

False Claims Act: Fundamentals

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Part I: Overview

Background

- Signed by President Lincoln during the height of the Civil War to combat rampant profiteering
- “For sugar [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys[.]” *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 722 F. Supp. 607, 609 (N.D. Cal. 1989) (quoting Tomes, *Fortunes of War*, 29 Harper’s Monthly Mag. 228 (1864)).
- The FCA’s reach has since extended to Medicare, Medicaid, Social Security, and other federal programs

General Structure

- Private/public partnership
- Cases may be initiated by whistleblowers, and the government has an opportunity to investigate and intervene
- If successful, the whistleblower may recover a portion of the government's damages

Why Whistleblowers?

- Congress has long recognized that the government, with limited resources, is overmatched in the fight against fraud. *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 560 (1943) (Jackson, J., dissenting)
- The bill is predicated on the “old-fashioned idea” of “setting a rogue to catch a rogue.” Cong. Globe, 37th Cong., 3d Sess. 955-56 (1863) (remarks of Sen. Howard).

What is the Whistleblower's Role?

- Whistleblowers gather evidence and organize the case
- Whistleblowers bring potential fraud cases to the government's attention
- Cases are filed under seal in order to give the government a chance to investigate (and potentially intervene in the litigation)

What Is the Government's Role?

- The government has unique tools to investigate potential claims
- If the government formally joins the litigation by intervening, it bears primary responsibility for prosecuting the action. See 31 U.S.C. § 3730(c)(1).
- The government can also dismiss the action or settle the lawsuit over the whistleblower's objection. See 31 U.S.C. § 3730(c)(2).

What Do Parties Stand to Gain?

- The government may recover treble damages and significant statutory penalties
- Whistleblowers may obtain a percentage of the government's damages

Nashville: The Health Care Industry Capital

- \$70 billion = revenue generated by Nashville-based health care companies.
- >250 health care companies have operations in Nashville
- 300 professional service firms (e.g., accounting, architecture, banking, legal) providing expertise in the health care industry.
- 16 publicly traded health care companies are located in Nashville

Part II: Navigating the Statute

Who is Liable Under the FCA?

- In general, any person who knowingly submits a false claim to the government
- Any person, such as a subcontractor, who causes another to submit a false claim to the government
- Any person who knowingly conceals or avoids an obligation to pay money to the government (“reverse false claims”)
- Individuals who conspire to violate the False Claims Act

Key Term: “False Claim”

- Any “request or demand, whether under a contract or otherwise, for money or property” that is “presented to an officer, employee, or agent of the United States” or to a contractor working on a government program. See 31 U.S.C. § 3129(b)(2).

Five Most Common Types of Civil False Claims Act Cases

- The “mischarge” case
 - “Upcoding”
 - Double-billing
- The “fraud-in-the-inducement” case
 - Bid rigging
 - Kickbacks
- The “false certification” case
 - Express and implied
 - “Materiality” questions
- The “substandard product or service” case
 - Common in procurement, health care cases
- The “reverse false claim case”

Most Common Federal Programs Affected by the FCA

- Medicare
- Medicaid
- Social Security
- Defense Procurement
- Federal Loan Guarantees/Mortgage Fraud
- Other government programs involving federal grants (e.g., USAID, Department of Education grants, etc.)

Key Terms:

- Qui Tam
- Relator

Key Term: “knowingly”

- Actual knowledge,
- Deliberate ignorance of the truth, or
- Reckless disregard of the truth. See 31 U.S.C. § 3729(b)(1)(A).
- No need to prove specific intent to defraud. See 31 U.S.C. § 3729(b)(1)(B).

Damages Explained

- Statutory penalties: an automatic fine of \$5,500 to \$11,000 for each and every false claim
- Treble damages: if the government suffers any damages due to the fraud, the amount of damages is tripled
- Recent development: “Gross” or “Net” Trebling? See *United States v. Anchor Mortg. Corp.*, 711 F.3d 745, 748-49 (7th Cir. 2013)

Calculating the Whistleblower's Share

- If the government intervenes: 15-25%
- If the government chooses not to intervene: 25-30%
- The whistleblower's share may be lowered if the whistleblower participated in the fraud
- Recent development: the whistleblower may not recover more than 10% if the suit was primarily based on a public disclosure

Key Term: “Public Disclosure Bar”

- Until recently, courts did not have jurisdiction to hear cases that were based on “public disclosures,” which were broadly defined. 31 U.S.C. § 3730(e)(4)(A).
- Recent development: the FCA now defines the term “publicly disclosed” narrowly.
- Facts learned during state-court litigation or federal litigation between private parties may now be used as the basis for a whistleblower suit.
- Recent development: dismissal is no longer automatic.

