

Outside Counsel

Expert Analysis

Department of Justice Broadens Use of False Claims Act

In a Dec. 4, 2012, press release, the Department of Justice triumphantly announced a record \$4.9 billion total recovery for False Claims Act (FCA) cases, 31 U.S.C. §§3729-33.¹ Attorney General Eric Holder pledged to increase the Justice Department's resources and remain vigilant in prosecuting false claims in the future.² Moreover, the attorney general praised the "brave individuals" who acted as whistleblowers and brought qui tam actions against alleged violators.³ In addition to receiving kudos from the Justice Department, these whistleblowers (and their attorneys) obtained a sizable slice of the money recovered by the government in this banner year of FCA enforcement activity.⁴

For example, in May 2012, after the Justice Department announced a settlement with the nation's largest mortgage servicers to resolve allegations that they fabricated mortgage assignments and other servicing abuses, a single whistleblower took home more than \$18 million from the proceeds of the settlement.⁵ And, in October 2012, a sole relator, the FCA term for private parties, who initiated the underlying qui tam action against a pharmaceutical company alleging off-label drug promotion and kick-

MARY E. MULLIGAN is a partner at Friedman Kaplan Seiler & Adelman and a former federal prosecutor. TANVIRVAHORA, an associate at the firm whose bar admission is pending, assisted in the preparation of this article. Mulligan can be reached at mmulligan@fklaw.com.

By
**Mary E.
Mulligan**



backs received more than \$17 million after the claims were settled with the Justice Department.⁶

Unsurprisingly, practitioners have predicted 2013 to be another record year for FCA judgments obtained by the Justice Department and whistleblowers. With the news that Holder will remain in his position in the Obama administration and in light of the staggering amounts recovered by whistleblowers likely to entice the plaintiffs' bar to initiate more cases,⁷ 2013 will likely be another record-setting year for FCA enforcement activities.

An important trend is worth examining in this expanding FCA landscape, aside from the sheer increase in the volume of cases. Specifically, the Justice Department has branched out its enforcement activities to reach companies, organizations and individuals that once thought themselves safe from FCA scrutiny. While health care fraud and pharmaceuticals have been the traditional "bread and butter" of whistleblower and Justice Department actions in the recent past, any entity

or individual receiving federal funds is at risk.⁸ These potential defendants include banks, educational institutions, non-profit organizations, contractors, grant recipients and others that may not be accustomed to defending FCA actions.

These trends in FCA enforcement make it clear that any company or organization receiving federal funds should devise strategies and preventative measures to protect themselves from FCA lawsuits. Further, should a whistleblower or federal investigation emerge, companies and organizations should have a first-response plan in place to avoid becoming a statistic for the government's next press release.

False Claims Act: a Primer

The False Claims Act, originally signed into law by President Abraham Lincoln in 1863, was strengthened by Congress in 1986 to serve as a major anti-fraud whistleblower law.⁹ The FCA prohibits submitting a false claim for payment by the federal government. This includes "submitting or causing another to submit to a false statement or record in support of a false claim."¹⁰

Liability under the FCA is a battlefield with multiple fronts. While the Department of Justice may independently prosecute FCA violators, individuals and whistleblowers may also bring suit on behalf of the government, pursuant to the qui tam provision of the FCA.¹¹ These relators (and their attorneys) share in

up to 30 percent of any recovery made in cases where the government does not intervene and from 15 percent to 25 percent of the money recovered if the government intervenes and takes control of the action. A relator is also entitled to recover attorney fees and costs. In fiscal year 2012, about 80 percent of the 782 new FCA matters opened during the 2012 fiscal year were initiated pursuant to FCA's qui tam provisions.¹² Additionally, the FCA has multiple state and municipal counterparts, which places organizations receiving funds from any government entity at risk.

