

## 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

##### Diagnostic Testing Facility Settles Claims for Kickbacks to Physicians for Patient Referrals (Southern District of New York)

Balance Diagnostics USA, LLC, a diagnostic testing facility, agreed to pay \$2.5 million to settle civil claims under the FCA and Anti-Kickback Statute (AKS) arising out of payments to physicians and their medical practices in exchange for patient referrals. The Government alleged that, from January 2009 through December 2019, Balance made payments of hundreds of thousands of dollars in the form of sham rent payments to over 100 physicians and their practices to induce them to refer patients for diagnostic testing services performed by Balance's staff at the physicians' offices. According to the Government, the rent payments were based solely on the number of patient referrals and were far above market value for the space utilized. Balance admitted and accepted responsibility for the alleged conduct. Under similar circumstances, an Illinois medical equipment provider was recently convicted of eight counts of wire fraud for paying kickbacks to a U.S. Department of Veterans Affairs clerk in exchange for bogus monthly rental fees. These cases show the Government is scrutinizing ancillary relationships and contracts and examining the substance of business relationships rather than merely on their form.

##### Hospital Pays Largest FCA Recovery in Massachusetts History (District of Massachusetts)

Cape Cod Hospital agreed to pay \$24.3 million to settle civil claims under the FCA arising from claims it violated Medicare rules requiring one or two cardiologists to independently examine the patient to determine if a heart valve replacement is needed and documentation of that decision. Investigating a whistleblower's tip, the Government concluded that half of the hospital's 800 claims for transcatheter aortic-valve replacements from November 2015 through December 2022 were in violation of those rules. The hospital paid \$24.3 million to the Government, with \$4.3 million going to the whistleblower, marking it the largest FCA recovery from a Massachusetts hospital in history. Cape Cod Hospital also agreed to enter into a five-year corporate integrity agreement authorizing the U.S. Department of Health and Human Services to review its Medicare claims. Notably, the hospital received credit under DOJ Guidelines for voluntarily producing materials, identifying relevant documents, and voluntarily implementing remedial measures.

##### Online Lender Resolves Claims For Inflated Loans (District of Massachusetts, Eastern District of Texas)

Now-bankrupt online lender Kabbage Inc. has agreed to pay \$120 million in two separate agreements to resolve allegations relating to thousands of false claims for loan forgiveness and operating without adequate fraud controls. The first settlement, for \$63 million, resolved allegations it violated the FCA by knowingly inflating loans to maximize processing fees. According to the Government, Kabbage double-counted state and local taxes employees paid in determining



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#### Related Practice Areas

- White Collar Defense & Investigations

borrowers' gross wages, which increased the loan amount, and resulted in excess processing fees. The second settlement, for \$57 million, resolved allegations that Kabbage had inadequate fraud controls in place in violation of its obligations under the Paycheck Protection Program (PPP).

## **Nuclear Plant Contractor Settles FCA Claims for Submission of Time Not Worked (Northern District of Texas)**

Consolidated Nuclear Security LLC (CNS) has agreed to pay \$18.4 million to resolve allegations under the FCA that its product technicians at an Amarillo, Texas plant recorded hours they never worked. Pursuant to a federal contract with the U.S. Department of Energy, CNS operated the plant for the assembly, disassembly, and retrofitting of nuclear weapons. According to the Government, from July 2014 through June 2020, CNS received payment for time worked based on falsified time sheets submitted by some of the plant's technicians. CNS cooperated with the investigation and fired the employees at issue, resulting in a credit for taking disclosure, cooperation, and remediation into account.

## **LEGAL TRENDS AND INSIGHTS**

### **DOJ Health Care Fraud Enforcement Action Results in Unprecedented Recovery**

On June 27, 2024, the DOJ announced that its National Health Care Fraud Enforcement Action resulted in 193 defendants charged and over \$2.75 billion in false claims. Those 193 defendants included 76 doctors, nurse practitioners, and other licensed medical professionals in 32 different federal districts across the country. The enforcement action was led and coordinated by the Health Care Fraud Unit of the Criminal Division's Fraud Section together with U.S. Attorneys' Offices, the Department of Health and Human Services Offices of Inspector General, FBI, and Drug Enforcement Administration. The charges alleged include a fraud scheme in connection with amniotic wound grafts, the unlawful distribution of millions of prescription drugs by individuals associated with a digital technology company, the distribution of adulterated and misbranded HIV medication, fraudulent addiction treatment schemes, telemedicine, and laboratory fraud, and healthcare fraud and opioid schemes. Notably, these actions were achieved, in part, by the Health Care Fraud Unit's Data Analytics Team, which used cutting-edge data analytics to identify and support the investigations leading to these charges. For further insight into the Government's use of data analytics in FCA healthcare enforcement actions, [click here](#). For more information on how healthcare continues to drive FCA enforcement, [click here](#), [here](#), and [here](#).

### **Use of Patent Reviews in FCA Claims Goes Before the Supreme Court**

Valeant Pharmaceuticals is headed to the Supreme Court to attempt to resolve a Circuit split over whether information cited in Patent Trial and Appeals Board (PTAB) reviews can be later used by whistleblowers in FCA lawsuits under the public disclosure bar. Since 2018, Valeant has been defending allegations that it overcharged Medicare, Medicaid, and other programs for sales of an ulcerative colitis drug based on the whistleblower's allegations that it held a monopoly over the drug using patent claims that judges at the PTAB later found were invalid. In January, the Ninth Circuit denied Valeant's request to review its decision to revive the whistleblower's suit, leading to Valeant's April Petition. For more coverage of the case, [click here](#) and [here](#).

### **Increased Focus on Procurement Fraud in Department of Defense Contracts**

The Department of Defense's (DOD) Office of Inspector General recently announced an increased focus on procurement fraud. In 2023, DOJ announced settlements and judgments relating to DOD of \$551 million. Among those settlements was a \$377 million settlement with Booze Allen Hamilton pertaining to allegations that it improperly billed commercial and international costs to its government contracts. We expect this trend to continue well into 2024. For further coverage, [click here](#).

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### **Trending Enforcement Targeting Private Equity Healthcare Portfolios Provides Important Compliance Reminder**

DOJ has expressed its continued focus on private equity acquisitions, particularly in the healthcare

space. For further coverage on how healthcare companies can protect their investments, [click here](#).

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