28th Annual Ounce of Prevention Seminar

Welcome

Predicting the Future:
Federal Contracting in an Election Year

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FALSE CLAIMS ACT:

Recent Developments and Their Impact on Compliance and Enforcement

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False Claims Act: Recent Developments and Their Impact on Compliance and Enforcement

- Recent FCA and *Qui Tam* Enforcement Statistics
- Regulatory/Legislative Developments
- Recent Cases and Their Impact on Compliance & Enforcement
- Recent Settlements and Their Impact on Compliance & Enforcement

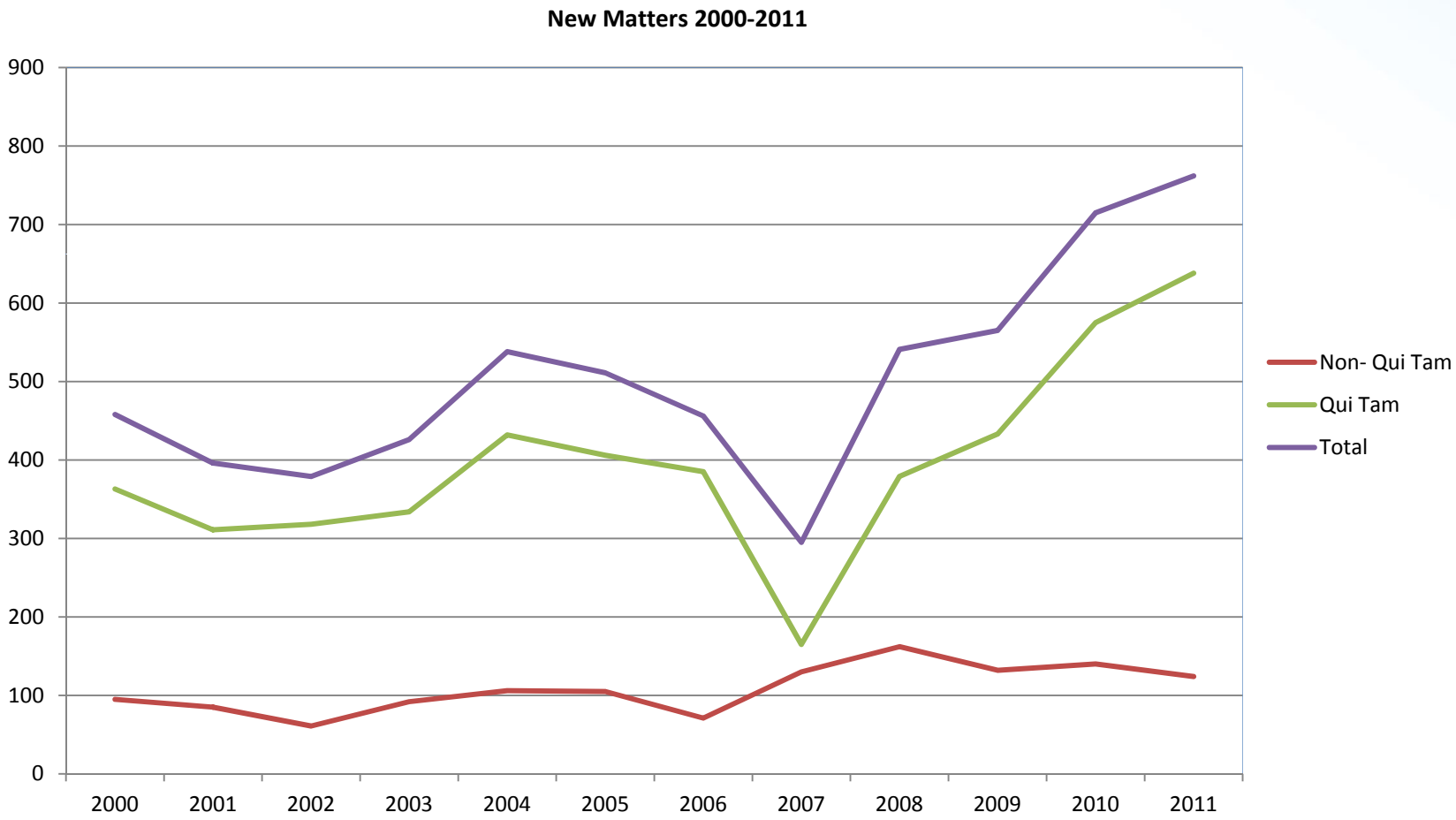
FCA: Common Theories of Liability

1. **False Claim –** *when a contractor **knowingly submits** a false claim to the Government or a recipient of Government funds, like another contractor, or causes another to submit a false claim.*
2. **False Record or Statement –** *when a contractor **knowingly makes** a false record or statement material to a false claim.*
3. **Reverse False Claim** – *when a contractor **knowingly makes** a false record or statement material to an obligation to pay money to the Government, or **knowingly and improperly avoids** an obligation to pay money to the Government.*
4. **Conspiracy** – *when a contractor **conspires to do** any of the above: (1) submit a false claim, (2) make a false statement, or (3) submit a reverse false claim.*

