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**Recent Developments
Under the Federal False Claims Act**

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INTRODUCTION

The False Claims Act (“FCA”) was enacted in 1863 in response to allegations of fraud that arose in the context of Civil War procurements, but the FCA became a significant enforcement tool only after Congress enacted watershed amendments in 1986, including stiffer damages and penalties, and the expansion of the rights of private citizens, known as *qui tam* relators, to bring suits on behalf of the government. The Department of Justice recovered more than \$3.6 billion under the FCA in fiscal year 2015, bringing total FCA recoveries to more than \$48 billion since 1986.¹ Nearly \$3 billion recovered in 2015 was in *qui tam* cases initiated or brought by relators, whose “relator’s share” totaled \$597.6 million that year. The number of *qui tam* suits filed in fiscal year 2015 was 632, roughly six times the number of non-*qui tam* suits that the government filed that year. There are no signs that *qui tam* actions are going to decline.

The Affordable Care Act strengthened the government’s focus on health care fraud, allocating an additional \$350 million to that effort over the next ten years, but the single most effective weapon in the government’s arsenal continues to be the civil False Claims Act. Of the \$3.6 billion in FCA recoveries in 2015, more than \$1.9 billion was from the health care industry (broadly defined to include pharmaceutical and medical device companies).² As the Justice Department has noted, the government’s focus on healthcare-related actions has consistently produced large FCA recoveries:

Including this past year’s \$1.9 billion, the department has recovered nearly \$16.5 billion in health care fraud since January 2009 to the end of fiscal year 2015—more than half the health care fraud dollars recovered since the 1986 amendments to the False Claims Act. These recoveries restore valuable assets to federally funded programs such as Medicare, Medicaid, and TRICARE But just as important, the department’s vigorous pursuit of health care fraud prevents billions more in losses by deterring others who might otherwise try to cheat the system for their own gain. The department’s success is a direct result of the high priority the Obama Administration has placed on fighting health care fraud.³

The Justice Department’s comprehensive approach to health care fraud includes using the FCA “to encourage the adoption of, and consistent adherence to, best practices.”⁴ Increasingly, DOJ is demanding “nonmonetary remedial measures,” such as expensive corporate integrity agreements, in FCA settlements. Also, DOJ has announced that it intends to follow the new policy memorandum known as the “Yates Memo” that takes a more aggressive approach toward pursuing individuals as FCA defendants in addition to corporations.⁵

¹ See Press Release, Dep’t of Justice, *Justice Department Recovers Over \$3.5 Billion from False Claims Cases in Fiscal Year 2015* (Dec. 3, 2015) (“DOJ’s 2015 Press Release”).

² See *id.*

³ *Id.*

⁴ See Press Release, Dep’t of Justice, *Assistant Attorney General Stuart Delery Delivers Remarks at American Bar Association’s 10th National Institute on the Civil False Claims Act and Qui Tam Enforcement* (June 5, 2014).

⁵ See Memorandum from Deputy Att’y Gen. Sally Quillan Yates, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015) (“Yates Memo”), <https://www.justice.gov/dag/file/769036/download>; Press Release, Dep’t of Justice, *Principal Deputy Assistant Att’y Gen. Benjamin C. Mizer Delivers Remarks at the 16th Pharm Compliance Cong. and Best Practices Forum* (Oct. 22, 2015), <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-benjamin-c-mizer-delivers-remarks-16th>.

Substantive areas of particular concern to health care providers and the health care industry include upcoding, off-label promotion, failure to document patient care, deficient compliance training, worthless services, and the expanded use of the Antikickback statute as bases for FCA liability. In addition, the knowing nonpayment of an “obligation”—defined to include “knowingly and improperly” retaining an “overpayment” from a government health care program—is a basis for the FCA’s treble damages and penalties under the “reverse false claim” theory of liability. Provisions linking the FCA to government health care program requirements ensure that the FCA’s role in health care fraud enforcement will only increase.

Substantive and procedural FCA amendments enacted in 2009 and 2010—in the Fraud Enforcement and Recovery Act of 2009 (“FERA”), the Affordable Care Act (“ACA”), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”)—make it easier for the government and *qui tam* relators to conduct investigations and obtain recoveries under the FCA.⁶ The full impact of FERA’s and the ACA’s amendments is beginning to be felt, and it is clear that these amendments will be the basis for attempts to recover more funds, cover more potential defendants, and narrow defenses to FCA suits in the years to come. Now that thirty states plus the District of Columbia, New York City, Chicago, and Philadelphia have false claims laws, false claims litigation often takes place at the federal, state, multi-state, and municipal levels. The considerable resources of the government—federal and state—coupled with the seemingly limitless supply of whistleblowers willing to litigate FCA claims on behalf of the government, assure that the civil False Claims Act will remain one of the government’s most powerful weapons against fraud.

The key changes under FERA, the ACA, and Dodd-Frank discussed below are:

- FERA’s amendments to FCA liability
- FERA’s amendments to the FCA’s procedural provisions
- FERA’s retroactive application to pending FCA cases
- The ACA’s amendments to the “public disclosure” bar
- The Dodd-Frank Act’s amendments to the FCA’s whistleblower provisions.

Important recent FCA developments discussed include:

- Claims and presentment
- Pleading requirements under Rule 9(b)
- Materiality
- Falsity and false certification liability
- Causation
- The FCA’s knowledge and intent standards
- Reverse false claims
- Damages and penalties
- Public disclosure and first-to-file
- Retaliation

For a full discussion of the FCA and decisional law under it, please refer to JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS (Wolters Kluwer Law & Business) (4th ed. & Supp.

⁶ See FERA, Pub. L. No. 111-21 (2009); ACA, Pub. L. No. 111-148, 124 Stat. 119 (2010); Dodd-Frank Act, Pub. L. No. 111-203, §3301, 124 Stat. 1376, 2079 (2010).

2016-1) (“BOESE”). A redline showing the current FCA, as amended, is attached as Appendix 1.

A. FCA Fundamentals

Some important features that are present in both versions of the FCA—before and after FERA—should be noted at the outset:

- Violations of the FCA give rise to potentially enormous economic liability. The law provides that all damages are trebled. Each false claim submitted is subject to a mandatory penalty of \$5,500 and \$11,000 per violation.
- The FCA can be enforced not only by the powerful resources of the federal government, but also through the use of private plaintiffs, referred to as *qui tam* relators. The term "*qui tam*" is derived from a Latin phrase, "*qui tam pro domino rege quam pro se ipso*," or “who pursues this action on our Lord the King’s behalf as well as his own.” As this phrase indicates, the *qui tam* action arose in early English common law as a device for permitting private individuals to litigate claims on the sovereign's behalf. Like relators in modern FCA actions, early *qui tam* litigants not only gained standing they otherwise would lack, but also a share of any recovery obtained on the sovereign's behalf as a result of the *qui tam* action. Significant amendments to the False Claims Act in 1986 strengthened the rights of relators, and increased the bounties that may be awarded to successful relators, thus dramatically increasing the incentives to filing suit. There are unique procedural steps involved when a *qui tam* relator initiates FCA litigation, including the requirement that the complaint must be filed under seal, and the United States may intervene and take over the action.
- Whether an FCA suit is initiated by the government or by a *qui tam* relator, the liability, damages and penalties provisions remain the same. Defendants are also liable for the attorneys' fees and costs of relators.
- A number of state and local governments have adopted their own versions of false claims acts, with *qui tam* enforcement. Although in the past these laws have varied considerably from the federal FCA, most of them no longer do because they must follow the federal model in order to receive an economic incentive under the Deficit Reduction Act of 2005.⁷

It is also important to note what the False Claims Act does not cover. Although false tax returns are almost certainly the most common false claim filed with the federal government, the False Claims Act expressly excludes such claims from the scope of its coverage.⁸ This FCA “tax bar” has been held to apply broadly whenever a false claim is made or a benefit is procured

⁷ Pub. L. No. 109-171, §§ 6031-6033, 120 Stat. 4, 72-74 (2006) (to be codified at 42 U.S.C. §§ 1396a(a), 1396b(i), 1396h(a)).

⁸ 31 U.S.C. § 3729(e) provides that “This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1954.”

under the Internal Revenue Code, and is not limited to false income tax claims.⁹ Recently, however, New York amended its state FCA to allow *qui tam* enforcement of tax law violations.¹⁰

B. The 1986 Law

Prior to the 2009 and 2010 amendments, liability under the civil False Claims Act has arisen primarily under the provisions of 31 U.S.C. §§ 3729(a)(1) - (7). The government (or the *qui tam* relator) bears the burden of proving each element of a False Claims Act violation, including damages, by the preponderance of the evidence.¹¹ The four most commonly-invoked liability provisions of the 1986 FCA are:

- Section 3729(a)(1) establishes liability for so-called “direct” false claims to the government;
- Section 3729(a)(2) imposes liability for making false records or false statements to support a false claim;
- Section 3729(a)(3) involves conspiracy to get a false claim paid; and
- Section 3729(a)(7), the so-called “reverse false claims provision,” imposes liability for false records or statements made to reduce or avoid an obligation to the government.

