proper defendant under the FCA.

United States ex rel. Bunk v. Birkart Globistics, GmbH & Co., et al., 2012 WL 488256 (E.D. Va. Feb. 14, 2012)

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

About the Case

The relator alleged that the defendants had violated the FCA by engaging in bid-rigging on contracts to transport military household goods. While the

relator initially alleged damages, he did not seek to prove damages at trial. The jury found the defendants liable for submitting 9,136 false invoices.

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

The court then considered whether a $50 million civil penalty would violate the Eighth Amendment's Excessive Fines Clause. The court determined that, in this case, the government did not suffer any economic harm, and the number of invoices alone was not reflective of the defendants' culpability. Given these considerations, the court held that the $50 million civil penalty would be "grossly disproportionate" to any harm suffered by the government.[95]

In post-trial briefing, the relator and the United States argued that the penalty could be reduced to $24 million by counting only a portion of the invoices. The court, however, rejected this argument, both because, in its view, the $24 million figure would "not result from any principled application of the FCA," and because a $24 million civil penalty would still be constitutionally excessive.[96]

Finally, the court considered whether it had the discretion to impose a constitutionally permissible penalty, but it concluded that it lacked the discretion to do so. In the court's view, the FCA "does not grant the court authority to impose a total penalty below the amount derived" from the statute itself.[97]

The plaintiffs appealed to the Fourth Circuit and the appeal is pending. The Pharmaceutical Research and Manufacturers of America ("PhRMA")[98] submitted an *amicus* brief in support of defendants-appellees in order to emphasize that courts, through proper application of Eighth Amendment principles, should prevent the imposition of penalties that irrationally exceed the harm actually suffered by the government.

Implications for Future False Claims Act Cases

The *Bunk* decision is the latest contribution to the growing debate on whether and, if so, how, the Excessive Fines Clause applies to civil penalties

under the FCA. The *Bunk* decision is particularly noteworthy in its rejection of the notion that an otherwise constitutionally excessive fine may be brought within constitutional bounds by reducing the number of false claims. The *Bunk* decision is one example of cases in which courts are increasingly troubled by the imposition of penalties that are grossly disproportionate to actual harm to the government.

Fifth Circuit—Government Employees as Relators and as Original Sources

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

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

About the Case

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

The Fifth Circuit reversed and remanded. The Fifth Circuit joined the Tenth and Eleventh Circuits in holding that a federal employee may bring a *qui tam* action under the FCA.[99] The court found that nothing in the FCA's text suggests that Congress intended to exclude federal employees from the definition of a "person" in the provision authorizing *qui tam* actions, 31 U.S.C. § 3730(b)(1). The court contrasted § 3730(b)(1)'s unqualified language with the express bar on certain kinds of actions by military personnel in 31 U.S.C. § 3730(e).

Having found that the relators were permitted to sue under the FCA, the Fifth Circuit remanded for the district court to determine whether the action was barred by the FCA's public-disclosure bar, 31 U.S.C. § 3730(e)(4). The

Fifth Circuit ruled that, if the *qui tam* action was found to be based upon publicly disclosed information, the relators could not, as a matter of law, overcome the public-disclosure bar by demonstrating that they were original sources of that information. In order to qualify as an original source, a relator must have direct and independent knowledge of the allegations underlying the complaint and must have voluntarily provided the information to the government. The Fifth Circuit joined the Ninth Circuit in holding that "the fact that a relator 'was employed specifically to disclose fraud is sufficient to render his disclosures nonvoluntary.'"[100]

Implications for Future False Claims Act Cases

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

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

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

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

About the Case

In *Allison Engine Co. v. United States ex rel. Sanders*,[101] the Supreme Court held that FCA liability under 31 U.S.C. § 3729(a)(2) requires intent to present a false claim to the government. In response to the Supreme Court's decision, Congress included in FERA an amendment of § 3729 removing reference to presentment to the government. Congress provided that the changes

to the presentment requirement "shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act…that are pending on or after that date."[102] After FERA's enactment, the *Allison Engine* defendants filed a motion seeking to prohibit application of the amended § 3729. The district court granted the motion, finding that "claim" in the retroactivity provision means a demand for payment and that no claim in that sense was pending on June 7, 2008. The court held that a contrary reading would violate the Constitution's *Ex Post Facto* Clause.

The Sixth Circuit reversed. It concluded that Congress intended "claim" in the retroactivity provision to mean a civil action or case. The court reasoned that a demand for payment is never made **"**under the FCA," as the retroactivity provision puts it; rather, "the FCA (and its liability standards) only apply after an allegedly fraudulent request for payment is made and a civil action pursuant to the FCA is filed."[103]

Having determined that FERA mandates application of the § 3729 amendment to all cases pending on June 7, 2008, the court analyzed whether such retroactive application would violate the *Ex Post Facto* Clause, which prohibits, among other things, punishing an act that was not punishable when committed. The court explained that the *Ex Post Facto* clause generally does not apply to civil sanctions such as those available under the FCA, unless there is clear proof that the statute "is so punitive either in purpose or effect as to negate" the classification of the statute as civil.[104] While the court acknowledged that certain factors weigh in favor of finding the FCA to be punitive in purpose and effect, such factors were insufficient to overcome Congress's denomination of the FCA as a civil remedial scheme.

Implications for Future False Claims Act Cases

The federal courts of appeals remain fairly evenly split as to the meaning of the word "claim" in FERA's retroactivity provision, with the Second, Sixth, and Seventh Circuits finding the word to mean a civil case or action[105] and the Ninth and Eleventh Circuits finding the word to mean a demand for payment.[106]

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

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

About the Case

The district court granted summary judgment against a government contractor for submitting payroll certifications that falsely attested that a sub-contractor's employees were paid the prevailing wages required by the Davis-Bacon Act. The district court rejected the defendant's argument that FCA liability for Davis-Bacon Act violations was prohibited by the doctrine of primary jurisdiction, which generally requires courts to refer a matter to an appropriate regulatory agency "whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body.'"[107]

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

Implications for Future False Claims Act Cases

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

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

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

About the Case

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

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

First, as to falsity, the court held that it was unclear whether there was anything improper about creating a subsidiary that was eligible to take advantage of higher Medicare reimbursements. The court cautioned that a business should not "be punished solely for seeking to maximize profits."[108] The court rejected the government's argument that RCG's subsidiary was an alter-ego of RCG, observing that "[t]he corporate form need not be disregarded when its adoption was meant to 'secure its advantages and where no violence to the legislative purpose is done by treating the corporate entity as a separate legal person.'"[109] The court concluded that the United States had failed to identify any legislative purpose violated by the creation of RCGSC.

