The False Claims Act:

What the Litigation Practitioner Needs to Know About Actions Based on False Claims and Their Defenses

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Introduction

Anyone who conducts business with the government – directly or indirectly – should be aware of and concerned about the False Claims Act ("FCA" or "the Act"). Broadly, the law imposes liability upon anyone who causes the government to pay money on a claim that is knowingly false in some respect. Originally enacted during the Civil War, the law underwent major revision in 1986. Since that time, the government has collected in excess of $35 billion from defendants in settlements and judgments.[1] Congress continues to fine-tune this law by incorporating anti-fraud provisions into other legislation.

The trend as to the number and size of judgments and settlements is increasing. The number of *qui tam* suits rose from 30 in 1987 to between 300 and 400 a year from 2000 to 2009. More than 700 FCA suits were filed in each of the last two years.[2] Most of these suits were brought under the Act's *qui tam* provisions – giving private citizens the right and incentive to pursue fraud claims on behalf of the government.[3] In 2014, the federal government recorded $5.7 billion in settlements and judgments collected in civil cases involving fraud against the government.[4] Of this amount, nearly $3 billion came from cases filed by whistleblowers.[5] Since January 2009, the federal government has paid whistleblowers more than $2.5 billion.[6] With recent amendments enacted in 2009 in

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[1] *See* John T. Boese, Civil False Claims and Qui Tam Actions, App. H (4th ed. 2013).

[2] *See* Press Release, Department of Justice, *Justice Department Recovers Nearly $6 Billion from False Claims Act Cases in Fiscal Year 2014 First Annual Recovery to Exceed $5 Billion; Over 700 Whistleblower Lawsuits for Second Consecutive Year* (November 20, 2014) (available at Justice.gov).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *See Id.*

the Patient Protection and Affordable Care Act (ACA) and in 2010 in the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), intended by Congress to make it easier to pursue false claims, the number of suits is sure to increase.

No industry, no organization, no person is exempt from this law. A review of the cases and Department of Justice press releases reads like a Who's Who of American business. With increased incentives for whistleblower plaintiffs, reduced scienter requirements, and more state and local governments enacting versions of the FCA, companies must be more vigilant than ever in their compliance programs aimed at eliminating fraud. And practitioners whose clients do business with the government (or contract with others who do business with the government) may find it useful to develop a working knowledge of the key features of this law to enable them to advise clients who find themselves on the receiving end of an FCA complaint.

Brief History of the False Claims Act

The FCA, 31 U.S.C. §§ 3729 – 3733, was enacted in 1863 in an effort to combat fraud perpetrated by suppliers to the Union Army.[7] It originally provided for civil penalties of $2,000 per false claim and doubling of the government's damages.[8] It included provisions allowing private citizens to sue on behalf of the government, providing those "relators" with 50 percent of the amount the government recovered as a result of their cases. The *qui tam* provisions of this law have their roots, as with most of American law, in the English common law. *Qui tam* is short for "*qui tam pro domino rege quam pro se ipso in hac parte sequitur,*" which translates literally to "he who

[7] *See* Vermont Agency of Nat. Resources v. United States *ex rel.* Stevens, 529 U.S. 765, 781-82 (2000)
[8] *Id.* at 785.

pursues this action on our Lord the King's behalf as well as his own."[9] Beginning as early at the 13th century, access to royal courts could only be gained by alleging harm to the King.[10]

Significant amendments to the FCA were enacted in 1943, mainly altering the *qui tam* sections of the law largely as a result of a Supreme Court decision in *United States ex rel. Marcus v. Hess*.[11] In *Hess*, the relator alleged that contractors were involved in collusive bidding on government contracts. Those same defendants, however, had been criminally indicted prior to the filing of the relator's *qui tam* action. The Supreme Court nevertheless permitted the suit to proceed, finding that even if the relator was piggybacking on the criminal proceeding – plagiarizing the indictment in fact – the suit nevertheless promoted the end of the FCA by allowing the government a greater recovery than it would receive solely from the imposition of a criminal penalty.[12] The 1943 amendments were signed into law not long after this decision. They included a reduction in the relator's percentage recovery to 10 percent in the event the government participated in the case or 25 percent if it did not, and an outright prohibition on *qui tam* suits based on evidence or information already in the possession of the federal government. What's more, if the government elected to intervene, the relator's participation in the case came to an end. These changes yielded a significant drop in *qui tam* actions, although the government continued to employ the FCA against unscrupulous contactors in the procurement context throughout WWII, the Korean Conflict, and the Vietnam War.

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[9] *Id.* at 769.
[10] *See* Note, *The History and Development of Qui Tam,* 1972 Wash. U. L. Q. 81, 85 (1972).
[11] 317 U.S. 537 (1943).
[12] *See Id.* at 545.

By the 1980s, the pendulum had swung to the opposite end of the arc. Increasing reports of fraud on the government, mainly in the area of federal defense procurement, likely a consequence of the expansion of defense spending during the Reagan Administration, led to amendment of the FCA in 1986. The recoverable damages increased from double to treble the government's losses. The statutory penalties were increased from $2,000 per false claim to a range from $5,000 to $10,000 per false claim.[13] In addition, there were several revisions to the *qui tam* provisions. The amendment increased the relator's recovery to a maximum of 25 percent in cases where the government intervened, and 30 percent in cases where the government elected not to intervene. What's more, a provision was added to permit relators to recover their attorneys' fees and costs. The 1986 amendments also permitted the relator to continue as a party to the action in cases where the government intervened, even though the government would have primary responsibility for prosecuting the action. Finally, the amendments relaxed the prohibition on a relator's recovery where the government already knew the underlying facts. The new provision permitted a *qui tam* suit even where the government was in possession of the information as long as the relator was the original source of the information supplied to the government.

