JUSTICE NEWS

Acting Assistant Attorney General Stuart F. Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement

Washington, DC, United States ~ Thursday, June 7, 2012

Thank you Joyce for that kind introduction. And thanks to all of you for being here today. I appreciate the opportunity this afternoon to share a few of my thoughts about our collective efforts in this important area of False Claims Act enforcement. As you saw in your first panel today, it is abundantly clear that, twenty-five years after this statute was significantly amended, it remains the government's most potent civil weapon in addressing fraud against the taxpayers.

Indeed, since coming into this office a few months ago, I have been struck by the sheer volume of the cases that are brought -- and the recoveries that are obtained -- under this statute. Since January 2009, the Civil Division, working with our partners in the U.S. Attorney offices, has recovered over $11.1 billion under the False Claims Act. Of this amount, more than $7.4 billion was recovered in health care fraud matters, with the largest recoveries coming from the pharmaceutical and medical device industries. These are historic figures.

But I want to begin my remarks here this afternoon by acknowledging the man who played such a central role in making this statute the bulwark against fraud that it is today. The Department sustained a very heavy blow last month when we lost Mike Hertz. Many of you in this room had the honor of working with and knowing Mike. The defense bar viewed him as an intelligent and honest broker, and Taxpayers Against Fraud just last year awarded him its Honest Abe Award, commemorating his decades of service. I know he has been a steady presence at this conference since its inception.

But those of us in the Department -- those who worked by his side, some for decades -- particularly grieve his passing. Mike was a colleague, mentor and friend to everyone with whom he worked, and even when they moved on to other endeavors, that mutual friendship and respect remained. I know that is true for many in this room.

Mike's career will forever be associated with the Department's record-setting success under the False Claims Act. In 1986, Mike led the Department's efforts to convince Congress to modernize the Act, removing barriers to proving false claims, and reinvigorating the *qui tam* or "whistleblower" provisions by encouraging individuals to come forward with evidence and receive up to 30 percent of recoveries. Since those 1986 amendments, recoveries have topped $33 billion, including more than $22 billion attributable to *qui tam* claims. Mike was instrumental in setting the paradigm used so successfully today to investigate and handle cases of fraud against the government.

Unfortunately, Mike is not the only colleague we have lost recently. George Vitelli is also missing from our gathering today. George was a Senior Trial Counsel in the Fraud Section who just last month lost his battle with cancer. During his career with the Department, George successfully pursued a number of our leading False Claims Act matters. He often shared his invaluable leadership and guidance with attendees of this conference, when he moderated panels on the ethical issues surrounding False Claims Act litigation.

Mike and George will be dearly missed.

We are grappling now with the difficult task of finding a new permanent Deputy Assistant Attorney General for the Commercial Litigation Branch, but I am happy to say that Joyce Branda has generously agreed to serve as the Acting DAAG while we do so. Joyce is well-known to most of you and I am sure you will agree that her leadership, knowledge, and sound judgment will serve us well during this period. I am also pleased that Michael Granston and Dan Anderson have agreed to serve as Acting Directors of the Fraud Section during Joyce's absence.

Although this is a period of transition and change within the Civil Division, our False Claims Act work has continued steadily. Last year, more than 630 qui tam matters were filed with the Department – more than in any other year in the history of the Act and an increase of more than 47% since 2009. More than two-thirds of these cases alleged false claims to government health care programs. Just last month, the Department announced that Abbott Laboratories would pay $1.5 billion to resolve criminal and civil allegations arising from its illegal marketing of the prescription drug, Depakote. This was the latest in a series of so-called "off-label marketing" cases in which the Civil Division, working with U.S. Attorneys' offices around the country, has prosecuted pharmaceutical and device manufacturers who market their products for uses not approved as safe and effective by the FDA.

But of course the reach of the False Claims Act extends well beyond health care matters.

We are actively pursuing financial fraud schemes, which can have devastating effects beyond just the Federal Gove rnment, often hitting ordinary Americans directly. The cornerstone of our work in this area is the interagency Financial Fraud Enforcement Task Force, established in November 2009 by the President. I serve as a co-chair of three of the Task Force's working groups, all of which bring together the government's civil and criminal capabilities, from multiple regulatory and enforcement agencies, to enhance our enforcement, prevention, and outreach efforts.