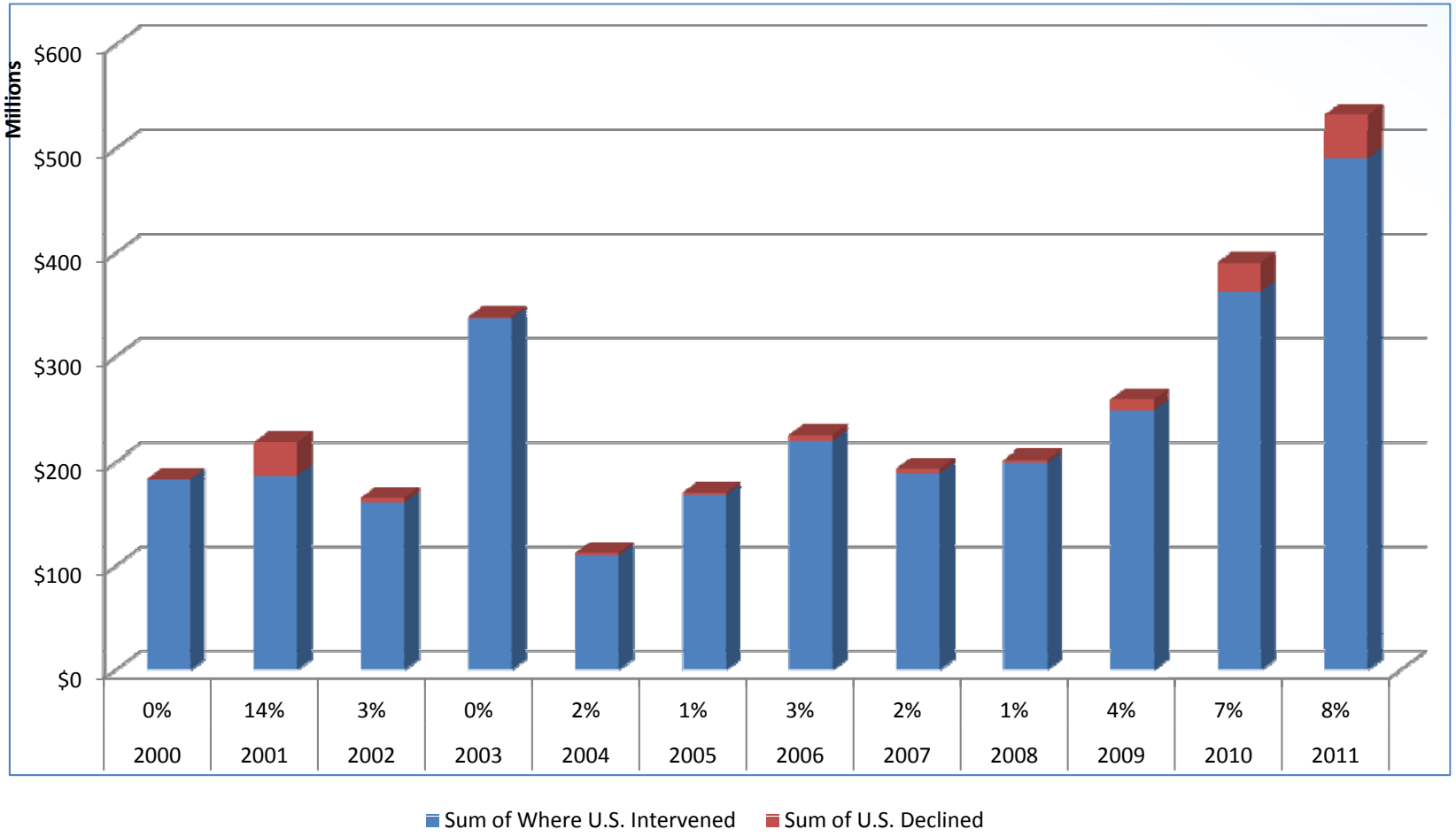
FCA Statistics: FY 2011

	FY 2011	Total since 1986
New matters	762	12,132
Qui tam	638	7,843
Recoveries	$3,029,249,933	$30,315,593,792
Relator share	$532,193,735	$3,418,672,503

New Matter Filings 2000-2011



Relator's Share of Awards 2000-2011



Heightened Enforcement Under Obama Administration

- Obama Administration
  - Since January 2009, $8.7 billion
  - Largest three year recovery total in DOJ History
  - 28 percent of DOJ recoveries since 1986

- Task Forces
  - National Procurement Fraud Task Force (2006), now focused on Recovery Act fraud
    - Inspectors General
    - FBI and Defense investigative agencies
    - Federal prosecutors from U.S. Attorney's offices
    - DoJ's Antitrust, Civil, Criminal, Environmental & Natural Resources, National Security and Tax Divisions
  - Financial Fraud Enforcement Task Force (2009)
  - Financial Institutions and Public Sector Fraud Unit (DOJ – Nov. 2010)
    - Mortgage, bank, government procurement fraud
    - Contracting fraud in Afghanistan

Regulatory/Legislative Developments

- Continued Significance of 2009 and 2010 amendments
  - Fraud Enforcement and Recovery Act (2009)
  - Patient Protection and Affordable Care Act (2010)

- Both amendments enhance the potency of the *qui tam* provisions
  - Cut back on the use of the public disclosure bar (PPACA)
  - Overpayments:
    - FERA redefined "obligation" under the FCA to include "retention of any overpayments".
    - PPACA requires that overpayments under Medicare and Medicaid must be reported and returned within 60 days of discovery, or the date a corresponding hospital report is due. Failure to timely report and return an overpayment exposes a provider to liability under the FCA.
  - Federal Anti-Kickback Statute, 42 U.S.C. 1320a-7b(b) revised (PPACA) to provide that claims submitted in violation of the AKS automatically constitute false claims for purposes of the FCA liability

Regulatory/Legislative Developments

- May 5, 2011 "Fighting Fraud to Protect Taxpayers Act of 2011" introduced in the Senate
  - Greater funding to DOJ for investigation and prosecution of fraud, including FCA violations
  - Would permit DOJ to recover investigation and prosecution costs relating to FCA actions
- June 13, 2011: "Campaign to Cut Waste"
  - Executive Order 13576--Delivering an Efficient, Effective, and Accountable Government

Regulatory/Legislative Developments

- Nov. 18, 2011: New DoD Final Rule: DFARS 252.203-7005 Representation Relating to Compensation of Former DOD Officials
  - Requires prospective government contractors to represent, as part of their offers, that certain former DOD officials employed by the offeror are in compliance with post-employment restrictions

