



## 29TH ANNUAL OUNCE OF PREVENTION SEMINAR

Weathering the  
Rough Seas of  
Regulation



# False Claims Act Developments

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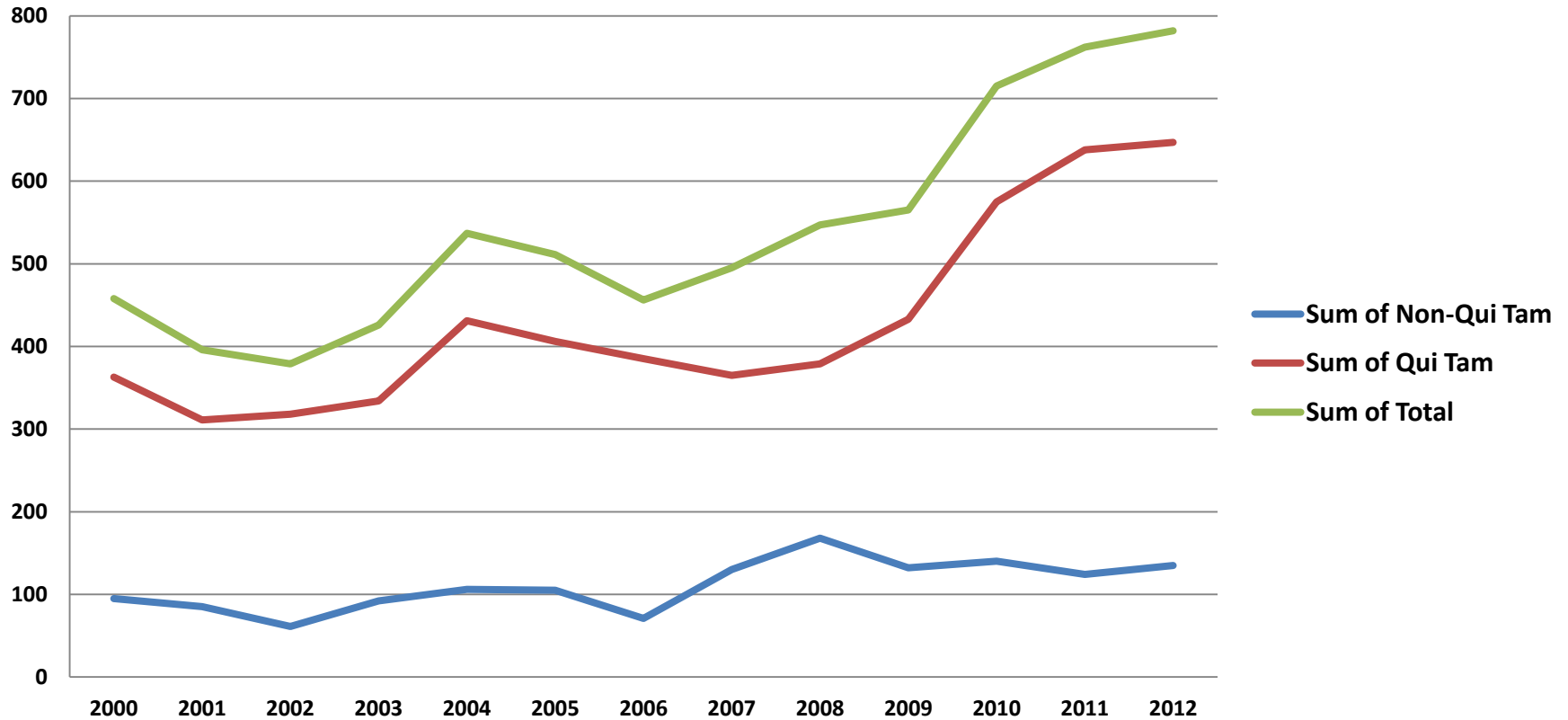
# Agenda

- Recent FCA and *Qui Tam* Enforcement Statistics
- Recent FCA-Related Regulatory/Legislative Developments
- Recent FCA Enforcement Trends
- Recent Cases and Settlements and Their Impact on Compliance and Enforcement

