

January 8, 2019

False Claims Act: 2018 Year-in-Review

TABLE OF CONTENTS

Introduction: Highlights and Trends.....	1
I. FEDERAL LEGISLATIVE AND REGULATORY DEVELOPMENTS.....	5
A. Congress.....	5
B. Department of Justice.....	6
C. Department of Health and Human Services.....	10
D. Department of Veterans Affairs.....	10
E. Securities and Exchange Commission.....	11
F. Commodity Futures Trading Commission.....	11
II. FEDERAL CASE LAW DEVELOPMENTS.....	12
A. Supreme Court.....	12
1. Pending Merits Case: Statute of Limitations.....	12
2. Pending Petition for Certiorari: Materiality.....	13
3. Notable Denials of Certiorari: (1) Rule 9(b); (2) Materiality.....	13
B. D.C. Circuit: Alleged Non-Compliance with Settlement Agreement.....	16
C. First Circuit: [None].....	17
D. Second Circuit: (1) First-to-File Bar; (2) Definition of “Claim”.....	17
E. Third Circuit: (1) Causation; (2) Public Disclosure Bar; (3) Causation for Retaliation Claims; (4) Oversight of Sealed Cases.....	19
F. Fourth Circuit: Retaliation.....	24
G. Fifth Circuit: Public Disclosure Bar.....	26
H. Sixth Circuit: (1) Materiality; (2) Scierer.....	27
I. Seventh Circuit: (1) Retaliation; (2) Particularity; (3) Materiality.....	28
J. Eighth Circuit: [None].....	30

K.	Ninth Circuit: (1) Implied False Certification; (2) Government-Action Bar	30
L.	Tenth Circuit: Falsity.....	32
M.	Eleventh Circuit: Statute of Limitations.....	33
III.	FEDERAL SETTLEMENTS, INTERVENTIONS, AND COMPLAINTS	35
A.	Healthcare and Pharmaceuticals.....	35
B.	Procurement and Grants	42
C.	Financial Institutions.....	49
IV.	STATE AND LOCAL DEVELOPMENTS	51
A.	State Legislative Activity	51
B.	Noteworthy State Settlements or Judgments.....	52
C.	Noteworthy State Supreme Court Decisions.....	54
	About WilmerHale’s False Claims Act Practice	56

Introduction: Highlights and Trends

Federal False Claims Act (FCA) recoveries in fiscal year 2018 amounted to \$2.88 billion, down by roughly \$600 million from the prior year and dropping below \$3 billion for the first time in eight years. Healthcare cases, including ones involving drug and device companies, accounted for most of the total, at roughly \$2.51 billion, up slightly from the previous year. Recoveries in Defense Department cases totaled approximately \$107 million, less than half the 2017 figure. The value of settlements and judgments in the non-healthcare and non-defense category dropped sharply, to just below \$260 million. In 2018, 645 new qui tam cases were filed—an average of more than 12 a week—down slightly from the year before but still at historically high levels.¹

In 2018, the Department of Justice (DOJ) continued to stress its focus on individual accountability, noting a number of substantial awards against individuals in cases also involving corporate entities and more than \$100 million in awards against individuals.²

DOJ Flexes Its Dismissal Authority

On January 10, 2018, Michael Granston, the Director of the Fraud Section of DOJ's Civil Division, issued a memorandum (the "Granston Memo") that provides DOJ attorneys with a framework to evaluate when to affirmatively seek dismissal of qui tam suits pursuant to the government's authority under 31 U.S.C. § 3730(c)(2)(A). The Granston Memo explains that DOJ considers dismissal "an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent."

The Granston Memo identifies seven non-exclusive circumstances in which DOJ attorneys should consider moving to dismiss: (1) when the relator's claims lack merit because the "relator's legal theory is inherently defective," or because "the relator's factual allegations are frivolous"; (2) when the action "duplicates a pre-existing government investigation and adds no useful information"; (3) when "an agency has determined that a *qui tam* action threatens to interfere with the agency's policies or the administration of its programs and has recommended dismissal to avoid these effects"; (4) when "necessary to protect the Department's litigation prerogatives," such as to avoid interference with similar claims in which the government has intervened; (5) when necessary to safeguard classified information or national security interests; (6) when "the government's expected costs are likely to exceed any expected gain"; and (7) when "problems with the relator's action [would] frustrate the government's efforts to conduct a proper investigation." DOJ formally incorporated the policy into the Justice Manual (formerly known as the United States Attorneys' Manual) at Section 4-4.111 in September 2018.³

When the Granston Memo appeared in January 2018, many wondered whether it signaled a change in DOJ practice or instead, as the Memo itself suggested, represented just a summary restatement of DOJ's approach to the exercise of its dismissal authority. Several instances of DOJ's use of that authority near the end of the year suggest that DOJ is indeed making more frequent use of dismissals and indicate some of the factors that seem to carry most weight with DOJ.

At the end of November, in responding to the Supreme Court's order requesting a brief in *Gilead Sciences, Inc. v. United States ex rel. Campie*, No. 17-936, DOJ not only responded to the question presented but also announced that, if the case were remanded to the district court, DOJ would move to dismiss the suit, based on two of the considerations described in the Granston Memo: a determination following an investigation that the claims were unfounded and a concern about discovery burdens on the government if the case were to proceed. A little more than two weeks later, DOJ moved to dismiss 11 cases brought with the substantial involvement of an organization called National Healthcare Analysis Group, apparently formed to develop a basis for asserting qui tam claims against pharmaceutical companies on a particular theory of Anti-Kickback Statute (AKS) liability. DOJ's briefs reflect not only its rejection of the theory of liability advanced in the cases but also its apparent hostility to organizational relators that pursue qui tam suits as a business model. DOJ's hostility seemed to be driven in significant part by what it alleged to be National Healthcare Analysis Group's deceptive methods of collecting information about company practices. Consistent with that last consideration, DOJ a few days later moved to dismiss two qui tam suits brought by a relator who, according to DOJ, faced allegations of short-selling the stock of the companies he had named as defendants.

These actions suggest that DOJ is most likely to use its dismissal authority in cases when it not only finds the relator's theory of liability unfounded but also considers the relator's activities to be improper in some way or views the case as likely to impose substantial discovery or litigation burdens on the government for little likely gain.

DOJ Restricts Use of Agency Guidance in Affirmative Litigation

On January 25, 2018, former Associate Attorney General Rachel Brand issued a memorandum (the "Brand Memo") that prohibits DOJ attorneys from using their civil enforcement authority to convert agency guidance documents into binding rules. In other words, DOJ will not use noncompliance with a guidance document to prove a violation of the applicable statute or regulation. DOJ may use evidence that a party read a guidance document as proof that the party knew of its obligations under the law, which can be relevant to establishing scienter as an element of an FCA claim. The Brand Memo builds on former Attorney General Jeff Sessions' November 16, 2017 memorandum prohibiting DOJ from issuing guidance documents that legally bind the public without undertaking a rulemaking process.⁴

In December, DOJ added a new section to the Justice Manual setting out standards for use of agency guidance documents in affirmative litigation.⁵ Although the Justice Manual codification draws on principles first announced in the Brand Memo, the Justice Manual arguably gives DOJ lawyers greater leeway in using guidance documents than the Brand Memo did, or makes clear that possible uses left unaddressed by the Brand Memo are permissible.⁶ First, section 1-20.202 of the codification authorizes use of guidance documents "as probative evidence that a party has satisfied, or failed to satisfy, professional or industry standards or practices relating to applicable statutory or regulatory requirements." Second, the Justice Manual appears to give DOJ lawyers greater leeway than the Brand Memo did in using guidance documents to help prove a defendant's culpable mental state.⁷ Third, the Justice Manual expressly includes

obligations created by “contract or certification” as among the underlying legal obligations that may continue to be enforced without regard to there being an equivalent statutory or regulatory requirement.⁸

Supreme Court To Resolve Statute of Limitations Question

In *Cochise Consultancy, Inc. v. United States ex rel. Hunt*, No. 18-315, the Supreme Court will resolve a Circuit split over 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 question presented is whether a relator may rely on § 3731(b)(2) when the United States has declined to intervene and, 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.”

The Supreme Court’s resolution of the disagreement in the lower courts will provide greater certainty for FCA defendants and discourage forum-shopping. A holding that § 3731(b)(2) is not available in declined cases would provide FCA defendants with greater protection against stale claims.

Continued Division in the Lower Courts Over Escobar and Materiality

The Supreme Court’s 2016 decision in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), continued to generate debate among the lower courts. In *Escobar*, the Court held that implied certification claims were viable under the FCA but only in certain circumstances. In the two and a half years since the Court handed down *Escobar*, dozens of lower courts have addressed issues left uncertain by *Escobar*, above all (i) when does a claim for payment constitute an implied certification of compliance with a regulatory or contractual obligation, and (ii) what establishes or disproves the materiality of an allegedly false representation.

Disagreements among the lower courts over these issues have begun to make their way back up to the Supreme Court. Parties filed three petitions for certiorari asking the Court to clarify the significance of the government’s payment practices in determining the materiality of alleged false certifications. See *Gilead Sciences, Inc. v. United States ex rel. Campie*, No. 17-936 (*petition docketed* Jan. 3, 2018, *cert. denied*, Jan. 7, 2019); *United States ex rel. Harman v. Trinity Industries, Inc.*, No. 17-1149 (*petition docketed* Feb. 16, 2018, *cert. denied*, Jan. 7, 2019); *Brookdale Senior Living Communities, Inc. v. United States ex rel. Prather*, No. 18-699 (*petition docketed* Nov. 28, 2018). Lower courts also continue to divide on the question whether the two conditions *Escobar* described as sufficient to establish implied false certifications—specific representations and non-disclosure that renders those representations misleading—are necessary. See, e.g., *United States ex rel. Rose v. Stephens Institute*, 909 F.3d 1012 (9th Cir. 2018).

Widening Circuit Split Over the First-to-File Bar

Courts continue to debate whether a first-to-file bar dismissal can be cured by amendment or only by filing a new action. In *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015), the Supreme Court held that the first-to-file bar does not apply once the earlier-filed action is no longer pending, but it left open how a relator may proceed after dismissal. This past year, the Second Circuit (agreeing with the government) joined two other Circuits in siding with defendants and rejecting the permissibility of curing violations by amendment of the complaint, with the First Circuit having previously permitted cure through amendment. See *United States ex rel. Wood v. Allergan, Inc.*, 899 F.3d 163 (2d Cir. 2018).

Increased Penalties

On January 29, 2018, DOJ announced its final rule adjusting civil penalties for 2018 under the 2015 Bipartisan Budget Act, which requires annual indexing of FCA penalties to account for the inflation rate. The minimum per-claim penalty increased by approximately 2% from between \$10,957 and \$21,916 to between \$11,181 and \$22,363. This adjustment applies to penalties assessed after January 29, 2018, and to violations that occurred after November 2, 2015.⁹

I. FEDERAL LEGISLATIVE AND REGULATORY DEVELOPMENTS

A. Congress

Enacted Legislation

- On June 25, 2018, President Trump signed into law S. 1869, the Whistleblower Protection Coordination Act, which permanently extends the program requiring each inspector general's office to have a dedicated official focused on empowering and educating whistleblowers. The Act also changes the title of these officials from "Ombudsman" to "Whistleblower Protection Coordinator," and charges them with assisting the inspectors general in educating the federal workforce on established reporting procedures and in the timely and appropriate handling of disclosures and allegations of reprisal.¹⁰
- On July 7, 2018, President Trump signed into law H.R. 2229, the All Circuit Review Act, which makes permanent a pilot program established by the Whistleblower Protection Enhancement Act of 2012. The Review Act provides whistleblowers with the ability to appeal decisions of the Merit Systems Protection Board to any US Court of Appeals.¹¹
- On August 13, 2018, President Trump signed into law H.R. 5515, the John S McCain National Defense Authorization Act for Fiscal Year 2019 (FY 2019 NDAA). Among the Act's many provisions is a requirement that the Secretary of Energy submit a report to Congress on how the Secretary defines a "chilled work environment" and an assessment as to whether the Secretary has the necessary authority to protect whistleblowers from retaliation.¹²

House of Representatives

- On March 20, 2018, Representative Raja Krishnamoorthi (D-IL) introduced H.R. 5351, the No Disrupting Accountability (NDA) Act, which seeks to clarify that a nondisclosure agreement based on employment in the Executive Office of the President or the White House may not be enforced if the individual violates the agreement by disclosing information that would be otherwise protected by federal whistleblower law.¹³
- On May 8, 2018, Representatives Madeleine Z. Bordallo (D-Guam) and Don Young (R-Alaska) introduced H.R. 5697, the Wildlife Conservation and Anti-Trafficking Act of 2018. The bill would, among other measures, incentivize whistleblowers to report wildlife trafficking.¹⁴ Senator Wyden (D-OR) introduced a companion bill in the Senate, S. 3605.¹⁵
- On June 1, 2018, Representatives Josh Gottheimer (D-NJ) and Lee Zeldin (R-NY) introduced H.R. 5993, the Fixing Housing Access Act of 2018, which seeks to amend the FCA by establishing certain restrictions on false claims actions arising from various government loan insurance programs—such as limiting damages and establishing a special statutory materiality threshold for recovery.¹⁶

- On September 26, 2018, Representative Francis Rooney (R-FL) introduced H.R. 6922, the Union Integrity Act, which seeks to amend the Labor-Management Reporting and Disclosure Act of 1959 to extend whistleblower protections to union employees. The bill would prohibit retaliation against union employees who engage in whistleblowing activities and provide a procedure for handling allegations of reprisal.¹⁷
- On October 5, 2018, Representative Louie Gohmert (R-TX) introduced H.R. 7032, the Adam S. Lovinger Whistleblower Reprisal Act of 2018, which seeks to amend the Intelligence Reform and Terrorism Prevention Act of 2004 to provide protection for whistleblowers holding a security clearance. The bill outlines the penalties facing an officer or employee of an agency who uses denial or restriction of a whistleblower's security clearance as a method of retaliation.¹⁸

Senate

- On February 13, 2018, in a speech on the floor of the Senate, Senator Chuck Grassley (R-IA) expressed his concern about how lower courts had been interpreting the Supreme Court's recent ruling in *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). He criticized courts for applying a "so-called government knowledge bar" to evaluating materiality in FCA cases. He stated that Justice Thomas, in his opinion, "did not say that in every case, if the government pays a claim despite the fact that someone, somewhere in the bowels of the bureaucracy might have heard about allegations that the contractor may have done something wrong, the contractor is automatically off the hook." He argued that if courts apply such a rule, the government will be hindered in its mission to protect taxpayers from fraud.¹⁹
- On May 24, 2018, Senator Tammy Duckworth (D-IL) introduced S. 2968, the Department of Energy and Nuclear Regulatory Commission Whistleblower Protection Act of 2018, intended to protect whistleblowers employed by the Department of Energy (DoE) and the Nuclear Regulatory Commission. The bill would amend the Energy Reorganization Act to clarify that all employees of those two agencies who bring whistleblower claims against the agencies are protected against retaliation.²⁰
- On June 28, 2018, Senator Chuck Grassley (R-IA), along with the members of the bipartisan Senate Whistleblower Protection Caucus, introduced a resolution (S. Res. 558) designating July 30, 2018, as National Whistleblower Appreciation Day. The Senate unanimously adopted the resolution.²¹

B. Department of Justice

Adjustment to Civil Penalties

- On January 29, 2018, DOJ announced its final rule adjusting civil penalties for 2018 under the 2015 Bipartisan Budget Act, which requires

annual indexing of FCA penalties to account for the inflation rate. The minimum per-claim penalty increased by approximately 2% from between \$10,957 and \$21,916 to between \$11,181 and \$22,363. This adjustment applies to penalties assessed after January 29, 2018, and to violations that occurred after November 2, 2015.²²

Guidance on FCA Enforcement

- On January 10, 2018, Michael Granston, the Director of the Fraud Section of DOJ's Civil Division, issued a memorandum (the "Granston Memo") that provides DOJ attorneys with a framework to evaluate when to affirmatively seek dismissal of qui tam suits under the FCA pursuant to the government's authority under 31 U.S.C. § 3730(c)(2)(A). The Granston Memo explains that DOJ considers dismissal "an important tool to advance the government's interests, preserve limited resources, and avoid adverse precedent." The memo identifies seven non-exclusive circumstances in which DOJ attorneys should consider moving to dismiss: (1) when the relator's claims lack merit because the "relator's legal theory is inherently defective," or because "the relator's factual allegations are frivolous"; (2) when the action "duplicates a pre-existing government investigation and adds no useful information"; (3) when "an agency has determined that a *qui tam* action threatens to interfere with the agency's policies or the administration of its programs and has recommended dismissal to avoid these effects"; (4) when "necessary to protect the Department's litigation prerogatives," such as to avoid interference with similar claims in which the government has intervened; (5) when necessary to safeguard classified information or national security interests; (6) when "the government's expected costs are likely to exceed any expected gain"; and (7) when "problems with the relator's action [would] frustrate the government's efforts to conduct a proper investigation." DOJ formally incorporated the policy into the Justice Manual at Section 4-4.111 in September 2018.²³

When the Granston Memo appeared in January 2018, many wondered whether it signaled a change in DOJ practice or instead, as the Memo itself suggested, represented just a summary restatement of DOJ's approach to the exercise of its dismissal authority. Several instances of DOJ's use of that authority near the end of the year suggest that DOJ is indeed making more frequent use of dismissals and indicate some of the factors that seem to carry most weight with DOJ.

At the end of November, in responding to the Supreme Court's order requesting a brief in *Gilead Sciences, Inc. v. United States ex rel. Campie*, No. 17-936, DOJ not only responded to the question presented but also announced that, if the case were remanded to the district court, DOJ would move to dismiss the suit, based on two of the considerations described in the Granston Memo: a determination following an investigation that the claims were unfounded and a concern about discovery burdens on the government if the case were to proceed. A little more than two weeks later, DOJ moved to dismiss 11 cases brought with the substantial involvement of an organization called National Healthcare Analysis Group, apparently formed to develop a basis for asserting qui

tam claims against pharmaceutical companies on a particular theory of Anti-Kickback Statute (AKS) liability. DOJ's briefs reflect not only its rejection of the theory of liability advanced in the cases but also its apparent hostility to organizational relators that pursue qui tam suits as a business model. DOJ's hostility seemed to be driven in significant part by what it alleged to be National Healthcare Analysis Group's deceptive methods of collecting information about company practices. Consistent with that last consideration, DOJ a few days later moved to dismiss two qui tam suits brought by a relator who, according to DOJ, faced allegations of short-selling the stock of the companies he had named as defendants.

These actions suggest that DOJ is most likely to use its dismissal authority in cases when it not only finds the relator's theory of liability unfounded but also considers the relator's activities to be improper in some way or views the case as likely to impose substantial discovery or litigation burdens on the government for little likely gain.