Violation of the FCA carries a civil penalty of not less than \$5,500 and no more than \$11,000 for each claim.¹³ More importantly, the FCA imposes liability equal to triple the amount of damages suffered by the government.¹⁴ While the government intervenes in only two out of 10 qui tam actions filed, the government's decision is a key indicator of the size of the recovery. By way of example, of the \$4.9 billion recovered by the government in fiscal year 2012, less than 1 percent was from qui tam actions in which the government declined to intervene.¹⁵

Enforcement Branches Out

The FCA's reach is extensive. Just ask Lance Armstrong. The disgraced cyclist, now stripped of his Tour de France jerseys as well as most public goodwill, was named as a defendant in a 2010 qui tam action filed in the District Court for the District of Columbia by former fellow teammate Floyd Landis.¹⁶ The qui tam complaint (under seal but later leaked to the media) alleged Armstrong made false statements in connection with doping, and thereby defrauded the U.S. Postal Service of the \$30 million sponsorship contract for the Tour de France team.¹⁷ On Feb. 22, 2013, the Justice Department announced that it will intervene in the whistleblower lawsuit filed by Landis ending months of speculation as to whether the Justice Department would enter the fray.¹⁸

Landis' complaint alleges that Armstrong and his associates violated the terms of their contractual agreement

with the Postal Service by using banned performance-enhancing drugs and fraudulently received more than \$30 million from the Postal Service based on their contractual agreement to play fair and abide by the rules. The government's intervention in the whistleblower lawsuit is a huge boost for Landis, and dramatically increases his chance of taking home a sizable recovery. This case will be closely watched by FCA practitioners and the media in the coming year.¹⁹

Practitioners have predicted 2013 to be another record year for FCA judgments obtained by the Justice Department and whistleblowers.

Closer to home, the Justice Department is expanding its reach to companies and organizations doing business in New York that previously did not face extensive False Claims Act scrutiny. While the health care and pharmaceutical industries remain the top source of FCA recovery funds, the Justice Department has not hesitated to prosecute companies in other sectors, including the financial industry (particularly institutions involved in mortgage-backed securities), not-for-profit organizations, and educational institutions. The Justice Department's expanded reach follows the implementation of legislative changes to the FCA in 2009 which broadened its scope to cover government contractors or grant recipients who submit false or fraudulent claims for federal projects or programs. Even subcontractors on government projects are now potential targets of the FCA. The following is a brief synopsis of significant FCA settlements announced during 2012 in the Eastern and Southern districts of New York:

Financial Industry

Bank of America and Countrywide. The Justice Department alleged that Bank of America and Country-

wide knowingly made loans insured by the Federal Housing Administration (FHA) to unqualified buyers, and that the banks inflated home appraisals on government-backed loans. In February 2012, the U.S. Attorney's Office for the Eastern District of New York announced the two companies settled with the government for \$1 billion. Half the sum would be an immediate payment to the government for harm inflicted on the FHA, and the other \$500 million would be deferred to a loan modification program to eligible borrowers. After three years, any remaining sum in the loan modification program would go to the government.²⁰

CitiMortgage. CitiMortgage participated in the FHA's Direct Endorsement Lender Program, a program that authorizes private entities to approve mortgage loans for insurance by the FHA. In a civil fraud lawsuit, the Justice Department alleged that CitiMortgage falsely certified that 30,000 mortgages complied with FHA requirements when they did not and misled the government into insuring risky loans for six years. On Feb. 15, 2012, CitiMortgage settled the claims for \$158.3 million.²¹

Flagstar. Flagstar Bank, one of the largest savings banks and mortgage loan originators in the country, admitted and accepted responsibility for the submission of false certifications to the U.S. Department of Housing and Urban Development (HUD). The false certifications induced the government to insure improper loans that later defaulted. Flagstar settled with the Justice Department for \$132.8 million in February 2012.²²

Deutsche Bank and MortgageIT. The Justice Department alleged that Deutsche Bank and its wholly owned subsidiary, MortgageIT, falsely certified loans to HUD for federal insurance, thousands of which defaulted. In May 2012, Deutsche Bank and MortgageIT settled with the Justice Department for more than \$202 million, and admitted to and accepted responsibility for misconduct as part of the settlement.²³

Not-for-Profit Organizations

Structured Employment Economic Development Corporation (SEEDCO):

On Dec. 18, 2012, the Justice Department announced that SEEDCO, a not-for-profit organization that operates Workplace Career Centers in New York City, agreed to a \$1.725 million settlement. SEEDCO and seven of its managers were accused of fraud in connection with a federally funded program to provide job placement assistance to unemployed New York City residents. Among other things, the Justice Department accused SEEDCO of routinely falsifying entries in the government job placement reporting database.²⁴

The Justice Department is not only initiating or intervening in more FCA actions, it is expanding its scrutiny to any company or organization receiving federal funds, including government contractors and grant recipients.