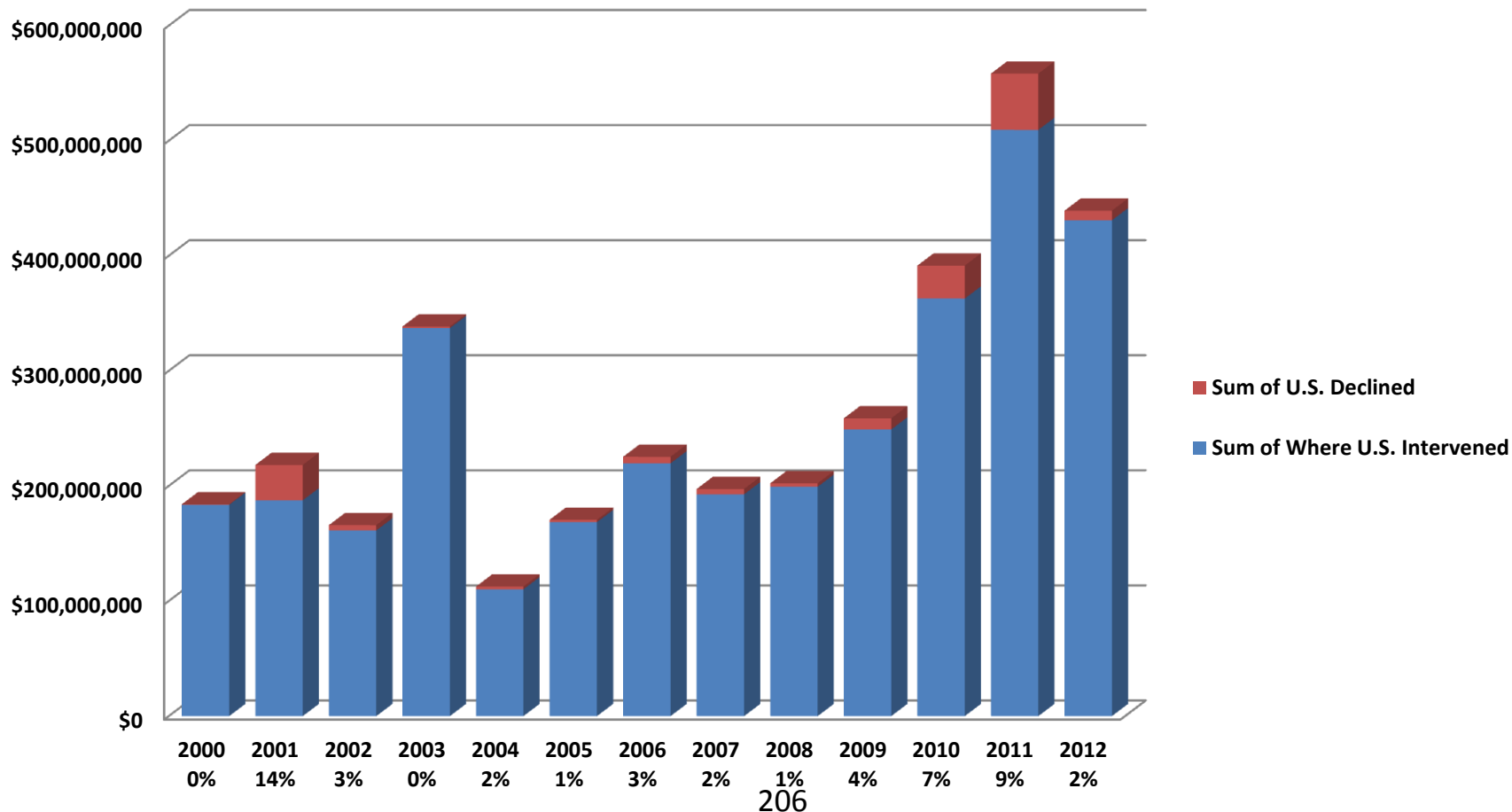
# FCA Statistics: FY 2012

	<b>FY 2012</b>	<b>Total since 1986</b>
<b>New matters</b>	<b>782</b>	<b>12,913</b>
<b><i>Qui tam</i></b>	<b>647</b>	<b>8,489</b>
<b>Recoveries</b>	<b>\$4,959,333,598</b>	<b>\$35,192,303,318</b>
<b>Relators' share</b>	<b>\$439,220,244</b>	<b>\$3,887,909,070</b>

