

**CRISIS MANAGEMENT  
AND FIRST AID: WHEN  
GOVERNMENT  
CONTRACTORS ARE  
THE HEADLINERS**

**WELCOME**

**OOPS** 2014

**THE FALSE CLAIMS ACT: Recent  
Lessons in the Courts and a Look  
Ahead as Cases and Recoveries  
Continue to Rise**

Brian Tully McLaughlin  
Andy Liu  
Mark Troy  
Jason Lynch

OOPS 2014

# Agenda

- Government Recoveries Are Climbing Still: FCA Statistics and Settlements
- FCA-Related Regulatory/Legislative Updates
- Trials and Tribulations – How Courts and Contractors Are Responding to Bet-the-Company Cases
- Liability Developments Around the Circuits and Takeaways for Compliance and Enforcement

# FCA Statistics: FY 2013

- \$3.8 Billion recovered (2<sup>nd</sup> highest annual recovery)
  - \$2.9 Billion from *qui tam suits*
  - \$388 Million paid to relators
  - \$887 Million in procurement fraud matters (a new record)
- 753 new *qui tam* suits (a new record)
- \$39 Billion recovered since 1986

# FCA-Related Regulatory/Legislative Updates

# Legislative Update

- Chamber of Commerce legislative reform
  - Federal govt is improperly using FCA to generate cash while failing to stop fraud or encourage corporations to self-police
  - Govt has overwhelming settlement leverage
- Suggested reforms
  - Reduce damages multiplier for companies with compliance programs
  - Reduce bounty available to whistleblowers in high-dollar recoveries

# **FCA Liability Developments Around the Circuits and Takeaways for Compliance and Enforcement**

## **Trials and Tribulations: How Courts and Contractors Are Responding to Bet-the-Company Cases**

# FCA Damages – Quick Overview

- Three times “the amount of damages which the Government sustains because of the act of that person.” 31 U.S.C. § 3729(a)(1).
  - Many methods of measuring damages.



# Measuring Damages In FCA Cases

- Benefit of the bargain (*Bornstein*):
  - Difference in value between what the Government received and what it paid.
- Full contract value:
  - Damages extend to all claims submitted under fraudulently obtained contract, grant or benefit.
- But-for approach:
  - What the government paid versus what it would have paid had the allegedly false claims/statements/records been true.

# Case Developments - Damages

- *U.S. v. Anchor Mortgage Corp.* (7th Cir.)
  - Issue: where the government received some partial benefit, do you account for it before or after trebling?
  - Seventh Circuit rejects “gross trebling” (government’s position) and adopts “net trebling” (defendant’s position)

# Case Developments - Damages

- *U.S. ex rel. Bunk v. Gosselin* (4th Cir.)
  - Issue: does the court have discretion to impose lesser penalties to avoid imposing an excessive fine under the Eighth Amendment?
  - District court (and the plain language of the FCA) say NO. Fourth Circuit says YES
  - \$50M in penalties on a \$3M contract with no actual damages is unconstitutional but \$24M in penalties is constitutional

## Case Study: *U.S. ex rel. Hooper v. Lockheed Martin Corp.* (C.D. Cal. 2014)

- Allegation: fraudulent underbidding on cost reimbursement contract
- Damages Prayer: \$450 million (to be trebled)
  - Difference between original estimate and final cost to be paid on the contract
  - Relator's counsel sought to shift the burden of proof on damages
- Court used a benefit of the bargain test
  - difficult to prove damages caused by a false estimate on a cost reimbursement contract

## Case Study: *U.S. ex rel. Hooper v. Lockheed Martin Corp.* (C.D. Cal. 2014)

- Key Factors for Defending Against Liability
  - Air Force Testimony
    - Especially significant given prohibition on discussion DOJ decision not to intervene
  - Govt Knowledge Defense
    - Air Force knowledge of estimation process
- An estimate is just that – an estimate!
  - Hard work and good faith of Lockheed employees

## Case Study: *U.S. ex rel. Purcell v. MWI Corp.* (D.D.C. 2014)

- Small business manufacturer selling water pumps abroad, financed through Ex-Im
- Were commissions paid to foreign agent “regular”?
- \$74.3 million loaned, \$108 million repaid
- Govt. motion for reconsideration *granted*
  - Evidence of repayment excluded

## Case Study: *U.S. ex rel. Purcell v. MWI Corp.* (D.D.C. 2014)

- Jury finds liability (commissions were ‘irregular’)
- What about offset of damages for repayment?
  - Matter of first impression: “Neither the parties nor the Court have identified any factually-comparable case under the False Claims Act...”
- Court completely offsets jury award
  - “Compensatory payments” (*Bornstein*) not limited to ‘original loss’ (i.e., single damages)
- “[T]here are cases where fraud on the Government has occurred but, because the Government has gotten what it paid for, the Government’s recovery is limited to civil penalties.”

63

# Case Developments – Rule 9(b)

- *U.S. ex rel. Nathan v. Takeda Pharmaceuticals* (4<sup>th</sup> Cir.)
  - Issue: Does Rule 9(b) require identification of a specific false claim?
  - Circuit split and general confusion
  - Government weighs in
  - Supreme Court passes on the issue



# Case Developments – First to File Bar and the Wartime Suspension of Limitations Act

- *U.S. ex rel. Carter v. Halliburton Co.* (4th Cir. 2013), *petition for cert. filed*
  - Issues: (1) What happens to a second-filed case if an otherwise first-filed case ceases to be pending; and (2) does the WSLA extend to *qui tam* cases?
  - Issues of first impression in the Circuit Courts
  - First-to-file provision bar applies only if there is an earlier case still pending
  - WSLA applies to civil *qui tam* cases, tolling the statute of limitations while the country is “at war”
- *U.S. ex rel. Shea v. Cellco Partnership* (D.C. Cir. 2014)
  - Affirms dismissal with prejudice based on first-to-file bar
  - “pending action” is merely a reference to the earlier filed action, not a temporal limit on the preclusive effect of an earlier, related action
- Potential ramifications for contractors if both rulings in *Carter* are affirmed?

# Questions?

Brian Tully McLaughlin  
202-624-2628  
[bmclaughlin@crowell.com](mailto:bmclaughlin@crowell.com)

Andy Liu  
202-624-2907  
[aliu@crowell.com](mailto:aliu@crowell.com)

Mark Troy  
213-443-5576  
[mtroy@crowell.com](mailto:mtroy@crowell.com)

Jason Lynch  
202-624-2678  
[jlynch@crowell.com](mailto:jlynch@crowell.com)