



32<sup>nd</sup> Annual

**OUNCE OF  
PREVENTION  
SEMINAR**

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# False Claims Act: Trends and Emerging Issues

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## Agenda

- Stats and Trends: Relators Go It Alone / Stiffer Penalties on the Horizon
- A Sample of What's to Come With Extrapolation
- Liability Involving Ambiguous Terms
- High Court to Rule on Implied Cert.



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## 2015 FCA Recoveries

- \$3.6 billion recovered in FCA settlements or judgments in 2015
  - Decrease from 2014 record-breaking recovery of almost \$5.7 billion
- Over \$21 billion recovered in last 5 years







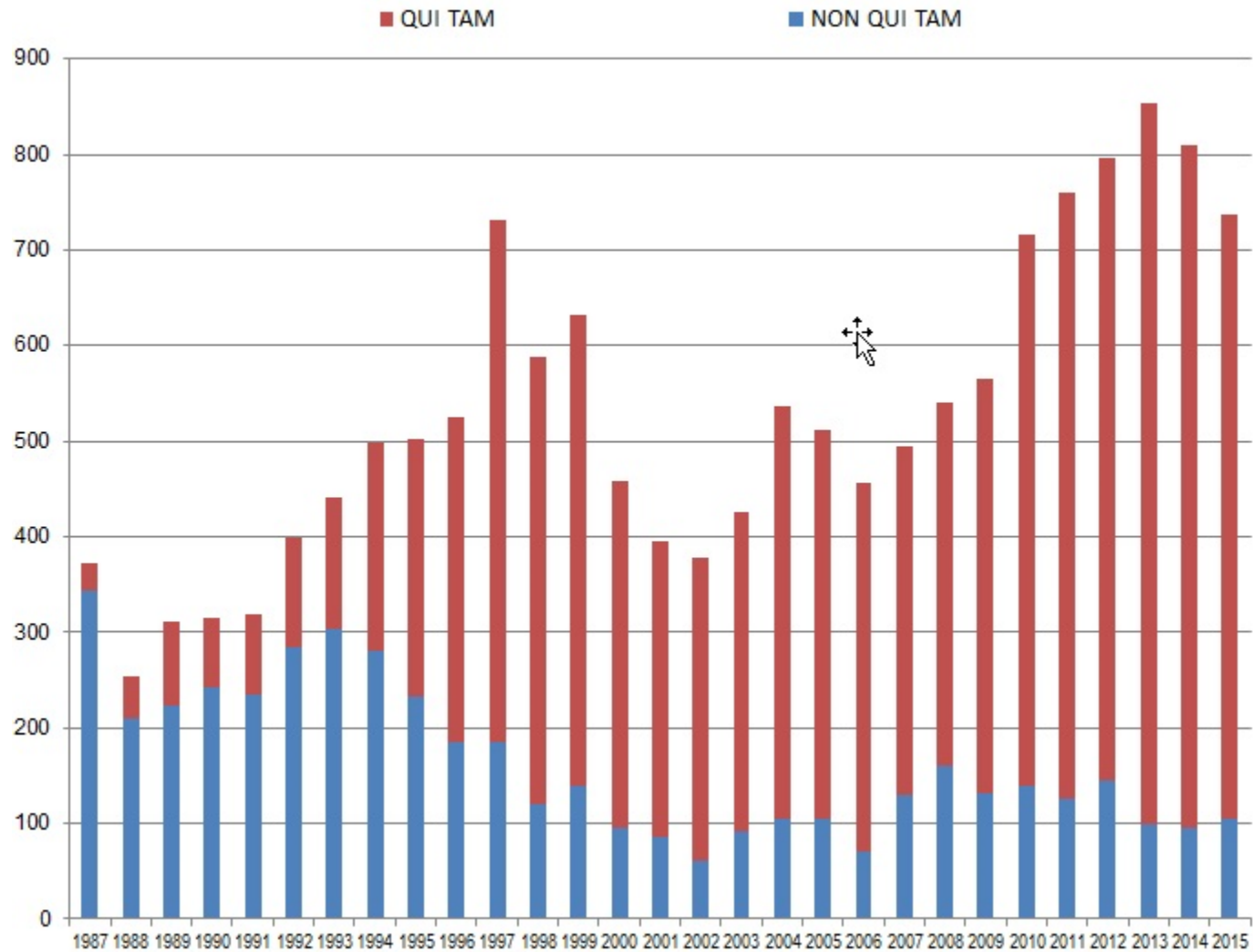
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## Qui Tam Activity Steady and High