- Dec. 6, 2011: Senate Homeland Security and Governmental Affairs Committee hearing on S. 241 "Non-Federal Employee Whistleblower Protection Act"

Case Law Developments

- First to File Rule
- Constitutionality of FCA Seal Provisions
- Public Disclosure Bar
- Implied Certifications
- Pleading Fraud with Particularity (FRCP 9(b))
- Indirect Liability: Reverse False Claims
- Damages & Penalties
- Attorney's Fees & Costs

First to File Rule

- *United States ex rel. Batiste v. SLM Corp.* (D.C. Cir. 2011)
  - FCA's first-to-file rule bars subsequent actions even where the first complaint does not satisfy the pleading requirements of FRCP 9(b). Subsequent suits are barred where they allege the "same material elements of fraud," such that a governmental investigation of the first complaint would uncover the fraud alleged in the second.
  - Conflicts with Sixth Circuit's decision in *Walburn v. Lockheed Martin Corp.* (6th Cir. 2005), which held that the first-to-file rule applies only where the earlier complaint satisfies Rule 9(b).

Constitutionality of FCA Seal Provisions Upheld

- *ACLU v. Holder* (4th Cir. 2011)
  - Upheld the constitutionality of the FCA seal provisions
    - Denial of access to a *qui tam* complaint and docket sheet did not violate the First Amendment because the FCA's seal provisions are narrowly tailored to serve a compelling government interest of protecting the integrity of ongoing fraud investigations.
  - Rejected the argument that the seal provisions violate the separation of powers under the Constitution
    - the FCA seal provisions are "a proper subject of congressional legislation and do not intrude on 'the zone of judicial self-administration to such a degree as to prevent the judiciary from accomplishing its constitutionally assigned functions.'"

Public Disclosure Bar

- *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885 (2011)
  - Federal agency's written response to a FOIA request constitutes a "report" within the meaning of the FCA's public disclosure bar

- *United States ex re. Baltazar v. Warden* (7th Cir. 2011)
  - Where the relator adds "vital" "defendant specific facts" that were "not in the public domain," Government reports of industry wide practices are insufficient to require dismissal of a *qui tam* suit under the FCA's public disclosure bar

- *U.S. ex rel. Jones v. Collegiate Funding Services, Inc.* (4th Cir. March 14, 2011)
  - SEC filings may constitute "administrative reports" triggering the FCA's public disclosure bar

Implied Certifications

- *United States ex rel. Hutcheson v. Blackstone Medical, Inc.* (1st Cir. 2011)
  - Claims can be impliedly false or fraudulent under the FCA where they "represent[] compliance with a material condition of payment that was in fact not met," *even if the precondition of payment is not expressly stated in a statute or regulation*.
  - Non-submitting third parties may be liable if they knowingly cause submitting entities to present a materially false or fraudulent claim through their submissions.
  - Supreme Court denied *certiorari* on Dec. 5, 2011.

- *United States ex rel. Wilkins v. United Health Group* (3d Cir. 2011)
  - Claims can be fraudulent even without an express certification of compliance, so long as compliance with the particular statute or regulation is a condition of government payment.
    - Monthly requirement to certify compliance with Medicare guidelines was pre-requisite for eligibility under Medicare and compliance was express condition of payment.

Implied Certifications: Pleading Fraud with Particularity (FRCP 9(b))

- *United States ex rel. Chesbrough v. VPA, P.C.*, 655 F.3d 461 (6th Cir. 2011)
  - Relators alleged implied certification theory that an in-home medical services provider submitted false claims for radiological exams to Medicaid and Medicare.
  - Court affirmed dismissal on FRCP 9(b) grounds because relators could not identify any specific Medicare or Medicaid regulations that expressly required the defendant to comply with the industry standards upon which they relied as a prerequisite to payment of claims.
  - "[N]oncompliance constitutes actionable fraud only when compliance is a prerequisite to obtaining payment. Thus, a relator cannot merely allege that a defendant violated a standard – he or she must allege that compliance with the standard was required to obtain payment."