Biotechnology

Amgen. In December 2012, Amgen, a biotechnology company, agreed to pay \$762 million to settle allegations that it promoted the off-label marketing and use of an anemia drug and other products.²⁵ In the civil settlement, which resolves claims in 10 separate qui tam lawsuits, Amgen agreed to pay \$612 million with the bulk going to the federal government and the remainder to individual states.

The criminal settlement included a guilty plea to a misdemeanor charge, a criminal fine of \$136 million and forfeiture of \$14 million. In addition to the monetary settlements, Amgen agreed to a Corporate Integrity Agreement and compliance reform.

Education Industry

Princeton Review: On Dec. 20, 2012, Princeton Review admitted to falsifying attendance records to obtain reimbursement from a federal program intended

to provide tutoring services for underprivileged children and agreed to pay \$10 million to settle these allegations.²⁶

New York Institute of Technology (NYIT)/Cardean Learning Group: On Dec. 27, 2012, NYIT, a not-for-profit university in New York, and Cardean, a for-profit online education provider, paid a total of \$4 million to resolve allegations that they provided improper compensation for recruiters, thereby violating the terms of federal student loans and grants agreements with the U.S. Department of Education.²⁷

These cases are only a snapshot of the FCA claims brought against a diverse group of defendants in New York, and all within the last year. The Justice Department is not only initiating or intervening in more FCA actions, it is expanding its scrutiny to any company or organization receiving federal funds, including government contractors and grant recipients.

Conclusion

The False Claims Act has become the Justice Department's "most powerful tool" to deter fraud. For 2013, companies and organizations contracting with federal and/or state governments should be on continued alert for these increasingly potent and proliferating cases. Further, companies and organizations that historically have not been defendants could face greater liability as the Justice Department and whistleblowers become more ambitious in testing the scope and strength of the FCA.

.....●.....

1. See Press Release, Office of Pub. Affairs, U.S. Dept. of Justice, Justice Department Recovers Nearly \$5 Billion False Claims Act Cases in Fiscal Year 2012 (Dec. 4, 2012), <http://www.justice.gov/opa/pr/2012/December/12-ag-1439.html> ("Dec. 4, 2012 Press Release").

2. *Id.* at 1 ("I'm confident that we will continue to build on this historic progress in the months and years ahead.")

3. *Id.* at 4.

4. *Id.*

5. See Press Notice, U.S. Attorney's Office, D.S.C., \$95 Million Settlement with the Nation's Five Largest Mortgage Servicers Partially Resolves South Carolina False Claims Act Lawsuit (March 9, 2012).

6. See Press Release, Office of Pub. Affairs, U.S. Dept. of Justice, Boehringer Ingelheim to Pay \$95 Million to Resolve False Claims Act Allegations (Oct. 25, 2012), <http://www.justice.gov/opa/pr/2012/October/12-civ-1291.html>.

7. Ryu Spaeth, "Why is Eric Holder Staying at the Justice Department?" *The Week* (Jan. 9, 2013), <http://theweek.com/article/index/238596/why-is-eric-holder-staying-at-the-justice-department>.

8. 31 U.S.C. §§3729(a).

9. 31 U.S.C. §§3729-3733; Dec. 4, 2012 Press Release at 1.

10. 31 U.S.C. §§3729(a).

11. 31 U.S.C. §3730(b).

12. See Fraud Statistics, U.S. Dept. of Justice (Oct. 24, 2012), http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf ("Fraud Statistics").

13. 31 U.S.C. §§3729(a).

