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WHAT'S INSIDE

FALSE CLAIMS ACT

Wiring contractors end False Claims Act case for $3 million

Three companies will pay a combined $3 million to the United States to settle a lawsuit claiming they gave federal employees illegal gratuities in order to win a CIA contract for cable and wiring installation work.

United States ex rel. Jones v. Anixter International Inc. et al., No. 09-CV-1011, settlement announced (E.D. Va. Mar. 7, 2013).

The Justice Department said in a March 7 statement that the payment by American Systems Corp., Anixter International Inc. and Corning Cable Systems LLC resolves allegations that the companies violated the False Claims Act, 31 U.S.C. § 3729.

The FCA is the government's primary tool for fighting procurement fraud.

The companies agreed to resolve the suit, which was filed by former Anixter employee William Jones, without admitting to any wrongdoing, according to the Justice Department.

Jones sued the companies and seven other firms in the U.S. District Court for the Eastern District of Virginia in 2009. The case was sealed

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REUTERS/Larry Downing

The suit claimed the three defendant companies gave CIA employees illegal gifts in order to influence the specifications of the upcoming contract.

COMMENTARY

Damage and penalty awards arising from retroactive application of false-claims statutes: Constitutional or not?

Lori L. Pines and Arielle R. Pankowski of Weil, Gotshal & Manges discuss whether federal and state false-claims laws can be applied retroactively.

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Damage and penalty awards arising from retroactive application of false-claims statutes: Constitutional or not?

By Lori L. Pines, Esq., and Arielle R. Pankowski, Esq.
Weil, Gotshal & Manges

Over the past several years, False Claims Act litigation has been on the rise and the scope of liability and recovery under the statute has expanded greatly. The federal FCA, 31 U.S.C. § 3729, prohibits individuals or businesses from knowingly submitting, or causing someone else to submit, a false or fraudulent claim for payment to the government. The plaintiff in a federal FCA suit can be either the Department of Justice or an individual *qui tam* relator filing on behalf of the government.[1] The FCA provides for treble damages and a per-claim penalty of $5,500 to $11,000.[2]

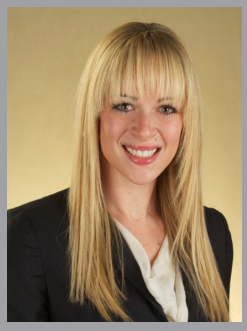
In 2009, the Fraud Enforcement and Recovery Act amended several federal FCA provisions, including:

- Expanding liability for "reverse" false claims by imposing liability for knowingly or recklessly retaining overpayments from the government, even in the absence of any false statement.
- Creating liability for claims presented to entities administering government funds.
- Permitting the government's complaint to relate back to the filing of the relator's complaint, which allows the Justice Department to conduct longer investigations.
- Expanding the anti-retaliation provisions to cover contractors and agents in addition to employees.[3]

Given these amendments and the expanding scope of liability and recovery under the False Claims Act, it is absolutely essential for companies and practitioners to pay close attention to developments in FCA law that could potentially save them millions of dollars down the line.

> In 2009 the Fraud Enforcement and Recovery Act amended several federal False Claims Act provisions.

Not only is FCA litigation one of the fastest-growing areas of federal litigation, but an increasing number of states are enacting and expanding their own FCA statutes. Currently, more than 30 states and four municipalities have enacted FCAs, under which hundreds of millions of dollars have been recovered.[4]



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In addition, several states have recently strengthened their laws, and at least seven states have legislation pending to either enact or expand a false-claims law.[5] Most state FCAs include *qui tam* provisions that provide for treble damages plus per-claim penalties and that award private whistle-blowers a share of any money received.

In a time when state and federal budgets are severely strained, the revenue-generating potential of false-claims act litigation is undeniably attractive to governments. Both state and federal governments are devoting an increasing amount of resources to investigating and enforcing violations of false-claims laws. The Justice Department's efforts to seek recoveries under the FCA have been unabated, and the number of FCA suits continues to increase with steady force. In the last fiscal year (ending Sept. 30, 2012), the agency recovered $4.9 billion from financial settlements and judgments in FCA cases, marking the third year in a row that the federal government has recovered more than $3 billion under the federal FCA.[6] This is the Justice Department's largest financial recovery for a single year, surpassing the previous record by more than $1.7 billion.

The Justice Department's total recoveries under the FCA for the past four years (since January 2009) total $13.3 billion — the largest four-year total in the department's history and more than a third of total recoveries under the FCA since the statute was amended in 1986.[7]

Moreover, with the *qui tam* provisions that allow individuals to pocket up to 30 percent of any recovery,[8] there are ample incentives for the Justice Department, plaintiffs, government interveners and attorney generals to expand FCA liability and advocate novel recovery theories. In the 2012 fiscal year alone, a record 647 federal *qui tam* suits were filed, and the Justice Department recovered a resulting $3.3 billion from whistle-blower suits filed during that period.[9]

Federal and state governments are likely

to continue this enforcement trend in 2013. Given the increased popularity of FCA lawsuits and the recent beefing-up of false-claims laws in both the federal and state arenas, numerous courts have been faced with the issue of whether false-claims statutes can be applied retroactively.

In particular, a number of federal courts have grappled with the specific issue of whether damages and penalties that are awarded in connection with the retroactive application of false-claims statutes violate the Ex Post Facto Clause of the Constitution.[10]

The clause prohibits the legislature from passing any law that retroactively imposes punishment for an act that was not punishable when committed, retroactively increases the punishment for a crime after its commission or deprives one charged with a crime of a defense that was available at the time the crime was committed.[11]

The Ex Post Facto Clause is only implicated by criminal statutes or acts intended to punish — the prohibition does not apply to penalties that are considered remedial in nature. Generally, courts agree that Congress intended the FCA to be a civil statute.[12] However, even a statute intended to enact a civil regulatory scheme may be so punitive, either in purpose or effect, so as to negate the legislature's intent to deem it civil, and thereby place it in the realm of ex post facto regulations.[13] Accordingly, if courts determine that the FCA's treble damages and penalties cross the "punitive threshold," applying these statutes retroactively could be deemed constitutionally barred. Defendants would undoubtedly invoke such findings to limit their exposure to the FCA's harsh damage provisions.

In determining if a sanction is punitive for purposes of the Ex Post Facto Clause, courts use the seven factors set forth in *Kennedy v. Mendoza-Martinez*, a non-FCA case:

- Whether the sanction involves an affirmative disability or restraint.
- Whether the sanction has historically been regarded as a punishment.
- Whether the sanction comes into play only on a finding of *scienter* (intent to defraud).
- Whether operation of the sanction will promote the traditional aims of punishment of retribution and deterrence.
- Whether the behavior to which the sanction applies is already a crime.
- Whether an alternative purpose to which the sanction may rationally be connected is assignable.
- Whether the sanction appears excessive in relation to the alternative purpose assigned.[14]

However, the Supreme Court warns that these factors are "neither exhaustive nor dispositive" but are simply "useful guideposts."[15]

The federal district courts are split on the issue of whether the retroactive application of the federal FCA violates the Ex Post Facto Clause. In *United States ex rel. Drake v. NSI Inc.*, the U.S. District Court for the District of Connecticut held that the FCA is not sufficiently punitive so as to warrant application of the Ex Post Facto Clause to bar the relator's *qui tam* action.[16] In arriving at this conclusion, the *NSI* court used the *Mendoza-Martinez* analysis, noting that sanctions under the FCA did not approach imprisonment, sanctions had been viewed as civil, a separate criminal statute existed to prohibit the same conduct, and the FCA damages multiplier had both compensatory and punitive purposes.

Alternatively, in *United States ex rel. Baker v. Community Health Systems* and *United States v. Hawley*, the U.S. District Court for the District of New Mexico and the U.S. District Court for the Northern District of Iowa held that the federal FCA's statutory scheme is punitive in purpose and effect, and thus, that retroactive application of the statute would violate the Ex Post Facto Clause of the Constitution.[17]

In *Community Health*, the court found that five of the seven *Mendoza-Martinez* factors weighed in favor of finding that the FCA is punitive:

- The FCA sanctions have historically been regarded as punitive.
- The FCA requires *scienter* in that it requires evidence to support an inference of knowing fraud.
- Sanctions as provided in the civil version of the FCA are intended to deter conduct.
- Sanctions, particularly the treble damages provision, are excessive in relation to the purpose of compensating the government for its loss.
- The behavior to which the Fraud Enforcement and Recovery Act now attaches liability was not previously considered sufficient to find liability under the same provision.[18]

Likewise, in *Hawley*, the court found that a majority of the *Mendoza-Martinez* factors weigh in favor of a finding that the federal FCA sanctions are so punitive, either in purpose or effect, as to negate congressional intent to deem them civil.[19] Accordingly, the *Hawley* court held that retroactively applying the FCA sanctions would impose punishment for acts that were not punishable prior to enactment of the FERA amendments, and thus, would violate the Ex Post Facto Clause of the Constitution.[20]

Only one appellate court, the 6th U.S. Circuit Court of Appeals, has addressed the issue. In *Sanders v. Allison Engine Co.*, the appeals court overruled the District Court in holding that the retroactive application of the federal FCA does not violate the Ex Post Facto Clause because the FCA's treble damages are not sufficiently punitive.[21] Because the appeals court found that Congress did not intend to impose punishment when it enacted the FCA, it chose to focus on the second step in the ex post facto analysis: determining whether the statutory scheme is "so punitive either in purpose or effect as to negate [Congress'] intention to deem it civil."

The court used the *Mendoza-Martinez* factors to guide its inquiry, ultimately finding that, on balance, the factors weigh in favor of finding a civil purpose or effect.[22] Since "only the clearest proof" suffices to establish that a civil statute is punitive, the 6th Circuit found that when "viewed as a whole, the factors fail to demonstrate a sufficiently punitive purpose or effect to transform what has been denominated a civil penalty into a criminal penalty."[23]

In a time when state and federal budgets are severely strained, the revenue-generating potential of false-claims-act litigation is undeniably attractive to governments.

Recently, states' false-claims statutes have undergone similar scrutiny, raising the same constitutional question: Does retroactive application of a state's FCA violate the Ex Post Facto Clause of the applicable state constitution and/or the U.S. Constitution? For example, in *Commonwealth v. Schering-Plough Corp.* the court held that the Ex Post Facto Clause of the federal Constitution barred retroactive application of the Massachusetts False Claims Act due to the MFCA's punitive nature.[24] The MFCA provides for treble damages, a penalty of $5,000 to $10,000 per claim, consequential damages, prejudgment interest, attorney fees and costs of the actions.[25]

Because the MFCA was modeled on its federal counterpart, Massachusetts courts generally look to federal FCA cases when interpreting the MFCA.[26] In *Schering-Plough*, the court found that four of the seven *Mendoza-Martinez* factors provide "clear proof" that the MFCA sanctions are so punitive either in purpose or effect as to transform the MFCA into a criminal penalty for ex post facto purposes.[27] Most significantly, the court found that the MFCA's consequential damages, high prejudicial interest, costs and attorney fees on top of the FCA penalties and treble damages are "significantly more penal than the FCA." [28] Because compensation is fully provided by the other provisions of the statute, the court reasoned, these FCA penalties promote the goals of retribution and deterrence.