Second, the court held that, even if the regulations ultimately prohibited using a wholly owned subsidiary to take advantage of higher Medicare payments, the United States had not shown that the defendants had acted with the requisite knowledge of their claims' falsity. The United States alleged that "the regulations were clear that wholly-owned subsidiaries were ineligible" to take advantage of the higher Medicare payments and that RCG acted with "reckless disregard" of those regulations by having its subsidiary seek such payments.[110] However, the Sixth Circuit held that the evidence indicated that RCG consistently sought clarification of the regulations from counsel and the government, followed industry practice in trying to sort through ambiguous regulatory language, and was forthright with the government about RCGSC's structure. The court found that to "deem such behavior 'reckless disregard'

of controlling statutes and regulations imposes a burden on government contractors far higher than what Congress intended when it passed" the FCA.[111]

Implications for Future False Claims Act Cases

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

Seventh Circuit—FCA Retaliation Claim; Corporate Knowledge

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

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

About the Case

The relator filed a lawsuit against his former employer, ITT Educational Services, Inc., alleging that he was fired in violation of the FCA, 31 U.S.C. § 3730(h), "after identifying and reporting several irregularities in the way ITT was handling its federally subsidized loans and grants for students."[112] The employer moved for summary judgment on various grounds, including that the employee failed to present evidence that he was fired because he engaged in protected conduct under the FCA, an essential element of an FCA retaliation claim.

The district court agreed with the employer, granting its motion for summary judgment, and the Seventh Circuit affirmed. As the Seventh Circuit stated, to survive a motion for summary judgment on an FCA retaliation claim, an employee must point to evidence showing (1) that he engaged in protected

conduct; and (2) that he was fired "'because of'" that conduct.[113] The Seventh Circuit assumed, without deciding, that the employee's evidence was sufficient to permit a finding that he engaged in "efforts to stop" potential FCA violations, a type of protected conduct under the 2009 amendment to the FCA.[114] The Seventh Circuit concluded, however, that the employee's retaliation claim failed because he presented no evidence to show that his protected conduct was connected to his employer's termination decision. Specifically, there was no evidence in the record that the four executives involved in the decision to fire the employee had any knowledge of his protected FCA conduct.

The employee's failure to present such evidence was fatal because "it is the decisionmakers' knowledge that is crucial."[115] The court of appeals rejected the employee's request that it "impute to [the employer] (and its agents) any knowledge that [a lower-level supervisor] gained when [the employee] reported potential violations."[116] That argument, the court noted, "seriously misunderstands the way liability rules work in the corporate setting," and would ultimately "defeat the specific statutory requirement that an employee's termination be 'because of' her protected conduct."[117] The court made clear that, apart from narrow exceptions not at issue (like the "cat's paw" theory of liability), "companies are not liable under the False Claims Act for every scrap of information that someone in or outside the chain of responsibility might have."[118]

Implications for Future False Claims Act Cases

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

Eighth Circuit—No FCA Liability Based on Reasonable Application of GAAP

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

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

About the Case

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

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

With regard to the relator's accounting-fraud allegations, the court emphasized that GAAP are merely a set of generalized principles, rather than hard-and-fast rules. The court explained that because GAAP permits a range of acceptable methods, a relator that fails to allege facts showing that the defendant's accounting methods were beyond the scope of any reasonable application of GAAP fails to state a claim under the FCA. Further, the court noted that even if the relator had alleged violations of GAAP, these violations "alone [would] not demonstrate knowing fraud."[119]

Implications for Future False Claims Act Cases

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

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

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

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

About the Case

The government solicited bids for work on a particular program on a cost-reimbursement-plus-fee basis. The contract was awarded on the basis of "best value," which took factors other than cost into account. After a competitive bid process, the government selected Lockheed Martin's amended proposal, which the contractor had reduced from its initial proposal to present its best and final offer. In its acceptance memorandum, the government noted that although the defendant's final proposal was unrealistically low, it thought that the proposal offered the best overall value, even knowing that there were risks of cost growth beyond the estimate.

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

In addressing the FCA claim based on the allegedly false estimates, the Ninth Circuit adopted a potentially broad fraudulent-inducement theory. Rejecting the defendant's argument that bids are inherently subjective, the court held that knowingly submitting false estimates can be a source of FCA liability. The court relied heavily upon the Supreme Court's decision in *United States ex rel. Marcus v. Hess*,[120] in which the Court held that contractors were liable under the FCA for obtaining contracts through collusive bidding based on fraudulent inducement. The court also looked to decisions from the First and Fourth Circuits, which had held that false estimates, even when based on opinions, can be the basis for FCA liability.

Applying this law to the facts, the Ninth Circuit held the evidence offered by the relator was sufficient to create a disputed issue of material fact as to whether the defendant's bid was knowingly or recklessly based on a false

estimate of costs. In particular, the court found persuasive evidence indicating that the defendant had instructed employees to decrease costs in the bid without regard to the actual expected costs of performing the work. Thus, the court reversed the district court and remanded this FCA claim for trial.[121]

Addressing the other alleged FCA violations, the court held that the evidence supporting the claims of fraudulent use of freeware and defective testing procedures was insufficient to survive summary judgment because the government had knowledge of and had approved the conduct.[122] Although careful to note that the government-knowledge defense is not an automatic bar to FCA claims, the court held that the government's knowledge of the conduct here showed that the defendant did not knowingly submit a false claim.

Finally, the court also held that the longer statute of limitations from Maryland, the transferor jurisdiction, would apply to the relator's FCA retaliation claim.[123] In *Van Dusen v. Barrack*, the Supreme Court instructed in diversity cases after a transfer pursuant to 28 U.S.C. § 1404(a) for *forum non conveniens*, the transferee district court should apply the same substantive law that the transferor district court would have applied had the case not been moved.[124] The application of *Van Dusen* to federal causes of action that direct courts to adopt the most closely analogous state statute of limitations, such as the FCA, is an issue over which circuits have diverged. In this case, the Ninth Circuit joined the Fifth, Seventh, and Tenth Circuits in holding that where a federal cause of action is transferred for *forum non conveniens*, the transferee district court must apply the statute of limitations that would have applied in the transferor district.[125] Thus, here, Maryland's longer statute of limitations applied, and the court reversed the district court's dismissal of this claim.

Implications for Future False Claims Act Cases

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

This decision does not, however, present all bad news for defendants. The case reinforces the vitality of the government knowledge defense by holding

that full disclosure and approval of planned conduct within the scope of a contract should normally defeat an FCA claim. Thus, in this regard, the case provides a blueprint for companies who are proactively trying to avoid protracted FCA litigation.

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

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

About the Case

The relators filed a *qui tam* action alleging that Honeywell International Inc. intentionally miscalculated energy baselines to obtain additional payments under the energy-savings incentives in its 1997 Energy Savings Performance Contract ("ESPC") with the U.S. Army for the installation of certain systems on military bases.[126] In 2003, the United States Army Audit Agency ("AAA") issued internal reports concluding that Honeywell overstated the baseline energy costs in the contract. In 2005, the Government Accountability Office ("GAO") published a similar report, which generally discussed problems in ESPCs, concluding that many contractors were inaccurately calculating baseline costs. The district court applied the FCA's public-disclosure bar in effect at the time (*i.e.*, prior to the 2010 amendments) and dismissed the action, reasoning that it did not have subject matter jurisdiction because the AAA and GAO reports were publicly disclosed prior to the filing of the relators' suit and contained the same information as alleged in the complaint.