The remaining three subsections of Section 3729(a), subsections (a)(4), (a)(5) and (a)(6), tend to be either redundant or to apply to situations that occur infrequently under modern government contracting procedures. These sections of the FCA are seldom invoked, and therefore have not been the subject of significant case law analysis.¹²

The 1986 amendments lowered the intent needed for an FCA violation to the “recklessness” standard, established the burden of proof at a preponderance of the evidence, and expanded the *qui tam* enforcement mechanism by:

- increasing the relators’ share to up to 30 % of the government’s recovery;
- removing the government knowledge bar and replacing it with public disclosure/original source provisions;
- adding a retaliation provision;
- allowing *qui tam* participation after U.S. intervention; and
- encouraging *qui tam* intervention if the U.S. declined to intervene.

⁹ United States *ex rel.* Lissack v. Sakura Global Capital Mkts., Inc., 377 F.3d 145 (2d Cir. 2004). Congress has enacted a “tax *qui tam*” statute which provides a bounty to anyone who brings tax underpayments by certain corporations and high-income individuals to the attention of the IRS. See Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, §406, 120 Stat. 2922, 2958 (Dec. 20, 2006). See also BOESE, §1.07[A][1].

¹⁰ See N.Y. State Fin. Law §189.4(a). See also FraudMail Alert No. 10-08-26, *New York State FCA: New York’s False Claims Act Now Equals or Exceeds Federal Fraud Law—False State Tax Returns Are Now Privately Enforceable under State FCA*, <http://friedlive.icvmgroup.net/siteFiles/Publications/Fried%20Frank%20FraudMail%20Alert.pdf>.

¹¹ 31 U.S.C. § 3731(c).

¹² For a review of the limited case law arising under subsections (a)(4), (a)(5), and (a)(6), see BOESE, §§ 2.01[G] - [J].

C. The 2009 Amendments—FERA

Although Congress stated that its purpose in enacting FERA was to expand the FCA’s liability provisions in order to reach frauds by financial institutions and other recipients of TARP and economic stimulus funds, the 2009 amendments were not needed for that purpose because financial institutions and stimulus funds were already covered by the existing FCA. FERA was simply the vehicle for FCA amendments that had been languishing in Congress since well before the financial crisis in 2008. The broader purpose of a general expansion of the FCA is reflected in the amendments: they are not limited to mortgage and financial fraud, they have nothing to do with financial markets, and they apply across the board to all recipients and payers of government money or property, including health care providers and the health care industry.

The amendments expand FCA liability beyond previous limits by revising all seven of the statute’s liability provisions and redefining key terms such as “claim,” “material,” and “obligation.” While the key liability provisions of the FCA remain those addressing false claims, false statements supporting false claims, conspiracy, and reverse false claims, FERA renumbered and expanded these provisions to cover additional conduct. The new Sections 3729(a)(1)(A), (a)(1)(B), (a)(1)(C), and (a)(1)(G), extend liability to any person who:

- (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
 - (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
 - (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
- [. . .] or
- (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

A red-line version of the False Claims act is attached as Appendix 1, and use of this red-line is critical to understanding the revisions. Many of the important details of the 2009 amendments are discussed in a contemporaneously issued FraudMail Alert (attached as Appendix 2). A few key illustrations of the expansion in FCA liability under FERA include the following:

- Section 3729(a)(1)(B) amended Section 3729(a)(2) to remove the phrase “to get,” on which the unanimous Supreme Court relied in *Allison Engine Co. v. United States ex rel. Sanders*¹³ to limit FCA liability to false statements or claims made by defendants for the purpose of getting the government to pay the claim. FERA expressly applied this amendment retroactively to “claims” pending on or after June 7, 2008 (which was two days before the Supreme Court’s decision in *Allison Engine*). This attempt to apply the amendment retroactively to prior conduct has

¹³ 553 U.S. 662 (2008).

been challenged, and courts are divided on its retroactive application in pending cases.¹⁴

- The language in Section 3729(a)(3) had been properly interpreted to limit liability for conspiracy to violations of then-Section 3729(a)(1). Section 3729(a)(1)(C) amended this provision to extend liability for conspiracy to commit a violation of any other substantive section of the FCA.
- Section 3729(a)(1)(G) expanded the scope of reverse false claims liability in the prior law under Section 3729(a)(7) to include retention of an overpayment.

More key changes to FCA liability are included in FERA's statutory definitions of "claim," "obligation," and "material" in Section 3729(b), which are discussed below.

The Department of Justice has authority to conduct broad pre-intervention discovery through civil investigative demands ("CIDs") that allow it to demand production of documents, oral testimony, and answers to interrogatories. This CID discovery power augments DOJ's pre-existing power to obtain documentary evidence through subpoenas and authorized investigative demands, and it is stronger than standard civil discovery because the Federal Rules of Civil Procedure do not apply to it. FERA expanded DOJ's power to issue CIDs and to use the information received in response to CIDs for an "official use."¹⁵ Under this expanded authority, the Attorney General's authority to issue CIDs was delegated to the Assistant Attorney General for the Civil Division,¹⁶ who then redelegated this authority to certain senior enforcement officials in the Civil Division as well as to U.S. Attorneys in certain cases.¹⁷ After this expansion, use of CIDs by both DOJ and U.S. Attorneys' Offices has increased dramatically.¹⁸

FERA also amended the FCA to permit the government's complaint-in-intervention and amendments to the complaint to relate back to the original *qui tam* complaint for statute of

¹⁴ Compare *Hopper v. Solvay Pharmaceuticals, Inc.*, 588 F.3d 1318, 1327 (11th Cir. 2009) (defining "claim" as a demand for payment as under Section 3729(b)(2)(A) and finding that no such claims were pending as of June 7, 2008), and *Allison Engine Co. v. United States ex rel. Sanders*, No. 1:95CV970, 2009 WL 3626773 (S.D. Ohio Oct. 27, 2009) (defining "claim" as a demand for payment, and finding that applying the amendment retroactively would violate the Ex Post Facto Clause), and *United States v. Science Applications Int'l Corp.*, No. 04-1543, 2009 WL 2929250 (D.D.C. Sept., 14, 2009), with *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94 (2d Cir. 2010) (applying amendment retroactively because relator's claim was pending as of June 7, 2008), and *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262 (5th Cir. 2010) (same). See also *New York v. Sprint Nextel Corp.*, No. 103917/2011 (N.Y. Sup. Ct. July 1, 2013) (slip op.) (ruling that the New York FCA's tax liability amendment was not sufficiently punitive in nature or effect to preclude its retroactive application under the Ex Post Facto Clause); *United States ex rel. Romano v. New York-Presbyterian Hosp.*, No. 00 Civ. 8792(LLS), 2008 WL 612691 (S.D.N.Y. Mar. 5, 2008) (ruling that the relator could not add state FCA claims to federal claims that were based on Medicaid claims submitted more than six years prior to the New York FCA's effective date).

¹⁵ See Appendix 2 at 5 (discussing CID amendment).

¹⁶ See Order No. 3134-2010 (Jan. 15, 2010).

¹⁷ See Dep't of Justice, Directive No. 1-10, Redelegation of Authority of Assistant Attorney General, Civil Division, to Branch Directors, Heads of Offices and United States Attorneys in Civil Division Cases (Mar. 8, 2010) (to be codified at 28 C.F.R. Part 0).

¹⁸ In fiscal year 2011, DOJ authorized the issuance of 888 CIDs—more than ten times the number issued during the two years before re-delegation combined. See Press Release, Dep't. of Justice, *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* (June 7, 2012), <http://www.justice.gov/iso/opa/civil/speeches/2012/civ-speech-1206071.html>.

limitations purposes.¹⁹ FERA revised the FCA's retaliation provision so that it protects contractors and agents in addition to employees, although the conduct and remedies under this provision are still employment-based.²⁰

Key FCA provisions unchanged by FERA include: (1) the FCA's standard of scienter, which is "knowing" or "knowingly," (2) the FCA's definition of damages, and (3) the public disclosure/original source jurisdictional bar provisions. FERA made no change in the law on the question of whether government employees can be *qui tam* relators, and on the application of Rule 9(b)'s pleading requirements to FCA complaints. As discussed below, the Affordable Care Act amended the FCA's public disclosure bar in 2010, and a further revision of the FCA's retaliation provision was made by the Dodd-Frank Act.