A statute intended to enact a civil regulatory scheme may be so punitive, either in purpose or effect, so as to negate the legislature's intent to deem it civil.

The court also noted that the MFCA treble and consequential damages appear to go far beyond making the commonwealth whole and therefore, the civil penalties are primarily punitive in nature.

Likewise, in *State ex rel. Foy v. Austin Capital Management*, a New Mexico intermediate appellate court held that retroactive application of the state's FCA (the Fraud Against Taxpayers Act)[29] violates the federal and state ex post facto clauses.[30] The court found that under five of the seven *Mendoza-Martinez* factors, the state's false-claims statute appears to be punitive in nature:

- The treble damages provision has historically been regarded as punishment.
- A finding of *scienter* is an element of the violation.
- The damages involved promote the traditional aims of punishment: retribution and deterrence.
- The behavior being sanctioned is already considered a crime.
- The punishment is excessive when compared with its alternative regulatory or remedial purpose.[31]

Since "the legislation [is] sufficiently punitive in its effect that, on balance, the punitive effects outweigh the remedial effect," the *Austin Capital* court held that retroactive application of the New Mexico FCA is barred by the ex post facto clauses of the state and federal constitutions.[32]

While the issue has not yet been decided by the New York courts, the retroactive application of the New York State False Claims Act[33] is being challenged on ex post facto grounds in the context of the case against Sprint Nextel, the state attorney general's first whistle-blowing tax lawsuit under the recently amended New York FCA. The attorney general's office filed the case in April 2012, seeking treble damages (over $300 million) from Sprint Nextel for its allegedly knowing and fraudulent failure to collect and pay more than $100 million in state taxes from sales of telephone services since 2005.[34]

One of Sprint Nextel's key defenses in the litigation is the argument that the retroactive application of the amended New York FCA violates the Ex Post Facto Clause of the federal Constitution.[35] The Sprint litigation is still ongoing; if the court determines that the New York FCA's civil penalties and treble damages are punitive in nature, then it may very well decide to prohibit the retroactive application of the amended state law.

In April 2012 the New York Court of Appeals, the state's highest court, issued its first decision addressing the New York FCA in *State ex. rel. Grupp v. DHL Express (USA)*.[36] Although this decision did not address the issue of whether the retroactive application of the state FCA violates the Ex Post Facto Clause, the court did recognize the punitive purpose of the statute:

> [R]ather than redressing the harm actually suffered, the statute's imposition of civil penalties and treble damages evinces a broader punitive goal of deterring fraudulent conduct against the state. That is, instead of compensating the state for damages caused by DHL's purported scheme and addressing its narrow proprietary interests, the FCA would punish and consequently deter such future conduct.[37]

The Court of Appeals reasoned that the New York FCA "establishes public policy goals and is thus, regulatory in nature" because it imposes "civil penalties and treble damages."[38] This observation may provide a hook for future FCA defendants to challenge the retroactive application of the New York FCA on ex post facto grounds.

Given the state and federal governments' growing commitment to the aggressive enforcement of false-claims statutes, litigation in this area is likely to continue at an increasing rate. In this dynamic environment, it is more important than ever for companies and practitioners to track ongoing developments in FCA law such as the viability of the ex post facto/retroactivity defense. Only time will tell whether the ex post facto/retroactivity argument will provide defendants with a means for limiting their exposure to FCA treble damages and penalties in certain jurisdictions. WJ

NOTES

[1] The federal FCA includes a "*qui tam*" provision allowing private persons, known as relators, to file actions on behalf of the government (informally called "whistle-blowing"). 31 U.S.C. § 3730(b).

[2] 31 U.S.C.A. § 3729(a)(1).

[3] Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617; 31 U.S.C. §§ 3729(a)(1)(G), 3729(b)(2)(A)(ii), 3730(h), 3731(c). The FERA amendments made changes retroactive to June 7, 2008, two days prior to the U.S. Supreme Court's decision in *Allison Engine Co. Inc. v. United States ex. rel. Sanders*, 553 U.S. 662 (2008).

[4] For a comprehensive list of states and municipalities that have enacted false-claims laws, and an illustrative sample of judgments or settlements recovered pursuant to state

false-claims laws, see the Taxpayers Against Fraud survey at http://taf.org/taf-ef-state-fca.pdf.

[5] For example, recent amendments (California Assembly Bill 2492) to the California False Claims Act, which went into effect Jan. 1, expand liability, increase penalties and further protect relators with expanded anti-retaliation provisions.

[6] Press Release, U.S. Dep't of Justice, Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012 (Dec. 4, 2012), *available at* http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html. *See also* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Acting Associate Attorney General Tony West Speaks at Pen and Pad Briefing Announcing Record Civil FY 2012 Recoveries (Dec. 4, 2012), *available at* http://www.justice.gov/iso/opa/asg/speeches/2012/asg-speech-1212041.html.

[7] *Id.*

[8] 31 U.S.C. §§ 3730(d)(1), (2).

[9] *Id.*

[10] *Sanders v. Allison Engine Co.,* 2012 WL 5373532, at *11 (6th Cir. Nov. 2, 2012) (quoting *Kansas v. Hendricks,* 521 U.S. 346, 361 (1997)).

[11] *United States v. Coleman,* 675 F.3d 615, 619 (6th Cir. 2012); *see* U.S. Const. art. I, § 9, cl. 3.

[12] *See, e.g., Allison Engine Co.,* 2012 WL 5373532, at *9-11 (text of statute and committee reports indicate that Congress intended to implement civil proceedings for combating fraud and not to impose punishment); *United States v. Hawley,* 812 F. Supp. 2d 949, 959 (N.D. Iowa 2011) ("it is readily apparent from the text of the statute, amendments, and Senate reports, that Congress intended FCA proceedings to create a civil mechanism to address fraudulent claims").

[13] *Allison Engine,* 2012 WL 5373532, at *9 (internal citations omitted).

[14] *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168–69 (1963); *see, e.g., Allison Engine,* 2012 WL 5373532, at *11.

[15] *Smith v. Doe,* 538 U.S. 84, 97 (2003) (internal citations omitted).

[16] *United States ex rel. Drake v. NSI Inc.,* 736 F. Supp. 2d 489, 502 (D. Conn. 2010).

[17] *United States ex rel. Baker v. Cmty. Health Sys..,* 709 F. Supp. 2d 1084, 1112 (D.N.M. 2010); *United States v. Hawley*, 812 F. Supp. 2d at 962.

[18] *Cmty. Health,* 709 F. Supp. 2d at 1112.

[19] *Hawley*, 812 F. Supp. 2d at 961.

[20] *Id.* at 961-62.

[21] *Allison Engine,* 2012 WL 5373532, at *14. The 6th Circuit ruling has been stayed pending the filing of a petition for a writ of *certiorari* by Allison Engine in the Supreme Court. *See Sanders v. Allison Engine Co.,* No. 1:95-cv-00970-TMR, *case stayed* (Jan. 22, 2013).

[22] *Id.* at *12-14. The court held that: (1) The FCA sanctions do not "approach[] the infamous punishment of imprisonment" and thus, do not involve an affirmative disability or restraint. Thus, this factor does not weigh in favor of finding a punitive purpose or effect; (2) Monetary penalties (such as those imposed under the FCA) have not historically been viewed as "punishment," but rather as a sanction enforceable by civil proceedings. As such, this factor does not weigh in favor of finding a punitive purpose or effect; (3) Although a violation of the FCA contains an element of *scienter* (knowing conduct), the FCA can also be violated upon a finding of recklessness. Thus, because the FCA can be violated by a "lower mens rea than knowingly," the third factor does not weigh in favor of finding that the effect of the FCA is to punish; (4) Although the FCA has some deterrent effects, and thus, may weigh in favor of finding a punitive effect, this factor is not dispositive; (5) The behavior punished by FCA is already a crime, and thus, this factor weighs in favor of finding a punitive purpose or effect; (6) Although treble damages typically reveal an intent to punish past, and deter future, unlawful conduct, the FCA's treble damages also contains an alternative purpose — "that of compensating, or making whole, the government for its losses suffered due to fraud." As such, the court held that this factor weighs in favor of finding a civil purpose or effect; and (7) Despite the fact that the treble damages provision of the FCA may allow for situations where the sanctions may appear excessive in relation to the alternative purpose assigned (compensating the government for its losses), the last factor would at best only weakly favor a finding of punitive effect.

[23] *Id.* at *14 (quoting *Smith*, 538 U.S. at 92) (internal quotations marks omitted).

[24] *Commonwealth v. Schering-Plough Corp.,* 779 F. Supp. 2d 224, 238 (D. Mass. 2011).

[25] Mass. Gen. Laws ch. 12, §5B.

[26] *Schering-Plough,* 779 F. Supp. 2d at 237-38.

[27] *Id.* The court found that: (1) the MFCA sanctions do not approach imprisonment and thus, the first factor weighs in favor of finding that MFCA sanctions are civil and regulatory in purpose or effect; (2) historically, money penalties were imposed in both civil and criminal contexts and thus, the second factor does not weigh strongly in favor of either camp; (3) the MFCA has a clear *scienter* requirement and thus, the third factor weighs in favor of finding that the MFCA sanctions are punitive; (4) presentation of false claims can be prosecuted criminally by the commonwealth and thus, the weighs in favor of a finding that the MFCA sanctions are punitive; and (5) because the court finds that there is no alternative compensatory purpose for the penalties because the interest and money damages satisfy any compensatory purpose, consideration of the "excessiveness" factor carries little or no weight in the context of the MFCA.

[28] *Id.* at 236-37.

[29] N.M. Stat. Ann. §§ 44-9-1 to -14 (2007).

[30] *State ex rel. Foy v. Austin Capital Mgmt.,* 2012 WL 6934848, at *13 (N.M. Ct. App. Dec. 26, 2012).

[31] *Id.* at *6-13.

[32] *Id.* at 13 (internal citations and quotations omitted).

[33] N.Y. State Fin. Law § 187.

[34] Press Release, N.Y. Office of Attorney Gen., A.G. Schneiderman Files Groundbreaking Tax Fraud Lawsuit Against Sprint for Over $300 Million (Apr. 19, 2012), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-files-groundbreaking-tax-fraud-lawsuit-against-sprint-over-300-million; *State ex rel. Empire State Ventures v. Sprint Nextel,* No. 103917-2011 *superseding complaint filed* (N.Y. Sup. Ct., N.Y. County Apr. 19, 2012), *available at* http://www.ag.ny.gov/sites/default/files/press-releases/2012/Sprint-Complaint.pdf.

[35] *State v. Sprint Nextel,* No. 103917-2011, *brief in support of defendants' motion to dismiss filed* (N.Y. Sup. Ct., N.Y. County June 14, 2012).

[36] *State ex rel. Grupp v. DHL Express (USA), Inc.,* 19 N.Y.3d 278 (N.Y. 2012).