These amendments also resolved a dispute among the courts about whether it was necessary for the government to prove specific intent to defraud. The amended law required proof that the defendant either had actual knowledge of the falsity of the information or acted either in deliberate ignorance of it or with reckless disregard of the

[13] In 1999, these penalties were increased to $5,500 to $11,000 per false claim. 64 Fed. Reg. 47104 (Aug. 30, 1999).

truth of the information.[14] The 1986 amendments also created a private right of action for any person who is discriminated against for participating or aiding in a FCA prosecution.[15] This section entitles the prevailing claimant to recover double back pay, reinstatement, and any other relief necessary to make that person whole.[16]

Further amendments to the FCA came along in 2009 under the Fraud Enforcement and Recovery Act (FERA). FERA renumbered the liability provisions of the FCA. Notably, FERA also codified a "materiality" requirement that previously existed as part of the common law surrounding the statute. The logic behind the provision was obvious. Not every false statement or representation made to the government should necessarily give rise to liability under the law. Rather, only statements or representations that were material to the government's decision to pay the claim should lead to liability. Materiality is defined as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[17] These amendments, with one exception, were intended to be prospective only.

The 2010 passage of the ACA and the Dodd-Frank Act led to further refinements in the FCA. The ACA modified the public disclosure/original source limits on the FCA. The government now has a "veto" power, to prevent dismissal of a *qui tam* suit despite public disclosure where it opposes dismissal.[18] Dodd-Frank modified the provisions pertaining to retaliation. Now the FCA protects relators engaged in "lawful acts" as well

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[14] *See* 31 U.S.C. § 3729 (b) (2000).
[15] *See* 31 U.S.C. § 3730 (h) (2000).
[16] *Id.* The amendments also included a provision that reduced the damages recoverable against the defendant who voluntarily disclosed and cooperated with the government to "not less than 2 times the amount of damages." *See* 31 U.S.C. § 3729 (a).
[17] 31 U.S.C. § 3729 (b)(4).
[18] *See* 31 U.S.C. § 3730(e)(4)(A).

as "other efforts to stop 1 or more violations" of the FCA.[19] And this protection extends to employees, contractors, and agents covered by this section, as well as "associated others."[20]

Elements of a Claim

Conduct actionable under the FCA is set forth in 31 U.S.C. § 3729(a)(1), delineated in seven subsections. As a general matter, conduct that causes the government to pay more than it is legally required to pay, or receive less than it is lawfully entitled to, gives rise to liability under the FCA. Under 3729(a)(1)(A), the elements are:

1. The person must present or cause another to present a claim for payment or approval by the United States;
2. The claim must be false or fraudulent; and
3. The actor must know that the claim is false. [21]

Note that some courts have held that damages are not required if the foregoing elements are established. In that instance, statutory penalties ($5,500 – $11,000 per false claim) can still be imposed.[22] These elements are discussed further *infra*.

A claim for payment. Prior to the 1986 amendments, some courts construed "claim" rather narrowly, limiting it to claims for money made directly of the government. A broader definition was adopted in the 1986 amendments: "any request or demand which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of

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[19] 31 U.S.C. § 3730(h).
[20] *Id.*
[21] United States *ex rel.* Stinson v. Provident Life & Accident Ins. Co., 721 F. Supp. 1247, 1258-59 (S.D. Fla. 1989).
[22] *See* United States *ex rel.* Aakhus v. Dyncorp, Inc., 136 F.3d 676, 681 (10th Cir. 1998).

the money or property . . . ."[23] This definition thus permitted FCA liability for fraud perpetrated on grantees of federal funds. In 2009, this was broadened to include claims for money or property regardless of whether the government had title to it, as long as the government provided the money or property or will reimburse a portion of it. The money or property also had to be expended on the government's behalf, or used for a government purpose. Note that based on this definition, a bid would not constitute a claim. A bid is nothing more than an offer to perform, in exchange for compensation.[24]

False or fraudulent. Falsity is an objective inquiry that requires consideration of all facts and circumstances. Often, an invoice is not false on its face and consideration of the underlying contracts, regulations, etc. are necessary to determine whether it is false in fact.[25] Questions of falsity are often intertwined with the issue of intent, and the decisions on this issue often revolve around the exact meaning of contract and regulatory terms. Ambiguity tends to negate intent and/or falsity.[26]

Knowledge or intent. With respect to the element of intent, as noted *supra*, the 1986 amendments relieved the government of the obligation to prove specific intent to defraud. The amended law required proof that the defendant either acted in deliberate ignorance of available information or with reckless disregard of the truth of the

[23] 31 U.S.C. § 3729(c) (1986).

[24] *See, e.g.,* United States *ex rel.* Laird v. Lockheed Martin Eng'g & Sci. Servs. Co., 491 F.3d 254, 260 (5th Cir. 2007) (contract underbid not a false claim).

[25] *See, e.g.,* United States v. Davis, 803 F. Supp. 830 (S.D.N.Y. 1992), *aff'd in part and rev'd in part sub nom.* United States v. General Dynamics Corp., 19 F.3d 770 (2d Cir. 1994) (evidence bearing on falsity of claims relating to cost estimations).

[26] *See, e.g.,* Wilson v. Kellogg, Brown & Root, Inc., 525 F.3d 370, 378 (4th Cir. 2008) (relator cannot base a claim on nothing more than his interpretation of imprecise contract term); Crane Helicopter Servs., Inc. v. United States, 45 Fed. Cl. 410 (Fed. Cl. 1999) (government failed to prove falsity where the evidence on issue of defendant's knowledge and accuracy of representations made to the Federal Aviation Administration was equivocal).

information.[27] As noted, questions of ambiguity in the interpretation of contracts and regulations may lead to the conclusion that the defendant lacked intent as long as the defendant's interpretation is not unreasonable.[28] Also, circumstances involving mistake or mere negligence should not lead to liability.[29]

Materiality. Prior to the 2009 FERA amendments, the statute did not contain an explicit "materiality" requirement. Nevertheless, variously calling it materiality, causation, or reliance, most courts imposed such a requirement on the government and FCA relators. And such a requirement was necessary. Absent a materiality or reliance requirement, every knowing technical contract breach or regulatory violation – however minor or even trivial – would give rise to FCA liability. Surely that is not what Congress intended.[30]

Causation. It should be obvious that the knowing submission of a false claim to the government does not result in FCA liability unless it is shown that this actually *caused* the government to make payment. Causation is an express element under 31 U.S.C. § 3729(a)(1)(A). As to the remaining bases for FCA liability, proof of causation is implicit. In many cases, the causal connection is clear and simple. In some instances,

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[27] *See* 31 U.S.C. § 3729 (b) (2000).

