False Claims Act: 2019 Year-in-Review

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Introduction: Highlights and Trends

FISCAL 2019 RECOVERIES TOP $3 BILLION

After dipping just below $3 billion the year before, federal False Claims Act (FCA) recoveries rebounded in Fiscal Year 2019 to just over $3 billion.[1] More than 600 new qui tam suits were filed for the ninth year in a row, and government-initiated complaints rose from 123 to 146. As usual, healthcare cases accounted for the bulk of awards, at $2.6 billion. Cases against pharmaceutical companies made up nearly three-quarters of that total. The value of judgments and settlements in Department of Defense (DoD) matters more than doubled, to more than $252 million, while the similar figure for cases involving neither healthcare nor defense dropped from $260 million to just under $200 million.

SUPREME COURT ALLOWS EXTENDED LIMITATIONS PERIOD IN DECLINED CASES

In *Cochise Consultancy, Inc. v. United States ex rel. Hunt,* 139 S. Ct. 1507 (2019), the Supreme Court held that: (1) the FCA's fall-back limitations period, allowing an action to be brought within three years after "the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date" of the alleged fraud," 31 U.S.C. § 3731(b)(2), is available in qui tam suits in which the government has declined to intervene, and (2) the relator in such a suit is not the "official of the United States charged with responsibility to act" whose knowledge would start the clock on the limitations period in § 3731(b)(2). 139 S. Ct. at 1510-11.

DOJ EXERCISES ITS STATUTORY DISMISSAL AUTHORITY

The January 2018 "Granston Memorandum"[2]—which provided a framework for DOJ's exercise of its authority to dismiss qui tam cases under 31 U.S.C. § 3730(c)(2)(A)—generated significant interest among the FCA bar when it was issued. At the time, it was unclear whether the memo would lead the Department of Justice (DOJ) to be more assertive in seeking dismissal of cases the Department determined were not in the public interest. While there has been some uptick over the past two years, DOJ motions to dismiss remain the exception, not the rule. In a December 19, 2019 letter to Senator Charles Grassley (R-IA), DOJ explained that it had moved to dismiss 45 qui tam cases between January 1, 2018 and October 25, 2019—roughly 4 percent of the 1170 cases filed.[3] Courts have granted 25 such dismissals, up from six during the preceding two years according to an analysis by Bloomberg Law.[4]

Courts have overwhelming granted DOJ motions to dismiss in cases where they are filed, but there have been some notable exceptions—and courts are divided over the proper standard for ruling on such motions. On one hand, the D.C. Circuit has held that DOJ has an "unfettered right" to dismiss qui tam suits. *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003). On the other, the Ninth Circuit has held that DOJ must identify a “valid government purpose” that is rationally related to dismissal. *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (internal quotation marks omitted). While both standards should be deferential to the government, DOJ has encountered resistance under the more stringent Ninth Circuit standard—and is currently appealing the denial of motions to dismiss to the Seventh and Ninth Circuits. *See United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, No. 17-CV-765-SMY-MAB, 2019 WL 1598109 (S.D. Ill. April 15, 2019); *United States v. Academy Mortgage Corp.*, No. 16-cv-02120, 2018 WL 3208157 (N.D. Cal. June 29, 2018). The question over the proper standard has been presented to the Supreme Court in a pending petition for certiorari. *See United States ex rel. Schneider v. JPMorgan Chase Bank, National Association*, No. 19-678 (*petition docketed* Nov. 20, 2019). The *CIMZNHCA* and *Schneider* cases are discussed below.

DOJ ISSUES GUIDANCE ON COOPERATION CREDIT, COMPLIANCE PROGRAMS, INABILITY-TO-PAY CLAIMS, AND CONSULTATION WITH AFFECTED AGENCIES

In 2019, DOJ issued a number of guidance documents, some codified in the Department’s Justice Manual, that can assist FCA defense counsel in negotiating with the Department. Probably the most significant addresses the manner in which DOJ will award credit to defendants who cooperate during an FCA investigation. Under this cooperation policy, codified in the Justice Manual, credit may be earned by voluntarily disclosing misconduct, cooperating in an ongoing internal investigation, or undertaking remedial measures such as implementing or improving compliance programs. The Criminal Division made public memoranda explaining to Assistant U.S. Attorneys (i) how to consider companies’ compliance programs when conducting an investigation of a corporation, determining whether to bring charges, and negotiating plea or other agreements and (ii) how to evaluate a company’s claim that it cannot afford to pay criminal fines or monetary penalties as part of a corporate settlement. Near the end of the year, DOJ entered into a memorandum of understanding with the Department of Housing and Urban Development formalizing arrangements for consultation prior to initiating an FCA action, and DOJ added language to the Justice Manual endorsing such consultation with affected agencies more generally.

COURTS DEBATE FIRST-TO-FILE BAR, MATERIALITY, RETALIATION STANDARDS

The courts of appeal continued to wrestle with many core provisions of the FCA. The First Circuit joined the D.C. and Second Circuits in holding that the first-to-file bar is not jurisdictional, rejecting the contrary view of the Fourth Circuit. A petition for certiorari is pending. While the issue is somewhat technical, it has important practical consequences because multiple relators pursue similar claims against common defendants with considerable frequency. In the wake of the Supreme Court’s 2016 decision in *Escobar*, which underscored the demanding nature of the FCA’s materiality requirement, courts continue to disagree over how to assess materiality both at the motion-to-dismiss and summary-judgment stages; the Third and Fifth Circuits issued notable decisions addressing materiality post-*Escobar* in 2019, while the Supreme Court continued to avoid a return to the issue. Retaliation claims also gained appellate consideration this past year, with the D.C. and First Circuits issuing decisions favorable to retaliation plaintiffs, at least at the pleading stage.

Federal Legislative and Regulatory Developments

CONGRESS

Enacted Legislation

- On July 1, 2019, President Trump signed into law H.R. 3151, the Taxpayer First Act.[5] The Act reforms the Internal Revenue Service (IRS) whistleblower program to include anti-retaliation protections for whistleblowers who report tax fraud to the IRS.[6] The Act also requires the IRS to provide whistleblowers with updates on how their submissions are being handled.[7]

House of Representatives

- On January 3, 2019, Representative Rick Allen (R-GA) introduced H.R. 59, the Transparency and Accountability of Failed Exchanges Act.[8] The bill—which is focused on establishing audit requirements for states that receive funding to create health insurance exchanges under the Patient Protection and Affordable Care Act (PPACA)—includes a provision that would amend the PPACA to clarify that the FCA preempts any state enforcement actions related to funds issued pursuant to the PPACA.[9]
- On January 30, 2019, Representatives John Garamendi (D-CA) and Don Young (R-AK) introduced H.R. 864, the Wildlife Conservation and Anti-Trafficking Act of 2019.[10] The bill would, among other measures, incentivize whistleblowers to report violations of anti-wildlife trafficking laws.[11]
- On July 9, 2019, the House passed H.R. 2515, the Whistleblower Protection Reform Act of 2019.[12] The bill would amend Section 21F of the Securities Exchange Act of 1934 to include language providing protections to whistleblowers who report misconduct to their employers.[13] The bill was passed in response to the Supreme Court's decision in *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767 (2018), which held that only whistleblowers who report misconduct to the Securities and Exchange Commission are afforded the protections provided in Section 21F.[14]
- On August 2, 2019, Representatives Gerald Connolly (D-VA), Mark Meadows (R-NC), Bob Gibbs (R-OH), and Brian Fitzpatrick (R-PA) introduced H.R. 4147, the Whistleblower Expansion Act of 2019. The bill would amend 41 U.S.C. § 4712—which establishes protections for federal contractors who report misconduct related to federal contracts—to clarify that § 4712 applies to subcontractors and subgrantees.[15]

- On October 23, 2019, Representative Cynthia Axne (D-IA) introduced H.R. 4816, the Whistleblower Programs Improvement Act, which would amend the Commodity Exchange Act to strengthen the Commodity Futures Exchange Commission whistleblower program.[16]

Senate

- On July 23, 2019, the Senate unanimously adopted a resolution (S. Res. 194) introduced by Senator Chuck Grassley (R-IA), along with the members of the bipartisan Senate Whistleblower Protection Caucus, designating July 30, 2019 as National Whistleblower Appreciation Day.[17]
- On July 30, 2019, Senators Mike Braun (R-IN) and Margaret Wood Hassan (D-NH) introduced S. 2315, the Whistleblower Act of 2019, the Senate companion bill to H.R. 4147 described above.[18]
- On September 23, 2019, Senators Chuck Grassley (R-IA), Joni Ernst (R-IA), Tammy Baldwin (D-WI), and Richard Durbin (D-IL) introduced S. 2529, the Whistleblower Programs Improvement Act, a companion bill to H.R. 2515, described above.[19]
- On October 17, 2019, the Senate passed by unanimous consent S. 2258, the Criminal Antitrust Anti-Retaliation Act of 2019, which would provide anti-retaliation protections for employees who report suspected violations of antitrust laws.[20] The bill would also provide a mechanism for whistleblowers who believe they have been retaliated against to file a complaint with the Secretary of Labor.[21]
- On November 6, 2019, Senator Rand Paul (R-KY) introduced S. 2798, the Whistleblower Protection Act of 2019, which would provide that whistleblower protections do not preclude—"in the case of criminal prosecutions and impeachments arising from the disclosures of whistleblowers"—the accused from confronting the whistleblower.[22]

DEPARTMENT OF JUSTICE

Adjustment to Civil Penalties?

- On April 5, 2019, DOJ made permanent, without change, an interim final rule published on June 30, 2016 that establishes the method for calculating annual inflation adjustments for civil monetary penalties, including penalties under the FCA.[23]
- Unlike in each of the past three years, DOJ failed to announce an annual penalty increase during 2019. We expect it to do so early in 2020.

Guidance

- **Cooperation Credit.** On May 7, 2019, DOJ released formal guidance regarding the manner in which DOJ will award credit to defendants who cooperate during an FCA investigation. Under this cooperation policy, codified in DOJ's Justice Manual, credit may be earned by voluntarily disclosing misconduct, cooperating in an ongoing internal investigation, or undertaking remedial measures such as implementing or improving compliance programs.[24]

According to Assistant Attorney General Jody Hunt, "voluntary disclosure . . . is the most valuable form of cooperation."[25] To receive credit, entities or individuals must make "proactive, timely, and voluntary self-disclosure" to DOJ regarding misconduct that could lead to previously unknown false claims and fraud. Credit may also be awarded if entities or individuals that discover additional misconduct beyond the scope of known concerns in the course of conducting an internal investigation, voluntarily disclose such additional misconduct.[26]

DOJ identified 13 forms of cooperation that may earn cooperation credit: (1) identifying individuals substantially involved in or responsible for the alleged misconduct; (2) disclosing relevant facts and identifying opportunities for the government to obtain evidence relevant to the government's investigation that is not in the possession of the company or individual or not otherwise known to the government; (3) preserving, collecting, and disclosing relevant documents and information relating to their provenance beyond existing business practices or legal requirements; (4) identifying individuals who are aware of relevant information or conduct, including an entity's operations, policies, and procedures; (5) making available for meetings, interviews, examinations, or depositions a company's officers and employees who possess relevant information; (6) disclosing facts relevant to the government's investigation gathered during the company's independent investigation (not to include information subject to attorney-client privilege or work product protection), including attribution of facts to specific sources rather than a general narrative of facts, and providing timely updates on the organization's internal investigation into the government's concerns, including rolling disclosures of relevant information; (7) providing facts relevant to potential misconduct by third-party entities and third-party individuals; (8) providing information in native format, and facilitating review and evaluation of that information if it requires special or proprietary technologies so that the information can be evaluated; (9) admitting liability or accepting responsibility for the wrongdoing or relevant conduct; (10) assisting in the determination or recovery of the losses caused by the organization's misconduct; (11) notifying a relevant agency about a company's or individual's disclosure, other cooperation, or remediation, so that the agency in its discretion may consider such factors in evaluating its administrative options, such as suspension, debarment, exclusion, or civil monetary penalty decisions; (12) publicly acknowledging the company's or individual's disclosure, other cooperation, or remediation; and (13) assisting the company or individual in resolving qui tam litigation with a relator or relators. This list is not exhaustive nor are these measures mandatory.[27]

Finally, DOJ stated that it will consider awarding credit when a company takes appropriate remedial measures in response to a violation, including appropriately disciplining or replacing those responsible for the misconduct, accepting responsibility for the violation, and implementing or improving compliance programs to prevent a recurrence.[28]

Cooperation credit will most frequently take the form of a reduction in the damages multiplier and civil penalties but may not result in a defendant's paying less than single damages. DOJ may also notify regulators in order for them to consider cooperation "in deciding how to apply administrative remedies," or publicly acknowledge the company's cooperation.[29]

– **Compliance Programs.** On April 30, 2019, the DOJ Criminal Division released a 19-page guidance document for prosecutors describing factors they should consider when conducting an investigation of a corporation, determining whether to bring charges, and negotiating plea or other agreements. The new guidance supplements a prior version issued by DOJ's Fraud Section in February 2017 and includes 12 factors that are organized under three overarching topics. Part I of the guidance asks whether a corporation's compliance program is well designed. It focuses on six key hallmarks of a well-designed compliance program relating to risk assessment, company policies and procedures, training and communications, confidential reporting structure and investigation process, third-party management, and mergers and acquisitions. Part II asks if the program is being applied earnestly and in good faith and whether the program is being implemented effectively. DOJ will consider the company's commitment by senior and middle management, autonomy and resources, and incentives and disciplinary measures. Finally, Part III discusses whether the compliance program works in practice. The policy explores a compliance program's capacity for continuous improvement, periodic testing, and review; investigation of misconduct; and analysis and remediation of underlying misconduct.[30]

– **Inability-To-Pay Claims.** On October 8, 2019, Assistant Attorney General for the Criminal Division Brian A. Benczkowski announced a new guidance memorandum on how to evaluate a company's claim that it cannot afford to pay criminal fines or monetary penalties as part of a corporate settlement.[31] The guidance introduced an 11-prong questionnaire that companies may use to assess financial hardship and to make the case for a fine reduction.[32]

– **Consultation with Affected Agencies**. In December 2019, DOJ added a paragraph to the Justice Manual codifying the principle that "[i]n any False Claims Act matter, the

USAO or Fraud Section attorneys will confer with the relevant agency during the investigative, litigation, and settlement phases of the matter [and] will solicit the agency's views on the False Claims Act matter, including, for example, on the falsity and materiality aspects of any alleged violations of the relevant agency requirements, in order to assist the Department in determining whether the elements of the False Claims Act can be established." In qui tam actions "if the agency does not support the whistleblower's pursuit of the matter, the agency may recommend that the Department seek dismissal of the case. While the decision whether to seek dismissal remains the exclusive authority of the Department, the Department will consult with the agency in making such a decision."[33]

DEPARTMENT OF HEALTH AND HUMAN SERVICES

– On October 9, 2019, the Department of Health and Human Services (HHS) announced proposals for a number of new and revised exceptions to the Physician Self-Referral Law (Stark Law) and safe harbors for the Anti-Kickback Statute (AKS). The proposals are intended to foster greater coordination and innovation among healthcare professionals and entities, consistent with the movement from traditional fee-for-service arrangements to value-based ones in which compensation is based on quality of care, health outcomes, and efficiency.[34]

The proposed changes to the Stark Law regulations would ease certain requirements and allow greater flexibility, including: (1) eliminating rules defining the time period when referrals are prohibited due to a noncompliant relationship in order to allow more case-by-case flexibility; (2) excluding titular ownership and employee stock ownership programs from ownership or investment interests; (3) creating a 90-day grace period to satisfy the signature and writing requirements of the exceptions; (4) eliminating the requirement that physician practices sign three-party relocation agreements in certain circumstances; (5) expanding the exception for remuneration unrelated to designated health services to include remuneration "not related to patient care services" (i.e., for services performed by a physician that could be performed by someone who is not a medical professional); (6) expanding the fair market value exception to cover leases, including those for less than a year that would otherwise not qualify for the office space rental exception; (7) allowing physicians to be paid up to $3,500 per year for items and services even in the absence of documentation, provided other requirements are met.[35]

Proposed changes to the AKS rules include revisions to several existing safe harbors. For example, the personal services and management safe harbor would be modified to allow for outcomes-based payments and to eliminate the requirements that the aggregate amount of compensation and exact schedule for the services be set in advance. The warranties safe harbor would be modified to allow coverage of bundled items and services, to impose additional safeguards, and to provide a written definition of "warranty." The local transportation safe harbor would be modified to expand the distance residents of rural areas may be transported and to remove any mileage limit on transporting discharged patients.[36]

The proposed rules were published in the Federal Register on October 17, 2019, and comments were accepted through December 31, 2019. The proposed changes follow Requests for Information from the Centers for Medicare & Medicaid Services and Office of the Inspector General (OIG), published in the summer of 2018 as part of HHS's Regulatory Sprint to Coordinated Care, which received over 700 comments from industry stakeholders.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

– On October 28, 2019, DOJ and the Department of Housing and Urban Development (HUD) published a Memorandum of Understanding establishing guidance on how HUD and DOJ will consult with one another regarding use of the FCA in connection with alleged defects in mortgage loans insured by Federal Housing Administration (FHA). The agreement provides that (1) HUD expects violations of FHA requirements by FHA-approved mortgagees or other participants in FHA mortgage insurance programs will be enforced primarily through HUD administrative proceedings; (2) HUD will rely on the Mortgagee Review Board to review and refer FCA claims; (3) HUD may recommend that DOJ seek dismissal of any case filed by a qui tam relator; and (4) the Mortgagee Review Board may exercise its discretion to seek administrative action even if it decides to decline referral of a matter for FCA litigation. The MOU sets forth how DOJ and HUD will cooperate during the investigative, litigation, and settlement phases of FCA matters when DOJ receives a referral from a third party, such as in qui tam cases. DOJ attorneys will also solicit HUD's input to determine whether the elements of the FCA can be established, which requires a showing of a material violation of HUD requirements.[37]