D. Recent Developments in FCA Liability, *Qui Tam* Enforcement, and Retaliation

Last term, the Supreme Court decided that the Wartime Suspension of Limitations Act had no place in the civil FCA arena, and at the same time, the Court resolved a circuit court split on the FCA's first-to-file bar by ruling that a later related action is not barred unless the prior suit was "pending" when the later action was brought.²¹ This term, the Court granted certiorari in *United States ex rel. Escobar v. Universal Health Services, Inc.*,²² a case that involves an important issue with a much broader role in FCA jurisprudence. As explained in more detail in the discussion of falsity/false certification below, the two questions the Court agreed to address in *Escobar* are whether the "implied false certification" theory of FCA liability is viable, and if so, how it should be applied. Other recent developments include the Sixth Circuit's rejection of the government's "total damages" theory in favor of applying an "actual loss" test under the benefit of the bargain analysis of FCA damages,²³ and the D.C.Circuit's decision reaffirming that there can be no FCA liability where the law or regulation is ambiguous, the defendant's interpretation of the language is reasonable, and the agency issued no formal guidance indicating the defendant's interpretation was wrong.²⁴

Given the number of important developments this year, only a few of the most significant can be briefly touched upon in these pages. For a more exhaustive analysis of recent FCA developments, see JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS (Wolters Kluwer Law & Business) (4th ed. & Supp. 2016-1).

1. Claims and Presentment

Prior to FERA, Section 3729(a)(2) liability was limited to false statements supporting false claims for money or property that the government "provides" or "will reimburse." Some courts read this language to require the false claim to be subjected to a government payment or approval process, but the circuits were split on the underlying question of whether "presentment" of the false claim to the government was required under Section 3729(a)(2). In a unanimous decision, in *Allison Engine Co. v. United States ex rel. Sanders*,²⁵ the Supreme Court resolved this split by holding that presentment was not required under Section 3729(a)(2), but that was

¹⁹ See Appendix 2 at 5 (discussing relation-back amendment).

²⁰ See *id.* at 4 (explaining FERA's retaliation amendments).

²¹ *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015).

²² 780 F.3d 504 (1st Cir.), *cert. granted*, 136 S. Ct. 582 (Dec. 4, 2015).

²³ *United States ex rel. Wall v. Circle C Construction, LLC*, No. 14-6150, 2016 WL 423750 (6th Cir. Feb. 4, 2016).

²⁴ *United States ex rel. Purcell v. MWI Corp.*, 807 F.3d 281 (D.C.Cir. 2015).

²⁵ 553 U.S. 662 (2008).

limited to false statements that were designed “to get” a false claim paid or approved “by the Government.” The Court found that this limitation was necessary because, without a clear link to payment or approval by the government, the FCA would be “boundless” and become an “all-purpose antifraud statute.”²⁶

FERA, however, eliminated both the “to get” language and the “by the Government” limitation in Section 3729(a)(2) as well as comparable language in Sections 3729(a)(3) and (a)(7). Now Section 3729(a)(1)(B) liability is limited by a nexus to the government requirement in the definition of “claim” in Section 3729(b)(2)(ii), which covers requests for funds to a contractor, grantee, or other recipient, if the money or property requested “is to be spent or used on the Government's behalf or to advance a Government program or interest.” FERA does not define the key terms “used on the Government's behalf” or “to advance a Government program or interest,” and therefore their meaning is left to the courts to determine on a case-by-case basis.

The presentment requirement remains in Section 3729(a)(1)(A), however, and the definition of “claim” in Section 3729(b)(2)(A)(i) makes clear that presentment must be directly to the government. The Fourth Circuit’s decision in *United States ex rel. Nathan v. Takeda Pharm. N.A., Inc.* emphasizes that this requirement is still of primary importance under Section 3729(a)(1)(A) and must be pled with particularity under Rule 9(b) even when a fraudulent scheme is alleged:

[T]he critical question is whether the defendant caused a false claim to be presented to the government, because liability under the Act attaches only to a claim actually presented to the government for payment, not to the underlying fraudulent scheme.”²⁷

The Fourth Circuit compared the *Nathan* relator’s allegations with those in *United States ex rel. Grubbs v. Kanneganti*,²⁸ and *United States ex rel. Duxbury v. Ortho Biotech Products*,²⁹ and drew clear distinctions between allegations of fraudulent conduct that necessarily lead to an inference that false claims were presented to the government and the allegations made by the *Nathan* relator, which did not lead to the same inference. The relator in *Nathan* asked the Supreme Court to review the Fourth Circuit’s decision, and the Court invited the Solicitor General to submit a brief expressing the views of the United States on the question of whether Rule 9(b) requires an FCA complaint to allege with particularity that specific false claims actually were presented to the government. After the Solicitor General submitted a brief opposing a per se rule but noting that this *qui tam* suit would be dismissed under either standard, the Court denied *certiorari* in *Nathan*.

2. Requirements under Rule 9(b)

Rule 9(b) provides:

²⁶ 553 U.S. at 669, 672.

²⁷ 707 F.3d 451, 456 (4th Cir. 2013) (internal citations omitted).

²⁸ 565 F.3d 180 (5th Cir. 2009).

²⁹ 579 F.3d 13 (1st Cir. 2009). It should be noted that the scope of the claims in *Duxbury* were strictly limited when the First Circuit affirmed the district court’s order limiting discovery to the claims that survived dismissal and precluding the relator from discovery on “nationwide” fraud that was outside the time frame and geographic location of the original relator’s employment. See *United States ex rel. Duxbury v. Ortho Biotech Prods., LP*, 719 F.3d 31 (1st Cir. 2013).

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind may be averred generally.

Courts have explained that the purposes of this “heightened” requirement to plead the circumstances of the fraud with particularity are to deter meritless claims of fraud, to protect defendants’ reputations, to give particularized notice to defendants of plaintiffs’ claims, and to prevent fraud suits in which the dispositive facts are learned through discovery.³⁰ To satisfy this requirement, the complaint must set forth specifics as to the who, what, when, where, and how of the fraud alleged.³¹ Courts universally apply this heightened pleading requirement to FCA complaints because the allegations sound in fraud, and there is no conflict between the FCA’s lower intent requirements and Rule 9(b), which provides that intent may be averred generally. Courts use a case-by-case approach in applying Rule 9(b) to substantive claims that have various proof requirements, and this approach helps to define the contours of FCA liability. However, some erosion in the heightened standard is occurring in certain *qui tam* cases where the details of a fraudulent scheme have been alleged with particularity but no actual false claim was pled.

As the *Nathan* case discussed above reflects, the False Claims Act was not designed to punish every type of fraud committed upon the government. Instead, because liability under the FCA attaches only to a claim actually presented to the government for payment, not to the underlying fraudulent scheme, “the critical question is whether the defendant caused a false claim to be presented to the government.”³² Despite this key requirement for FCA liability, a clear circuit split has developed over whether Rule 9(b) requires FCA complaints to allege the details of a false claim that actually was submitted. Some recent decisions from the First, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits have found that detailed allegations of a particular fraudulent scheme that produce a strong inference that false claims were submitted may meet Rule 9(b)’s requirement for specificity,³³ although even within those circuits there is some confusion over the proper standard. Other decisions in the Second, Fourth, and Sixth Circuits have applied a stricter standard under which not just the existence of the fraudulent scheme, but false claims that actually were submitted as a result, must be pled with particularity.³⁴ The fact that the lower standard is still in flux within individual circuits that have applied it,³⁵ and the subsequent dismissals in cases where the inference that false claims were

³⁰ See, e.g., *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 226 (1st Cir.), *cert. denied*, 125 S. Ct. 59 (2004); *United States ex rel. Clausen v. Lab. Corp. of Am.* 290 F.3d 1301, 1313, 1316-17 (11th Cir. 2002); *United States v. Rogan*, No. 02-C-3310, 2002 WL 31433390, at *3 (N.D. Ill. 2002).

³¹ See, e.g., *United States ex rel. Cafasso v. General Dynamics C4 Sys.*, 637 F.3d 1047, 1057 (9th Cir. 2011); *United States ex rel. Lacy v. New Horizons, Inc.*, 348 F. App’x 421 (10th Cir. 2009); *Corsello v. Lincare, Inc.* 428 F.3d 1008, 1014 (5th Cir. 2005).

³² 707 F.3d 451, 456 (4th Cir. 2013).

³³ See, e.g., *United States ex rel. Duxbury v. Ortho Biotech Prods., L.P.*, 579 F.3d 13 (1st Cir. 2009); *United States ex rel. Foglia v. Renal Ventures Management, LLC*, 754 F.3d 153 (3d Cir. 2014); *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180 (5th Cir. 2009); *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849 (7th Cir. 2009); *United States ex rel. Thayer v. Planned Parenthood*, No. 13-1654, 2014 WL 4251603 (8th Cir. Aug. 29, 2014); *Ebeid v. Lungwitz*, 616 F.3d 993 (9th Cir. 2010); *United States ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, 591 F. App’x 693, 708 (11th Cir. 2014).

³⁴ See, e.g., *United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, 707 F.3d 451 (4th Cir. 2013), *cert. denied*, 81 U.S.L.W. 3650 (U.S. Mar. 31, 2014) (No. 12-1349); *United States ex rel. SNAPP, Inc. v. Ford Motor Co.*, 618 F.3d 505 (6th Cir. 2010). See also *United States ex rel. Siegel v. Roche Diagnostics Corp.*, 988 F. Supp. 2d 341 (E.D.N.Y. 2013) (applying a heightened standard that requires an actual false claims to be pled).