- On January 25, 2018, former Associate Attorney General Rachel Brand issued a memorandum (the "Brand Memo") that prohibits DOJ attorneys from using their civil enforcement authority to convert agency guidance documents into binding rules. In other words, DOJ will not use noncompliance with a guidance document to prove a violation of the applicable statute or regulation. DOJ may use evidence that a party read a guidance document as proof that the party knew of its obligations under the law. The Brand Memo builds on former Attorney General Jeff Sessions' November 16, 2017 memorandum prohibiting DOJ from issuing guidance documents that legally bind the public without undertaking a rulemaking process.²⁴

In December, DOJ added a new section to the Justice Manual setting out standards for use of agency guidance documents in affirmative litigation.²⁵ Although the Justice Manual codification draws on principles first announced in the Brand Memo, the Justice Manual arguably gives DOJ lawyers greater leeway in using guidance documents than the Brand Memo did, or makes clear that possible uses left unaddressed by the Brand Memo are permissible.²⁶ First, section 1-20.202 of the codification authorizes use of guidance documents "as probative evidence that a party has satisfied, or failed to satisfy, professional or industry standards or practices relating to applicable statutory or regulatory requirements." Second, the Justice Manual appears to give DOJ lawyers greater leeway than the Brand Memo did in using guidance documents to help prove a defendant's culpable mental state.²⁷ Third, the Justice Manual expressly includes obligations created by "contract or certification" as among the underlying legal obligations that may continue to be enforced without regard to there being an equivalent statutory or regulatory requirement.²⁸

- On February 28, 2018, in a speech at the Federal Bar Association Qui Tam Conference, Deputy Associate Attorney General Stephen Cox discussed the significance of the Granston and Brand Memos. He stated that qui tam cases will continue to play an important role in FCA enforcement. Cox noted the significant resources the government

expends in monitoring qui tam cases, even if it decides not to intervene, as relevant to whether a case should be dismissed. Cox also explained that dismissal may sometimes be in the government's best interests even if some claims for payment were not entirely accurate because the inaccuracies may not have materially harmed the government. With respect to the Brand Memo, Cox stated that guidance documents should educate the public concerning regulatory requirements and serve as "an appropriate, and important, source of transparency."²⁹

- On May 9, 2018, Deputy Attorney General Rod Rosenstein announced a new DOJ policy for determining corporate resolution penalties (the Piling On Policy) while giving remarks at the New York City Bar Association White Collar Crime Institute. The Piling On Policy encourages coordination among DOJ and other enforcement agencies when imposing multiple penalties for the same conduct. Rosenstein stated that the policy's "aim is to enhance relationships with our law enforcement partners in the United States and abroad, while avoiding unfair duplicative penalties." While the policy does not provide a right of action and is not enforceable in court, it was incorporated into the Justice Manual at Section 1-12.100 in May 2018.³⁰
- On November 29, 2018, Deputy Attorney General Rosenstein gave remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act in which he announced a revised policy concerning DOJ's pursuit of individual accountability in corporate criminal and civil cases. In criminal cases, "absent extraordinary circumstances, a corporate resolution should not protect individuals from criminal liability," he stated. If a corporation is seeking cooperation credit, it must identify every individual who was substantially involved in or responsible for the criminal conduct. But Rosenstein advised that investigations should not be delayed solely to allow corporations to collect information about individuals whose involvement was not substantial and who are not likely to be prosecuted. In civil cases, DOJ attorneys have discretion to award some credit to a corporation if it identifies all wrongdoing by senior officials, including members of senior management or the board of directors, even if the corporation does not qualify for maximum credit. Rosenstein further noted that DOJ attorneys cannot award any credit to a corporation that conceals misconduct by members of senior management or the board of directors, or otherwise demonstrates a lack of good faith in its representations.³¹

Additional Guidance for Compliance Programs

- On May 21, 2018, during remarks at Compliance Week's 2018 Conference for Compliance and Risk Professionals, Deputy Attorney General Rosenstein discussed DOJ's reform of its corporate enforcement policies and the importance of corporate compliance and ethics. Rosenstein identified two questions DOJ asks about a corporation's compliance program during an investigation: (1) "what was the state of the compliance program at the time of the improper conduct?"; and (2) "what is the current state of the compliance function, after remediation to address any lessons learned?"³²

- In a speech on June 14, 2018, to the American Bar Association’s 12th National Institute on the Civil False Claims Act and Qui Tam Enforcement, Acting Associate Attorney General Jesse Panuccio discussed initiatives undertaken by DOJ to reform FCA enforcement, including focusing on crediting companies that implement effective compliance and ethics programs. Panuccio reinforced that corporate defendants can receive a more favorable resolution for providing meaningful assistance to DOJ’s FCA investigations. Voluntary disclosure is the most valuable form of cooperation. Other cooperation efforts can include sharing information learned from an internal investigation and making witnesses available. DOJ, Panuccio stated, will “reward companies that invest in strong compliance measures.”³³
- On October 12, 2018, Assistant Attorney General Brian Benczkowski announced a memorandum that provides guidance on the selection of monitors for corporations involved in DOJ Criminal Division cases. Benczkowski emphasized the importance of compliance programs and elaborated on factors Criminal Division attorneys should consider when evaluating the benefits of a monitor. These factors include: (1) the type and pervasiveness of the conduct; (2) involvement of senior management in the violation of law or company policy; (3) investments/improvements to the company’s compliance program; (4) adequate remedial measures taken to address problematic behavior by employees, management, or third-party agents; (5) testing remedial improvements and internal controls; and (6) financial cost to the company.³⁴

C. Department of Health and Human Services

- On July 18, 2018, the Department of Health and Human Services (HHS) Office of Inspector General (OIG) submitted a draft proposed rule to the Office of Management and Budget entitled “Removal of Safe Harbor Protection for Rebates to Plans or PBMs Involving Prescription Pharmaceuticals and Creation of New Safe Harbor Protection.” The proposed rule would apparently remove safe harbor protection under the AKS for prescription drug rebates.³⁵
- On August 27, 2018, the HHS OIG issued its annual request for proposals for developing new, and modifying existing, safe harbor provisions under the AKS and exceptions to the beneficiary inducement provisions of the civil monetary penalty statute. Comments were due by October 26, 2018.³⁶

D. Department of Veterans Affairs

- On July 19, 2018, the Government Accountability Office (GAO) issued a report finding that Department of Veterans Affairs (VA) whistleblowers face higher rates of disciplinary action and dismissal after filing reports of wrongdoing, when compared to their VA peers. The report found, among other things, that VA whistleblowers were 10 times more likely than their VA peers to receive disciplinary action within a year of reporting misconduct; 66% of VA employees who filed a formal complaint did not work at the VA after one year; and VA officials found guilty of misconduct

sometimes received reduced punishment or none at all. GAO made 16 recommendations to address these and other issues.³⁷

E. Securities and Exchange Commission

- On June 28, 2018, the Securities and Exchange Commission (SEC) voted to propose amendments to the rules governing the SEC whistleblower program. The proposed rules would, among other things, (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 whistleblower has submitted false information to the SEC. Comments were due September 18, 2018.³⁸

F. Commodity Futures Trading Commission

- On August 2, 2018, the Commodity Futures Trading Commission (CFTC) announced more than \$45 million in whistleblower awards in 2018, \$30 million of which was awarded to one whistleblower. The CFTC also made its first award to a whistleblower living in a foreign country.³⁹

II. FEDERAL CASE LAW DEVELOPMENTS

A. Supreme Court

1. Pending Merits Case: Statute of Limitations

***Cochise Consultancy, Inc. v. United States ex rel. Hunt*, No. 18-315, petition for certiorari, 2018 WL 4348523 (U.S. Sept. 7, 2018), cert. granted, 202 L. Ed 2d 400 (Nov. 16, 2018)**

About the Case

The question presented concerns 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 question presented is whether a relator may rely on § 3731(b)(2) when the United States has declined to intervene and, 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.”

Relator Hunt alleges that the defendants, for whom he worked, engaged in a bid-rigging and bribery scheme that led to inflated charges for security services the Defense Department hired them to provide in Iraq. The relator filed his action more than six years after the alleged fraud occurred, but within three years of when he disclosed it to the government. 2018 WL 4348523, at *9-10.

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 *2, *10. That holding conflicted with decisions of the Fourth and Tenth Circuits, which have held that § 3731(b)(2) does *not* apply in cases in which the government has declined to intervene; and of the Ninth Circuit, which has held that § 3731(b)(2) can apply in that circumstance but that the relator *is* the relevant “official of the United States.”

Implications for Future FCA Cases

The Supreme Court’s resolution of the disagreement in the lower courts will provide greater certainty for FCA defendants and discourage forum-shopping. A holding that § 3731(b)(2) is not available in declined cases would provide FCA defendants with greater protection against stale claims.

2. Pending Petition for Certiorari: Materiality

Brookdale Senior Living Communities, Inc. v. United States ex rel. Prather, No. 18-699 (petition docketed Nov. 28, 2018)

About the Case

The relator was employed by the defendant, a senior living community, as a nurse. She alleges that the defendant's policy was to enroll assisted living residents in home health care services that were not medically necessary, and that this practice led to the submission of numerous claims that were "held" because they did not meet Medicare requirements. The relator was hired to work on a project to facilitate the processing of those claims. She alleges that the defendant paid doctors to review held claims and sign orders for care that had previously been provided.

The district court dismissed the complaint for failure to plead materiality. The Sixth Circuit reversed. *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.*, 892 F.3d 822 (6th Cir. 2018). First, it reasoned that the regulatory requirement in question was an express condition of payment. *Id.* at 831-833. Second, the court held that the relator had alleged "the government did not know that the claims the defendants submitted were false" and that, without such knowledge, "the government's response to the claims submitted by the defendants . . . has no bearing on the materiality analysis." *Id.* at 833-834. In that context, the court rejected the negative inference the district court had drawn from the relator's failure to plead facts concerning "the government's past practice with respect to claims that the government knew did not comply" with the relevant requirement. *Id.* Finally, the court pointed to the relator's reference to various government guidance documents that suggested the requirement in question was important to the government. *Id.* at 834-836. Taken together, the court explained, these allegations established materiality.

The defendant petitioned for certiorari on two questions: "[w]hether the failure to plead facts relating to past government practices in an FCA action can weigh against a finding of materiality" and "[w]hether an FCA allegation fails when the pleadings make no reference to the defendant's knowledge that the alleged violation was material to the government's payment decision."

3. Notable Denials of Certiorari: (1) Rule 9(b); (2) Materiality

Medical Device Business Services, Inc. v. United States ex rel. Nargol, No. 17-1108 (cert. denied, Apr. 16, 2018)

About the Case

The relators alleged that the defendant's marketing of a hip replacement device violated the FCA and its state counterparts in two ways. First, the relators alleged that the defendant made false statements regarding the product's safety and effectiveness when seeking clearance from the FDA. *United States ex rel. Nargol v. DePuy Orthopaedics, Inc.*, 865 F.3d 29, 32 (1st Cir. 2017). The relators alleged that, but for such statements, the FDA would not have approved the

device and doctors would not have submitted reimbursement claims for the device. *Id.* at 32. Second, the relators alleged that the company “palmed off” inferior versions of the device, which they claimed had “latent manufacturing defects” and failed to comport with the design specifications of the FDA-approved version. *Id.*

The First Circuit affirmed the dismissal of the first set of claims but reversed the dismissal of the claims resting on the relators’ allegations that the company had sold defective devices that “materially differed” from the FDA-approved device. *Id.* at 38. The court held that relators can satisfy Federal Rule of Civil Procedure 9(b) “by providing ‘factual or statistical evidence to strengthen the inference of fraud beyond possibility’ without necessarily providing details as to each false claim.” *Id.* at 39.

The relators’ complaint included (1) a single allegation that a doctor in New York in 2007 had implanted the device, which then failed for the patient as a result of defects that became apparent only after the doctor had submitted a claim for reimbursement, *id.* at 37, and (2) a statistical analysis, which the court viewed as showing to a “statistical[] certain[ty]” that the defendant had caused providers to unknowingly submit false claims for reimbursement, *id.* at 41.

The defendant sought certiorari, asking the Supreme Court to resolve a longstanding Circuit split that pits the Second, Fourth, Sixth, Eighth, and Eleventh Circuits’ more stringent construction of Rule 9(b) against the Third, Fifth, Seventh, Ninth, Tenth, and D.C. Circuits’ more relaxed construction of the Rule—with the First Circuit’s position allegedly in the middle. The Court once again declined to resolve the split.

Implications for Future FCA Cases

The Court’s denial of this credible petition seems to signal, again, that the Court does not see a need to resolve the entrenched and acknowledged Circuit split regarding whether Rule 9(b) requires relators to plead specific examples of false claims.

Gilead Sciences, Inc. v. United States ex rel. Campie, No. 17-936 (petition docketed Jan. 3, 2018, cert. denied, Jan. 7, 2019)

About the Case

This is one of several cases in which petitioners were seeking clarification of the test for materiality described in the Supreme Court’s *Escobar* decision. In its application for FDA approval of an anti-retroviral drug, Gilead represented that it would source a particular ingredient from registered facilities in Canada, Germany, and the United States. Instead, the relator alleges, Gilead bought the ingredient from a supplier in China, which contaminated some batches. *United States ex rel. Campie v. Gilead Sciences, Inc.*, 862 F.3d 890, 895-896 (9th Cir. 2017). The relator alleges that Gilead never informed the FDA of either the swap or the contamination, subsequently obtained approval for the drug, and its anti-retroviral drug to the government, for which it received federal funds. *Id.* at 895-96. Even though the government has known of the Chinese facility for years, however, the FDA never rescinded its approval of the three drugs, and the federal government has continued to purchase them without requesting refunds.

Reversing the district court, the Ninth Circuit held that the complaint was adequate to survive a motion to dismiss. It held that the relator had adequately alleged materiality even though the government had not rescinded its approval of the drugs after learning about Gilead's conduct. The court reasoned that it would be improper "to read too much into the FDA's continued approval" for several reasons, including that "the parties dispute[d] exactly what the government knew and when, calling into question its 'actual knowledge.'" *Id.* at 906-907. The court concluded that the issues of materiality were "matters of proof, not legal grounds to dismiss relators' complaint." *Id.* at 907.

Gilead petitioned for certiorari, presenting the question "[w]hether an FCA allegation fails when the Government continued to approve and pay for products after learning of alleged regulatory infractions and the pleadings offer no basis for overcoming the strong inference of immateriality that arises from the Government's response." Pet. at *1. The Court called for the views of the Solicitor General. 138 S. Ct. 1585 (2018) (Mem.).

The government recommended that certiorari be denied, on the ground that the Ninth Circuit had correctly articulated the relevant legal principles and that there was no meaningful division among the circuits. Gov't Br. at 1, 7, 23. Notably, however, the government indicated that if the case were remanded to the district court, it would move to dismiss the suit, based on two of the considerations described in the Granston Memo: a determination following an investigation that the claims were unfounded and a concern about discovery burdens on the government if the case were to proceed. *Id.* at 15.

***United States ex rel. Harman v. Trinity Industries, Inc.*, No. 17-1149 (petition docketed Feb. 16, 2018, cert. denied, Jan. 7, 2019)**

About the Case

The relator's petition for certiorari presented—among others—the question "[w]hether continued payment by the Government is a factor that may be considered by the jury in an FCA claim, or whether it is a determinative factor that would cause the claim to be immaterial as a matter of law." *Id.* at *i. The relator alleged that Trinity had made changes to guardrails it manufactures after receiving approval for the guardrails from the Federal Highway Administration (FHWA) and had failed to disclose those changes. *United States ex rel. Harman v. Trinity Industries, Inc.*, 872 F.3d 645, 650 (5th Cir. 2017). The relator alleged that Trinity therefore had falsely certified compliance with FHWA testing requirements, causing the submission of false claims for federal subsidies. Trinity argued that FHWA regulations required retesting only for changes deemed significant under a standard of "good engineering judgment." *Id.* at 656.

Throughout the case, the FHWA indicated that it did not believe it had been defrauded. Before trial, the FHWA—with knowledge of the changes made to the guardrails and the relator's allegations—issued a memorandum stating that "there was an unbroken chain of eligibility for Federal-aid reimbursement" for the guardrails. *Id.* at 650. After the jury returned a verdict in favor of the relator, the FHWA ordered independent testing of the guardrails and again concluded that the guardrails installed across the country had been tested and approved. *Id.* at

651. The FHWA never rescinded its approval for the guardrails and continued to make payments for the guardrails.

On appeal, Trinity argued that the relator could not establish falsity, scienter, or materiality. *Id.* at 653–654. Applying the materiality standard outlined by the Supreme Court in *Escobar*, the Fifth Circuit held that the relator had not established materiality “given FHWA’s unwavering position that the [guardrail] was and remains eligible for federal reimbursement.” *Id.* at 668. The court noted that, “though not dispositive, continued payment by the federal government after it learns of the alleged fraud substantially increases the burden on the relator in establishing materiality,” *id.* at 663, and found that the “FHWA continued to reimburse the [guardrail] units with full knowledge of [relator’s] claims about the product’s purported deficiencies,” *id.* at 668.

B. D.C. Circuit: Alleged Non-Compliance with Settlement Agreement

***United States ex rel. Schneider v. JPMorgan Chase Bank, N.A.*, 878 F.3d 309 (D.C. Cir. 2017), en banc reh’g denied, Feb. 16, 2018**

The D.C. Circuit affirmed dismissal of a relator’s claim that JPMorgan Chase Bank falsely certified compliance with a settlement agreement it had entered with the federal government. The court also held that a potential penalty for noncompliance with the settlement agreement was not an “obligation” within the meaning of the FCA.

About the Case

The relator alleged that (1) JPMorgan Chase Bank falsely claimed compliance with a settlement it had reached with the federal government arising out of the 2008 housing crisis, 878 F.3d at 311-313; and (2) that JPMorgan Chase Bank falsely represented compliance with the Treasury Department’s Home Affordable Modification Program (HAMP). *Id.* The district court dismissed the settlement claim, holding that the relator had failed to exhaust the dispute resolution procedures required by the settlement. It also dismissed without prejudice the HAMP claim for failing to allege a material violation. *Id.* at 313

The D.C. Circuit affirmed dismissal of the settlement claim—on a different ground than the district court—holding that it was an improper collateral attack on the judgment of the monitor appointed under the settlement. *Id.* at 314. The D.C. Circuit held that the relator was not required to exhaust the dispute resolution procedures in the settlement agreement because the relator had no standing to represent the government before he filed his FCA action, and once he filed the action, it was too late to satisfy exhaustion. *Id.* Nonetheless, the D.C. Circuit affirmed the dismissal, noting that the monitor was aware of JPMorgan Chase Bank’s alleged practices and determined it was in compliance. *Id.* Thus, the claim was an improper collateral attack on the monitor’s judgment. The court observed that there was no allegation that JPMorgan Chase Bank made false statements to the monitor, which the court noted “might have been problematic.” *Id.* The D.C. Circuit noted another “fatal flaw” in the relator’s settlement claim—namely, the lack of an “obligation.” *Id.* at 315. The FCA requires a fraud claim that is “material to an *obligation* to pay or transmit money or property to the

Government.” *Id.* at 315 (quoting 31 U.S.C. § 3729(a)(1)(G)). But the D.C. Circuit held that potential exposure to penalties for alleged noncompliance with the settlement was a “highly contingent outcome” and thus could not be an “obligation” under the FCA. *Id.*

On the HAMP claim, the court agreed that the relator failed to allege a materially false violation and affirmed the district court’s dismissal without prejudice. *Id.*

Implications for Future FCA Cases

While the D.C. Circuit narrowed the scope of potential FCA claims arising under a settlement agreement with the government (by excluding those that collaterally attack the monitor’s judgment), the court also left open the possibility that a future action involving allegations of false statements to the monitor could be viable. Independent of such allegations, however, the lack of an “obligation” could cabin FCA liability under the court’s reasoning.

C. First Circuit: [None]

D. Second Circuit: (1) First-to-File Bar; (2) Definition of “Claim”

***United States ex rel. Wood v. Allergan, Inc.*, 899 F.3d 163 (2d Cir. 2018)**

The Second Circuit held that a relator cannot avoid the first-to-file bar by including more details in the complaint than in the first-filed action and that the first-to-file violation cannot be cured by amending or supplementing the complaint after the first-filed case is dismissed.

About the Case

The relator alleged that Allergan had engaged in a kickback scheme that caused the federal, state, and the District of Columbia governments to overpay under Medicare and Medicaid. 899 F.3d at 165-166. When the relator filed his initial complaint, there were two other actions pending (under seal) that alleged similar FCA violations. *Id.* at 167. Those actions, however, were dismissed by the time the relator amended his complaint for the third time. *Id.* at 168. The district court ruled that the relator’s action violated the first-to-file bar, but that his claims need not be dismissed because there was no related action pending at time of the third amendment. *Id.*

On interlocutory appeal, the Second Circuit agreed on the first-to-file violation but reversed on the curability of that violation. First, the court held that actions are “related” within the meaning of the first-to-file bar if they allege “the same ‘essential facts,’” regardless of whether the later action alleges more details than the earlier action. *Id.* at 169. The relator’s claims satisfied this standard. The court further noted that the Sixth Circuit’s contrary holding—an earlier-filed complaint that fails the Rule 9(b) pleading standard does not bar subsequent actions, *see Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 973 (6th Cir. 2005)—is not supported by the language of the statute and would cause practical problems. *Wood*, 899 F.3d at 169-170.

Second, the Second Circuit held that the first-to-file violation cannot be cured by amending the complaint because the statute bars “bring[ing]” a related action and the plain meaning of “bring” encompasses only the filing of the initial complaint. *Id.* at 171-172. The court further reasoned that legislative history supported its conclusion and that a contrary holding would cause numerous inefficiencies, such as a court having to decide which later action is able to proceed where the first-filed action is dismissed and there is more than one subsequent action. *Id.* at 173-174. The Second Circuit thus held that the relator’s action was “incurably flawed from the moment” he filed his action, agreeing with the D.C. Circuit and departing from the First Circuit’s conclusion to the contrary. *Id.* at 170-171. The court remanded the case, with instructions to dismiss the action without prejudice. *Id.* at 175.

Implications for Future FCA Cases

The Second Circuit created or deepened circuit splits—first by disagreeing with the Sixth Circuit on the threshold applicability of the first-to-file bar and then by departing from the First Circuit on the curability of a first-to-file violation.

United States ex rel. Kraus v. Wells Fargo & Co., No. 11-Civ. 5457, 2018 WL 2172662 (E.D.N.Y. May 10, 2018)

The district court ruled that Federal Reserve Banks are not the United States or its agents for purposes of the FCA.

About the Case

The relators alleged that the defendants presented false information to Federal Reserve Banks (FRBs) in connection with their loan applications and that, as a result, FRBs charged a lower interest rate and received less money. 2018 WL 2172662, at *1. The FCA defines a “claim” as “any request or demand . . . for money or property . . . that—is presented to an officer, employee, or agent of the United States” or “is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest, and if the United States Government—(I) provides or has provided any portion of the money or property requested or demanded; or (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.” 31 U.S.C. § 3729(b)(2).