DEPARTMENT OF VETERANS AFFAIRS

– On October 24, 2019, the Department of Veterans Affairs (VA) OIG issued a report finding that the VA Office of Accountability and Whistleblower Protection (OAWP) had failed to properly implement the VA Accountability and Whistleblower Protection Act. President Trump established the VA OAWP in 2017 in order to improve VA's ability to hold employees accountable for misconduct and enhance protections for whistleblowers. The VA OIG's review of the office, prompted by requests from several Democratic Senators and Representative Timothy Walz (D-MN), found that, far from protecting whistleblowers, OAWP had aided in retaliation against whistleblowers, sparked confusion throughout the VA, and failed to carry out its mandate to discipline top executives. The report found that (1) OAWP misinterpreted its statutory mandate, resulting in failures to act within its investigative authority (i.e., investigating individuals who were not included within the scope of the OAWP's authority or failing to refer matters for investigation to other more appropriate investigative entities); (2) the OAWP did not consistently conduct procedurally sound, accurate, thorough, and unbiased investigations (i.e., failure to conduct investigations designed to ensure that all known or obviously relevant evidence was obtained); (3) VA has struggled with implementing the Act's enhanced authority to hold covered executives accountable (i.e., a disciplinary official mitigated the discipline recommended by OAWP as too severe, in part because of a lack of clear guidance); (4) the OAWP failed to fully protect whistleblowers from retaliation (i.e., failure to protect complainants' identities and prevent their concerns from being sent to the facilities/network offices where the complainant worked or that were the subject of the allegation); and (5) VA did not comply with additional requirements of the Act (i.e., failure to revise supervisors' performance plans and provide required training).[38]

SECURITIES AND EXCHANGE COMMISSION

– The Securities and Exchange Commission (SEC) continues to consider public comments received on the Whistleblower Rule amendments proposed in June 2018. The amendments would clarify the requirements for anti-retaliation protections under the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act and provide tools to increase efficiencies in the claims review process. As we previously reported, the amendments would: (1) allow awards based on information leading to deferred prosecution agreements and non-prosecution agreements entered into by DOJ or a state attorney general, or a settlement agreement entered into by the Commission outside of the context of a judicial or administrative proceeding; (2) authorize the SEC to adjust monetary sanctions of at least $100 million downward, but to no less than $30 million, so that the payout does not exceed an amount that is "reasonably necessary to reward the whistleblower and to incentivize other similarly situated whistleblowers"; (3) eliminate a whistleblower's potential to receive multiple recoveries from different whistleblower programs for providing the same information; (4) establish a uniform definition of "whistleblower"; and (5) clarify the SEC's ability to bar individuals from submitting whistleblower applications if the individual has submitted false information to the SEC. Comments were due September 18, 2018. We expect that the rule will be finalized in first half of 2020.[39]

COMMODITY FUTURES TRADING COMMISSION

- Between May and September 2019, the Commodity Futures Trading Commission (CFTC) issued alerts advising prospective whistleblowers on how to become eligible for financial awards and certain protections by reporting potential violations of law concerning four key issues: money laundering, insider trading, foreign bribery (i.e., fraud, manipulation, and false reporting), and virtual currency fraud. The alerts, which address types of misconduct outside of the CFTC's usual jurisdiction, reflect the CFTC's increased enforcement efforts in areas typically dominated by the Financial Crimes Enforcement Network and DOJ.[40]

Federal Case Law Developments

SUPREME COURT

Merits Decision: Statute of Limitations

Cochise Consultancy, Inc. v. United States ex rel. Hunt, **139 S. Ct. 1507 (2019)**

About the Case

The questions presented concerned the interpretation of 31 U.S.C. § 3731(b), which provides two limitations periods for FCA actions. Under § 3731(b)(1), an FCA action "may not be brought . . . more than 6 years after the date" of the alleged violation. Under § 3731(b)(2), an action "may not be brought . . . more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date" of the alleged fraud. The questions presented were: (1) whether a relator may rely on § 3731(b)(2) when the United States has declined to intervene, and (2) if so, whether the relator, an agency official, or a Justice Department lawyer is the "official of the United States charged with responsibility to act." 139 S. Ct. at 1510-11.

Relator Hunt alleged that the defendants, for whom he had worked, had engaged in a bid-rigging scheme that had led to inflated charges for security services provided to the Defense Department in Iraq. He filed his action more than six years after the alleged fraud occurred, but within three years of when he disclosed to the government evidence supporting his allegations. The government declined to intervene. *United States ex rel. Hunt v. Cochise Consultancy, Inc.***,** 887 F.3d 1081, 1085 (11th Cir. 2018). Reversing the district court, the Eleventh Circuit held that the relator could invoke § 3731(b)(2), even though the United States had not intervened, and that he did not qualify as an "official of the United States" within the meaning of § 3731(b)(2), thus allowing his claims to proceed. *Id*. at 1083. That holding conflicted with decisions of the Fourth and Tenth Circuits, which had held that § 3731(b)(2) does not apply in cases in which the government has declined to intervene, and of the Ninth Circuit, which had held that § 3731(b)(2) can apply in that circumstance but that the relator is the relevant "official of the United States."

In a unanimous opinion penned by Justice Thomas, the Supreme Court affirmed the Eleventh Circuit's decision and held that: (1) 31 U.S.C. § 3731(b)(2) is available in a qui tam suit in which the government has not intervened, and (2) the relator in such a suit is not the "official of the United States charged with responsibility to act" whose knowledge would start the clock on the limitations period in § 3731(b)(2). 139 S. Ct. at 1510-11.

Implications for Future FCA Cases

The Supreme Court's resolution of the disagreement in the lower courts provides greater clarity for FCA defendants and will discourage forum-shopping by relators. But it will also afford relators more time, in some circumstances, to bring FCA claims, thus keeping alive claims that otherwise would have been time-barred.

Pending Petitions for Certiorari: (1) Government Dismissals Under § 3730(c)(2)(A); (2) First-to-File Bar

***United States ex rel. Schneider v. JPMorgan Chase Bank, National Association*, No. 19-678 (*petition docketed* Nov. 20, 2019)**

About the Case

This petition presents the question of the appropriate standard of review for government motions to dismiss a qui tam complaint pursuant to 31 U.S.C. § 3730(c)(2)(A). That provision states that "[t]he Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 U.S.C. § 3730(c)(2)(A).

Relator Laurence Schneider alleged that the defendant submitted false certifications of compliance with the National Mortgage Settlement Agreement. Following a remand from the D.C. Circuit on some of the relator's claims, the United States moved to dismiss the action under 31 U.S.C. § 3730(c)(2)(A). After a hearing, the district court granted the government's motion to dismiss. The relator appealed, and the government moved for summary affirmance. The D.C. Circuit affirmed dismissal based on prior Circuit decisions holding that § 3730(c)(2)(A) "give[s] the government an unfettered right to dismiss [a qui tam] action," thus rendering the government's decision to dismiss essentially "unreviewable." *United States ex rel. Schneider v. JPMorgan Chase Bank, Nat'l Ass'n*, No. 19-7825, 2019 WL 4566462, at *1 (D.C. Cir. Aug. 22, 2019) (citing *Swift v. United States*, 318 F.3d 250, 252 (D.C. Cir. 2003); *Hoyte v. Am. Nat'l Red Cross*, 518 F.3d 61, 65 (D.C. Cir. 2008)). The D.C. Circuit's standard differs from the test adopted by the Ninth and Tenth Circuits, which employ a "two-step analysis . . . to test the [government's] justification for dismissal: (1) identification of a valid Government purpose; and (2) a rational relation between dismissal and accomplishment of the purpose. If the [United States] satisfies the two-step test, the burden switches to the relator 'to demonstrate that the dismissal is fraudulent, arbitrary and capricious, or illegal.'" *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 at 1145 (quoting *United States ex rel. Sequoia Orange Co. v. Sunland Packing House Co.*, 912 F. Supp. 1325, 1341, 1347 (E.D. Cal. 1995)); *see Ridenour v. KaiserHill Co., L.L.C.*, 397 F.3d 925, 936 (10th Cir. 2005).

Implications for Future FCA Cases

Since the issuance of the so-called Granston Memorandum in January 2018, the government has used its authority to dismiss qui tam actions under § 3730(c)(2)(A) with greater frequency. While both competing standards of review are deferential, the Supreme Court's embrace of the more deferential *Swift* standard would simplify the government's use of its statutory dismissal authority under § 3730(c)(2)(A).

***Estate of Robert Cunningham v. McGuire*, No. 19-583 (*petition docketed* Oct. 25, 2019)**

About the Case

This petition raises the question whether FCA's "first-to-file bar" is jurisdictional. The bar provides that "[w]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). If the bar is jurisdictional, then courts may consider facts outside the pleadings to determine its application. If it is not, they will be limited to the pleadings and materials that are subject to judicial notice on a motion brought pursuant to Federal Rule of Civil Procedure 12(b)(6).

In 2009, Cunningham sued Millennium, a urinalysis lab, alleging it had billed the government for medically unnecessary lab tests. *United States ex rel. Cunningham v. Millennium Labs., Inc.*, 202 F. Supp. 3d 198, 201 (D. Mass. 2016). In January 2012, respondent McGuire brought his own FCA action against Millennium, also alleging that Millennium submitted claims for medically unnecessary testing. After the government intervened and reached a settlement with the relators, McGuire brought a crossclaim for a declaratory judgment that he had been the first to file and thus was entitled, under 31 U.S.C. § 3730(d)(1), to the relator's share of the settlement money. Cunningham moved to dismiss the crossclaim, arguing that he, not McGuire, had been the first to file. *Id.* at 201-02.

The district court held that the first-to-file bar was jurisdictional and reviewed the crossclaim under Rule 12(b)(1). Based on materials outside the complaints, the court held that Cunningham had been the first to file and dismissed the crossclaim for lack of subject matter jurisdiction. *Id.* at 202-03.

The First Circuit reversed and held, for the first time, "that the first-to-file rule is not jurisdictional." *United States v. Millenium [sic] Labs., Inc.*, 923 F.3d 240, 251 (1st Cir. 2019). It determined that "McGuire was the first-to-file relator and that he has stated a claim that he is entitled to the relator's share of the settlement." *Id.* at 244. Analyzing the issue under Rule 12(b)(6), the First Circuit limited itself to the four corners of the relevant complaints. It determined that Cunningham and McGuire had alleged different frauds and that McGuire had established that he had been the first to file a claim of the sort of fraud by Millennium that he had alleged. *Id.* at 252-53.

Implications for Future FCA Cases

Resolution of this Circuit split will provide greater certainty to lower courts regarding what evidence they can consider in applying § 3730(b)(5), to relators regarding what facts they must plead in order to avoid § 3730(b)(5)'s bar, and to defendants in whether to seek dismissal under Rule 12(b)(1) or Rule 12(b)(6).

Notable Denials of Certiorari: (1) Rule 9(b): Relator's Knowledge of Billing Records; (2) Rule 9(b): Information in Defendant's Possession

***United States ex rel. Strubbe v. Crawford County Memorial Hospital*, No. 19-225 (*cert. denied*, Nov. 25, 2019)**

About the Case

This is one of several cases in which petitioners have sought clarification about whether in order to satisfy Rule 9(b)'s heightened pleading standards a relator must be able to allege from personal knowledge the presence of misrepresentations in the defendant's invoices.

The relators alleged that paramedics and emergency medical technicians at a county hospital were ordered by management to perform unnecessary services and then enter incorrect time into the hospital billing software. But the relators did not have access to the bills sent to Medicare for the services provided nor to the underlying financial records for expenditures submitted on cost reports to Medicare. The defendants argued that because the relators did not see the Medicare bills, they could not allege the contents of the bills and thus could not adequately allege the falsity of any claims for payment. Both the district court and the Eighth Circuit agreed, dismissing the relators' complaint. *United States ex rel. Strubbe v. Crawford Cty. Mem'l Hosp.*, 915 F.3d 1158, 1161 (8th Cir. 2019).

Petitioners sought certiorari, asking the Supreme Court to resolve what they characterized as "a growing circuit split" between the more permissive First, Third, Seventh, Ninth and D.C. Circuits and the more restrictive Eighth and Tenth Circuits on the question of what specific knowledge a relator must have to be able to properly plead an FCA claim when the relator does not have access to the bills sent to the government.

***Intermountain Health Care, Inc. v. United States ex rel. Polukoff*, No. 18-911 (*cert. denied*, June 10, 2019)**

About the Case

This was another petition seeking clarification about how to apply Rule 9(b) in FCA cases. In particular, the relator-petitioner asked the Court to determine when, if ever, the typical requirement of alleging the “who, what, when, where, and how” of the alleged fraud may be relaxed because the information concerning one or more of those facts is in the defendant’s sole control. Pet. at 6.

The relator alleged that certain surgical procedures and associated hospital services provided by defendants were medically unnecessary, and that reimbursement claims to the government for these services were therefore false. The district court dismissed the complaint for failure to satisfy Federal Rule of Civil Procedure 9(b). The Tenth Circuit reversed. The court of appeals acknowledged that Rule 9(b) normally requires relators to allege “the who, what, when, where and how of the alleged claims” but it “excuse[d] deficiencies that result from the [relator's] inability to obtain information within the defendant's exclusive control.” *Id.*

D.C. Circuit: (1) Reverse False Claims; (2) Retaliation

***United States ex rel. Kasowitz Benson Torres LLP v. BASF Corp.*, 929 F.3d 721 (D.C. Cir. 2019)**

The D.C. Circuit affirmed that a failure to inform the Environmental Protection Agency (EPA) of the risks posed by certain chemicals in violation of the Toxic Substances Control Act does not, standing alone, cause a violation of the FCA’s reverse false claim provision.

About the Case

The Toxic Substances Control Act (TSCA) requires chemical manufacturers to provide the EPA with “information which reasonably supports the conclusion that [a] substance or mixture presents a substantial risk of injury to health or the environment” and authorizes EPA to take administrative action against any manufacturer that fails to disclose this information, including by imposing civil penalties. 929 F.3d at 724 (quoting 15 U.S.C. §2607(e)). Relator Kasowitz Benson Torres LLP alleged that the defendants (BASF Corporation, Covestro LLC, Dow Chemical Company, and Huntsman International LLC) failed for several decades to report the potential risks of isocyanate chemicals, which can pose health hazards if inhaled or exposed to skin. *Id.* Kasowitz argued that this failure to report violated the reverse false claim and conversion provisions of the FCA by depriving the government of property (in the form of substantial risk reports) and money (in the form of unpaid civil penalties). The district court dismissed the complaint.

The D.C. Circuit affirmed dismissal of the complaint in its entirety. The D.C. Circuit first rejected Kasowitz's theory that defendants violated the reverse false claim provision by concealing or avoiding "an obligation to pay or transmit money . . . to the Government." *Id.* at 725 (quoting 31 U.S.C. § 3729(a)(1)(G)). Kasowitz argued that the TSCA "automatically imposes an obligation to pay a civil penalty at the moment a defendant commits a violation," and that concealing the failure to report substantial risk information therefore created FCA liability. The D.C. Circuit disagreed. Analyzing the text of the TSCA, the panel concluded that the EPA had discretion to determine whether to impose a civil penalty. *Id.* at 726. Because not every TSCA violation results in a civil penalty, Kasowitz's automatic civil penalty theory failed. *Id.*

The D.C. Circuit next rejected Kasowitz's theory that defendants violated the reverse false claim provision by concealing or avoiding "an obligation to pay or transmit . . . property to the Government." *Id.* at 725 (quoting 31 U.S.C. § 3729(a)(1)(G)). Kasowitz argued that substantial risk information is property which defendants were obligated to transmit to the Government. The D.C. Circuit assumed without deciding that substantial risk information was the defendants' property but concluded that the defendants' obligation to provide this information to the Government did not constitute an obligation to transmit a property interest. *Id.* at 727. The D.C. Circuit also noted that Kasowitz's property rights theory "would make any violation of countless reporting requirements actionable under the FCA." *Id.* at 728*.*

Relying on the same underlying analysis, the D.C. Circuit also rejected Kasowitz's theory that defendants violated the FCA's conversion provision by possessing "property or money used, or to be used, by the Government." *Id.* at 728 (quoting 31 U.S.C. § 3729(a)(1)(D)). Defendants possessed neither property nor money to be used by the government because they had no obligation to pay any money or transmit any property interest to the government. *Id.*

Implications for Future FCA Cases

The D.C. Circuit expressed skepticism of novel theories of reverse claims liability. However, by grounding its analysis of Kasowitz's automatic liability theory in the text of the TSCA's penalty provisions rather than in the FCA, the Court left open the possibility that concealing a regulatory failure that carries an automatic, non-discretionary civil penalty could lead to FCA reverse false claims liability.

***Singletary v. Howard University*, 939 F.3d 287 (D.C. Cir. 2019)**

The D.C. Circuit reversed the district court's denial of leave to amend the plaintiff's FCA retaliation complaint, distinguishing between the standard required to adequately allege that an employer had terminated a plaintiff because of acts done in furtherance of an FCA action and the standard required to adequately allege that the plaintiff was terminated because of efforts to stop violations of the FCA.

About the Case

Dr. Sylvia Singletary was hired by Howard University as the "Attending Veterinarian" for the Medical School, where her responsibilities included overseeing the welfare of laboratory animals. 939 F.3d at 293. Under the Animal Welfare Act of 1966, 7 U.S.C. §§ 2131-2159 and the Health Research Extension Act of 1985, 42 U.S.C. § 289d, Howard as a condition of receiving federal grant money is required to house laboratory animals within appropriate temperature and humidity ranges and to annually certify compliance with all required animal welfare standards. 939 F.3d at 292.