³⁵ See, e.g., *United States ex rel. Grenadyor v. Ukrainian Village Pharmacy, Inc.*, 772 F.3d 1102 (7th Cir. 2014); *United States ex rel. Dunn v. North Mem’l Health Care*, 739 F.3d 417 (8th Cir. 2014); *United States ex rel. Ge v.*

submitted was not borne out following discovery,³⁶ indicate that the limits to its application are still being delineated.

3. Materiality

Because it is obvious that no regulated party could ever comply with the tens of thousands of applicable laws, regulations, and guidelines, courts needed to develop a legal mechanism for differentiating violations that went to the heart of the claim for federal money from violations that were inconsequential to the funding decision. At first, that legal mechanism became known as “materiality,” and the historical basis of the materiality requirement can be traced to *United States v. McNinch*, in which the Supreme Court held that the civil False Claims Act is “not designed to reach every kind of fraud practiced on the Government.”³⁷ More recently, in *Allison Engine Co. v. United States ex rel. Sanders*, the Supreme Court clearly indicated in the context of its discussion of the elements of liability under Section 3729(a)(2) that a showing of “materiality” is required, and that a false statement must be a “condition of payment” in order to satisfy that materiality requirement.³⁸

After FERA, however, the statutory definition of “material” became “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” This standard is not new, and courts have interpreted it as strongly limiting FCA liability to false statements that directly affect the government’s payment decision. For example, several courts have held that violations of “conditions of participation” in a federal healthcare program did not result in FCA violations. In *United States ex rel. Conner v. Salina Regional Health Center*, the Tenth Circuit found that sweeping, general certifications of compliance with conditions of participation in annual Medicare cost reports were not actionable because they were not specific conditions of payment.³⁹ Similarly, in *United States ex rel. Landers v. Baptist Memorial Health Care Corp.*, the district court found that there was no evidence showing that noncompliance with Medicare’s conditions of participation would make the defendants ineligible for Medicare payments or lead to nonpayment of the claims.⁴⁰

However, the materiality analysis used by other courts obscures the difference between violations of conditions of participation and conditions of payment. For example, in *United States ex rel. Hendow v. University of Phoenix*, the Ninth Circuit found it unimportant that the University’s certification was a promise to comply with a restriction on enrollment incentive compensation in the future, and ruled that the distinction between a condition of participation and payment was “a distinction without a difference” because the government “plainly care[d]” about the restriction.⁴¹ Ultimately, the court required “a causal . . . connection between fraud and

Takeda Pharm. Co., 737 F.3d 116 (1st Cir. 2013); *United States ex rel. Nunnally v. W. Calcasieu Cameron Hosp.*, 519 F. App’x 890, 892-95 (5th Cir. 2013) (unpublished decision).

³⁶ See, e.g., *United States ex rel. Lusby v. Rolls-Royce Corp.*, No. 1:03CV680-SEB-WGH, 2012 WL 4357438 (S.D. Ind. Sept. 24, 2012) (granting summary judgment to defendant because relator had no proof that Rolls-Royce made a false claim for payment to the government); *United States ex rel. Duxbury v. Ortho Biotech Prods., LP*, 719 F.3d 31 (1st Cir. 2013) (“*Duxbury II*”) (granting summary judgment to defendant).

³⁷ 356 U.S. 595, 599 (1958).

³⁸ 553 U.S. 662, 672 (2008) (FCA defendants must “intend the Government to rely on [their] false statement as a condition of payment”).

³⁹ 543 F.3d 1211 (10th Cir. 2008).

⁴⁰ 525 F. Supp. 2d 972 (W.D. Tenn. 2007). The reader should note that the author was one of the attorneys representing the defendants in this case.

⁴¹ 461 F.3d 1166, 1176-77 (9th Cir. 2006).

payment,” but this condition to payment requirement was undercut by the court’s emphasis on materiality in its analysis of the allegations.

In *United States v. Science Applications International Corp.*, the DC Circuit adopted a similar approach in rejecting SAIC’s effort to limit the implied certification theory to exclude the violation of an organizational conflict of interest provision that was not an express condition of payment:

Even though we have rejected SAIC's effort to cabin the implied certification theory, we fully understand the risks created by an excessively broad interpretation of the FCA. As SAIC compellingly points out, without clear limits and careful application, the implied certification theory is prone to abuse by the government and *qui tam* relators who, seeking to take advantage of the FCA's generous remedial scheme, may attempt to turn the violation of minor contractual provisions into an FCA action. In our view, however, instead of adopting a circumscribed view of what it means for a claim to be false or fraudulent, this very real concern can be effectively addressed through strict enforcement of the Act's materiality and scienter requirements.⁴²

But the DC Circuit’s concern about potential abuse under the implied false certification theory of liability is unhelpful given the low “materiality” threshold put in place by FERA’s amendments.

In light of the potential for abuse under this theory, business groups have proposed reforms that include eliminating the implied false certification theory of liability in FCA cases.⁴³ Meanwhile, the courts have found another way to limit this broad liability, and they are easing the impact of FERA’s low materiality threshold by refusing to conflate the elements of “materiality” and “falsity” in FCA cases premised on this theory, as discussed below.

4. Falsity and False Certification

The terms “false” and “fraudulent” are not specifically defined in the FCA. They have been construed and interpreted by the courts with reference to their construction and interpretation in other contexts, most notably in criminal cases brought under 18 U.S.C. §§ 287 and 1001. Establishing falsity under both the FCA and the criminal False Claims or False Statements Act requires proof of “actual falsity.”⁴⁴ In the FCA context, resolving disputed questions of falsity often involves the interpretation of a law, regulation, contract, or agreement.

Many FCA cases are based not on facially or factually false claims, but on allegedly false certifications of compliance with a law, regulation or contract provision. Some of the most significant FCA developments each year arise in “false certification” or “legally false” claim cases that involve something quite different from direct overbilling or factually false claims. FCA plaintiffs are using the statute to litigate alleged regulatory and statutory violations, most of which lack a private right of action, on the theory that the defendant falsely certified compliance with the regulatory scheme and the government would not have paid the claim had it known about the noncompliance. In a “false certification” or “legally false” claim, the defendant has provided the goods or services to the government or government beneficiary for the agreed upon

⁴² 626 F.3d 1257, 1270 (D.C. Cir. 2010).

⁴³ See *Fixing the FCA*, *supra*. note 23.

⁴⁴ See *United States v. Diogo*, 320 F.2d 898 (2d Cir. 1963); *United States v. Lange*, 528 F.2d 1280 (5th Cir. 1976).

price. For example, a hospital has provided medically necessary services to a Medicare eligible beneficiary and billed the government the proper amount, but the hospital has not complied with some other regulation, statute, or contract term in the course of delivering those services. For example, the hospital may have violated one or more “conditions of participation” in the course of delivering the necessary services to the eligible beneficiary.

FCA liability based on implied false certifications has been rightly criticized and subjected to significant limitation in a number of jurisdictions because it imposes potentially enormous liability under the statute’s reckless disregard standard without the defendant’s making an express false claim or a false statement to support a false claim. Many courts have limited the application of this theory to situations in which the government has explicitly conditioned its payment upon compliance with the statute or regulation violated, and have refused to infer a false claim if the claimant was not expressly required to certify compliance in order to receive payment.⁴⁵ With the statutory adoption of the more lenient test for materiality under which a false statement only has to “be capable of influencing” the government’s decision to pay the claim, courts have begun to rely more heavily on the “prerequisite to payment” analysis of falsity as a limit on liability under the false implied certification theory. To establish “legal falsity” in these cases, certification of “compliance with a statute or regulation *as a condition to* government payment” has been required.⁴⁶

The Prerequisite to Payment Requirement. In a remarkable decision in 2010, the Fifth Circuit adopted a stringent standard for false certification cases that prevents the FCA from becoming a catch-all vehicle for punishing minor violations of law that occur in the course of providing federally-funded medical services or performing under government contracts. In *United States ex rel. Steury v. Cardinal Health, Inc.*,⁴⁷ the Fifth Circuit ruled that a defendant can be liable under the FCA for a false certification of compliance with a regulatory requirement—even one that is “material” to the government’s decision to pay the claim—only if the payment by the government agency is conditioned on compliance with the statute, regulation, or contract provision. The relator in *Steury* claimed that by submitting claims for payment to the Veterans Administration for allegedly defective intravenous fluid pumps, Cardinal Health falsely and implicitly certified compliance with an implied warranty of merchantability. Without deciding whether it would adopt the implied false certification theory, the Fifth Circuit found that Cardinal Health did not make an implied certification simply because the FAR includes warranty of merchantability provisions. This basis for liability did not suffice because the FAR also allows the government to choose to override implied warranties of merchantability with express warranties, or to accept and pay for noncompliant commercial items. The court held that the claim could not be “false” within the meaning of the FCA if compliance with this warranty was not required in order to receive payment, and that “a false certification, without more, does not give rise to a false claim for payment unless payment is conditioned on compliance.”⁴⁸

Moreover, the court found that determining whether a false certification is “material” under the expansive “natural tendency” definition of that term does not eliminate the

⁴⁵ See, e.g., *United States ex rel. Mikes v. Straus*, 84 F. Supp. 2d 427, 435 (S.D.N.Y. 1999) (The “implied false certification” theory applies “only in those exceptional circumstances where the claimant’s adherence to the relevant statutory or regulatory mandates lies at the core of its agreement with the Government, or . . . where the Government would have refused to pay had it been aware of the claimant’s non-compliance”); *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262 (5th Cir. 2010). See also BOESE, § 2.03 (citing cases by circuit).