Dismissing the action, the district court ruled that FRBs are not the “Government” or its “agents” under the FCA, based on four factors the court inferred from *Rainwater v. United States*, 356 U.S. 590 (1958), and *United States v. McNinch*, 356 U.S. 595 (1958). 2018 WL 2172662, at *2-3. Those factors are: (1) the statutory language placing the entity in or out of government; (2) the source of its initial capital and whether the government has continuing financial involvement; (3) the manner of appointment or confirmation of its leadership, as well as the federal employee status of the entity’s employees; and (4) the government’s interest and involvement in the purpose and function of the entity. *Id.* at *3. The court found that all four factors supported the conclusion that FRBs were not the government, holding as follows. (1) The statute creating FRBs did not designate them as part of any executive department or agency and instead

provided that FRBs be separate, privately owned, corporate bodies. *Id.* at *3-4. (2) FRBs are owned by private stockholders made up of national banks and do not receive government appropriations to operate. *Id.* at *5-6. The court rejected the relators' argument that the government was involved because, under the statute, any claim submitted to an FRB will reduce funds available to be remitted back to the Treasury. Such a connection, the court said, was too tenuous. *Id.* at *5. (3) FRBs are subject to local leadership and control and its employees are not government employees. *Id.* at *6. (4) FRBs operate independently of the government, without any lawmaking authority. *Id.* at *6-7.

The district court also concluded that FRBs are not agents of the government. *Id.* at *8. The court acknowledged that the statute refers to FRBs as "fiscal agents" for specified roles but noted that that term is not defined in the statute. *Id.* And the dictionary, the court reasoned, defined "fiscal agent" as simply "a bank or other financial institution that collects and disburses money and services . . . on another's behalf." *Id.* The court further reasoned that, in other contexts, courts have distinguished between "fiscal agents" and general agents. *Id.*

Implications for Future FCA Cases

The district court's decision is currently on appeal in the Second Circuit. The Court of Appeals' ruling could be significant because, as the district court noted, there was "no authority" on this issue at the time of the district court's decision. *Id.* at *2.

E. Third Circuit: (1) Causation; (2) Public Disclosure Bar; (3) Causation for Retaliation Claims; (4) Oversight of Sealed Cases

***United States ex rel. Greenfield v. Medco Health Sols., Inc.*, 880 F.3d 89 (3d Cir. 2018)**

The Third Circuit held that a relator alleging a false claim based on a kickback scheme must show that the defendant submitted at least one claim seeking reimbursement for services that violated the AKS.

About the Case

The relator alleged that defendant Accredo Health Group, a specialty pharmacy, made donations to charities, which in turn recommended Accredo's services to hemophilia patients, including those who received Medicare and Medicaid. 880 F.3d at 91-92. When Accredo decided to reduce its donation amount, the charities urged Accredo to restore its funding. *Id.* at 92. Accredo did so after determining it was in its business interest. *Id.* On cross-motions for summary judgment, the district court ruled that the FCA claim failed because there was no evidence that any federally insured patient utilized Accredo's services *because of* Accredo's donations to the charities. *Id.* at 92-93. The district court did not decide whether donations to charities could violate the AKS.

The Third Circuit affirmed the grant of summary judgment for Accredo on a narrower ground, also without deciding whether Accredo's donations were illegal kickbacks. *Id.* at 93 n.4, 100. Based on the statutory context and purpose of the

AKS and the FCA, the court held that the subjective intent or but-for cause required by the district court—that patients chose Accredo’s services *because of* Accredo’s donations to the charities—was not needed. *Id.* at 94-98. Nonetheless, the relator must show a “link” between Accredo’s claims and the kickback scheme, meaning that “at least one of Accredo’s claims sought reimbursement for medical care that was provided in violation of the Anti-Kickback Statute.” *Id.* at 98. The relator failed to show the necessary link. *Id.* at 98-100. It was not enough that the kickback scheme and the submission of claims overlapped in time, nor was it sufficient for the relator to hypothesize that at least some of the charities’ recommendations must have been directed to federal beneficiaries. *Id.* The court held that a kickback “does not morph into a false claim” unless a specific claim for reimbursement covers a patient who received the illegal referral, and that is what the relator failed to show. *Id.* at 100.

Implications for Future Cases

The Third Circuit clarified the necessary link between an alleged kickback scheme and claims submitted to the government. Although that link is “less than” but-for causation or subjective intent, *id.* at 98, the court’s requirement that a relator identify at least one claim for reimbursement covering a patient who had received an illegal referral provides a limit on FCA liability in the context of the AKS.

United States v. Omnicare, Inc., 903 F.3d 78 (3d Cir. 2018)

The Third Circuit held that the additional nonpublic information that a relator added to publicly known information in his complaint permitted an inference of fraud that was unavailable when relying solely on the public disclosures, and therefore the relator’s claim was not barred by the public disclosure bar.

About the Case

The relator, a former nursing home and pharmacy owner, alleged that the defendant, PharMerica, engaged in an unlawful “swapping” scheme in violation of the AKS. 903 F.3d at 83. In the alleged scheme, PharMerica would offer discounted prices to supply prescriptions to Medicare Part A patients in nursing homes (reimbursed by the government to the nursing home on a flat per-diem basis) in order to induce that same nursing home to contract with PharMerica to supply services to Medicare Part D patients (reimbursed by the government to the supplier directly on at-cost). *Id.* To support his theory, the relator relied on several industry and government agency reports describing the general risk of “swapping” and related pricing schemes in the healthcare industry, as well as on PharMerica’s Form 10-K financial disclosures. *Id.* at 85-86. The relator claimed that PharMerica violated the FCA when it certified in its reimbursement claims that it was complying with the AKS. *Id.* at 82.

The district court dismissed the relator’s claims, deeming them barred by the FCA’s public disclosure bar. *Id.* at 82-83. The district court concluded that certain of the reports upon which the relator relied effectively put the public on notice about ongoing unlawful schemes like swapping. *Id.* at 86-87. It also concluded that the relator’s statement made during deposition that he was able to deduce

the scheme from PharMerica's Form 10-K counseled towards a conclusion that the claim was publicly disclosed. *Id.* at 88.

On appeal, the Third Circuit held that the public disclosure bar did not apply because the publicly available information could not have reasonably supported an inference of fraud. *Id.* at 89. The court reasoned that the relator used non-public information to "make sense of publicly available information." *Id.* Additionally, the Third Circuit noted that the district court "misapprehended [the relator's] testimony and the central importance of his non-public" information about PharMerica's low per-diem rates, which the relator alleged were implausibly low if PharMerica were not securing more lucrative contracts for Medicare Part D services in exchange. *Id.* at 88. The Third Circuit concluded that the publicly available information "did not disclose the alleged true state of affairs" regarding the violations of the AKS. *Id.* at 89.

Implications for Future FCA Cases

The Third Circuit's decision clarified and expanded the permissible use of public information when stating an FCA violation, which may encourage more relators to advance claims despite the existence of publicly known facts. The court made clear, however, that the non-public information relied on in the complaint must be necessary to support an inference of fraud.

DiFiore v. CSL Behring, LLC, 879 F.3d 71 (3d Cir. 2018)

The Third Circuit held that an employee claiming unlawful retaliation under the FCA must prove that her protected conduct was the "but-for" cause of the retaliation.

About the Case

DiFiore, a former director of marketing at CSL, alleged that the pharmaceutical company unlawfully retaliated against her, ultimately resulting in her resignation, after she raised concerns about potential off-label marketing of drugs. 879 F.3d at 73. After trial on her retaliation claim, the district court instructed the jury that they must find that DiFiore's protected activity—i.e., her raising concerns about unlawful marketing to her superiors—was the "but-for" cause of CSL's retaliation. *Id.* at 75.

On appeal, DiFiore argued that the district court should have applied the lower "motivating factor" standard, as discussed by the Third Circuit in *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 186 (3d Cir. 2001). 879 F.3d at 76. But the Third Circuit held that the district court was right to rely on two more recent Supreme Court rulings on the causation standard: *Gross v. FBL Financial Services Inc.*, 557 U.S. 176 (2009) and *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013). *Id.* The Third Circuit concluded that DiFiore was relying on dictum in *Hutchins*, and that "[e]ven if the 'motivating factor' standard had been part of our holding in *Hutchins*, the Supreme Court's subsequent decisions in two cases, *Gross* and *Nassar*, undermine the rationale for applying that standard." *Id.*

Implications for Future FCA Cases

The Third Circuit clarified the causation standard for FCA retaliation claims, aligning the Circuit with recent Supreme Court precedent and resolving any lingering confusion from its prior discussion of the causation standard in *Hutchins*.

***United States ex rel. Freedom Unlimited, Inc. v. City of Pittsburgh, Pennsylvania*, 728 F. App'x 101 (3d Cir. 2018)**

The Third Circuit reversed the dismissal of a qui tam case under the public disclosure bar and for failure to allege materiality, remanding for a more fact-intensive inquiry to determine whether the relator qualified as an original source and whether the alleged false certifications were material under *Escobar*.

About the Case

Relators, a group of fair housing advocates, alleged that the City of Pittsburgh defrauded HUD by making false certifications to secure public housing funds. 728 F. App'x at 102. They alleged that the City falsely certified that it had complied with certain conditions—for instance, that it removed impediments to fair housing, that it implemented a citizen participation plan that allowed for public comment on the use of federal funds, and that it would limit the use of funds to certain eligible activities but used the money for improper non-housing expenditures like street repaving and regular infrastructure repair. *Id.* at 102-103.

The district court dismissed the case, finding that the transactions upon which the relators' allegations were based had been publicly disclosed. *Id.* at 104. The district court further concluded that the relators had failed to state a claim under an implied false certification theory because the City's certifications addressed conditions of participation, not conditions of payment, as required by then-governing Circuit precedent in *United States ex rel. Wilkins v. Universal Health Group, Inc.* 659 F.3d 295 (3d Cir. 2011). 728 F. App'x at 105.

On the public disclosure issue, the Third Circuit found that the relators had alleged independent material knowledge of the allegations separate from the City's public disclosures, and therefore the district court erred by applying the public disclosure bar at the motion to dismiss stage. *Id.* at 104-105. The court noted that a fact-intensive inquiry is sometimes required to determine whether the public disclosure bar should apply or whether a relator might qualify as an original source and that at least some discovery should have been allowed based on the independent nature of relators' claimed knowledge. *Id.* Accordingly, the Third Circuit remanded on the public disclosure bar.

On materiality, the Third Circuit concluded that *Escobar* in effect overruled *Wilkins*, which had distinguished between conditions of payment and conditions of participation in determining liability under the FCA. *Id.* at 105-106. The court noted that *Escobar* instead requires a determination of whether the noncompliance would be material to a governmental payment decision. *Id.* The Third Circuit instructed the district court that, if the case survives the public disclosure bar on remand, the court should apply the *Escobar* standard to assess

whether the City's potential false statements in its certifications could have influenced HUD's decision to grant funding. *Id.* at 106-107.

Implications for Future FCA Cases

The Third Circuit cautioned district courts not to dismiss cases prematurely when relators plausibly claim to rely on information distinct from what is already publicly disclosed. The Third Circuit also explained that its precedents relying on the distinction between conditions of payment and conditions of participation were no longer valid in light of *Escobar*.

***United States ex rel. Brasher v. Pentec Health, Inc.*, 338 F. Supp. 3d 396 (E.D. Pa. 2018)**

After the government had obtained ten extensions of the seal to evaluate potential intervention in the case, the district court denied an eleventh request—and likewise denied a joint request filed by the government, the relator, and the defendant to allow the case to remain under seal.

About the Case

The relator alleged, under seal, that Pentec defrauded or conspired to defraud government health insurance programs, in violation of the FCA. *Id.* at 397. Since filing suit, the government filed for ten requests to extend the seal and the intervention evaluation period. *Id.* At the time of the tenth extension request, the government's criminal investigation had closed and a civil investigation had resumed. *Id.* The government argued that good cause existed for the tenth extension, citing the time needed to complete the intervention evaluation, the continuing need to protect the relator's identity, and the need to give Pentec time to respond before being prejudiced by making public potentially untrue allegations. *Id.* at 398. The district court granted the tenth request but noted its concerns about the length and secrecy of the matter. *Id.*

Months later, the government moved for an eleventh extension. *Id.* at 398. At that time, the government said it needed more time to meet with Pentec to discuss a potential settlement. The court denied that request because Pentec had already been served with the complaint, there was no evidence the relator would be subject to retaliation, and there was no evidence of financial injury to the defendant by lifting the seal. *Id.* at 398-99. The government, the relator and the defendant moved for reconsideration. *Id.* at 397.

The district court denied the joint request for reconsideration and reiterated that there was no showing of harm to the defendant by disclosing the now-closed criminal investigation and that protecting the secrecy of settlement negotiations is not a reason to keep the case sealed. *Id.* at 402-03. The court rejected the government's suggestion that it was courts' "practice" to grant unlimited extensions with little oversight, noting the statute requires the government to show "good cause" for the extension. *Id.* at 403. The district court ordered the government to make its intervention decision within 30 days of learning that the seal had been lifted. *Id.* at 404.

Implications for Future FCA Cases

This case provides an interesting example of a district court's potential role in oversight of sealing and intervention decisions.

F. Fourth Circuit: Retaliation

***United States ex rel. Cody v. ManTech Int'l*, Nos.17-1722, 17-1757, 2018 WL 3770141 (4th Cir. Aug. 8, 2018)**

The Fourth Circuit joined the majority of courts of appeal in applying the “but-for” causation standard to FCA retaliation claims.

About the Case

The relators, former employees of ManTech International, alleged that they were retaliatorily discharged in violation of the FCA and the Defense Contractor Whistleblower Protection Act. 2018 WL 3770141 at *1. A jury found in the relators' favor and awarded them compensatory damages for emotional distress (by the time of trial, the relators had abandoned their qui tam allegations and pursued only their claims for retaliation). *Id.* at *1, *5. The defendant moved for judgment as a matter of law arguing that there was insufficient evidence to prove that it had terminated the relators because they filed the FCA action and that there was insufficient evidence to establish a damages award for emotional distress. *Id.* at *1. The district court denied the Rule 50 motion with respect to the jury's verdict but granted the motion with respect to the compensatory damages for emotional distress. *Id.* The defendant and relators cross-appealed to the Fourth Circuit.

In determining whether there was sufficient evidence to conclude that the defendant terminated relators because they filed the FCA suit, the Fourth Circuit confronted the unsettled debate over the applicable causation standard. *Id.* at *7-8. While some courts have adopted a “contributing factor” standard for causation, others have adopted a “but for” causation standard instead. Relying on *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009) and *University of Texas Southwest Medical Center v. Nassar*, 570 U.S. 338 (2013), the Fourth Circuit concluded that “a retaliation claim under the FCA requires proof of ‘but for’ causation.” *Id.* at *8. The Court held that the “but-for” standard was satisfied for one of the relators, but not for the other. *Id.* at *10.

The Fourth Circuit also concluded that there was insufficient evidence to support the compensatory damages award for emotional distress. *Id.* at *13.

Implications for Future FCA Cases

The Fourth Circuit now joins other courts in applying the majority “but-for” causation standard in FCA retaliation cases.

***O'Hara v. Nika Technologies, Inc.*, 878 F.3d 470 (4th Cir. 2017)**

The Fourth Circuit extended whistleblower protections to relators who provide information that could lead to an FCA violation even if the alleged whistleblower is not providing information about his/her own employer.

About the Case

The plaintiff sued his employer under the FCA's "whistleblower-protection provisions," 31 U.S.C. § 3730(h), arguing that he was terminated "for disclosing another company's alleged fraud on the government." 878 F.3d at 472. The district court granted the employer's motion for summary judgment on the FCA claim "because it determined that § 3730(h) only protects disclosures targeting the whistleblower's employer." *Id.* The plaintiff appealed.

Section 3730(h) provides in relevant part that "[a]ny employee . . . shall be entitled to all relief necessary to make that employee . . . whole, if that employee . . . is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee . . . in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter." 31 U.S.C. § 3730(h).

The Fourth Circuit, relying on the plain language of § 3730(h), concluded that "protection under the statute depends on the type of conduct that the whistleblower discloses . . . rather than the whistleblower's relationship to the subject of his disclosures." 878 F.3d at 475. Specifically, the court explained that § 3730(h) provides for protection against "lawful acts done . . . in furtherance of an action under this section," which "refers to a lawsuit under § 3730(b)[.]" 878 F.3d at 475. For its part, § 3730(b) provides that "[a] person may bring a civil action for a violation of [the FCA]." *Id.* (quoting § 3730(b)) (alterations in original). Accordingly, the Fourth Circuit noted, "§ 3730(h) protects lawful acts in furtherance of an FCA action" regardless of the "relationship between the whistleblower and the subject of his disclosures." *Id.*

Despite finding the district court's statutory analysis erroneous, the Fourth Circuit affirmed the district court's grant of summary judgment because the plaintiff failed to "disclose any conduct that could have led to a viable FCA action." *Id.* at 476. The plaintiff had sought to rely on his disclosure of alleged fraudulent activity that had in fact been explicitly directed by the government. *Id.*

Implications for Future FCA Cases

The Fourth Circuit's holding extends the whistleblower protections provided in the FCA to a new context in which an employee is protected from retaliation for disclosing fraudulent conduct by someone other than her own employer.

G. Fifth Circuit: Public Disclosure Bar

***United States ex rel. Solomon v. Lockheed Martin Corp.*, 878 F.3d 139 (5th Cir. 2017)**

The Fifth Circuit affirmed its adoption of an inference-based test for determining the applicability of the public disclosure bar, applying the bar even if the fraud itself is not disclosed.

About the Case

The relator alleged that his employer “authoriz[ed] retroactive application of management reserve funds to improve cost-performance overruns,” which allegedly “constituted false cost variance reporting that led to [defendants] being awarded fees they would not have otherwise received.” 878 F.3d at 142. Before the relator brought his FCA claim, the Defense Contract Management Agency and the GAO performed audits and filed reports detailing “mismanagement and improper use of management reserve funds to keep ‘the cost performance index (CPI) from worsening.’” *Id.* Applying the pre-2010 version of the FCA’s public-disclosure bar (which was expressly jurisdictional), the district court held that the relator “was jurisdictionally barred because his complaint could have been synthesized from public disclosures, and he did not qualify as an original source because his reports to the government had been nonvoluntary.” *Id.* at 143.

In determining whether the relator’s claim was jurisdictionally barred as a public disclosure, the Fifth Circuit reaffirmed “a test embraced by other circuits for determining whether public disclosures contain sufficient indicia of an FCA violation to bar a subsequently filed FCA complaint.” *Id.* at 144. Specifically, the court explained that under its approach, “the combination of X and Y must be revealed, from which the readers or listeners may infer Z.” *Id.* (quoting *United States ex rel. Colquitt v. Abbott Labs.*, 858 F.3d 365, 374 (5th Cir. 2017)). In the example provided, “X and Y are two required elements for the inference: ‘a misrepresented state of facts and a true state of facts.’” *Id.* (quoting *United States ex rel. Springfield Terminal Ry Co. v. Quinn*, 14 F.3d 645, 655 (D.C. Cir. 1994)) (emphasis in original). Applying that test to the facts at issue, the court explained that the “DCMA and GAO reports allege[d] facts that ma[d]e a potentially fraudulent scheme readily identifiable[.]” *Id.* at 146. The court also noted that the public disclosure bar does not depend on the “overall probability of someone inferring fraudulent activity from the public disclosures,” but instead “[t]he focus is on whether they *could have* made the inference.” *Id.* (emphasis in original). Accordingly, the court concluded that the claims were based on public disclosures and jurisdictionally barred because the relator did not qualify as an original source.

Implications for Future FCA Cases

The Fifth Circuit affirmed its inference-based theory of the public disclosure bar and applied it in a context where the fraud itself was not necessarily disclosed, but the necessary facts for fraud were disclosed. Furthermore, the Fifth Circuit emphasized that the public disclosure bar is dependent solely on whether the fraud *could be* inferred from the available public information with no attention to the probability of the fraud being discovered from those disclosures.

H. Sixth Circuit: (1) Materiality; (2) Scienter

***United States v. Brookdale Senior Living Communities*, 892 F.3d 822 (6th Cir. 2018), petition for cert. filed (U.S. Nov. 20, 2018) (No. 18-699)**

The Sixth Circuit reversed the dismissal of a relator’s third amended complaint, finding that she had sufficiently alleged materiality and scienter under the Supreme Court’s *Escobar* standards.

About the Case

The relator—Marjorie Prather—brought a qui tam action against Brookdale Senior Living Communities, a home health care services provider, and related defendants. Prather alleged that Brookdale submitted false claims to Medicare for reimbursements of costs of providing home health care services. The district court dismissed her complaint, holding that she did not allege fraud with particularity. 892 F.3d 825-26. The Sixth Circuit reversed that decision, in part, holding that Prather had pleaded the required particularity. *Id.* at 826. On remand, the district court granted Prather leave to file a Third Amended Complaint in light of the Supreme Court’s decision in *Escobar*. The defendants moved to dismiss again on the grounds that Prather did not plead sufficiently the materiality and scienter elements of her two alleged FCA violations. The district court granted defendants’ motion, and the Sixth Circuit reversed and remanded.