- *Qui tam* actions continue to be majority of suits filed under FCA
  - FY 2015: Whistleblowers initiated approximately 86% of the FCA cases
  - 1986: only 8% of FCA suits initiated by whistleblowers
- 5<sup>th</sup> consecutive year in which relators filed 600 or more matters

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# Number of FCA New Matters



Source: DOJ "Fraud Statistics – Overview" (Nov. 23, 2015)



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## Dramatic Increase in Qui Tam Recoveries

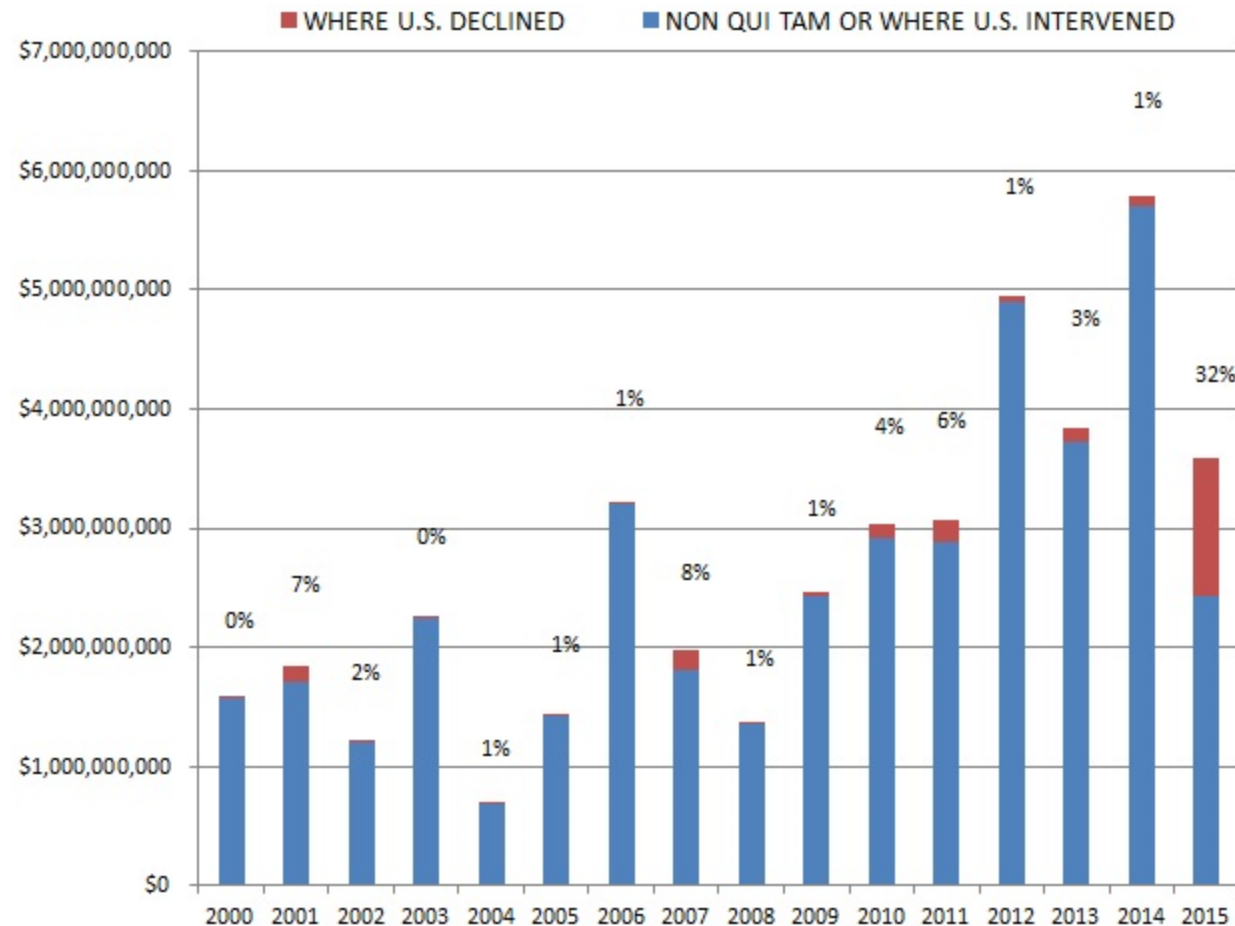
- \$1.1 billion of recoveries (32%) from cases filed by relators where government declined to intervene
  - Prior years' relator filings resulted in only 1% of amount of recoveries, and never as much as 10%
- Relators increasingly willing to pursue case after government declination