⁴⁶ *Mikes*, 274 F.3d 687, 697. (Emphasis added).

⁴⁷ 625 F.3d 262 (5th Cir. 2010).

⁴⁸ *Id.* at 269.

applicability of the “prerequisite to payment” test.⁴⁹ The court concluded that there could be no liability in *Steury* because payment by the government agency was not conditioned on compliance with the certification alleged. The language used by the court in *Steury* permits the argument that the Fifth Circuit would apply this “falsity” requirement in both express and implied certification cases. The Fifth Circuit’s analysis of falsity introduces a welcome concept—fundamental fairness—and imposes it on False Claims Act enforcement.

In reaching its decision in *Steury*, the Fifth Circuit cited with approval the Second Circuit’s decision in *United States ex rel. Mikes v. Straus*,⁵⁰ which also required the false certification to be a “prerequisite for payment” in order to support an FCA violation. As the circuit court decisions summarized below demonstrate, most other circuit courts have adopted this prerequisite to payment requirement in the analysis of legal falsity, and they have applied it as a threshold requirement for FCA liability based on a false certification—whether express or implied.

Key cases discussing the requirements for legal falsity include:

- **First Circuit.** *United States ex rel. Ge v. Takeda Pharm. Co.*, 737 F.3d 116, 121 (1st Cir. 2013) (ruling that the relator “alleged facts that would demonstrate a ‘fraud-on-the-FDA’ with respect to intentional under-reporting of adverse events,” but she failed to allege that any claims submitted to Medicare or Medicaid by patients and physicians were rendered “false” as a result), *cert. denied*, 83 U.S.L.W. 3184 (U.S. 2014). *Cf. United States ex rel. Escobar v. Universal Health Servs., Inc.*, 780 F.3d 504 (1st Cir.), *cert. granted*, 136 S. Ct. 582 (Dec. 4, 2015) (ruling that compliance with state mental health facility staffing and supervision provisions was a condition of payment). The *Escobar* case is discussed in more detail below.
- **Second Circuit.** *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001) (ruling that “implied false certification is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies *expressly* states the provider must comply in order to be paid”) (emphasis in original).
- **Third Circuit.** *United States ex rel. Wilkins v. United Health Group, Inc.*, 659 F.3d 295 (3d Cir. 2011) (holding that compliance with Medicare marketing regulations was not a condition of government payment under federal health insurance programs, but that submitting claims to these programs while violating the AKS was actionable under the FCA).
- **Fourth Circuit.** *United States ex rel. Rostholder v. Omnicare, Inc.*, 745 F.3d 694 (4th Cir.) (“Because the Medicare and Medicaid statutes do not prohibit reimbursement for drugs packaged in violation of the [FDA safety regulations], Omnicare could not have *knowingly* submitted a false claim for such drugs”) (emphasis in original), *cert. denied*, 83 U.S.L.W. 3185 (U.S. 2014).
- **Fifth Circuit.** *United States ex rel. Steury v. Cardinal Health, Inc.*, 625 F.3d 262 (5th Cir. 2010) (refusing to base FCA liability on the allegation that claims for payment for allegedly defective intravenous fluid pumps were “false” because they violated an implied warranty of merchantability).

⁴⁹ *Id.*

⁵⁰ 274 F.3d 687, 700.

- **Sixth Circuit.** *United States ex rel. Hobbs v. MedQuest Assocs.*, 711 F.3d 707, 713 (6th Cir. 2013) (holding that regulatory noncompliance that violates “conditions of participation”—even if serious and intentional—is not enough to establish an FCA violation and that “approved physician” and updating enrollment information requirements were not conditions of Medicare payment).
- **Seventh Circuit.** *United States ex rel. Hill v. City of Chicago*, No. 14-1317, 2014 WL 6065418 (7th Cir. Nov. 14, 2014) (affirming dismissal of relator’s false certification allegations that the City’s implemented program differed from its grant application for lack of falsity).
- **Eighth Circuit.** *United States ex rel. Ketrosor v. Mayo Found.*, 729 F.3d 825, 832 (8th Cir. 2013) (rejecting relator’s reporting violation claim because it did not allege a violation of any regulation or code and the reporting requirement was not a “material condition of payment”).
- **Ninth Circuit.** *United States ex rel. Ebeid v. Lungwitz*, 616 F.3d 993, 998 (9th Cir.) (joining other circuits in ruling that “the false certification theory is premised on a false certification of compliance that is “a prerequisite to obtaining a government benefit”), *cert. denied*, 131 S. Ct. 801 (2010).
- **Tenth Circuit.** *United States ex rel. Conner Salina Reg’l Health Ctr.*, 543 F.3d 1211, 1220 n.6 (10th Cir. 2008) (adopting a “materiality” requirement that limited FCA liability to violations of conditions of payment and concluding that, “although the government considers substantial compliance a condition of ongoing Medicare *participation*, it does not require perfect compliance as an absolute condition to receiving Medicare *payments* for services rendered”) (emphasis in original).
- **Eleventh Circuit.** *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002) (holding that the FCA does not create liability “merely for a health care provider’s disregard of Government regulations or improper internal policies unless, as a result of such acts, the provider knowingly asks the Government to pay amounts it does not owe”).
- **D.C. Circuit.** *United States v. Science Applications Int’l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010) (adopting the implied false certification theory and noting that liability under this theory could be based on plaintiff’s showing that the contractor “withheld information about its noncompliance with material contractual requirements”).

Supreme Court to Review Implied False Certification Theory in *Escobar* Case. In a welcome move, the Supreme Court has agreed to wade into the thorny thicket known as the “implied false certification” theory of liability and decide how such FCA allegations should be treated. Certiorari was granted in *Universal Health Services, Inc. v. United States ex rel. Escobar* late last year.⁵¹ In *Escobar*, the Court has agreed to address: (1) the validity of the implied false certification theory and (2) the application of the theory, and in particular, whether the relevant statute, regulation, or contractual provision must expressly state that compliance is a condition of payment. For those who receive government money and are subject to a multitude of regulatory requirements—government contractors, healthcare providers, grantees, and many others—expansive application of the implied certification theory is a significant threat. With the adoption of the more lenient test for materiality under which a false statement only has to “be

⁵¹ *United States ex rel. Escobar v. Universal Health Servs., Inc.*, 780 F.3d 504 (1st Cir.), *cert. granted*, 136 S. Ct. 582 (Dec. 4, 2015) (No. 15-7).

capable of influencing” the government’s decision to pay the claim, courts have begun to rely more heavily on the “prerequisite to payment” analysis of falsity explained above as a limit on liability under the implied false certification theory. The Petitioner (the defendant below) in *Escobar* argues that “false or fraudulent” requires an affirmative misstatement in the claim, or that FCA liability should be limited to violation of a statute, regulation, or contractual provision that is expressly designated as a precondition to payment. In an amicus brief supporting the Respondent in *Escobar*, the Solicitor General argues that a claim may be false even if it does not contain an explicit falsehood, and even if the requirement violated is not explicitly identified as a condition of payment. Oral argument in *Escobar* is scheduled for April 19.

5. Causation

Section 3729(a)(1) of the FCA imposes liability on any person who “knowingly presents, or *causes to be presented*, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval.” (emphasis added). Liability under this provision specifically requires a causal link between the defendant’s actions and the submission of a false claim to the government, but the Act does not include a definition of causation. Principles of causation from tort law have been applied by some courts, but their application to FCA allegations could stretch these principles beyond their legal foundation. In view of the FCA’s punitive nature, and because the provisions of the civil FCA and the criminal false claims statute were historically the same until relatively recently, a strong argument can be made for strictly construing undefined or ambiguous provisions such as causation under the FCA as under criminal statutes. FERA amended the predicate of the “causes to be presented” language in Section 3729(a)(1)(A), but neither the meaning of causation nor its role was changed. Similar amendments to Section 3729(a)(1)(B) did not change its requirement for causing a false record or statement in support of a false claim. The courts are developing standards for these causal requirements.