Implied Certifications: Circuit Split

- *Accept Implied Certification Theory*
  - *Precondition of payment need not be expressly stated in a statute or regulation.*
    - *First*
    - *Tenth*
    - *District of Columbia*
  - *Precondition of payment must be expressly stated in a statute or regulation.*
    - *Second*
    - *Ninth*
    - *Third*
    - *Sixth*
  - *Eleventh Circuit*
- *Reject Implied Certification Theory*
  - *Fifth Circuit*
  - *Fourth Circuit*

Expanded Liability for Reverse False Claims

- Defendants that have no obligations to the federal government may be liable for indirect reverse false claims for causing another entity to make false statements to the government under 31 U.S.C. § 3729(a)(7) (recodified as amended at 31 U.S.C. § 3729(a)(1)(g))
  - *United States v. Caremark, Inc.* (5th Cir. 2011)

- Expansion of liability for overpayments
  - 2010 Amendment to the Affordable Care Act defined as an "obligation" under the FCA an overpayment retained more than 60 days after it was "identified" or past the due date for the corresponding cost report.
  - *United States ex rel. Matheny v. Medco Health Solutions, Inc.* (11th Cir. 2011)
    - Medco Health Solutions entered into a "Corporate Integrity Agreement" ("CIA") with OIG-HHS, which required the company and its employees to return to the government all overpayments within 30 days using a specific form.
    - Relators alleged that Medco Health Solutions and its subsidiaries failed to report and refund $69 million in overpayments to the federal government, in violation of the CIA.
    - Court reinstated relators' FCA claims, finding that the relators had sufficiently pled the requisite who, what, when, where, and why of the suspected fraud.
    - Rejected the district court's ruling that the relators' failure to demonstrate that the money was not eventually repaid was fatal to their complaint: "*The failure to [remit Overpayments] within the thirty day deadline is itself a violation of the CIA, regardless of whether the Overpayments were eventually repaid.*"

Damages & Penalties

- *United States v. SAIC*, 626 F.3d 1257 (D.C. Cir. 2010)
  - Calculation of damages
  - The amount the government paid out based on the false claims over and above what it would have otherwise paid must take into account any value of the services received

- *U.S. ex rel. Bunk v. Birkart Globistics GmnH & Co., et al.* (E.D.V.A)
  - Eighth Amendment's Excessive Fines Clause
  - Declined to impose statutory penalties on jury's finding of 9,136 false claims that would have amounted to between $50.2 million and $100.4 million
  - Such penalties violate Eighth Amendment where relator failed to establish that the government suffered any economic harm or damages.

Attorneys' Fees & Costs

- Three-pronged attack for defendants:
  - 31 U.S.C. § 3730(d)(4)
    - Relator liable for clearly frivolous, vexatious, or harassing lawsuit.
  - 28 U.S.C. § 1927
    - Attorneys liable for multiplying the proceedings unreasonably and vexatiously.
    - In *United States ex rel. Levesky v. ITT Educational Services Inc.* (S.D. Ind.), the court granted defendant's motion for attorneys' fees and sanctions against relator's attorneys – *individually and against their law firms.*
  - Inherent Power of the Court
    - Both relator and counsel may be liable.

