Weil

FCA Watch

Summaries for Weil's FCA Watch – March 2014

By Alea Mitchell

DOJ Announces $3.8B Recovered in FY 2013 False Claims Act Actions

In its year-end review, the Department of Justice (DOJ) announced that it secured $3.8 billion in recoveries under the False Claims Act (FCA) during fiscal year 2013. This is the second-largest annual recovery of its type in history.

As in previous years, the largest FCA recoveries in 2013 arose from cases alleging health care fraud. The $2.6 billion in federal health care recoveries raised the DOJ's total recovered health care dollars since the Fraud Enforcement and Recovery Act (FERA) amendments were passed in 2009 to $12.1 billion. The department recovered an additional $443 million in 2013 for state Medicaid programs. FCA cases alleging procurement fraud, relating primarily to defense contracts, added an additional $890 million to the 2013 total – an FCA recovery record in that sector.

Of the $3.8 billion recovered, $2.9 billion came from *qui tam* actions filed by private citizens on behalf of the government, underscoring the huge role played by whistleblowers post-FERA in bringing FCA claims. The number of *qui tam* suits filed in 2013 soared to 752 – 100 more than the record set in fiscal year 2012. The DOJ paid out approximately $345 million in whistleblower awards.

CMS Delays Sunshine Act Reporting Deadline

The Centers for Medicare and Medicaid Services (CMS) has relaxed the deadline for submitting 2013 data under the Physician Payment Sunshine Act.

Under a new reporting process, drugmakers will be required to register and submit aggregate data about payments made to physicians and teaching hospitals, including gifts, dinners, and honoraria. The original deadline was March 31. CMS now says the industry will not have to submit detailed information on payments until sometime in May.

Eighth Circuit Endorses Fraud-in-the-Inducement Claim, Potentially Widening FCA's Scope

In *In re Baycol Prods. Litig.*, 732 F.3d 869 (8th Cir. 2013), the Eighth Circuit endorsed a controversial fraud-in-the-inducement theory of FCA liability

that could theoretically allow the federal government to recoup every payment it makes to contractors who engage in allegedly misleading conduct when negotiating contracts with the government.

In a nonintervention *qui tam* action, relator Laurie Simpson alleged that Bayer AG fraudulently induced the Department of Defense (DOD) to enter into contracts to purchase the cholesterol drug Baycol by downplaying the relationship between the drug and development of a serious muscle disorder. Simpson presented no evidence of specific claims made to the government for payment but instead alleged that, had the DOD known the true risks associated with Baycol, it would not have entered into the contracts. Thus, according to the relator's theory, every dollar the government spent under the contracts was recoverable under the FCA.

The district court dismissed the complaint on the basis that it failed to satisfy Fed. R. Civ. P. 9(b). The Eighth Circuit disagreed in part, concluding that under a fraud-in-the-inducement theory, claims for payment submitted under a contract initially induced by fraud do not have to be false or fraudulent in and of themselves in order to state a cause of action under the FCA.

This holding vastly increases the possible damages at issue. Typically in FCA suits, damages are calculated by determining the difference between what the government paid and the value of what it received. Under this fraud-in-the-inducement theory, however, the government could potentially claw back every dollar it spent under the contract, even if it received a benefit.

Second Circuit Upholds Bar to Ex-Attorney's *Qui Tam* Suit

In *U.S. v. Quest Diagnostics Inc.*, 734 F.3d 154 (2nd Cir. 2013), the Second Circuit upheld a district court decision that a former general counsel violated the New York Rules of Professional Conduct (NY Rules) by joining a *qui tam* action and broadly disclosing confidential information of a former client.

In the underlying suit, former general counsel Mark Bibi and two former executives brought a *qui tam* action pursuant to the FCA against former employers Unilab Corp. and Quest Diagnostics for allegedly violating the Anti-Kickback Statute. The district court dismissed the action and disqualified Bibi, his co-plaintiffs, and their lawyers from bringing a subsequent action on the basis that the suit was brought in violation of the former general counsel's ethical obligations under the NY Rules.