The Ninth Circuit reversed, holding that publication of the AAA and GAO reports did not constitute a public disclosure.[127] As to the AAA reports, although they were available to the public and could have been obtained through a Freedom of Information Act ("FOIA") request, no member of the public actually requested the reports prior to the filing of the suit. The court relied upon its previous decision in *United States ex rel. Schumer v. Hughes Aircraft Co.*, stating that "'[i]n the FOIA context, information cannot be deemed disclosed until a member of the public requests the information and *receives*

it from the government…. Only then is the information *actually*, rather than *theoretically* or *potentially*, available to the public.'"[128] This approach is in line with other courts, as several other circuits have also held that information that is potentially available to the public, but not actually disclosed, does not constitute a public disclosure.[129]

The Ninth Circuit also held that the AAA reports were not publicly disclosed when the government provided them to EMP2, a private company hired to audit ESPC contracts. The court again relied on *Schumer*, which distinguished a public disclosure from "'the release of information within a private sphere.'"[130] The court held that because EMP2 was acting on behalf of the government and had "an incentive to keep confidential the information learned during the audit," the disclosure of the AAA reports to EMP2 was not a public disclosure.[131]

The court held that the GAO report was not a public disclosure because it did not specifically name contractors or locations, but contained only generalized information on conduct similar to that alleged in the suit. Therefore, it did not contain sufficient information to allow the government to pursue an investigation against the defendants.[132]

Implications for Future False Claims Act Cases

The *Honeywell* decision is only the most recent appellate case to touch upon one of the most hotly contested areas of FCA law: the relationship between FOIA requests and the public-disclosure bar of the FCA. This decision is relatively narrow, however, and it closely follows previous Ninth Circuit decisions setting out the distinction between information that is actually available versus potentially available to the public.

Tenth Circuit—Retaliatory Discharge

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

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

About the Case

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

In affirming summary judgment for the employer, the Tenth Circuit held that "in order to overcome the presumption that they are merely acting in accordance with their employment obligations," an employee must show that the employer was on notice that the former employee was either (1) taking action in furtherance of an FCA lawsuit, or (2) assisting in an FCA action brought by the government.[133]

Implications for Future False Claims Act Cases

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

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

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

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

About the Case

The relator alleged that the DC school system failed to maintain supporting documentation for a Medicaid reimbursement claim. The relator had direct knowledge of the lack of documentation because his firm was involved with the claims process. Before the relator filed his complaint, a government audit report disclosed the lack of documentation. The district court conclud-

ed that because the information was publicly disclosed before the lawsuit was filed, the relator could not proceed with his action as an "original source" and dismissed the action.

Reversing that decision, the DC Circuit held that to qualify as an "original source" relators are not required to provide the information to the government before a public disclosure; they are, however, required to provide the information prior to filing the lawsuit.[134] Relying on the Supreme Court's statements in *Rockwell International Corp. v. United States*[135] that an "original source" must provide information to the government on which the *relator's* allegations are based, the DC Circuit concluded that even though the complaint's allegations were publicly disclosed in the audit report, the relator had provided the government his direct and independent knowledge before filing suit and was therefore an "original source" able to pursue an FCA action.

Notably, the DC Circuit also held that damages were inappropriate because there was no allegation that the government received less value than it paid.[136] The relator alleged neither that the school system failed to provide any of the claimed services nor that it exaggerated costs—only that the school system failed to maintain documentation. The court noted, however, that statutory penalties would be appropriate if a violation was proven on remand.

Implications for Future False Claims Act Cases

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

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

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

About the Case

Although the government initially declined to intervene, it subsequently moved to dismiss the case as part of a negotiated settlement with the de-

fendant. The district court dismissed the case over the relator's objection. The DC Circuit rejected relator's argument that the government was not allowed to dismiss an action after it had initially declined to intervene. The court held, however, that 31 U.S.C. § 3730(c)(2)(B) required that the district court hold a fairness hearing and could not approve dismissal without findings that "the proposed settlement is fair, adequate and reasonable under all the circumstances."[137] In requiring a fairness hearing, the DC Circuit rejected the government's argument that it had an unfettered right to dismiss an FCA action without any court oversight.

Implications for Future False Claims Act Cases

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

STATE AND LOCAL DEVELOPMENTS

Legislative Developments

There was a lot of state and local FCA legislative activity in 2012 and we expect it to continue into 2013. Enduring a prolonged economic downturn, state and local governments undoubtedly hope to emulate the federal government's FCA successes. States are also incentivized by the 2005 federal Deficit Reduction Act ("DRA"), which encourages states to fight Medicaid fraud by allowing a state, if it has enacted an FCA that is at least as effective as the federal FCA, to keep 10 percent of what would otherwise be the federal share of Medicaid funds the state recovers.[138] A number of states passed or improved their FCAs in the years immediately following the DRA, but the 2009 and 2010 amendments strengthening the federal FCA rendered many state FCAs DRA-non-compliant and the states were given until March 31 or August 13, 2013, to bring their FCAs back into alignment.[139] Accordingly, several states amended their FCAs during 2012, as described below. (Unless otherwise noted below, the federal government has not yet decided whether the newly amended FCAs satisfy the DRA.)

- *California*: On September 28, 2012, the governor signed an amend-

ment strengthening California's FCA. The amendment expands the "original source" exception to the public-disclosure bar, allowing a person who "has knowledge that is independent of, and materially adds to, the publicly disclosed allegations or transactions" to satisfy the original-source exception, even if the person's information was not the basis for the investigation that led to the public disclosure. The amendment permits an individual who "planned and initiated" the FCA violation to recover a portion of the proceeds from the judgment. The amendment also allows an employee to seek reinstatement, special and punitive damages, and back pay if they experience retaliation for filing an FCA matter. Finally, the amendment increased the civil penalties for FCA violations.[140]

- *District of Columbia*: In November, the District of Columbia amended its Medicaid-only FCA to conform to the federal amendments.[141]
- *Georgia*: In April, Georgia substantially expanded the scope of its FCA. Previously, Georgia's FCA covered only false claims submitted under the state's Medicaid program. However, the amended FCA applies to all industries that conduct business with the state. Georgia also adopted the federal amendments to the FCA, including the expanded definition of the original-source exception to the public-disclosure bar and protections for individuals who face retaliation from their employer for initiating an FCA claim.[142]
- *Hawaii*: In July, Hawaii adopted the federal amendments to its FCA.[143]
- *Massachusetts*: In July, the Massachusetts legislature also adopted the federal amendments to its FCA.[144]
- *Rhode Island*: In June, Rhode Island expanded its FCA to allow municipalities, in addition to the Attorney General, to bring FCA actions through their city or town solicitors or duly appointed legal counsel.[145]
- *Tennessee*: In April, Tennessee modified its Medicaid-only FCA, attempting to reflect the scope of the federal amendments.[146] On November 20, however, the federal government issued a determination that Tennessee's amended FCA does not conform to the federal requirements. In order to remain eligible for the 10 percent incentive under the DRA, Tennessee

must further revise its FCA by August 31, 2013.[147]