Recent C&M FCA Litigation

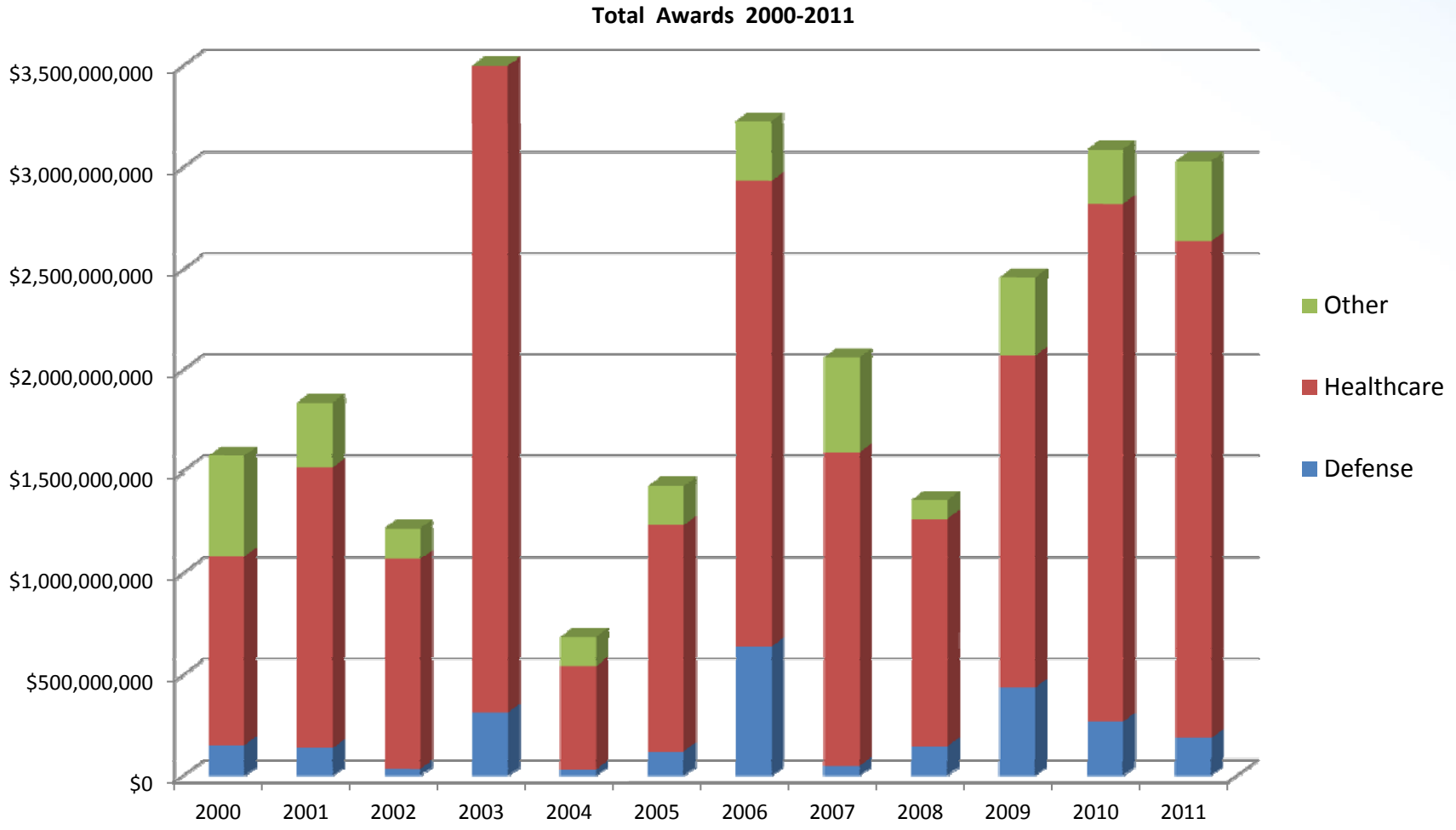
- *United States ex rel. Melan Davis & Brad Davis v. Erik Prince, et al. (E.D. Va.)* (Judge Ellis)
  - Alleged overbilling on labor and reimbursable services
  - 2 contracts, both for security services
    - Hurricane Katrina
    - WPPS II (Iraq / Afghanistan)
  - Total WPPS II contract value exceeded $1 billion
  - No liability found
    - Most claims dismissed after motion to dismiss and motion for summary judgment
    - Complete defense verdict on claims that proceeded to trial