Beginning in the summer of 2013, Singletary repeatedly informed her direct supervisor, Dr. Thomas Obisesan, that the air temperature in the lab animals' quarters was too high and that their living conditions were not in compliance with regulatory standards and violated the terms of the University's NIH grants. Obisesan was the University's Vice President for Regulatory Research and Compliance and the official responsible for certifying animal-welfare compliance, but he took no action in response to Singletary's concerns. *Id.* at 293-94. Singletary also reported her concerns to the Dean of the Medical School and the Chair of the University's Animal Care and Use Committee; they also took no action. During this time, the University certified to federal agencies that its lab animals were being appropriately maintained and cared for.

In April 2014, 21 mice died from heat exhaustion. Singletary emailed the NIH to report the deaths, and NIH directed Obisesan to submit a corrective action plan. Obisesan "excoriated" Singletary for reporting directly to NIH, and shortly thereafter Howard cut Singletary's appointment by six months. Singletary subsequently resigned. She later sued the University, alleging that she was terminated in retaliation for engaging in activity protected by the FCA. *Id.* at 294.

The district court dismissed and denied leave to amend, determining that Singletary's activities were not protected because they were within the scope of her employment at Howard and that she had failed to allege that the University was aware of her allegedly protected activity. *Id.* at 294-95.

The D.C. Circuit reversed. The Court first distinguished between the two forms of activity protected by the FCA's anti-retaliation provision: (1) acts in furtherance of an FCA action and (2) acts in furtherance of efforts to stop an FCA violation. Under the first prong, activity is protected only if the employee investigates matters with a "distinct possibility" of leading to a viable FCA case. *Id.* at 295. Under the second prong, however, the employee's activities are protected if the employee has "an objectively reasonable belief that the employer is violating, or will violate, the False Claims Act" and attempts to stop the potential violation. *Id.* at 296. Applying the second prong, the Court determined that Singletary had an objectively reasonable belief that Howard would falsely certify compliance with animal welfare standards and that she took action to "head[] off any false claim." *Id.* at 298.

Turning to the University's knowledge of Singletary's protected conduct, the Court rejected the argument that the University lacked notice because Singletary "was just doing her job," noting that she went above and beyond her job requirements—including by directly notifying NIH.

Judge Katsas dissented, arguing that Singletary never identified to her employers that they were potentially violating the FCA.

Implications for Future FCA Cases

This decision clarifies that an employee alleging an FCA retaliation claims does not need to identify a viable FCA action in order to establish that their activity was protected.

First Circuit: (1) Retaliation; (2) First-to-File Bar

***Guilfoile v. Shields*, 913 F.3d 178 (1st Cir. 2019)**

The First Circuit reversed in part the district court's dismissal of an FCA retaliation claim, holding that the terminated employee had adequately alleged that he had raised concerns about activity that could lead to an FCA action.

About the Case

Thomas Guilfoile worked for a healthcare conglomerate (the Integrated Entity) that partnered with hospitals to provide specialty pharmacy services. Upon learning that the Integrated Entity had entered into a contract with a consultant who also worked with hospitals under which the consultant would be paid for each hospital referred to the Integrated Entity, Guilfoile raised concerns with his employer that the consultant contract violated the AKS because the Integrated Entity had paid to secure contracts that could result in claims to federal healthcare programs. 913 F.3d at 184. He later learned that the Integrated Entity's hospital contracts included a false representation that the Integrated Entity had a fully staffed call center, and again raised concerns about contract fraud. He subsequently was terminated.

After his termination, Guilfoile sued the Integrated Entity and its owner alleging retaliation in violation of the FCA. According to Guilfoile's complaint, he was terminated for his efforts to stop FCA violations by protesting the consultant contract and the claims regarding a staffed call center. The district court dismissed the complaint. With respect to the consultant contract, the district court concluded that Guilfoile had failed to plead a violation of the AKS and that, even if he had pleaded an AKS violation, he had failed to connect any such violation to a potential false claim. *Id.* at 190. With respect to the call center, the district court concluded that the connection between the call center term and the submission of claims to the government was too tenuous and that Guilfoile had failed to adequately allege that the term was material within the meaning of the FCA.

The First Circuit reversed with respect to the consultant contract. Distinguishing between the standard required for alleging an FCA claim and the standard required for alleging termination in violation of the FCA, the Court held that Guilfoile only was required to allege that he raised concerns about activity that "reasonably could lead to an FCA action." In the Court's terms, "rather than plausibly pleading the existence of a fire . . . a plaintiff alleging FCA retaliation need only plausibly plead a reasonable amount of smoke." *Id.* at 189. Because Guilfoile's concern with the consultant contract centered on the AKS, he did not need to identify specific claims or plead materiality; instead, he satisfied his pleading requirement by alleging that the Integrated Entity paid kickbacks to secure a contract with a hospital that would include billing to federal insurance programs. *Id.* at 191.

Implications for Future FCA Cases

The First Circuit clarified that an employee alleging retaliation for raising concerns about kickbacks is engaging in conduct that "reasonably could lead to an FCA action" and is thus protected. *Id.* at 193.

***United States v. Millenium [sic] Laboratories, Inc.*, 923 F.3d 240 (1st Cir. 2019)**

The First Circuit held for the first time that the FCA's first-to-file rule is not jurisdictional and clarified the method of analysis for resolving first-to-file disputes. As noted above, a petition for certiorari is pending in the Supreme Court.

About the Case

The government intervened in and settled several qui tam suits against the defendants. Relator Mark McGuire filed a crossclaim for declaratory judgment that he was the first to file. Relator Robert Cunningham moved to dismiss, arguing that he had been first to file. Cunningham's complaint alleged that defendant Millennium Labs used a single drug-testing kit that could detect multiple drugs but encouraged physicians to bill as if several tests had been conducted, and that this single kit also could lead to unnecessary confirmatory testing. McGuire's complaint alleged that Millennium persuaded physicians to execute a standard battery of confirmatory tests regardless of whether there was a need for those tests. McGuire's complaint was among those settled by the government; Cunningham's was not. The district court found that the first-to-file rule was jurisdictional, agreed with Cunningham that he had been first to file, and dismissed McGuire's crossclaim for lack of subject matter jurisdiction.

The First Circuit reversed. Applying the clear statement rule of *Arbaugh v. Y&H Corp*., 546 U.S. 500 (2006), and in consideration of the approaches taken in other circuits, the panel overturned Circuit precedent and held that the first-to-file rule was not jurisdictional. On the merits, the panel held that McGuire was first to file because McGuire and Cunningham alleged "different frauds with different mechanisms." 923 F.3d at 253. The Court rejected the district court's determination that

Cunningham's complaint had been sufficient to put the government on notice, holding instead that to be eligible for first-to-file treatment a complaint must contain "all the essential facts" of later-filed claims. *Id.* at 254.

Implications for Future FCA Cases

This case brings the First Circuit into line with the D.C. Circuit and the Second Circuit, which have held that the first-to-file rule is not jurisdictional, and into opposition with the Fourth Circuit, which has maintained that the rule is jurisdictional. Because a jurisdictional objection may be raised at any time, this ruling is relevant to when a first-to-file objection may be raised; it is also relevant to whether a district court may consider matters outside the pleadings pursuant to Fed. R. Civ. P. 12(b)(1) or is limited to the four corners of the complaint and materials fairly incorporated by reference pursuant to Fed. R. Civ. P. 12(b)(6). With a pending petition for certiorari, the Supreme Court has an opportunity to rule definitively on whether the first-to-file bar is jurisdictional.

Second Circuit: (1) Alternate Remedies; (2) Federal Reserve Banks as Permissible Defendants

***United States v. L-3 Communications EOTech, Inc.*, 921 F.3d 11 (2d Cir. 2019)**

The Second Circuit held that a relator who (a) previously voluntarily dismissed his qui tam action and (b) had no other qui tam actions pending *at the time* the government pursued its own FCA claim is not entitled to the relator's share of a later government settlement.

About the Case

The relator sought to rely on the FCA provision stating, *inter alia*, that if the government pursues an "alternate remedy," the person who initiated the qui tam action "shall have the same rights in such proceeding as such person would have had if the action had continued under this section." *See* 31 U.S.C. § 3730(c)(5). The Court found that the relator's reliance on § 3730(c)(5) was misplaced, holding that it applied only if the relator had a pending qui tam action in which the government could intervene *when* the government initiated its own FCA action.

Implications for Future FCA Cases

The Court addressed an issue of first impression in the Second Circuit and joined the position of several other circuits with this ruling.

***United States v. Wells Fargo & Co.*, 943 F.3d 588 (2d Cir. 2019)**

The Second Circuit held that the FCA can apply to those who defraud the lending programs of the Federal Reserve Banks (FRBs), overturning the ruling of the lower court.

About the Case

The Court reasoned that while FRB personnel are not “officer[s]” or “employee[s] . . . of the United States” within the meaning of § 3729(b)(2)(A)(i), 943 F.3d at 596-98, the banks themselves fit the statute’s definition of government “agents.” *Id.* at 598-601. Accordingly, requests made to their emergency lending programs can be considered “claims” under the FCA. *Id.* The Court cautioned, however, that its opinion “is narrowly focused on the FCA and [the Court’s] analysis may not be relevant to questions involving the status of the FRBs in other contexts.” *Id.* at 592.

Implications for Future FCA Cases

This ruling introduces a new class of potential FCA defendants—those who defraud the lending programs of the FRBs.

Third Circuit: (1) Collateral Estoppel; (2) Materiality; (3) Standing

***United States ex rel. Doe v. Heart Sol., PC*, 923 F.3d 308 (3d Cir. 2019)**

The Third Circuit (1) held that an FCA defendant is not estopped from denying the falsity and scienter elements of an FCA claim by an individual employee’s criminal conviction; and (2) analyzed post-*Escobar* materiality and causation standards on summary judgment.

About the Case

An individual was convicted of defrauding Medicare after having admitted at her plea colloquy that Medicare paid her employer for testing that she had falsely represented. After her conviction, the government intervened in a civil qui tam FCA case against her and her employer. The district court granted summary judgment in favor of the government, relying on the individual’s criminal conviction and plea colloquy.

The Third Circuit reversed. The court of appeals first held that although an employee’s criminal conviction and plea colloquy collaterally estopped her from denying the falsity and knowledge elements of a civil FCA claim regarding the same conduct, the conviction and colloquy did not collaterally estop her employer from denying them. The Third Circuit reasoned that collateral estoppel does not apply unless the party against whom the earlier decision is asserted previously had a “full and fair opportunity to litigate that issue.” 923 F.3d at 316. The Court concluded that the employer did not have any opportunity, much less a “full and fair opportunity” to contest the claim at the employee’s separate criminal proceedings.

The Third Circuit also analyzed post-*Escobar* materiality standards. The government submitted evidence that Medicare would not have paid the testing claims without a supervising neurologist’s certification, which is required by applicable regulations. As the defendants failed to introduce evidence to the contrary, the Court held that the government had met its materiality burden. The Court also held that by establishing materiality, the government had also adequately demonstrated causation. Specifically, the Court noted that "[t]his conclusion as to materiality also means that there was causation—the final FCA element. Because these misrepresentations were material, they caused damage to Medicare." *Id.* at 318.

Implications for Future FCA Cases

First, the Court clarified the scope of collateral estoppel with respect to criminal convictions and civil FCA actions. Second, in analyzing post-*Escobar* materiality standards on summary judgment, the Court combined the separate elements of causation and materiality. This approach may lighten the government's burden to show causation in the Third Circuit going forward.

***United States v. Wegeler*, 941 F.3d 665 (3d Cir. 2019)**

The Third Circuit affirmed the denial of a relator's motion to intervene in a criminal case against a defendant named in a parallel civil FCA case.

About the Case

The relator sought leave to intervene in criminal proceedings against the same defendant she had named in her qui tam suit under the FCA. The motion for leave was denied. The relator appealed, arguing that she was entitled to participate in the criminal action in order to recover a share of any restitution because the criminal action was an "alternate remedy" under the FCA, 31 U.S.C. § 3730(c)(5).

The Third Circuit affirmed the denial of leave to intervene. Joining the Ninth and Eleventh Circuits, the Third Circuit held: (1) a qui tam relator lacks standing to intervene in a criminal case notwithstanding her rights to share in any recovery and to participate in any alternate-remedy proceedings under the FCA; and (2) even if she had standing to intervene to vindicate her rights under the FCA, the only remedy the FCA provides a relator is to commence or continue the FCA action.

Implications for Future FCA Cases

The Third Circuit proclaimed that this ruling maintained a "long line of precedent" holding that a private individual lacks "a judicially cognizable interest in" another individual's prosecution and sentence. 941 F.3d at 669 (internal quotation marks omitted).

Fourth Circuit: Collateral Estoppel

***United States v. Whyte*, 918 F.3d 339 (4th Cir. 2019)**

The Fourth Circuit held, as a matter of first impression, that the government is not a party to an FCA action in which it does not intervene and therefore cannot be collaterally estopped by a prior FCA action in which it did not intervene.

About the Case

This case involves parallel criminal and FCA proceedings related to a contract defendant's company entered into to provide armored vehicles to multinational forces in Iraq. 918 F.3d at 342. Despite receiving progress payments, the company failed to deliver all of the promised vehicles and the contract was terminated. *Id.* at 342-43. The Department of Defense later learned that the delivered vehicles were also defective. *Id.* at 343.

The defendant was indicted on multiple counts of fraud. Several months later, the company's president filed a separate qui tam suit against the defendant and his company. *Id.* The government declined to intervene. The case ultimately went to trial, where the jury found that the defendant had not presented fraudulent claims. *Id.*

The defendant filed several motions to dismiss his indictment, arguing that the criminal case was collaterally estopped by the prior FCA action. *Id.* The district court rejected this argument, holding that the government was not bound by a judgment in an FCA suit in which it had not intervened. *Id.* at 343-44. After being convicted at trial, the defendant appealed, seeking reversal of his conviction on multiple grounds, including that the district court erroneously concluded that the government was not estopped from prosecuting him for the same conduct adjudicated in the FCA suit. *Id.* at 344.

On appeal, the Fourth Circuit held, as a matter of first impression, that the government is not a party to an FCA action in which it declined to intervene for purposes of collateral estoppel. *Id.* at 345. In reaching this conclusion, the Fourth Circuit relied heavily on cases holding that the government was not a party for other purposes in qui tam suits in which it declined to intervene. *See United States ex rel. Eisenstein v. City of New York*, 556 U.S. 928 (2009); *United States ex rel. Sanders v. N. Am. Bus. Indus., Inc.*, 546 F.3d 288 (4th Cir. 2008). Because the government was not a party to the earlier FCA action, the Court held that the government did not have a full and fair opportunity to litigate the matter of the defendant's fraud as required to establish collateral estoppel. 918 F.3d at 348.

Implications for Future FCA Cases

For FCA cases in the Fourth Circuit in which the government does not intervene, the government will not be estopped from pursuing criminal actions based on the same underlying conduct.

Fifth Circuit: (1) Materiality; (2) Use of Statistical Sampling

***United States ex rel. Lemon v. Nurses to Go, Inc.*, 924 F.3d 155 (5th Cir. 2019)**

The Fifth Circuit conducted a materiality analysis under the factors set out by the Supreme Court in *Escobar*, finding that relators had alleged material violations.

About the Case

Relators, former employees at a hospice care provider, alleged that several hospice care providers violated the FCA by engaging in fraudulent Medicare billing practices. Relators alleged several billing irregularities, including failure to complete and maintain required certifications, failure to conduct face-to-face encounters between physicians and patients, billing for services to deceased patients, and enrolling patients in continuous home care unnecessarily. 924 F.3d at 157. The district court granted defendants' motion to dismiss, holding that the underlying acts, as alleged, were immaterial under the FCA. *Id.* at 158.

The Fifth Circuit analyzed whether the violations alleged by relators were material under the non-exhaustive factors set out by the Supreme Court in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). *Id.* at 161-63. First, the Court examined whether the relators' claims were based on fraudulent certifications of compliance with conditions of payment. Although not conclusively establishing materiality, the Court found that the allegations set out violations of requirements expressly identified as conditions of payment by Congress and Medicare and were therefore probative evidence of materiality. *Id.* at 161. The Court also found that relators raised a reasonable inference that the government would deny payment if it knew about the alleged violations. Relators alleged that the HHS OIG has taken criminal and civil enforcement actions against other hospice providers that submitted bills for ineligible services. *Id.* at 162. Following the Sixth Circuit's reasoning in *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 892 F.3d 822 (2018), the Fifth Circuit agreed that *Escobar* does not require the relator to allege specific prior government actions prosecuting similar claims. *Id.* Finally, the Court found that the government would attach importance to the underlying violations since it had found the allegations were sufficient to establish that the government would deny payment. *Id.* at 163. With respect to the allegations that defendants provided and charged for unnecessary continuous care services, the Court rejected defendants' argument that they "billed for what they did," noting that defendants "cannot provide and charge for services without certifying that the patients are first eligible for those services" and therefore that the violations as alleged were not minor. *Id.* The Fifth

Circuit found that the relators had alleged material violations under *Escobar* and remanded for consideration of defendants' Rule 9(b) particularly arguments.

Implications for Future FCA Cases

This decision provides an example of a detailed analysis of materiality under *Escobar*.

***United States v. Hodge,* 933 F.3d 468 (5th Cir. 2019)**

The Fifth Circuit upheld a jury verdict awarding almost $300 million to the government for claims under the FCA and the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA).

About the Case

A former branch manager for Allied Capital filed a qui tam action alleging that Allied Capital violated the FCA by fraudulently obtaining FHA insurance for loans that later defaulted. The government intervened. After a five-week trial, Allied Capital was found liable under the FCA for misrepresentations regarding its compliance with FHA underwriting guidelines and for misrepresenting that certain loans were originated by registered branches, as well as for claims under FIRREA.