[37] *Id.*

[38] *Id.*

Health care enforcement in 2012: A year in review

By Hope Foster, Esq., Tracy Miner, Esq., Jessica Sergi, Esq., Stephanie Willis, Esq., and Samantha Kingsbury, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo

Last year was another busy year in health care fraud enforcement. In 2012, the Office of Inspector General for the Department of Health and Human Services (HHS-OIG) reported total expected recoveries of $6.9 billion from all of its enforcement initiatives. Additionally, HHS-OIG excluded 3,131 individuals and entities from participation in federal health care programs; brought criminal actions against 778 individuals and entities alleged to have engaged in crimes against HHS programs; and filed 367 civil actions — including federal False Claims Act (FCA) suits, federal actions under the Civil Monetary Penalties Law, and other administrative proceedings. Also, 2012 saw the single largest takedown (in terms of the amount of Medicare false billings at stake) in the history of the Medicare Fraud Strike Force. Two hundred HHS-OIG special agents, forensic examiners, and analysts executed a takedown across seven cities of over 100 individuals involved in Medicare fraud schemes linked to $452 million in total Medicare false claims.[1]

The federal government's commitment to health care fraud enforcement remains steadfast, and its investment in such efforts is still paying dividends.

The enforcement numbers speak for themselves and reinforce a message that has become increasingly clear over the past few years: the federal government's commitment to health care fraud enforcement remains steadfast, and its investment in such efforts is still paying dividends. This report will review some of the enforcement trends that continued from 2011 into 2012 and highlight the areas in which we expect to see intensified enforcement efforts in the coming year.

TRENDS AND AREAS OF FOCUS CONTINUING FROM 2011

Home health care

Perpetuating a long-standing trend that began well before 2011, the government continued to investigate and take enforcement action against home health care agencies (HHAs) in 2012. This past year, countless HHA providers, business owners, and employees were investigated for, charged with, and, in a number of cases, convicted of health care crimes. At least seven of those cases involved such individuals receiving lengthy prison sentences. A few examples demonstrate that the government's commitment to enforcement against HHAs shows no signs of waning:

- On June 19, 2012, a federal judge in Miami sentenced the owner and an employee of an HHA to 108 months (9 years) and 46 months (3 years and 10 months) in prison, respectively, for their roles in a $22 million Medicare fraud scheme. Both defendants were also sentenced to three years of supervised release and ordered to pay $14 million and $2 million, respectively, in restitution. The defendants (and co-conspirators) submitted approximately $22 million in false Medicare claims and, from those claims, received approximately $14 million in payments. Their scheme involved a conspiracy with patient recruiters to bill the Medicare program for unnecessary home health care and therapy services. The defendants paid kickbacks and bribes to patient recruiters in return for patients. Then, the defendants used nurses and office staff to falsify Medicare beneficiary files to make it appear that such beneficiaries qualified for home health care and therapy services and generated prescriptions, plans of care, and certifications for these illegally obtained patients that were used to fraudulently bill Medicare for medically unnecessary therapy and home health services.
- On December 20, 2012, a federal judge sentenced the former co-owner of a Chicago-area HHA to ten years in prison after he was convicted of submitting tens of thousands of false claims to Medicare (misrepresenting the services provided) worth approximately $2.9 million. The ten-year sentence was the maximum allowable sentence for each of the seven charges against the defendant (but the judge ordered them to be served concurrently). This fraud scheme involved billing for: (1) services that were not medically necessary; (2) services purportedly provided by physicians when, in fact, they were provided by physician assistants; (3) services performed by a podiatrist whose license had been suspended (despite a representation that a licensed podiatrist was providing services); and, (4) false certifications of patients as eligible for home care services.

This continued focus on HHAs may be attributable, in large part, to HHS-OIG's conclusion that one in four HHAs exceeded a high-billing threshold used to detect questionable billing practices. In its most recent Semiannual Report to Congress, HHS-OIG reported that in 2010, the federal government inappropriately paid approximately $5 million in claims submitted by HHAs that fell into one of three categories: (1) claims that overlapped with inpatient hospital stays; (2) claims that overlapped with skilled nursing facility stays; and, (3) claims for services allegedly rendered after a patient's death. Most of these errors came from HHAs in California, Florida, Michigan, and Texas. To prevent recurrence

of this conduct, HHS-OIG recommended, in part, increased monitoring of billing for home health services and initiation of actions against the identified inappropriate payments and the HHAs with questionable billings.[2]

This recommendation may well be a harbinger of ongoing enforcement actions against HHAs in 2013.

DME companies and patient recruiters

Durable medical equipment (DME) companies and patient recruiters also continued to draw law enforcement's attention in 2012. Throughout the year, a number of them were convicted of Medicare fraud and received lengthy prison sentences. As in the past, the lengths of the sentences clearly signal that the government takes its fraud enforcement initiatives seriously. Below are a few examples of cases that resulted in stiff penalties, including prison sentences:

- On November 16, 2012, one patient recruiter was sentenced to 87 months (7 years and 3 months) in prison and was ordered to pay $887,085 in restitution after a two-month trial resulted in conviction on one count of conspiracy to commit a kickback violation and one count of violating the Anti-Kickback Statute (AKS). A second patient recruiter was sentenced to 42 months (3 years and 6 months) in prison and ordered to pay $300,876 in restitution. In this case, the defendants solicited, and were paid, kickbacks to refer ineligible Medicare beneficiaries to a purported partial hospitalization program (PHP). A PHP is a form of intensive treatment for severe mental illness. Many of the patients admitted to the PHP were not eligible for such services because they (1) were chronic substance abusers; (2) suffered from conditions that would not benefit from group therapy; or (3) had no mental health diagnosis whatsoever but were seeking fraudulent mental health treatment in order to be declared exempt from certain requirements for their applications for United States citizenship. This scheme involved over $50 million in false claims submitted to federal health care programs.
- On August 21, 2012, the owner of multiple DME companies was sentenced to 180 months (15 years) in prison for his role in numerous Medicare fraud schemes involving fraudulent claims and illegal kickback payments for unnecessary DME. In addition to a 15-year prison sentence, the defendant was ordered to serve three years of supervised release and pay $13,397,759 in restitution (jointly and severally with his co-defendants). The defendant owned and operated several Louisiana-based DME companies that fraudulently billed Medicare for medical equipment that either was not medically necessary or not actually provided. The defendant also hired patient recruiters to obtain Medicare beneficiary information and prescriptions for medical equipment (including leg braces, arm braces, power wheelchairs, and wheelchair accessories). These prescriptions were then used to submit fraudulent claims to the Medicare program. Over the course of this scheme, the defendant's companies submitted more than $22.5 million in fraudulent claims to the Medicare program. During this same time period, the defendant worked as a patient recruiter for yet another DME company, which submitted more than $4.5 million in fraudulent claims to the Medicare program.

The False Claims Act, often in combination with criminal cases

The civil FCA also gave rise to robust enforcement efforts in 2012. The Department of Justice (DOJ) reported recovering $4.9 billion in settlements and judgments under the FCA in 2012. Trends in pending FCA litigation are also instructive; approximately 55 *qui tam* cases were unsealed, in whole or in part, last year. Of the unsealed cases, the government declined to intervene in 49 cases and intervened in four. Upon review, the majority of the remaining cases (approximately 19) targeted physicians or physician group practices, and the most common claims were either violations of Medicare conditions of payment or false certifications of compliance with the AKS.

Large settlements in 2012 in the pharmaceutical industry

Of the $4.9 billion in reported recoveries from last year's FCA settlements, two of the largest involved GlaxoSmithKline (GSK) ($2 billion) and Abbott Laboratories (Abbott) ($800 million).

In July 2012, GSK pled guilty to three misdemeanor violations of the federal Food, Drug, and Cosmetic Act (FDCA), agreed to implement compliance measures as part of its plea agreement, paid $1 billion to resolve the criminal claims, and paid an additional $2 billion to resolve federal civil liabilities under the FCA. The government alleged that GSK engaged in off-label promotion of two products and failed to provide required clinical data about a third product. Under the plea agreement, GSK's Board of Directors must annually review the effectiveness of its compliance program and summarize that review in a resolution. In addition, the President of GSK's North America Pharmaceutical Division must annually review GSK's compliance program and certify that the program includes the compliance policies and procedures required by the plea agreement and complies with the Reportable Incident reporting requirement.

> Health care enforcement by the DOJ in 2012 expanded internationally through the use of the Foreign Corrupt Practices Act of 1977.

Similarly, in May 2012, Abbott pled guilty to a misdemeanor violation of the FDCA and agreed to pay $1.5 billion to resolve its criminal and civil liability for unlawful promotion of the prescription drug Depakote for uses not approved by the FDA. Abbott also paid a criminal fine of $500 million, forfeited $198.5 million in assets, and will be on probation for five years. In its plea, Abbott admitted that it had used a specialized sales force to market Depakote in nursing homes for the control of agitation and aggression in elderly dementia patients. It also admitted that it had marketed Depakote to treat schizophrenia in combination with other antipsychotic drugs, even though clinical trials failed to demonstrate the effectiveness of this combination.

In addition, to resolve civil suits under federal and state FCAs, Abbott agreed to pay $800 million to the federal government and participating state governments to settle allegations, arising from several *qui tam* complaints, that off-label marketing of Depakote and violations of the federal AKS had caused false claims to be submitted

to government health care programs. The allegedly unlawful promotion included making false and misleading statements about the safety, efficacy, dosing and cost-effectiveness of Depakote for some of the unapproved uses, "and claiming use of Depakote to control behavioral disturbances in dementia patients would help nursing homes avoid the administrative burdens and costs of complying with ... regulatory restrictions applicable to antipsychotics." Abbott also allegedly offered and paid kickbacks to health care professionals and long-term-care pharmacy providers to induce them to promote and/or prescribe Depakote and to improperly influence the content of company-sponsored Continuing Medical Education (CME) programs.

In connection with the civil settlement, Abbott entered into a Corporate Integrity Agreement, which, among other things, imposes additional compliance obligations.

Anti-kickback cases:

Many of the FCA cases settled in 2012 were predicated on alleged violations of the AKS. In addition, approximately 23 percent of the FCA *qui tam* cases unsealed last year involved allegations of false certification of compliance with the AKS.

The following are examples of 2012 FCA settlements that included alleged AKS violations:

- In August 2012, Pacific Health Corporation (PHC) resolved, for $16.5 million, federal and state claims alleging that it had violated the AKS and the FCA. The government contended that three PHC-affiliated hospitals had engaged in a scheme to pay recruiters to transport homeless Medicare or Medi-Cal beneficiaries by ambulance from "Skid Row" in Los Angeles to the hospitals for medically unnecessary treatments.
- In December 2012, Victory Pharma Inc. agreed both to a criminal forfeiture of $1.4 million to resolve federal AKS allegations and to a FCA settlement of $9.9 million. The government had alleged that Victory paid kickbacks to doctors to induce them to write prescriptions for Victory's products.
- In December 2012, Sanofi U.S. agreed to pay $109 million to resolve allegations that it had violated the FCA by giving physicians free units of a drug, in violation of the AKS, to induce them to purchase and prescribe the product.