Settlements

- Industry Trends
  - Defense/Military Procurement
  - Information Technology
  - Foreign Assistance Grants

- Legal Developments:
  - Relator's Power to Object to Settlements

Total Awards by Industry 2000-2011



Defense/Military Procurement

- SAIC & AES
  - *Qui tam* suit alleged that prior to issuance of GSA award, SAIC, AES, AES CEO Dale Galloway, Lockheed Martin and former government employees Stephen Adamec and Robert Knesel conspired to ensure that SAIC and its teaming partners were awarded the $116 million task order by sharing non-public, advance procurement information.
  - SAIC will pay $20,400,000 and AES and Dale Galloway will pay $2,166,000.
  - Adamec and Knesel are paying $110,000.
- Maersk Line Limited
  - $31.9 million to resolve *qui tam* suit allegations that it submitted false claims overcharging the United States in connection with contracts to transport cargo in shipping containers to support U.S. troops in Afghanistan and Iraq.
  - Relator to receive $3.6 million.

Information Technology

- Oracle
  - $46 million to settle allegations under the FCA and Anti-Kickback Act that a company it acquired in 2010 (Sun Microsystems) submitted false claims and caused others to submit false claims to the GSA and other federal agencies in return for recommendations that federal agencies purchase its products. (Jan. 2011)
  - $199.5 million plus interest for allegedly failing to meet contractual obligations to the General Services Administration regarding commercial pricing policies and practices. (Oct. 2011)
    - Largest settlement ever obtained by GSA
    - Relator to receive $40 million share
- Verizon Communications
  - $93.5 million to resolve whistleblower allegations that the company and its subsidiary overcharged the GSA on government-wide voice and data telecommunications services contracts and submitted false claims for reimbursement of charges that were not directly reimburseable under their contracts.
- Accenture
  - $63.675 million to settle whistleblower allegations it received kickbacks, inflated prices and rigged bids in connection with federal information technology contracts.

Foreign Assistance Grants

- Academy for Educational Development (AED)
  - $5 million to $15 million to settle allegations that the company submitted false claims to the USAID in connection with two cooperative agreements under which AED provided foreign assistance in Afghanistan and Pakistan.
  - Government alleged AED failed to ensure that its actions under the two cooperative agreements complied with applicable regulations concerning competition in procurements, adherence to contract specifications and supervision of subcontractors.

Relator's Power to Object to Settlements

- *United States ex rel. Schweizer v. Oce N.V.* (D.C. Cir. 2011)
  - D.C. Circuit unanimously reversed the district court's approval of an FCA settlement over a relator's objection when the lower court did not examine the agreement's fairness.
  - Court held that, while the government has "unfettered discretion" under section 3730(c)(2)(A) to dismiss a *qui tam* action outright over a relator's objections, section 3730(c)(2)(B) is applicable to dismissal of settled cases over the relator's objection and requires the district court to conduct a hearing to determine whether the proposed settlement is "fair, adequate, or reasonable under all circumstances."

Trends

- More new case filings and larger recoveries
  - As of Sept. 2010, 1200 *qui tam* cases waiting for government intervention
  - 638 new filings in 2011
- Recoveries from health care industry continue to dominate (81%) of funds recovered
  - Defense: 6%
  - Other: 13%
    - Information Technology
    - Increased focus on financial fraud cases
  - Recoveries from pharmaceutical industry were $2.2 of $2.4 billion recovered from health care industry

Trends

- Boundaries of FERA (2009) and PPACA (2010) amendments continue to be litigated
  - Public disclosure bar
  - Possible impact of SCOTUS holding *State of Florida v. U.S. Department of Health and Human Services*
- Expanded theories of third party liability
  - Caremark (5th Cir.) and Hutcheson (1st Cir.) add to potential theories of FCA liability for third parties that have no direct dealings with the government