- *Washington*: In March, Washington modified its Medicaid-only FCA to track the federal amendments.[148] On November 20, the federal government confirmed that Washington's amendments conform to the DRA and Washington remains eligible for the 10 percent incentive.[149]
- Other states that do not currently have FCAs have proposed such legislation, including Arizona, Kentucky, and Maine.[150]
- *New York City*: This year, New York City saved and amended its FCA, remaining one of only a few metropolitan areas that have their own FCAs (others include Chicago, Philadelphia, and Allegheny County, Pennsylvania). Enacted in 2005, the New York City FCA ("NYC FCA") expired on June 1, 2012.[151] On June 20, the mayor signed into law a permanent NYC FCA that is more closely aligned with the federal FCA and the New York State FCA ("NYS FCA").[152] The new NYC FCA is generally similar to the federal and NYS FCAs (minus the NYS FCA's tax-fraud provision, which is discussed below), although the NYC FCA does not allow a whistleblower to sue without the permission of the city's chief lawyer.[153] The NYC FCA now has a public-disclosure bar comparable to the federal and NYS FCAs, exempting claims by "an original source of the information" and allowing the city's chief lawyer to waive the bar "in his or her absolute discretion,"[154] and the NYC FCA's whistleblower awards now conform to the federal and NYS FCAs.[155] New York City also simultaneously enacted two other laws that could bolster the NYC FCA's effectiveness: the first extends whistleblower protections to officers and employees of city contractors and subcontractors, and the second requires city contractors and subcontractors to post information about whistleblower protections.[156]

Noteworthy Settlements

- *Texas Settlement with Janssen Pharmaceuticals*: In January, Johnson & Johnson subsidiary Janssen Pharmaceuticals agreed to pay $158 million to resolve Medicaid fraud claims in Texas. The complaint stemmed from a whistleblower lawsuit filed in 2004. It alleged that the Texas Medicaid

program excessively reimbursed pharmacies that dispensed Risperdal, an antipsychotic medication, to Medicaid patients because Johnson & Johnson overstated Risperdal's efficacy.[157]

- *Multistate Settlement with Johnson & Johnson*: In August, Johnson & Johnson reached a $181 million settlement with 36 other states and the District of Columbia stemming from allegations that it improperly marketed and advertised Risperdal and Invega, another antipsychotic drug.[158]
- *Multistate Settlement with McKesson Corporation*: In July, McKesson Corporation agreed to pay 30 states over $151 million in a Medicaid fraud settlement under state FCAs. McKesson allegedly reported inflated pricing information for over 1,400 prescription drugs. These prescription drugs include Adderall, Prozac, and Ritalin. New York received $64 million, the largest individual state portion of the settlement.[159]
- *California and Federal Settlement with Senior Care Action Network*: On August 23, the Senior Care Action Network ("SCAN") reached a $323 million settlement with California and the federal government over excess payments to Medicare and Medi-Cal, California's Medicaid program. The settlement resolves state and federal FCA claims, including those brought by a former employee of SCAN. The complaint alleged that SCAN failed to prove contractually required information to the California Department of Health Services, which prevented the department from revising capitation rates for SCAN. California will receive $190.47 million of the settlement, while the federal government will receive $133.2 million.[160]
- *New York Settlement with Compass Group USA*: On September 19, New York State reached an $18 million NYS FCA settlement with food services provider Compass Group USA, Inc., for improperly overcharging 39 New York schools and school districts. Compass received discounts from its food vendors but did not pass on those savings to New York's schools, as required by law. As part of the settlement, Compass adopted a code of conduct requiring it to work diligently to comply, ahead of the statutory time tables, with the enhanced nutritional standards of the Healthy, Hunger-Free Kids Act passed by the U.S. Congress on January 25, 2012.[161]

Noteworthy Judgments and Complaints

- *Arkansas Judgment against Johnson & Johnson*: In April, an Arkansas judge ordered Johnson & Johnson to pay more than $1.2 billion based on the marketing of Risperdal after a jury found that Johnson & Johnson minimized and concealed the dangers associated with the antipsychotic drug. Roughly $1.19 billion was a penalty for nearly 240,000 violations of Arkansas's Medicaid FCA. Johnson & Johnson has appealed the judgment.[162] The Arkansas attorney general recently asked for $181 million in attorneys' fees and expenses for the law firm that represented Arkansas in the case.[163]
- *Louisiana Verdict against Johnson & Johnson Affirmed*: In August, a Louisiana appeals court upheld a 2010 verdict against Johnson & Johnson for $258 million under the state's Medicaid-only FCA. That verdict also stemmed from the marketing and advertising of Risperdal, as well as Invega.[164]
- *Illinois and Minnesota Qui Tam Suits Filed against MetLife and Prudential*: Whistleblower suits filed in Illinois and Minnesota claimed that MetLife and Prudential failed to turn over unclaimed life insurance benefits to the state. The suits were filed on behalf of the states by Total Assets Recovery Services, an investigative company based in Michigan. They allege that MetLife and Prudential failed to comply with state requirements to notify state agencies when life insurance benefits went unclaimed.[165]
- *New York's Aggressive Use of Its FCA's Tax Provision*:
  - In 2010, the 2007 NYS FCA was expanded, by an amendment sponsored by NY Attorney General Eric Schneiderman (who was then a state senator), to encompass false filings relating to New York State and local taxes where the net income or sales of the defendant is at least $1 million for any taxable year and the damages sought exceed $350,000.[166] This provision is apparently unique among the federal, state, and local FCAs, although the IRS does have a whistleblower program.[167] On April 19, 2012—after more than a year of preparatory activity demonstrating his commitment to enforcing the NYS FCA's tax provision and working with whistleblowers[168]—the

AG publicly invoked the NYS FCA's tax provision for the first time, suing Sprint Nextel Corp. for over $300 million based on alleged underpayment of sales taxes. The AG's complaint, which superseded a whistleblower's *qui tam* complaint, alleges that Sprint Nextel, in an attempt to gain an unfair advantage over its competitors, was and is under-collecting sales taxes on flat-rate access charges for wireless calling plans and thus underpaying such taxes to the New York State and local governments.[169] Sprint Nextel moved to dismiss the complaint, arguing among other things that retroactive application of the NYS FCA violates the *Ex Post Facto* Clause of the U.S. Constitution.[170] The motion is pending.