POTENTIAL IMPLICATIONS/ISSUES FOR 2013

Increased relators' shares incentivizing whistleblowers

In reviewing its 2012 enforcement successes, the DOJ highlighted the significant recoveries that resulted from actions brought by relators. For example, four GSK whistleblowers will receive 15–25% of an approximate $1 billion settlement while whistleblowers in two other qui tam suits will receive a percentage of approximately $250 million. Similarly, in the Abbott settlement the whistleblowers will receive $84 million from the federal portion of the settlement.

Increased focus on compliance

As noted above, both the GSK and Abbott plea agreements include substantial compliance requirements for the company and for board members and executives. The agreements have many common provisions and reveal the government's thinking about corporate compliance measures that will effectively prevent off-label marketing. Many such provisions are summarized and compared in chart below.

Compliance Obligation	GSK — Addendum to Plea Agreement	Abbott — Plea Agreement
Reportable Events	The company will report quarterly "reportable incidents," which are any probable FDCA violations related to pharmaceutical marketing.	The company will report quarterly to the probation office any "reportable events," which are probable FDCA violations.
Board Certifications	The Board of Directors will review and evaluate the effectiveness of the company's compliance program and submit a resolution that the company has implemented an effective compliance program to meet the requirements of federal health care programs, FDA requirements, and the Addendum to the Plea Agreement.	The Board of Directors will review the effectiveness of the company's compliance program and submit to the probation officer a resolution that the company had in effect policies and procedures designed to prevent violations of the FDCA.
Executive Certifications	GSK's U.S. President will review and certify that the company's compliance measures continue to include the compliance measures in the plea agreement and that reportable incidents have been properly reported.	The CEO shall review the effectiveness of the company's compliance program and certify to the probation officer that the company's compliance program includes the compliance policies and procedures in the plea agreement and that "reportable events" have been properly reported. This is a probation requirement.
Compensation	Compensation and sales incentives cannot be based on the volume of sales. The sales force will be evaluated based on business acumen, customer engagement, and scientific knowledge of GSK products.	Compensation for sales representatives cannot inappropriately motivate off-label marketing or promotion of products.
Medical Education Must Be Free from Marketing's Involvement	Independent medical education (IME) program and medical education grant-making will have no commercial involvement.	CME and grant-making decisions cannot be approved by sales and marketing organization.
Control Over Medical Education Programs	Third parties must maintain control over the content, faculty, educational methods, materials, and venue for IME programs.	Third-party CME providers must maintain control over selection of content, faculty, educational methods, materials, and venue for CME programs.
Clinical Trials and Research Must Be Approved by the Medical or Research Organization	GSK-sponsored research must be approved by medical or research organizations, and its policies and procedures will require that sales and marketing personnel cannot participate in the design, conduct, or publication of GSK-sponsored research.	Clinical trials funded or controlled by Abbott must be approved by medical or scientific organizations, and its policies and procedures must require that it will not approve scientific research purely for the purposes of developing an article or reprint for sales representative's use.
Verifying Unsolicited Requests for Off-Label Use	Sales personnel must refer all requests for information about off-label uses to its medical affairs personnel and must obtain signatures from medical personnel who verbally requested written information about an off-label use to confirm that the request was unsolicited.	N/A

Health care providers and pharmaceutical and medical device manufacturers may wish to review these compliance obligations and consider whether to implement similar provisions, as they represent the government's views (at least in part) on ways to prevent improper marketing and promotion of FDA-approved products.

In addition, the board resolutions and the individual executive certifications in the GSK and Abbott plea agreements summarized above could subject the certifying individuals to personal liability should the certifications prove to be false or not supported by the requisite due diligence. According to Ellyn Sternfield, a Member of Mintz Levin's Health Care Enforcement Defense Group, "[i]t is no secret that in cases of corporate misconduct, federal prosecutors are looking to establish individual liability at the executive or board level. But, if they cannot prosecute individual officers or board members at the front end of a case, government attorneys are incorporating settlement terms that will make it easier for the government to establish individual liability in future cases."

NEW AREAS OF FOCUS IN 2012

FCPA enforcement in health care

Health care enforcement by the DOJ in 2012 expanded internationally through the use of the Foreign Corrupt Practices Act of 1977 (FCPA).[3] The statute's anti-bribery provisions prohibit the corrupt "giving, offering, or promising [of] anything of value, directly or indirectly, to a foreign official for the purpose of obtaining or retaining business." The FCPA also contains an "accounting books and records" provision enforced by the Securities and Exchange Commission (SEC) that requires public companies to "maintain truthful, accurate, reasonably detailed records reflecting domestic and foreign transactions, disposition of assets, and management approval" of such transactions. The FCPA generally applies to U.S. companies, citizens, nationals, residents, and any persons or entities acting in furtherance of a corrupt payment while in U.S. territory.

Key definitions within the statute, such as the terms "anything of value" and "foreign official," have extreme ramifications in the health care industry. For instance, "anything of value" can include situations where an offeror intending to influence a foreign official provides a charitable donation to an entity with which the foreign official is involved in exchange for his or her business. Additionally, the "foreign official" definition includes such individuals as physicians and nurses employed by state-run hospitals. Furthermore, the FCPA's anti-bribery provisions impose liability for third-party conduct. Thus, a company cannot be willfully blind to the acts of non-employee third-party distributors or agents who commit acts of bribery to advance the company's business.[4]

Since 2009, Assistant Attorney General Lanny Breuer has made it clear that the health care industry is a major target of FCPA enforcement, declaring that the DOJ "will be intensely focused on rooting out foreign bribery in [the health care product] industry." In 2012, the DOJ entered into four Deferred Prosecution Agreements (DPAs) with three medical device companies and one pharmaceutical company alleged to have violated the FCPA's anti-bribery provisions:[5]

Company & Settlement Date	Monetary Penalties & Compliance Obligations [6]	Alleged Conduct
Smith & Nephew (Feb. 6, 2012)	Affiliates and employees allegedly authorized the payment of approximately $9.4 million to a third-party distributor's shell companies, some or all of which was passed on to physicians to corruptly induce them to purchase the company's medical devices.	DOJ: $16.8 million SEC: $5.4 million disgorgement of profits
Biomet (Mar. 26, 2012)	Subsidiaries, employees, and agents allegedly made improper payments to publicly employed health care providers in Argentina, Brazil, and China to secure lucrative business with hospitals.	DOJ: $17.28 million
Orthofix (Jul. 10, 2012)	Mexican subsidiary allegedly bribed officials of government-owned health care and social services provider with cash, laptop computers, televisions, and appliances directly or indirectly through front companies.	DOJ: $7.4 million in penalties SEC: $5.4 million in disgorgement of profits
Pfizer H.C.P. (Aug. 7, 2012)	Indirect wholly owned subsidiary of Pfizer Inc., allegedly made a broad range of improper payments through sham consulting contracts and an exclusive distributorship to hospital administrators, regulatory and purchasing committee members, and other health care professionals in Bulgaria, Croatia, Kazakhstan, and Russia to influence government decisions regarding the approval and registration of Pfizer Inc. products, the award of pharmaceutical tenders, and the level of sales of Pfizer Inc. products.	DOJ: $15 million penalty

Smith & Nephew's and Biomet's DPAs[7] also required the companies to implement rigorous internal controls, to cooperate with the DOJ in future investigations of similar conduct within the industry, and to retain an external compliance monitor for 18 months. In addition, health care companies that settled FCPA cases in 2012 with DPAs are required to perform compliance self-assessments on a periodic basis over the next two to three years, as specified in the DPA.

Although DOJ FCPA enforcement has decreased overall in the past few years, health care companies have become a larger proportion of DOJ's enforcement targets. Four of the nine corporate DOJ FCPA enforcement actions brought in 2012 were against health care companies, and the aggregated criminal penalties for these actions totaled approximately $56 million or approximately 40 percent of all DOJ FCPA penalties for calendar year 2012. By comparison, DOJ only settled with one health care company in 2011, out of 11 total corporate FCPA enforcement actions. Of note, no individuals were prosecuted under the FCPA in any industry this year, although the statute permits it. Six of the 12 (50 percent) FCPA enforcement actions brought by the SEC and/or DOJ involved pharmaceutical or other health care-related entities. These six enforcement actions generated 65 percent of the all civil and criminal fines and penalties of the $260 million imposed under the FCPA in calendar year 2012.

The focus on the health care industry is ongoing. According to one blog, out of the 88 active FCPA investigations that had been publicly disclosed in SEC filings by December 31, 2012, 15 involved companies in

the health care industry.[8] These investigative targets include pharmaceutical companies, medical device and imaging companies, renal dialysis providers, and laboratory corporations — and prosecutions of individuals related to these companies are still a possibility.

Paul Pelletier, former principal deputy chief of the DOJ Criminal Division's Fraud Section and a current Member in Mintz Levin's Litigation Practice and its Health Care Enforcement Defense Group, noted in early 2012 that DOJ was using investigative targets as "[j]unior G-men" to report their competitors' alleged FCPA violations to demonstrate cooperation with the government.[9] Thus, new additions to the list of investigative targets could result from increasingly sophisticated investigative practices, companies informing on one another, and companies self-reporting to preempt informant reports.

Off-label marketing

Generally, 22 U.S.C. §331 prohibits the "alteration or misbranding of any food, drug, device, tobacco product, or cosmetic in interstate commerce." Under this provision, the government typically asserts that when a drug is marketed for uses unapproved by the FDA, the drug is misbranded because its existing label does not adequately address the off-label use. In 2012, the government often used this provision and resolved criminal and civil cases regarding off-label marketing to recover substantial settlements. A few examples include:

Notably, in late 2012, in *U.S. v. Caronia,* 703 F.3d 149 (2d Cir. 2012), the 2nd U.S. Circuit Court of Appeals for the overturned a conviction of off-label promotion. The defendant was an employee of Orphan Medical, Inc. (Orphan) which developed Xyrem. The FDA approved Xyrem for two uses related to narcolepsy. In 2005, a doctor recorded two calls with Mr. Caronia during which he promoted Xyrem for unapproved uses. Mr. Caronia was convicted by a jury following a trial during which the government argued that these conversations constituted off-label promotion and violated FDCA's misbranding provisions. Mr. Caronia appealed to the 2nd Circuit.

On December 3, 2012, in a split decision, the 2nd Circuit overturned Mr. Caronia's conviction of conspiracy to introduce a misbranded drug into interstate commerce. The court held that the government had prosecuted Mr. Caronia for his speech alone, which is not permissible under the First Amendment.