# Increase in Qui Tam Recoveries

Cases where Government declined intervention as percentage of Total FCA Recoveries



Source: DOJ "Fraud Statistics – Overview" (Nov. 23, 2015)



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## Penalties Set To Increase

### Federal Civil Penalties Inflation Adjustment Act Improvements Act



- Agencies must increase FCA penalties to account for inflation
  - One-time “catch up” adjustment to FCA penalty levels
  - Penalty range (currently at \$5,500 - \$11,000) can potentially double
  - Additional annual adjustments per the CPI





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## Impact of Penalty Adjustments

- Penalties will increase A LOT
  - Example: Railroad Retirement Board
- Greater discrepancies between penalties and damages
- Potential for more Eighth Amendment and Due Process challenges to penalties
- Increased Settlement Leverage



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## A Sample of What's to Come with Extrapolation



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## Background

- Statistical sampling historically used in antitrust, voting rights, and mass tort cases
- Until recently, sampling rarely used in FCA cases and never used at trial, without the consent of the defendant, to prove liability



## Background (cont.)

- In FCA context, sampling used to determine damages where defendants did not contest liability
  - *U.S. v. Cabrera-Diaz*, 106 F. Supp. 2d 234 (D.P.R. 2000); *U.S. v. Fadul*, No. CIV.A. DKC 11-0385 (D. Md. Feb. 28, 2013)
- The *Fadul* and *Cabrera-Diaz* courts looked to well-established use of sampling in administrative context

## Recent Developments

- *United States ex rel. Martin v. Life Care Centers*, No. 1:08-cv-00251-HSM-WBC (E.D. Tenn. Sept. 29, 2014)
  - Government alleged nursing home operator violated FCA, charging Medicare for unnecessary services
  - Government argued case involved too many claims to litigate on case-by-case basis
  - Government's statistical expert used random sample of 400 patient admissions (out of 54,396 admissions)



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## *Life Care (cont.)*

- Life Care moved for summary judgment, arguing Government cannot prove liability to claims outside the sample by extrapolation
- Court recognized that “using extrapolation to establish damages when liability has been proven is different than using extrapolation to establish liability”
- However, court found that judicial precedent and FCA’s legislative history does not prohibit use of statistical sampling to prove liability





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## *U.S. ex rel. Michaels et al. v. Agape Senior Community*, No. CA 0:12-3466-JFA (D.S.C. June 25, 2015)

- South Carolina nursing home allegedly submitted fraudulent claims to Medicare and Medicaid for care that was not medically necessary
- In discovery, relators told court that it would cost between \$16M to \$26M to have experts review more than 50,000 individual claims
- Court ruled that it will not allow statistical sampling; recommends parties conduct bellwether trial of 100 claims
- Parties settled



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## *Agape (cont.)*

- Government, who did not intervene, objected to settlement
- Relators moved to enforce settlement
- Court denied motion to enforce judgment, stated its reasons for disallowing stat sampling and certified ruling for interlocutory appeal
- On Sept. 29, 2015, Fourth Circuit agreed to hear appeal



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## Litigating Cases with Sampling

- Until area of law is settled, defendants should be prepared to challenge use of statistical sampling at various stages of litigation
  - Consider making arguments in FRCP 9(b) that plaintiffs have failed to allege fraud with particularity by failing to identify submission of individual false claims