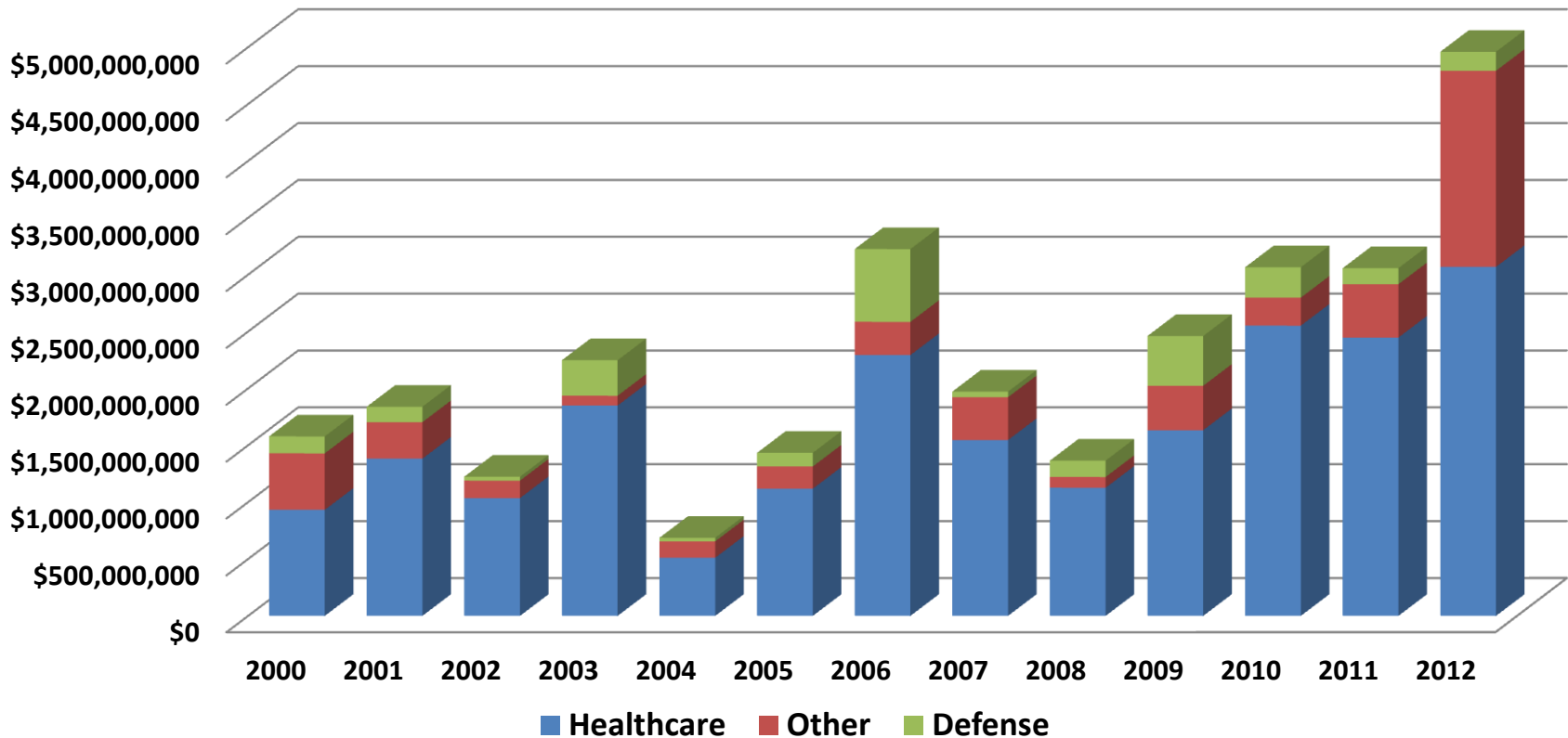
# New Matter Filings 2000-2012



# Relators' Share of Awards 2000-2012



# Total Awards by Industry 2000-2012



# Recent FCA Regulatory/Legislative Developments



# U.S. Supreme Court Upholds ACA

## *2010 Healthcare Act amendments to FCA remain law*

- Relaxation of public disclosure bar
- 60-day deadline from discovery for returning Medicare/Medicaid overpayments
- Violations of Medicare/Medicaid Anti-Kickback statutes constitute false claims for FCA purposes