- A second, and more sweeping, use of the NYS FCA's tax provision came to light in September 2012, when the media reported that AG Schneiderman had served subpoenas in July on at least a dozen private equity firms as part of a NYS FCA investigation into the propriety of what one article described as "a widely used tax strategy that saved these firms hundreds of millions of dollars."[171] According to media reports, the AG is looking into whether the firms (1) converted into fund assets the fees they collect for managing investors' money, resulting in the fees being taxed at the much lower rate for capital gains, rather than the rate for ordinary income, (2) deferred payouts of the converted fees in ways that improperly reduced their tax liabilities, and (3) treated management fees as a return of invested capital not subject to taxation.[172] The AG's "probe of tax practices at private-equity firms is based on information from a whistleblower, according to a person familiar with the matter."[173]
- A prominent whistleblowers' attorney has said that he and others already have large tax cases, and he predicted that the NYS FCA's tax provision and AG Schneiderman's "aggressive" enforcement efforts (combined with gridlock under the IRS whistleblower program) will make New York an important forum.[174]

- *Retroactive Application of New Mexico FCA Held Unconstitutional*: A New Mexico intermediate appellate court held on December 26 that retroactive application of that state's FCA, the Fraud Against Taxpayers Act,[175]

violates the federal and state *Ex Post Facto* Clauses. The decision contains a fairly extensive discussion of the issue.[176]

TRENDS IN 2012 AND TIPS FOR 2013

Increasing Whistleblower Awards, Activity, and Protections

In announcing record FCA recoveries in the 2012 fiscal year, the DOJ highlighted the particularly significant—and increasing—role that whistleblowers have played in litigation under the statute. Relators brought a record-setting 647 federal *qui tam* suits last year. Of the record $4.9 billion recovered to the U.S. Treasury in FY 2012, $3.3 billion stemmed from whistleblower suits.[177] "Since 1986, whistleblowers have been awarded nearly $4 billion, with $439 million in awards in fiscal year 2012";[178] and in FY 2012, the SEC received more than 3,000 whistleblower tips as part of the Dodd-Frank Whistleblower Program which, like the FCA, can enrich whistleblowers up to 30 percent of any amount collected.[179] Congress's enactment of additional federal legislative protections for government-employee whistleblowers, states' amendment of their FCAs to conform to the more whistleblower-friendly provisions of the federal statute, as well as notable whistleblower developments in the courts, suggest that this upward trend in whistleblower activity is likely to continue.

Notable Recoveries

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

- In July, GlaxoSmithKline agreed to pay $2 billion to resolve civil liability under the FCA. Of that amount, four whistleblowers who brought two *qui tam* lawsuits will receive a 15 to 25 percent share of about $1.017 billion, and whistleblowers who brought two other *qui tam* suits will receive

a share of about $250 million.[180]

- Abbott Laboratories, Inc. agreed in May to pay $800 million to resolve FCA claims related to off-label marketing. Whistleblowers will receive $84 million from the federal share of this settlement amount.[181]
- In February's $25 billion settlement with the five largest mortgage-service providers, $220 million went to settle FCA *qui tam* lawsuits, including $46.5 million for the relators. In announcing the settlement, the Attorney General touted a new website through which additional whistleblowers in the mortgage-servicing arena are invited to come forward.[182]
- Despite serving forty months in federal prison for his role in the underlying fraud, former UBS banker Bradley Birkenfeld obtained a $104 million award from the IRS's non-FCA whistleblower program in September for reporting tax evasion at the bank.[183]

Legislative Protection for Whistleblowers

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

Whistleblower-Friendly Developments in the Courts

Courts reviewing whistleblower suits in 2012 eased whistleblowers' ability to litigate their claims and further opened the door for federal employee whistleblowers. The D.C. Circuit announced a significant procedural victory for whistleblowers in *United States ex rel. Schweizer v. Océ N.V.,*[184] curtailing the power of the government and the defendant to settle a case over the relator's objection. In such circumstances, the government must now convince the court "after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances."[185] It handed whistleblowers another win in *United States ex rel. Davis v. District of Columbia,*[186] holding that a relator can qualify as an original source as long as the relator provides information to the government prior to filing suit, even if there has already been some public disclosure of relevant information. Further expanding the population of potential relators, in *Little v. Shell Exploration & Production Co.*,[187]

the Fifth Circuit joined the Tenth and Eleventh Circuits in holding that a government employee can sue under the FCA's *qui tam* provisions.

Other Key Developments and Trends in 2012

- *Ongoing DOJ Involvement After Declining To Intervene*. Under pressure from courts to make intervention decisions with regard to *qui tams* more quickly, the DOJ is increasingly seeking to keep its options open even after declining to intervene.[188] When declining intervention, the DOJ now regularly states that it is not intervening "*at this time,*" suggesting it could decide to intervene later. It has also filed statements of interest in connection with motions to dismiss that ask courts to dismiss the case without prejudice to the United States. Accordingly, companies must be prepared for ongoing DOJ investigations and interest even after a formal declination.
- *Focus on the Pharmaceutical Industry*. As in the last several years, the DOJ continues to focus on the pharmaceutical industry.
  - As described above, 2012 saw a large number of significant settlements with pharmaceutical companies. The federal exclusion regime, pursuant to which the government can exclude pharmaceutical and other companies from federal healthcare programs, fuels these huge settlements, imposing tremendous, unsustainable costs on healthcare manufacturers and the U.S. economy. Such enforcement almost invariably avoids the courts, and therefore companies and individuals lack clear rules for compliance, while those who can risk testing the government's case are often quite successful, demonstrating the weakness of the government's cases. Magnifying the enormous leverage afforded by the threat of exclusion is the fact that numerous pharmaceutical and medical device companies sell a significant portion of their products to beneficiaries of federal healthcare programs—and exclusion therefore could be a death blow for a company. At the same time, exclusion is a sub-optimal outcome even for the government, because it would have the effect of depriving program participants of access to valuable medications and devices.[189]
  - The Department of Health and Human Services has indicated that it

intends to increase scrutiny of the pharmaceutical industry in 2013, including by auditing several companies regarding their drug pricing policies.[190] Such audits could translate into additional FCA cases in the future, including those that focus on Medicare fraud or off-label marketing.

- *Use of Debarments and Suspensions of Government Contractors*. Agencies have come under increasing pressure to use debarment and suspension as an additional way of punishing government contractors. Suspension or disbarment can be devastating to those companies that conduct significant government business, and can be imposed on those who violate the FCA or who merely fail to disclose "credible evidence" of a violation of the FCA.[191] Congress has been pushing agencies to make more aggressive use of suspension and disbarment, including by requesting that GAO investigate the Defense Department's processes for identifying companies subject to disbarment or suspension.[192] In the current environment, it is more important than ever for companies to be alert to disclosure obligations and evaluate the risk of debarment along with other possible outcomes of fraud allegations.
- *Continued Expansion of the Implied-Certification Theory of FCA Liability.* Last year's Year in Review noted an expansion of the implied-certification theory of FCA liability, with the First and Third circuits joining six others that had previously embraced the theory. That trend continued in 2012, with *qui tam* relators and the DOJ pursuing cases based on implied certification. Recent assertions of the false-certification theory demonstrate a willingness by the DOJ to pursue the FCA's treble damages and penalties over what often appear to be mere differences in the interpretation of contractual terms or regulatory requirements. The DOJ settled or intervened in false-certification cases in a variety of sectors throughout the year, and examples are discussed throughout this Year in Review, including the Flagstar Bancorp settlement, the complaint against Wells Fargo Bank, the settlement with Gunnison Energy Corporation, and the intervention in the suit against American Commercial College Inc. The D.C. District Court in particular has been accepting of these cases,[193] and rulings favorable to the government promise heightened risk for contractors operating in contractual or regulatory gray areas.