On appeal, Allied Capital argued that there was insufficient evidence of scienter, materiality, and causation to support liability for the FCA claims. *See* 933 F.3d at 473. With respect to scienter, the Fifth Circuit found sufficient evidence presented by the government that Allied Capital lied about its use of unregistered branches and continued originating loans from unregistered branches even after receiving notice of the issue from HUD. *Id.* The Court also found that there was sufficient evidence to establish materiality, citing testimony that HUD would not have insured loans originated by unregistered branches and evidence regarding the government's actions once it discovered loans originated from unregistered branches and Allied Capital's conduct. *Id.* at 474. Finally, the Court found that the government presented enough evidence to establish that the false statements were a proximate cause of the losses where expert evidence was used to show that a sample of unregistered loans defaulted at higher rates, noting that "connecting false statements and defaults with specific loans is not feasible in a case that relies on sampling and extrapolation." *Id.* at 475.

Allied Capital also argued on appeal that the methodologies employed by the government's experts were insufficiently reliable, necessitating reversal of the jury's verdict. *Id.* Of note, the Court rejected Allied Capital's challenge to the reliability of the sampling methodology used by the government's expert to evaluate loan files where the parties had agreed on the sampling methodology during discovery and Allied Capital had not previously raised objections as to the reliability of the methodology. *Id.* at 477-78.

The Fifth Circuit affirmed the trial verdict.

Implications for Future FCA Cases

Defendants should take note that sampling and extrapolation can be used to establish causation and raise any arguments as to the reliability of a sampling methodology during discovery so as not to waive potential defenses at summary judgment or trial.

Sixth Circuit: [None]

Seventh Circuit: Government Dismissals Under § 3730(c)(2)(A)

***United States ex rel. CIMZNHCA, LLC v. UCB, Inc.*, No. 17-CV-765-SMY-MAB, 2019 WL 1598109 (S.D. Ill. April 15, 2019)**

The district court denied the government's motion to dismiss the relator's claims because the government had not investigated the specific allegations against the defendants in the case or conducted a cost-benefit analysis specific to the case.

About the Case

The relator alleged that pharmaceutical defendants had provided kickbacks (in the form of free services) to prescribers to induce them to prescribe a drug, Cimzia, to patients. 2019 WL 2409576, at *1. As a result, pharmacies allegedly submitted false claims to Medicare and Medicaid that led to tens of millions of dollars in improper reimbursements. *Id.*

The government declined to intervene and moved to dismiss the case under 31 U.S.C. § 3730(c)(2)(A). *Id.* The relator responded that the government's decision to dismiss was arbitrary and capricious and unrelated to any rational government interest. *Id.*

The district court considered a circuit split regarding the appropriate standard for evaluating the government's exercise of its statutory dismissal authority. *Id.* at *2. The court explained that the Fifth and Eighth Circuits agree with the standard set forth by the D.C. Circuit in *Swift v. United States*, under which the government has an "unfettered right to dismiss" cases under the FCA, leaving the decision to dismiss "essentially unreviewable" in court. *Id.* (quoting 318 F.3d 250, 252 (D.C. Cir. 2003) (internal quotation marks omitted)). In contrast, the Ninth and Tenth Circuits apply a two-step burden-shifting test that requires the government to identify "a valid government purpose," and "a rational relation between dismissal and accomplishment of the purpose." *Id.* (quoting *United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1145 (9th Cir. 1998) (internal quotation marks omitted)).

The district court found the reasoning of the Ninth and Tenth Circuits persuasive and rejected the *Swift* standard. *Id.* at *3. Applying the *Sequoia Orange* standard, the court determined that the government's decision to dismiss was arbitrary, despite the government's asserted interest in avoiding litigation costs. The court reasoned that, rather than "fully investigate the allegations against the specific defendants in this case," the government merely conducted "a general collective investigation" into eleven similar cases that the relator had filed against various defendants nationwide, and the government had not performed a cost-benefit analysis to compare potential litigation costs to a potential recovery in this particular case. *Id.* The court also suggested that the government's proffered interests may have been "pretextual," in light of the government's "animus towards the relator." *Id.* at *4.

The district court also denied the government's motion for reconsideration. The government filed a notice of appeal in July 2019, and the case is now pending before the Seventh Circuit.

Implications for Future FCA Cases

The case highlights the practical importance of the standard for evaluating the government's exercise of its statutory dismissal authority. While both the *Swift* and *Sequoia Orange* standards are facially deferential to the government, district courts have used *Sequoia Orange* standard to deny motions to dismiss that would in all likelihood have been granted under *Swift*. The possibility of such denials may result in more analysis and documentation by DOJ in jurisdictions governed by *Sequoia Orange*—and should inform defense counsel's engagement with DOJ in seeking such dismissals.

Eighth Circuit: Submission of False Claims

***United States ex rel. Strubbe v. Crawford County Memorial Hospital*, 915 F.3d 1158 (8th Cir. 2019)**

About the Case

The relators, an EMT and two paramedics at Crawford County Memorial Hospital (CCMH), alleged that CCMH submitted false claims for Medicare reimbursement and made false statements or reports to get these reimbursements paid. Relators alleged, for example, that after getting a new CEO, CCMH began to require that paramedics perform breathing treatments that had already been provided by nursing staff and that hospital management told employees that this change was for "billing and cost reimbursement purposes." 915 F.3d at 1163. Employees were also required to document that each breathing treatment lasted 30 minutes regardless of its actual length. *Id*. Relators alleged on information and belief that these changes allowed the hospital to seek higher reimbursement from Medicare. *Id*.

The district court dismissed the substantive FCA claims for failure to plead fraud with particularity because the complaint did not allege facts showing that any false claims were submitted. *Id.* at 1162. In affirming the district court, a majority of the panel acknowledged that a relator can meet the Rule 9(b) particularity requirement without pleading representative examples of false claims if the relator alleges the "particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted." *Id.* at 1164 (quoting *United States ex rel. v. Planned Parenthood of the Heartland*, 765 F.3d 914, 918 (2014)). The majority concluded, however, that the facts pled showed only "the *possibility* that CCMH submitted claims." *Id.* at 1165. The majority noted that the relators did not have access to the billing department, did not provide any details about the hospital's billing practices, and did not allege facts to show how they knew that false claims were actually submitted to Medicare. *Id.* at 1165-66.

The dissent concluded that relators had adequately alleged facts that led to a strong inference that claims were actually submitted. *Id.* at 1171. The dissent noted that the majority opinion would significantly limit the universe of potential FCA whistleblowers, as it "essentially require[s] that the relators here witness the Medicare forms being submitted in order to get past the pleading stage in this case." *Id.* Such an approach, the dissent argued, would allow the hospital to "effectively eliminate any civil liability for false claims by eliminating access to financial information." *Id*.

Implication for future FCA cases

This decision limits the ability of relators to survive the pleading stage when they cannot provide representative examples of false claims and when they cannot supply billing or other personal knowledge to support an inference that false claims were actually submitted as a result of the defendants' alleged misconduct. It will contribute to the ongoing debate among the circuits on the proper gatekeeping to be performed by Rule 9.

Ninth Circuit: [None]

Tenth Circuit: Public Disclosure Bar

***United States ex rel. Reed v. KeyPoint Government Solutions,* 923 F.3d 729 (10th Cir. 2019)**

About the Case

The relator alleged that her former employer, KeyPoint Government Solutions (KeyPoint), a company that conducts background investigations for the federal government, fraudulently billed the government for work that was inadequately or improperly performed. 923 F.3d at 736.

The United States declined to intervene, and KeyPoint moved to dismiss on the ground that the complaint was barred by the FCA's public disclosure bar. Converting the motion to a summary-judgment motion, the district court found that the relator's claims were "substantially the same" as those that had been publicly disclosed—in multiple public documents, including news reports, congressional hearings, and other lawsuits, involving allegations of widespread misconduct in the background-investigations industry—and that the relator did not qualify as an "original source" of the information. *Id.* at 741.

The Tenth Circuit reversed. It agreed with the district court that the relator's allegations were "substantially the same" as those that had been publicly disclosed but held that the relator qualified as an original source. *Id.* at 757.

The Court noted that it had "yet to expound on the meaning of the 'materially adds' language in the original-source exception," which was added to the statute as part of the 2010 amendments to the FCA. *Id.* at 743, 755 (an "original source" is one "who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions." 31 U.S.C. § 3730(e)(4)(B)). After considering the approach taken by other circuits, the Court concluded that it was persuaded by the First Circuit's articulation of the standard in *United States ex rel. Winkelman v. CVS Caremark Corp.*, 827 F.3d 201, 211 (1st Cir. 2016). It described the standard as follows: "[A] relator who discloses new information that is sufficiently significant or important that it would be capable of influencing the behavior of the recipient—i.e., the government—ordinarily will satisfy the materially-adds standard. On the other hand, a relator who merely adds background information or details about a known fraudulent scheme typically will be found not to have materially added to the publicly disclosed information." 923 F.3d at 757 (internal citations omitted).

Implication for future FCA cases

The Tenth Circuit's interpretation of the "materially adds" standard in the original source exception to the public disclosure bar underscores that the standard must not be conceptually duplicative of the public disclosure analysis itself; in practice, the original source exception is more likely to be met when the public disclosures themselves are less robust.

Eleventh Circuit: Falsity

***United States v. AseraCare, Inc*., 938 F.3d 1278 (11th Cir. 2019)**

About the Case

The government intervened in an FCA suit brought by three relators against providers of end-of-life hospice care, which alleged that the providers falsely certified patients' eligibility for hospice benefits. Under the relevant Medicare regulations, providers must certify that the individual is terminally ill based on a physician's clinical judgment and must provide documentation that supports the medical prognosis. 938 F.3d at 1292-93. There was no dispute that AseraCare submitted documentation of each patient's medical condition and that the certifications were signed by appropriate medical personnel. The government instead alleged that AseraCare's certifications for payment were false because, in the government's view, the patients were not terminally ill. *Id.* at 1284-85.

The district court bifurcated the jury trial, with the first phase focused on falsity (using a statistical sample of patients and claims). *Id.* at 1286. Experts for both sides considered the same medical information and same medical standards but reached different conclusions as to whether the sampled patients were terminally ill. A jury found that AseraCare had submitted false claims for a majority of the sampled claims. *Id.* at 1289.

Following trial, AseraCare moved for judgment as a matter of law, arguing that the Court had made reversible error in its jury instructions concerning the FCA's falsity element. *Id.* at 1289-90. The Court agreed, noting that the falsity element required proof of an objective falsehood and that a mere difference of opinion between physicians, without more, is not enough to show falsity. It then sua sponte granted summary judgment for AseraCare on the ground that, as a matter of law, the government could not prove falsity if the only evidence it had was its own expert's opinion that the patients were terminally ill. *Id.* at 1290.

On appeal the Eleventh Circuit addressed what it considered to be a question of first impression: "When can a physician's clinical judgment regarding a patient's prognosis be deemed 'false'?" *Id.* at 1296. The Court agreed with the district court: "[I]n order to show objective falsity . . ., the Government must show something more than the mere difference of reasonable opinion concerning the prognosis of a patient's likely longevity." *Id.* at 1297-98. As the Court explained, to prove falsity in a situation like this, an FCA plaintiff "must identify facts and circumstances surrounding the patient's certification that are inconsistent with the proper exercise of a physician's clinical judgment. Where no such facts or circumstances are shown, the FCA claim fails as a matter of law." *Id.* at 1297.

Having embraced the legal standard articulated by the district court, the Court nonetheless vacated the district court's grant of summary judgment so that it could consider additional evidence—in addition to the government's expert medical testimony—related to falsity.

Implication for future FCA cases

The Eleventh Circuit made it even more difficult for FCA plaintiffs to establish falsity in medical necessity cases by requiring some objective proof beyond clinical expert disagreement. The decision also provides helpful guidance for FCA cases in which the underlying question of falsity turns on matters of professional judgment.

Federal Settlements, Interventions and Complaints

HEALTHCARE AND PHARMACEUTICALS

Healthcare and Pharmaceuticals Settlements

- **Reckitt Benckiser Group plc (RB Group):** In July, DOJ announced that global consumer goods conglomerate RB Group had agreed to pay $1.4 billion to resolve potential criminal and civil liability related to a federal investigation of the marketing of the opioid addiction treatment drug Suboxone. The civil settlement involved $700 million paid to resolve claims that the marketing of Suboxone caused false claims to be submitted to government healthcare programs.[41] The allegations addressed in the civil settlement included that RB Group directly or through its subsidiaries promoted the sale and use of Suboxone to physicians who were writing inappropriate prescriptions, including for uses that were unsafe, ineffective, and medically unnecessary; that RB Group promoted the sale or use of Suboxone Film using false or misleading claims that the film was less susceptible to diversion and abuse than other products; and that RB Group submitted a petition to the US Food & Drug Administration (FDA) claiming that Suboxone Tablet was being discontinued due to safety concerns in an effort to delay the entry of generic competition for Suboxone to improperly control the pricing of Suboxone, impacting pricing to federal healthcare programs. The claims resolved by the civil settlement were allegations only, and there was no determination of liability. RB Group affirmatively denied the allegations.
- **Insys Therapeutics:** In June, DOJ announced that opioid manufacturer Insys Therapeutics had agreed to pay $225 million as part of a global resolution to settle criminal and civil allegations. Both the criminal and civil investigations arose out of Insys's payment of kickbacks and other unlawful marketing practices in connection with the marketing of Insys's sublingual fentanyl spray.[42] The criminal information alleged that Insys began using speaker programs as a vehicle to pay bribes and kickbacks to targeted practitioners in exchange for increased prescriptions and increased dosage of the fentanyl spray. As part of the criminal resolution, Insys entered into a deferred prosecution agreement, Insys's operating subsidiary pleaded guilty to five counts of mail fraud, and the company agreed to pay a $2 million fine and $28 million in forfeiture. The civil allegations included, on top of the sham speaker programs, that kickbacks were also given in the form of jobs for prescribers' relatives and friends, as well as meals and entertainment. As part of the civil resolution, Insys agreed to pay $195 million to resolve allegations it violated the FCA. The claims resolved by the civil settlement were allegations only, and there was no determination of liability.
- **Avanir Pharmaceuticals:** In September, DOJ announced that California-based pharmaceutical manufacturer Avanir Pharmaceuticals had agreed to pay over $108

million to resolve civil and criminal allegations that the company had violated the FCA and AKS. Avanir paid nearly $96 million and agreed to enter into a Corporate Integrity Agreement (CIA) with HHS OIG to resolve federal civil allegations that Avanir had provided money, travel, and food to physicians to induce them to prescribe its drug, Nuedexta, and had marketed the drug for non-approved uses using false and misleading information. To resolve the criminal allegations that it had violated the AKS by paying a physician to prescribe and promote Nuedexta, Avanir agreed to pay a $7.8 million penalty, forfeit $5 million, and enter into a deferred prosecution agreement. Avanir also agreed to pay $7 million to resolve state Medicaid claims.[43] Avanir admitted to certain conduct as part of the deferred prosecution agreement, but the claims resolved by the civil settlement were allegations only and there was no determination of liability.

– **Astellas Pharma US Inc. and Amgen Inc.:** In April, DOJ announced that pharmaceutical companies Astellas Pharma US Inc. and Amgen Inc. agreed to pay $100 million and $24.7 million, respectively, to resolve claims that they violated the AKS and FCA. The government alleged that both companies used charitable organizations to provide improper copay and other assistance to patients to induce the patients to purchase their drugs. Both companies entered into five-year CIAs with HHS OIG as part of the settlements.[44] The claims resolved by the settlements were allegations only, and there was no determination of liability.
– **Inform Diagnostics:** In January, DOJ announced that pathology laboratory company Inform Diagnostics, formerly known as Miraca Life Sciences Inc., had agreed to pay $63.5 million to resolve allegations that it had violated the AKS, Stark Law, and FCA. The government alleged that Inform Diagnostics provided subsidies for electronic health records (EHR) systems and technology consulting services to physicians that referred business to the laboratory.[45] The claims resolved by the settlement were allegations only, and there was no determination of liability.
– **Greenway Health LLC:** In February, DOJ announced that Greenway Health LLC, an EHR company in Tampa, Florida, had agreed to pay $57.25 million to resolve allegations that it had caused its users to submit false claims by misrepresenting the capabilities of its EHR product. Under the Medicare and Medicaid EHR Incentive Program, healthcare providers were eligible to receive incentive payments for adopting EHR technology that met certain criteria as certified by an independent body approved by HHS. The government alleged that Greenway deceived the certifying entity and heathcare providers about the eligibility of its EHR program, causing the providers to submit false claims for incentives. The government also alleged that Greenway violated the AKS by paying clients to recommend its EHR software to new customers. As part of the resolution, Greenway entered into a five-year CIA with HHS OIG, which required the company to retain an independent review organization to assess Greenway's software quality control, compliance systems, and arrangements