In *United States ex rel. Franklin v. Parke-Davis*, the court held that common law tort causation principles required two questions to be considered in determining whether the defendant’s allegedly improper promotion of off-label uses caused the submission of false claims: (1) whether the defendant’s conduct was a “substantial factor” in producing the harm; and (2) whether the outcome was foreseeable.⁵² The court concluded that the relator provided sufficient evidence to show that the defendant “played a key role in setting in motion a chain of events that led to false claims,” and that it was foreseeable that the defendant’s actions would “ineluctably result in false Medicaid claims.”⁵³ In *United States ex rel. Drescher v. Highmark*,

⁵² No. Civ. A. 96-11651PBS, 2003 WL 22048255, at *4 (D. Mass. Aug. 22, 2003). *See also* *United States ex rel. Freedman v. Suarez-Hoyos*, MD, No. 8:04CV933-T-24 EAJ, 2012 WL 4344199 (M.D. Fla. Sept. 21, 2012) (citing *Parke-Davis* and ruling that liability could attach to a kickback arrangement that was a substantial factor in causing presentation of a false claim); *United States ex rel. Carpenter v. Abbott Labs., Inc.*, 723 F. Supp. 2d 395 (D. Mass. 2010) (finding allegations that defendant’s literature compared its drug favorably with other drugs approved for off-label outpatient use and failed to reflect unfavorable information about the drug were sufficient to pass the “substantial factor” test for causation of claims to Medicare for off-label use); *United States ex rel. DeCesare v. Americare In Home Nursing*, No. 1:05CV696, 2010 WL 5313315, at *13 (E.D. Va. Dec. 16, 2010) (finding that it was a “necessary, foreseeable, and obvious consequence of VNSN’s referrals that Medicare and Medicaid claims would be filed,” and therefore that the complaint alleged that VNSN caused false claims to be submitted under the “substantial factor” test); *United States ex rel. Strom v. Scios, Inc.*, 676 F. Supp. 2d 884, 891 (N.D. Cal. 2009) (finding that the causation requirement of Rule 9(b) had been met by the allegation that “Defendants’ marketing activities created the market for the outpatient use of [the drug], and . . . encouraged such a use even though they had no credible evidence that [the drug] was effective in that context”).

⁵³ 2003 WL 22048255, at *6.

Inc., however, the court cautioned the government that basing causation on medical insurers' incorrect denial or incorrect payment of claims and subsequent submission of false claims by a secondary insurer was a "novel" theory that required evidence of direction and control on the medical insurers' part and few options on the part of secondary insurers.⁵⁴ More recently, in *Allison Engine*, the Supreme Court applied a common law principle underlying proximate cause in interpreting Section 3729(a)(2) liability to ensure that "a defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct."⁵⁵ And while FERA's amendments in Section 3729(a)(1)(B) eliminated the purpose-based "to get" limitation which was the focus of the Court's analysis in *Allison Engine*, there is no indication of congressional intent to extend liability beyond these natural, ordinary, and reasonable consequences.

In *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, the relator alleged that Blackstone paid kickbacks to physicians to get them to use its medical devices in surgeries performed in a hospital, causing the physicians and the hospital to submit false claims to Medicare for reimbursement of services using those devices as well as for the devices themselves. Referring to the Supreme Court's rulings in *United States ex rel. Marcus v. Hess* and *United States v. Bornstein* that a non-submitting entity could be liable for knowingly causing a submitting entity to submit a false claim, the First Circuit found that FCA liability was not conditioned on whether the submitting entity knew or should have known about the non-submitting entity's unlawful conduct.⁵⁶ The First Circuit reasoned that the *qui tam* complaint could state a claim under the "causes to be presented" or "causes to be made or used" language in Sections 3729(a)(1) and (a)(2) if it identified a materially false or fraudulent claim—including a claim that was false due to an implied representation of compliance with a precondition of payment, such as the prohibition on kickbacks in the provider agreement.

After the Affordable Care Act amended the Antikickback Statute to provide that Medicare or Medicaid claims that include "items or services resulting from" a kickback violation are false claims under the FCA, defendants have argued that the phrase "resulting from" requires the government to plead that the kickback scheme actually caused false claims to be submitted on a claim-by-claim basis. One court rejected that argument as calling for "a strict 'but for' causation requirement" that would narrow the scope of the word "false."⁵⁷

6. Knowledge and Intent

Under Section 3729(b) of the FCA, "knowing" and "knowingly" are defined as:

- (1) has actual knowledge of the information;
- (2) acts in deliberate ignorance of the truth or falsity of the information; or

⁵⁴ 305 F. Supp. 2d 451 (E.D. Pa. 2004).

⁵⁵ 553 U.S. 662, 672 (2008).

⁵⁶ *Id.* at 390 (citing *Hess*, 317 U.S. 537 (1943), and *Bornstein*, 423 U.S. 303 (1976)).

⁵⁷ See *United States ex rel. Kester v. Novartis Pharma. Corp.*, No. 11CV8196(CM), 2014 WL 4230386 (S.D.N.Y. Aug. 7, 2014) (ruling that the government sufficiently pled an AKS violation against Novartis under the express false certification theory without requiring the government to allege that the kickback scheme actually caused the pharmacy's sale to a particular patient). However, the district court subsequently modified its ruling in *Kester* based on finding that the AKS could not be a basis for implied false certification liability prior to March 2010 because the AKS did not expressly precondition payment of federal claims prior to that date and Second Circuit precedent in *Mikes v. Straus* requires an express precondition to payment. *Kester*, 43 F. Supp. 3d 332 (S.D.N.Y. 2014).

- (3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

FERA made no substantive change in this definition.

a. *Allison Engine Intent*

In *Allison Engine Co. v. United States ex rel. Sanders*, the Supreme Court found that the “presentment” requirement that limits liability under Section 3729(a)(1) was not a requirement under Section 3729(a)(2). In order to prevent the FCA from being used as an “all-purpose antifraud statute,”⁵⁸ however, the Court imposed another intent element, in addition to the FCA’s “knowing” standard, that limited a defendant’s liability under Sections 3729(a)(2) and (a)(3) to the “natural, ordinary, and reasonable consequences of his conduct.” The Court found that the purpose of a false statement under Section 3729(a)(2) must be “to get” a false claim paid or approved by the government, and that a conspiracy to defraud under Section 3729(a)(3) must be for the purpose of “getting” a false claim allowed or paid. FERA’s FCA amendments removed these references to purpose, substituting a materiality requirement for the “to get” language in Section 3729(a)(1)(B) that the Supreme Court in *Allison Engine* relied upon in imposing the additional intent requirement, and making a similar substitution in Section 3729(a)(1)(G). These substantive alterations to the statute complicate FCA litigation and raise retroactivity issues in some cases, as already noted above. FERA did not alter Section 3729(b)(1), which defines the statutory intent standards for “knowing” and “knowingly,” discussed below.

b. The “Reckless Disregard” Standard

The FCA’s actual knowledge and deliberate ignorance standards are rarely used by the government to prove intent because the defendant’s specific state of mind is the determining factor under them. Reckless disregard, on the other hand, has been described as aggravated gross negligence, gross negligence-plus, or conduct that runs an unjustifiable risk of harm.⁵⁹ The government has also argued that the FCA’s knowledge standard can be met with “collective knowledge,” but that argument was soundly rejected by the D.C. Circuit in a recent decision, as discussed below.

In *Safeco Insurance Co. of America v. Burr*, the Supreme Court held that the reckless disregard standard was an objective one in a case interpreting a similar standard in the Fair Credit Reporting Act (“FCRA”).⁶⁰ Under this objective standard, the Court found that a defendant’s incorrect interpretation of an ambiguous statutory provision, if reasonable, does not provide a basis for liability unless there was an unjustifiably high risk of violating the statute. In *United States ex rel. K & R Ltd. Partnership v. Massachusetts Housing Finance Agency*, the D.C. Circuit applied the definition of reckless disregard from the Supreme Court’s *Safeco* decision to an FCA case.⁶¹ *Safeco* and *K & R Ltd.* make examinations of subjective intent

⁵⁸ 553 U.S. 662, 672 (2008).

⁵⁹ See *United States v. Krizek*, 859 F. Supp. 5 (D.D.C. 1994), *aff’d*, 111 F.3d 934 (D.C. Cir. 1997).

⁶⁰ 551 U.S. 47 (2007).