- *Push for Broader Settlements.* As the DOJ has become more aggressive in pursuing implied-certification theories of FCA liability, companies negotiating settlements with the DOJ have sought greater protection from potential FCA claims. The most noteworthy example of this trend is the national mortgage settlement described above, which included a broad settlement of FCA claims based on certain covered conduct. Such settlements are likely to be tested in the coming years.

Tips for 2013

- *Arbitration of Retaliation Claims*. Many relators bring *qui tam* suits that include claims that they were illegally retaliated against in connection with their whistleblowing, in violation of the FCA. Such retaliation claims can proceed even if the underlying suit proves meritless. These claims may be subject to arbitration under certain circumstances, however, based on the terms of the employee's contract. *United States ex rel. Hepburn v. Northrop Grumman Systems Corp.*,[194] discussed above, is one recent example of a court enforcing an arbitration clause. Companies should review their employment agreements to ensure that retaliation-based claims are subject to arbitration, thereby speeding resolution and reducing the costs associated with litigating *qui tams*.
- *FCA Compliance Programs*. With heightened FCA enforcement activity by the DOJ, increased awareness in the relators' bar of sizeable recent settlements, and continued fallout from the financial crisis, companies who do business with the government are increasingly asking what they can do to reduce or mitigate their potential FCA exposure. While any company that does business with the government faces potential FCA liability, companies may find it is a good time to review their FCA compliance programs and consider implementing additional measures to limit risk.
  - *Basic Steps*. Any company can implement these relatively low-cost methods to reduce or mitigate potential FCA exposure: (1) hold regular, companywide fraud prevention training, which can be standalone or added to existing training programs; (2) maintain an internal whistleblower hotline, including a system to investigate issues and to protect whistleblowers from retaliation; (3) issue regular re-

minders of company email use policies to prevent casual and careless statements that could be misinterpreted or taken out of context; and (4) Deliberately handle employee separations by conducting detailed exit interviews for high-risk employees and carefully crafting severance packages.

- *Maintain Positive Employee Relations*. Good morale and company loyalty may be the best means to prevent disaffected employees from filing *qui tam* complaints that lead to frivolous but expensive litigation. Employee benefits, such as employee assistance programs to provide aid for dealing with personal issues, may mitigate incentives to bring frivolous suits.
- *Risk-Based Strategies*. In addition to the basic steps, companies facing moderate potential FCA liability may consider incorporating risk-based FCA strategies in their operations. For example, acting deliberately when dealing with ambiguous laws, regulations, and government contracts; seeking expert opinions as necessary; and maintaining meticulous records of the company's decision-making process. Formal risk assessments should also consider the potential FCA implications of decisions made in uncertain regulatory regimes.
- *An Advanced Program.* Companies with a high risk of FCA liability, such as pharmaceutical companies, financial institutions, and those in other heavily regulated industries, are increasingly considering targeted, intensive efforts for high-risk lines of business (generally those involving government programs, government-guaranteed products, or government contracts). Employees in these high-risk lines of business may receive specific, recurring anti-fraud training. These lines of business may also be subject to heightened oversight by companies' legal and compliance departments. Finally, organizations within these companies may be tasked with a systematic, periodic review of risks based on trends in FCA enforcement and/or audits of particular business activities.

Any or all of these steps can help to create an effective compliance program and legal strategy that will help prevent FCA allegations, limit po-

tential damages if a suit is filed, and serve as a positive equitable factor in the eyes of the DOJ or a court.

CONCLUSION

FCA activity promises to continue unabated into 2013.

NOTES

[74] *See Scott v. Metropolitan Health Corp.*, Nos. 05-1948, *et al.*, 2007 WL 1028853 (6th Cir. Apr. 3, 2007) (unpub.).
[75] 411 U.S. 792 (1973).
[76] 668 F.3d at 32.
[77] 697 F.3d at 95 (internal quotations omitted).
[78] *Id.* at 80.
[79] *Id.* at 88.
[80] *E.g.*, *United States ex rel. Longhi v. United States*, 575 F.3d 458, 473 (5th Cir. 2009) ("The Government's benefit of the bargain was to award money to eligible deserving small businesses…. In a case such as this, where there is no tangible benefit to the government and the intangible benefit is impossible to calculate, it is appropriate to value damages in the amount the government actually paid to the Defendants."); *see also United States v. Rogan*, 517 F.3d 449, 453 (7th Cir. 2008); *United States v. Mackby*, 339 F.3d 1013 (9th Cir. 2003).
[81] 21 U.S.C. § 355(a)-(d).
[82] *See Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 350 (2001) (citing 21 U.S.C. § 396).
[83] *See* 21 U.S.C. § 331(a); 21 C.F.R. § 201.5.
[84] 2012 WL 5992141, at *4-5.
[85] 131 S. Ct. 2653 (2011).
[86] 2012 WL 5992141, at *10-13.
[87] 2012 WL 5992141, at *13-15 (citing 447 U.S. 557 (1980)).
[88] 2012 WL 5992141, at *8 & n.9, *15.
[89] *Id.*
[90] 681 F.3d at 577-78.
[91] *Id.* at 579.
[92] *Id.* at 580.

[93] *Id.* at 581. That test considers the following factors: "(1) whether any judgment against the entity as defendant will be paid by the State or whether any recovery by the entity as plaintiff will inure to the benefit of the State; (2) the degree of autonomy exercised by the entity, including such circumstances as who appoints the entity's directors or officers, who funds the entity, and whether the State retains a veto over the entity's actions; (3) whether the entity is involved with state concerns as distinct from non-state concerns, including local concerns; and (4) how the entity is treated under state law, such as whether the entity's relationship with the State is sufficiently close to make the entity an arm of the State." *Id.* at 580.

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

[95] 2012 WL 488256, at *7.

[96] *Id.* at *14.

[97] *Id.* at *12.

[98] WilmerHale represented the Pharmaceutical Research and Manufacturers of America.

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

[100] 690 F.3d at 294 (citing *United States ex rel. Fine v. Chevron, U.S.A.*, 72 F.3d 740, 744 (9th Cir.1995) (*en banc*)).

[101] 553 U.S. 662, 668-69 (2008).

[102] Pub. L. No. 111-21, 123 Stat. 1617 § 4(f)(1) (2009).

[103] 2012 WL 5373532, at *6.

[104] *Id.* at *9 (citing *Smith v. Doe*, 538 U.S. 84, 92 (2003)).