with healthcare providers.[46] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Jazz Pharmaceuticals plc (Jazz), Lundbeck LLC (Lundbeck), and Alexion Pharmaceuticals Inc. (Alexion):** In April, DOJ announced that pharmaceutical companies Jazz, Lundbeck, and Alexion had agreed to pay $57 million, $52.6 million, and $13 million, respectively, to resolve claims that they violated the AKS and FCA. The government alleged that the companies used charitable organizations to provide improper copay assistance to patients to induce the patients to purchase their drugs. Jazz and Lundbeck also entered into five-year CIAs with HHS OIG as part of the settlements.[47] The claims resolved by the settlements were allegations only, and there was no determination of liability.
- **Encompass Health Corporation:** In June, DOJ announced that Encompass Health Corporation (formerly known as HealthSouth Corporation) agreed to pay $48 million to resolve allegations that it violated the FCA. The government alleged that inpatient rehabilitation facilities owned by Encompass provided inaccurate information to Medicare to maintain their status as an inpatient rehabilitation facility and earn a higher rate of reimbursement. The government also alleged that some admissions to its inpatient rehabilitation facilities were not medically necessary.[48] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **MedStar Health Inc. (MedStar):** In March, DOJ announced that MedStar and two of its hospitals—MedStar Union Memorial Hospital and MedStar Franklin Square Medical Center—agreed to pay $35 million to settle allegations that they had violated the AKS and FCA. The government alleged that MedStar entered into sham professional services arrangements with cardiologists in exchange for those cardiologists referring patients to the hospitals.[49] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Sutter Health LLC:** In April, DOJ announced that California-based healthcare provider Sutter Health and several affiliated entities—Sutter East Bay Medical Foundation, Sutter Pacific Medical Foundation, Sutter Gould Medical Foundation, and Sutter Medical Foundation—had agreed to pay $30 million to resolve allegations that they violated the FCA by reporting unsupported patient diagnoses. The government alleged that these unsupported diagnostic codes increased the capitated payments the government made to several Medicare Advantage Organizations that had contracted with Sutter Health to provide services for their beneficiaries.[50] The claims resolved by the settlement were allegations only, and there was no determination of liability.[51]
- **Diabetic Care Rx LLC d/b/a Patient Care America (PCA):** In September, DOJ announced that compounding pharmacy PCA, PCA's CEO and former VP of Operations, and private equity firm Riordan, Lewis & Haden Inc. agreed to pay over $21 million to resolve allegations that they violated the FCA and AKS. The

government alleged that the defendants had organized payments to third-party marketers, who in turn paid telemedicine doctors to prescribe creams and vitamins to military members and their families reimbursable by TRICARE. The government also alleged that PCA and a marketer paid copayments on behalf of patients without regard to their financial need through a sham charitable organization, and that PCA continued to claim reimbursement for prescriptions despite complaints from patients that they did not consent to them.[52] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Sanford Health, Sanford Medical Center, and Sanford Clinic (collectively, Sanford):** In October, DOJ announced that Sanford of Sioux Falls, South Dakota agreed to pay $20.25 million to resolve allegations that they had violated the FCA and AKS by allowing one of their employed neurosurgeons to perform procedures—some of which were medically unnecessary—using implantable devices from a physician-owned distributorship in which he had a financial interest. As part of the settlement, Sanford also entered into a CIA with HHS OIG that required, among other things, Sanford to hire an independent review organization.[53] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Vanguard Healthcare LLC:** In February, DOJ announced that Tennessee-based Vanguard Healthcare LLC and affiliated companies (collectively, Vanguard)—as well as Vanguard's majority owner and CEO and its former director of operations—had agreed to pay more than $18 million to settle claims that five Vanguard-owned skilled nursing facilities submitted false claims to Medicare and Medicaid for services that were grossly substandard or worthless. The settlement also resolved allegations that the facilities submitted preadmission forms with forged nurse or physician signatures to TennCare, Tennessee's Medicaid Program. As part of the settlement, Vanguard and its CEO entered into a five-year CIA with HHS OIG, which requires the appointment of a quality of care monitor.[54] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **US WorldMeds LLC (WorldMeds):** In April, DOJ announced that Kentucky-based pharmaceutical manufacturer WorldMeds agreed to pay $17.5 million to resolve allegations that it violated the AKS and FCA. The government alleged that WorldMeds attempted to induce patients to purchase its drugs by providing copay assistance through a charitable foundation. The government also alleged that WorldMeds gave two physicians excessive speaking and consulting fees, as well as other entertainment perks, to induce them to prescribe its drugs.[55] As part of the settlement, WorldMeds entered into a five-year CIA with HHS OIG, which required the appointment of an independent review organization. The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Covidien LP:** In March, DOJ announced that Covidien LP agreed to pay over $17 million to resolve allegations that it violated the AKS and FCA. The government alleged that Covidien provided free or discounted physician practice and market

development support—including customized marketing plans, “lunch and learn” meals, and assistance with organizing vein screening events to identify new patients—to physicians in California and Florida in order to induce those physicians to purchase Covidien’s vein ablation products.[56] The claims resolved by the settlement were allegations only, and there was no determination of liability.

– **Mallinckrodt ARD LLC:** In September, DOJ announced that Mallinckrodt ARD LLC, formerly known as Mallinckrodt ARD Inc. and previously Questcor Pharmaceuticals Inc. (Questcor), agreed to pay $15.4 million to resolve allegations that Questcor violated the FCA and AKS by providing physicians with lavish meals and entertainment expenses to induce the physicians to prescribe its medication, H.P. Acthar Gel.[57] The claims resolved by the settlement were allegations only, and there was no determination of liability.
– **ACEll, Inc.:** In June, DOJ announced that Maryland-based medical device manufacturer ACell had agreed to pay over $15 million to resolve civil and criminal allegations that the company had violated the FCA and Federal Food, Drug, and Cosmetic Act (FDCA). Pursuant to the guilty plea, ACell removed a powder wound dressing product from the market due to the health risk posed by the device but failed to report the removal to the FDA and concealed the reason for the removal from doctors, hospitals, and the company’s salesforce. As part of the plea agreement, ACell agreed to pay a $3 million fine. To settle the civil FCA violations, ACell agreed to pay $12 million for causing false claims for the wound dressing powder to be submitted to government healthcare programs. The government also alleged that ACell provided incorrect coding recommendations to healthcare providers in order to inflate reimbursement from Medicare. The government also alleged ACell provided improper inducements such as entertainment, paid speakerships, and free products to encourage orders for ACell products.[58] ACell admitted to certain conduct as part of the plea agreement, but the claims resolved by the civil settlement were allegations only and there was no determination of liability.
– **Avanti Hospitals LLC (Avanti):** In January, DOJ announced that California-based Avanti and six of its owners had agreed to pay $8.1 million to settle claims that they had caused Avanti’s subsidiary, Memorial Hospital of Gardena, to submit claims in violation of the AKS and Stark Law. The government alleged that Avanti paid a medical director at the hospital more than fair market value to incentivize the physician to refer patients to the hospital. The agreement—which partially resolved allegations in a qui tam suit brought by the hospital’s former CEO—also required Avanti and the hospital to enter into a CIA with HHS OIG.[59] The claims resolved by the settlement were allegations only, and there was no determination of liability.
– **Heritage Pharmaceuticals Inc.:** In May, DOJ announced that New Jersey-based generic pharmaceutical manufacturer Heritage Pharmaceuticals agreed to pay $7.1 million to resolve allegations that it violated the FCA and AKS. The government alleged that Heritage paid and received remuneration through arrangements on price,

supply, and allocation of customers with other pharmaceutical manufacturers for certain generic drugs in violation of the AKS and that the sale of such drugs resulted in payments made by or claims submitted to federal healthcare programs.[60] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Osteo Relief Institutes:** In October, DOJ announced that seven Osteo Relief Institutes in Arizona, California, Kentucky, New Jersey, and Texas and their owners agreed to collectively pay $7.1 million to settle allegations that they had violated the FCA by billing Medicare for medically unnecessary injections and knee braces. The clinics allegedly administered viscosupplementation injections—which are intended to treat osteoarthritis by supplementing the fluid in patients' knee joints—to patients that did not need them. The clinics also allegedly gave patients multiple brands of viscosupplements without clinical support and used discounted viscosupplements from foreign countries. As part of the settlement, the clinics entered into a CIA with HHS OIG that required, among other things, the clinics to retain an independent review organization.[61] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Joseph P**. **Galichia:** In May, DOJ announced that Kansas-based cardiologist Joseph P. Galichia agreed to pay $5.8 million to resolve allegations that he and his medical group violated the FCA. The government alleged that Galichia improperly billed federal healthcare programs for medically unnecessary cardiac stent procedures.[62] Galichia also agreed to a three-year exclusion from participation in any federal healthcare program. The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Beaver Medical Group L.P. and Sherif Khalil:** In August, DOJ announced that Beaver Medical Group physician practice and one of its members, Dr. Sherif Khalil, agreed to pay $5 million to resolve allegations that they had violated the FCA by inaccurately reporting diagnoses to Medicare Advantage plans and causing the plans to receive inflated payments from Medicare.[63] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Rialto Capital Management LLC (Rialto) and RL BB-IN KRE LLC (RL BB):** In June, DOJ announced that Rialto and its former affiliate RL BB agreed to pay $3.6 million to resolve allegations that Rialto and the Kentuckiana Medical Center (KMC), a Clarksville, Indiana-based hospital owned by RL BB, violated the AKS, Stark Law and FCA. The government alleged that Rialto and KMS engaged in illegal financial arrangements with two doctors who referred patients to the hospital.[64] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Gary D. Newsome:** In April, DOJ announced that Gary D. Newsome, the former CEO of Health Management Associates LLC (HMA), a hospital chain headquartered in Naples, Florida, agreed to pay $3.46 million to settle allegations that he caused HMA

to submit false claims for reimbursement in violation of the AKS and FCA. The government alleged that Mr. Newsome and HCA encouraged emergency department physicians to admit patients who could have been treated on an outpatient basis. The government also alleged that HMA made payments and awarded contracts to its emergency department staffing company, EmCare, in exchange for increased admissions.[65] The claims resolved by the settlement were allegations only, and there was no determination of liability. HMA and EmCare had previously settled related allegations with the government for around $130 million.

- **GenomeDx Biosciences Corp. (GenomeDX):** In February, DOJ announced that Vancouver-based genetic testing laboratory GenomeDX had agreed to pay $1.99 million to resolve allegations that it violated the FCA by submitting claims to Medicare for unnecessary genetic tests. The government alleged that the company submitted claims between September 2015 and June 2017 for post-operative genetic tests for prostate cancer patients who did not have risk factors necessitating the test.[66] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Skyline Urology:** In February, DOJ announced that the physician group Skyline Urology had agreed to pay $1.85 million to resolve allegations that they had improperly billed Medicare for evaluation and management services that should have been bundled with other procedures performed on the same day.[67] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Pacific Medical Buildings LLC (PMB), PMB Lakeway LLC, RD Development Partners LLC, Lakeway Management LLC, J&L Rush Family Partnership LP, Jeff Rush, and Brad Daniel:** In June, DOJ announced that PMB, PMB Lakeway LC, RD Development Partners LLC, Lakeway Management LLC, J&L Rush Family Partnership LP, Jeff Rush, and Brad Daniel had agreed to pay $1.1 million to resolve claims they had violated the FCA. The government alleged that the defendants made false statements while seeking FHA insurance for a mortgage loan to fund construction of a new hospital. Specifically, the government alleged that the defendants concealed the true financial condition and prospects of the hospital by delaying refunds to investors who had canceled their investments so that they could meet FHA's minimum equity requirements.[68] The settlement also resolved allegations that the settling parties received impermissible distributions of project funds. The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Vital Life Institute LLC:** In February, DOJ announced that Florida-based compounding pharmacy Vital Life Institute LLC, formerly known as AgeVital Pharmacy LLC, and its owners had agreed to pay at least $775,000 to resolve claims that the company submitted claims to government payors in violation of the AKS and FCA. The government alleged the pharmacy paid a third-party marketing company to

solicit patients for prescriptions regardless of need and to arrange for prescribers to sign the prescriptions. The patients were then referred to the pharmacy to have the prescriptions filled.[69] The claims resolved by the settlement were allegations only, and there was no determination of liability.

Healthcare and Pharmaceuticals Interventions and Actions

- **Arriva Medical LLC (Arriva) and Alere Inc. (Alere):** In February, DOJ announced that it was intervening in a qui tam suit against Arriva and its parent Alere alleging that they violated the FCA and AKS. The lawsuit alleges that Arriva provided Medicare beneficiaries with new glucometers regardless of whether the beneficiaries already had functioning meters. Arriva also allegedly made no meaningful effort to collect copayments from beneficiaries for the meters or testing supplies purchased from Arriva.[70] The claims asserted are allegations only, and there has been no determination of liability.
- **Wheeling Hospital Inc. (Wheeling), R & V Associates Ltd.(R&V), and Ronald Violi:** In March, DOJ announced that it had filed a complaint in intervention against Wheeling, Wheeling's management consultant R & V, and Wheeling's CEO Ronald Violi. The complaint alleges that Wheeling's compensation to a number of employed and contracted physicians violated the AKS and Stark Law because the physicians' compensation was above fair market value or based on the volume or value of the physicians' referrals to the hospital.[71] The claims asserted are allegations only, and there has been no determination of liability.
- **Doctor's Choice Home Care Inc, Timothy Beach, and Stuart Christensen:** In May, DOJ announced that it had filed a complaint in intervention against Florida-based Doctor's Choice Home Care Inc., Timothy Beach, and Stuart Christensen alleging FCA violations. The government alleges that the defendants engaged in the payment of kickbacks in the form of sham medical director agreements and payments to the spouses of referring physicians.[72] The claims asserted are allegations only, and there has been no determination of liability.
- **Daniel McCollum:** In June, DOJ announced it had filed a complaint in intervention against Daniel McCollum, a South Carolina-based chiropractor, and pain management clinics and urine drug testing laboratories owned or managed by McCollum, for improperly engaging in illegal financial relationships and providing medically unnecessary services and items.[73] The claims asserted are allegations only, and there has been no determination of liability.
- **Smart Pharmacy Inc., SP2 LLC, and Gregory Balotin:** In June, DOJ announced that it had filed a complaint in intervention against two Florida-based compounding pharmacies, Smart Pharmacy Inc. and SP2 LLC, as well as their owner, Gregory Balotin. The complaint alleges that the pharmacies improperly included an atypical antipsychotic drug in compounded pain creams to boost reimbursement for

prescriptions and also regularly waived patient copayment obligations.[74] The claims asserted are allegations only, and there has been no determination of liability.

- **Lakeway Regional Medical Center, LLC (LRMC); Surgical Development Partners, LLC (SDP); G. Edward Alexander; Frank Sossi; and John Prater:** In September, DOJ announced that it had filed suit against LRMC, SDP, and three individuals for improperly obtaining a loan insured by the FHA and distributing funds related to the development of the Lakeway Regional Medical Center in Lakeway, Texas in violation of the FCA and the Financial Institutions Reform, Recovery, and Enforcement Act of 1989. The government alleges that the defendants improperly delayed paying refunds to investors who had cancelled their investments in order to make it appear as if the project had sufficient cash on hand to satisfy mortgage covenants required to close the loan.[75] The claims asserted are allegations only, and there has been no determination of liability.

PROCUREMENT AND GRANTS

Procurement and Grants Settlements

- **Duke University:** In March, the US Attorney's Office for the Middle District of North Carolina announced that Duke University had agreed to pay $112.5 million to resolve allegations that, between 2006 and 2018, it submitted falsified or fabricated data and statements in 30 grants or progress reports. The government alleged that these false claims, which were submitted to the NIH and EPA, caused the NIH and EPA to pay out millions of dollars of grant funds they otherwise would not have. Specifically, the government alleged that a university researcher fabricated the results of research related to mice in its Airway Physiology Laboratory. The agreement resolved a qui tam suit brought by Joseph Thomas, a former university employee who pursued the action on the government's behalf and received $33,750,000 from the settlement. The claims resolved by the settlement were allegations only, and there was no determination of liability.[76]
- **Hyundai Oilbank Co. Ltd. and S-Oil Corporation:** In March, DOJ announced that South Korea-based companies Hyundai Oilbank and S-Oil had agreed to pay a total of approximately $52 million to resolve civil antitrust and FCA claims related to an alleged bid-rigging conspiracy. The government alleged that each company made false statements in connection with their agreements not to compete against each other to provide fuel services to DoD. The agreement resolved a qui tam suit brought by a resident and citizen of South Korea, in which the government intervened. In a separate criminal matter, Hyundai Oilbank and S-Oil agreed to plead guilty to criminal charges and pay a total of approximately $75 million in criminal fines for their involvement in a decade-long bid-rigging conspiracy that targeted contracts to supply fuel to US military bases in South Korea. Except as to conduct admitted in the

criminal pleas, the claims resolved by the civil settlement were allegations only, and there was no determination of liability.[77]