Significantly, in its case against Mr. Caronia, the government did not allege that any of his statements were false or that he was involved in fraudulent conduct. Instead, its case was based solely on the off-label promotional statements he made. In the future, the government may bring cases that focus on false statements or fraudulent conduct associated with off-label statements. Additionally, it is likely that relators and the government will choose to bring off-label cases under other laws, such as state consumer protection statutes, rather than tangle with the First Amendment issues that will now surely be raised in any off-label FCA case. In any event, with the plethora of pending off-label marketing cases, both criminal cases and parallel civil False Claims Act cases, lawyers will all be paying close attention to what happens next.[10]

Defendant	Alleged Conduct	Settlement Amount
Amgen	$762 million to resolve criminal and alleged civil liabilities.	Amgen pled guilty in December 2012 to illegally selling a misbranded drug.
Pfizer	$491 million	"Third-quarter 2012 reported earnings in comparison with the year-ago quarter were unfavorably impacted by a $491 million charge resulting from an agreement-in-principle with the U.S. Department of Justice to resolve an investigation into Wyeth's historical promotional practices in connection with Rapamune ...."
Pfizer	$55 million	Tabletext Pfizer in December 2012 agreed to settle charges of off-label marketing of Protonix.
Boehringer Ingelheim Pharmaceuticals, Inc. (BIPI).	$95 million	In October 2012, BIPI agreed to pay $95 million to resolve alleged civil False Claims Act violations arising from the unlawful marketing of, Aggrenox, Combivent, and Micardis.

Medicaid fraud

Last year, in addition to focusing its efforts on national and international initiatives, the federal government also focused its resources on state-level enforcement. In 2012, there were some interesting cases in the Medicaid fraud arena, specifically involving dentists and orthodontists:

> The federal government appears to be considering the increased use of at least one relatively "new" theory of misconduct: the "worthless services" theory.

- On December 13, 2012, Dr. Michael David Goodwin, a Texas orthodontist, pleaded guilty to one count of health care fraud relating to a scheme he devised to defraud the Texas Medicaid program of approximately $2.6 million. Dr. Goodwin admitted that from January 2008 to March 2011 he: (1) billed Texas Medicaid for services that were not medically necessary; (2) billed for services provided by dental assistants without supervision by a dentist or orthodontist; (3) billed for services rendered to Medicaid patients scheduled for treatment on days when Dr. Goodwin was not in the state and which, instead, were rendered by dental assistants; (4) hired dentists who were not enrolled in Texas Medicaid to provide the appearance of supervision while dental assistants treated patients and billed for those services; and (5) instructed dental assistants to falsify patient records to reflect an "adjustment" when none had been performed. On February 11, 2013, Dr. Goodwin was ordered to forfeit $1.56 million of the funds he received under the scheme; he will be further sentenced later this year.
- On June 20, 2012, Robin Lockwood, a dentist from Oklahoma City, Oklahoma, was charged with health care fraud. Dr. Lockwood was accused of (1) submitting claims for dental services she never rendered and (2) providing non-reimbursable services but writing her

treatment notes (on which her practice relied when submitting Medicaid claims) as though the services that she had performed were reimburseable.

- On May 16, 2012, Dr. Carlos Armin Morales-Ryan, a dentist, and his wife, Dr. Nelia Patricia Garcia-Morales, an orthodontist, both of whom practiced in Laredo, Texas, pleaded guilty to a criminal information admitting they made false statements on bills to Texas Medicaid. Specifically, each provider admitted to submitting a claim for services provided to one patient, on one occasion, on a day when neither provider was in Texas. To resolve the charges stemming from these two claims, the providers signed a plea agreement under which they received five years' probation and were ordered to pay $686,545 in restitution. The magnitude of this sentence, when compared to the underlying conduct, is yet another indication of the seriousness with which the government pursues its enforcement efforts, no matter how minor the alleged misconduct may appear.

Durable medical equipment (DME) companies and patient recruiters also continued to draw law enforcement's attention in 2012.

Despite the apparent spike in enforcement against dentists for fraudulent Medicaid claims, the federal government's involvement in the above cases is not so much indicative of a stronger commitment to fighting fraud in dentistry, as it is a reflection of a larger potential future trend of increased attention to state enforcement initiatives — and recoveries. A number of factors appear to be responsible for this new trend.

First, in recent years, state and federal agencies have been working together with increasing regularity on health care fraud cases of national import. For example, when the DOJ reported the settlement reached in the Abbott case (discussed above), it noted that several state and federal agencies were involved, including the Virginia Attorney General's Medicaid Fraud Control Unit; the Internal Revenue Service - Criminal Investigation; the FDA - Office of Criminal Investigation; the Defense Criminal Investigative Service; the Department of Health and Human Services - Office of Inspector General; the West Virginia State Police; the Office of Personnel Management - Office of Inspector General; the Department of Veterans' Affairs Office of Inspector General; the Department of Labor - Office of Inspector General; and TRICARE Program Integrity. Through their collaborative efforts on "big" cases, state and federal agencies have developed relationships that seem to have carried over into state cases.

Second, in the past few years especially, Congress has pressured investigative and enforcement agencies to produce quantifiable returns on the investment of taxpayer dollars in health care fraud enforcement initiatives. As such, bodies like the Health Care Fraud Prevention Enforcement and Action Team (HEAT), which is a collaborative initiative between HHS and DOJ, are incentivized to produce "big numbers" (i.e., recovery of large sums and other stringent penalties). This pressure to secure demonstrable enforcement successes seems to have directed some attention toward state enforcement, in addition to federal enforcement issues.

Finally, the increasing federal attention to state-level cases (including Medicaid cases) may be related, in part, to rising FCA enforcement at the state level. At present, 29 states and the District of Columbia have their own FCAs. In addition to an uptick in qui tam FCA cases at the state level, state attorneys general are hiring private legal counsel (to serve as special attorneys general) to pursue these cases and secure large settlements on behalf of the state. Because the federal government is entitled to recover "a share of Medicaid overpayments, damages, fines, penalties, and any other component of a legal judgment or settlement when a State recovers pursuant to legal action under its State FCA," the federal government is paying more attention to these cases and looking to secure its share.[11]

'Worthless services' cases

In addition to exploring new industries for increased enforcement focus, the federal government appears to be considering the increased use of at least one relatively "new" theory of misconduct: the "worthless services" theory. While the "worthless services" theory is not actually a new legal doctrine (as it has previously been asserted as the basis for FCA claims), it may represent the newest lens through which the federal government views alleged health care fraud. The crux of this theory is that "the performance of services is so deficient that for all practical purposes it is the equivalent of no performance at all."[12] At least two cases in 2012 involved this theory: one was an FCA suit filed by a whistleblower and the other was a case filed by the federal government. While it is difficult to predict what the utilization of this theory might mean for future enforcement, it is certainly an issue of which all health care providers should be aware.

On August 8, 2012, a federal trial judge unsealed a whistleblower suit alleging that Mimbres Memorial Hospital (Mimbres) in New Mexico had submitted claims to Medicare and Medicaid for microbiology services in violation of requirements imposed by the Centers for Medicare & Medicaid Services (CMS) for the certification of laboratories (under the Clinical Laboratory Improvement Acts of 1988 (CLIA)).

The civil FCA also gave rise to robust enforcement efforts in 2012.

The whistleblower worked at the hospital and alleged that, because a provider's eligibility for reimbursement for laboratory services depends on CLIA compliance, the hospital's failure to meet CLIA requirements rendered those claims a violation of the FCA. The relator also accused Mimbres, in part, of (1) failing to conduct routine quality-control procedures on instruments to ensure that they produced accurate and verifiable results; (2) failing to conduct required monitoring and internal reviews; and (3) using outdated equipment instructions. As a result, the relator contended, the accuracy of the test results used for diagnosis and treatment could not be validated. Moreover, the relator charged that Mimbres knowingly ignored the risks that such practices posed to patients' health and safety.

Although the United States and the state of New Mexico declined to intervene in the Mimbres case, it appears that the government has not dismissed the utility of the "worthless services" theory. On August 13, 2012, George D. Houser, the owner of a nursing home located in Georgia, was sentenced to serve 20 years in federal prison on charges of conspiring with his wife to defraud the Medicare and Georgia Medicaid programs by billing them for "worthless services" in the operation of three nursing homes.

CONCLUSION

In and of themselves, trends in health care enforcement during 2012 have been significant in reinforcing the government's fraud investigation and recovery strategies. But these trends will likely intensify in the post-health reform era. Already, in 2013, we have seen the release of the final regulations[15] under the Sunshine Act,[16] which have far-reaching impacts to health care fraud enforcement against group purchasing organizations and manufacturers of drugs, devices, biologics, or medical supplies covered by certain federal health care programs. Also, health care privacy and security enforcement will likely increase in the aftermath of the recent release of the HIPAA Omnibus regulations.[17] Given this trend, it is quite possible that 2013 may also bring the release of a final 60-Day Overpayment Rule[18] related to FCA and Civil Monetary Penalties Law liability for failures to report and return a federal health care program overpayment within 60 days of identifying its existence.

Overall, the enactment of new laws and regulations at the federal and state levels related to health care reform will provide the government with more opportunities to detect and seek out fraud and abuse in the industry. The impact of new laws and regulations implementing the federal health care program integrity provisions of the Affordable Care Act,[19] combined with the enforcement agencies' continued efforts in historically fruitful areas of fraud recoveries and increasing experimentation with new theories of potential liability, strongly suggest that 2013 may well be another landmark year in health care enforcement. WJ

Approximately 23 percent of the FCA *qui tam* cases unsealed last year involved allegations of false certification of compliance with the Anti Kickback Statute.

Between July 2004 and September 2007, Mr. Houser billed Medicare and Medicaid approximately $41 million (and was paid $32.9 million) based on his certifications that residents in these homes had a safe, clean physical environment, nutritional meals, medical care, and services that would promote or enhance their quality of life. In reality, the government alleged that there was "a long-term pattern and practice of conditions at [Mr. Houser's] nursing homes that were so poor, including food shortages bordering on starvation, leaking roofs, virtually no nursing or housekeeping supplies, poor sanitary conditions, major staff shortages, and safety concerns..."[13] that any services that Mr. Houser rendered were of no value to the residents.

The court found that Mr. Houser "was well aware that ongoing jeopardy conditions existed at the nursing homes during this time. Rather than make a good faith effort to remedy the glaring issues impacting the residents' health and welfare, the evidence shows that [Mr. Houser] chose instead to divert significant nursing home funds [to] his real estate development ventures and for other personal expenses and that [the] defendant intentionally attempted to cover up and conceal from the surveyors the nursing homes' issues and his diversion of funds."[14]

This case was the first in which a defendant was convicted, following a trial in federal court, for submitting claims for worthless services. It may very well not be the last.

NOTES

[1] U.S. Dep't of Health & Human Services, Office of Inspector General, Semiannual Report to Congress, Apr. 1, 2012 – Sept. 30, 2012.

[2] U.S. Department of Health & Human Services, Office of Inspector General, Semiannual Report to Congress, Apr. 1, 2012 – Sept. 30, 2012, at 6.

[3] 15 U.S.C. §§ 78dd-1, *et seq*.

[4] The DOJ and SEC have recently published "A Resource Guide to the U.S. Foreign Corrupt Practices Act," (FCPA Guidance), which provides health care companies with additional insight into the "foreign official" and "instrumentality" definitions that put their practices into such peril. Additionally, the FCPA Guidance provides 10 "Hallmarks of Effective Compliance Programs" and more insight on the agencies' enforcement stance on unlawful gifts, entertainment, and travel practices that form a large part of FCPA violations.