Key Term: “Original Source”

- Even if a whistleblower suit is based on facts that are publicly available, the lawsuit may proceed if the whistleblower can show that he or she was the “original source” of the information. 31 U.S.C. § 3730(e)(4)(B).
- Recent development: A whistleblower once needed to demonstrate “direct and independent knowledge” of the information underlying the allegations. Now, a whistleblower need only demonstrate “knowledge that is independent of and materially adds to the publicly disclosed” information. *Id.*

Key Term: “First to File” Rule

- The False Claims Act provides that “no other person other than the Government may intervene or bring a related action based on the facts underlying the pending action.” 31 U.S.C. § 3730(b)(5).
- This “first-to-file” rule encourages whistleblowers to report fraud as soon as possible
- At the same time, whistleblowers must conduct a thorough investigation and put forth detailed factual allegations, otherwise the case will be dismissed

Anti-Retaliation Provisions

- It is illegal to discharge, demote, suspend, threaten, harass, or in any other manner discriminate against employees because of their lawful efforts to bring a whistleblower claim. *See* 31 U.S.C. § 3730(h).
- An employee's remedies include reinstatement, double back pay (plus interest), and compensation for any "special damages" (including attorneys' fees). *Id.*

Part III: Recent Amendments

Fraud Enforcement and Recovery Act of 2009 (“FERA”):

- Broadens the definition of a “false claim”
- Lowers the threshold for proving intent
- Strengthens the FCA’s anti-retaliation provisions
- Increases the Department of Justice’s power to investigate fraud

Elimination of “Presentment” Requirement

- Expands the scope of potential FCA liability by eliminating the “presentment” requirement (overruling the Supreme Court’s opinion in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008)).
- Now, a subcontractor may be liable for defrauding a contractor using federal funds; there is no need to show a subcontractor’s intent to defraud the government

FERA: Intent Redefined

- No longer necessary to prove intent to defraud
- Plaintiffs are only required to show that the false claim was “material,” meaning that it was capable of influencing payment on a claim. 31 U.S.C. § 3129(b)(4).

FERA: Anti-Retaliation Provisions

- Now, in addition to employees, contractors and agents are protected from retaliation for lawful efforts to initiate or investigate whistleblower claims. 31 U.S.C. § 3730(h).

FERA: Civil Investigative Demands

- A subpoena duces tecum may compel production of documents, but a CID is broader
- A CID may require the recipient to answer interrogatories (formal questions) or to give oral testimony under oath
- The government may issue a CID whenever there is “reason to believe that any person may be in possession, custody, or control of documentary material or information relevant to a false claims law investigation.” 31 U.S.C. § 3733.
- Authority delegated to each of 93 U.S. Attorney’s Offices; Attorney General’s approval no longer necessary

The Patient Protection and Affordable Care Act of 2010

- Narrows Public Disclosure Bar
- Broadens Original Source Requirement
- Statutory Anti-Kickback Liability
- Includes Overpayments
- Health Care Exchanges

PPACA: Narrower Public Disclosure Bar

- Dismissal is no longer mandatory
- No longer bars a lawsuit based on facts discovered during state court litigation
- No longer bars a lawsuit based on facts discovered during federal litigation between private parties

PPACA: Original Source Expanded

- Previously, an original source must have had “direct and independent knowledge of the information on which the allegations are based.”
- Now, an original source is one who has “knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions.” See 31 U.S.C. 3730(e)(4)(B).

PPACA: Overpayments

- The FCA now imposes liability on health care providers who receive Medicare/Medicaid overpayments (accidentally or otherwise) and fail to return the money to the government within 60 days

PPACA: Anti-Kickback Statute

- The Anti-Kickback statute prohibits anyone from knowingly or willfully paying or receiving remuneration in exchange for referrals or the purchase of any item or service that may be paid for by a federal health care program.
- A claim to the government is now automatically rendered “false” for purposes of the FCA if the medical services or items were furnished in violation of the Anti-Kickback Statute. 42 U.S.C. § 1320a-7b(g).
- Even unintentional violations of the statute can give rise to liability.