- **Unitrans International Inc. (Unitrans):** In December, DOJ announced that Unitrans agreed to pay $45 million to resolve criminal obstruction charges and civil FCA allegations relating to the illegal transportation of goods across Iran in connection with a contract to provide material and logistical support to US troops in Afghanistan. As part of a global resolution, Unitrans entered into a non-prosecution agreement (NPA) with DOJ and agreed to pay $31.5 million as a combined criminal monetary penalty and victim compensation payment amount in this matter. In connection with the NPA, Unitrans admitted that certain of its officers and officers of Anham FZCO (Anham), an associated Dubai Free Zone company incorporated under the laws of the United Arab Emirates, obstructed proceedings pending before the US Defense Logistics Agency (DLA). Unitrans also agreed to pay $27 million to resolve FCA allegations that it, along with Anham, fraudulently induced DLA and the Army to award wartime contracts for food and trucks by knowingly and falsely certifying compliance with United States sanctions against Iran. The civil agreement also resolves allegations that Anham knowingly and falsely represented construction progress on its Bagram warehouse to induce DLA to award the prime vendor contract to provide food to US troops in Afghanistan. The allegations resolved by the civil settlement were brought in a qui tam lawsuit filed by Rory Maxwell, John Bush, and Supreme Foodservice GmbH. Except as to conduct admitted in the criminal pleas, the claims resolved by the civil settlement were allegations only, and there was no determination of liability.[78].
- **Hydro Extrusion Portland, Inc., formerly known as Sapa Profiles Inc. (SPI):** In April, DOJ announced that SPI agreed to pay $34.6 million to resolve allegations that it caused a government contractor to invoice the Missile Defense Agency (MDA) and National Aeronautics and Space Administration (NASA) for aluminum extrusions that failed to comply with contract specifications. In a related criminal plea agreement, SPI admitted to altering results of tests meant to ensure the consistency of aluminum extruded at its facilities and to falsifying certifications. The terms of the civil settlement called for SPI to receive credits of $23.6 million for its restitution payments under the criminal plea agreement, and to pay $6 million to NASA and $5 million to the MDA. Except as to conduct admitted in the criminal pleas, the claims resolved by the civil settlement were allegations only, and there was no determination of liability.[79]
- **Hikmatullah Shadman:** In March, the US Attorney's Office for the District of Columbia announced that Mr. Shadman agreed to pay approximately $25 million to resolve allegations that he wrongfully acquired assets as a government contractor in Afghanistan. The civil settlement was part of a global settlement that involved the resolution of a criminal case and FCA allegations. Mr. Shadman, an Afghan national, ran several companies, including Hikmat Shadman Logistics Services Company (HSLSC), which were subcontracted to deliver supplies to support US service

members in Afghanistan. The government alleged that Shadman's companies submitted thousands of falsified documents, which allegedly led the United States to pay for services that were never rendered, and that Shadman charged inflated prices. As part of the global settlement, several of Shadman's companies, including HSLSC, entered into a separate agreement to resolve FCA allegations concerning kickbacks paid to obtain delivery subcontracts. $1.5 million of the forfeited funds were allocated to resolve these claims. HSLSC was also criminally prosecuted by the US Attorney's Office in the Eastern District of North Carolina and pleaded guilty to paying gratuities to US service members to obtain subcontracts. HSLSC was sentenced to pay an $810,000 fine and forfeit $190,000. As part of the criminal case, HSLSC also agreed to be placed on probation for five years, not to contest debarment, and not to seek to engage in business within the United States, and its corporate officers agreed not to apply for visas to travel to the United States.[80] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **American Airlines, Inc.:** In August, DOJ announced that American Airlines, Inc. agreed to pay approximately $22.1 million to resolve civil allegations that it falsely reported the times it transferred possession of US mail to foreign postal administrations or other intended recipients under contracts with the US Postal Service (USPS). USPS contracted with American Airlines to take possession of receptacles of United States mail at six locations in the United States or at various DoD and State Department locations abroad and then deliver that mail to numerous international and domestic destinations. The claims resolved by the settlement were allegations only, and there was no determination of liability.[81]
- **Informatica LLC:** In May, DOJ announced that Informatica LLC, a software development company, had agreed to pay $21.57 million to resolve allegations that it knowingly gave false information about its commercial accounting practices to resellers, who used that false information to negotiate with the General Services Administration (GSA) for government-wide Multiple Awards Schedule contracts. The government alleged that because GSA uses commercial pricing disclosures to negotiate the maximum prices that a vendor can charge agencies, Informatica's false information led GSA to negotiate less favorable pricing. The settlement also resolved claims that Informatica led the government to make purchases of foreign-produced items in violation of the Trade Agreements Act (TAA). The agreement resolved a qui tam suit brought by a former Informatica employee who received $4,314,000 from the settlement. The claims resolved by the settlement were allegations only, and there was no determination of liability.[82]
- **Luke Hillier:** In August, DOJ announced that Mr. Hillier, the majority owner and former CEO of ADS, Inc., agreed to pay $20 million to resolve civil allegations that he fraudulently obtained numerous federal set-aside contracts reserved for small businesses that his company was ineligible to receive due to its alleged affiliations with a number of other entities, such that the affiliates should have been considered

to be part of the company for purposes of certifying small business status. The claims resolved by the settlement were allegations only, and there was no determination of liability.[83]

- **Texas Health and Human Services Commission:** In December, DOJ announced that the Texas Health and Human Services Commission (THHSC), a state agency, had agreed to pay $15.3 million to resolve allegations that it had violated the FCA in connection with its administration of the Supplemental Nutrition Assistance Program (SNAP). The government alleged that, beginning in 2009, THHSC contracted with Julie Osnes Consulting LLC to lower its SNAP quality control error rate; that It implemented Osnes Consulting recommendations that allegedly injected bias into THHSC's quality control process; and that these changes resulted in THHSC's submitting false quality control data and information to the US Department of Agriculture (USDA), for which it received performance bonuses for fiscal years 2010, 2013, and 2014 to which it was not entitled. The claims resolved by the civil settlement are allegations only, and there has been no determination of liability.[84]
- **International Business Machines Corporation (IBM) and Cúram Software (Cúram):** In June, DOJ announced that IBM and Cúram agreed to pay $14.8 million to settle allegations that they made material misrepresentations to the State of Maryland during the Maryland Health Benefit Exchange (MHBE) contract award process for the development of Maryland's Health Insurance Exchange (HIX) website and IT platform. Federal grants from HHS partially funded MHBE's contract for the Maryland HIX. The claims resolved by the settlement were allegations only, and there was no determination of liability.[85]
- **ITT Cannon:** In July, the US Attorney's Office for the Central District of California announced that ITT Cannon agreed to pay $11 million to settle allegations that it sold electrical connectors to the US military that had not been properly tested in compliance with contract requirements. ITT sold the untested connectors both directly to the federal government and through distributors and other government contractors which incorporated the connectors into technology and equipment sold to the federal government. The allegations arose from a qui tam lawsuit filed by a former regional quality manager at ITT Cannon's Santa Ana facility. The claims resolved by the settlement were allegations only, and there was no determination of liability.[86]
- **United Parcel Service (UPS):** In September, DOJ announced that UPS agreed to pay $8.4 million to resolve allegations that it overcharged federal agencies for package delivery services under a GSA contract. This settlement resolved allegations that from 2007-2014 UPS failed to follow the Price Reductions Clause of the GSA contract, which required UPS to provide GSA with certain lower prices offered to another customer, resulting in the government paying more than it should have for package deliveries. The claims resolved by the settlement were allegations only, and there was no determination of liability.[87]

- **Northrop Grumman Systems Corporation (NGSC):** In January, DOJ announced that NGSC, agreed to pay $5.2 million to resolve allegations that it falsely billed labor under a contract with the USPS. The government alleged that NGSC, which had been contracted to provide labor at USPS data centers, knowingly billed certain personnel at rates corresponding with billing categories for which they did not have the requisite education and/or experience. The claims resolved by the settlement were allegations only, and there was no determination of liability.[88]
- **PAE Applied Technologies, LLC (PAE):** In June, the US Attorney's Office for the Western District of Oklahoma announced that PAE agreed to pay $4.2 million to settle civil allegations that it knowingly submitted false claims to the US Air Force for employee wages under an Aircraft Maintenance, Airfield Management, Aircrew Life Support and Base Operating Support contract. Specifically, the United States alleged that PAE submitted false claims for wage rates above the applicable wage caps. The United States also alleged that PAE would not have received award fees under the contract if PAE had disclosed that it had billed the United States for wages that exceeded the wage caps. This case arose from allegations filed in a qui tam suit by a former PAE employee in which the government intervened and resolved all allegations under the lawsuit. The claims resolved by the settlement were allegations only, and there was no determination of liability.[89]
- **Ambu Inc.:** In August, the US Attorney's Office for the Eastern District of Pennsylvania announced that Ambu agreed to pay $3.3 million to resolve civil allegations that it certified to the DLA and VA that its medical products came from designated countries under the TAA, when over 80% of Ambu's sales to the DLA and VA were of products of Malaysia and China, which are non-TAA compliant countries. The claims resolved by the settlement were allegations only, and there was no determination of liability.[90]
- **Andrew Otero and A&D General Contracting (A&D):** In June, the US Attorney's Office for the Southern District of California announced that A&D and Mr. Otero agreed to pay $3,259,679 to settle civil allegations that they created a fraudulent joint venture to appear qualified to secure government contracts which had been set aside for service-disabled veteran-owned small businesses (SDVOSBs). In November 2018, a federal jury convicted A&D and Mr. Otero of fraudulently obtaining over $11 million SDVOSBs set-asides. Judge Houston sentenced Mr. Otero to 18 months in custody and ordered him to pay $400,000 in criminal fines, ordered A&D to pay $1.5 million in criminal fines, and imposed criminal forfeiture of $334,561. Payment of the civil settlement amount, which arose from the same conduct, was offset by the criminal fines imposed by Judge Houston.[91]
- **Ahern Painting Contractors Co. (Ahern):** In November, the US Attorney's Office for the Southern District of New York announced that Ahern agreed to pay $3 million to resolve allegations that Ahern fraudulently obtained payments on two federally funded construction projects by misrepresenting compliance with the Disadvantaged

Business Enterprise rules, which require participation of businesses owned by women and minorities. As part of the settlement, Ahern admitted and accepted responsibility for the conduct alleged in the government's complaint.[92]

- **ABS Development Corporation (ABS):** In November, DOJ announced that ABS agreed to pay $2.8 million and give up $16 million in potential administrative claims to settle civil allegations that it fraudulently obtained a foreign military sales contract reserved for American companies. ABS, a Delaware corporation based in New York, is a subsidiary of Ashtrom International, Ltd. of Israel. DOJ alleged that, in order to obtain the contract to renovate a shipyard in Haifa, Israel, ABS falsely represented to the Army that it would perform the work, and then certified that it was in fact performing the work as the prime contractor when it knew that Ashtrom intended to and did perform the work. The claims resolved by the settlement were allegations only, and there was no determination of liability.[93]
- **E.M. Photonics, Inc. (EMP) and Eric Kelmelis:** In January, the US Attorney's Office for the District of Delaware announced that EMP and its CEO, Eric Kelmelis, agreed to pay $2.75 million to resolve allegations that they sought disbursements from various federal agencies for falsified labor costs and duplicative work. The government alleged that Kelmelis and EMP engaged in two schemes to defraud the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) contracting programs. Specifically, the government alleged that EMP and Kelmelis directed EMP employees, or caused others to direct EMP employees, to falsely complete timesheets for direct labor that the employees did not perform and submit false invoices and public vouchers to the funding agencies for direct labor that was not performed on these contracts and grants. The government also alleged that EMP and Kelmelis sought and received SBIR/STTR funding for essentially equivalent work that was already performed and funded by another government agency and falsely certified that such work was, in fact, non-duplicative. The claims resolved by the settlement were allegations only, and there was no determination of liability.[94]
- **Arkwin Industries, Inc.:** In September, the US Attorney's Office for the Eastern District of New York, the Defense Criminal Investigative Service (DCIS), and the Air Force Office of Special Investigations (AFOSI) announced that Arkwin Industries, Inc. agreed to pay a $2.6 million settlement after self-disclosing that it overbilled the government and its prime contractors. Arkwin designs, tests, and manufactures precision hydraulic and fuel system components for civil and military fixed-wing aircraft, spacecraft, turbine engines, and other special applications, as both a prime and a subcontractor to DoD, the US Air Force, and the US Navy. Arkwin detected an error in its accounting system that had double-counted worker hours spent performing inspections of its products, which it self-disclosed to the government. Arkwin hired outside counsel and a forensic accounting team to conduct an internal investigation. After concluding its investigation, Arkwin reported its findings to the United States. DOJ, with the support of DCIS and AFOSI, conducted its own investigation. Arkwin

cooperated throughout the investigation. DOJ concluded that the overbilling was accidental and negotiated the $2.6 million settlement, which represents the total of potential overbilling, with interest.[95]

- **North Greenville University (NGU):** In February, DOJ announced that NGU in South Carolina had agreed to pay $2.5 million to resolve allegations that it submitted false claims to the US Department of Education. Specifically, DOJ alleged that between 2014 and 2016, NGU compensated a student recruiting company based on enrollment numbers, in violation of the federal ban on incentive-based compensation for student recruiting. The settlement resolved a qui tam suit brought by a co-owner of the recruiting company, who received $375,000 from the settlement. The claims resolved by the settlement were allegations only, and there was no determination of liability.[96]
- **The Sesolinc Group (Sesolinc):** In August, the US Attorney's Office for the Southern District of Georgia announced that Sesolinc agreed pay up to $2.4 million to settle allegations that it supplied defective products and submitted false claims to the Army, VA and GSA. Specifically, the United States alleged that Sesolinc sold products to the United States that failed to meet applicable electrical and structural standards. This settlement resolved allegations that were originally brought as a qui tam lawsuit by a former Sesolinc employee, in which the government intervened.[97] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Kikiktagruk Inupiat Corporation (KIC) and KIC Development LLC (KICD):** In May, the US Attorney's Office for the Western District of Texas announced that KIC, an Alaskan Native Corporation, and KICD, a subsidiary of KIC, agreed to pay $2.025 million to settle allegations that KICD paid kickbacks to obtain no-bid set-aside contracts with the US Army Corps of Engineers (USACE) to perform construction work at Ft. Bliss military installation in El Paso, Texas. The government alleged that KICD paid bribes and kickbacks to a contract employee at the USACE to divert the Ft. Bliss set-aside contracts to KICD. That contract employee and three KICD employees pleaded guilty to the criminal bribery scheme in 2016. This settlement resolved allegations that were originally brought as a civil qui tam lawsuit by a former KICD employee. The claims resolved by the settlement were allegations only, and there was no determination of liability.[98]
- **Richard Moore; Carolina Sodding Services, LLC (Carolina Sodding); and Carolina Enterprises of the Lowcountry, LLC (Carolina Enterprises):** In June, the US Attorney's Office for the District of South Carolina announced that Mr. Moore agreed to pay $1.6 million to resolve allegations that he and his companies, Carolina Sodding and Carolina Enterprises, submitted false invoices for materials that were never provided and false certifications that his companies were women-owned businesses. Mr. Moore and his companies were contracted to perform work at the

Savannah River Nuclear Site in Aiken, South Carolina. The claims resolved by the settlement were allegations only, and there was no determination of liability.[99]

- **University of Wisconsin-Madison:** In March, the US Attorney's Office for the Western District of Wisconsin announced that the University of Wisconsin-Madison agreed to pay $1.5 million to settle allegations that it failed to adhere to Office of Management and Budget cost principles that require rebates and discounts to be credited to federal grants and awards. The government alleged that the university did not properly account for rebates and credits, and thus overcharged the United States. The claims resolved by the settlement were allegations only, and there was no determination of liability.[100]
- **Classic Site Solutions, Inc. (CSS) and Cheryl Sady:** In August, the US Attorney's Office for the District of Connecticut, the Small Business Administration (SBA) and GSA announced that CSS and its owner, Cheryl Sady, agreed to pay $1.3 million to settle allegations that CSS and Ms. Sady made false statements to the SBA to obtain certification as a Historically Underutilized Business Zone (HUBZone) company. The government alleged that, by using a HUBZone certification fraudulently obtained from the SBA, CSS bid on and won millions of dollars of government contracts set aside for qualified HUBZone companies, as well as contracts for which a price preference was available to HUBZone companies.[101] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Raytheon Company (Raytheon):** In June, the US Attorney's Office for the District of Nevada announced that Raytheon agreed to pay $1.075 million to resolve allegations that it induced the County of Los Angeles, California, to enter into a contract funded by a federal grant based on misrepresentations regarding Raytheon's capability to provide the products involved. Raytheon was contracted to provide interoperable dispatch consoles to the County of Los Angeles for its sheriff and fire departments. The claims resolved by the settlement were allegations only, and there was no determination of liability.[102]
- **North American Specialty Insurance Company (NASIC):** In September, the US Attorney's Office for the Western District of North Carolina announced that NASIC agreed to pay $1,040,035 to resolve civil allegations that it bonded general contractor, Claro Company, Inc., which submitted false claims to the United States for services performed under fraudulently obtained contracts from DoD and USDA that had been set aside for companies that qualified for the SBA's Section 8(a) Business Development Program. The United States alleged that NASIC knew or should have known that Claro was not eligible for 8(a) set-asides, and that by bonding Claro's projects, NASIC allowed Claro to fraudulently bid for contracts under the preferences in the 8(a) program. The claims resolved by the settlement were allegations only, and there was no determination of liability.[103]
- **Upstate Construction Services, LLC (Upstate) and Structural Associates, Inc. (Structural):** In October, the US Attorney for the Northern District of New York

announced that Upstate and Structural agreed to pay more than $1 million to resolve allegations that they improperly obtained government contracts set aside for companies qualified as HUBZone firms. The settlements resolved allegations that Upstate, which was a qualified HUBZone entity, and Structural, which was not, entered into a set of agreements—including two Silent Joint Venture Agreements—that were not disclosed to the government. The agreements allegedly enabled Upstate to obtain bonding on jobs that it otherwise would not have been able to obtain, and in exchange Structural, which could not have bid on the jobs itself or as part of a joint venture with Upstate, received approximately half of Upstate's profits on government contracts worth millions of dollars. The claims resolved by the settlement were allegations only, and there was no determination of liability.[104]

– **Capco, LLC:** In December, the US Attorney's Office for the District of Colorado announced that Capco agreed to pay over $1 million to resolve civil allegations that it defrauded the US Army in connection with contracts to manufacture grenade launchers for the US Army. Specifically, the United States alleged that Capco manufactured and shipped weapons it knew did not meet contract specifications, while certifying that the weapons conformed to contract specifications. The allegations arose under a qui tam lawsuit brought by a former quality engineer at Capco. The claims resolved by the settlement were allegations only, and there was no determination of liability.[105]

– **GS Engineering, Inc. (GSE):** In September, the US Attorney's Office for the Western District of Michigan announced that GSE agreed to pay $1 million to resolve allegations that it submitted false claims for lease costs under its federal defense contracts. In connection with the settlement, GSE's president, GSE's former bookkeeper, and four companies that those individuals owned and controlled—Arcadian Holdings, LLC, Echo Leasing, LLC, GS Engineering Services, Inc. (d/b/a GS Infrastructure), and LJ Leasing, LLC—agreed to be voluntarily excluded from federal contracts and awards for a period of three years. In addition to its settlement with the US Attorney's Office, GSE entered into a three-year administrative agreement with the US Army. The administrative agreement requires GSE to, among other things, maintain an ethics and compliance program and retain a Corporate Ethics Monitor to review and report on GSE's compliance with government contracting requirements. The claims resolved by the settlement were allegations only, and there was no determination of liability.[106]