⁶¹ 530 F. 3d 980 (D.C. Cir. 2008).

unnecessary in FCA cases involving reasonable interpretations of ambiguous requirements where the government has not provided formal guidance.⁶²

More recently, in *United States ex rel. Purcell v. MWI Corp.*, the D.C. Circuit ruled that no jury could properly find that MWI acted “knowingly” in certifying that it paid “regular commissions”—an ambiguous term—to its sales agents in connection with a transaction funded by an Ex-Im Bank loan.⁶³ This decision reinforced the important principles that the FCA does not reach “an innocent, good-faith mistake about the meaning of an applicable rule or regulation” or extend to claims made based on “reasonable but erroneous interpretations of a defendant’s legal obligations,” and that informal guidance on the interpretive issue is insufficient to warn a regulated defendant away from its otherwise reasonable interpretation.⁶⁴ The D.C. Circuit also recognized that the outcome avoided the potential due process problems posed by “penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.”⁶⁵

The government has argued that corporate “collective knowledge” is appropriate under the False Claims Act because the Act is remedial rather than penal in nature. This fundamentally misconstrues the nature of the statute, particularly in light of rulings characterizing FCA damages and penalties as punitive. In *United States v. Science Applications International Corp.*, the D.C. Circuit forcefully and definitively rejected the government’s argument that collective knowledge can be used to prove intent under the False Claims Act.⁶⁶ Exhibiting a clear grasp of the high stakes involved in FCA liability, the panel unanimously held that collective knowledge was “an inappropriate basis for [FCA] scienter” because

it effectively imposes liability, complete with treble damages and substantial civil penalties, for a type of loose constructive knowledge that is inconsistent with the Act’s language, structure, and purpose.⁶⁷

As a result, the court found that the FCA’s scienter standard must be strictly enforced, and it interpreted this standard to allow liability based on constructive knowledge only when defendants act with “reckless disregard” or “deliberate ignorance,” noting that innocent mistakes or negligence remain defenses to liability. Collective knowledge conflicts with this statutory standard, the court concluded, because it lacks balance and precision, noting that it would allow

⁶² See, e.g., *United States ex rel. Ketroser v. Mayo Found.*, 729 F.3d 825 (8th Cir. 2013) (“Mayo’s reasonable interpretation of any ambiguity inherent in the regulations belies the scienter necessary to establish a claim of fraud under the FCA”); *United States ex rel. Farmer v. City of Houston*, 523 F.3d 332 (5th Cir. 2008) (finding that relator could not show that the defendants “knew” of the falsity of the claims because the regulations governing the program were unclear). See also *Chapman Law Firm v. United States*, No. 09-891C, 2012 WL 256090 (Fed. Cl. Jan. 18, 2012) (applying the doctrine of *contra proferentem* to the ambiguous contract provision that was drafted by the government, accepting the contractor’s reasonable interpretation, and denying the government’s motion for partial summary judgment on the FCA claim). Cf. *United States ex rel. Chilcott v. KBR, Inc.*, No. 09CV4018, 2013 WL 5781660 (C.D. Ill. Oct. 25, 2013) (finding both interpretations facially reasonable, but drawing from the allegations the “reasonable inference that [Relator’s] interpretation is the correct one” and inferring that “Defendants did not simply choose, in good faith, a reasonable interpretation among equal alternatives”).

⁶³ 807 F.3d 281 (D.C. Cir. 2015).

⁶⁴ *Id.* at 287-90.

⁶⁵ *Id.* at 287.

⁶⁶ 626 F.3d 1257 (D.C. Cir. 2010).

⁶⁷ *Id.* at 1274.

“a plaintiff to prove scienter by piecing together scraps of ‘innocent’ knowledge held by various corporate officials, even if those officials never had contact with each other or knew what others were doing in connection with a claim seeking government funds.” *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 452 F.2d 908, 918 n.9 (4th Cir. 2003). In other words, even absent proof that corporate officials acted with deliberate ignorance or reckless disregard for the truth by submitting a false claim as the result of, for instance, a communication failure, the fact-finder could determine that the corporation knowingly submitted a false claim.⁶⁸

The court held that the proper standard for knowledge under the FCA excludes collective knowledge. Because the district court’s instruction to the jury allowed it to find that SAIC submitted false claims “knowingly” where no individual at SAIC had all of the knowledge necessary for FCA liability, the court found that the district court’s instruction was erroneous and prejudicial, and ordered a new trial.

The SAIC case includes one more element that is critical to the “knowledge” requirement in FCA cases based on implied certifications that are alleged to be false. While deciding that the D.C. Circuit would accept this basis for FCA liability, the court placed an important limit on its use:

Establishing knowledge under this provision on the basis of implied certification requires the plaintiff to prove that the defendant knows (1) that it violated a contractual obligation, and (2) that its compliance with that obligation was material to the government’s decision to pay.⁶⁹

This knowledge requirement is a critical limit on the use of the implied certification theory of liability because it means that the government or the relator will have to prove the defendant knew that the government’s paying agent considered the violation to be material. Only time will tell if this rational limitation on false certification cases will be adopted by other circuits.

7. Reverse False Claims

Under Section 3729(a)(7), liability for a “reverse false claim” is triggered only when a person

knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.

This requires the person to take an affirmative step to avoid an obligation to pay the government. In *United States ex rel. Bahrani v. ConAgra, Inc.* (“*Bahrani II*”) the Tenth Circuit agreed with the defendants that *Allison Engine*’s intent requirement was equally applicable to claims brought under Section 3729(a)(7), even though the Supreme Court had not specifically resolved the issue.⁷⁰ Thus, in order to prove liability under this section, in addition to taking an affirmative step, the relator must also “establish that the defendant ‘made a false record or statement for the

⁶⁸ *Id.* at 1275.

⁶⁹ *Id.* at 1271.

⁷⁰ 624 F.3d 1275, 1302 (10th Cir. 2010). The reader should note that the author was an expert witness for the defense on the issue of attorneys’ fees in the *Bahrani* case.

purpose of concealing, avoiding, or decreasing an obligation to pay or transmit money or property to the Government.”⁷¹ In ruling that Section 3729(a)(7) liability required proof of this intent element and concluding that the jury specifically determined that the relator had not proved the required *Allison Engine* intent element, the Tenth Circuit reversed the judgment below in favor of the relator on the reverse false claims allegations in *Bahrani II*. The Tenth Circuit also rejected the government’s argument that the five claims should be remanded, and declined to order a new trial, concluding that:

[i]f every defendant who knows or should know about an obligation to pay money is automatically deemed to have acted with the purpose of decreasing the obligation, there is no purpose or intent standard left.⁷²

FERA, however, eliminated the key words denoting purpose in Section 3729(a)(7)—“to conceal, avoid, or decrease”—and instead, bases liability under Section 3729(a)(1)(G) on making, using, or causing a false record or statement that is “material” to an “obligation” to pay money to the government. In addition, FERA provides an alternative basis for liability which requires simply knowingly concealing, or knowingly and “improperly” avoiding or decreasing an “obligation” to pay the government—without the necessity of making any false statement.⁷³

FERA defines “obligation” as an established duty, whether or not fixed, arising from a contract, grant, license, fee-based, or similar relationship, or from retention of an overpayment. Precisely how a duty arises from retention of an overpayment and when it becomes “established” is not clear under this statutory language. The Senate Report explained that this language was not intended “to create liability for a simple retention of an overpayment that is permitted by a statutory or regulatory process for reconciliation,” such as those under a state-administered Medicaid program.⁷⁴ The term “improperly” in Section 3729(a)(1)(G) seems to limit this liability to a bad faith retention of an overpayment.⁷⁵

The phrase “whether or not fixed” in this definition of “obligation” has been interpreted to cover cases where an established duty to pay the government is owed but the amount owed is unfixed. Recently, however, a *qui tam* plaintiff attempted to extend liability beyond recognized limits to a statutory fine under the Environmental Protection Act. While no reverse false claim liability was ultimately found in the EPA case because the jury concluded that the statutory condition for imposing the fine—substantial risk information that should have been reported—was unmet,⁷⁶ the judge allowed the claim to go to a jury rather than simply dismissing it because the fine was contingent.⁷⁷ Attempts by *qui tam* plaintiffs to extend FCA liability to penalties or fines should be dismissed on the grounds that the “obligation” requirement under Section

⁷¹ *Id.* at 1303 (quoting *Allison Engine*, 553 U.S. at 671).

⁷² *Id.*

⁷³ See *United States ex rel. Yannacopoulos v. General Dynamics*, 652 F.3d 818 (7th Cir. 2011) (noting that Section 3729(a)(1)(G) makes it unlawful to conceal, avoid or decrease an obligation to pay the government, “apparently regardless of whether such actions involve . . . a falsehood”) *Id.* at *14 n. 16.

⁷⁴ S.Rep. No. 111-10, at 15 (2009).

⁷⁵ In a contemporaneous statement about the amendment, Senator Kyl explained that the definition of “improperly” under state law was inherently tortious, illegal, or *malum in se*, and thus it required either improper motive or inherently improper means. 155 Cong. Rec. S. 4540 (daily ed. Apr. 22, 2009) (statement of Sen. Kyl).

⁷⁶ *Simoneaux v. E.I. DuPont De Nemours & Co.*, No. 12-219, 2015 U.S. Dist. LEXIS 22505 (M.D. La. Feb. 25, 2015).

