

## Whistleblower Watch

### A quarterly update on FCA Enforcement and Qui Tam Litigation

*Whistleblower Watch* is a comprehensive source for all False Claims Act (FCA) news and information. Every quarter, Cozen O'Connor will provide in-house counsel and compliance professionals with a summary of the most notable FCA enforcement actions, settlements, and legal trends, as well as an in-depth look at emerging and significant FCA-related issues. *Subscribe* to stay on top of these changes and find out how they may affect you.

#### Recent FCA Settlements and Enforcement Actions

##### Pharmacists, False Claims, and the Controlled Substances Act (Eastern District of Pennsylvania)

On August 1, 2023, Future Pharmacy, JJ Pharmacy, and their owners agreed to pay \$3.5 million and to submit to a 5-year federal healthcare exclusion to settle civil claims under the FCA and Controlled Substances Act. The settlement resolves allegations that the pharmacies billed Medicare for drugs that were never disbursed to patients and filled other prescriptions without proper documentation.

##### Misrepresenting the Capabilities of Electronic Health Record Software (District of Vermont)

The Government's focus on healthcare technology enforcement using multi-office investigations continues, exemplified by a recent settlement by software company NextGen Healthcare, Inc. On July 13, 2023, NextGen agreed to pay \$31 million to settle claims that it defrauded the Government and customers about the capabilities of its Electronic Health Records (EHR) software. In order to qualify for EHR subsidies to incentivize healthcare providers to adopt robust EHR platforms, NextGen represented that its software met all of the criteria for the federal program. However, the NextGen software lacked key functionality, and the company instead included coding designed to fool the compliance tests and make it appear that its software included capabilities that it did not.

##### Customer Satisfaction with Government Websites (Eastern District of Michigan)

On July 21, 2023, the technological consulting company Foresee Results, Inc. agreed to pay \$7 million to settle claims that it had defrauded the Government by using unreliable methods to measure consumer satisfaction with certain Government websites hosted by the Department of the Interior. The Government claims that Foresee represented that it would use the American Customer Satisfaction Index but instead used other, less costly indices. The settlement is part of an effort at the Department of Justice, led by the Procurement Collusion Strike Force, to increase enforcement of noncompliance with contract terms and representations.

##### The Largest Procurement Fraud Settlement in History? (District for the District of Columbia)

On July 21, 2023, defense contractor Booz Allen Hamilton Holding Corporation agreed to pay more than \$377 million to resolve allegations that it improperly charged non-contract costs to the Government over the course of 10 years. The Government claimed that Booz Allen used bogus accounting methods to improperly charge costs to Government contracts that were related to its commercial and international business and had no significant nexus with its Government work. The settlement arises from a qui tam action and is likely the largest procurement fraud settlement in the history of the FCA.



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#### Related Practice Areas

- White Collar Defense & Investigations

## Legal Trends and Insights

### A Circuit Split on Kickbacks

How closely connected does a Medicare claim need to be with a kickback to support an FCA claim? That issue is currently the subject of a circuit split – the Sixth and Eighth Circuits require but-for causation, but the First and Third Circuits have held that only “some” of a “sufficient” connection is required for FCA liability. That split will take center stage in *United States v. Teva*, which is scheduled for trial in mid-September in the United States District Court for the District of Massachusetts. The stakes could not be higher for Teva, which faces more than \$10 billion in potential liability. We will continue to follow this trial and the circuit split on the interplay of the FCA and Anti-Kickback Statute. Read more about the case against Teva [here](#).

### Is Corrupt Intent Required?

Pfizer’s defense against FCA claims asserted by the Government in the District of Virginia will require the court to determine whether kickbacks require “corrupt intent.” The Government claims relate to Pfizer’s financial assistance program, which provides funds to certain patients, including Medicare beneficiaries, to help pay for the pharmaceutical company’s most expensive drugs. The Government claims that the payments constitute kickbacks because some patients would not purchase certain Pfizer medications without the financial assistance, and therefore the Pfizer payments act as an “inducement.” However, Pfizer argues that there is no corrupt intent, which is required for AKS liability, relying on the Supreme Court’s ruling last term interpreting similar language in the immigration context.

### A Deeper Dive

#### The Emergence of Data Analytics in FCA Enforcement

2023 has seen a continued increase in reliance upon data analytics and artificial intelligence in FCA enforcement matters. While these nuanced technologies are undoubtedly beneficial, they have not come without resistance from the courts. For an in-depth analysis of the role of data analytics in FCA enforcement, click [here](#).

#### The Court Clarifies the FCA Scienter Standard

As we have all now seen, the Court recently clarified that a defendant’s subjective beliefs must be considered in determining whether they “knowingly” violated the FCA. We take a closer look at the Court’s landmark decision in *U.S. ex rel. Proctor v. Safeway Inc. and U.S. ex rel. Schutte et al. v. SuperValu Inc.* [here](#). And check out our prior coverage of the cases [here](#) and [here](#).

#### The Court Affirms Government’s Right to Intervene

As previously reported, the Court recently confirmed that the Government may intervene and move to dismiss an FCA lawsuit at any time during the pendency of the case. For a closer look at our prior coverage of the *U.S. ex rel. Polansky v. Executive Health Resources, Inc.* decision, click [here](#).

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