These benefits are readily apparent in the Department's recent successes against mortgage fraud. During the last five months, the Department's False Claims Act recoveries alone have exceeded $1.2 billion, and the Department played a leading role in negotiating the historic $25 billion settlement agreement with mortgage servicers.

We have also been vigilant in our efforts under the False Claims Act and other tools to root out fraud in connection with the procurement of goods and services used by our military and civilian agencies, including fraud affecting our men and women fighting in Iraq and Afghanistan. This type of fraud takes on many forms. For example, earlier this year, Maersk Line agreed to pay the United States $31.9 Million to resolve claims that Maersk inflated the charges for shipping supplies to Iraq and Afghanistan. And ATK Launch Systems Inc. agreed to pay nearly $37 Million to resolve allegations that it sold dangerous and defective illumination flares to the Army and the Air Force. All told, since January 2009, procurement fraud cases have accounted for approximately $1.6 billion in recoveries – which exceeds the amount in any comparable period.

Cases like those I just described are commonly brought to us by relators and their counsel. Our statistics paint a compelling picture of the impact that the strengthened qui tam provisions have had on the False Claims Act. Since 1986, nearly 70% of all False Claims Act recoveries can be attributed to *qui tam* matters.

Our intervention rate in these matters, however, has remained fairly constant over the decades. For every ten cases filed by relators, the government ultimately intervenes in only two. I very much appreciate that the decision to file a qui tam action is often a very difficult one. Relators are often shunned by their colleagues. Counsel for relators often put significant time and effort into matters that may never result in a recovery.

And yet I would be remiss if I did not mention that all too often DOJ attorneys dedicate significant time and effort investigating allegations that are too broadly pled or that are based on faulty information. I must stress,

as have my predecessors who have spoken at this event in the past, the importance of relators filing actions that meet the requirements of the False Claims Act and, in particular, providing enough information to allow us to investigate and evaluate a claim effectively. Of course, by helping us, you are helping yourselves, as a sufficiently- and accurately-detailed claim enhances the Government's ability to assess intervention. Even in those cases in which we do not intervene, a well-pled claim is essential for enabling relators to be prepared to exercise their right under the FCA to serve as private Attorneys General and to take their case forward. Narrowly drawn and well-pled complaints are far more likely to prevail, as recent cases have demonstrated.

In much the same way, I ask our colleagues in the defense bar to recognize the importance of this work in protecting taxpayer money. I have heard the charge that *qui tam* lawsuits represent a cost of doing business, and that *qui tam* settlements and recoveries should be treated as any other regulatory burden. Respectfully, this approach misses the point, and does a disservice to your clients.

Protecting taxpayer dollars is one of the Attorney General's core priorities. This includes a commitment to increase our efforts to reduce fraud at the outset. Although the recoveries I discussed earlier reflect the impressive work of this Department, it would be better if we did not need to bring these cases at all. The Department is well aware of the fact that litigation can only plausibly reach a fraction of the fraud committed against U.S. Government programs – which likewise makes the prevention of fraud a more potent tool for protecting the interests of the United States than efforts to undo the damage of completed schemes.

That is why we continue to pursue non-monetary remedies and other measures to help prospectively reduce fraud. And it is why we want to engage with you and your clients to encourage self-reporting, discuss forward-looking compliance measures, and generally work cooperatively to try to eliminate fraud. Litigation to recover the costs of fraud is a far inferior option to preventing fraud in the first place.

A quick glance into the future should demonstrate the benefits of this approach.

As you all know, retiree rolls are swelling – a trend that (along with other legal and demographic changes) will steadily increase the number of people participating in federal health care programs and the number of claims for federal health care benefits. At the same time, our country is broadly confronted with economic and fiscal challenges, which rightly and predictably result in public outrage whenever hard-earned (and scarce) tax dollars are directed from legitimate and important government programs to improper purposes.

Given this reality, we must safeguard our public dollars, and we must increase our emphasis on identifying and punishing waste, fraud, and abuse. So rather than waiting for the government to detect and respond to fraud, I invite you to join with the Department in establishing structures that help prevent fraud – and the need for lawsuits to combat it – in the first instance.