[28] *See, e.g.,* United States ex rel. Oliver v. Parsons Co., 195 F.3d 457, 464 (9th Cir. 1999) (good faith nature of defendant's interpretation of accounting regulation precluded FCA liability).

[29] *See* Wang v. FMC Corp., 975 F.2d 1412, 1421 (9th Cir. 1992) ("known to be false" does not include that which is merely untrue, but rather that which is a lie; "[t]he Act is concerned with ferreting out 'wrongdoing,' not scientific errors").

[30] *See* United States *ex rel.* Berge v. Board of Trustees of Univ. of Alabama, 104 F.3d 1453, 1459 (4th Cir. 1997) (making explicit the government's burden to prove materiality in FCA actions). The FERA amendments codified this requirement at 31 U.S.C. § 3729(a)(1).

however, the defendant's act is more attenuated or removed from the government's act of payment, and causation is more difficult to determine.[31]

A common scenario involves a direct claim by someone asking the government to pay more than it is obligated to pay under the circumstances. For example, a contractor who knowingly bills the government more for labor than the contract permits is subject to liability under the FCA. Similarly, contactors or suppliers who submit products or services that are materially substandard may be subject to FCA liability.[32] Note that liability under the FCA does not depend on the knowledge of the person actually submitting the claim. As long as someone in an organization acts knowingly in causing a business or contractor to submit a false claim, liability can arise. For example, where a final inspector signs off on work that he knows was not done, it matters not that the department responsible for processing and submitting the claim for payment is unaware. This scenario implicates the "cause another to present" language of the statute. Similarly, a subcontractor who knowingly submits a false statement of charges to the general contractor who incorporates that into the bill submitted to the government violates the FCA. The subcontractor in that instance may be liable to the government despite the absence of contractual privity.

One who makes knowingly false statements in order to obtain a contract with the government can also be liable under the FCA. This is sometimes referred to as "fraud in

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[31] *See, e.g.,* United States *ex rel.* Franklin v. Parke-Davis, No. 96-11651PBS, 2003 WL 22048255, at *4-5 (D. Mass. Aug. 22, 2003) (using tort principles finding defendant's actions to be substantial factor in causing payment in "off-label" drug promotion case); *cf.* United States *ex rel.* Sikkenga v. Regence Bluecross Blueshield, 472 F.3d 702, 734 (10th Cir. 2006) (cautioning against using tort principles to construe a statute that is punitive in nature).

[32] *See, e.g.,* United States *ex rel.* Lee v. SmithKline Beecham, 245 F.3d 1048, 1053 (9th Cir. 2001) (reversing dismissal of worthless services case based on failure to plead with sufficient particularity under F.R.C.P. 9(b) and granting leave to replead).

the inducement." In one such case, the Supreme Court held that every claim for payment submitted after the defendant was found to be involved in collusive bidding was false.[33] Given that liability under this scenario can be so sweeping, most courts have found this type of fraud only rarely. Typically, it must be shown that the defendant never intended to comply with the pertinent contract or applicable regulations.[34] FCA liability may also be found where one relies on a false record to get a claim paid, 31 U.S.C. § 3729(a)(1)(B), where one participates in a conspiracy to submit a false claim,[35] or where one delivers less property than is required.[36]

Then, there is the "reverse false claim" which involves the avoidance of an obligation to deliver payment or property to the government. The reverse false claim was first codified in the 1986 amendments. This type of conduct may not involve a claim on the government *per se*, but nevertheless takes money from the government wrongfully and is thus actionable. For liability to attach, there must be a clear obligation to pay that is not merely speculative or contingent. In *United States v. Pemco Aeroplex, Inc.*, the defendant submitted an inventory schedule to the Air Force which gave notice that defendant was in possession of aircraft wings that were not necessary to fulfill its contract.[37] Defendant identified the wings as an older model valued between $750 and $1,125. The government agreed to sell the wings to defendant for scrap, and defendant

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[33] *See Hess*, 317 U.S. at 543-44.

[34] *See, e.g.,* United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1018 (7th Cir. 1999).

[35] *Id.* at § 3729(a)(1)(C)

[36] *Id.* at § 3729(a)(1)(D). Another common category of false claims is the category of "false certification" claims. These claims involve the express or implied certification of compliance with contract or regulatory requirements. *See, e.g.,* United States *ex rel. Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001).

[37] 166 F.3d 1311, 1312 (11th Cir. 1999) *reh'g granted and opinion vacated sub nom.* United States v. Pemco Aeroplex, Inc., 179 F.3d 1327 (11th Cir. 1999) *and on reh'g en banc sub nom.* United States v. Pemco Aeroplex, Inc., 195 F.3d 1234 (11th Cir. 1999).

later resold them for $1.5 million. Although the district court dismissed the government's action, which was affirmed on appeal, the 11th Circuit sitting *en banc* vacated and reversed finding that there was a current obligation to either return the wings or pay the government their fair value.[38]

Damages and Penalties

Section 3729(a) provides that the government recovers the amount of damages it incurs as a result of the defendant's illegal act. The calculation is logically stated as the amount of money the government actually paid less the amount it would have paid had the claim not been false. This simple formula generates the government's *single* damages. A defendant's liability to the government will be treble this amount by operation of law.[39]

Damages in cases where the government is charged incorrectly for services or products provided – either billed for something not provided or overcharged – are relatively easy to determine. As noted *supra*, damages are the amount paid minus what would have been paid had the claim been truthful.[40]

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[38] The FERA amendments brought about changes to reverse false claims liability. It was no longer necessary to prove specific intent to avoid payment or an obligation. Mere knowledge was sufficient. Obligation is defined as "an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment." 31 U.S.C. § 3729(b)(3). Note that violations of many federal statutes and regulations could in theory give rise to a reverse false claim, those legislative schemes typically have their own penalties, and they should not serve as a basis for FCA liability.