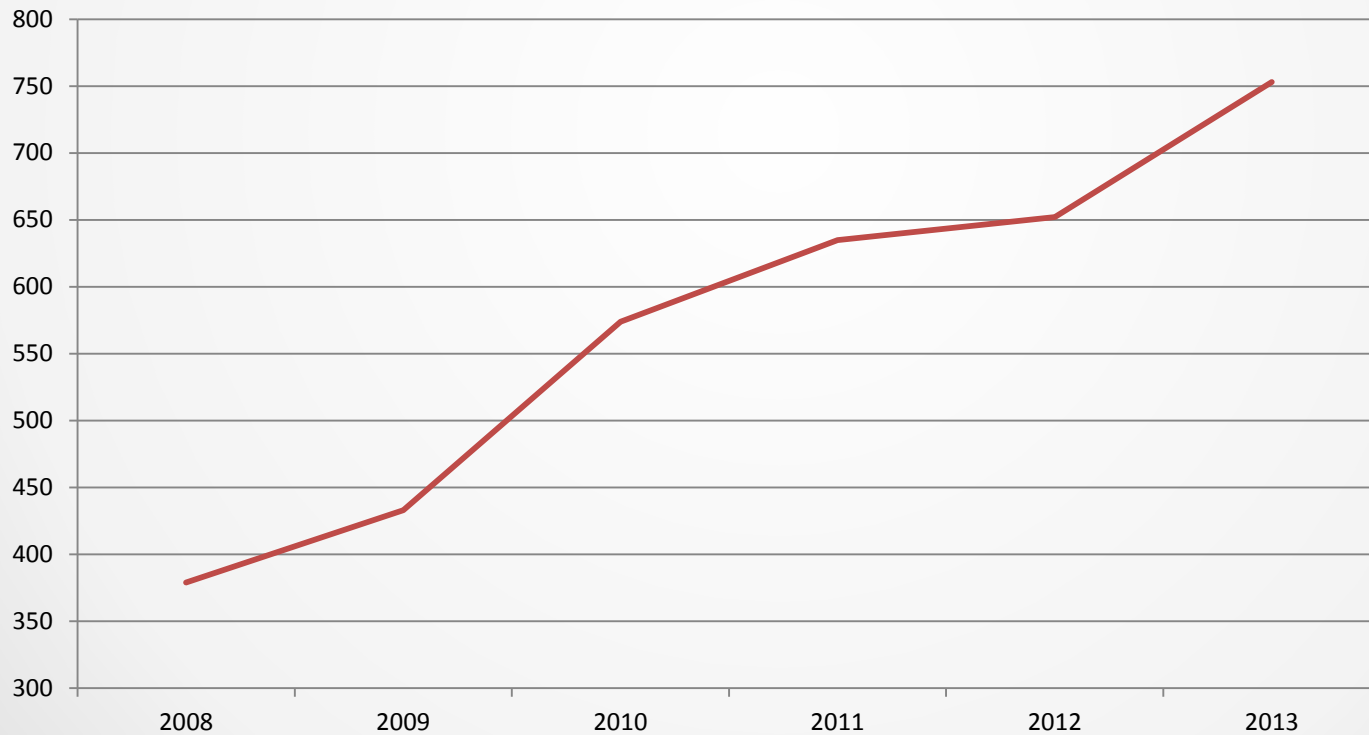
Part IV: The View From 10,000 Feet

Statistics – Overview of Qui Tam Actions

Total Qui Tam Actions from 1987 – 2013 = 9,244

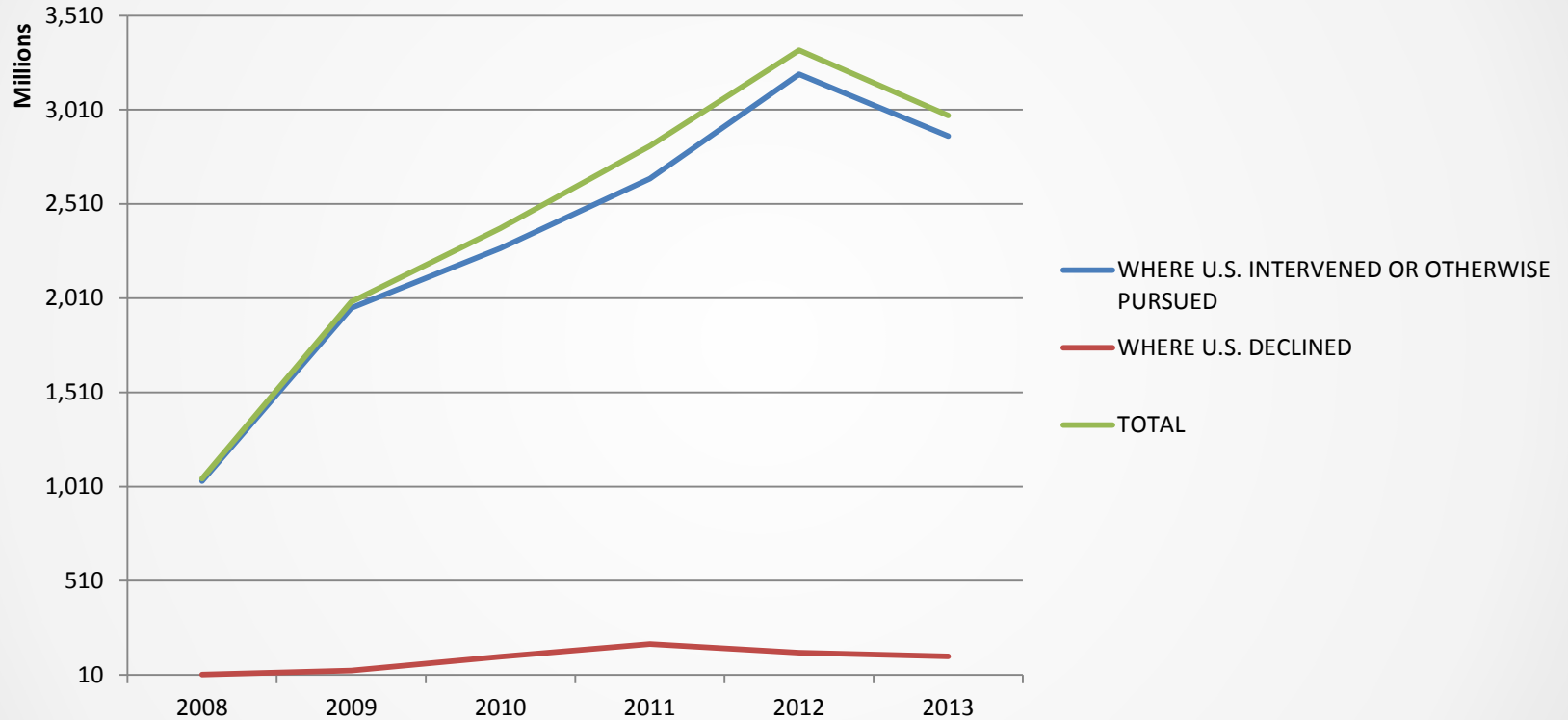
Total Qui Tam Actions in 2013 = 753

Qui Tam Actions from 2008 - 2013



Total Qui Tam Settlements and Judgments from 1987–2013 = \$27,201,587,782
Total Settlements and Judgments in 2013 = \$2,979,370,977