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## Daubert Challenges

- In *U.S. ex rel. Ruckh v. Genoa Healthcare LLC et al.*, relator moved *in limine* to admit expert testimony on statistical sampling (prior to any expert performing sampling)
- Court denied motion as premature, but stated there is no universal ban on sampling in *qui tam* action
- Court underscore importance of *Daubert* motions to challenge purported sample, noting defects in methodology or other evidentiary defects can exclude expert's sampling analysis



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## Battle of Experts

- If defendants are unsuccessful at excluding sampling evidence, might introduce competing testimony to challenge plaintiff's methodology
  - In *Life Care*, the court noted Life Care could challenge Government's use of extrapolation by cross-examination of Government's expert and introducing competing testimony



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## Bifurcation of Issues

- *U.S. v. AseraCare Inc.*, No. 2:12-CV-245-KOB
  - Court allowed Government to use statistical sampling and expert testimony to provide falsity element
  - Government planned to introduce pattern and practice evidence, including some prejudicial emails, to prove knowledge element
  - Court bifurcated falsity element and remaining elements (knowledge, materiality) into two separate trial





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## *AseraCare (cont.)*

- At conclusion of phase one trial, jury found false claims submitted for 104 of sample patients
- Judge granted defendant's motion for new trial after deciding it erred in refusing to give defendant's jury instruction
- In March 2016, judge threw out suit



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## What's Next?

- Fourth Circuit expected to rule in *Agape* in June 2016
  - If Fourth Circuit allows for sampling in cases where individualized evidence is available, likely Government and relators will bring more FCA cases and rely on sampling to support case-in-chief
  - Defendants will have to rely heavily on evidentiary motions to restrict use of sampling and provide competing expert testimony



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## Ambiguous Terms: No Warning, No Knowing Falsity

- *United States ex rel. Purcell v. MWI Corp.* (D.C. Cir. 2015) – reversing FCA jury verdict where regulation is ambiguous, and defendant’s interpretation was reasonable
  - C&M represented MWI at trial and appeal





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## MWI Background

- MWI: Small exporter of water pumps and irrigation equipment
- Export-Import Bank: finances and facilitates export of U.S. goods and services by providing loans to foreign purchasers, contributing to jobs/employment
- Sales agents: used by exporters to market/sell, working on commission



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## **MWI: The Sales, The Loans, The Commissions**

- MWI sold \$82 million in irrigation equipment to 7 Nigerian states
- Ex-Im financed ~\$75 million via 8 separate loans
- MWI's sales agent paid commissions of 24-35%, totaling ~\$26 million on the successful sales



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## MWI: The Certification

- Supplier's Certificate: MWI required to certify that it had not paid “any discount, allowance, rebate, commission, fee or other payment in connection with the sale”

*except*

“regular commissions or fees paid or to be paid in the ordinary course of business to our regular sales agents . . . and readily identifiable on our books and records as to amount, purpose, and recipient.”





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## *MWI*: What Does “Regular” Commission Mean?!

- Ex-Im never provided any guidance or definition of “regular commissions”
- DOJ proffered definitions during litigation, one of which was accepted by the district court for trial: those “normally and typically paid by the exporter and its competitors in the same industry” → an industry-wide standard



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## *MWI*: What Does “Regular” Commission Mean?

- MWI’s interpretation: the commissions it paid were “regular” because they were consistent with what MWI had been paying the same agent for over 12 years and were based on the same commission formula MWI used for all agents → the individual-agent standard



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## ***MWI: From Trial to Appeal***

- Jury finds for DOJ, but verdict is for \$7.5 million (not \$75 million as DOJ sought)
- In post-trial proceedings, court offsets all damages, imposing only penalties of \$580,000
- DOJ appeals damages ruling; MWI cross-appeals on liability





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## MWI's Cross-Appeal Arguments

- Ex-Im failed to provide MWI with fair notice of its interpretation, violating due process
- A reasonable interpretation of an ambiguous term precludes a finding of falsity *or* scienter
- The evidence was insufficient to show that MWI submitted knowingly false claims



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## MWI: DC Circuit Overturns Jury Verdict