[39] *See* Vermont Agency of Natural Resources v. United States *ex rel.* Stevens, 529 U.S. 765, 785-86 (2000). This holds unless, of course, the defendant avails itself of the provision pertaining to voluntary disclosure, in which case its damages may be limited to merely *double.*

[40] *See, e.g.,* United States v. Lorenzo, 768 F. Supp. 1127, 1129-30 (E. D. Pa. 1991) (charging Medicare for oral cancer exams rather than the routine dental exams which were ineligible for reimbursement).

In the case of fraud in the inducement, the damages can in some cases extend to all claims submitted under a fraudulently obtained contract.[41]

In the event of a reverse false claim the basic formula can be restated as the difference between what the government received and what it would have received absent knowing falsity. In the simplest case, where there is a failure to pay an amount owing under a contract (a lease payment, for example), the government's damages will equal the amount withheld. But the damages can be particularly difficult to determine when the underlying obligation is unclear or contingent.[42]

In cases involving substandard products or services, the central determinant is the value assigned to the product or service supplied. In *United States v. Bornstein,*[43] the Supreme Court tackled the issue of damages in a substandard product case, adopting a "benefit of the bargain" formula: the difference between the market value of the product received and the market value of the product contracted for.[44] In *United States ex rel. Roby v. Boeing Co.,* an Army helicopter crashed as a result of a defective transmission gear, resulting in a total loss of the aircraft. An issue on appeal was whether the high value items contract (HVIC) clause precluded damages under the FCA. The HVIC is inserted in some government contracts under the Federal Acquisition Regulations, to

[41] *See, e.g.,* United States *ex rel.* Longhi v. Lithium Power Techs., Inc., 575 F.3d 458, 473 (5th Cir. 2009) (grant awarded based on fraudulent application; single damages equal to the total amount of the grant); *but see* United States v. Education Dev. Network Inc., No. CIV. A. 89-7780, 1993 WL 533218, at *11 (E.D. Pa. 1993) (damages were the difference between the inflated amount proposed and the actual cost to the government).

[42] *See, e.g.,* United States v. Universal Fruits and Vegetables Corp., 370 F.3d 829 (9th Cir. 2004) (defendant shipped goods through South Korea to avoid an anti-dumping duty; $2 million verdict overturned on appeal because this was an attempt to collect customs duties, jurisdiction over which lies in the Court of International Trade).

[43] 423 U.S. 303 (1976)

[44] *Id.* at 317, n.13. *See also* United States *ex rel.* Roby v. Boeing Co., 302 F.3d 637, 646-47 (6th Cir. 2002).

limit contractor liability as to high cost items. Part of the logic for this is that contractors would purchase insurance in the absence of this provision, the cost of which would be passed on to the government. The government agrees to self-insure against this risk. The majority in *Roby* rejected this defense and also concluded that the value of the helicopter provided was zero. In doing so, it rejected Boeing's argument that the benefit of the bargain formula would limit the damages to the cost of the defective component, noting that Boeing billed the government for the cost of the helicopter as a unit.[45]

Penalties are to be imposed for each false claim. While this may sound simple enough, the cases reveal a wide variety in the manner of calculating the number of claims and assessing penalties. Most courts have held that penalties should attach to each demand for payment, as opposed to each false record submitted with a single demand for payment.[46] The amount of the penalty today is between $5,500 and $11,000 per false claim, although the statute provides no guidance to courts on how to determine the amount of the per-claim penalty within that range. Courts will often scale the penalty based on factors such as the defendant's culpability, the government's damages, defendant's ability to pay, etc.[47]

<u>*Qui Tam* – Actions Brought by Private Litigants</u>

The *qui tam* provisions of the FCA are a central feature of the law today. They permit someone other than the government – called a relator – to initiate an action under the FCA. The relator may pursue the action even if the government shows no interest in

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[45] *Id.* at 646-47.
[46] *See, e.g.* Bornstein, 423 U.S. at 309, n. 4.
[47] *See, e.g.,* United States v. Peters, 927 F. Supp. 363, 369 (D. Neb. 1996) (assessing $5,000 penalty per claim because government already recovered a windfall from the trebling of damages); *United States v. Murphy*, 937 F.2d 1032, 1035 (6th Cir. 1991) (maximum penalty awarded government due to defendant's prior involvement in bid-rigging).

it or declines involvement. In the event of a recovery against the defendant, the relator shares in the recovery.

A relator brings an FCA action on behalf of the United States. And virtually anyone has standing as a relator, as long as that person or entity possesses nonpublic knowledge of the fraud or was the original source of what has become public.[48] This includes employees of the defendant, former employees, competitors, employees of competitors, state and municipal governments, government employees (in some cases), special interest groups, and even attorneys. Note that this standing extends only to the pursuit of claims allowed under the FCA and does not extend to common law claims. Such claims (for fraud, unjust enrichment, and breach of contract, for example) may be brought by the government after it intervenes in an action, however.[49]

A relator who initiates an FCA action files the complaint under seal and serves the complaint upon the government along with a "written disclosure of substantially all material evidence and information the person possesses."[50] The purpose behind this requirement is to permit the government to investigate the claims to determine whether or not to intervene in the suit.[51] The complaint remains under seal for at least 60 days.[52]

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[48] *See* 31 U.S.C. § 3730(e)(4). Prior to the 2010 enactment of the ACA, the public disclosure requirement was held to be jurisdictional. Rockwell Int'l Corp. v. United States, 549 U.S. 457, 467-68 (2007). With the enactment of the ACA, this provision was amended to direct the court to "dismiss" an action where there was advance public disclosure, unless the government opposed dismissal, or unless the action was brought by the government or the relator was the original source of the information. 31 U.S.C. § 3730(e)(4)(A).