[5] U.S. Department of Justice, Criminal Fraud Section, "FCPA and Related Enforcement Actions" (2012), (last accessed Jan. 15, 2013).

[6] For each violation of the FCPA's anti-bribery provisions, companies can be subject to up to $2 million in criminal penalties and civil fines of up to $16,000 per violation. Individuals can be required to pay up to $250,000 in criminal fines and $16,000 in civil fines for each violation and receive a prison term of up to five years. For each violation of the statute's accounting books and records provisions, companies can be subject to up to $25 million in criminal penalties and civil fines of up to $725,000 per violation. Individuals can be required to pay up to $5 million in criminal fines and $150,000 in civil fines for each violation and receive a prison term of up to 20 years. In addition to all of these penalties and fines, the SEC can pursue additional civil remedies, such as injunctions and disgorgement of profits, against a defendant.

[7] *United States v. Smith & Nephew, Inc.*, No. 12-CR-030-RBW (D.D.C. Feb. 6, 2012), Deferred Prosecution Agreement; *United States v. Biomet, Inc.*, No. 12-CR-080 RBW (D.D.C. Mar. 26, 2012), Deferred Prosecution Agreement.

[8] Richard L. Cassin, "The Corporate Investigations List," *The FCPA Blog* (Jan. 3, 2013); "'Contagion effect' spreads FCPA risks" (Jan. 7, 2013).

[9] Paul E. Pelletier and Stephanie D. Willis, "Ratting Out the Competition: New DOJ Strategies," Law 360, (Mar. 28, 2012).

[10] "Off-Label Marketing – First Amendment Challenge Ruling" (Dec. 6, 2012).

[11] Comment from Ellyn Sternfield, Member of Mintz Levin's Health Care Enforcement Defense Group (Jan. 22, 2013); Letter from Herby B. Kuhn, Deputy Administrator, Acting Director, Center for Medicaid and State Operations, Centers for Medicare & Medicaid Services (Oct. 28, 2008). At present, there is a struggle taking place between the federal government and various state governments regarding the issue of federal share. In its 2008 letter, CMS took the position that federal share must be paid on all portions of a Medicaid FCA judgment or settlement. Many states are pushing back on this position. This is a complex issue, which is not the subject of this advisory. Readers wanting more information on this topic should contact Mintz Levin.

[12] *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 703 (2d Cir. 2001).

[13] Press Release, Federal Bureau of Investigation, Atlanta Division, "Former Nursing Home Operator Sentenced to Prison for 20 Years for Health Care Fraud and Tax Fraud" (Aug. 13, 2012).

[14] *Id.*

[15] Centers for Medicare & Medicaid Services, "Medicare, Medicaid, Children's Health Insurance Programs; Transparency Reports and Reporting of Physician Ownership or Investment Interests" (Feb. 8, 2013). Mintz Levin's Health Law Practice attorneys have provided analysis of the new rule here: Thomas S. Crane, Brian P. Dunphy, Karen S. Lovitch, and Kate F. Stewart, "CMS Publishes Final Sunshine Act Rule; Data Collection to Begin on August 1, 2013," *Health Law Alert* (Feb. 4, 2013).

[16] Section 1128G of the Social Security Act.

[17] Dianne J. Bourque et al., "HIPAA Omnibus Rule Reference Chart," *Health Law Alert* (Jan. 22, 2013); Dianne Bourque and Stephanie D. Willis, "Finally! HHS Office of Civil Rights Releases HIPAA Omnibus Rule with Sweeping Changes to Compliance Requirements and Enforcement," *Privacy & Security – HIPAA Compliance Alert* (Jan. 18, 2013).

[18] Medicare Program; Reporting and Returning Overpayments, 77 Fed. Reg. 9179 (proposed Feb. 16, 2012); Karen S. Lovitch and Stephanie D. Willis, "CMS Publishes Proposed Rule on Return of Medicare and Medicaid Overpayments," *Health Law Advisory* (Feb. 16, 2012).

[19] Pub. Law No. 111-148, as amended by Pub. Law No. 111-152 (2010).

(From L-R) **Hope Foster** is a member in **Mintz Levin Cohn Ferris Glovsky & Popeo**'s health law section in Washington, serves on the policy committee and chairs the health care enforcement defense group. **Tracy Miner** is a member in the firm's litigation section in Boston and chair of the white-collar defense group. She is experienced in health care fraud law and has successfully won acquittal in two landmark anti-kickback cases. **Jessica Sergi** is an associate with the firm. Her practice encompasses a wide range of litigation matters with an emphasis on securities-related issues and white-collar criminal defense. **Stephanie Willis** is an associate in the firm's health law section based in Washington. She is experienced in health care fraud enforcement matters involving the False Claims Act, the Anti-Kickback Statute, the Physician Self-Referral Act and other health care administrative actions under the Social Security Act. **Samantha Kingsbury** is an associate in the health law section in Boston, focusing on health care enforcement defense matters. This commentary was first published Feb. 25 by the law firm as a Health Care Enforcement Defense Advisory. Reprinted with permission.

False Claims Act

CONTINUED FROM PAGE 1

pursuant to the FCA to give the government time to decide whether to join in the allegations.

In a December 2011 amended complaint Jones said ASC and Anixter joined together to bid on a federal contract to install cable and wiring at CIA facilities. The two companies planned to use Corning as their supplier for the job, the suit said.

Jones claimed the three firms gave both CIA employees and the government's hired consultants illegal gifts in order to influence the specifications of the upcoming contract.

ASC, Anixter and Corning wanted specifications that would favor their products and therefore increase their chance to win the job, according to the suit.

Jones said the gratuities included meals, trips, entertainment and tickets to sporting events.

The Justice Department said the payment by American Systems Corp., Anixter International Inc. and Corning Cable Systems resolves allegations that the companies violated the False Claims Act.

"Improper gifts and gratuities paid to government officials are a corrupting influence on government contracts," U.S. Attorney Neil MacBride of the Eastern District of Virginia said in a statement.

The District Court unsealed the case after the government chose in January to join in Jones' allegations against ASC, Anixter and Corning and to negotiate a settlement.

The government declined to intervene in Jones' allegations against the remaining defendants, consisting of wiring industry parts manufacturers Cablofil Inc., Ortronics Inc., Wiremold Co., Berk-Tek, Martin International Enclosures Inc. and Legrand North America Inc., together with its representative, Network Products Inc.

As part of the settlement Jones agreed to drop the allegations against these firms, according to court records.

The Justice Department said Jones will receive a $585,000 share of the settlement proceeds. The FCA allows plaintiffs who bring fraud to the attention of the government to share in any recovery. WJ

Related Court Document:
Amended complaint: 2011 WL 10483024

See Document Section A (P. 23) for the amended complaint.

Corning to pay $5.65 million for overcharging government on lab supplies

Glassware manufacturer Corning Inc. has agreed to pay $5.65 million to the United States to resolve allegations that the company violated its contract with the government by giving commercial buyers better prices for its products.

United States ex rel. Jones v. Corning Inc., No. 1:10-CV-01692, settlement announced (D.D.C. Mar. 5, 2013).

"At a time when our political leaders are making tough choices about how to rein in federal spending, government contractors need to understand that they will not get away with overbilling the taxpayer," District of Columbia U.S. Attorney Ronald C. Machen Jr. said in a statement.

According to the Department of Justice, Corning entered into the contract in 2005 to provide various government entities with laboratory research products through the General Services Administration's Multiple Award Schedule program.

The MAS program streamlines procurement for federal agencies by allowing them to order commonly used products and services from approved vendors.

Contractors that participate in the MAS program must give the government complete and accurate information about the prices charged to commercial customers so the United States can ensure it obtains the same or better pricing, according to the Justice Department.

Participating contractors also must maintain a price list with the GSA and notify it of any changes to pricing discounts.

Kevin Jones filed a whistle-blower suit on behalf of the government in the U.S. District Court for the District of Columbia, claiming Corning violated its contract by knowingly giving private customers better deals.

The suit said some of the company's high- and moderate-volume private customers either received outright better prices or would receive equipment giveaways of such monetary value that they brought the actual contract price below that of the GSA contract.

Jones, a former account manager for Corning, alleged that the company maintains a database of all contracts and prices that signals a "red flag" when a contract is entered into at a better price than the GSA contract. Corning management routinely overrode or ignored that warning and approved pricing below that of the GSA contract, the complaint said.

The suit also alleged Corning provided kickbacks to government employees, as well as to employees and institutions receiving federal grant money, in exchange for buying Corning products.

> Former Corning Inc. employee Kevin Jones claimed the company violated its federal contract by knowingly giving private customers better deals.

The government intervened on the overpricing claims but declined to join the suit on the kickback claims and Jones agreed to drop them. His dismissal is without prejudice to the United States, according to the settlement approved by U.S. District Judge Barbara Jacobs Rothstein.

Corning agreed to settle with the government on the overpricing charges and to pay $5.65 million in civil penalties. Jones will receive $904,000 from the recovery as a whistle-blower under the False Claims Act, 31 U.S.C. § 3729, the Justice Department said.

"Companies that want to take advantage of federal contracts are obligated to deal openly and fairly with their government customers," Machen said. "When contractors fail to meet their obligations, we will hold them accountable and seek to make the taxpayer whole." WJ

Attorneys:
Plaintiff (United States): Jennifer A. Short, U.S. attorney's office for the District of Columbia, Washington

Plaintiff (Jones): Michelle Woolley, Murphy Anderson PLLC, Washington

Defendant: Ronald A. Schector, Arnold & Porter, Washington

Related Court Documents:
Complaint: 2010 WL 9439784
Notice of intervention: 2013 WL 1100318

See Document Section B (P. 37) for the complaint.

FALSE CLAIMS ACT

U.S. says it won't foot the bill for podiatrist's false Medicare claims

A North Carolina podiatrist knowingly submitted fraudulent claims for reimbursement from Medicare for services that were not eligible for payment, the United States has alleged in a federal complaint.

United States v. Cabarrus Podiatry Associates PC et al., No. 13-189, complaint filed (M.D.N.C. Mar. 7, 2013).

Some of those services were not medically necessary or were provided by unqualified personnel at the practice owned by defendant John M. Diehl, according to the suit filed in the U.S. District Court for the Middle District of North Carolina.

The practice, Cabarrus Podiatry Associates, is also named as a defendant.

According to the complaint, federal Medicare regulations exclude payments for services that are not reasonable and necessary.

When a provider submits a claim to Medicare, he is certifying that the services are medically necessary and that the claims are accurate, complete and truthful, the complaint says.

The government brought suit under the False Claims Act, 31 U.S.C. § 3729, which imposes liability on any person who knowingly presents a false or fraudulent claim for payment to the government.

The government says that prior to bringing suit it obtained a random sample of Diehl's billings to federal health care programs to see if he had billed for non-covered services.

A sampling of claims revealed the podiatrist submitted numerous claims for physical therapy services not provided by qualified personnel, according to the complaint.