# FCA-Related Legislation: Expired in Congress

- Fighting Fraud to Protect Taxpayers Act of 2011 (S. 890)
  - Senators Leahy and Grassley
  - Overview of FCA-related aspect of bill – would have amended FCA to:
    - provide that the cost of prosecutions under the FCA be credited to the appropriations accounts of the executive agency from which the funds used for the costs were paid
    - require Attorney General to submit to House and Senate Judiciary committees report of all FCA settlements
  - Expired at the end of the 112<sup>th</sup> Congress

## Updates to State FCA Laws

- Background: 2005 Federal Deficit Reduction Act (DRA)
  - incentivizes states to enact statutes as stringent as federal FCA
  - Qualified states may collect additional 10% of any recovery through state action
- HHS OIG issued 2-year grace period for states to conform to federal FCA amendments (FERA, PPACA, Dodd-Frank)
- March 2013: new OIG guidelines for evaluating state statutes

# Updates to State FCA Laws (cont'd)

- 29 States and District of Columbia have FCA laws
- Amendments to Strengthen State FCA (last year):
  - CA passed bill that conforms its FCA to the federal FCA
  - Hawaii, Massachusetts, Georgia, and Tennessee...
- Pending Legislation:
  - Alabama, Arizona, Michigan ...(among others)
- City FCA Laws: New York, Chicago and Philadelphia!
  - NYC FCA made permanent and amended to resemble NY state FCA

# States More Aggressive in Enforcing FCA

- NY State brings groundbreaking tax fraud FCA lawsuit against Sprint for over \$300 million
  - Allegations of failure to collect and pay sales tax
- NY State Attorney General plans to bring more and bigger FCA suits against corporate defendants for tax evasion



# ACA's Changes to the FCA

- Violation of the Anti-Kickback Statute (“AKS”) can be the basis for FCA liability
- Changes the intent/knowledge requirements under the AKS. Now, a “actual knowledge or specific intent to commit a violation of this section” not required.
- Affects the *Hanlester* defense, which interpreted the AKS to require proof the defendant (1) had specific knowledge of the law, and (2) had specific intent to disobey the law.
  - *Hanlester Network v. Shalala* (9<sup>th</sup> Cir. 1995)

# ACA's Changes to the FCA

- Creates *Per Se* FCA Violation for Failure to Report and Return Overpayments:
  - Any overpayment retained by a person after the deadline for reporting and returning the overpayment under paragraph (2) is an obligation (as defined in section 3729(b)(3) of title 31, United States Code) for purposes of section 3729 of such title.
- Does not add a new liability provision to the FCA, but stipulates with only limited detail the procedural steps and time period to report and return an identified overpayment obligation in order to avoid potential FCA liability.

# ACA's Changes to the FCA

- ACA provides a 60-day deadline for **reporting and returning** overpayments.
- The deadline is the later of:
  - (A) the date which is 60 days after the date on which the overpayment was identified;  
or
  - (B) the date any corresponding cost report is due, if applicable.
- Effective for overpayments “identified” as of the March 23, 2010 PPACA enactment date



# Proposed CMS Rule on Reporting and Refunding Overpayments

- Proposed rule contains 60-day report and return requirement with a 10-year “lookback”
- Strong industry opposition to proposed rule, including:
  - Lack of clarity as to what triggers 60-day period
  - 10-year lookback longer than the 6-year HIPAA record retention provision
- Comment period closed April 16, 2012; issuance of final rule is pending

# Recent FCA Enforcement Trends

# Enforcement Trends

- Expanded theories of liability and targeting of new industries
  - *E.g.*, Lance Armstrong case, mortgage cases, etc.
- Increase in “reckless disregard” cases
  - *E.g.*, *ATK Launch Systems (D. Utah)*
  - *E.g.*, *U.S. ex rel. Becker (N.D. Tex.)*
- Increase in non-employee relators
  - *E.g.*, competitors, government employees

# Recent Cases and Settlements and Their Impact on Compliance and Enforcement

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# FCA's Statute of Limitations Tolled Indefinitely?

