

The False Claims Act: Does the Road (to Liability) Go On Forever?

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Agenda

- FCA Statistics & Enforcement Trends
- Fraud on Tap at the High Court
- FCA Liability Trends
- The Courts' Continuing Struggles in Calculating Damages

FCA Statistics: FY 2014

- \$5.7 Billion recovered (new record)
 - \$3 Billion from *qui tam suits*
 - \$435 Million paid to relators (second highest recovery)
- \$46 Billion recovered since 1986
- \$23 Billion recovered since 2009

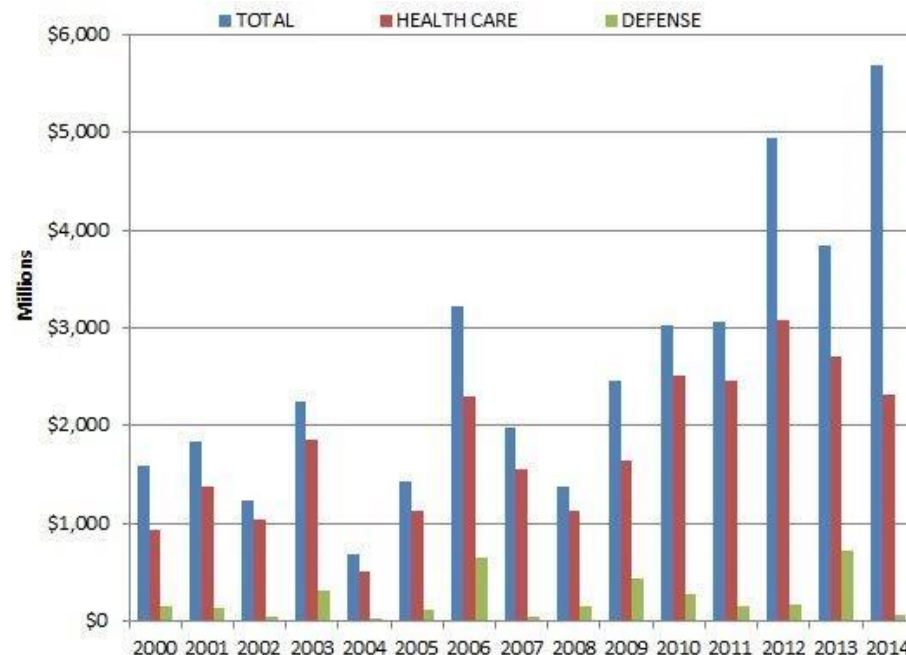


FCA Statistics: FY 2014

- *Qui Tam* activity continues to be high
 - 713 new *qui tam* suits (second highest ever) out of 804 FCA matters initiated
 - More than 1/3 of all FCA *qui tam* actions since 1986 filed in past 5 years
- *Qui Tam* plaintiff's bar expanding
- Just 1% of the government's FCA proceeds came from declined cases

FCA Enforcement Trends

- Industry Expansion shown through recoveries:
 - \$2.3 Billion – health care industry
 - \$65 Million – Department of Defense
 - \$3.1 Billion – settlements from banking industry



Source: DOJ Office of Public Affairs
(Nov. 20, 2014)

FCA Enforcement Trends

- Increased Criminal Prosecution
 - Jan. 2012 – AG Holder Memo re “Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings”
 - “deterrence of future misconduct”
 - “secure the full range of the government’s remedies”
 - Sept. 2014 – AAG Caldwell tells relator’s counsel gathering that the Criminal Division will “redouble our efforts to work alongside you. Qui tam cases are a vital part of the Criminal Division’s future efforts.”

FCA Enforcement Trends

- Increased Prosecution of Individuals
 - AG Holder (and others): Focus on individuals provides accountability, fairness and deterrence

Fraud on Tap at the High Court

- Implications of the Supreme Court’s “Pending” Decision in *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*
 - Argued Jan. 13, 2015
 - Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 – Does the WSLA apply to toll the civil FCA’s 6-year statute of limitations?
 - Court appears ready to rule “no”
 - First-to-File Bar, 31 U.S.C. 3730(b)(5) – Does the bar apply only while the earlier action remains “pending”?
 - Court appears ready to rule “yes” (if it reaches the question)

FCA Liability Trends

- Failure to state a claim
 - Rule 9(b): How much detail must complaint contain?
 - *U.S. ex rel. Escobar v. Universal Health* (1st Cir.)
 - *U.S. ex rel. Reiber v. Basic Contract Services Inc.* (9th Cir.)
 - Rule 8(a): Is the alleged fraud “plausible?”
 - *Gonzales v. Planned Parenthood of L.A.*, (9th Cir.)
 - *Urquilla-Diaz v. Kaplan University* (11th Cir.)
 - *U.S. ex rel. Pecht v. Ducommun* (C.D. Cal.)

FCA Liability Trends

- Implied Certification Gains Ground
 - *U.S. ex rel. Badr v. Triple Canopy, Inc.*, 775 F.3d 628 (4th Cir. 2015)
 - Where is the line between fraud and breach of contract/regulatory non-compliance?
 - *Omnicare* – regulations governing drug packaging
 - *WMATA* – failure to openly compete subcontracts
 - *Sanborn Map* – use of unapproved subcontractors

FCA Liability Trends

- *Qui Tam* Developments
 - Public Disclosure Bar: actual vs. legal notice to the gov't
 - *U.S. ex rel. Wilson v. Graham Cnty. Soil & Water Conserv. Dist.*, 777 F.3d 691 (4th Cir. 2015)
 - *U.S. ex rel. Whipple v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, --- F.3d --- (6th Cir. Feb. 25, 2015)
 - Original Source: hardening the knowledge requirement?
 - *U.S. ex rel. Schumann v. AstraZeneca Pharm. L.P.*, 769 F.3d 837 (3d Cir. 2014)
 - *U.S. ex rel Osheroff v. Humana, Inc.*, 776 F.3d 805 (11th Cir. 2015)

FCA Damages

- The Continuing Struggle Among the Courts to Calculate Damages
 - Government continues to assert that damages for some false certifications – those which are pre-conditions to the award of the contract – are the entire contract value.
 - Sampling and extrapolation can substitute for proof of actual damages – *U.S. ex rel. Martin v. Life Care Ctrs.* (E.D. Tenn.)
 - Estimates of how much was improperly paid were calculated by expert witnesses – *U.S. ex rel. Wall v. Circle C Constr.* (M.D. Tenn.)

Questions?

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