After considering the materiality standard outlined in *Escobar*, the Sixth Circuit concluded that the relator sufficiently alleged materiality by alleging that defendants violated the timing provision of 42 C.F.R. § 424.22(a)(2). This provision, the Court held, was an express condition of payment that goes to “the very essence of the [government’s] bargain.” *Id.* at 833-34. According to the Court, the fact that the government lacked any actual knowledge of defendant’s non-compliance had no bearing on the materiality analysis. *Id.* at 834. With respect to scienter, the Sixth Circuit held that Prather “alleged sufficient facts supporting the inference that the defendants deliberately ignored multiple employees’ concern about their compliance with relevant regulations, and instead pressured their employees only cursorily to review claims for compliance problems so that they could be quickly submitted for reimbursement.” *Id.* at 838. Judge McKeague, in dissent, would have held that Prather’s complaint did not satisfy Rule 8 or Rule 9(b) standards, and criticized the majority for “revers[ing] a well-reasoned decision by the district court to dismiss Prather’s complaint.” *Id.* at 838-39.

Implications for Future FCA Cases

The effects of *Escobar* continue to be felt with respect to the materiality analysis under the FCA.

I. **Seventh Circuit: (1) Retaliation; (2) Particularity; (3) Materiality**

***Heath v. Indianapolis Fire Department*, 889 F.3d 872 (7th Cir. 2018)**

The Seventh Circuit affirmed a grant of summary judgment in favor of the Indianapolis Fire Department, finding that there were no facts from which a jury could conclude that the relator's son was retaliated against because of his father's qui tam action.

About the Case

The relator filed a qui tam claim against the Indianapolis Fire Department alleging that it made false statements of material fact to the federal government in order to receive federal grant funds. Relator's son—who had recently been rejected from the Department—joined the suit, alleging that the Department retaliated against him for his father's lawsuit, in violation of the FCA. 889 F.3d at 873. The district court granted summary judgment for the Department, finding that the FCA's anti-retaliation provisions did not cover job applicants or prospective employees. *Id.* at 874.

The Seventh Circuit acknowledged that it had not yet addressed the question of whether § 3730(h)'s definition of "employee" was broad enough to encompass job applicants or prospective employees, and it declined to do so. *Id.* at 875. Rather, it held that even assuming the broader reading of § 3730(h), summary judgment for the Department was nonetheless appropriate because the relator's son could not show that he was retaliated against "because of" his father's protected activity. *Id.* at 874 (emphasis in original). The Seventh Circuit went on to note that the Supreme Court's recent Title VII decision in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013) "raises a question about" the causation standard for anti-retaliation claims brought under the FCA, but concluded that "[u]nder any standard, there is no evidence . . . from which a jury could conclude that the Department did not hire [the relator's son] because of his father's qui tam suit." *Id.* (emphasis added).

Implications for Future FCA Cases

The case highlights two open questions in the Seventh Circuit: (1) whether the FCA's anti-retaliation provisions apply to applicants and prospective employees and (2) whether the Supreme Court's but-for causation test articulated in *Nassar* extends to anti-retaliation claims brought under the FCA.

***United States ex rel. Berkowitz v. Automation Aids, Inc.*, 896 F.3d 834 (7th Cir. 2018)**

The Seventh Circuit affirmed the dismissal of a qui tam suit, holding that: (1) the relator did not plead fraud with specific particularity; (2) the defendant vendors' alleged conduct did not equate to knowingly making false statements in order to receive money from the government and (3) the relator did not allege that the vendors acted with reckless disregard of truth or falsity of information.

About the Case

The relator, Jeffrey Berkowitz, brought suit against nine separate competitor vendors alleging that they violated the FCA by making material false statements and presenting false claims to the United States. Berkowitz alleged that the defendants knowingly sold to the government products from non-designated countries in violation of the Trade Agreements Act (TAA). According to Berkowitz, any invoices the defendants submitted to the government for payment for products that did not comply with the TAA constitute material false statements as defined by the FCA. 896 F.3d. 839. The district court dismissed his claims on Rule 12(b)(6) grounds and the Seventh Circuit reviewed de novo.

On appeal, Berkowitz argued that the Rule 9(b) particularity standard should be relaxed because “as one of the defendants’ competitors, he does not have access to the detailed information that would substantiate his claims.” *Id.* at 841. The Seventh Circuit rejected this argument. While the court acknowledged that a party may make allegations “on information and belief” in the fraud context, it nonetheless concluded that even under that standard, the relator must still describe the predicate acts with some specificity “to inject ‘precision and some measure of substantiation’ into his allegations of fraud.” *Id.* Here, the Seventh Circuit explained, Berkowitz did not “describe the nature of the product lists he used to assist in the compilation of the reports [purportedly showing defendants’ fraud], indicate how these lists relate to the defendants’ actual sales, or say what particular information any sales orders submitted by the defendants contained.” *Id.*

With respect to materiality, the Seventh Circuit emphasized that the “fact that the defendants may have sold non-compliant products during a certain time period in violation of the TAA does not equate to the defendants making a knowingly false statement in order to receive money from the government.” *Id.* at 841-42. At most, the Seventh Circuit concluded, Berkowitz’s allegations “amount to claims that the defendants made mistakes or were negligent,” which alone are insufficient to infer fraud under the FCA. *Id.* Berkowitz went on to argue that even if he had not sufficiently pled that the defendants had actual knowledge of the false information, he alleged that the defendants acted with reckless disregard of the truth or falsity of the information. Again, the Seventh Circuit found that Berkowitz failed to allege even this more relaxed standard because he failed to demonstrate that “after being instructed to remove non-compliant products from their lists, the defendants . . . subsequently submitted claims for payment for these products[.]” *Id.* at 843.

Implications for Future FCA Cases

In rejecting the relator’s efforts to relax the 9(b) standard, the Seventh Circuit’s decision underscores that while it is difficult for a relator to allege with accuracy what occurs inside a competitor’s operations, this difficulty does not relieve a relator of his obligation to adequately plead all of the elements of an FCA claim or fully investigate his claim before filing a complaint.

J. **Eighth Circuit: [None]**

K. **Ninth Circuit: (1) Implied False Certification; (2) Government-Action Bar**

***United States ex rel. Rose v. Stephens Institute*, 909 F.3d 1012 (9th Cir. 2018)**

The Ninth Circuit sought to reconcile its standards for proving falsity and materiality in FCA cases with the Supreme Court's decision in *United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

About the Case

The relators, former admissions representatives of Stephens Institute, an art school, alleged that Stephens violated a "program participation agreement" it had with the Department of Education under which it received federal funding for financial aid. 909 F.3d at 1016. In that agreement, Stephens promised to comply with the Department's "incentive compensation ban," *id.*, which prohibits educational institutions from rewarding admissions officers for enrolling higher numbers of students. See 20 U.S.C. § 1094(a)(20); 34 C.F.R. § 668.14(b)(22). Despite acceding to this condition, Stephens instituted a policy to encourage admissions representatives to meet enrollment goals, including by increasing salaries. *Id.* at 1022.

The central issue on appeal was whether Stephens submitted material false claims to the government, given that *Escobar* "unsettled the state of this circuit's law" regarding both falsity and materiality in implied certification cases. *Id.* at 1017-18. On falsity, the Court considered whether its prior decision in *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993 (9th Cir. 2010), was still good law, even though it set a lower standard than *Escobar* because it did not require a relator to make specific representations about the goods or services provided. Relatedly, the Court considered whether a relator could establish an implied certification claim only by meeting *Escobar's* two conditions (specific representations and non-disclosure that renders those representations misleading). 909 F.3d at 1018-18. The majority concluded that relators must meet *Escobar's* two conditions and that *Ebeid* no longer provided the controlling standard in the Ninth Circuit. *Id.*

On materiality, the Court considered whether its prior decision in *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166 (9th Cir. 2006), which framed the question of materiality as whether the false certification "was relevant to the government's decision to confer a benefit," *id.* at 1018-19, survived *Escobar*. The panel concluded that *Hendow* was not "clearly irreconcilable with the reasoning or theory of *Escobar*" because *Hendow* did not state that noncompliance was material in *all* cases where there was evidence that a defendant did not comply with an incentive-compensation ban. *Id.* at 1019. The panel thus characterized *Escobar* as putting a "gloss" on existing Ninth Circuit materiality analysis. *Id.* at 1020. While the majority acknowledged that noncompliance with an incentive compensation ban is not per se material, it concluded that it was here, "because of the Department's past enforcement

activities, and because of the substantial size of the forbidden incentive payments." *Id.*

Judge N.R. Smith dissented in part. He argued that the majority failed to acknowledge that *Escobar* explicitly overruled *Hendow's* materiality standard and imposed a new materiality standard focused on whether the government would find noncompliance material to a payment decision. *Id.* at 1023.

Implication for future cases

This decision demonstrates that *Escobar's* effects continue to be felt, as the courts of appeal endeavor to reconcile pre-*Escobar* decisions with the Supreme Court's 2016 decision.

United States ex rel. Bennett v. Biotronik, Inc., 876 F.3d 1011 (9th Cir. 2017)

This case addressed a question of first impression in the Ninth Circuit: whether the government-action bar, which prohibits a relator from bringing a qui tam suit "based upon allegations or transactions which are the subject of a civil suit . . . in which the Government is already a party," applies even when the government is no longer an active participant in an ongoing, earlier-filed qui tam suit. *Id.* at 1014.

About the Case

Brian Sant filed a qui tam action on December 31, 2009, alleging that Biotronik paid kickbacks to physicians and sponsored sham clinical studies. The United States investigated the case for four years and entered into a settlement with Biotronik on the kickback allegations--but not the clinical studies claims. *Id.* at 1014. The case was dismissed with prejudice as to the kickback allegations, but not any other conduct.

On October 14, 2014, the relator in this case, Bennett, filed a qui tam complaint that provided "further detail" about the sham clinical studies alleged in the Sant complaint and added state-law claims but otherwise did not allege new claims against Biotronik. The United States and state governments declined to intervene, and the state governments consented to dismissal of their claims. *Id.* at 1014-15.

Biotronik moved to dismiss on the basis of the government-action bar under 31 U.S.C. § 3730(e)(3). *Id.* at 1015. The district court noted that Bennett raised substantially the same allegations as Sant did in his settled and dismissed case. The court reasoned that, because the government had been a party to the Sant case, Bennett's case was barred. The court explained that it did not matter that the Sant case had been dismissed because the government-bar provision does not include the word "pending," as does, for instance, the FCA's first-to-file provision. *Id.* The court also reasoned that, when the United States intervenes in a case, it becomes a party to the suit as a whole, not merely to a particular claim in the case. *Id.* at 1015-16.

A Ninth Circuit majority affirmed the district court, reasoning that "[b]oth common sense and statutory language demonstrate that the Government remains a 'party'

even after the cessation of its enforcement action." *Id.* at 1016. The majority also reasoned that a neighboring statutory provision--the public disclosure bar in § 3730(e)(4)--contemplates that the United States can be considered a party to an action that has concluded. That provision states that an action shall be dismissed "if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed . . . in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party." *Id.* at 1017. The majority reasoned that the use of the present tense to describe the government's relationship to prior transactions means that the government does not cease to be a party as soon as an action is no longer pending. *Id.* at 1017.

The majority also dismissed Bennett's concern that the court's interpretation would render the government-action bar and the public-disclosure bar redundant, given that "any filed Government action based on the same underlying facts would surely result in the public disclosure." *Id.* at 1018. It concluded that "Bennett overstates the nature and significance of the statutory overlap" and in any event, ignores that federal proceedings may not be public. *Id.* at 1019. The majority also concluded that "[a] person's status as a 'party' does not hinge on the outcome of each of the claims of the lawsuit to which he becomes a party." *Id.* at 1020.

Judge Siler, sitting by designation, dissented. In particular, he noted the position of the United States as amicus, which stated that "when it intervenes in a qui tam case on only some, but not all, of the claims in a case, it may choose to settle certain claims and not settle others, allowing the court to dismiss the case without prejudice to the government on the declined claims." *Id.* at 1021-22.

Implication for future cases

This decision significantly limits the ability of relators to bring serial actions based on the same underlying conduct and has wide-ranging implications for intervened actions brought under the federal FCA and state equivalents. It will be a powerful decision in the Ninth Circuit to dissuade would-be relators from filing serial actions based on the same conduct.

L. Tenth Circuit: Falsity

***United States ex rel. Polukoff v. St. Mark's Hospital*, 895 F.3d 730 (10th Cir. 2018)**

The Tenth Circuit reversed the dismissal of a qui tam suit, applying the "reasonable and necessary" standards set forth in the Medicare Program Integrity Manual.

About the Case

The relator, a doctor, alleged that his colleague, Dr. Sherman Sorensen, performed unnecessary heart surgeries for which he received Medicare reimbursement by fraudulently certifying that the procedures were medically necessary. *Id.* at 734.

The district court dismissed the complaint under Rules 12(b)(6) and 9(b). It held that, absent a regulation clarifying the conditions under which the government will or will not pay for a particular medical procedure, a doctor's certification to the government that such a procedure is medically reasonable and necessary cannot be false if it is based on an opinion, medical judgment, or conclusion about which reasonable minds may differ. *Id.* at 739-40.

The Tenth Circuit reversed. It held that a statement constituting a medical judgment or opinion is not immune to being "false." *Id.* at 742. It explained that, on these facts, a claim must be "reasonable and necessary" under the Medicare Program Integrity Manual—in other words, safe and effective, not experimental or investigational, and appropriate (*i.e.*, ordered and furnished by qualified personnel, in accordance with accepted standards of medical practice). *Id.* at 743 (quoting CMS, *Medicare Program Integrity Manual* § 13.5.1). Accordingly, a doctor's certification to the government that a procedure is "reasonable and necessary" is "false" if the procedure was not reasonable and necessary under the government's definition. *Id.* at 743.

Implications of the case

The decision makes clear that, at least in the Tenth Circuit, the fact that an alleged statement was one of opinion or judgment does not mean that the statement cannot be "false." A medical opinion that a procedure is reasonable or necessary may be "false" if it conflicts with the Medicare definition.

M. Eleventh Circuit: Statute of Limitations

***United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081 (2018), cert. granted, 202 L. Ed 2d 400 (Nov. 16, 2018)**

The Eleventh Circuit reversed the dismissal of a qui tam action on statute-of-limitations grounds, holding that the extended limitations period of 31 U.S.C. § 3731(b)(2) applies to cases in which the government declines to interview—creating a circuit split on the issue.

About the Case

The relator alleged that his employer, The Parsons Corporations, and another entity, Cochise Consultancy, Inc., submitted false claims to the United States for work they performed as defense contractors in Iraq. *Id.* at 1083. The relator alleged that Parsons originally awarded a security subcontract to ArmorGroup through a bid process, but the relator facilitated a corrupt scheme in which the subcontract was ultimately awarded to Cochise. *Id.* The relator alleged that, because Cochise did not have the capacity to provide the security needs required by the primary contract with DoD, the government ended up paying millions of dollars more to Cochise than it would have to ArmorGroup. During an interview about his involvement in a separate kickback scheme, the relator reported this fraud to the FBI several years after it had occurred. *Id.* at 1084.

Three years after that interview, and more than six years after Parsons awarded the contract to Cochise, the relator filed his complaint. *Id.* at 1085. The United States declined to intervene, and the defendants moved to dismiss, arguing the

claim was time-barred by 31 U.S.C. § 3731(b)(1)'s six-year statute-of-limitations period, which requires that an FCA claim be brought within six years of the date on which the violation is committed. *Id.* Section 3731(b)(2) permits a claim to be brought "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" 31 U.S.C. § 3731(b)(2).

The district court dismissed the case, concluding that it was untimely under (b)(1) and that (b)(2)'s limitation period was inapplicable because the United States had declined to intervene, or alternatively, because it began to run when the relator learned of the fraud and had thus expired.

The Eleventh Circuit agreed that the relator's claim was untimely under (b)(1) because he filed more than six years after the occurrence of the alleged fraud. However, it reversed as to (b)(2), finding that the provision applies to *qui tam* actions where the United States declines to intervene because § 3731(b) applies to "[a] civil action under section 3730" and "[a] non-intervened case[] is a type of civil action under § 3730." *Id.* at 1089.

Recognizing that its decision conflicted with the published decisions of two other circuits, the court rejected the argument that interpreting (b)(2) to apply to cases where the United States is not a party would lead to absurd results because "the limitations period is triggered by a federal official's knowledge." *Id.* at 1091. The court explained that in *qui tam* actions "the United States remains the real party in interest and retains significant control over the case." *Id.* The Eleventh Circuit thus made clear that in the circuit "knowledge of a government official, not the relator, . . . triggers the limitations period" in (b)(2). *Id.* at 1096. It reasoned that the text of (b)(2) "unambiguously identifies a particular official of the United States as the relevant person whose knowledge causes the limitations period to begin to run." *Id.* at 1097.

The Eleventh Circuit rejected the argument that relators will be incentivized to delay reporting fraud to the government in order to increase damages. *Id.* at 1093. The court explained that "[a] relator who waits to report a fraud risks recovering nothing or having his relator's share decreased," and that because (b)(2)'s statute of limitation is three years, "there will be cases in which § 3731(b)(1)'s six year limitations period will expire later." *Id.* at 1094. The Supreme Court granted certiorari to decide "whether a relator in a False Claims Act *qui tam* action may rely on the statute of limitations in 31 U.S.C. § 3731(b)(2) in a suit in which the United States has declined to intervene and, if so, whether the relator constitutes an 'official of the United States' for purposes of Section 3731(b)(2)." *Petition for Writ of Certiorari*, 2018 WL 4348523, at *i.

Implications of the case

The case creates multiple circuit splits on the issues of 1) whether the limitations period in § 3731(b)(2) is available to a relator in a non-intervened case and 2) whether the "knowledge of a government official" requirement can be triggered by the relator. The Supreme Court granted certiorari on November 16, 2018 to decide these issues.

III. FEDERAL SETTLEMENTS, INTERVENTIONS, AND COMPLAINTS

A. Healthcare and Pharmaceuticals

Healthcare and Pharmaceuticals Settlements

- **AmerisourceBergen Corporation:** In October, DOJ announced that AmerisourceBergen Corporation and certain subsidiaries agreed to pay \$625 million to resolve allegations arising from its operation of a facility that improperly repackaged oncology-supportive injectable drugs into pre-filled syringes and improperly distributed those syringes to physicians treating vulnerable cancer patients. The agreement—which followed a 2017 plea agreement—resolved the companies’ civil liability to the United States under the FCA for allegedly causing false claims for the drugs it repackaged to be submitted to federal health care programs.⁴⁰ Except as to conduct admitted as part of the guilty plea, the claims resolved by the civil settlement were allegations only, and there was no determination of liability.
- **Actelion Pharmaceuticals US, Inc.:** In December, DOJ announced that San Francisco-based Actelion Pharmaceuticals US, Inc. had agreed to pay \$360 million to resolve claims that it had improperly used a foundation to pay the copays of Medicare patients taking Actelion’s pulmonary arterial hypertension drugs. DOJ had alleged that the AKS prohibited Actelion from making such copays in order to induce Medicare patients to purchase the company’s products.⁴¹ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **HealthCare Partners Holdings LLC:** In October, DOJ announced that HealthCare Partners Holdings agreed to pay \$270 million to resolve claims alleging that it had provided inaccurate information that caused Medicare Advantage Plans to receive inflated Medicare payments.⁴² The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Health Management Associates, LLC (HMA):** In September, DOJ announced that HMA, formerly a US hospital chain headquartered in Naples, Florida, agreed to pay \$216 million to resolve civil claims in which the government alleged that HMA had knowingly billed government health care programs for inpatient services that should have been billed as outpatient or observation services, paid remuneration to physicians in return for patient referrals, and submitted inflated claims for emergency department facility fees.⁴³ Except as to conduct admitted in a related guilty plea and Non-Prosecution Agreement, the claims resolved by the civil settlement were allegations only, and there was no determination of liability.
- **William Beaumont Hospital (Beaumont):** In August, DOJ announced that Beaumont, a regional hospital system based in Detroit, Michigan, had agreed to pay \$84.5 million to resolve allegations of violations of the Stark Act, AKS, and FCA. The