Total Settlements and Judgment Totals 2008 - 2013

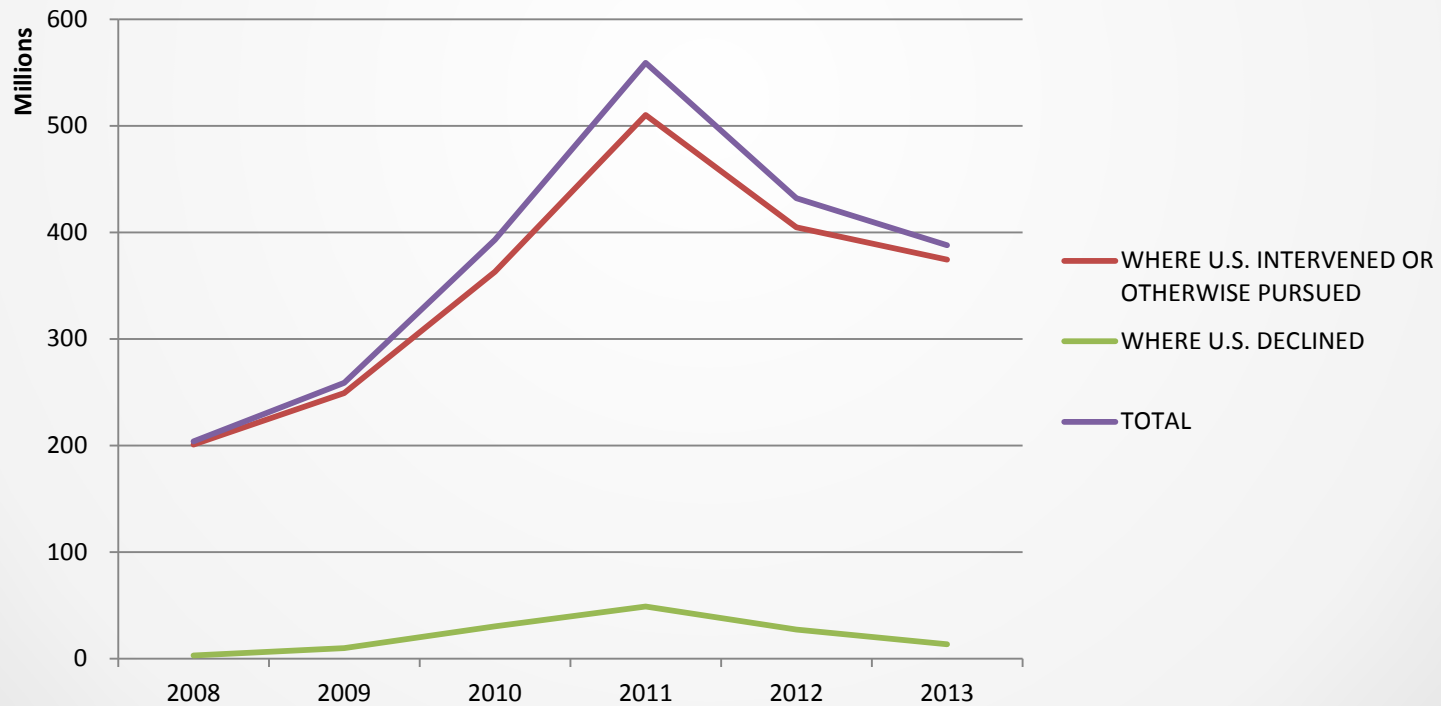


Amount that has been paid to Whistleblowers

