I. Elements of a False Claims Act Violation

A. A Direct (Affirmative) False Claim

Most False Claims Act cases involve direct or affirmative false claims – where the defendant knowingly submits a false claim for money or property to the United States. There are four primary elements of a direct false claim:

1. Claim

A claim is defined as any request for money or property made to either (i) the Government, or (ii) a third party (like a contractor or grantee) that receives federal money or property if it is to be used to advance a government interest or program.

2. Falsity

a. A claim is generally considered to be false if it seeks money or property to which the claimant is not entitled due to a violation of a statute, regulation, or contract.

b. Examples of false claims in the health care context include claims for (i) unnecessary services, (ii) services that are upcoded, (iii) services submitted in violation of the Anti-kickback or Stark statutes.

c. There is a continuing debate among the courts as to whether an express false statement or certification is required to render a claim false. The majority of courts have held that an express false statement or certification is not required.

3. Materiality

A false claim is material if it has a natural tendency to affect the Government’s decision whether to pay the claim.
4. **Knowledge**

Knowledge is defined as actual knowledge, reckless disregard, or deliberate ignorance.

B. **A Reverse False Claim**

The False Claims Act also imposes liability for concealing or avoiding an obligation to pay money or property to the United States. This is commonly referred to as a “reverse” false claim, because the money or property flows to the United States, which is the reverse of a direct false claim. The three primary elements of a reverse false claim are:

1. **Obligation**

   An obligation is defined as a contractual, statutary, or similar duty to pay money or property, and includes the duty to repay an overpayment.

2. **Improper concealment or avoidance**

   Previously, the reverse false claim provision required the use of a false statement to avoid an obligation to pay. Congress eliminated that requirement in 2009, and a false statement is no longer required for reverse false claims liability.

3. **Knowledge**

   This term has the same meaning that it does in the direct false claim context.

C. **Damages and Penalties**

1. A defendant that violates the False Claims Act is liable for damages equal to three times the amount of the Government’s loss.

2. A defendant is also liable for a civil penalty of between $5,500 and $11,000 for each violation.

D. **Statute of Limitations**

A False Claims Act case may be pursued within (i) 6 years from the false claim, or (ii) 3 years from when the Government learns of the false claim (but no more than 10 years after the false claim).
E. Historical Recoveries

1. In 2012, the United States recovered $4.9 billion under the False Claims Act (the highest recovery in a single year). Of this amount, more than $3 billion was recovered in health care fraud cases.

2. Since 1986, when the False Claims Act was substantially amended, the United States has recovered more than $36 billion ($24.9 billion in health care fraud cases).

II. The False Claims Act’s Qui Tam Provisions

A. Qui Tam Actions

The False Claims Act authorizes private whistleblowers (called “relators”) to file suits (called “qui tam” actions) on behalf of the United States, and to share in any recovery.

B. Filing Procedure

1. A qui tam action is originally filed under seal and served only on the United States (and not on the defendant).

2. The United States has at least 60 days (which may be extended) to investigate the relator’s allegations, and to elect whether to intervene and take over the lawsuit, or to let the relator pursue the action on his/her own.

3. Once the United States elects whether to intervene, the action is unsealed and served on the defendant. The case then proceeds like any other False Claims Act case.

C. Relator’s Share

1. If the United States intervenes in the qui tam action, the relator is entitled to between 15 and 25 percent of any recovery.

2. If the United States does not intervene, the relator is entitled to between 25 and 30 percent of any recovery.

3. The relator is also entitled to recover attorney’s fees and costs from the defendant.
D. Limitations on Qui Tam Actions

1. The FCA bars qui tam actions in certain circumstances, including if the action repeats claims previously filed by another relator or the government, or if the action is based on publicly disclosed information.

2. The government is also empowered to dismiss qui tam actions that are contrary to the public interest.

E. Historical Recoveries

1. Since 1986, qui tam recoveries have exceeded $25 billion, and the United States has awarded relators more than $4 billion.

2. During that same period, more than 8,800 qui tam cases have been filed (647 in the last year alone).

F. Retaliation Claims

1. The False Claims Act authorizes a relator to file a claim on his/her own behalf if the relator was retaliated against for pursuing a False Claims Act action.

2. If the relator’s retaliation claim is successful, the relator is entitled to reinstatement, and double any lost pay.

III. The Investigation of a False Claims Act Case

A. Qui Tam versus Non-Qui Tam

The Government generally investigates qui tam and non-qui tam cases similarly. In a qui tam case, the Government will likely begin its investigation by interviewing the relator. In a non-qui tam case, the Government will begin by speaking with the source of the information – whether it is the referring agency, a confidential informant, or in some cases, a voluntary disclosure by the defendant.

B. Use of Subpoenas and Civil Investigative Demands

1. The Government will frequently use either IG subpoenas or Civil Investigative Demands in connection with its investigation.

2. IG Subpoenas may be used to obtain documents and other tangible things.

3. Civil Investigative Demands are special subpoenas authorized by the False Claims Act. Civil Investigative Demands may be used to obtain not only documents, but also answers to interrogatories and testimony.
4. Congress amended the False Claims Act’s Civil Investigative Demand provisions in 2009, making it easier for the Department to use this discovery tool. Accordingly, Civil Investigative Demands, particularly for testimony, are increasingly being used in support of the Government’s False Claims Act investigations.

C. Partial Unsealing of Qui Tam Action

In qui tam cases, the Government will frequently request a partial unsealing of the case at some point during the investigation to obtain the defendant’s views of the allegations and, when appropriate, to explore the possibility of a settlement.

IV. Litigation of a False Claims Act Case

A. Jury Trials

A defendant in a False Claims Act case has a right to a jury trial.

B. Relator’s Participation

The False Claims Act authorizes a relator in a qui tam case to participate fully in the action, and frequently the relator’s counsel will litigate the case side-by-side with the Government’s attorneys.

C. Relator’s Pursuit of Unadopted Claims

Where the Government declines to take over a qui tam action in whole or in part, the relator is authorized to litigate the unadopted claims on his/her own, and many times the relator will elect to do so. Historically, however, the overwhelming majority of qui tam recoveries have occurred in cases where the Government has elected to intervene.

V. Settlement of a False Claims Act Case

A. Settlement Terms

1. The Government’s typical practice is that it will only settle and release claims for which it is being paid.

2. The Government typically insists on tax-neutral language.

3. In health care cases, the Government will frequently insist on a Compliance Agreement as part of a settlement.
B. Relator’s Right to Object

Although a relator has a right to object to the Government’s proposed settlement of a qui tam action, the Government may nevertheless settle such an action if it establishes that the proposed settlement is fair, adequate, and reasonable.

C. Settlement of Declined Cases

The Government has a right to object to the settlement of a declined qui tam action that it believes is not in the public interest. The courts are divided on whether such an objection is binding on the courts.

VI. State False Claims Acts

Many states and localities have their own False Claims Act statutes. They typically look very similar to the federal statute. In qui tam cases, where State funds may be implicated (for example, where the alleged fraud involves Medicaid funds), relators are increasingly filing suit under both the federal and state statutes. Accordingly, you may be dealing with multiple sovereign entities in the same action, which can add a further layer of complexity to both the litigation and resolution of the case.