The Second Circuit upheld this decision, agreeing that the confidential information divulged by Bibi was greater than reasonably necessary to prevent any alleged fraudulent scheme and therefore violated NY Rule 1.6(b). The Second Circuit further agreed that disqualification of Bibi's co-relators and their counsel was appropriate because they were tainted by exposure to confidential information.

White Paper Proposes Reforms to Fix the False Claims Act

The US Chamber Institute for Legal Reform posits that while the FCA is useful for punishing fraud against the United States, it is ineffective at preventing it.

Therefore, the Chamber Institute proposed various FCA amendments in *Fixing the False Claims Act: The Case for Compliance-Focused Reforms* to, among other things: (1) better promote compliance with existing laws; (2) incentivize companies to self-report; and (3) remove perceived incentives for relators to file frivolous lawsuits to extract settlements.

The amendments are designed to encourage companies to establish rigorous "gold standard" compliance programs, certified by third-party auditors. Benefits to companies for implementing such programs would include, among other things, lower total damages that would be based on a sliding scale.

Court Permits FIRREA and FCA Claims to Battle Bank Fraud

In *U.S. v. Wells Fargo Bank, N.A.*, 12 CIV. 7527 JMF, 2013 WL 5312564 (S.D.N.Y. Sept. 24, 2013), US District Judge Jesse Furman refused to dismiss an action filed by the US Department of Justice (DOJ) against Wells Fargo Bank alleging that the bank defrauded a government insurer by knowingly certifying that mortgages satisfied Federal Housing

Administration requirements despite their high risk of default. Judge Furman's ruling permits the DOJ to pursue claims pursuant to the FCA and the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA).

FIRREA, a statute enacted in 1989 in response to the savings and loan crisis, has been revived by the DOJ to prosecute claims arising out of the recent financial crisis. It provides civil penalties for certain criminal violations "affecting" a federally insured financial institution, including fraud. The statute has a ten-year statute of limitations period, the possibility of civil penalties of up to $1 million per violation and $5 million for continuing violations, and a "preponderance of the evidence" standard of proof.

Wells Fargo had moved to dismiss the FCA and FIRREA claims on statute of limitation grounds, which the court rejected based in part on the applicability of the Wartime Suspension of Limitations Act (WSLA). The WSLA suspends the statute of limitations for offenses involving fraud against the United States when the country is at war or Congress has enacted a specific authorization for the use of the armed forces.

Wells Fargo also contended that the FIRREA claims should be dismissed on the ground that the only financial institution the government alleged was affected was Wells Fargo itself, and such misconduct was not contemplated by the statute. The court again disagreed, concluding that the text of the statute did not exempt those financial institutions that perpetrate fraud that affects themselves.

This case is part of a larger trend of FCA and FIRREA claims being brought together in complaints against companies in the financial services sector. It also is part of a controversial trend of applying the WSLA to extend the statute of limitations in FCA cases unrelated to military contracting.

FCA Watch is published by the Litigation Department of Weil, Gotshal, & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

If you have any questions concerning the contents of this issue, or would like more information about Weil's False Claims practice, please speak to your regular contact at Weil, or to the editors or authors listed below:

Editors:

Lori Pines (NY)	Bio Page	lori.pines@weil.com	+1 212 310 8692
Steve Reiss (NY)	Bio Page	steven.reiss@weil.com	+1 212 310 8174

Associate Editors:

Nadya Salcedo (NY)	Bio Page	nadya.salcedo@weil.com	+1 212 310 8403
Kristen Echemendia (DC)	Bio Page	kristen.echemendia@weil.com	+1 202 682 7006

Authors:

Alea Mitchell (NY)	Bio Page	alea.mitchell@weil.com	+1 212 310 8387

© 2014 Weil, Gotshal & Manges LLP. All rights reserved. Quotation with attribution is permitted. This publication provides general information and should not be used or taken as legal advice for specific situations that depend on the evaluation of precise factual circumstances. The views expressed in these articles reflect those of the authors and not necessarily the views of Weil, Gotshal & Manges LLP. If you would like to add a colleague to our mailing list, please click here. If you need to change or remove your name from our mailing list, send an email to weil.alerts@weil.com.