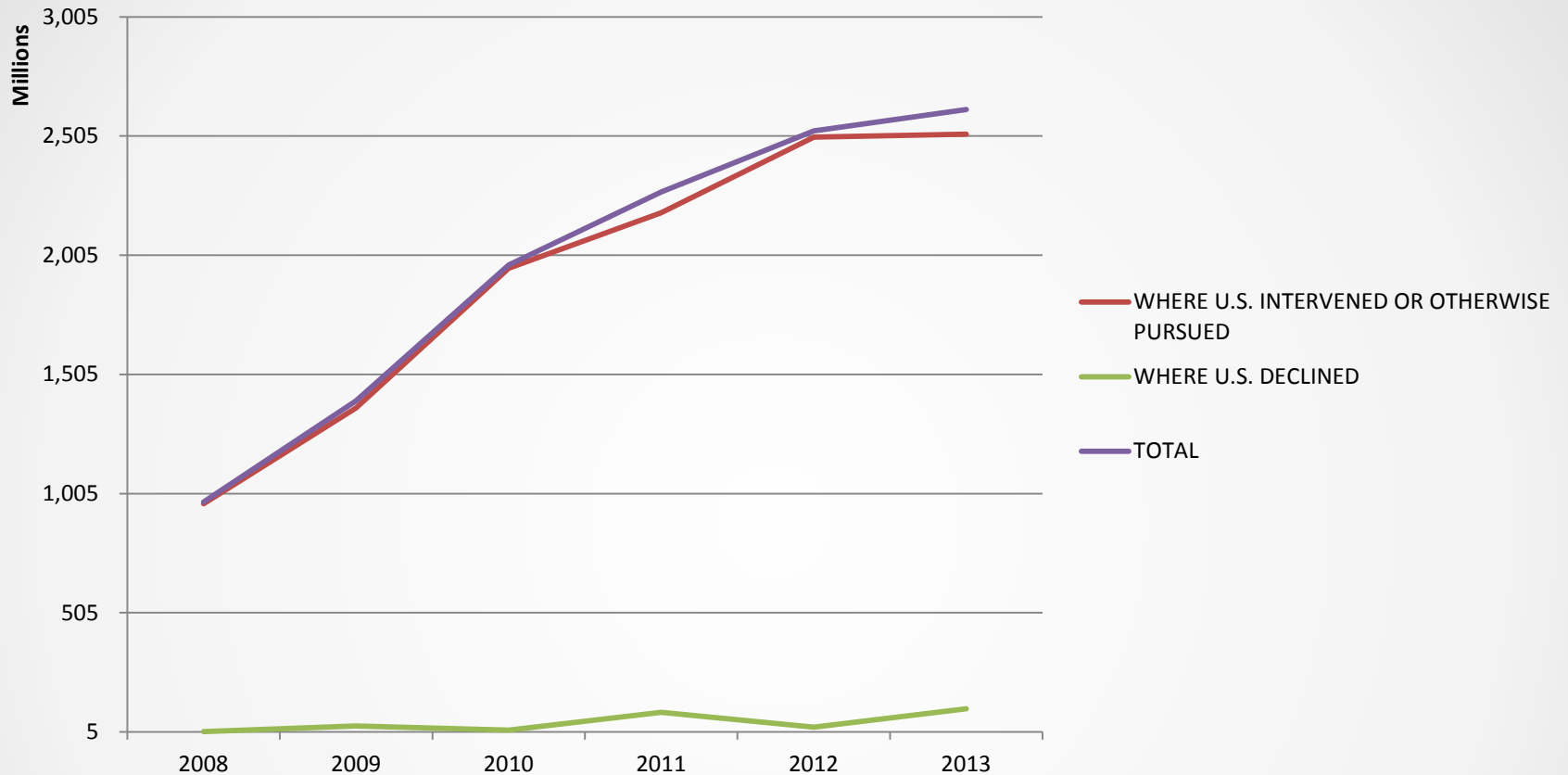
Total Amount Paid to Relators from 1987 – 2013 = \$4,272,156,638