- *U.S. ex rel. Carter v. Halliburton* (4<sup>th</sup> Cir. 2013) and *U.S. v. BNP Paribas SA* (S.D. Tex. 2012)
  - Fourth Circuit and S.D. Tex. are the latest courts to hold that the Wartime Suspension of Limitations Act tolls the civil FCA's statute of limitations when the United States is at war or Congress has enacted a specific authorization for the use of the Armed Forces (even if the contract at issue is not war-related).

# Ambiguous Requirements

- *U.S. ex rel. Williams v. Renal Care Group* (6<sup>th</sup> Cir. 2012)
  - Government intervenes in case against healthcare provider for interpreting ambiguous federal regulation in a way that maximizes its own profit.
  - Sixth Circuit rejects government's reckless disregard argument – defendant disclosed facts to government

## False Cost Estimates & Underbidding are Actionable

- *U.S. ex rel Hooper v. Lockheed Martin Corporation* (9<sup>th</sup> Cir. 2012)
  - 9<sup>th</sup> Circuit Relied on Logic of 1<sup>st</sup> and 4<sup>th</sup> Circuits
  - HELD: “[F]alse estimates, defined to include fraudulent underbidding in which the bid is not what the defendant actually intends to charge, can be a source of liability under the FCA, assuming that the other elements of an FCA claim are met.”

# False Cost Estimates & Underbidding are Actionable

## *U.S. ex rel Hooper v. Lockheed Martin Corporation (cont'd)*

- Issue - whether proposals on cost-reimbursement contract included cost estimates which Lockheed Martin knew were lower than the costs it expected to incur
  - District Court: no evidence of Lockheed Martin's state of mind in estimate choices and no suggestion of intent to submit unsupportable bids or other nefarious purpose
  - Summary judgment reversal based on testimony that one Lockheed Martin employee "was simply tasked [by management] to change the cost" estimate even though the change was not based on engineering judgment
  - Employee called the inputs to the bids "bad, bad guesses"
  - 9<sup>th</sup> Circuit did not consider why or how cost was changed
- No standard for determining how estimates will be evaluated
  - decision suggests that a cost estimate may be fraudulent if it is lower than what a contractor intends to charge



# Qui Tam Relators – Limitations and Expansions

- *U.S. ex rel. Little v. Shell Exploration & Prod. Co.* (5th Cir. 2012)
  - Federal auditors may have standing as qui tam relators
- *U.S. ex rel. Carter v. Halliburton* (4<sup>th</sup> Cir. 2013)
  - Interpreting first-to-file bar as requiring dismissal without prejudice to permit relator to bring new action if earlier related case is dismissed
- *U.S. ex rel. Beauchamp v. Academi* (E.D. Va. 2013)
  - Dismissing FCA claims under amended public disclosure bar and first-to-file bar
  - staying retaliation claims based on relators' agreements to arbitrate

# Damages – A Mixed Bag

- *U.S. ex rel. Feldman v. Von Gorp* (2d Cir. 2012)
  - government sought full contract value as damages in non-conforming goods/services case involving research training grant
  - Court rejects benefit-of-the-bargain calculation and awards full damages as matter of law on grounds that contract did not produce a tangible benefit to the government
- *U.S. v. Anchor Mortgage Corp.* (7<sup>th</sup> Cir. 2013)
  - Government’s “gross trebling” approach compared with “net trebling” calculus urged by defendant in FHA mortgage loan case where government sold the secured properties
  - Rejects DOJ’s interpretation of *U.S. v. Bornstein* and holds that net trebling approach is proper measure of government’s loss

# Questions?

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