– **Universal Concrete Products Corporation (UCP) and Donald Faust, Jr.:** In January, the US Attorney's Office for the Eastern District of Virginia announced that UCP and its co-owner and president, Donald Faust, Jr., agreed to pay $1 million to settle civil allegations that between 2015 and 2016 they had falsified test records for concrete panels created for Phase II of the Dulles Metrorail Project, which was partially funded by loans from the US Department of Transportation and the Commonwealth of Virginia. The government alleged that quality control employees at

UCP, a subcontractor supplying precast concrete, falsified test records to make it appear as though the concrete's air content was within the required range so that the general contractor would not reject the concrete panels. The allegations arose from a qui tam lawsuit filed by a former UCP quality control employee in 2016. The government intervened in the qui tam relator's suit in May 2018. The claims resolved by the settlement were allegations only, and there was no determination of liability.[107]

- **International SOS Assistance, Inc.; International SOS Government Services, Inc.; International SOS, LP; Air Rescue Americas, Inc.; Arnaud Vaissié; and Pascal Rey-Herme (collectively, International SOS):** In August, the US Attorney's Office for the Eastern District of Pennsylvania announced that International SOS agreed to pay $940,000 to resolve civil allegations that it overcharged TRICARE, a healthcare insurance system for members of the US military services and their families, for aeromedical evacuation services by concealing discounts it received from third-party air ambulance providers. International SOS negotiated discounts from third-party air ambulance providers, which it was required to pass along to TRICARE. Instead, International SOS did not disclose the actual cost of the aeromedical evacuation services during the quoting process; billed TRICARE at the higher non-discounted amount; and received payment from TRICARE for the inflated costs, which International SOS contends it retained as a fee. This settlement resolved allegations filed in a qui tam lawsuit by a former International SOS Regional Flight Desk Manager. The claims resolved by the settlement were allegations only, and there was no determination of liability.[108]
- **Julie Osnes and Julie Osnes Consulting LLC (collectively, Osnes):** In June, the US Attorney's Office for the Eastern District of Washington announced that the Osnes agreed to pay $751,571 to resolve allegations that they caused states to submit false quality control data for SNAP. The settlement resolved allegations that, pursuant to Osnes' recommendations and advice, certain states manipulated and biased the quality control process to falsely reduce their error rate, resulting in the states receiving bonuses to which they were not entitled based on the false and biased quality control information. The claims resolved by the settlement were allegations only, and there was no determination of liability.[109]
- **DeKalb County, Georgia:** In May, the US Attorney's Office for the Northern District of Georgia announced that DeKalb County agreed to pay $750,000 to resolve allegations that between 2013 and 2016, the County and its agency WorkSource DeKalb misused grant funds from the Department of Labor's On-the-Job Training (OJT) program by subsidizing the wages of County employees who were not eligible for the OJT program. The government alleged that WorkSource DeKalb required employees who were not eligible for OJT to sign OJT paperwork. The claims resolved by the settlement were allegations only, and there was no determination of liability.[110]
- **ManTech Advanced Systems International, Inc. (ManTech):** In August, the US Attorney's Office for the Eastern District of Virginia announced that ManTech agreed

to pay $750,000 to settle civil allegations that ManTech falsely represented that its principal manager of a contract for security services at the EPA had a Top Secret clearance as required by the contract. The settlement resolved allegations that from the time the project manager's clearance had been revoked until the time the project manager was removed from the project, ManTech billed EPA $325,701 for his services. The claims resolved by the settlement were allegations only, and there was no determination of liability.[111]

- **Fortinet, Inc.:** In April, the US Attorney's Office for the Northern District of California announced that Fortinet, a network security company, agreed to pay $545,000 to resolve allegations that between 2009 and 2016, a Fortinet employee altered country-of-origin labels so the products would appear to be compliant with the TAA, when they were not. Fortinet acknowledged that the responsible employee directed certain employees and contractors to change product labels so that no country of origin was listed or to include the phrases "Designed in the United States and Canada," or "Assembled in the United States." Fortinet acknowledged that the responsible employee's actions involved products sold to certain distributors that subsequently sold them to resellers, which in turn sold a portion of them to US government end users. The responsible employee was terminated from employment with Fortinet. To settle the allegations, Fortinet agreed to pay $400,000 and provide the United States Marine Corps with additional equipment valued at $145,000. This case arose from allegations filed in a qui tam lawsuit by a former Fortinet employee in which the government intervened.[112]
- **Mary Catherine Grasmick and MASS Service and Supply, LLC (MASS):** In September, the US Attorney's Office for the District of Colorado announced that Ms. Grasmick and her company MASS agreed to pay a combined $500,000 to settle civil allegations that they made false statements to the SBA to remain in the SBA's HUBZone program. Further, during the SBA's investigation, Ms. Grasmick intentionally caused the creation of spreadsheets with false information, and then knowingly sent that false information to investigators with the intent to impede and obstruct the government's investigation. Ms. Grasmick pleaded guilty to falsifying records with the intent to obstruct a federal investigation. Sentencing was scheduled for December 17, 2019. Except as to conduct admitted in the criminal pleas, the claims resolved by the civil settlement were allegations only, and there was no determination of liability.[113]
- **Sunrise Systems of Brevard, Inc. (Sunrise):** In August, the US Attorney's Office for the Middle District of Florida announced that Sunrise agreed to pay $500,000 to resolve allegations that it submitted claims for government funds in violation of SBA regulations. According to the settlement agreement, from December 10, 2013, through February 9, 2016, Sunrise partnered with a minority-owned small business, V&R Enterprises of Jacksonville, Inc., but violated the SBA's labor and work performance requirements in order to access SBA set-aside funds. The government

alleged that Sunrise performed nearly all the work on the joint venture NASA demolition project and received nearly all the profits, in violation of the law. The claims resolved by the settlement were allegations only, and there was no determination of liability.[114]

- **Tooles Contracting Group, LLC; Commercial Contracting Corporation (CCC); G&B Electric, Inc. (G&B); and James Gierlach:** In April, the US Attorney's Office for the Eastern District of Pennsylvania announced that Tooles, CCC, G&B, and G&B's President, James Gierlach, agreed to pay $466,500 to resolve allegations that Tooles, G&B, and Gierlach engaged in bid-rigging and inflated invoices that were submitted to Amtrak under a contract to improve the accessibility of several Amtrak stations. CCC was the minority owner of Tooles and contributed to the settlement.[115] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Silvus Technologies, Inc. (Silvus):** In July, the US Attorney's Office for the Northern District of New York announced that Silvus agreed to pay $435,806 to resolve allegations that Silvus overbilled the US Air Force on three different contracts. The government alleged that Silvus failed to accurately track its direct labor costs and certain indirect costs, improperly attributed some employee labor costs to the contracts, and included certain unallowable charges in its incurred cost proposals.[116] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Nagan Construction, Inc. (Nagan):** In August, the US Attorney's Office for the Southern District of New York announced that Nagan agreed to pay $435,000 to settle allegations that it underpaid workers on two federally funded construction projects at the United States Merchant Marine Academy (USMMA) and submitted false certified payroll reports that misclassified thousands of hours of work performed by these workers to the USMMA and the Department of Labor, violating both the Davis-Bacon Act and the FCA. Under the settlement agreement, Nagan admitted, acknowledged, and accepted responsibility for, among other things: Nagan's president and CEO, as well as other senior Nagan managers, were aware of the requirement to pay workers the prevailing wage rates listed in the applicable wage determinations; Nagan underpaid 20 employees on two USMMA projects; Nagan improperly misclassified thousands of hours of the work these employees performed on the two projects; and Nagan paid these employees for this work using the prevailing laborer wage, instead of the higher prevailing wage to which they were entitled for the carpentry, bricklayer, and other skilled work the employees had actually performed. Of the $435,000, $242,375 will be distributed to the current and former NAGAN employees who were underpaid. This case arose in connection with the filing of a qui tam lawsuit filed under seal in which the government intervened.[117]
- **Oral Roberts University (ORU):** In June, DOJ announced that ORU agreed to pay $303,502 to settle allegations that ORU submitted false claims to the US Department

of Education in violation of the federal ban on incentive-based compensation. The settlement resolves allegations that between 2014 and 2016, ORU hired Joined Inc. to recruit students to ORU. ORU allegedly compensated Joined Inc. in part with a share of the tuition that ORU received from the enrollment of recruited students, in violation of the prohibition on incentive compensation. This settlement resolved allegations that were originally brought as a qui tam lawsuit by Maurice Shoe, the co-owner of Joined. The claims resolved by the settlement were allegations only, and there was no determination of liability.[118]

– **Support of Microcomputers Associates (SOMA):** In June, the US Attorney's Office for the Eastern District of Pennsylvania announced that SOMA agreed to pay $300,000 to resolve allegations that it sold printers and other equipment to federal agencies that was manufactured in China and other non-TAA compliant countries. Specifically, the United States alleged that SOMA ignored TAA rules and offered to sell printers and other materials manufactured in China, Vietnam, and other non-TAA compliant countries to US government agencies. This settlement resolved allegations that were originally brought as a qui tam lawsuit by a former SOMA executive. The claims resolved by the settlement were allegations only, and there was no determination of liability.[119]

– **Drexel University:** In October, the US Attorney's Office for the Eastern District of Pennsylvania announced that Drexel University agreed to pay $189,062 to resolve allegations that a former professor used grant funds at "gentlemen's clubs" and for other unallowable purchases. After an internal audit, Drexel discovered that between 2007 and 2017, the head of Drexel's Department of Electrical and Computer Engineering, Dr. Chikaodinaka D. Nwankpa, submitted improper charges against federal grants. The majority of the charges were made to gentlemen's clubs and sports bars in the Philadelphia area. Drexel disclosed Dr. Nwankpa's conduct to the government and cooperated with the investigation to identify the full scope of the misconduct. Dr. Nwankpa repaid $53,328 to Drexel, resigned his position in lieu of termination, and was debarred from federal government contracting for a period of six months. The claims resolved by the settlement were allegations only, and there was no determination of liability.[120]

– **Liberty Air Parts, Inc.; U.S. Supply Corporation; George Onorato; and Ellen Onorato:** In June, the US Attorney's Office for the Eastern District of Pennsylvania announced that that two defense supply companies, Liberty Air Parts, Inc. and U.S. Supply Corporation, and a married couple who operated them, George and Ellen Onorato, agreed to pay $159,390 to resolve allegations that they supplied non-conforming parts to the military. Instead of supplying brand new parts—direct from the manufacturer or authorized dealer, the defendants supplied leftover, surplus parts. To conceal this substitution, they allegedly made false statements and falsified records. To resolve the allegations, the defendants agreed to the entry of a consent judgment against them in the amount of $159,390. As part of this proposed consent judgment, the defendants admitted that they supplied parts in surplus condition in violation of contract requirements and the FCA; their substitution harmed open competition and undermined the integrity of the government's procurement process; and they acted recklessly when they responded to the government's requests for information about the parts. As part of the proposed consent judgment, the defendants will be debarred from federal contracting.[121]

- **Memphis Goodwill Industries, Inc. (Goodwill):** In June, the US Attorney's Office for the Western District of Tennessee announced that Goodwill agreed to pay $150,000 to settle allegations that it falsely submitted annual certifications that it had employed disabled individuals for 75% of its direct labor hours pursuant to the AbilityOne Program, when the percentage of direct labor hours actually worked by disabled individuals was much lower. Goodwill falsified these records for services rendered to the Internal Revenue Service, VA and GSA.[122] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Spectra Contract Flooring (Spectra):** In March, the US Attorney's Office for the Western District of Washington announced that Spectra Contract Flooring, a wholly owned subsidiary of Shaw Industries Group Inc., agreed to pay $133,718 to settle allegations that it provided kickbacks to a defense contractor. The government alleged that as a subcontractor working on a seismic upgrade at the Bangor Submarine Base near Silverdale, Washington, Spectra billed the Navy for flooring services at the private residence of the head of the project's general contractor, Brent Meisner. In the related criminal case, Meisner was sentenced to 18 months in prison in 2017. The claims resolved by civil the settlement were allegations only, and there was no determination of liability.[123]
- **Eagle Alliance:** In November, the US Attorney's Office for the District of Maryland announced that Eagle Alliance, a Northrop Grumman partnership, paid $110,000 to resolve allegations that it improperly billed the government twice for the same computer hardware and billed certain used computer equipment to the government as if it were new. The allegations arose from a qui tam lawsuit filed by a former Eagle Alliance employee. The government intervened in the qui tam relator's suit. The claims resolved by the settlement were allegations only, and there was no determination of liability.[124]

Procurement and Grants Complaints and Interventions

- **Mission Support Alliance LLC (MSA), Lockheed Martin Corporation (LMC), Lockheed Martin Services Inc. (LMSI), and Jorge Francisco Armijo:** In February, the United States filed suit against MSA (a joint venture of which a LMC subsidiary was previously a member), LMC and an affiliate, and Jorge Francisco Armijo, Vice President of LMC and former President of MSA. The government alleged that these entities made false claims and kickbacks in connection with a multi-billion dollar contract with the Department of Energy to support environmental cleanup at the Hanford Site near Richland, Washington. MSA awarded its affiliate, LMSI, a multi-million dollar subcontract to provide management and technology solution services from 2010 through 2016. The government alleged that the defendants knowingly made false statements about the amount of profits included in LMSI's billing rates under the subcontract in violation of the FCA, and that LMC paid over $1 million to Armijo and other MSA executives in exchange for the LMSI subcontract at inflated rates. The complaint contains allegations only, and there has been no determination of liability.[125]

- **CB&I AREVA MOX Services LLC (MOX Services) and Wise Services Inc.:** In February, the United States filed suit against MOX Services and Wise Services, Inc. concerning a contract between MOX Services and the National Nuclear Security Administration (NNSA) to design, build, and operate a fuel fabrication facility in Aiken, South Carolina. MOX services entered into several subcontracts with Wise Services between 2008 and 2016. The government alleged that Wise Services falsely claimed reimbursement under the subcontracts for non-existent construction materials, and that MOX Services knowingly submitted $6.4 million in claims for these fraudulent charges to the NNSA. The complaint also alleged that Wise Services' Senior Site Representative Phillip Thompson paid kickbacks to MOX Services; Thompson has already pleaded guilty to conspiring to commit theft of government funds. The complaint contains allegations only, and there has been no determination of liability.[126]
- **BJ Trucking Company, Inc., Douglas Cline, and Chad Cline:** In March, the US Attorney's Office for the Eastern District of North Carolina filed suit against BJ Trucking Company and two of its principals, Douglas Cline and Chad Cline, for using federal funds to make unauthorized fuel purchases between 2009 and 2015. The government alleged that BJ Trucking, a former Highway Contract Route supplier for USPS used federal funds to pay for commercial, instead of postal, routes and for unleaded fuel purchases for unauthorized personal vehicles. The government also alleged that the Clines made hundreds of thousands of dollars of fraudulent transfers to conceal money from the government. The complaint contains allegations only, and there has been no determination of liability.[127]
- **Michael Edward White and David Mitchelle White:** In November, the US Attorney's Office for the Northern District of Florida announced that two former ranking City of Lynn Haven officials, which included Michael White, were indicted by a federal grand jury with several others for conspiring with three local business executives, which included David White, to process some $5 million in fraudulent invoices for Hurricane Michael cleanup work that was not performed. The 35-count indictment charged the defendants with conspiring to commit wire fraud, substantive counts of wire fraud, and conspiracy to commit money laundering. Former Lynn Haven City Manager Michael Edward White and Erosion Control Specialists (ECS) owner David White were

additionally charged with filing false claims to the Federal Emergency Management Agency (FEMA). Specifically, the indictment alleged that City Manager White entered into an emergency agreement with David White and ECS to perform services for Lynn Haven related to post-hurricane assistance, with the understanding that invoices submitted for payment to Lynn Haven would be submitted to FEMA for reimbursement. The invoices David White submitted were false and fraudulent as to a number of material matters. Michael White allegedly authorized payment for vague and false invoices and located jobs for ECS to perform that were not authorized under the emergency agreement. The complaint contains allegations only, and there has been no determination of liability.[128]

- **Navistar Defense LLC (Navistar):** In December, DOJ announced that the United States intervened in a qui tam suit filed in the US District Court for the District of Columbia against Navistar alleging that Navistar submitted fraudulent invoices to support inflated prices for commercial parts under its contract to supply Mine Resistant Ambush Protected vehicles to the US Marine Corps. The allegations arose from a qui tam lawsuit originally filed by a former government contracts manager for Navistar Defense. The claims alleged in the lawsuit are allegations only, and there has been no determination of liability.[129]

FINANCIAL INSTITUTIONS

Financial Institutions Settlements

- **Quicken Loans Inc. (Quicken):** In June, Quicken agreed to pay $32.5 million to resolve allegations that it violated the FCA by falsely certifying compliance with FHA mortgage insurance requirements as a direct endorsement lender. In its 2015 complaint brought in the District Court for the District of Columbia, the United States alleged that between September 2007 and December 2011, Quicken requested specific inflated appraisal values in violation of FHA rules, permitted its managers to violate FHA rules to approve loans, regularly misrepresented or miscalculated borrower incomes, pressured underwriters to approve more loans, and ignored red flags indicating a borrower would not be able to repay. The case was transferred to the Eastern District of Michigan in 2016, the court denied defendant's motion to dismiss in 2017, and the case entered mediation in 2019. The claims resolved by the settlement were allegations only, and there was no determination of liability.[130]
- **Sierra Pacific Mortgage (SPM):** In February, the US Attorney's Office for the Eastern District of California announced that SPM, a national mortgage lender headquartered in California, had agreed to pay $3.67 million to resolve allegations that it violated the FCA by falsely certifying compliance with FHA mortgage insurance requirements as a direct endorsement lender. The government alleged that between April 2007 and June 2009, SPM knowingly submitted loans for FHA insurance that did not qualify, failed to properly respond to internal warning signs that its loans were

poorly underwritten, and failed to properly implement a quality control program once it was aware of those warning signs. The claims resolved by the settlement were allegations only, and there was no determination of liability.[131]

Financial Institutions Complaints

- **Standard Chartered Bank, Standard Chartered Bank PLC, and Standard Chartered Trade Services Corporation (collectively, SCB):** In March, the District Court for the Southern District of New York ordered unsealed a civil complaint filed on November 29, 2018, by relator Brutus Trading, LLC against SCB. The relator (which had asserted similar allegations in a 2012 lawsuit that it voluntarily dismissed in 2017), alleges that SCB violated US sanctions against Iran by facilitating and concealing US dollar transactions on behalf of Iranian clients. The relator contends that the funds involved in such transactions are forfeited to the United States and that SCB violated the FCA by failing to provide those funds to the United States. The United States (through the US Attorney's Office for the Southern District of New York) declined to intervene and moved to dismiss the action, arguing that relator's theory that the potential for civil forfeiture can support "reverse false claim" liability is legally without merit, that the government's investigation into the relator's allegations revealed them to be baseless, and that separate instances of SCB's sanctions violations discovered by the government were not based on the relator's allegations.[132] The complaint contains allegations only, and there has been no determination of liability.
- **JD Equipment de Mexico, S de R.L. de CV (JD Equipment); South Point Equipment, LLC (South Point); and Alexis Dubourdieu Urdangarin:** In April, the United States (through the US Attorney's Office for the District of Columbia) filed a complaint against JD Equipment, South Point, and Alexis Dubourdieu Urdangarin (owner of JD Equipment and co-owner of South Point). The government alleges that the defendants forged signatures and failed to disclose the common ownership of South Point (a US exporter) and JD equipment (a foreign buyer) and thereby caused a third-party bank, Banco Monex, to file false claims with the Export-Import Bank of the United States. The government seeks $4.1 million in treble damages.[133] The complaint contains allegations only, and there has been no determination of liability.