- settlement resolves allegations that Beaumont provided compensation in excess of fair market value, as well as free or below-fair market value office space and employees to certain physicians in an effort to persuade those physicians to refer their patients, and then submitted claims for services provided to these illegally referred patients. The settlement also resolves claims that Beaumont allegedly misrepresented that a CT radiology center qualified as an outpatient department of Beaumont in claims to federal health care programs.⁴⁴ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Prime Healthcare Services, Inc., Prime Healthcare Foundation, Inc., and Prime Healthcare Management, Inc (collectively, Prime) and Dr. Prem Reddy:** In August, DOJ announced a \$65 million settlement with Prime and Prime’s founder and CEO, Dr. Prem Reddy. The government alleged that Prime had engaged in admitting patients who only required outpatient procedures and “up-coding,” billing for more expensive diagnoses. Prime also entered into a Corporate Integrity Agreement (CIA) with the HHS OIG requiring the company to engage in significant compliance efforts over the next five years. Pursuant to the agreement, Prime is also required to retain an independent review organization to review the accuracy of the company’s claims for services furnished to Medicare beneficiaries.⁴⁵ The claims resolved by the settlement were allegations only, and there was no determination of liability.
 - **Alere Inc.:** In March, DOJ announced a \$33.2 million settlement with Massachusetts-based medical device manufacturer Alere Inc. and its subsidiary Alere San Diego for causing hospitals to submit false claims to federal healthcare programs by selling unreliable diagnostic devices. The government alleged that the defendants sold diagnostic devices that they should have known produced erroneous results.⁴⁶ The claims resolved by the settlement were allegations only, and there was no determination of liability.
 - **Signature HealthCARE, LLC:** In June, DOJ announced that Signature HealthCARE, LLC had agreed to pay more than \$30 million to resolve allegations that Signature had submitted forged pre-admission certifications of patient need to the Tennessee Medicaid program. Tennessee will receive a portion of the overall settlement as part of the resolution of the allegations.⁴⁷ The claims resolved by the settlement were allegations only, and there was no determination of liability.
 - **Kalispell Regional Healthcare System:** In September, DOJ announced that Montana-based Kalispell Regional Healthcare System, along with six subsidiaries and related entities, had agreed to pay \$24 million to resolve allegations that they had violated the FCA by paying physicians more than fair market value, and by conspiring to enter into arrangements that improperly induced referrals. The government alleged that the settling companies had established arrangements with referring physicians that violated the Stark Law and other

arrangements that also violated the AKS.⁴⁸ The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Pfizer, Inc.:** In May, DOJ announced that Pfizer, Inc. agreed to pay \$23.85 million to settle allegations that it had used a foundation as a conduit to pay the copays of Medicare patients taking certain Pfizer drugs. Pfizer allegedly made donations to the foundation to enable it to cover the co-pays and received confirmation of the payments from the foundation, via a specialty pharmacy.⁴⁹ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Healogics, Inc.:** In June, DOJ announced that Florida-based Healogics had agreed to pay up to \$22.51 million to settle allegations that the company had billed Medicare for medically unnecessary and unreasonable hyperbaric oxygen therapies. The lawsuits were filed under the qui tam provisions of the FCA, and the whistleblower share of the settlement was up to \$4.27 million.⁵⁰ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **East Texas Medical Center Regional Healthcare System, Inc., Paramedics Plus, LLC, and Municipal Clients:** In August, DOJ announced a \$21 million settlement with seven ambulance industry defendants and their municipal clients on claims that the ambulance companies had paid significant kickbacks to the municipalities in an effort to secure their ambulance business.⁵¹ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **UPMC Hamot and Medicor Associates, Inc.:** In March, DOJ announced a \$20 million settlement with Pennsylvania-based hospital UPMC Hamot and regional cardiology practice Medicor Associates Inc. to resolve allegations that the defendants had submitted false claims to Medicare and Medicaid in violation of the AKS and Stark Law. The government alleged that the hospital had paid Medicor physicians for unnecessary services in exchange for patient referrals. A district court held in March 2017 that the arrangements violated the Stark Law.⁵² The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Banner Health:** In April, DOJ announced that Banner Health had agreed to an \$18-million settlement to resolve allegations that 12 of its hospitals in Arizona and Colorado had submitted false claims to Medicare by admitting patients that could have been treated on a less costly outpatient basis. As part of the settlement, Banner Health agreed to enter into a five-year CIA with the HHS OIG.⁵³ The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Health Quest Systems, Inc. and PutnamHealth Center (PHC):** In July, DOJ announced that Health Quest and PHC, a subsidiary hospital of Health Quest, had agreed to pay \$14.7 million to resolve allegations over false billing and payments to physicians designed to improperly induce referrals. As part of the settlement, Health Quest will pay an additional \$895,427 to the State of New York, which jointly funds the State’s Medicaid program. Separately but contemporaneously, Health Quest also agreed to enter into a CIA with the HHS OIG to address future compliance.⁵⁴
- **Mercy Health:** In May, DOJ announced that Mercy Health, an Ohio-based nonprofit that operates healthcare facilities in Ohio and Kentucky, had agreed to pay \$14.5 million to settle allegations that it had engaged in improper financial relationships with referring physicians. The settlement resolved allegations that Mercy Health provided compensation in excess of fair market value to six physicians in its employ. Mercy Health disclosed the issues.⁵⁵ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Covidien LP:** In December, DOJ announced that medical device manufacturer Covidien had agreed to pay \$13 million to resolve allegations resulting from its alleged payment of kickbacks to hospitals and institutions to induce them to use Covidien’s Solitaire mechanical thrombectomy device.⁵⁶ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Post-Acute Medical, LLC (PAM):** In August, DOJ announced a \$13 million settlement with PAM, an operator of long-term care and rehabilitation hospitals, for allegedly submitting claims to the Medicare and Medicaid programs that resulted from violations of the AKS and Stark Law. PAM also entered into a five-year CIA with the HHS OIG, which includes an ongoing review by an Independent Review Organization.⁵⁷ The claims resolved by the settlement were allegations only and there was no determination of liability.
- **AngioDynamics, Inc.:** In July, DOJ announced a \$12.5 million settlement with medical device maker AngioDynamics, resolving allegations that AngioDynamics had made misleading claims to market an unapproved drug-delivery system, instructed providers to use incorrect billing codes in an effort to circumvent denials by insurance providers, and falsely claimed Medicare coverage for a separate, recalled medical device.⁵⁸ The claims resolved by the civil settlement were allegations only, and there was no determination of liability.
- **SightLine Health LLC and Integrated Oncology Network Holdings LLC (ION):** In March, DOJ announced a settlement of up to \$11.5 million with Texas-based SightLine and parent company ION for alleged violations of the AKS and FCA. The government alleged that SightLine had induced physicians to refer patients to its cancer treatment centers by paying the physicians a share of the profits

- through a series of leasing companies that SightLine had allowed the physicians to invest in. As part of the settlement, SightLine, ION, and related entities agreed to enter into a five-year CIA with the HHS OIG.⁵⁹ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Southern SNF Management, Inc., Rehab Services in Motion d/b/a Dynamic Rehab, and Affiliated Skilled Nursing Facilities:** In July, DOJ announced a \$10 million settlement with Southern SNF Management, Inc., Rehab Services in Motion d/b/a Dynamic Rehab, and nine affiliated skilled nursing facilities for claims alleging they had encouraged the provision of medically unreasonable and unnecessary therapies.⁶⁰ The claims resolved by the settlement were allegations only, and there was no determination of liability.
 - **Rotech Healthcare Inc:** In April, DOJ announced that Florida-based Rotech Healthcare Inc. had agreed to pay \$9.68 million to resolve claims that it had billed Medicare for medically unnecessary portable oxygen contents. As part of the settlement, the company admitted that it had knowingly billed Medicare for beneficiaries that did not use or need the portable oxygen and regardless of whether the portable oxygen was actually delivered to the beneficiaries.⁶¹
 - **Medical Transport LLC:** In March, DOJ announced that Virginia Beach-based ambulance services provider Medical Transport LLC had agreed to pay \$9 million to settle allegations that it had violated the FCA by submitting false claims to Medicare, Medicaid, and TRICARE for ambulance transports that were not medically necessary, did not qualify as Specialty Care Transports, and that should have been billed to other payors. As part of the settlement, Medical Transport agreed to enter into a five-year CIA with the HHS OIG.⁶² The claims resolved by the settlement were allegations only, and there was no determination of liability.
 - **Caris Healthcare, L.P. and Caris Healthcare, LLC:** In June, DOJ announced an \$8.5 million settlement with Caris Healthcare, L.P. and its wholly-owned subsidiary Caris Healthcare, LLC. DOJ had alleged that Caris had improperly admitted and re-certified patients for hospice care who were ineligible for hospice benefits because their prognoses were not terminal.⁶³ The claims resolved by the settlement were allegations only, and there was no determination of liability.
 - **DJO Global Inc.:** In January, DOJ announced that DJO Global Inc. had agreed to pay \$7.62 million to resolve allegations that its subsidiary Empi Inc. had submitted false claims to TRICARE for excessive and unnecessary transcutaneous electrical nerve stimulation (TENS) electrodes. The government alleged that sales representatives from Empi had encouraged TRICARE beneficiaries to order TENS electrodes that were not medically necessary.⁶⁴ The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Reliant Rehabilitation Holdings, Inc.:** In August, DOJ announced that Reliant Rehabilitation Holdings, Inc. had agreed to pay \$6.1 million to resolve allegations it had provided skilled nurse practitioners for no cost or at less than fair market value to nursing homes and rehabilitation facilities in an effort to induce the facilities to contract with Reliant.⁶⁵ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Vascular Access Centers, L.P.:** In October, DOJ announced that Philadelphia-based Vascular Access Centers L.P., along with 23 subsidiary and related companies, had agreed to pay at least \$3.825 million to resolve claims that they had billed Medicare for non-reimbursable vascular access procedures performed on end-stage renal disease beneficiaries and had engaged in an alleged kickback scheme related to referrals for such procedures.⁶⁶ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Biotheranostics Inc.:** In April, DOJ announced that California-based diagnostic laboratory Biotheranostics Inc. had agreed to pay \$2 million to resolve allegations that it had submitted false claims to Medicare for breast cancer index tests that were not reasonable and necessary for the diagnosis and treatment of breast cancer.⁶⁷ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Allegiance Health Management, Inc.:** In June, DOJ announced that Louisiana-based Allegiance had agreed to pay more than \$1.7 million to resolve allegations that Allegiance had submitted claims for reimbursement concerning outpatient psychotherapy services that were not medically reasonable or necessary.⁶⁸ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Scripps Health:** In January, DOJ announced that Scripps Health had agreed to pay \$1.5 million to resolve claims that it had improperly billed Medicare and TRICARE for physical therapy services rendered by therapists who did not have relevant billing privileges and who were not supervised by an authorized provider.⁶⁹ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Matthew Anderson and PMC LLC:** In January, DOJ announced that a Tennessee-based chiropractor paid \$1.45 million, plus interest, to resolve claims that he and four pain clinics managed by his company, PMC LLC, had caused pharmacies to submit claims to Medicare and Medicaid for pain medication that had no legitimate medical purpose and for office visits that were up-coded. As part of the settlement, Anderson and PMC LLC were excluded from participating in federal health care programs for five years.⁷⁰ The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Grenada Lake Medical Center (GLMC):** In August, DOJ announced that GLMC had agreed to pay \$1.1 million to resolve allegations that the hospital had provided medically unnecessary psychotherapy services. The services were allegedly performed on GLMC’s behalf by Allegiance Health Management but were billed to Medicare by GLMC.⁷¹ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Drs. Aytac Apaydin and Stephen Worsham:** In January, DOJ announced that two urologists based in Northern California, Drs. Aytac Apaydin and Stephen Worsham, had agreed to pay \$1.085 million to resolve allegations that the physicians had submitted claims to Medicare for image-guided radiation therapy in violation of the AKS and Stark Law. The government alleged that the urologists referred patients to a wholly-owned imaging center and allowed other urologists to lease part of the center and bill for procedures performed there.⁷² The other urologists had previously settled claims against them for \$900,000. The claims resolved by the settlement were allegations only, and there was no determination of liability.

Healthcare and Pharmaceuticals Interventions

- **Diabetic Care Rx LLC d/b/a Patient Care America:** In February, DOJ announced that it had filed a complaint in intervention against Patient Care America, a Florida-based compounding pharmacy, alleging that it had paid illegal kickbacks to induce prescriptions for compounded drugs reimbursed by TRICARE. The government also brought claims against two pharmacy executives and a private equity firm that manages the pharmacy. The government alleges that the defendants paid kickbacks to marketing companies, telemedicine physicians, and TRICARE beneficiaries to induce prescriptions of compounded formulas, which were manipulated to ensure the highest possible reimbursement, without regard to medical need.⁷³ The complaint contains allegations only, and there has been no determination of liability.
- **Insys Therapeutics Inc.:** In May, DOJ announced it had intervened in five lawsuits alleging that Insys Therapeutics had violated the FCA in connection with its marketing activities of its product Subsys. The complaint, unsealed on May 15, alleges that Arizona-based Insys paid kickbacks, including in the form of speaker fees, jobs for friends and family members, and lavish meals and entertainment, to induce physicians and nurse practitioners to prescribe Subsys for their patients.⁷⁴ The complaint contains allegations only, and there has been no determination of liability.

B. Procurement and Grants

Procurement and Grants Settlements

- **SK Energy Co. Ltd., GS Caltex Corporation, and Hanjin Transportation Co. Ltd:** In November, DOJ announced that South Korea-based companies SK Energy, GS Caltex, and Hanjin had agreed to pay a total of \$154 million to resolve civil antitrust and FCA claims related to an alleged bid-rigging conspiracy. The government alleged that each company had made false statements in connection with their agreement not to compete against each other to provide fuel services to the Department of Defense (DoD). The government's FCA investigation resulted from a suit brought by a qui tam relator. In a separate criminal matter, SK Energy, GS Caltex, and Hanjin agreed to plead guilty to criminal charges and pay a total of \$82 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.⁷⁵
- **Toyobo Co. Ltd. of Japan and Toyobo U.S.A. Inc.:** In March, DOJ announced that Toyobo Co. Ltd. of Japan and its US subsidiary, Toyobo U.S.A. Inc. (collectively, Toyobo), had agreed to pay \$66 million to resolve claims that they had sold defective zylon fiber used in bullet proof vests that the United States purchased for federal, state, local, and tribal law enforcement agencies. The government alleged that between 2001 and 2005, Toyobo—the sole manufacturer of zylon fiber—knew that zylon degraded quickly in normal heat and humidity, which rendered bullet proof vests containing zylon unfit for use. The government also alleged that Toyobo nonetheless marketed zylon for bullet proof vests, published misleading degradation data, and, when some of the zylon-containing bullet proof vests were recalled in 2003, started a public relations campaign designed to convince other body armor manufacturers to keep selling zylon-containing vests. In 2005, the National Institute of Justice decertified all zylon-containing vests. The settlement resolved two lawsuits, one brought by the United States and the other brought by a criminal justice professor who had previously worked for a body armor manufacturer and as a law enforcement officer. The relator received \$5,775,000 as part of the settlement. The claims resolved by the settlement were allegations only, and there was no determination of liability.⁷⁶
- **Northrop Grumman Systems Corporation (NGSC):** In November, the US Attorney's Office for the Southern District of California announced that NGSC, a subsidiary of the Northrop Grumman Corporation, had agreed to pay \$25.8 million to settle civil allegations by the government that it overstated the number of hours its employees worked on the Battlefield Airborne Communications Node (BACN) and Dynamic Re-tasking Capability contracts with the US Air Force. This was in addition to earlier repayments, for a total civil recovery of approximately \$27.45 million. NGSC also agreed to forfeit

- \$4.2 million in a separate agreement to resolve a criminal investigation into fraudulent billing on the BACN contract. In exchange for admitting its employees' misconduct, making full restitution, and agreeing to cooperate in the ongoing criminal investigation, no criminal charges will be filed against NGSC. Except as to conduct admitted in connection with the criminal settlement, the claims resolved by the civil settlement were allegations only, and there was no determination of liability.⁷⁷
- **Inchcape Shipping Services Holdings Ltd.:** In May, DOJ announced that Inchcape (and certain of its subsidiaries), a marine services contractor headquartered in the United Kingdom, had agreed to pay \$20 million to resolve allegations that from 2005 to 2014 they had overbilled the US Navy for ship husbanding services by overstating the quantity of goods and services provided, billing at rates in excess of contract rates, and double-billing for some goods and services. The settlement resolved a qui tam suit brought by three former employees, who received approximately \$4.4 million from the settlement. The claims resolved by the settlement were allegations only, and there was no determination of liability.⁷⁸
 - **North American Power Group Ltd. (NAPG) and Michael Ruffatto:** In July, DOJ announced that NAPG and its owner and president, Michael Ruffatto, had agreed to pay the United States \$14.4 million to resolve allegations that between 2009 and 2012 they had falsified \$5.7 million in costs associated with a cooperative agreement with the DoE National Energy and Technology Laboratory to manage a carbon analysis and sequestration project in Wyoming. Ruffatto separately pleaded guilty to a felony count of intentional submission of false claims based on the same conduct. He was sentenced on June 27, 2018, to 18 months in prison, three years supervised release, a \$50,000 fine, and \$2 million in restitution.⁷⁹ Except as to conduct admitted as part of the guilty plea, the claims resolved by the civil settlement were allegations only, and there was no determination of liability.
 - **TrellisWare Technologies, Inc.:** In March, the US Attorney's Office for the Southern District of California announced that TrellisWare, a communications company located in San Diego, had agreed to pay just over \$12 million to settle allegations that it had misrepresented its eligibility to enter into Small Business Innovation Research (SBIR) contracts with DoD agencies. Between 2008 and 2015, TrellisWare was awarded multiple SBIR contracts to provide the Navy, Army, and Air Force with a variety of technology services and products involving communications and signal processing systems. The claims resolved by the settlement were allegations only, and there was no determination of liability.⁸⁰
 - **3M Company:** In July, the US Attorney's Office for the District of South Carolina announced that 3M, headquartered in St. Paul, Minnesota, had agreed to pay \$9.1 million to resolve allegations that it had knowingly sold the dual-ended Combat Arms Earplugs, Version 2

- to the US military without disclosing defects that hampered the effectiveness of the hearing protection devices. The settlement also resolved allegations brought in a qui tam suit. The relator was slated to receive \$1,911,000 as part of the settlement. The claims resolved by the settlement were allegations only, and there was no determination of liability.⁸¹
- **Arena Event Services, Inc. d/b/a Arena Americas:** In October, the US Attorney’s Office for the Southern District of Georgia announced that Arena Americas had agreed to pay the United States up to \$7.8 million to resolve allegations that it wrongfully obtained small business set-aside contracts from DoD. Through its investigation under the FCA, the United States determined that Arena Americas paid another entity, Military Training Solutions, LLC (MTS), to bid on and obtain small business contracts that ultimately would be performed by Arena Americas. MTS previously entered into a settlement agreement with the United States to resolve its liability under the FCA, and MTS owner Robert Obradovich pled guilty to one felony count of receiving unlawful kickbacks in a similar scheme. The claims resolved by the settlement agreement were allegations only, and there was no determination of liability.⁸²
 - **British Airways Plc (BA) and Iberia Airlines (Iberia):** In November, DOJ announced that BA and Iberia had agreed to pay \$5.8 million to resolve allegations by the government that they had made false reports regarding the timing of the transfer of possession of US mail to foreign postal administrations or other intended recipients under contracts with the US Postal Service (USPS). The claims resolved by the settlement were allegations only, and there was no determination of liability.⁸³
 - **Lance Armstrong:** DOJ announced in April that former professional cyclist Lance Armstrong had agreed to pay \$5 million to resolve allegations that his admitted use of performance-enhancing drugs (PEDs) had resulted in the submission of millions of dollars of false claims for sponsorship payments to the USPS from 1999 to 2004. The qui tam suit—filed in 2010 by Armstrong’s former teammate Floyd Landis, who admitted that he, too, had participated in PED use—alleged that Armstrong and his team had systematically employed PEDs and made numerous false statements to USPS management and to the public to induce the USPS to renew its sponsorship and increase sponsorship fees. Landis received \$1.1 million as part of the settlement. The claims resolved by the settlement were allegations only, and there was no determination of liability.⁸⁴
 - **Lockheed Martin Corp.:** In January, the US Attorney’s Office for the Northern District of California announced that Lockheed had agreed to pay \$4.4 million to resolve allegations that it had submitted false statements in the course of providing defective communications systems for the US Coast Guard’s National Security Cutters. In addition to paying the settlement amount, Lockheed agreed to provide the Coast Guard with \$2.2 million in repairs to the communications

- systems on the nine cutters covered by the contract. The qui tam lawsuit was brought by a former Lockheed engineer, who received \$990,000 as part of the settlement. The claims resolved by the settlement were allegations only, and there was no determination of liability.⁸⁵
- **Indal Technologies Inc.:** In October, DOJ announced that Indal had agreed to pay \$3.5 million to resolve allegations that it had knowingly sold defective helicopter landing systems designed for US Navy destroyers. The settlement resolved allegations by the government that Indal, without informing the Navy, had knowingly substituted a different, less expensive type of steel in numerous system track plates than the Navy had specified. The claims resolved by the settlement were allegations only, and there was no determination of liability.⁸⁶
 - **International Marine and Industrial Applicators, LLC (IMIA) and Marine Equipment Supply, LLC (MES):** In August, the US Attorney's Office in the Western District of Washington announced that IMIA, a marine maintenance company based in Alabama, and MES, a rental company owned by IMIA executives, had agreed to pay the government more than \$2.8 million to settle claims that they had improperly billed the Navy for equipment IMIA rented from MES while performing maintenance work on the USS Reagan at the Puget Sound Naval Shipyard in Bremerton, Washington. The claims resolved by the settlement were allegations only, and there was no determination of liability.⁸⁷
 - **Sorensen Gross Construction Company and Khalil Saab:** In July, DOJ announced that Sorensen and its corporate vice president, Khalil Saab, had agreed to pay \$2.481 million to resolve allegations that they had submitted false claims for payment under a construction contract funded by the US Agency for International Development for a project to build or renovate 16 schools in Aqaba, Jordan. DOJ alleged that Sorensen violated the contract by subcontracting almost the entirety of the project to a local Jordanian company. DOJ further alleged that Sorensen had falsified that it was performing the work done by the Jordanian company. The claims resolved by the settlement were allegations only, and there was no determination of liability.⁸⁸
 - **MassTech, Inc., Richard Lee, and Arnold Lee:** In May, the US Attorney's Office for the District of Maryland announced that MassTech, Inc., its former Chief Executive Officer, and its former Chief Financial Officer had collectively agreed to pay \$1.9 million to resolve allegations that MassTech had falsely certified that it was a small business concern with fewer than 500 employees under the relevant size standard to obtain SBIR awards. The claims resolved by the settlement were allegations only, and there was no determination of liability.⁸⁹
 - **University of Puerto Rico (UPR):** In November, the US Attorney's Office for the District of Puerto Rico announced that the government