One specific tactic that runs counter to this goal involves efforts by defendants in qui tam cases to "run out the clock" – to drag out compliance with government requests for information in order to force the Department to decline to intervene or forego making an intervention decision, leaving the relator to soldier on alone. Let me be clear that such a strategy is both destined to fail and contrary to defendants' own self-interests.

First, that strategy overlooks recent amendments to the FCA that strengthen our ability to compel information and testimony from targets and other witnesses. As you know, Civil Investigative Demands, or "CIDs," allow law enforcement to speed up civil investigations by obtaining documents and testimony quickly and under oath. The authority to issue CIDs has recently been delegated to the Assistant Attorney General for the Civil Division. That authority has, in turn, been re-delegated to U.S. Attorneys around the country in cases primarily handled by those offices.

Since this re-delegation of authority occurred, we have seen an impressive increase in the use of CIDs by Department lawyers. In the last fiscal year, the Department authorized the issuance of 888 CIDs – more than

10 times the number of CIDs issued during the two years before re-delegation combined. The current CID procedures mean that efforts to "run out the clock" will only push the Department to compel your clients to produce the information we need, and which they could provide without being subject to this tool.

Second, and more generally, this approach to potential *qui tam* litigation ignores the benefits of working collaboratively with the government in its fraud investigations. Most defendants in FCA matters have come to recognize that there is an enormous benefit to be gained by avoiding what will likely be costly and protracted discovery, trial, and the mandatory treble damages and penalties that will be assessed if the government prevails.

The more thorough and effective the job defense counsel do investigating the case and presenting their clients' views of the applicable facts and law, the more likely it is that we will find these defenses persuasive, and the more credit your clients will get from the federal government in negotiated resolutions. And, I might add, because disclosure and cooperation show a sincere interest in cleaning house – and ensuring a culture of doing the right thing – they can help companies demonstrate the necessary responsibility to continue participating in government programs and contracts.

There are legal requirements, policies, and practices in place that encourage businesses to combat fraud on their own. For example, as many of you may know, under the False Claims Act, self-disclosure of violations can mean a reduction in potential damages — either in litigation or during settlement. So, a decision to come in promptly and work with the government to resolve any liability that may arise from past wrongdoing is more than the right litigation decision. It is a good economic decision.

I opened my remarks to you this afternoon by mentioning the recent Abbott case, citing it as an example of the latest in our efforts to police illegal marketing of prescription drugs. But the Abbott case also provides a powerful illustration of the value placed by the Department on prospective measures to ensure future compliance.

We worked with counsel for Abbott to identify innovative, non-monetary measures that would help us to fully redress the wrong and prevent its recurrence. These measures include:

- A term of probation for five years which requires Abbott to report any probable violations of the Food Drug and Cosmetic Act to the probation office, and requires that its CEO personally certify compliance with this reporting requirement;
- An agreed statement of facts;
- A corporate integrity agreement with the Inspector General of the Department of Health and Human Services that requires, among other things, Abbott's board of directors to review the efficacy of the company's compliance efforts; and
- A requirement that Abbott institute policies to ensure that scientific research and any resulting publications foster increased understanding of scientific, clinical or healthcare issues.

These provisions, among others, reflect our view that there will be cases in the future in which obtaining only a monetary recovery will not adequately redress the wrong. We realize that each case is different and presents its own unique set of facts and circumstances. We also know that in some instances our seeking non-monetary relief may prolong or prevent settlement discussions. Nonetheless, it is increasingly our view that we owe it to taxpayers to do our best to implement measures to fully explain the conduct that led to the resolution, and to deter future bad acts.

The Department takes seriously the need to look for fair and just solutions to address fraudulent misconduct and prevent it going forward. And that need is something that we must meet collectively, as all of us – plaintiffs and defendants, counsel, and the government – each play a role in these cases. That is why I am so pleased

to be here and so convinced that conferences such as this play a vital role. These gatherings enhance our respective practices and our understanding of our respective positions. They allow all of us to consider – and debate – new ideas and varying perspectives.

And so I thank our co-chairs of the conference, Jack, Jeb and Dan for bringing together such a terrific faculty and I look forward to working with all of you in the future.

Thank you.

Civil Division

Updated September 17, 2014