Total Amount Paid to Relators in 2013 = \$387,825,711

Relator Share Awards from 2008 - 2013



Total Settlements for Health and Human Services From 2008-2013



Total Settlements for HHS from 1987–2013 = \$26,720,546,644

Total Settlements for HHS in 2008 = \$2,513,247,578

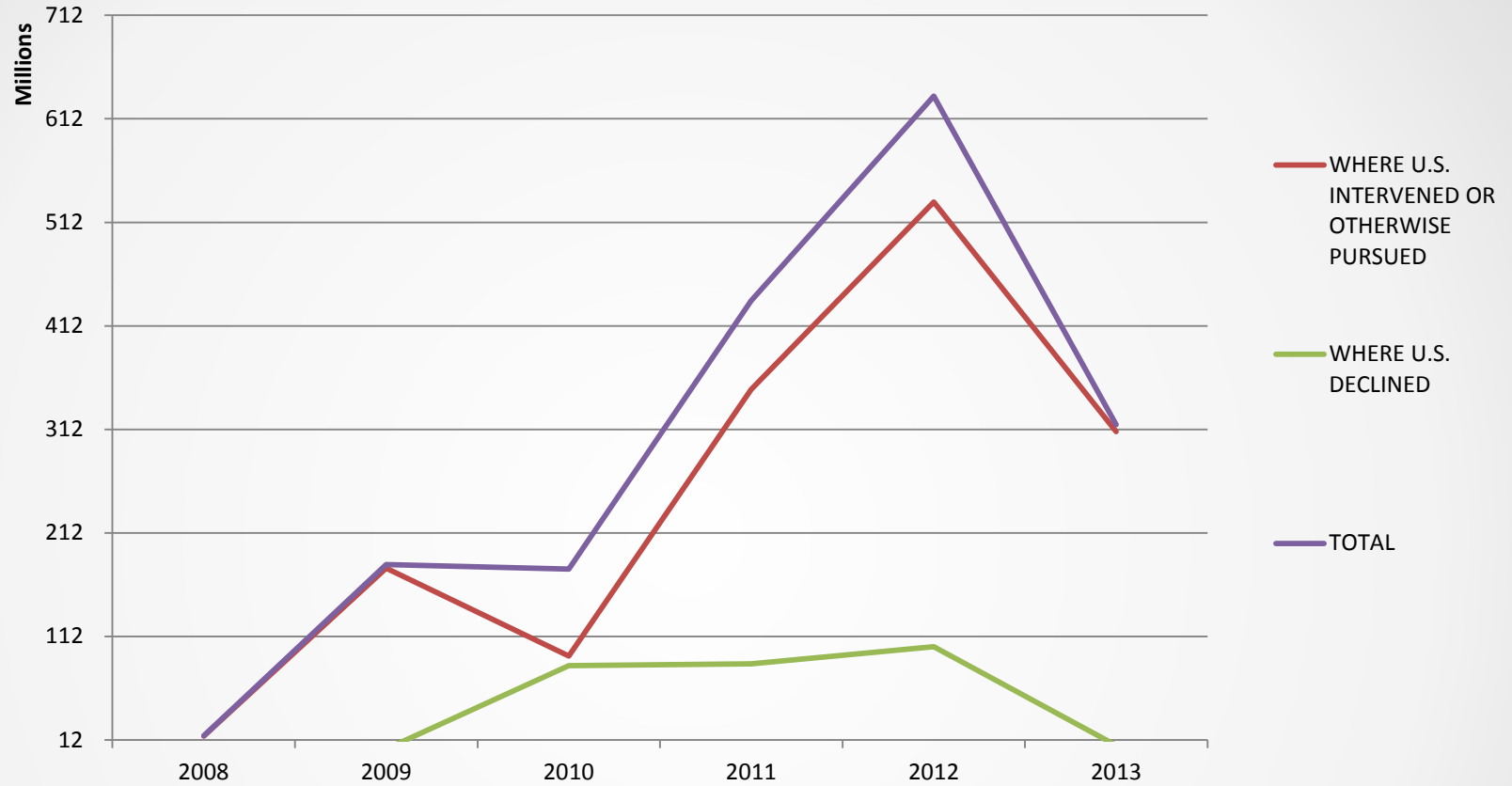
Total Settlements for HHS in 2013 = \$962,461,088