[49] *See* United States *ex rel.* O'Keefe v. McDonnell Douglas Corp., 918 F. Supp. 1338 (E.D. Mo. 1996).

[50] 31 U.S.C. § 3730(b)(2).

[51] An issue that arises with some frequency is the discoverability of the relator's written disclosure to the government. Many courts have held that it is discoverable, at least in the main. To the extent attorney work product is included in the disclosure to government attorneys, some courts, after conducting an *in camera* review, have declined to order production. *See, e.g.,* Grand *ex rel.* United States v. Northrop Corp., 811 F. Supp. 333 (S. D. Ohio 1992); *but see* United

There is no absolute time limit, however, since the statute permits the government to seek extensions of the time period "for good cause shown."[53]

At the expiration of the period of time allowed for investigation, the government must either (a) intervene in the action and take it over, (b) decline to intervene, (c) seek dismissal, or (d) attempt to settle the claim. Note that if the government declines to intervene, it can still attempt to do so later "for good cause." Usually this happens when new information is uncovered regarding the scope of the alleged fraud.[54] If the government elects to intervene in the action, it has primary responsibility for prosecuting the action and is not bound by any acts or statements of the relator.[55] The relator may, nevertheless, continue as a party to the action.

Although the relator continues as a party, the government may under certain circumstances restrict the relator's actions. Under section 3730 (c)(2)(C), the government may make an application to the court to restrict the relator's participation in any manner, at any stage in the proceedings, upon a showing that the relator's conduct will cause undue delay, would be repetitious, irrelevant, or harassing.

If the government is not persuaded of the merits of the claim, it may simply decline to intervene. Even if the relator is successful in recovering against the defendant, the government will still share in at least 70 percent of the recovery while expending no resources. The government has the right, however, to pursue dismissal of the *qui tam*

States *ex rel.* Burns v. A.D. Roe Coe, Co. Inc., 904 F. Supp. 592, 593 (W.D. Ky. 1995) (disclosure not protected by work product doctrine). Likewise, the information collected by the government during its investigation has also been held to be discoverable. *See* United States *ex rel. Yannacopolous v. General Dynamics*, 457 F. Supp. 2d 854, 860 (N.D. Ill. 2006).

[52] *Id.*

[53] *Id.* at § 3730(b)(3).

[54] *See Id.* at § 3730 (c)(3).

[55] *Id.* at § 3730 (c)(1).

action as long as the relator is given notice and an opportunity for a hearing.[56] A government request for dismissal, notwithstanding a relator's objection and right to a hearing, has been held by some courts to be beyond judicial review.[57]

The settlement of a *qui tam* action presents a number of considerations, which, in turn, vary depending on whether the government has intervened in the case. Where the government is a party, it may decide to settle a case over the objection of a relator. Before dismissing a settled action, the court must determine, after hearing, that the settlement is "fair, adequate and reasonable."[58] This is the same standard of review applied to class actions and has been held to be limited to ensuring the settlement is not a result of collusive negotiations.[59] Note that the government may also settle a *qui tam* action out from under the relator even if it is not a party.[60]

One issue that divides courts is whether government has the right to block a settlement negotiated between a relator and the defendant where the government has not intervened in a case. The government may object where, for example, the relator has a personal, employment-related claim against the defendant, such as a claim for wrongful discharge, and a majority of the settlement funds are allocated to the personal claim thus diminishing the government's share. Some courts have recognized that the government

[56] *Id.* at § 3730 (c)(2)(A).
[57] *See* Swift v. United States, 318 F.3d 250, 252 (D.C. Cir. 2003); *cf.* United States *ex rel.* Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1145 (9th Cir. 1998) (affirming district court's ruling that government's right to dismiss is subject to judicial review).
[58] 31 U.S.C. § 3730 (c)(2)(B).
[59] *See, e.g.,* Ritchie v. Lockheed Martin Corp., 558 F.3d 1161 (10th Cir. 2009).
[60] *See* United States *ex rel.* Schweizer v. Oce N.V., 677 F.3d 1228, 1233 (D.C. Cir. 2012).

cannot force a private litigant to continue to pursue a claim, although, under the FCA, the government does have the statutory right to challenge a settlement for "good cause."[61]

The relator will receive a share of the proceeds of the action. Where the government has intervened, the relator's recovery is limited to between 15 and 25 percent. The exact percentage to be awarded is within the discretion of the court. The statute offers little guidance beyond "the extent to which the person substantially contributed to the prosecution of the action."[62] The Department of Justice has issued a memorandum listing several nonexclusive factors that it recommends be considered in negotiating or adjudicating a relator's share of the recovery.[63] It should come as no surprise that division of the spoils between the government and relator is often hotly contested both in trial courts and on appeal.[64] When the relator pursues an FCA action without government involvement, the percentage of the recovery increases to a range of between 25 percent and 30 percent.[65]

The relator's share of any recovery can be reduced if the court finds that the relator was involved in perpetrating the fraud. 31 U.S.C. § 3730 (d)(3) provides that if the relator was someone who planned and initiated the violation which led to the FCA

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[61] *See* Sylvester v. Northrop Grumman Corp., No. 95-55220, 95-56058, 1996 WL 387621, at *2 (9th Cir. July 10, 1996) (no government right to bar a settlement absent intervention); *but see* Searcy v. Philips Elecs. N. Am. Corp., 3d 154, 156-57 (5th Cir. 1997) (allowing government to block settlement without intervening, based on objections to scope of release).

[62] 31 U.S.C. § 3730 (d)(1).

[63] *See* United States *ex rel.* Alderson v. Quorum Health Group, Inc., 171 F. Supp. 2d 1323, 1334 (M.D. Fla. 2001) (referring to the guidelines and noting that they might be useful as a checklist for negotiation).