- had recovered \$1,772,790 from UPR as part of a settlement agreement reached in connection to claims of misuse of grant funds provided to UPR by the National Aeronautics and Space Administration, DoE, and the National Science Foundation. The government alleged that UPR had not complied with the time- and effort-reporting requirements for salaries and wages to ensure that payroll for 2011 was correctly charged. The claims resolved by the settlement were allegations only, and there was no determination of liability.⁹⁰
- **Ranco Construction, Inc.:** The US Attorney’s Office for the District of New Jersey announced in May that Ranco Construction had agreed to pay \$1.5 million to settle allegations that it had paid its workers less than the minimum hourly wage required by state and federal law and then falsified payroll records to qualify for state and federal construction contracts. The settlement resolved a qui tam lawsuit filed by a former Ranco employee, who received more than \$150,000 from the settlement. The claims resolved by the settlement were allegations only, and there was no determination of liability.⁹¹
 - **Second Chance Body Armor, Inc. and Richard Davis:** In July, DOJ announced that Richard C. Davis, the founder and former CEO of Michigan-based Second Chance had agreed to resolve claims that Second Chance had sold defective Zylon bullet-proof vests to federal, state, local and tribal law enforcement agencies. The United States alleged that Second Chance’s bullet proof vests were defective due to the loss of their ballistic capability when exposed to heat and humidity and suffered from a poor rate of degradation. The United States further alleged that, rather than using a \$6 million payment from Toyobo Co. Ltd., the manufacturer of Zylon fiber, to fix the degradation problem, Second Chance pocketed the money and Davis and other Second Chance owners began meeting with various investment bankers to sell Second Chance. Qui tam lawsuits were filed against Richard Davis and Second Chance. The government intervened as to the claims against Mr. Davis. Mr. Davis will relinquish his interest in \$1.2 million in assets previously frozen by the United States and will pay an additional \$125,000 to the United States. The relator will receive \$28,750 plus a share of the United States’ ultimate recovery from the previously frozen funds. This settlement is part of a larger investigation of the body armor industry’s use of Zylon. The settlement resolved, in part, allegations that arose in the qui tam suit against Second Chance. Conspiracy claims against Second Chance and Toyobo remain pending. The claims resolved by the settlement were allegations only, and there was no determination of liability.⁹²
 - **Big-D Construction Corp. and Creative Times Day School, Inc.:** In April, the US Attorney’s Office for the District of Utah announced that Big-D Construction and Creative Times had agreed to pay \$1,062,900 and \$150,000 respectively to settle allegations that between 2009 and 2013 they had misrepresented their eligibility to participate in a Small Business Administration (SBA) program for small and disadvantaged businesses. The government alleged that Big-D had entered into a

- leasing agreement with Creative Times, a small business participant in SBA programs, under which Big-D personnel performed virtually all of the work on certain federal agency construction projects, contrary to the SBA's requirement that the small business perform at least 50% of the work itself. The settlement resolved a lawsuit filed by a qui tam relator. The claims resolved by the settlement were allegations only, and there was no determination of liability.⁹³
- **Beam Bros. Trucking Inc. (BBT), Gerald Beam, and Garland Beam:** DOJ announced in March that BBT and its principals Gerald Beam and Garland Beam had agreed to pay \$1,025,000 to settle allegations that BBT, a trucking company located in Mt. Crawford, Virginia, had misused payment cards provided by the USPS to purchase fuel in connection with contracts that did not allow for the use of the purchase cards, resulting in inflated charges to the government. The settlement resolved a qui tam suit filed by a former BBT employee. At the time of settlement, the relator's share of the recovery had yet to be determined. The claims resolved by the settlement were allegations only, and there was no determination of liability.⁹⁴
 - **Alpha Research & Technology, Inc. (ART):** In October, the US Attorney's Office for the Eastern District of California announced that ART, an El Dorado Hills company that provides command and control systems to the US Air Force, had agreed to pay the United States \$1 million to resolve allegations that ART had knowingly submitted inflated contract pricing to the government. The government alleged that between 2006 and 2011, ART submitted subcontract proposals to prime contractors to DoD and knowingly included millions of dollars of personal expenses of its owners, which ART knew were unallowable. The claims resolved by the settlement were allegations only, and there was no determination of liability.⁹⁵
 - **Community Renewal Team (CRT) and Lena Rodriguez:** The US Attorney's Office for the District of Connecticut announced in May that CRT and its president Lena Rodriguez had agreed to pay \$362,000 to resolve allegations that between 2009 and 2013 Rodriguez had directed certain CRT employees to bill their time to federal grants funded by HHS, the Department of Housing and Urban Development (HUD), and DoE while working on state-funded grant programs or other unrelated programs. The claims resolved by the settlement were allegations only, and there was no determination of liability.⁹⁶

Procurement and Grants Interventions

- **Universal Concrete Products Corp., Donald Faust Jr., and Andrew Nolan:** In May, the US Attorney's Office for the Eastern District of Virginia announced that the United States and Virginia had filed a combined notice of intervention in a qui tam lawsuit brought against Universal Concrete Products, Donald Faust Jr., and Andrew Nolan for their work on Phase II of the Dulles Metrorail Project. The United States and Virginia did not intervene in the relator's allegations

against the general contractor of the project, Capital Rail Constructors. The complaint contains allegations only, and there has been no determination of liability.⁹⁷

- **Tetra Tech EC Inc.:** In October, DOJ announced that it had intervened in three qui tam cases pending in the Northern District of California against Tetra Tech, alleging that Tetra Tech had submitted false claims to the US Navy for radiological remediation and support services. The Navy awarded contracts to Tetra Tech to test parcels of land at the Hunters Point Naval Shipyard for radiation and to remediate any areas where the radiation was excessive. The lawsuits allege that Tetra Tech misrepresented the source of soil samples it submitted for radiological testing. Earlier in 2018, two Tetra Tech supervisors, Stephen C. Rolfe and Justin E. Hubbard, pleaded guilty to falsifying records and were sentenced to eight months in prison. The claims asserted in the three complaints are allegations only, and there has been no determination of liability.⁹⁸

Procurement and Grants Complaints

- **Pratt & Whitney (P&W) and United Technologies Corp.:** In August, a judge on the US District Court for the District of Connecticut unsealed a qui tam complaint filed in 2016 by a former P&W employee alleging that P&W and its parent United Technologies sold the US military tens of millions of dollars in defective fighter jet engines. The complaint alleges that P&W falsified or cherry-picked durability testing results to conceal the use of a defective spray-coating process for parts in its jet engines, which are used in F-15, F-16, and F-22 fighter jets. The government has declined to intervene. The complaint contains allegations only, and there has been no determination of liability.⁹⁹
- **Global Linguist Solutions LLC (GLS):** In October, the US District Court for the District of Maryland unsealed a qui tam complaint first filed in 2015 by former employees alleging that GLS, a joint venture between DynCorp International LLC and AECOM National Security Programs Inc., had falsely represented that it satisfied small business subcontracting requirements under its government contracts. In 2007, GLS was awarded a \$4.6 billion contract with the US Army Intelligence and Security Command to provide foreign language linguistic, interpretation, and translation services for the Army and other agencies in support of Operation Iraqi Freedom. In 2011, it was awarded one of six slots in a multi-award deal to provide translation services worldwide, valued at up to \$9.7 billion. The complaint alleges that although the relators and other translators were ostensibly employed by subcontractors, in line with small business subcontracting requirements, they were effectively controlled by GLS, which misrepresented to the government a “leasing” agreement with the subcontractors. The government has declined to intervene. The complaint contains allegations only, and there has been no determination of liability.¹⁰⁰

- **Far East Construction Co., Huyn B. Kang, and Kyong S. Kang:** In October, the US Attorney’s Office for the Northern District of Illinois filed a suit against Far East and its officers (collectively, Far East) alleging that the company allowed a nonqualified entity to use its name to win several US military contracts set aside for small disadvantaged businesses. In 2008, Far East received a multi-year contract for construction work at the Fort Jackson Army base. The government alleges that Far East struck an illegal agreement with MCC Construction Co. allowing the Colorado-based company to benefit from a program designed to help historically underutilized business zones. The alleged scheme has also resulted in criminal charges and guilty pleas for MCC and Michelle Cho, a Far East employee and daughter of the company’s officers. The complaint contains allegations only, and there has been no determination of liability.¹⁰¹

C. Financial Institutions

Financial Institutions Settlements

- **Deloitte & Touche LLP:** On February 28, DOJ announced that Deloitte & Touche LLP had agreed to pay \$149.5 million to resolve allegations that it had violated the FCA as the independent auditor of Taylor, Bean & Whitaker Mortgage Corp. (TBW), a direct endorsement lender. The government alleged that, from 2002 to 2008, TBW was engaged in a fraudulent scheme involving, among other things, the purported sale of fictitious or double-pledged mortgage loans. It further alleged that Deloitte’s audits knowingly deviated from applicable auditing standards and therefore failed to detect the fraud. Multiple TBW officials were criminally convicted in connection with the fraud. The settlement resulted from coordinated efforts by the Civil Division’s Commercial Litigation Branch, HUD, and the HUD OIG. The claims resolved by the settlement were allegations only, and there was no determination of liability.¹⁰²
- **Finance of America Mortgage LLC:** On December 12, the US Attorney’s Office for the Northern District of New York announced that Finance of America Mortgage LLC had agreed to pay \$14.5 million to resolve allegations that its subsidiary Gateway Funding Diversified Mortgage Services, LP (Gateway) had violated the FCA as a direct endorsement lender. Gateway admitted that it had failed to audit all early-payment default (EPD) loans, as HUD requires, and that on the occasions when it did audit the loans, it ignored its compliance department’s concerns. Gateway also admitted that it had failed to adhere to HUD’s self-reporting requirements and that its senior executives had known that certain underwriters and offices at the company had a “pattern of poor performance” on EPD loans. The investigation arose from a qui tam suit filed by a former Gateway employee, who received \$2.39 million from the settlement. The investigation was conducted by the US Attorneys’ Office for the Northern District of New York, DOJ’s Civil Division, HUD, and the HUD OIG.¹⁰³

- **Universal American Mortgage Co. (UAMC):** On October 19, DOJ announced that UAMC had agreed to pay \$13.2 million to resolve allegations that it had violated the FCA as a direct endorsement lender. According to the government, between January 1, 2006, and December 31, 2011, UAMC knowingly endorsed for FHA insurance loans that did not qualify. The government further alleged that UAMC had improperly incentivized underwriters and knowingly failed to perform quality control reviews, contributing to UAMC’s endorsement of defective loans. The settlement also resolved allegations in an qui tam suit brought by a former employee of a related UAMC entity. The relator will receive \$1.98 million from the settlement. The investigation was conducted by HUD, the HUD OIG, DOJ’s Civil Division, and the US Attorneys’ Offices for the Eastern and Western Districts of Washington. The claims resolved by the settlement were allegations only, and there was no determination of liability.¹⁰⁴
- **Bank of America Corp.:** On January 5, DOJ filed a joint stipulation of dismissal in which Bank of America and related entities agreed to pay \$5 million to resolve a qui tam suit brought by foreclosure attorney Bruce Jacobs. (Note: WilmerHale represented the Bank of America entities in the litigation). Jacobs alleged that the Bank of America entities had used defective, rubber-stamped endorsements to file FHA mortgage insurance claims. The United States initially declined to intervene but eventually did so to approve the settlement. Jacobs received \$891,000 out of the settlement and his attorneys received \$1.6 million for fees and costs. The claims resolved by the settlement were allegations only, and there was no determination of liability.¹⁰⁵

IV. STATE AND LOCAL DEVELOPMENTS

A. 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.¹⁰⁶ 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 2018, the OIG certified three additional states as DRA-compliant: North Carolina, Virginia, and Washington.¹⁰⁷
- In late 2016 and 2017, the OIG determined that the following states are not DRA-compliant: California, Delaware, Florida, Georgia, Hawaii, Michigan, Minnesota, New Hampshire, New York, Rhode Island, and Wisconsin. The most frequent deficiency cited was that the state 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.¹⁰⁸ The OIG granted most of these states a grace period to amend their statutes by the end of 2018 (and thus the states continue to receive incentive funding until then).¹⁰⁹
- On March 15, 2018, **Washington** Governor Jay Inslee signed into law a bill conforming the civil penalty provisions of the Washington Medicaid False Claims Act with the federal FCA. The bill also relieved the Washington attorney general from a requirement that he adjust the state false claims act civil penalties each year through administrative rulemaking.¹¹⁰
- On March 21, 2018, **Florida** Governor Rick Scott signed into a law a bill that would continue to exempt from public record requirements (under the Open Government Sunset Review Act) the complaint and information held by the Department of Legal Affairs pursuant to an investigation of a violation of the Florida False Claims Act.¹¹¹
- On March 30, 2018, **Virginia** Governor Ralph Northam signed into law a bill conforming the civil penalty provisions of the Virginia Fraud Against Taxpayers Act with the federal FCA.¹¹²
- On April 12, 2018, **New York** Governor Andrew Cuomo signed into law a bill conforming the civil penalty provisions of the New York False Claims Act with the federal FCA.¹¹³
- On June 22, 2018, **North Carolina** Governor Roy Cooper signed into law a bill conforming the civil penalty provisions of the North Carolina

False Claims Act with the federal FCA. The bill also amended the state false claims act to provide that, for actions brought by private persons, the court and the Attorney General must provide written consent before an action may be dismissed.¹¹⁴

- On July 2, 2018, **Rhode Island** Governor Gina Raimondo signed into a law a bill conforming the civil penalty provisions of the Rhode Island False Claims Act with the federal FCA.¹¹⁵
- In the **District of Columbia**, a bill is pending that would expand false claims liability related to taxation. Specifically, the bill would allow for liability under the district’s false claims act 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.¹¹⁶
- In **Illinois**, bills are pending that would provide the Department of Revenue and the Attorney General, but not private parties, with authority to bring an administrative action or judicial action, respectively, for false claims relating to certain taxes.¹¹⁷ Another bill is pending that provides that false claims liability does not attach to acts pertaining to any taxes imposed, collected, or administered by Illinois.¹¹⁸
- In **Michigan**, a bill creating a state false claims act that expands the state’s current Medicaid False Claims Act beyond Medicaid claims remains pending.¹¹⁹ A bill that conforms the civil penalty provisions of the Michigan Medicaid False Claims Act to the federal FCA is also pending.¹²⁰
- In **New Jersey**, bills have been introduced that would clarify the effective date of the New Jersey False Claims Act¹²¹; make certain provisions of the state false claims act retroactive¹²²; and exempt awards recovered under the state false claims act from state income tax assessments.¹²³
- A bill creating a state false claims act—the Taxpayer Prevention Against Fraud Act—remains pending in **Pennsylvania**.¹²⁴
- Bills that would have aligned the current state false claims acts with the federal FCA failed in **Kansas** and **Wisconsin**.¹²⁵

B. Noteworthy State Settlements or Judgments

As in prior years, the most significant state false claims settlements in 2018 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 2018 included:

- **Several states settled with AmerisourceBergen Corporation for \$625 million.** In October, AmerisourceBergen Corporation agreed to pay \$625 million to the federal government and 44 states to settle allegations that a purported pharmacy opened by an AmerisourceBergen Corporation subsidiary had caused numerous false claims to be submitted to Medicaid for unapproved new drugs and defective, contaminated, or otherwise compromised drugs.¹²⁶ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Texas settled with AstraZeneca for \$110 million.** In August, AstraZeneca agreed to pay Texas \$110 million to settle allegations that it had falsely marketed two of its drugs in violation of the Texas Medicaid Fraud Prevention Act.¹²⁷ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **California settled with BP Energy Company for \$102 million.** In January, BP Energy Company agreed to pay California \$102 million to settle allegations that it had intentionally overcharged the State of California for natural gas that the State had purchased under three successive contracts from March 2003 to August 2012, in violation of the California False Claims Act.¹²⁸ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **All 50 states and the District of Columbia settled with Alere Inc. for \$33.2 million.** In July, Alere Inc. agreed to pay \$33.2 million to the federal government, all 50 states, and the District of Columbia to settle allegations that the company had knowingly sold materially unreliable diagnostic testing devices to hospitals.¹²⁹ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Several states settled with Benevis LLC for \$23.9 million.** In January, Benevis LLC (formerly known as NCDR, LLC) and 133 Kool Smiles Clinics across the nation supported by Benevis agreed to pay \$23.9 million to the federal government, 19 states, and the District of Columbia to settle allegations that they had fraudulently billed Medicaid programs for medically unnecessary dental work on pediatric patients.¹³⁰ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **New York settled with CenterLight Health System, Inc. and CenterLight Healthcare, Inc. for \$6.36 million.** In March, CenterLight Health System, Inc. and CenterLight Healthcare, Inc. agreed to pay New York \$6.36 million and the federal government \$3.94 million to settle allegations that their former managed long-term care plan had submitted fraudulent requests for monthly premiums and had failed to repay Medicaid for falsely-obtained payments.¹³¹ The claims resolved by the settlement were allegations only, and there was no determination of liability.

- **Massachusetts settled with South Bay Mental Health Center, Inc. for \$4 million.** In February, South Bay Mental Health Center, Inc. agreed to pay Massachusetts \$4 million to settle allegations that it had fraudulently billed the state’s Medicaid program for mental health care services provided to patients by unlicensed, unqualified, and unsupervised staff members at its clinics.¹³² The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Alaska settled with the ARC of Anchorage for \$2.3 million.** In April, the ARC of Anchorage agreed to pay Alaska \$2.3 million to settle allegations that it had billed the Alaska Medicaid Program for services not provided and for overlapping services with the same provider.¹³³ The claims resolved by the settlement were allegations only, and there was no determination of liability.
- **Indiana settled with ImmediaDent of Indiana LLC and Samson Dental Partners LLC for \$1.78 million.** In November, ImmediaDent of Indiana LLC and Samson Dental Partners LLC agreed to pay Indiana \$1,782,729 and the federal government \$3,400,271 to settle allegations that they had improperly billed Medicaid for dental services.¹³⁴ The claims resolved by the settlement were allegations only, and there was no determination of liability.

C. Noteworthy State Supreme Court Decisions

- ***Phone Recovery Services, LLC v. Verizon of New England, Inc.*, 102 N.E.3d 968, 973 (Mass. 2018):** The Supreme Judicial Court of Massachusetts held that a corporation does not have standing to bring suit as a relator under the Massachusetts False Claims Act, which defines “relator” as an “individual.” Only natural persons may be relators. WilmerHale filed an amicus brief on behalf of the Chamber of Commerce of the United States of America in support of the defendants.
- ***Phone Recovery Services, LLC v. Qwest Corporation*, 919 N.W.2d 315 (Minn. 2018):** The Supreme Court of Minnesota held that certain statutory fees and surcharges collected by telecommunications carriers were taxes and thus claims related to these surcharges were excluded from the Minnesota False Claims Act pursuant to a provision excluding from the Act “claims, records, or statements made under portions of the Minnesota Statutes relating to taxation.” *Id.* at 317. WilmerHale filed an amicus brief on behalf of the Chamber of Commerce of the United States of America in support of the defendants.
- ***Phone Recovery Services, LLC v. Verizon Washington, D.C., Inc.*, 191 A.3d 309 (D.C. Cir. 2018):** The District of Columbia Court of Appeals held that relators’ false claims allegations were not barred by the public disclosure bar because their description of the precise mechanism by which defendant phone companies allegedly committed fraud differed markedly from the more general publicly-

disclosed misconduct found in certain news articles. The court affirmed the lower court's dismissal of the case, however, because relators failed to plead fraud with sufficient particularity. Specifically, the court highlighted the fact that relators treated the defendants uniformly, alleged that their "proprietary methodology" showed each defendant under-remitted taxes at the exact same rate, and relied on conclusory allegations of misrepresentations in alleging fraud. *Id.* at 321.