State and Local Developments

STATE LEGISLATIVE ACTIVITY

- In 2005, Congress enacted the Deficit Reduction Act (DRA), which encourages states to fight Medicaid fraud by allowing a state to keep 10% of what would otherwise be the federal share of Medicaid funds recovered, if the state has enacted a false claims statute that is “at least as effective” as the federal FCA.[134] Following amendments in 2009 and 2010 that strengthened the federal FCA, many states were given until March or August of 2013 to update their false claims laws to bring them back into alignment with the federal statute. Several states have since amended their false claims statutes, and the HHS OIG has issued determinations on whether the state laws are DRA-compliant.
- In 2019, the OIG certified six additional states as DRA-compliant: **California**, **Delaware**, **Georgia**, **Hawaii**, **New York**, and **Rhode Island**.[135]
  - **Georgia** secured its compliance when, in May 2018, Governor Nathan Deal signed into law a bill conforming the civil penalty provisions of the Georgia False Medicaid Claims Act with the federal False Claims Act.[136]
  - **Delaware** achieved compliance in September 2018 when Governor John Carney signed into law a bill conforming the civil penalty provisions of the Delaware False Claims and Reporting Act with the federal False Claims Act.[137]
  - On June 7, 2019, **Hawaii** Governor David Ige signed into law a bill conforming the civil penalty provisions of the Hawaii False Claims Act with the federal False Claims Act.[138]
  - As reported in past editions of the WilmerHale False Claims Act Year-in-Review, **California** (in 2017) and **New York** and **Rhode Island** (in 2018) also amended their state false claims acts to conform to the civil penalty provisions of the federal False Claims Act.
- In a series of decision letters issued in late 2016, the OIG had determined that the following states were not DRA-compliant: **Florida**, **Michigan**, **Minnesota**, **New Hampshire**, and **Wisconsin**. The most frequent deficiency cited was that each state’s false claims statute did not reflect the increased penalties mandated under the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015, which increased the civil penalties authorized under the federal False Claims Act.[139] The OIG granted most of these states a grace period to amend their statutes until the end of 2018 (and thus the states had continued to receive incentive funding until then).[140]
- The HHS OIG made clear in a supplemental letter issued to **Minnesota** on January 25, 2019, that the grace period it had extended to come into DRA compliance had ended. As a result, “effective January 1, 2019,” states that were not DRA-compliant would “no longer receive the financial incentive authorized under” the DRA.[141]

- On February 26, 2019, **Wyoming** Governor Mark Gordon signed into law a bill amending the Wyoming Medicaid False Claims Act to confirm that the "Medicaid fraud control unit," a team housed within the Office of the Wyoming Attorney General, has authority to bring civil actions under the act.[142]
- On April 11, 2019, **Arkansas** Governor Asa Hutchinson signed into a law a bill that revised the Arkansas Medicaid Fraud False Claims Act to permit the Attorney General to agree to a payment of up to 10% of the statute's civil penalty to reward a person who provided information leading to the successful detection and settlement of a Medicaid false claim.[143]
- On May 30, 2019, **Minnesota** Governor Tim Walz signed into law a bill conforming the civil penalty provisions of the Minnesota False Claims Act with the federal False Claims Act.[144]
- On July 26, 2019, **Illinois** Governor J.B. Pritzker signed into law a bill amending the Illinois False Claims Act by restructuring how the state's Whistleblower Reward and Protection Fund is managed and distributed.[145]
- In the **District of Columbia**, a bill is pending that would expand false claims liability to include certain tax-related actions. The bill would allow for liability under the District's false claims statute if the false claimant reported net income, sales, or revenue totaling $1 million or more and the damages claimed totaled $350,000 or more.[146] An identical bill failed to advance in the previous legislative session.[147]
- In **Illinois**, three bills are pending that would provide the Department of Revenue and the Attorney General, but not private parties, with authority to bring an administrative or judicial action, respectively, for false claims relating to certain taxes.[148] Another bill is pending that would bar private parties from bringing claims under the Illinois False Claims Act for misconduct pertaining to a proposed "Checkout Bag Tax Act" that charges customers and retailers small fees related to the distribution of "single use" bags.[149]
- In **Kansas**, a bill is pending that would add a qui tam provision to the Kansas False Claims Act.[150]
- In **Michigan**, two bills remain pending that would expand the state's current Medicaid False Claims Act to cover claims beyond Medicaid.[151]
- In **New Jersey**, bills have been introduced that would clarify the effective date of the New Jersey False Claims Act,[152] and make certain provisions of the Act retroactive.[153]
- In **Oklahoma**, a bill has been introduced that would expand the Oklahoma False Claims Act beyond healthcare programs.[154]
- In **South Carolina**, a bill is pending that would create a qui tam system in South Carolina modeled largely on the federal False Claims Act.[155]
- In **Wisconsin**, three bills have been introduced that would restore a private individual's authority to bring a qui tam claim against a person who makes a false claim for medical assistance, a right that was eliminated in a 2015 statute.[156] The bills

would also conform the civil penalty provisions of the Wisconsin False Claims Act with those under the federal False Claims Act.[157] Of those bills, one would also expand the state's qui tam statute to include any false or fraudulent claims made to state agencies.[158]

- Bills that would have added qui tam provisions to the states' false claims acts failed in in **Maine**[159] and **Oregon**.[160]
- On January 31, 2019, **New Jersey** Governor Phil Murphy returned without his approval a bill that would have exempted awards recovered under the state false claims act from state income tax assessments. Governor Murphy stated that, although he "remain[ed] committed to . . . [i]ncentivizing whistleblowers," "matters of tax policy and State revenues" were better "considered as part of the overall annual budget negotiation process."[161]
- A bill that would have created a state false claims act failed in **North Dakota**.[162]

NOTEWORTHY STATE SETTLEMENTS OR JUDGMENTS

As in prior years, the most significant state false claims settlements in 2019 concerned alleged Medicaid fraud, typically involving allegations of inflated pricing, kickback schemes, or deceptive marketing. States have also continued to join forces with the federal government, either individually or in multi-state efforts.

Some of the more significant state false claims settlements in 2019 included:

- **All 50 states, the District of Columbia, and Puerto Rico settled with Reckitt Benckiser Group for $200 million.** In a settlement announced in October, Reckitt Benckiser (RB Group) agreed to pay $200 million to 50 states, the District of Columbia, and Puerto Rico to settle allegations that one of its subsidiaries, which it had spun off in 2014, had improperly marketed and promoted the drug Suboxone, resulting in allegedly improper expenditures of state Medicaid funds.[163] The agreement was entered into pursuant to a framework established by the company's prior global settlement with the federal government. The claims resolved by the settlement were allegations only, and there was no determination of liability. RB Group affirmatively denied the allegations.
- **Many states settled with Walgreen Co. for $269 million.** In January, Walgreen Co. (Walgreens) agreed to pay $269 million to the federal government and 49 states to settle allegations that Walgreens knowingly over-dispensed insulin pens to Medicaid and Medicare patients.[164] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Texas settled with Xerox Corporation and several of its former subsidiaries for $235.9 million.** In February, Xerox and several of its former subsidiaries—including Conduent, Inc.—agreed to pay Texas $235.9 million to settle allegations regarding

the processing of prior authorization requests by dentists to deliver orthodontic services to Medicaid patients in violation of the Texas Medicaid Fraud Prevention Act.[165] The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **California settled with Morgan Stanley for $150 million.** In April, Morgan Stanley agreed to pay California $150 million to settle allegations that it had concealed the high risk of mortgage-backed securities sold to the California Public Employees' Retirement System and the California State Teachers Retirement System from 2003 to 2007, in alleged violation of the California False Claims Act, Corporate Security Law, and False Advertising Law.[166] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Many states settled with Avalign Technologies, Inc. and its subsidiary Instrumed International, Inc. for $9.5 million.** In November, Avalign and its subsidiary Instrumed agreed to pay $9.5 million to 45 states and the federal government to settle allegations that they were submitting claims for reimbursement to Medicaid for medical devices that were not approved or cleared by the FDA.[167] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Several states settled with Cisco Systems, Inc. for $6 million.** In August, Cisco agreed to pay $6 million to 18 states and the District of Columbia to settle allegations that its security surveillance software sold to the states and the federal government had flaws rendering the system vulnerable to hackers and that, despite learning of the exposure, the company failed to report or remedy this security flaw for several years.[168] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Several states settled with LexisNexis Risk Solutions, Inc. and several affiliates for $5.8 million.** In July, LexisNexis Risk Solutions and several affiliates agreed to pay $5.8 million to Illinois, Massachusetts, New Jersey, New York, and Tennessee, as well as to the City of Baltimore, to settle allegations that they had underpaid certain fees associated with the purchase and resale of automobile crash reports and related crash data, which are owed to state and local law enforcement agencies by contract.[169] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Maryland settled with International Business Machines Corporation (IBM) and Cúram Software for $2.8 million.** In June, IBM and Cúram agreed to pay Maryland $2.8 million and the federal government $12 million to settle allegations regarding material misrepresentations made to Maryland during the state's Health Insurance Exchange contract procurement process.[170] The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **California and Florida settled with Covidien LP for $2.52 million.** In March, Covidien LP agreed to pay California $1,474,892, Florida $1,047,160, and the federal

government $17,477,947 to settle allegations that it provided free or discounted practice development and market development support to physicians located in California and Florida to induce purchases of its vein ablation products.[171] The claims resolved by the settlement were allegations only, and there was no determination of liability.

NOTEWORTHY STATE SUPREME COURT DECISION

– ***Gonzalez v. State*, 207 A.3d 147 (Del. 2019).** The State of Delaware brought an action against a SNAP recipient for fraud under Delaware common law and the Delaware False Claims and Reporting Act after the State had already prevailed in an administrative action against the recipient based on the same fraudulent conduct. The Supreme Court of Delaware held that the federal Food and Nutrition Act preempted the State's civil action because Congress intended to require states to choose between an administrative hearing and court when proceeding against an individual for fraud in obtaining SNAP benefits. 207 A.3d at 154.

About WilmerHale's False Claims Act Practice

With a team of veteran litigators and former lawyers from the Justice Department and other key federal departments, including DoD and HHS, WilmerHale brings unparalleled experience to representing clients in FCA investigations and litigation. We regularly represent clients in sectors of the economy facing the greatest FCA activity, including healthcare and pharmaceuticals, defense, government procurement, financial services, energy, and information technology. Our team includes lawyers who, during prior government service, oversaw the management, litigation and settlement of major FCA investigations and suits. We thus approach each matter with a deep understanding of the government's objectives, and we have obtained favorable resolutions of numerous matters without a formal action being filed. We also have an extensive track record of obtaining early dismissal or resolution of suits by focusing on precedent-setting legal defenses, including innovative uses of the public-disclosure and first-to-file bars. By conducting credible internal investigations and negotiating with DOJ, we have also helped clients avoid criminal prosecution and accomplish appropriate civil resolutions of parallel criminal, civil, and administrative proceedings. If a case goes to trial, we have experienced courtroom advocates prepared to take the case to a jury.

Our FCA Group includes:

- A former Deputy Attorney General of the United States, who supervised all of DOJ's litigating and law enforcement components (including DOJ's Civil Frauds Unit and the US Attorneys' Offices) and co-led (with the Deputy Secretary of HHS) the Obama Administration's "HEAT" initiative against healthcare fraud. He also served in an earlier administration as Assistant Attorney General for the Civil Division, where he directly supervised FCA enforcement; and as Deputy General Counsel for DoD, where he supervised all litigation at DoD, including FCA and government-contracts litigation.
- A former Deputy Attorney General of the United States, who in that capacity had ultimate oversight over DOJ's Civil Frauds Unit and considered major interventions and settlements. She also had served as General Counsel of DoD, responsible for overseeing all litigation, including FCA litigation.
- Four former US Attorneys—for the Central District of California, the District of Columbia, and the District of Colorado.
- A former General Counsel of DoD, responsible for overseeing all litigation, including FCA and other procurement-related legal work.
- A former Chief of Staff and Assistant Secretary for the Department of the Interior, who, in response to the Deepwater Horizon incident, acted as lead negotiator of the Natural Resource Damage Assessment team.
- Numerous former Assistant US Attorneys and other lawyers with jury trial experience, as well as litigators who specialize in handling government contracts litigation.

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[1] The statistics in this paragraph are drawn from the following Justice Department documents: Civil Division, US Dep't of Justice, Fraud Statistics—Overview; Fraud Statistics—Health and Human Services; Fraud Statistics—Department of Defense; Fraud Statistics—Other (Non-HHS, Non-DOD) (Jan. 9, 2020), https://www.justice.gov/opa/press-release/file/1233201/download; and Press Release, US Dep't of Justice, *Justice Department Recovers Over $3 Billion from False Claims Act Cases in Fiscal Year 2019* (Jan. 9, 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019.

[2] Memorandum from Michael D. Granston, Director, Commercial Litigation Branch, Fraud Section, US Dep't of Justice, to Att'ys, Commercial Litigation Branch, Fraud Section (Jan. 10, 2018), https://assets.documentcloud.org/documents/4358602/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf.

[3] Letter from Stephen E. Boyd, Assistant Att'y Gen. for Leg. Aff., to Sen. Charles E. Grassley (Dec. 19, 2019), https://aboutblaw.com/NTc.

[4] Daniel Seiden, *DOJ Pursues Drug Suit that Got Away to Shore Up Dismissal Power*, Bloomberg Law (Jan. 6, 2020), https://news.bloomberglaw.com/federal-contracting/doj-pursues-drug-suit-that-got-away-to-shore-up-dismissal-power.

[5] Taxpayer First Act, Pub. L. No. 116-25, 133 Stat. 981 (2019), https://www.congress.gov/bill/116th-congress/house-bill/3151/text?overview=closed.

[6] *Id.* § 1405.

[7] *Id.*

[8] H.R. 59, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/59/text.

[9] *Id.* § 2(b).

[10] H.R. 864, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/864/text.

[11] *Id.* §§ 101-103.

[12] H.R. 2515, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/2515.

[13] *Id.* § 2.

[14] *See* Press Release, Off. of Rep. Al Green, *Congressman Al Green Announces Passage of Whistleblower Protection Reform Act of 2019* (July 9, 2019), https://algreen.house.gov/press-release/congressman-al-green-announces-passage-whistleblower-protection-reform-act-2019.

[15] H.R. 4147, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/4147/text?r=55&s=1.

[16] H.R. 4816, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/4816/text.

[17] S. Res. 194, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/senate-resolution/194/text.

[18] S. 2315, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/senate-bill/2315/text.

[19] S. 2529, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/senate-bill/2529/text.

[20] S. 2258, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/senate-bill/2258/text.

[21] *Id.* § 216(b).

[22] S. 2798, 116th Cong. § 5 (2019), https://www.congress.gov/bill/116th-congress/senate-bill/2798/text.

[23] Civil Monetary Penalties Inflation Adjustment, 84 Fed. Reg. 13,520 (Apr. 5, 2019), https://www.govinfo.gov/content/pkg/FR-2019-04-05/pdf/2019-06732.pdf.

[24] Press Release, US Dep't of Justice, *Department of Justice Issues Guidance on False Claims Act Matters and Updates Justice Manual* (May 7, 2019), https://www.justice.gov/opa/pr/department-justice-issues-

guidance-false-claims-act-matters-and-updates-justice-manual; US Dep't of Justice, Justice Manual 4-4.112 (May 2019), https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.112.

[25] Press Release, US Dep't of Justice, *Department of Justice Issues Guidance on False Claims Act Matters and Updates Justice Manual* (May 7, 2019), https://www.justice.gov/opa/pr/department-justice-issues-guidance-false-claims-act-matters-and-updates-justice-manual.

[26] Justice Manual 4-4.112.

[27] *Id.*

[28] *Id.*

[29] Press Release, US Dep't of Justice, *Department of Justice Issues Guidance on False Claims Act Matters and Updates Justice Manual* (May 7, 2019), https://www.justice.gov/opa/pr/department-justice-issues-guidance-false-claims-act-matters-and-updates-justice-manual.

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