The sampling of 60 claims revealed that Diehl submitted numerous claims for physical therapy services that were not provided by qualified personnel or for services not covered by Medicare, according to the complaint.

Although Diehl was advised as early as 2006 that his physical therapy personnel did not meet Medicare guidelines for delivery of services, he continued to bill and be paid by the government for services provided for unqualified employees, the complaint says.

Diehl also submitted claims for non-covered services, such as electrical stimulation or electromagnetic therapy for the treatment of wounds, the suit says.

Electrical stimulation and electromagnetic therapy are only covered to treat acute and severe ulcers, and there is no evidence that Diehl was using the therapies for those purposes, the government alleges.

The complaint alleges presentation of false claims, payment by mistake of fact, unjust enrichment and fraud.

The government is seeking unspecified damages, including treble damages, investigative costs and civil penalties. WJ

Attorneys:
Plaintiff: U.S. Attorney Ripley Rand and Assistant U.S. Attorney Cheryl T. Sloan, Greensboro, N.C.

Related Court Document:
Complaint: 2013 WL 991438

FALSE CLAIMS ACT

Huron wins dismissal of whistle-blower lawsuit

(Reuters) – Huron Consulting Group Inc. won the dismissal on March 5 of a whistle-blower lawsuit accusing it of causing a New York hospital to receive more than $30 million in inflated payments under the Medicare and Medicaid programs.

United States ex rel. Associates Against Outlier Fraud v. Huron Consulting Group et al., No. 09-1800, 2013 WL 856370 (S.D.N.Y. Mar. 5, 2013).

U.S. District Judge Jed Rakoff in Manhattan ruled against Associates Against Outlier Fraud, which brought the lawsuit under the federal False Claims Act and a similar New York state law.

The lawsuit also named as a defendant Empire HealthChoice Assurance Inc., which acted as the fiscal intermediary that serviced the hospital, St. Vincent Catholic Medical Center, during the time in question.

"We believed from the beginning of the case that the allegations were without merit and are gratified to have the case dismissed with prejudice," said Jennifer Frost Hennagir, a spokeswoman for Huron.

Philip Michael, a lawyer for the whistle-blower, said he was disappointed by the decision. "We're examining it to determine what our next step would be," he said.

In its annual report filed Feb. 21, Huron said it had held preliminary settlement talks with Associates Against Outlier Fraud and, as a result, recorded a $1.2 million charge in the second quarter of 2012.

Asked if the settlement offer was still on the table, Hennagir said no.

Adopted during the Civil War era, the False Claims Act allows individuals to bring lawsuits on behalf of the U.S. government against companies that have defrauded it. Those whistle-blowers share in any settlement that might result.

The government also has the option to intervene in the lawsuits. It did not in the Huron case, leaving the whistle-blower to pursue it on its own.

The lawsuit, filed in 2009, centered on events surrounding the restructuring of St. Vincent Catholic Medical Center and its 2005 bankruptcy filing.

It was filed by Associates Against Outlier Fraud, which is solely owned by Steven Landgraber, who worked as an accountant consultant at St. Vincent's from 2005 to 2006.

According to the lawsuit, St. Vincent's had hired consulting firm Speltz & Weis in 2003 to help turn its business around. Huron later acquired Speltz & Weis in 2005.

The lawsuit contended that Huron caused false claims to be made under Medicaid and Medicare for supplemental reimbursement of unusually high in-patient care costs.

But Judge Rakoff in his March 5 decision said the whistle-blower had been unable to support the fundamental allegation in its complaint with facts or law. Huron's conduct was at worst "bad practice" but not forbidden by regulation or standard practice, he wrote.

"There is, in sum, no law, rule, regulation or fact rendering Huron's submission of outlier-producing bills under these circumstances false or fraudulent," Judge Rakoff said.

A lawyer for Empire did not respond to a request for comment. WJ

(Reporting by Nate Raymond in New York; editing by Stephen Coates)

Related Court Document:
Opinion: 2013 WL 856370

CRIMINAL LAW

Security guard gets 9-year sentence for attempted espionage

A former civilian security guard at a U.S. Consulate facility in China will serve nine years in prison for attempting to pass classified defense information to a Chinese government agency.

United States v. Underwood, No. 11-CR-261, defendant sentenced (D.D.C. Mar. 5, 2013).

Bryan Underwood must also serve a two-year term of supervised release after his prison sentence, the Justice Department said in a statement March 5.

Judge Ellen S. Huvelle of the U.S. District Court for the District of Columbia sentenced Underwood, who pleaded guilty last August to attempting to communicate national defense information to a foreign government.

The Justice Department said the information, which had the potential to put national security at risk, did not end up in the wrong hands because U.S. authorities learned of Underwood's plan before he could bring it to fruition.

In a September 2011 superseding indictment prosecutors said that between November 2009 and August 2011 Underwood worked in Guangzhou, China, at a U.S. Consulate facility that was under construction.

Underwood, 32, held a top-secret security clearance and was responsible for protecting sensitive information at the consulate's construction site, according to the department.

While working at the consulate, Underwood devised a plan to recoup some personal investment losses sustained in March and April 2011 by selling information to the Chinese government, the Justice Department said.

> Bryan Underwood pleaded guilty to attempting to pass national defense information to China, the Justice Department said.

Underwood sought to sell both information about the U.S. Consulate and access to the facility for between $3 million and $5 million, according to the charges.

REUTERS/Claro Cortes IV

A Chinese police officer stands guard outside the U.S. Consulate in Shanghai. Bryan Underwood sought to sell information about the U.S. Consulate to the Chinese government for between $3 million and $5 million.

At the time, Underwood was working on a special project at the consulate with U.S. law enforcement agents. He planned to use the project as an excuse if the scheme were discovered, the Justice Department said.

Prosecutors said Underwood wrote a letter notifying the Chinese Ministry of State Security that he had information that would interest the agency. After guards at the MSS office would not allow him to hand-deliver

the letter, Underwood allegedly left the document out in the open in his apartment, in the belief that Chinese agents often searched Americans' residences.

The Justice Department also claimed that in May 2011 Underwood took prohibited photos of the U.S. Consulate building and classified material that was inside.

He also allegedly created a diagram depicting the location of the consulate's surveillance cameras and made a list of the facility's security features.

When FBI agents and representatives from the State Department's Diplomatic Security Service interviewed Underwood Aug. 5, 2011, he admitted that he tried to contact the Chinese government, prosecutors said. However, he falsely claimed his attempts were part of the U.S. law enforcement project at the consulate, according to the information.

In another interview conducted two weeks later Underwood admitted he was trying to sell the classified data, according to the Justice Department.

"Access to classified information is a special responsibility to be honored, not a financial opportunity to be exploited," U.S. Attorney Ronald C. Machen Jr. said in a statement.

Prosecutors add that after Underwood was arrested Sept. 1, 2011, he fled to Los Angeles, where the FBI found him hiding in a hotel and took him into custody. WJ

Related Court Document:
Superseding indictment: 2011 WL 8896399

FERES DOCTRINE

Widow in Alaska air show crash wants case in state court

A woman whose husband died when the Air Force jet he was riding in crashed during preparations for a 2010 air show has moved to remand her case against the state of Alaska after Alaska agreed to dismiss its third-party complaint against the federal government.

Dayton v. State, No. 3:12-cv-00245, remand motion filed (D. Alaska Mar. 8, 2013).

Theresa Dayton's motion to remand the case to state court, filed March 8 in the U.S. District Court for the District of Alaska, says she "has not made, nor does she intend to make, any claim against the United States of America" or under federal law. Now that the federal government is no longer a party to the suit, there is no basis for federal jurisdiction, Dayton says.

The claim arises entirely under Alaska state law, the remand motion says, adding that the suit "does not satisfy any of the categories of [federal] jurisdiction set forth in Article III" of the U.S. Constitution.

Alaska agreed March 5 to drop the third-party complaint it filed against the United States, moving the same day to dismiss the suit in its entirety under the *Feres* doctrine.

In *Feres v. United States*, 340 U.S. 135 (1950), the U.S. Supreme Court held that military service members cannot recover against the federal government under the Federal Tort Claims Act, 28 U.S.C. § 1346, for injuries that occurred incident to their service.

The court extended the *Feres* doctrine in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), holding that it also bars third-party actions against the United States arising from injuries incident to military service.

Dayton's suit arises from the July 28, 2010, crash of a Boeing C-17 during preparations for the Arctic Thunder Air Show at Joint Base Elmendorf-Richardson, near Anchorage. The Alaska Air National Guard, the Air Force and a local nonprofit organization sponsored the show.

The suit says that on the day of the crash, Air Force Maj. Michael Freyholtz deviated from his preapproved flight plan to make his flyby maneuvers more impressive to spectators. According to the complaint, Freyholtz executed a steep bank at dangerously low speeds, a combination that allegedly stalled the engine and caused the plane to crash.

Freyholtz died in the crash, along with Dayton's husband, Senior Master Sgt. Thomas E. Cicardo of the Alaska Air National Guard, and the two other crewmen on board.

In its dismissal motion, Alaska argued that the *Feres* doctrine bars not only federal but also state tort claims incident to military service. "Suits founded on state law have the same potential for undermining military discipline as federal tort claims," the motion says, citing *Jaffee v. United States*, 663 F.2d 1226 (3d Cir. 1981).

"Cicardo was killed while on active duty, flying aboard a military aircraft, being flown by military pilots, performing a military function, on a military base," the motion says. "His death was unquestionably incident to his military service."

Alaska also says Dayton's suit cannot survive because the federal government "certified," in its motion to dismiss the third-party complaint, that all three crewmen on board the flight with Cicardo were "serving in the scope of their federal office or employment. The suit seeks to hold Alaska vicariously liable for the negligence of its employees, which it cannot do because no one on the plane was acting as a state employee, the motion says. WJ

Attorneys:
Plaintiff: Robert M. Libbey, Anchorage, Alaska

Defendant: Assistant Attorney General Jonathan Woodman, Anchorage

Related Court Document:
Motion to remand: 2013 WL 1146744

Judge dismisses injury suits over 'burn pits' in Iraq, Afghanistan

A federal judge in Maryland has dismissed multidistrict litigation against government contractors over alleged personal injuries caused by exposure to toxic fumes from open "burn pits" and contaminated water at U.S. military base camps in Iraq and Afghanistan.

In re KBR Inc. Burn Pit Litigation, No. RWT 09md2083, 2013 WL 709826 (D. Md. Feb. 27, 2013).

U.S. District Judge Roger W. Titus of the District of Maryland granted a renewed motion to dismiss by KBR Inc. and Halliburton Co. on the grounds that the court does not have subject matter jurisdiction to hear "political questions" raised by the suit.

The defendants also have "derivative sovereign immunity" to tort claims in connection with their work for the government under the Federal Tort Claims Act, 28 U.S.C. § 2680(a), as well as immunity under the FTCA for claims related to "combatant activities," the judge held.

The ruling applies to 57 class actions and individual complaints against Halliburton, KBR, Kellogg Brown & Root and Kellogg Brown & Root Services for exposure to emissions from open burning pits and contaminated water in connection with military operations in Iraq and Afghanistan.