Settlements for Department of Defense 2008 - 2013



Total Settlements for DOD from 1987–2013 = \$5,733,022,105

Settlements for Non-HHS, Non-DOD from 2008-2013

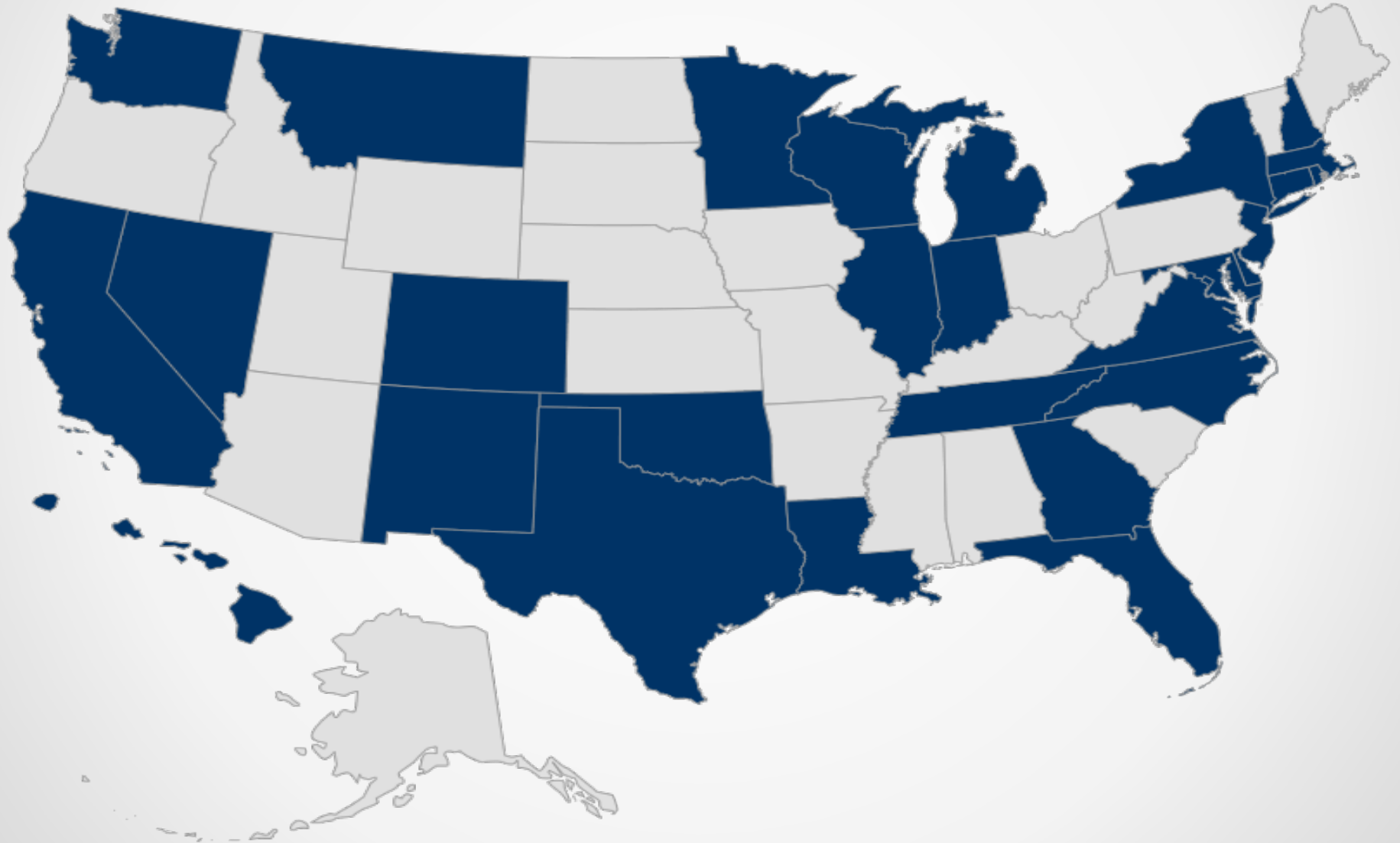


Total Settlements for Non DOD, Non HHS from 1987–2013 = \$6,488,021,741

Recent Trends

- “Mini-FCAs”: At least 32 states have passed statutes mirroring the Federal False Claims Act
- The SEC, IRS, and CFTC have also created whistleblower programs

State FCAs



Recent Trends: Off-Label Marketing

- Off-label marketing consisted several of the largest cases of 2013:
 - Johnson & Johnson (Risperdal) – \$2.2 Billion
 - Amgen (Aranesp) – \$762 Million
 - Wyeth (Rapamune) – \$491 Million
- Nevertheless, the Second Circuit recently held that the First Amendment protected off-label marketing. *See United States v. Cariona*, 09-cr-5006 (2d Cir. 2012).
- GlaxoSmithKline recently banned the practice of paying physicians to promote its drugs.

Recent Trends: Mortgage Insurance Fraud

- The 50-state, \$25 billion mortgage settlement relating to mortgage fraud contained claims for relief under the False Claims Act; six whistleblowers collectively recovered over \$225 million
- *United States v. Bank of America/Countrywide* (E.D.N.Y.): Bank of America agreed to pay \$1 billion as part of the 50-state global settlement
- *United States v. Deutsche Bank & Mortgagelt* (S.D.N.Y.): Settled for \$202.5 million
- *United States v. CitiMortgage, Inc.* (S.D.N.Y.): Settled for \$158.3 million
- *United States v. Flagstar Bank* (S.D.N.Y.): Settled for \$132.8 million

Recent Trends: Implied Certification

- Implied Certification: when an entity falsely certifies that it has complied with a statute, regulation or contractual term that is a prerequisite for payment
- FERA imposed a new “materiality” standard, but courts are divided as to its implementation
 - Question of law?
 - Question of fact?

Future Trends: the False Claims Act and State Health Care Exchanges

- The Affordable Care Act creates state-run health care exchanges intended to provide a marketplace for individuals to compare insurance policies.
- Section 1313 of the Affordable Care Act specifies that any payments made “by, through, or in connection with” a state insurance exchange are subject to the FCA if they fail to comply with federal regulations. See 42 U.S.C. § 18033(a)(6)(A).
- Any damages may be multiplied by six. See 42 U.S.C. § 18033(a)(6)(B).
- In sum: Health insurers that participate in state insurance exchanges will be subject to close scrutiny for potential violations of the False Claims Act.

Conclusion: Whither the FCA?

- Last year, the DOJ recovered \$2,979,370,977 in whistleblower cases under the False Claims Act.
- The DOJ also recovered \$829,912,477 in non-whistleblower claims brought under the False Claims Act.
- What new developments will 2014 bring?