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 health care fraud. He also served in an earlier administration as Assistant Attorney General for the Civil Division, where he directly supervised FCA enforcement for the United States; and as Deputy General Counsel for DoD, where he supervised all litigation at DoD, including FCA and government-contracts litigation.
- A former Deputy Attorney General of the United States, 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 Deputy Assistant Attorney General and Principal Deputy Associate Attorney General, who in those capacities worked closely with the Civil Frauds Unit on several high-profile matters, and who in the latter capacity considered major interventions and settlements proposed by that unit.

- A former 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.

For more information on False Claims Act matters, please contact:

Washington DC

Christopher E. Babbitt	+1 202 663 6681	christopher.babbitt@wilmerhale.com
Jonathan G. Cedarbaum	+1 202 663 6315	jonathan.cedarbaum@wilmerhale.com
Jamie Gorelick	+1 202 663 6500	jamie.gorelick@wilmerhale.com
Ronald C. Machen	+1 202 663 6881	ronald.machen@wilmerhale.com
Alejandro N. Mayorkas	+1 202 663 6221	alejandro.mayorkas@wilmerhale.com
David W. Ogden	+1 202 663 6440	david.ogden@wilmerhale.com
Jonathan E. Paikin	+1 202 663 6703	jonathan.paikin@wilmerhale.com
Stephen W. Preston	+1 202 663 6900	stephen.preston@wilmerhale.com
Howard M. Shapiro	+1 202 663 6606	howard.shapiro@wilmerhale.com
Andrew E. Shipley	+1 202 663 6283	andrew.shipley@wilmerhale.com
Charles C. Speth	+1 202 663 6133	charles.speth@wilmerhale.com

New York

Debo P. Adegbile	+1 212 295 6717	debo.adegbile@wilmerhale.com
Hallie B. Levin	+1 212 295 6710	hallie.levin@wilmerhale.com

Boston

Stephen A. Jonas	+1 617 526 6144	stephen.jonas@wilmerhale.com
Emily R. Schulman	+1 617 526 6077	emily.schulman@wilmerhale.com

Los Angeles

Matthew B. Benedetto	+1 213 443 5323	matthew.benedetto@wilmerhale.com
David C. Marcus	+1 213 443 5312	david.marcus@wilmerhale.com

Denver

Thomas L. Strickland	+1 720 274 3148	thomas.strickland@wilmerhale.com
John F. Walsh	+1 720 274 3154	john.walsh@wilmerhale.com

The overall editors of this report were Jonathan Cedarbaum and Christopher Babbitt. The contributors were Matthew Benedetto, Brian Boynton, Barry Hurewitz, Stephen Jonas, Jonathan Paikin, Emily Schulman, Charles Speth, James Barton, Cadene Russell Brooks, Chanda Brown, Claire Chung, Ari Evans, Sonia Fleury, Kevin Gallagher, Helam Gebremariam, Leslie Harrelson, Michael Horrell, Michael Morillo, Saurabh Sanghvi, Stephanie Simon, Anuradha Sivaram, Allyson Slater, Drew Van Denover, Ariel Warner, April Williams, Ed Williams, Daniel Winik, and Derek Woodman.

-
- 1 The figures in this paragraph come 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) (Dec. 21, 2018), https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery; and Press Release, Off. of Public Aff., US Dep't of Justice, *Justice Department Recovers Over \$2.8 Billion from False Claims Act Cases in Fiscal Year 2018* (Dec. 21, 2018), <https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018>.
 - 2 Press Release, Off. of Public Aff., US Dep't of Justice, *Justice Department Recovers Over \$2.8 Billion from False Claims Act Cases in Fiscal Year 2017* (Dec. 21, 2018), <https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018>.
 - 3 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>; US Dep't of Justice, *Justice Manual* 4-4.111 (Sept. 2018), <https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.111>; Jonathan G. Cedarbaum, David W. Ogden & Carl J. Nichols, *Justice Department Issues Guidance on Dismissing Qui Tam False Claims Act Cases Over Relators' Objections*, WilmerHale.com (Jan. 25, 2018), <https://www.wilmerhale.com/en/insights/client-alerts/2018-01-25-justice-department-issues-guidance-on-dismissing-qui-tam-false-claims-act-cases-over-relators-objections>.
 - 4 Memorandum from Rachel Brand, Assoc. Att'y Gen., to Heads of Civil Litigating Components, US Att'ys (Jan. 25, 2018), <https://www.justice.gov/file/1028756/download>; Carl J. Nichols, Jonathan G. Cedarbaum, David W. Ogden, Brian Boynton & Ed Williams, *Justice Department Issues Memo Limiting Use of Agency Guidance in Affirmative Civil Enforcement Suits*, WilmerHale.com (Feb. 5, 2018), <https://www.wilmerhale.com/en/insights/client-alerts/2018-02-05-justice-department-issues-memo-limiting-use-of-agency-guidance-in-affirmative-civil-enforcement-suits>; Memorandum from Jeff Sessions, Att'y Gen., to All Components (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download>.
 - 5 See *Justice Manual* 1-20.000 *et seq.* (Dec. 2018), <https://www.justice.gov/jm/1-20000-limitation-use-guidance-documents-litigation>.
 - 6 See our alert and the Brand Memo *supra* n.4. The Brand Memo is also linked in the alert. The November 2017 memorandum from then-Attorney General Jeff Sessions, upon which the Brand Memo built, has also been codified at *Justice Manual* 1-19.000 (Dec. 2018), <https://www.justice.gov/jm/1-19000-limitation-issuance-guidance-documents-1>. It is cross-referenced in the Brand Memo section of the Manual.
 - 7 *Justice Manual* 1-20.201.
 - 8 *Id.* at 1-20.204.
 - 9 Civil Monetary Penalties Inflation Adjustment, 83 Fed. Reg. 3944, 3945 (Jan. 29, 2018) (to be codified at 28 C.F.R. pt. 85), <https://www.gpo.gov/fdsys/pkg/FR-2018-01-29/pdf/2018-01464.pdf>.
 - 10 See Whistleblower Protection Coordination Act, Pub. L. No. 115-192, ___ Stat. ___ (2018), <https://www.congress.gov/115/bills/s1869/BILLS-115s1869enr.pdf>.
 - 11 See All Circuit Review Act, Pub. L. No. 115-195, 132 Stat. 1510 (2018), <https://www.congress.gov/115/plaws/publ195/PLAW-115publ195.pdf>.
 - 12 See John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 3134, ___ Stat. ___ (2018), <https://www.congress.gov/115/bills/hr5515/BILLS-115hr5515enr.pdf>.
 - 13 H.R. 5351, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/5351/text>.

-
- 14 H.R. 5697, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/5697/text>.
 - 15 S. 3605, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/senate-bill/3605/text>.
 - 16 H.R. 5993, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/5993/text>.
 - 17 H.R. 6922, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/6922/text>.
 - 18 H.R. 7032, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/house-bill/7032/text>.
 - 19 164 Cong. Rec. S892–93 (daily ed. Feb. 13, 2018) (statement of Sen. Chuck Grassley); Prepared Senate Floor Statement by Senator Chuck Grassley of Iowa, Interpreting the False Claims Act (Feb. 13, 2018), <https://www.grassley.senate.gov/news/news-releases/interpreting-false-claims-act>.
 - 20 S. 2968, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/senate-bill/2968/text>.
 - 21 S. Res. 558, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/senate-resolution/558/text>.
 - 22 Civil Monetary Penalties Inflation Adjustment, 83 Fed. Reg. 3944, 3945 (Jan. 29, 2018) (to be codified at 28 C.F.R. pt. 85), <https://www.gpo.gov/fdsys/pkg/FR-2018-01-29/pdf/2018-01464.pdf>.
 - 23 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>; *Justice Manual* 4-4.111 (Sept. 2018), <https://www.justice.gov/jm/jm-4-4000-commercial-litigation#4-4.111>; Jonathan G. Cedarbaum, David W. Ogden & Carl J. Nichols, *Justice Department Issues Guidance on Dismissing Qui Tam False Claims Act Cases Over Relators' Objections*, WilmerHale.com (Jan. 25, 2018), <https://www.wilmerhale.com/en/insights/client-alerts/2018-01-25-justice-department-issues-guidance-on-dismissing-qui-tam-false-claims-act-cases-over-relators-objections>.
 - 24 Memorandum from Rachel Brand, Assoc. Att'y Gen., to Heads of Civil Litigating Components, US Att'ys (Jan. 25, 2018), <https://www.justice.gov/file/1028756/download>; Carl J. Nichols, Jonathan G. Cedarbaum, David W. Ogden, Brian Boynton & Ed Williams, *Justice Department Issues Memo Limiting Use of Agency Guidance in Affirmative Civil Enforcement Suits*, WilmerHale.com (Feb. 5, 2018), <https://www.wilmerhale.com/en/insights/client-alerts/2018-02-05-justice-department-issues-memo-limiting-use-of-agency-guidance-in-affirmative-civil-enforcement-suits>; Memorandum from Jeff Sessions, Att'y Gen., to All Components (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download>.
 - 25 See *Justice Manual* 1-20.000 *et seq.* (Dec. 2018), <https://www.justice.gov/jm/1-20000-limitation-use-guidance-documents-litigation>.
 - 26 See our alert and the Brand Memo *supra* n.4. The Brand Memo is also linked in the alert. The November 2017 memorandum from then-Attorney General Jeff Sessions, upon which the Brand Memo built, has also been codified at *Justice Manual* 1-19.000 (Dec. 2018), <https://www.justice.gov/jm/1-19000-limitation-issuance-guidance-documents-1>. It is cross-referenced in the Brand Memo section of the Manual.
 - 27 *Justice Manual* 1-20.201.
 - 28 *Id.* at 1-20.204.
 - 29 Stephen Cox, Deputy Assoc. Att'y Gen., Remarks at the Federal Bar Association Qui Tam Conference (Feb. 28, 2018), <https://www.justice.gov/opa/speech/deputy-associate-attorney-general-stephen-cox-delivers-remarks-federal-bar-association>.

-
- 30 Rod Rosenstein, Deputy Att’y Gen., Remarks to the New York City Bar White Collar Crime Institute (May 9, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-new-york-city-bar-white-collar>; *Justice Manual* 1-12.100 (May 2018), <https://www.justice.gov/jm/jm-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings#1-12.100>.
- 31 Rod Rosenstein, Deputy Att’y Gen., Remarks at the American Conference Institute’s 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0>; Jay Holtmeier, Ronald C. Machen, Michael Mugmon, Kimberly A. Parker & John F. Walsh, *DOJ Announces Revisions to Policy on Corporate Cooperation*, WilmerHale.com (Dec. 3, 2018), <https://www.wilmerhale.com/en/insights/client-alerts/20181204-doj-announces-revisions-to-policy-on-corporate-cooperation>.
- 32 Rod Rosenstein, Deputy Att’y Gen., Remarks at Compliance Week’s 2018 Annual Conference for Compliance and Risk Professionals (May 21, 2018), <https://www.justice.gov/opa/speech/deputy-attorney-general-rod-rosenstein-delivers-remarks-compliance-week-s-2018-annual>; Jay Holtmeier, Kimberly A. Parker, Erin G.H. Sloane & Jeff Habenicht, *New DOJ Policy to Prevent “Piling-On,”* WilmerHale.com (May 30, 2018), <https://www.wilmerhale.com/en/insights/client-alerts/2018-05-30-new-doj-policy-to-prevent-piling-on>.
- 33 Jesse Panuccio, Acting Assoc. Att’y Gen., Remarks at the American Bar Association’s 12th National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 14, 2018), <https://www.justice.gov/opa/speech/acting-associate-attorney-general-jesse-panuccio-delivers-remarks-american-bar>.
- 34 Brian A. Benczkowski, Assistant Att’y Gen., Remarks at NYU School of Law Program on Corporate Compliance and Enforcement Conference on Achieving Effective Compliance (Oct. 12, 2018), <https://www.justice.gov/opa/speech/assistant-attorney-general-brian-benczkowski-delivers-remarks-nyu-school-law-program>; Memorandum from Brian A. Benczkowski, Assistant Att’y Gen., to All Criminal Division Personnel (Oct. 11, 2018), <https://www.justice.gov/opa/speech/file/1100531/download>.
- 35 Off. of Info. & Reg. Aff., Off. of Mgmt. & Budget, Pending EO 12866 Regulatory Review (July 18, 2018), https://www.reginfo.gov/public/do/eoDetails?rrid=128288&utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axiosvitals&stream=top.
- 36 Medicare and State Health Care Programs: Fraud and Abuse; Request for Information Regarding the Anti-Kickback Statute and Beneficiary Inducements CMP, 83 Fed. Reg. 43,607 (Aug. 27, 2018), <https://www.federalregister.gov/documents/2018/08/27/2018-18519/medicare-and-state-health-care-programs-fraud-and-abuse-request-for-information-regarding-the>.
- 37 US Gov’t Accountability Off., GAO-18-137, *Dep’t of Veterans Affairs: Actions Needed to Address Employee Misconduct Process and Ensure Accountability* (July 2018), <https://www.gao.gov/assets/700/693268.pdf>.
- 38 Whistleblower Program Rules, 83 Fed. Reg. 34,702 (proposed July 20, 2018), <https://www.gpo.gov/fdsys/pkg/FR-2018-07-20/pdf/2018-14411.pdf>; Press Release, Sec. & Exch. Comm’n, *SEC Proposes Whistleblower Rule Amendments* (June 28, 2018), <https://www.sec.gov/news/press-release/2018-120>.
- 39 Release No. 7767-18, Commodity Futures Trading Comm’n, *CFTC Announces Multiple Whistleblower Awards Totaling More Than \$45 Million* (Aug. 2, 2018), <https://www.cftc.gov/PressRoom/PressReleases/7767-18>.
- 40 Press Release, Off. of Pub. Aff., US Dep’t of Justice, *AmerisourceBergen Corporation Agrees to Pay \$625 Million to Resolve Allegations that It Illegally Repackaged Cancer-Supportive Injectable Drugs to Profit from Overfill* (Oct. 1, 2018), <https://www.justice.gov/opa/pr/amerisourcebergen-corporation-agrees-pay-625-million-resolve-allegations-it-illegally>.
- 41 Press Release, Off. of Pub. Aff., US Dep’t of Justice, *Drug Maker Actelion Agrees to Pay \$360 Million to Resolve False Claims Act Liability for Paying Kickbacks* (Dec. 6, 2018),

<https://www.justice.gov/opa/pr/drug-maker-actelion-agrees-pay-360-million-resolve-false-claims-act-liability-paying>.

- 42 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Medicare Advantage Provider to Pay \$270 Million to Settle False Claims Act Liabilities* (Oct. 1, 2018), <https://www.justice.gov/opa/pr/medicare-advantage-provider-pay-270-million-settle-false-claims-act-liabilities>.
- 43 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Hospital Chain Will Pay Over \$260 Million to Resolve False Billing and Kickback Allegations; One Subsidiary Agrees to Plead Guilty* (Sept. 25, 2018), <https://www.justice.gov/opa/pr/hospital-chain-will-pay-over-260-million-resolve-false-billing-and-kickback-allegations-one>.
- 44 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Detroit Area Hospital System to Pay \$84.5 Million to Settle False Claims Act Allegations Arising from Improper Payments to Referring Physicians* (Aug. 2, 2018), <https://www.justice.gov/opa/pr/detroit-area-hospital-system-pay-845-million-settle-false-claims-act-allegations-arising>.
- 45 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Prime Healthcare Services and CEO to Pay \$65 Million to Settle False Claims Act Allegations* (Aug. 3, 2018), <https://www.justice.gov/opa/pr/prime-healthcare-services-and-ceo-pay-65-million-settle-false-claims-act-allegations>.
- 46 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Alere to Pay U.S. \$33.2 Million to Settle False Claims Act Allegations Relating to Unreliable Diagnostic Testing Devices* (Mar. 23, 2018), <https://www.justice.gov/opa/pr/alere-pay-us-332-million-settle-false-claims-act-allegations-relating-unreliable-diagnostic>.
- 47 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Signature HealthCARE to Pay More Than \$30 Million to Resolve False Claims Act Allegations Related to Rehabilitation Therapy* (June 8, 2018), <https://www.justice.gov/opa/pr/signature-healthcare-pay-more-30-million-resolve-false-claims-act-allegations-related>.
- 48 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Kalispell Regional Healthcare System to Pay \$24 Million to Settle False Claims Act Allegations* (Sept. 28, 2018), <https://www.justice.gov/opa/pr/kalispell-regional-healthcare-system-pay-24-million-settle-false-claims-act-allegations>.
- 49 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Drug Maker Pfizer Agrees to Pay \$23.85 Million to Resolve False Claims Act Liability for Paying Kickbacks* (May 24, 2018), <https://www.justice.gov/opa/pr/drug-maker-pfizer-agrees-pay-2385-million-resolve-false-claims-act-liability-paying-kickbacks>.
- 50 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Healogics Agrees to Pay Up to \$22.51 Million to Settle False Claims Act Liability for Improper Billing of Hyperbaric Oxygen Therapy* (June 20, 2018), <https://www.justice.gov/opa/pr/healogics-agrees-pay-2251-million-settle-false-claims-act-liability-improper-billing>.
- 51 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Ambulance Company and Its Municipal Clients Agree to Pay Over \$21 Million to Settle Allegations of Unlawful Kickbacks and Improper Financial Relationships* (Aug. 27, 2018), <https://www.justice.gov/opa/pr/ambulance-company-and-its-municipal-clients-agree-pay-over-21-million-settle-allegations>.
- 52 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Pennsylvania Hospital and Cardiology Group Agree to Pay \$20.75 Million to Settle Allegations of Kickbacks and Improper Financial Relationships* (Mar. 7, 2018), <https://www.justice.gov/opa/pr/pennsylvania-hospital-and-cardiology-group-agree-pay-2075-million-settle-allegations>.
- 53 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Banner Health Agrees to Pay Over \$18 Million to Settle False Claims Act Allegations* (Apr. 12, 2018), <https://www.justice.gov/opa/pr/banner-health-agrees-pay-over-18-million-settle-false-claims-act-allegations>.
- 54 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Health Quest and Putnam Hospital Center to Pay \$14.7 Million to Resolve False Claims Act Allegations* (July 9, 2018),

<https://www.justice.gov/opa/pr/health-quest-and-putnam-hospital-center-pay-147-million-resolve-false-claims-act-allegations>.

- 55 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Ohio Hospital Operator Agrees to Pay United States \$14.25 Million to Settle Alleged False Claims Act Violations Arising from Improper Payments to Physicians* (May 10, 2018), <https://www.justice.gov/opa/pr/ohio-hospital-operator-agrees-pay-united-states-1425-million-settle-alleged-false-claims-act>.
- 56 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Medical Device Maker ev3 to Plead Guilty and Pay \$17.9 Million for Distributing Adulterated Device; Covidien Paid \$13 Million to Resolve Civil Liability for Second Device* (Dec. 4, 2018), <https://www.justice.gov/opa/pr/medical-device-maker-ev3-plead-guilty-and-pay-179-million-distributing-adulterated-device>.
- 57 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Post Acute Medical Agrees to Pay More Than \$13 Million to Settle Allegations of Kickbacks and Improper Physician Relationships* (Aug. 15, 2018), <https://www.justice.gov/opa/pr/post-acute-medical-agrees-pay-more-13-million-settle-allegations-kickbacks-and-improper>.
- 58 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Medical Device Maker AngioDynamics Agrees to Pay \$12.5 Million to Resolve False Claims Act Allegations* (July 18, 2018), <https://www.justice.gov/opa/pr/medical-device-maker-angiodynamics-agrees-pay-125-million-resolve-false-claims-act>.
- 59 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Radiation Therapy Company Agrees to Pay Up to \$11.5 Million to Settle Allegations of False Claims and Kickbacks* (Mar. 29, 2018), <https://www.justice.gov/opa/pr/radiation-therapy-company-agrees-pay-115-million-settle-allegations-false-claims-and>.
- 60 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Two Consulting Companies and Nine Affiliated Skilled Nursing Facilities to Pay \$10 Million to Resolve False Claims Act Allegations Relating to Medically Unnecessary Rehabilitation Therapy Services* (July 18, 2018), <https://www.justice.gov/opa/pr/two-consulting-companies-and-nine-affiliated-skilled-nursing-facilities-pay-10-million>.
- 61 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Rotech Agrees to Pay \$9.68 Million to Settle False Claims Act Liability Related to Improper Billing for Portable Oxygen* (Apr. 12, 2018), <https://www.justice.gov/opa/pr/rotech-agrees-pay-968-million-settle-false-claims-act-liability-related-improper-billing>.
- 62 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Ambulance Company to Pay \$9 Million to Settle False Claims Act Allegations* (Mar. 28, 2018), <https://www.justice.gov/opa/pr/ambulance-company-pay-9-million-settle-false-claims-act-allegations>.
- 63 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Caris Agrees to Pay \$8.5 Million to Settle False Claims Act Lawsuit Alleging that It Billed for Ineligible Hospice Patients* (June 25, 2018), <https://www.justice.gov/opa/pr/caris-agrees-pay-85-million-settle-false-claims-act-lawsuit-alleging-it-billed-ineligible>.
- 64 Press Release, Off. of Pub. Aff., US Dep't of Justice, *California Medical Device Company to Pay \$7.62 Million to Resolve Allegations that Its Subsidiary Billed TRICARE for Excessive, Unnecessary Supplies* (Jan. 23, 2018), <https://www.justice.gov/opa/pr/california-medical-device-company-pay-762-million-resolve-allegations-its-subsidiary-billed>.
- 65 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Reliant to Pay \$6.1 Million to Settle False Claims Act Allegations that It Paid Kickbacks to Nursing Homes for Rehabilitation Therapy Business* (Aug. 23, 2018), <https://www.justice.gov/opa/pr/reliant-pay-61-million-settle-false-claims-act-allegations-it-paid-kickbacks-nursing-homes>.
- 66 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Vascular Access Centers to Pay at Least \$3.825 Million to Resolve False Claims Act Allegations* (Oct. 23, 2018), <https://www.justice.gov/opa/pr/vascular-access-centers-pay-least-3825-million-resolve-false-claims-act-allegations>.