[64] *See, e.g.,* United States v. General Elec. Co., 808 F. Supp. 580, 583-84 (S.D. Ohio 1992); United States *ex rel.* Thornton v. Science Applications Int'l Corp., 79 F. Supp. 2d 655, 657 (N.D. Tex. 1998) *vacated sub nom.* United States v. United States ex rel. Thornton, 207 F.3d 769 (5th Cir. 2000) (dispute between relator and government when part of settlement was defendant's agreement to waive certain claims and relator claimed the value of the waived claims were "proceeds of the action").

[65] 31 U.S.C. § 3730 (d)(2).

action, the court has discretion to reduce the award as it deems appropriate. This section applies regardless of whether the government intervenes in the action. If the relator is prosecuted and convicted of criminal violations in connection with the fraud, however, the relator must be dismissed from the action without prejudice to the government's right to pursue it.[66]

The FCA also allows the relator to recover, upon motion, an amount for reasonable expenses including reasonable attorneys' fees and costs incurred in prosecuting the action. This is so, regardless of whether the relator recovers by way of judgment or settlement.[67] Courts will approach the issue of fees in a manner similar to that used in other non-FCA contexts, such as class actions.[68] And the award is usually limited to time spent prosecuting successful FCA claims.[69]

Out of concern that relators could be subject to retaliation for bringing claims under the FCA, Congress, as part of the 1986 amendments, incorporated a remedy. This conferred a statutory cause of action upon anyone subject to discharge or discrimination in the terms and conditions of employment for lawful actions taken in furtherance of an action brought under 31 U.S.C. § 3730 (h). Relators so claiming were entitled to "all relief necessary to make the person whole."[70] The amendments of 2009 modified the

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[66] *Id.*

[67] 31 U.S.C. § 3730(d)(1).

[68] *See, e.g.,* United States *ex rel.* Gonter v. Hunt Valve Co., 510 F3d 610 (6th Cir. 2007) (using lodestar method for calculating relator's attorneys' fee award).

[69] *See* Miller v. Holtzmann, 575 F. Supp. 2d 2 (D. D.C. 2008), *amended in part, vacated in part sub nom.* United States ex rel. Miller v. Bill Harbert Int'l Const., Inc., 786 F. Supp. 2d 110 (D.D.C. 2011) (excluding fees for time spent litigating relator's share of recovery). Under limited circumstances, a prevailing defendant may recover fees and expenses from relator where the court finds that the action was "clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." 31 U.S.C. § 3730 (d)(4); United States *ex rel.* J. Cooper & Assocs. v. Bernard Hodes Group, Inc., 422 F. Supp. 2d 225, 239 (D. D.C. 2006).

[70] *Id.*

class of persons protected to make clear that it applied not merely to employees, but independent contractors who were harmed by retaliatory actions of an FCA defendant. The definition of protected conduct was amended further in the Dodd-Frank Act of 2010 which made clear that the protection applied to persons acting in furtherance of an action brought under 31 U.S.C. § 3730 (h), or engaged in other "efforts to stop 1 or more violations of this subchapter." The relator must be engaged in conduct protected under the FCA, not merely in the assigned duties of employment, and there must be a causal nexus between the relator's conduct, and the adverse employment action.[71]

Defenses and Responses to Claims

Public disclosure, lack of original source, first-to-file bar. As noted, proper parties-relator must, under the statute, bring their claims based on information that has not been disclosed to the public. Alternatively, if the information is in the public domain, the relator must be the original source of the information.[72] These requirements if not met can serve as a basis for dismissal of the *qui tam* action.[73] The first-to-file bar prevents subsequent relators from piggybacking on the efforts of the first relator to file by precluding *qui tam* actions based on the same facts that gave rise to the first-filed action.[74]

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[71] *See* McBride v. Peak Wellness Ctr., Inc., 688 F.3d 698, 704 (10th Cir. 2012) (reporting violation of internal procedures was not protected and did not overcome presumption plaintiff was acting in accord with employment duties; presumption can be overcome by notifying defendant of intent to bring or assist in bringing FCA action); United States *ex rel.* Williams v. Martin-Baker Aircraft Co., 389 F. 3d 1251, 1262 (D.C. Cir. 2004) (temporal association between relator's report to government and discharge was evidence of causation); *cf.* United States *ex rel.* Sanchez v. Lymphatyx, Inc., 596 F. 3d 1300, 1303 (11th Cir. 2010) (relator's warning that defendant's conduct was unlawful or subject to criminal liability was protected).

[72] 31 U.S.C. § 3730(e)(4)(A).

[73] *See Id.*

[74] 31 U.S.C. § 3730(b)(5).

Lack of materiality, lack of intent, lack of falsity. Although these are elements of the plaintiff's case-in-chief, and thus not defenses *per se*, they nevertheless represent key issues upon which FCA liability, more often than not, fundamentally depends. The burden of proof on these elements remains with the plaintiff. If at the close of discovery the plaintiff lacks proof on one of these issues, the FCA defendant should be entitled to judgment as a matter of law.

Counterclaims against the relator and third-party actions. Where the relator engaged in wrongdoing of some sort that causes damage or harm to the defendant, the defendant may be able to assert a counterclaim. Typically, courts have not favored counterclaims for contribution or indemnity.[75] Courts have generally refused to permit counterclaims that seek to shift liability from the defendant to a relator caught up in the fraud, holding that such counterclaims would have a chilling effect on fraud reporting.[76] This prohibition, however, does not necessarily apply to actions against third-parties.[77]

Failure to meet the requirements of Rule 9(b). FRCP 9(b) imposes special pleading requirements in cases of fraud: "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." The key word in this prescription is "particularity." To pass muster under this Rule, a plaintiff must identify dates, names of persons, names of products, statements made, documents used, amounts

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[75] *See* United States *ex rel.* Head v. Kane Co., 668 F. Supp. 2d 146, 153 (D. D.C. 2009) (allowing counterclaim for defamation); United States *ex rel. Madden v. General Dynamics*, 4 F.3d 827, 831 (9th Cir. 1993) (allowing counterclaims for breach of fiduciary duty and misappropriation of trade secrets).