REUTERS/Andrew Burton

U.S. Army soldiers watch garbage burn in a pit at Forward Operating Base Azzizulah in Afghanistan Feb. 4. A judge recently dismissed 57 lawsuits filed by military personnel who said they were injured by toxic fumes from the pits.

> The plaintiffs alleged KBR and Halliburton burned vast quantities of unsorted waste, including trucks, petroleum-containing products, human corpses and plastics in enormous open pits at military base camps in Iraq and Afghanistan.

The plaintiffs, most of whom are military personnel, alleged the defendants contracted with the government to provide waste disposal and water treatment services at military bases that adhered to standards set by the Environmental Protection Agency and host country guidelines.

Instead, KBR and Halliburton burned vast quantities of unsorted waste, including trucks, petroleum-containing products, medical waste, human corpses and plastics, in enormous open pits without regard for human health and safety, according to the consolidated complaint.

The defendants also failed to properly treat and chlorinate water supplies on bases and provided unsafe water to U.S. forces, the complaint says.

The Judicial Panel on Multidistrict Litigation transferred the cases to the District Court in 2009 for consolidated pretrial proceedings based on common factual issues.

KBR and Halliburton moved to dismiss the suits in January 2010, asserting they raised political questions that the District Court did not have jurisdiction to resolve.

The defendants also contended they were entitled to derivative sovereign immunity as government contractors under the discretionary-function exception to the FTCA, and their claims were preempted by the FTCA's exception for combatant activities.

The FTCA generally allows plaintiffs to sue the federal government for injuries or death caused by the negligence of government employees acting in their official capacity, with certain exceptions.

The discretionary-function exception provides that a claim cannot be based on an employee's or agency's exercise of, or failure to exercise, a discretionary duty involving

an element of judgment, choice or policy considerations.

The combatant activities exception, 28 U.S.C. § 2680(j), preserves sovereign immunity against any claim arising from combatant activities of the military or naval forces or the Coast Guard during a time of war.

Judge Titus denied the defendants' motion without prejudice in September 2010. He said the court did not have enough information to decide the issues raised by the motion and asked the parties to submit a joint plan for limited jurisdictional discovery.

The judge stayed litigation later that year due to pending decisions by the 4th U.S. Circuit Court of Appeals on related legal issues.

In September 2011 the 4th Circuit ruled in *Taylor v. Kellogg Brown & Root Services Inc.,* 658 F.3d 402 (4th Cir. 2011), that the political question doctrine barred a service member's claim against a government contractor for injuries related to an electric shock at an American military base in Iraq.

The *Taylor* ruling set a two-part inquiry for application of the political question doctrine that asked courts to consider the extent to which a government contractor was under the military's control and whether the military's decisions with respect to the contractor were closely intertwined with national security interests.

KBR and Halliburton filed a renewed motion to dismiss the MDL last June, citing *Taylor* and other legal developments and asserting that the military determined methods of waste disposal and water operations in Iraq and Afghanistan.

Judge Titus said the defendants provided ample evidence to warrant application of the political question doctrine under the factors identified in *Taylor*.

The military made the choice to use open burn pits and oversaw water services, and it would not be appropriate for the court to review military decisions to resolve the plaintiffs' claims, the judge said.

Dismissal is also warranted under derivative sovereign immunity afforded by the discretionary-function exception to the FTCA, he held.

Citing the U.S. Supreme Court's recent ruling in *Filarsky v. Delia,* 132 S. Ct. 1657 (2012), Judge Titus said contractors should not be left "holding the bag" for government employees with whom they worked.

The combatant activities exception to the FTCA also preempts the plaintiffs' claims, as it has long been recognized that the creation and maintenance of military facilities is necessary to sustain combat operations, the judge held.

Granting the motion, Judge Titus said the court was not "unsympathetic" to the plaintiffs' claims, but the appropriate remedies are not available through the judiciary. WJ

Attorneys:
Plaintiffs: Susan L. Burke and Susan M. Sajadi, Burke PLLC, Washington

Defendants: Raymond B. Biagini, Robert A. Matthews and Daniel L. Russell Jr., McKenna, Long & Aldridge, Washington

Related Court Documents:
Memorandum opinion: 2013 WL 709826
Plaintiffs' brief in opposition: 2012 WL 2912717
Motion to dismiss: 2012 WL 2912885
First consolidated MDL complaint: 2010 WL 1944183

F-35 AIRCRAFT

Factbox: U.S., allies plan to buy over 3,100 F-35 fighters

(Reuters) – The United States and its allies plan to buy more than 3,100 new F-35 Joint Strike Fighter warplanes in coming years.

Following is a list of the planned purchases and possible changes, where applicable, according to data provided by Lockheed Martin Corp., the prime contractor for the $396 billion weapons program, and defense officials in the United States and other purchasing countries.

Lockheed is developing three variations for the U.S. military services and eight partner countries that helped fund the plane's development: Britain, Australia, Italy, Turkey, the Netherlands, Denmark, Norway and Canada. Two other countries, Israel and Japan, have also placed orders for the fighter jet.

The conventional landing A-model will be used by the U.S. Air Force and most allies; the B-model, which can take off from shorter runways and land like a helicopter, will be used by the U.S. Marine Corps, Italy and Britain; and the C-model, or carrier variant, will be used by the U.S. Navy and Marine Corps.

U.S. AIR FORCE

The U.S. Air Force plans to buy a total of 1,763 F-35 A-models through 2037. The Air Force has already begun early training of pilots to fly the F-35, and technicians to service the planes, at Eglin Air Force Base in Florida.

The first F-35As have begun to arrive at Nellis Air Force Base near Las Vegas, where the Air Force eventually plans to use 36 F-35s for operational testing and evaluation and training.

REUTERS/Tom Reynolds/Lockheed Martin Corp/Handout

Lockheed Martin Corp. is developing three variations of the F-35 Joint Strike Fighter, shown here, for the U.S. military services and eight partner countries that helped fund the plane's development.

U.S. NAVY

Current plans call for the U.S. Navy to buy 260 C-model F-35s, which have longer wings and a special tailhook that allows them to land on aircraft carriers. Navy officials are evaluating how many F-35 C-models to buy — and on what timetable — since lawmakers have also ordered the Navy to buy 41 new F/A-18 E/F Super Hornets built by Boeing Co. at a cost of about $3.1 billion.

U.S. MARINE CORPS

The Marine Corps, the smallest of the U.S. military branches, plans to buy 340 F-35 B-models and 80 F-35 C-models to replace its current fleet of F/A-18 Hornets, EA-6B Prowlers, and AV-8B Harrier "jump jets."

The Marines aim to start using the new F-35Bs by the end of 2015, if Lockheed completes development of the software it is now working on.

BRITAIN

Britain's Royal Air Force and Royal Navy, which have invested $2 billion to help develop the new warplane, plan to buy a total of 138 F-35 B-models.

Britain has so far committed to buying 48 of the new planes, and remains committed to the F-35 program, but its defense budget remains under pressure.

ITALY

Italy initially planned to buy 131 F-35 fighters, but curtailed its order early last year. Now it is slated to buy 60 F-35A models and 30 F-35Bs, but tough budget pressures in Europe and an inconclusive election could still pare that 90-jet order in coming years, experts say.

Italy has invested heavily in both the F-35 development effort and construction of a final assembly plant being built by Lockheed Martin and Alenia Aeronautica, a unit of Finmeccanica SpA, at Cameri air base in northern Italy.

NETHERLANDS

The Dutch military, which is slated to buy 85 F-35As in coming years, has already ordered two jets that will be used for training. A spokesman for the Dutch defense ministry said the government will finalize its procurement plans for the F-35 this year.

TURKEY

Turkey is slated to buy 100 F-35As. It recently delayed by two years its first order for two jets.

AUSTRALIA

Australia is slated to buy 100 F-35As, but experts say it could reduce its order by 30 to 50 jets, given delays in the expected fielding of the new plane. It is expected to decide later this year whether to buy 24 more Boeing Co F/A-18 E/F Super Hornets.

NORWAY

Norway, which has a growing defense budget unlike many of its European neighbors, plans to buy 52 F-35A fighter jets at a total projected cost of $10 billion, the country's biggest weapons procurement.

DENMARK

Denmark is slated to buy 30 F-35As.

CANADA

Canada, one of the eight international development partners on the F-35 program, was to buy 65 F-35 A-model fighter jets for C$9 billion, but announced in December that it would evaluate all available options for new fighters.

The announcement was intended to put an end to growing controversy about the government's decision to buy the F-35 without an open competition. A spending watchdog said the decision to buy the F-35s was based on bad data from officials, who deliberately downplayed the costs and risks of the program.

Canada has not formally withdrawn from the F-35 program and still has a representative at the program's offices near the Pentagon.

ISRAEL

Israel has ordered 19 F-35 jets, and plans to order up to 75 jets in coming years.

JAPAN

Japan announced in December 2011 that it was ordering 42 F-35 A-model jets.

A senior official at Japan's Defense Ministry said it was keeping a close eye on cost and schedule risks on the program, but there were no plans to change Tokyo's order. WJ

(Reporting by Andrea Shalal-Esa; additional reporting by Ivana Sekularac in Amsterdam and Kiyoshi Takenaka in Tokyo)

NEWS IN BRIEF

VIRGINIA ENVIRONMENTAL FIRM WINS CLEANUP JOB WORTH UP TO $100 MILLION

The Navy has chosen Virginia-based Tetra Tech EC Inc. to perform environmental cleanup work under a contract that may be worth up to $100 million depending on the tasks ordered by the government. The U.S. Department of Defense said in a March 14 statement that the company would work at Navy facilities in Connecticut, Maine, Massachusetts, Maryland, North Carolina, Pennsylvania, Virginia and Washington, D.C., as well as in Puerto Rico and Africa. The contract, which runs until March 2018, also requires Tetra Tech to work in other locations if requested by the Navy. The Defense Department said the company beat out two other bidders for the job.

OHIO COMPANY TO SUPPLY AFGHANISTAN WITH METAL DETECTORS

The U.S. Department of Defense said in a March 13 statement that Ohio-based CEIA USA Ltd. has won a Navy contract to supply metal detectors and related equipment to Afghanistan. The $33 million contract is part of the federal government's Foreign Military Sales Program. Under the program, the United States obtains supplies from contractors and sells them to friendly foreign nations. CEIA will perform the work at a facility in Italy until the contract ends in September, according to the Defense Department.

DEFENSE AGENCY ORDERS MILITARY CLOTHING FROM 2 FIRMS

Florida-based Tennier Industries Inc. and Puerto Rico-based API LLC will be supplying the Defense Logistics Agency with military clothing under newly awarded contracts, according to a March 19 U.S. Department of Defense statement. Tennier will receive more than $16.5 million to provide the Army with jackets for use in extreme cold and wet weather, while API is being paid $11.6 million for Army combat uniform camouflage coats. The Defense Department said it expects both companies to complete the jobs by March 2014.

CASE AND DOCUMENT INDEX