-
- 67 Press Release, Off. of Pub. Aff., US Dep't of Justice, *San Diego Laboratory Agrees to Pay \$2 Million to Settle False Claims Act Allegations Related to Unnecessary Breast Cancer Testing* (Apr. 19, 2018), <https://www.justice.gov/opa/pr/san-diego-laboratory-agrees-pay-2-million-settle-false-claims-act-allegations-related>.
- 68 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Allegiance Health Management to Pay More Than \$1.7 Million to Resolve False Claims Act Allegations* (June 5, 2018), <https://www.justice.gov/opa/pr/allegiance-health-management-pay-more-17-million-resolve-false-claims-act-allegations>.
- 69 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Scripps Health to Pay \$1.5 Million to Settle Claims for Services Rendered by Unauthorized Physical Therapists* (Jan. 19, 2018), <https://www.justice.gov/opa/pr/scripps-health-pay-15-million-settle-claims-services-rendered-unauthorized-physical>.
- 70 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Tennessee Chiropractor Pays More Than \$1.45 Million to Resolve False Claims Act Allegations* (Jan. 24, 2018), <https://www.justice.gov/opa/pr/tennessee-chiropractor-pays-more-145-million-resolve-false-claims-act-allegations>.
- 71 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Grenada Lake Medical Center to Pay More Than \$1.1 Million to Resolve False Claims Act Allegations Involving Medically Unnecessary Psychotherapy Services* (Aug. 6, 2018), <https://www.justice.gov/opa/pr/grenada-lake-medical-center-pay-more-11-million-resolve-false-claims-act-allegations>.
- 72 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Two California Urologists Agree to Pay More Than \$1 Million to Settle False Claims Act Allegations Related to Radiation Therapy Referrals* (Jan. 23, 2018), <https://www.justice.gov/opa/pr/two-california-urologists-agree-pay-more-1-million-settle-false-claims-act-allegations>.
- 73 Press Release, Off. of Pub. Aff., US Dep't of Justice, *United States Files False Claims Act Complaint Against Compounding Pharmacy, Private Equity Firm, and Two Pharmacy Executives Alleging Payment of Kickbacks* (Feb. 23, 2018), <https://www.justice.gov/opa/pr/united-states-files-false-claims-act-complaint-against-compounding-pharmacy-private-equity>.
- 74 Press Release, Off. of Pub. Aff., US Dep't of Justice, *United States Intervenes in False Claims Act Lawsuits Accusing Insys Therapeutics of Paying Kickbacks and Engaging in Other Unlawful Practices to Promote Subsys, a Powerful Opioid Painkiller* (May 15, 2018), <https://www.justice.gov/opa/pr/united-states-intervenes-false-claims-act-lawsuits-accusing-insys-therapeutics-paying>.
- 75 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Three South Korean Companies Agree to Plead Guilty and to Enter into Civil Settlements for Rigging Bids on United States Department of Defense Fuel Supply Contracts* (Nov. 14, 2018), <https://www.justice.gov/opa/pr/three-south-korean-companies-agree-plead-guilty-and-enter-civil-settlements-rigging-bids>.
- 76 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Japanese Fiber Manufacturer to Pay \$66 Million for Alleged False Claims Related to Defective Bullet Proof Vests* (Mar. 15, 2018), <https://www.justice.gov/opa/pr/japanese-fiber-manufacturer-pay-66-million-alleged-false-claims-related-defective-bullet>.
- 77 Press Release, US Atty's Off, S.D. Cal., *Northrop Grumman Subsidiary Agrees to Pay \$31.65 Million for Overbilling U.S. Air Force in Civil and Criminal Settlements* (Nov. 2, 2018), <https://www.justice.gov/usao-sdca/pr/northrop-grumman-subsidiary-agrees-pay-3165-million-overbilling-us-air-force-civil-and>; Press Release, Off. of Pub. Aff., US Dep't of Justice, *Northrop Grumman Systems Corporation to Pay \$27.45 Million to Settle False Claims Act Allegations* (Nov. 2, 2018), <https://www.justice.gov/opa/pr/northrop-grumman-systems-corporation-pay-2745-million-settle-false-claims-act-allegations>.
- 78 Press Release, Off. of Pub. Aff., US Dep't of Justice, *United States Settles Lawsuit Alleging that Contractor Falsely Overcharged the U.S. Navy for Ship Husbanding Services* (May 29, 2018), <https://www.justice.gov/opa/pr/united-states-settles-lawsuit-alleging-contractor-falsely-overcharged-us-navy-ship-husbanding>.

-
- 79 Press Release, Off. of Pub. Aff., US Dep't of Justice, *North American Power Group Ltd and Its Owner Agree to Pay \$14.4 Million to Resolve Alleged False Claims for Department of Energy Cooperative Agreement Funds* (July 6, 2018), <https://www.justice.gov/opa/pr/north-american-power-group-ltd-and-its-owner-agree-pay-144-million-resolve-alleged-false>.
- 80 Press Release, US Atty's Off., S.D. Cal., *San Diego Communications Company Pays More Than \$12 Million to Settle False Claim Act Allegations Regarding Eligibility for Small Business Innovation and Research Contracts* (Mar. 9, 2018), <https://www.justice.gov/usao-sdca/pr/san-diego-communications-company-pays-more-12-million-settle-false-claim-act>.
- 81 Press Release, US Atty's Off., D.S.C., *3M Company Agrees to Pay \$9.1 Million to Resolve Allegations that It Supplied the United States with Defective Dual-Ended Combat Arms Earplugs* (July 30, 2018), <https://www.justice.gov/usao-sc/pr/3m-company-agrees-pay-91-million-resolve-allegations-it-supplied-united-states-defective>.
- 82 Press Release, US Atty's Off., S.D. Ga., *Defense Contractor Agrees to Pay United States Up to \$7.8 Million to Settle False Claims Act Investigation* (Oct. 9, 2018), <https://www.justice.gov/usao-sdga/pr/defense-contractor-agrees-pay-united-states-78-million-settle-false-claims-act>.
- 83 Press Release, Off. of Pub. Aff., US Dep't of Justice, *British Airways and Iberia Airlines Agree to Pay \$5.8 Million to Settle False Claims Act Allegations for Falsely Reporting Delivery Times of U.S. Mail Transported Internationally* (Nov. 13, 2018), <https://www.justice.gov/opa/pr/british-airways-and-iberia-airlines-agree-pay-58-million-settle-false-claims-act-allegations>.
- 84 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Lance Armstrong Agrees to Pay \$5 Million to Settle False Claims Allegations Arising from Violation of Anti-Doping Provisions of U.S. Postal Service Sponsorship Agreement* (Apr. 19, 2018), <https://www.justice.gov/opa/pr/lance-armstrong-agrees-pay-5-million-settle-false-claims-allegations-arising-violation-anti>.
- 85 Press Release, US Atty's Off., N.D. Cal., *Lockheed Martin Agrees to Pay \$4.4 Million to Resolve Claims it Provided Faulty Equipment to the Coast Guard* (Jan. 19, 2018), <https://www.justice.gov/usao-ndca/pr/lockheed-martin-agrees-pay-44-million-resolve-claims-it-provided-faulty-equipment-coast>.
- 86 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Indal Technologies Agrees to Pay \$3.5 Million to Settle False Claims Act Allegations* (Oct. 15, 2018), <https://www.justice.gov/opa/pr/indal-technologies-agrees-pay-35-million-settle-false-claims-act-allegations>.
- 87 Press Release, US Atty's Off., W.D. Wash., *Two Marine Maintenance Companies Pay \$2.8 Million to Settle False Claims Act Investigation* (Aug. 7, 2018), <https://www.justice.gov/usao-wdwa/pr/two-marine-maintenance-companies-pay-28-million-settle-false-claims-act-investigation>.
- 88 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Sorensen Gross Construction Co. and Corporate Vice President Khalil Saab to Pay \$2.481 Million to Settle Claims Related to USAID Aqaba Schools Project* (July 26, 2018), <https://www.justice.gov/opa/pr/sorensen-gross-construction-co-and-corporate-vice-president-khalil-saab-pay-2481-million>.
- 89 Press Release, US Atty's Off., D. Md., *Masstech, Richard Lee, and Arnold Lee to Pay U.S. \$1.9 Million to Settle False Claims Act Allegations Relating to Small Business Innovation Research Awards* (May 3, 2018), <https://www.justice.gov/usao-md/pr/masstech-richard-lee-and-arnold-lee-pay-us-19-million-settle-false-claims-act-allegations>.
- 90 Press Release, US Atty's Off., D.P.R., *University of Puerto Rico Settles Misuse of Grant Funds Case* (Nov. 29, 2018), <https://www.justice.gov/usao-pr/pr/university-puerto-rico-settles-misuse-grant-funds-case>.
- 91 Press Release, US Atty's Off., D.N.J., *Burlington County, New Jersey, Construction Firm to Pay \$1.5 Million to Resolve Joint State and Federal False Claims Action* (May 2, 2018),

<https://www.justice.gov/usao-nj/pr/burlington-county-new-jersey-construction-firm-pay-15-million-resolve-joint-state-and>.

- 92 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Former Second Chance Body Armor President Settles False Claims Act Case Related to Defective Bullet Proof Vests* (July 16, 2018), <https://www.justice.gov/opa/pr/former-second-chance-body-armor-president-settles-false-claims-act-case-related-defective>.
- 93 Press Release, US Atty's Off., D. Utah, *Utah Construction Contractors Reach Civil Settlement in False Claims Act Case* (Apr. 2, 2018), <https://www.justice.gov/usao-ut/pr/utah-construction-contractors-reach-civil-settlement-false-claims-act-case>.
- 94 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Beam Bros. Trucking Inc. and Its Principals Agree to Settle Civil False Claims Act Allegations* (Mar. 12, 2018), <https://www.justice.gov/opa/pr/beam-bros-trucking-inc-and-its-principals-agree-settle-civil-false-claims-act-allegations>.
- 95 Press Release, US Atty's Off. E.D. Cal., *Defense Contractor Agrees to Pay \$1 Million to Settle Allegations Under the False Claims Act* (Oct. 15, 2018), <https://www.justice.gov/usao-edca/pr/defense-contractor-agrees-pay-1-million-settle-allegations-under-false-claims-act>.
- 96 Press Release, US Atty's Off., D. Conn., *Community Renewal Team Pays \$362,000 to Settle False Claims Acts Allegations* (May 17, 2018), <https://www.justice.gov/usao-ct/pr/community-renewal-team-pays-362000-settle-false-claims-acts-allegations>.
- 97 Press Release, US Atty's Off., E.D. Va., *United States and Virginia Intervene in Metrorail Whistleblower Litigation* (May 16, 2018), <https://www.justice.gov/usao-edva/pr/united-states-and-virginia-intervene-metrorail-whistleblower-litigation>.
- 98 Press Release, Off. of Pub. Aff., US Dep't of Justice, *United States Joins Lawsuits Against Tetra Tech EC Inc. Alleging False Claims in Connection with Shipyard Cleanup* (Oct. 26, 2018), <https://www.justice.gov/opa/pr/united-states-joins-lawsuits-against-tetra-tech-ec-inc-alleging-false-claims-connection>.
- 99 Second Amended Complaint, *Bonzani v. United Tech. Corp.*, No. 3:16-cv-01730-JCH (D. Conn. Aug. 9, 2018), ECF No. 48.
- 100 First Amended Complaint, *Fadlalla v. Dyncorp Int'l LLC*, No. 8:15-cv-01806-PX (D. Md. Mar. 25, 2016), ECF No. 9.
- 101 Complaint, *United States v. Far East Constr.*, No. 1:18-cv-07069 (N.D. Ill. Oct. 22, 2018), ECF No.1.
- 102 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Deloitte & Touche Agrees to Pay \$149.5 Million to Settle Claims Arising from Its Audits of Failed Mortgage Lender Taylor, Bean & Whitaker* (Feb. 28, 2018), <https://www.justice.gov/opa/pr/deloitte-touche-agrees-pay-1495-million-settle-claims-arising-its-audits-failed-mortgage>.
- 103 Press Release, US Atty's Off., N.D.N.Y., *Finance of America Mortgage to Pay \$14.5 Million to Resolve False Claims Act Liability Involving FHA Mortgage Lending* (Dec. 12, 2018), <https://www.justice.gov/usao-ndny/pr/finance-america-mortgage-pay-145-million-resolve-false-claims-act-liability-involving>.
- 104 Press Release, Off. of Pub. Aff., US Dep't of Justice, *Universal American Mortgage Company LLC (UAMC) Agrees to Pay \$13.2 Million to Resolve False Claims Act Allegations Related to Loan Guarantees* (Oct. 19, 2018), <https://www.justice.gov/opa/pr/universal-american-mortgage-company-llc-uamc-agrees-pay-132-million-resolve-false-claims-act>.
- 105 *United States ex rel. Jacobs v. Bank of Am. Corp.*, No. 1:15-cv-24585-UU (S.D. Fla.).
- 106 See 42 U.S.C. § 1396h (if state false claims law meets certain requirements, federal share of Medicaid-fraud amounts recovered by state action shall be decreased by 10 percent).
- 107 See Off. of the Inspector Gen., US Dep't of Health & Human Servs., *State False Claims Act Reviews*, <http://www.oig.hhs.gov/fraud/state-false-claims-act-reviews/index.asp>.
- 108 42 U.S.C. § 1396h.

-
- 109 See Off. of the Inspector Gen., US Dep't of Health & Human Servs., *State False Claims Act Reviews*, <http://www.oig.hhs.gov/fraud/state-false-claims-act-reviews/index.asp>.
- 110 See Ch. 63 (S.B. 6053) (Wash. 2018), <http://lawfilesexternal.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/Senate/6053.sl.pdf>.
- 111 See Ch. 2018-75 (H.B. 7013) (Fla.), <https://www.flsenate.gov/Session/Bill/2018/07013/ByVersion>.
- 112 See Ch. 624 (S.B. 487) (Va. 2018), <https://lis.virginia.gov/cgi-bin/legp604.exe?181+cab+HC10215SB0487+SB1REF>.
- 113 See S.B. 7507, 2017-2018 Leg. Sess. (N.Y. 2018), <https://www.nysenate.gov/legislation/bills/2017/s7507>.
- 114 See Ch. 2018-41 (S.B. 368) (N.C.), <https://www2.ncleg.net/BillLookup/2017/S368>.
- 115 See Ch. 155 (H.B. 7540) (R.I. 2018), <http://webserver.rilin.state.ri.us/BillText/BillText18/HouseText18/H7540.pdf>.
- 116 See B22-166 (D.C. 2017), <http://lims.dccouncil.us/Legislation/B22-0166?FromSearchResults=true>.
- 117 See H.B. 5004, 100th Gen. Assemb., 2017-2018 Sess. (Ill. 2018), <http://www.ilga.gov/legislation/billstatus.asp?DocNum=5004&GAID=14&GA=100&DocTypeID=HB&LegID=110461&SessionID=91>; S.B. 2605, 100th Gen. Assemb., 2017-2018 Sess. (Ill. 2018), <http://www.ilga.gov/legislation/billstatus.asp?DocNum=2605&GAID=14&GA=100&DocTypeID=SB&LegID=109651&SessionID=91>.
- 118 See H.B. 5300, 100th Gen. Assemb., 2017-2018 Sess. (Ill. 2018), <http://www.ilga.gov/legislation/billstatus.asp?DocNum=5300&GAID=14&GA=100&DocTypeID=HB&LegID=111042&SessionID=91>.
- 119 S.B. 65, 99th Leg., Reg. Sess. (Mich. 2017), [http://www.legislature.mi.gov/\(S\(iqd45tjto bodxf0fops4nkq\)\)/mileg.aspx?page=getObject&objectName=2017-SB-0065](http://www.legislature.mi.gov/(S(iqd45tjto bodxf0fops4nkq))/mileg.aspx?page=getObject&objectName=2017-SB-0065).
- 120 S.B. 669, 99th Leg., Reg. Sess. (Mich. 2017), [http://www.legislature.mi.gov/\(S\(prv54e0yil dubeaphwyqne5h\)\)/mileg.aspx?page=GetObject&objectname=2017-SB-0669](http://www.legislature.mi.gov/(S(prv54e0yil dubeaphwyqne5h))/mileg.aspx?page=GetObject&objectname=2017-SB-0669).
- 121 See S.B. 1172, 218th Leg., 2018 Sess. (N.J. 2018), https://www.njleg.state.nj.us/2018/Bills/S1500/1172_11.PDF.
- 122 See S.B. 819, 218th Leg., 2018 Sess. (N.J. 2018), https://www.njleg.state.nj.us/2018/Bills/S1000/819_11.PDF.
- 123 See A.B. 3614, 218th Leg., 2018 Sess. (N.J. 2018), https://www.njleg.state.nj.us/2018/Bills/A4000/3614_11.PDF.
- 124 See H.B. 1027, 201st Gen. Assemb., Reg. Sess. (Pa. 2017), <http://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2017&sessInd=0&billBody=H&billTyp=B&billNbr=1027&pn=1186>.
- 125 See H.B. 2337, 2017-2018 Leg., 2017 Sess. (Kan. 2018), http://kslegislature.org/li/b2017_18/asures/hb2337/; A.B. 1021, 2017-2018 Leg., 2017 Sess. (Wisc. 2018), <https://docs.legis.wisconsin.gov/2017/proposals/ab1021>.
- 126 Press Release, N.Y. Off. of Att'y Gen., *A.G. Underwood Announces \$625 Million National Agreement with AmerisourceBergen Corporation for Distributing Unapproved and Adulterated Drugs – Including Cancer Drugs* (Oct. 1, 2018), <https://ag.ny.gov/press-release/ag-underwood-announces-625-million-national-agreement-amerisourcebergen-corporation>.
- 127 Press Release, Tex. Off. of Att'y Gen., *AG Paxton Recovers \$110 Million for Texas in Medicaid Fraud Settlements* (Aug. 7, 2018), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-recovers-110-million-texas-medicaid-fraud-settlements>.

-
- 128 Press Release, Cal. Off. of Att’y Gen., *Attorney General Becerra: BP Energy Company Pays \$102 Million in Settlement for Overcharging Californians for Natural Gas* (Jan. 11, 2018), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-bp-energy-company-pays-102-million-settlement>.
- 129 Press Release, Ark. Off. of Att’y Gen., *Arkansas to Receive \$140,611.56* (July 26, 2018), <https://arkansasag.gov/media-center/news-releases/settlement-reached-with-medical-device-company/>.
- 130 Press Release, Mass. Off. of Att’y Gen., *National Dental Chain Pays \$1.7 Million to Massachusetts Over Claims of Fraudulent Billing, Performing Unnecessary Dental Work on Children* (Jan. 12, 2018), <https://www.mass.gov/news/national-dental-chain-pays-17-million-to-massachusetts-over-claims-of-fraudulent-billing>.
- 131 Press Release, N.Y. Off. of Att’y Gen., *A.G. Schneiderman Announces \$10.3 Million Joint State-Federal Settlement with CenterLight Over False Medicaid Billing* (Mar. 28, 2018), <https://ag.ny.gov/press-release/ag-schneiderman-announces-103-million-joint-state-federal-settlement-centerlight-over>.
- 132 Press Release, Mass. Off. of Att’y Gen., *Mental Health Center to Pay \$4 Million Under AG Settlement for Illegally Billing MassHealth for Unlicensed Patient Care* (Feb. 8, 2018), <https://www.mass.gov/news/mental-health-center-to-pay-4-million-under-ag-settlement-for-illegally-billing-masshealth-for>.
- 133 Press Release, Alaska Off. of Att’y Gen., *The ARC of Anchorage to Pay Nearly \$2.3 Million Dollars to Settle Medicaid False Claims Act Allegations* (Apr. 24, 2018), <http://www.law.state.ak.us/press/releases/2018/042418-MFCU.html>.
- 134 Press Release, Ind. Off. of Att’y Gen., *AG Curtis Hill and Federal Authorities Announce \$5.1 Million Settlement with Dental Firms* (Nov. 5, 2018), <https://calendar.in.gov/site/oag/event/ag-curtis-hill-and-federal-authorities-announce-51-million-settlement-with-dental-firms/>.