[76] *See* United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., Inc., 190 F.3d 963, 967 (9th Cir. 1999) (dismissing counterclaim for contribution or indemnity against relator).

[77] *See* Cell Therapeutics Inc. v. Lash Group, Inc., 586 F.3d 1204 (9th Cir. 2009) (allowing third-party action for indemnification).

at issue, etc.[78] Allegations of fraud are subjected to heightened pleading requirements for various reasons, not the least of which is that they imply a violation of moral, not just legal, principles and thus present greater reputational risk.[79] Virtually every court to consider the issue has held that Rule 9(b)'s pleading requirements apply to actions brought under the FCA.[80]

Statute of limitations. Actions brought under the FCA, either by the government or by a *qui tam* relator, must be timely. The 1986 amendments to the FCA provided that civil actions must be brought within six years after the date on which the violation is committed, or within three years of the date an official of the United States charged with responsibility to act knew or should have known of the facts material to the right of action, whichever occurs later, but in no event more than 10 years after the date on which the violation occurred.[81] This statute thus incorporates a limitations period, a discovery rule or tolling provision that can extend the period (three years after facts were known or knowable), and a statute of repose which precludes liability more than 10 years post violation.

Although the statute states that the limitations clock commences on the date the violation is committed, it provides no further guidance as to when, for limitations

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[78] *See* United States *ex rel.* Ge v. Takeda Pharmaceutical Co. Ltd., 737 F.3d 116, 123 (1st Cir. 2014).

[79] *See* Segal v. Gordon, 467 F.2d 602, 607 (2nd Cir. 1972) (specificity requirement intended to protect reputations of defendants resulting from vague accusations of serious wrongdoing).

[80] *See, e.g.,* United States *ex rel.* Ge v. Takeda, 737 F3d at 121; United States *ex rel.* Drake v. Norden Sys., Inc., 375 F.3d 248, 258 (dismissing FCA pleading lacking sufficiently detailed allegations of fraud); United States *ex rel.* Robinson v. Northrop Corp., 149 F.R.D. 142, 145 (N.D. Ill. 1993) (rejecting claim that relaxed pleading standard should apply to FCA *qui tam* actions).

[81] 31 U.S.C. § 3731(b).

purposes, a violation exists. Courts have differed on this issue.[82] Courts also disagree on whether the three-year discovery rule can apply to actions filed by relators in which the government does not intervene.[83]

Government knowledge negates fraud. In some instances, the government may be aware of deficiencies, inaccuracies, or errors in a claim, and fail to raise an issue about it. Some courts have held that in such circumstances, the government's awareness negates the fraud or falsity requirement of the FCA.[84] Similarly, when the government becomes aware of the falsity in a claim after it is submitted, but honors the claim nevertheless, the government can be said to have sanctioned the defendant's conduct, thus negating falsity or fraud.[85]

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[82] *See, e.g.,* United States *ex rel.* Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148 (2d Cir. 1993) (violation committed when the claim is paid by the government); *but see* United States *ex rel.* Bauchwitz v. Holloman, 671 F. Supp. 2d 674 (E.D. Pa. 2009) (statute commences when the false grant application submitted).

[83] *See* United States *ex rel.* Hyatt v. Nothrop Corp., 91 F.3d 1211, 1217–18 (9th Cir. 1996) (applying tolling provision to *qui tam* actions); *cf.* United States *ex rel.* Thistlethwaite v. Dowty Woodville Polymer, Ltd., 6 F. Supp. 2d 263, 265 (S.D.N.Y. 1998) ("By the clear statutory language, the Relator's time is not extended to three years after the United States official learns of the violation. That provision only applies to the government."). The amendments of 2009 included a provision for relation back of the government's complaint in intervention. That is, as long as the government's claims arose out of the same conduct that gave rise to the relator's claims, the amendment will relate back to the relator's original filing. 31 U.S.C. § 3731(c). Insofar as the government's complaint raises new allegations of wrongdoing not at issue in the previous filing, those claims will not relate back and would be barred if not timely made.

[84] *See* United States *ex rel.* Hooper v. Lockheed Martin Corp., 688 F.3d 1037, 1050-51 (9th Cir. 2012) (no fraud where the Air Force was aware of testing methods used, even though they did not comply with contract); United States *ex rel.* Durcholz v. FKW, Inc., 189 F.3d 542, 544-45 (7th Cir. 1999) (government knowledge of an improper claim negates falsity and intent).

[85] United States v. Chilstead Bldg. Co., Inc., 18 F. Supp. 2d 210, 213 (N.D.N.Y. 1998); *but see* United States *ex rel.* McCray Sanitation Servs., Inc. v. Midwest Container Co*.,* 7 F.3d 1046 (10th Cir. 1993) (government official cannot ratify prior fraud). This defense is likely to be more effective where the government agency is not only aware of the facts supporting the FCA violation, but also of the existence of the FCA suit or investigation and, nevertheless, approves continued performance. *See, e.g.,* United States *ex rel.* Harrison v. National Semiconductor Corp*.,* 105 F.3d 650 (4th Cir. 1997).

State False Claims Statutes

It should surprise no one that many states have enacted legislation modeled on the federal FCA, and nearly all of these incorporate *qui tam* provisions offering financial incentives to private litigants. While most are similar to the FCA, these laws have various unique or distinguishing features. Increasingly, plaintiffs in FCA proceedings allege violations not only of the federal law, but of the state law where fraudulent conduct is alleged to have impacted both the state and federal treasuries. While a detailed description of state false claims laws is beyond the scope of this paper, the features of a few state statutes will be discussed for illustrative purposes.