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

[106] *See United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047,

1051 n.1 (9th Cir. 2011); *Hopper v. Solvay Pharm., Inc.*, 588 F.3d 1318, 1327 n.3 (11th Cir. 2009).
[107] 697 F.3d at 352 (citing *Charvat v. EchoStar Satellite*, LLC, 630 F.3d 459, 466 (6th Cir. 2010)).
[108] 696 F.3d at 528.
[109] *Id.* (citations omitted).
[110] *Id.* at 530-31.
[111] *Id.* at 531.
[112] 690 F.3d at 846.
[113] *Id.* at 847 (quoting 31 U.S.C. § 3730(h)(1)).
[114] *Id.* at 848.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] 690 F.3d at 957.
[120] 317 U.S. 537 (1943).
[121] 688 F.3d at 1050.
[122] *Id.* at 1050-51.
[123] *Id.* at 1045-46.
[124] 376 U.S. 612, 639 (1964).
[125] 688 F.3d at 1046.
[126] *United States of America ex rel. Berg v. Honeywell Int'l, Inc.*, No. 07-cv-00215, slip op. at 2 (D. Alaska Dec. 20, 2010).
[127] *Honeywell*, 2012 U.S. App. LEXIS 25897, at *2-5.
[128] *Id.* at *3 (quoting *Schumer*, 63 F.3d 1512, 1520 (9th Cir. 1995)).
[129] *United States v. A.D. Roe Co., Inc.*, 186 F.3d 717, 723 (6th Cir. 1999); *United States v. Bank of Farmington*, 166 F.3d 853, 860 (7th Cir. 1999), *overruled on other grounds by Glaser v. Wound Care Consultants, Inc.*, 570 F.3d 907 (7th Cir. 2009); *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1520 (10th Cir. 1996); *U.S. ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 652 (D.C. Cir. 1994); *but see United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1158 (3d Cir. 1991) (holding that all discovery materials, even when not filed with court, are publicly disclosed because materials are potentially available to public); *United States ex rel. Kreindler & Kreindler v. United Techs. Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993) (adopting *Stinson* approach); *United States ex rel. Paranich v. Sorgnard*, 396

F.3d 326, 333-34 (3d Cir. 2005) (questioning *Stinson* in light of more recent cases, but not overruling it).

[130] *Honeywell*, 2012 U.S. App. LEXIS 25897, at *4 (quoting *Schumer*, 63 F.3d at 1520).

[131] 2012 U.S. App. LEXIS 25897, at *4-5. *See also Seal 1 v. Seal A*, 255 F.3d 1154, 1161-62 (9th Cir. 2001) (public disclosure occurs where "outsider" with "significant incentive" to use allegations to own advantage receives information).

[132] 2012 U.S. App. LEXIS 25897, at *5 (citing *United States v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1019 (9th Cir. 1999)).

[133] 688 F.3d at 704 (citation omitted).

[134] 679 F.3d at 837-39.

[135] 549 U.S. 457, 470-72 (2007).

[136] 679 F.3d at 839-40.

[137] 677 F.3d at 1233-34.

[138] 42 U.S.C. §1396h (if state FCA meets certain requirements, federal share of Medicaid-fraud amounts recovered by state action shall be decreased by 10 percent).

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

[140] *See* A.B. 2492, 2011-2012 Leg., 2d. Sess. (Cal. 2012) (enacted), *available at* http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_2451-2500/ab_2492_bill_20120416_amended_asm_v98.html.

[141] *See* B19-0224, 2012 Sess. (D.C. 2012) (enacted), *available at* http://dcclims1.dccouncil.us/images/00001/20121113164311.pdf.

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

[143] *See* H.B. 1181, 2011-2012 Sess. (Haw. 2012) (enacted), *available at* http://www.capitol.hawaii.gov/session2012/bills/HB1181_SD1_.htm.

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

[145] *See* S. 2659, 2012 Sess. (R.I. 2012) (enacted), *available at* http://webserver.rilin.state.ri.us/BillText12/SenateText12/S2659.pdf.

[146] *See* H.B. 2378, 107th Gen. Assemb., 2d Sess. (Tenn. 2012) (enacted), *available at* http://www.tn.gov/sos/acts/107/pub/pc0806.pdf.

[147] *See* Letter from Daniel R. Levinson, Inspector Gen., to Robert E. Cooper, Jr., Att'y Gen. of Tenn. (Nov. 20, 2012), *available at* https://oig.hhs.gov/fraud/docs/

falseclaimsact/Tennessee.pdf.

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

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

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

[151] N.Y. City Local Law 53 § 4 (2005), *available at* http://www.nyc.gov/html/law/downloads/pdf/false1.pdf.

[152] N.Y. City Admin. Code § 7-801, *et seq.* (2102), *available at* http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=@PLADC0T7C8+&LIST=LAW+&BROWSER=EXPLORER+&TOKEN=51861664+&TARGET=VIEW; N.Y. City Local Law 34 (2012), *available at* http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1105375&GUID=C503029E-5EBE-4327-AAF8-55A42D619105&Options=ID|Text|&Search=false+claims.

[153] N.Y. City Admin. Code § 7-804(b)(2) (2012).

[154] *Id.* § 7804(d)(3). *Cf.* 31 U.S.C. § 3730(e)(4)(A); N.Y. State Fin. Law §190(9)(b).

[155] N.Y. City Admin. Code § 7-804(i). *Cf.* 31 U.S.C. § 3730(d); N.Y. State Fin. Law § 190(6).

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

[157] *See* Press Release, Office of the Att'y Gen. of Tex., *Texas Attorney General*

Secures $158 Million Agreement with Drug Maker Over Medicaid Fraud Allegations (Jan. 19, 2012), *available at* https://www.oag.state.tx.us/oagnews/release.php?id=3956; *see* Johnson & Johnson Form 10-Q at 29 (Nov. 9, 2012) ("In January 2012, JPI settled a lawsuit filed by the Attorney General of Texas…"), *available at* http://www.investor.jnj.com/secfiling.cfm?filingID=200406-12-140.

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

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

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

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

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

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

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

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

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

[167] 2010 N.Y. Sess. Laws Ch. 379 § 3 (McKinney), *available at http://ssl.csg.org/dockets/2012cycle/32B/32Bbillls/1332b06nywhistleblowerfraud.pdf*; Press Release, N.Y. State Sen. Eric T. Schneiderman, *Senator Eric. T. Schneiderman Shepherds Historic Anti-Fraud Taxpayer Protection Measure Through Legislature* (July 1, 2010), *available at* http://www.nysenate.gov/press-release/senator-eric-t-schneiderman-shepherds-historic-anti-fraud-taxpayer-protection-measure-.

[168] Less than a month into his term as AG, he created the Taxpayer Protection Bureau (TPB), dedicated to enforcing the amended NYS FCA, including against "large-scale tax cheats." Press Release, N.Y. State Office of the Att'y Gen., *A.G. Schneiderman Launches New Initiative to Bolster Recovery of Taxpayer Dollars & Fight Government Fraud* (Jan. 27, 2011), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-launches-new-initiative-bolster-recovery-taxpayer-dollars-fight. In June 2011, his office presented a full-day NYS FCA conference, featuring tax officials and whistleblowers' attorneys speaking on panels like "Tax Fraud and the New York False Claims Act: The New Frontier" and "New Paradigm of Public-Private Partnerships with NY OAG." *See NY Attorney General to Host False Claims Conference*, Corporate Crime Reporter, May 26, 2011, *available at* http://www.corporatecrimereporter.com/falseclaimsny05262011.htm.