14. *Id.*

15. See Fraud Statistics, *supra* note 10.

16. Reed Albergotti, "Feds Ponder Joining Suit Against Armstrong," *Wall St. J. Sports* (Dec. 10, 2012, 5:13 PM), <http://online.wsj.com/article/SB10001424127887323339704578171551137193218.html>.

17. https://docs.google.com/file/d/0B0UaqYGyOz2SQ3FGLXBCaT_VwNDQ/edit?pli=1 (via NEW YORK DAILY NEWS).

18. Michael Martinez, "Feds Join Whistle-Blower Lawsuit Against Lance Armstrong," *CNN* (Feb. 22, 2013, 9:01 PM), <http://www.cnn.com/2013/02/22/us/doj-armstrong-lawsuit>.

19. Terri Thompson, Christian Red, et al., "Attorney General Eric Holder Will Decide Whether to Join Whistleblower Lawsuit Against Lance Armstrong," *New York Daily News* (Jan. 15, 2013, 6:07 PM), <http://www.nydailynews.com/sports/i-team/lance-legal-fate-rests-ag-holder-hands-article-1.1240710>.

20. See Press Release, U.S. Attorney's Office, E.D.N.Y., U.S. Dept. of Justice, "\$1 Billion To Be Paid by the Bank of the America to the United States; Largest False Claims Act Settlement Relating to Mortgage Fraud" (Feb. 9, 2012), <http://www.justice.gov/usao/nye/pr/2012/2012feb09.html>.

21. See Press Release, U.S. Attorney's Office, S.D.N.Y., U.S. Dept. of Justice, "Manhattan U.S. Attorney Files and Simultaneously Settles Fraud Lawsuit with Citimortgage, Inc. for Reckless Mortgage Lending Practices" (Feb. 15, 2012), <http://www.justice.gov/usao/nys/pressreleases/February12/citimortgageincsettlementpr.pdf>; Stipulation and Order of Settlement and Release between the United States of America and the Relator, *United States v. Citigroup*, No. 11-Civ-5473 (S.D.N.Y. Feb. 15, 2012).

22. See Press Release, U.S. Attorney's Office, S.D.N.Y., U.S. Dept. of Justice, "Manhattan U.S. Attorney Sues Flagstar Bank for Fraudulent Mortgage Lending Practices and Settles for \$132.8 Million and Other Concessions" (Feb. 24, 2012), <http://www.justice.gov/usao/nys/pressreleases/February12/flagstarbanksettlement.html>.

23. See Press Release, U.S. Attorney's Office, S.D.N.Y., U.S. Dept. of Justice, "Manhattan U.S. Attorney Recovered \$202.3 Million From Deutsche Bank and MortgageIT In Civil Fraud Case Alleging Reckless Mortgage Lending Practices and False Certifications to HUD" (May 10, 2012), <http://www.justice.gov/usao/nys/pressreleases/May12/deutschebankmortgageitsettlement.html>.

24. See Consent Dec., *United States ex rel. Doe v. Structured Employment Economic Development*, No. 1:11-cv-06425-AKH (Dec. 18, 2012).

25. See Press Release, Office of Pub. Affairs, U.S. Dept. of Justice, "Amgen Inc. Pleads Guilty to Federal Charge in Brooklyn, NY; Pays \$762 Million to Resolve Criminal Liability and False Claims Act Allegations" (Dec. 19, 2012), <http://www.justice.gov/opa/pr/2012/December/12-civ-1523.html>.

26. See Press Release, U.S. Attorney's Office, S.D.N.Y., Manhattan U.S. Attorney Announces Settlement of Claims That Princeton Review Fabricated Attendance Records for Thousands of Hours of Tutoring to Children That was Paid for with Federal Funds (Dec. 20, 2012), <http://www.justice.gov/usao/nys/pressreleases/December12/PrincetonReviewSettlement.php>.

27. See Press Release, U.S. Attorney's Office, S.D.N.Y., Manhattan U.S. Attorney Announces \$4 Million Fraud Settlement with New York Institute of Technology and Cardean Learning Group, LLC (Dec. 27, 2012), <http://www.justice.gov/usao/nys/pressreleases/December12/NYITSettlementPR.php>.