In 1987, California became the first state to enact an anti-fraud statute with *qui tam* incentives.[86] The law was amended in 2009 to track the FERA amendments to the federal FCA. Generally, the liability and damages provisions are consistent with the FCA. Unlike the federal law, the California statute permits relators to obtain up to 50% of the recovery in a case in which the state attorney general declines to intervene.[87] Even if the attorney general elects later to intervene after first declining, the relator retains responsibility for prosecuting the case and, for purposes of dividing any recovery, is treated as though the state never intervened at all.[88] The California law also bars state employees from bringing suits based on information obtained through their employment, with an exception where internal reporting measures are exhausted and the responsible agency has failed to act on the information within a reasonable time.[89] By statute, a

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[86] Cal. Gov't Code §§ 12650 – 12656.
[87] Cal. Gov't Code §§ 12652(g)(2)-(3), (8).
[88] Cal. Gov't Code §§ 12652(f)(2)(B).
[89] Cal. Gov't Code §§ 12652(d)(4).

defendant's guilty plea in a related criminal proceeding has collateral estoppel effect in state civil FCA proceedings.[90]

Another of the older state FCA statutes is the Illinois False Claims Act, which has been on the books since 1992. Originally titled the Illinois Whistleblower Reward and Protection Act, it was amended in 2010 to change its title to the Illinois False Claims Act.[91] The liability provisions of the law track the federal FCA. Damages are trebled and penalties are imposed in the amount of $5,500 to $11,000 per claim. Recoveries are divided between the relator and government in the same percentages as those set forth in the federal FCA. In a departure from its federal cousin, the Illinois law sets up a fund in the state treasury and directs that one-sixth of the monies recovered under the law shall be paid to the Attorney General, and one-sixth to the Department of the State Police.[92] The Illinois Supreme Court has interpreted that State's law to permit the attorney general to control the litigation even in cases where the Attorney General has declined to intervene.[93]

New Jersey's False Claims Act was enacted in 2008 and amended in 2010.[94] It incorporates many of the elements of the federal FCA. The state's attorney general has the authority to dismiss the action – for good cause shown, a requirement absent from the federal FCA. The law mandates distribution of the proceeds in part to the state's "False Claims Prosecution Fund" used for investigation and prosecution of false claims, as well

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[90] Cal. Gov't Code §§ 126554(d).
[91] 740 ILCS § 175/3(c).
[92] 740 ILCS § 175/8.
[93] *See* Scachitti v. UBS Financial Services, 215 Ill.2d 484, 831 N.E.2d 544, 561 (2000). In *Scachitti*, the Illinois Supreme Court upheld the constitutionality of the Illinois FCA, reversing a decision of the Circuit Court of Cook County. The Illinois Supreme Court also held that private litigants have standing to sue on behalf of the State under the *qui tam* provisions of the statute.
[94] N.J. Stat. Ann. § 2A:32C-1 through 2A:32C-15.

as the state's "Medicaid Fraud Control Fund" in the event of recoveries from actions involving Medicaid fraud. Unlike the federal law, current or former state employees are prohibited from acting as relators when the facts came to light as a result of an audit or inspection the employee participated in as part of his official duties.[95] This provision arguably removes any incentive for state employees to withhold information for use by that employee in a private *qui tam* action.

Municipal False Claims Laws

Some cities have followed suit by enacting local laws prohibiting fraud and offering incentives to whistleblowers to pursue false claims. The City of Chicago enacted an ordinance in 2005 that incorporated many of the provisions of the state and federal acts.[96] The law was later amended to provide for protection of whistleblowers from retaliation.[97] It varies from the federal law in certain respects. For example, the law allows for liability in the event of a false claim made in connection with a bid or proposal, even when the bid or proposal was rejected by the City.[98]

San Francisco and New York City are examples of two other municipalities who have adopted anti-fraud laws with whistleblower incentives. The San Francisco ordinance was invalidated, however, on the ground that it was preempted by the California FCA.[99] New York City's FCA ordinance was in effect before the state of New York enacted its law. A whistleblower claim is initiated by submitting to the corporation counsel a proposed civil complaint along with all material information in that person's

[95] N.J. Stat. Ann. § 2A:32C-9.d.
[96] Chicago Ill. Mun. Code § 1-21-010 – 1-22-060.
[97] Chicago Ill. Mun. Code § 2-152-171.
[98] Chicago Ill. Mun. Code § 1-22-010.
[99] *See* City and County of San Francisco v. Tutor-Saliba Corp., No. C-02-5286, 2005 WL 645389, at *3 (N.D. Cal. Mar. 17, 2005).

possession.[100] Thereafter the corporation counsel is charged with investigating the information and determining whether to pursue a "civil enforcement action" or designating the complainant as a "special assistant corporation counsel" for purposes of filing a civil enforcement action against one or more of the parties named in the proposed civil complaint.[101] The corporation counsel may decline to name the complainant as a special assistant corporation counsel when certain statutory conditions are met, e.g., where the appointment could result in excessive cost to the city or interference with a contractual relationship.

Conclusion

The upward trajectory of recent FCA activity is likely to continue. Due to changes in the federal FCA making it easier to pursue these claims and high profile successes in prosecuting fraud, the number of suits for alleged fraud at all levels of government will likely increase. Windfall-seeking whistleblowers will also likely occupy a greater role in the filing and prosecution of these cases.

Business organizations must establish robust fraud-prevention controls and rigorous compliance programs to minimize the impact of litigation by the government and its proxies. This includes procedures and policies for reporting and remedying violations that are clear and well-publicized. Responsiveness and confidentiality in complaint handling too is important in establishing an atmosphere of open reporting and elimination of fraud. Periodic audits and training of personnel can help to ensure effectiveness of the program over time. Finally, in the case of serious violations, counsel should be involved in the process as early as possible to, among other things, ensure

[100] N. Y. C. Admin. Code § 7-801 – 7-810.
[101] N. Y. C. Admin. Code § 7-804(b)(2).

preservation of evidence, oversee investigations, negotiate with the government, relators, and their counsel, and prepare for litigation if all else fails.