[169] Superseding Complaint, *State of New York ex rel. Empire State Ventures v.*

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

[170] Memorandum of Law in Support of Defendants' Motion to Dismiss, *State of New York ex rel. Empire State Ventures v. Sprint Nextel*, No. 103917-2011, at 21-23 (N.Y. Sup. Ct., N.Y. Cnty. June 14, 2012), https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=YAyG/Z4jNMD3pMhpls40lQ==&system=prod.

[171] Karen Freifeld & Greg Roumeliotis, *Bain Capital Among Private Equity Firms Probed Over Tax Strategy*, Reuters, Sept. 1, 2012, *available at* http://www.huffingtonpost.com/2012/09/01/bain-investigation-private-equity-taxes_n_1849570.html.

[172] *E.g., id.*; Nicholas Confessore, et al., *Inquiry on Tax Strategy Adds to Scrutiny of Finance Firms*, N.Y. Times, Sept. 1, 2012, *available at* http://www.nytimes.com/2012/09/02/business/inquiry-on-tax-strategy-adds-to-scrutiny-of-finance-firms.html.

[173] Reed Albergotti & Laura Saunders, *Global Finance: Informer Sparked New York Probe—Attorney General Is Looking at How Buyout Firms Handled Management Fees, Tax Implications*, Wall Street Journal, Sept. 13, 2012, at C3.

[174] *John Phillips: The False Claims Act and How to Save $500 Billion*, Corporate Crime Reporter, Aug. 6, 2012, *available at* http://www.corporatecrimereporter.com/?s=%22john+phillips%22.

[175] N.M. Stat. Ann. §§ 44-9-1 to -14 (2007).

[176] *New Mexico ex rel. Foy v. Austin Capital Mgmt., Ltd.*, No. 31, 421 (N.M. Ct. App. Dec. 26, 2012).

[177] *See* Press Release, *supra* n.1.

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

[179] Press Release, U.S. Securities & Exchange Commission, *SEC Receives More than 3,000 Whistleblower Tips in FY 2012* (Nov. 15, 2012), *available at* http://www.sec.gov/news/press/2012/2012-229.html.

[180] Richard Blackden, *Glaxo whistleblowers to share $250m windfall*, The Telegraph, July 4, 2012, *available at* http://www.telegraph.co.uk/finance/newsbysector/pharmaceuticalsandchemicals/9374104/Glaxo-whistleblowers-to-

share-250m-windfall.html; *Whistleblowers played major role in Glaxo case, leading to Glaxo's record settlement*, PR Newswire, July 12, 2012, *available at* http://www.prnewswire.com/news-releases/whistleblowers-played-major-role-in-glaxo-case-leading-to-glaxos-record-settlement-161074325.html; *see* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *GlaxoSmithKline to Plead Guilty and Pay $3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data* (July 2, 2012), *available at* http://www.justice.gov/opa/pr/2012/July/12-civ-842.html.

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

[182] James O'Toole, *Whistleblowers Win $46.5 Million in Foreclosure Settlement*, CNN.com, July 2, 2012, *available at http://money.cnn.com/2012/07/02/news/economy/whistleblowers-foreclosure-settlement/*; Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Residential Mortgage-Backed Securities (RMBS) Working Group Announces New Resources to Investigate RMBS Misconduct* (May 24, 2012), *available at* http://www.stopfraud.gov/iso/opa/stopfraud/2012/12-opa-672.html; Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *$25 Billion Mortgage Servicing Agreement Filed in Federal Court* (Mar. 12, 2012), *available at* http://www.justice.gov/opa/pr/2012/March/12-asg-306.html; U.S. Dep't of Justice, Documents for the Mortgage Servicing Settlement (updated Mar. 2012), *available at http://www.justice.gov/opa/opa_mortgage-service.htm*.

[183] David Kocieniewski, *Whistle-Blower Awarded $104 Million by I.R.S.*, N.Y. Times, Sept. 11, 2012, *available at* http://www.nytimes.com/2012/09/12/business/whistle-blower-awarded-104-million-by-irs.html?_r=0.

[184] 671 F.3d 1228 (D.C. Cir. 2012).

[185] *Id.* at 1237 (citing 31 U.S.C. § 3720(c)(2)(B)).

[186] 679 F.3d 832 (D.C. Cir. 2012).

[187] 690 F.3d 282 (5th Cir. 2012).

[188] *See, e.g.*, *United States ex rel. Martin v. Life Care Ctrs. of Am., Inc.*, No. 08-cv-251, 2012 WL 6084626, at *5-7 (E.D. Tenn. Nov. 15, 2012) (government's conduct in requesting extensions of sealing deadline for four years had "stretched the FCA's 'under-seal' requirement to its breaking point," and noting that future requests to extend seal "in this action and other qui tam cases before this Court… will be met with significant scrutiny").

[189] In "The Exclusion Illusion: Fixing a Flawed Health Care Fraud Enforcement System," WilmerHale lawyers propose a better way: Take exclusion off the

table as a penalty option when a company has instituted a corporate integrity program that complies with comprehensive, rigorous standards certified by a third-party organization. David W. Ogden & Elisebeth Collins Cook, "The Exclusion Illusion: Fixing a Flawed Health Care Fraud Enforcement System," U.S. Chamber Institute for Legal Reform, Oct. 2012, available at http://www.wilmerhale.com/files/upload/The%20Exclusion%20Illusion.pdf.

[190] *Pharma Focus Should Be on Drug Pricing, Promotional Activities, OIG Official Says*, Health Care Daily Report, Nov. 7, 2012, *available at* http://www.bna.com/pharma-focus-drug-n17179870783/.

[191] 73 Fed. Reg. 67064 (Nov. 12, 2008), *available at* http://www.gpo.gov/fdsys/pkg/FR-2008-11-12/html/E8-26953.htm.

[192] U.S. Gov't Accountability Office, GAO-12-932, Report to U.S. Senate Committee on Armed Services, *Suspension And Debarment[:] DOD Has Active Referral Processes, But Action Needed to Promote Transparency* (Sept. 2012), *available at* http://gao.gov/assets/650/648577.pdf.

[193] *E.g.*, *United States v. DRC, Inc.*, 856 F. Supp. 2d 159 (D.D.C. 2012); *United States v. First Choice Armor & Equipment, Inc.*, 808 F. Supp. 2d 68 (D.D.C. 2011); *United States v. Kellogg Brown & Root Services, Inc.*, 800 F. Supp. 2d 143 (D.D.C. 2011).

[194] No. 11-302, 2012 WL 5877545 (M.D. Fla. Nov. 20, 2012).