- “Regular commissions” is ambiguous
- MWI’s interpretation was reasonable
- Ex-Im failed to warn MWI away from its reasonable interpretation
  - “Absent evidence that the Bank, or other government entity, had officially warned MWI away from its otherwise facially reasonable interpretation of that undefined and ambiguous term, the FCA’s objective knowledge standard . . . did not permit a jury to find that MWI “knowingly” made a false claim.” [Citing *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007)]



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## MWI: DC Circuit Overturns Jury Verdict

- “Authoritative Guidance”
  - Evidence that a Bank officer told MWI that there were no definitive guidelines but commissions should be somewhere near 5 percent = insufficient
  - In *Safeco*, an informal letter written by agency staff was inadequate (551 U.S. at 70 n.19)





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## MWI: DC Circuit Overturns Jury Verdict

- Bad Faith is Irrelevant When a Party Reasonably Interprets an Ambiguous Term
  - Evidence that MWI employees were concerned that the commissions should be disclosed did not prove scienter
  - “subjective intent—including bad faith—is irrelevant when a defendant seeks to defeat a finding of knowledge based on its reasonable interpretation of a regulatory term” (citing *Safeco*, 551 U.S. at 70 n.20)



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## MWI: DC Circuit Overturns Jury Verdict

- “Had the government wanted to avoid such consequences [payment of large commissions], it could have defined its regulatory term to preclude them. Of course, the government may instead determine that its goals are better served by not doing so, much as the Bank officials’ testimony implied. This may be the government’s choice, but then the FCA may cease to be an available remedy if the government concludes after the fact that a particular commission is not ‘regular’ because it is too high.”



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## MWI: The Damages Dance

- DOJ argued that loans would not have been issued had the commissions been disclosed, and sought the full value of the loans as damages ( $\$75\text{m} \times 3 = \$225\text{m}$ )
- (Mis)applying *Bornstein v. U.S.*, 423 U.S. 303 (1976), the district court on the eve of trial excluded all evidence of loan repayment
  - **Loans were fully repaid by Nigeria**
  - **Ex-Im received \$108m, including \$33.7m in interest/fees**
- In spite of the excluded evidence, the jury rendered a verdict for just \$7.5m, not \$75m
- In post-trial hearing, court applied *Bornstein* again, ruling that the \$108m in undisputed loan payments were “compensatory” and applied them as an offset, zeroing out any damages
- TAKE NOTE: DOJ and relators are more frequently seeking to widen the application of *Bornstein* to support full contract value damages theories and exclude benefit of the bargain evidence





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## Implied Certification: High Court Set To Resolve Circuit Split

- *Universal Health Services v. United States ex rel. Escobar*
- Whether FCA allows an implied false certification theory of liability
- If so, whether regulation at issue must contain an explicit condition of payment to trigger liability
- Decision expected before end of June term



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## Background

- Relators' daughter died following treatment from unlicensed and unsupervised counselors
  - Facility owned/operated by UHS
- Alleged UHS violated FCA when it presented reimbursement claims to Medicaid
  - Counselors were not supervised as required by Massachusetts regulations
- Clinic did not explicitly certify compliance



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## Procedural History

- District Court
  - Dismissed relators' complaint
  - Massachusetts regulations at issue imposed only conditions of participation in the government program, not preconditions to payment as required for FCA liability
- First Circuit
  - Reversed District Court
  - Regulations at issue were in fact conditions of payment, even if they did not expressly state that they were





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# Arguments Before the Court

- UHS
  - A claim cannot be false or fraudulent without an affirmative misstatement
  - FCA liability should only attach if requirements expressly provide that compliance is a condition of payment
  - Challenged assertion that FCA's knowledge element provides sufficient protection
- Relators
  - Claim for payment impliedly represents that provider is entitled to payment
  - Claim is false if it is submitted by provider not entitled to payment
  - Limiting liability to violations of requirements expressly made conditions to payment would create loophole



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## Reaction From Justices

- Asked very few questions regarding viability of the implied certification theory
  - Questions focused on where the line should be drawn
- Little discussion of limiting liability to violations of provisions expressly made conditions to payment
  - Questions focused on how to determine when a violation is “material”

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