⁷⁷ See *Simoneaux v. E.I. DuPont De Nemours & Co.*, No. 12-219-SDD-SCR, 2014 WL 4352185 (M.D. La. Sept. 2, 2014) (rejecting DuPont’s argument that because payment of statutory penalties under the Toxic Substances Control Act was not mandatory but was contingent on an order of the EPA, the “obligation” requirement was unmet).

3729(a)(1)(G), like that under Section 3729(a)(7), is not met where the duty to pay is contingent.⁷⁸

While FERA imposed liability for retention of an overpayment under the FCA in the general terms discussed above, the Affordable Care Act of 2010 directly linked retention of an overpayment under Medicare or Medicaid to FCA liability. It did so by defining an “overpayment” as any Medicare or Medicaid funds “that a person receives or retains . . . to which the person, after applicable reconciliation, is not entitled,” and it established the deadline for reporting and returning an overpayment as the later of either 60 days after an overpayment has been “identified” or the date of a corresponding cost report.⁷⁹ The ACA did not define the term “identified,” however, nor did it use the FCA’s terms “knowing” or “knowingly.” Although overpayments returned within the deadline are excluded from FCA liability, the ACA stated that an overpayment retained after reconciliation is an “obligation” under Section 3729(b)(3) of the FCA. The ACA provided no lookback period for this FCA liability. In a pending intervened case, the defendant has challenged one of the first *qui tam* cases brought to enforce the ACA’s overpayment requirements through the FCA.⁸⁰

Six years after the ACA was passed, CMS issued a final rule promulgating regulations for reporting and refunding overpayments under Medicare Parts A and B.⁸¹ The regulations took effect March 14, 2016. They track the ACA’s definition of an “overpayment,”⁸² and they incorporate the statutory deadline for reporting and returning an overpayment, which is the later of either 60 days after the overpayment was “identified,” or the date of a corresponding cost report.⁸³ The regulations define “identified” as follows:

A person has identified an overpayment when the person has, or should have through the exercise of reasonable diligence, determined that the person has received an overpayment and quantified the amount of the overpayment. A person should have determined that the person received an overpayment and quantified the amount of the overpayment if the person fails to exercise reasonable diligence and the person in fact

⁷⁸ See *American Textile Mfrs. Inst., Inc. v. The Limited, Inc.*, 190 F.3d 729 (6th Cir. 1999) (“*ATMI*”) (“Contingent obligations—those that will arise only after the exercise of discretion by government actors—are not contemplated by the statute.”). The reader should note that the author represented the defendants in the *ATMI* case.

⁷⁹ ACA, Pub. L. No. 111-148, 124 Stat. 119, § 6402 (2010).

⁸⁰ See *United States ex rel. Kane v. Healthfirst, Inc.*, No. 11 Civ. 2325 (ER), 2015 WL 4619686 (S.D.N.Y. Aug. 3, 2015) (defining “identified” as when a provider is put on notice of a potential overpayment). See also *United States ex rel. Ortiz v. Mount Sinai Hosp.*, No. 13 Civ. 47335 (RMB), slip op. (S.D.N.Y. Nov. 9, 2015) (finding that relators sufficiently pled wrongful overpayment retention with illustrative examples).

⁸¹ Medicare Program: Reporting and Returning of Overpayments, 81 Fed. Reg. 7654-7684 (Feb. 12, 2016) (to be codified at 421 C.F.R. pts. 401, 405). In addition, CMS issued final rules regarding overpayments under Parts C and D that set a six-year lookback period for reporting and repaying “identified” overpayments, and deem an overpayment to have been “identified” when an organization “has determined, or should have determined through the exercise of reasonable diligence, that [it] has received an overpayment.” Medicare Program; Contract Year 2015 Policy and Technical Changes to the Medicare Advantage and the Medicare Prescription Drug Benefit Programs, 79 Fed. Reg. 29,844, at 29,958, 29,963 (May 23, 2014) (to be codified at 42 C.F.R. pts. 422, 423).

⁸² 42 C.F.R. § 401.303. See ACA, 42 U.S.C. § 1320a-7k(d)(4)(B). CMS stated that it was addressing concerns about the “breadth” of this definition by expanding the ways overpayments could be reported and returned to include existing “claims adjustment or reversal and credit balance reporting process[es]” as well as new processes created in the future. 81 Fed. Reg. at 7656, 7675.

⁸³ 42 C.F.R. § 401.305(b)(1). The regulations also include grounds for suspending the deadline in cases of extended repayment schedule requests, submissions to OIG’s self-disclosure protocol, and submissions to CMS’s voluntary self-referral disclosure protocol. 42 C.F.R. § 401.305(b)(2).

received an overpayment.⁸⁴

This definition recognizes that an overpayment must be quantified before it can be reported and returned.⁸⁵ However, the definition also incorporates a “reasonable diligence” standard to cover the so-called “ostrich defense” by a person who “should have determined” that an overpayment was received and quantified it, but failed to do so.⁸⁶ That standard is “fact-dependent,” and, according to CMS, it requires both “proactive compliance activities to monitor claims” and “reactive investigative activities.”⁸⁷ The final rule states that, absent “extraordinary circumstances,” “a reasonable amount of time” for this process is a total of 8 months—6 months for the investigation and 2 months for reporting and returning the overpayment.⁸⁸

CMS’s regulations establish a maximum lookback period of six years for reporting and returning an overpayment, which extends from the date the overpayment was received.⁸⁹ While this is shorter than the ten-year period CMS originally proposed, it poses significant challenges due to evolving Medicare guidance and recordkeeping considerations. Although the government and relators have pursued more aggressive positions in *qui tam* cases alleging liability based on retention of an overpayment under the FCA and the ACA in the courts,⁹⁰ there is no basis for applying stricter standards than CMS’s final rule in such cases.

8. Damages and Penalties

FCA violations result in liability for:

a civil penalty of not less than \$5,000 and not more than \$10,000, . . . plus 3 times the amount of damages which the Government sustains *because of* the [person’s] act.”⁹¹

The measure of damages in a False Claims Act case is dependent on the nature of the alleged fraud, but the test is always the same: the difference between what the government actually paid and what it should have paid absent the FCA violation.

⁸⁴ 42 C.F.R. § 401.305(a)(2).

⁸⁵ 81 Fed. Reg. at 7661 (clarifying that “part of the identification is quantifying the amount”). Where an overpayment amount has been extrapolated based on a statistical sampling methodology, the person must describe the methodology in the report. 42 C.F.R. § 401.305(d).

⁸⁶ 81 Fed. Reg. at 7660.

⁸⁷ 81 Fed. Reg. at 7661, 7662. In replacing the “knowing” standard in the proposed rule with the “reasonable diligence” standard in the final rule, CMS acknowledged that, while the ACA defines “knowing” and “knowingly” as those terms are defined under the FCA, no statutory provision concerning reporting and returning overpayments used those terms. *Id.* at 7659. Accordingly, CMS noted that it was not seeking to interpret “knowing” and “knowingly” as used in the FCA. *Id.* at 7661.

⁸⁸ 81 Fed. Reg. at 7662. CMS explained that reasonable diligence is demonstrated by performing a “timely, good faith investigation” within 6 months of receiving “credible information” concerning a potential overpayment, and that the 60-day time period for reporting and returning the overpayment begins when the investigation is completed. 81 Fed. Reg. at 7661, 7662. Or, in the case of the person who failed to demonstrate reasonable diligence, the 60-day period begins on the day the person received this information. *Id.* at 7661.

⁸⁹ 42 C.F.R. § 401.305(f). CMS stated that the requirements in its final rule are not retroactive, and that prior to March 14, 2016, a “good faith effort” to comply with the ACA’s overpayment requirements was sufficient. 81 Fed. Reg. 7673.

⁹⁰ *See, e.g.,* United States *ex rel.* Stone v. Omnicare, Inc., No. 09 C 4319, 2011 WL 2669659 (N.D. Ill. July 7, 2011); United States *ex rel.* Kane v. Healthfirst, Inc., No. 11CV2325(ER), 2015 WL 4619686, at *12 (S.D.N.Y. Aug. 3, 2015) (adopting a definition of “identified” that covered the case where defendants were put on notice of “a set of claims likely to contain numerous overpayments,” “even if the precise amount due has yet to be determined”).

⁹¹ 31 U.S.C. § 3729(a)(1) (emphasis supplied).

In false certification cases, courts of appeals appear to be divided regarding whether a broad “but for” test or an actual loss test of causation is the proper measure of damages. In *United States v. Science Applications International Corp.*,⁹² the D.C. Circuit vacated the damages portion of the decision below because of a flawed jury instruction that required the jury to assume that SAIC’s services had no value. That assumption was particularly egregious in this case because the jury had already decided that actual damages to the government, as measured for purposes of the alternative breach of contract claim, were \$78, yet the district court imposed FCA damages of \$6.49 million. Reversing that portion of the lower court’s decision, the circuit court held that there is no irrebuttable presumption that expert services and advice are worthless if an organizational conflict of interest provision has been violated, and ruled that the damages must take into account the value of the goods and services. The panel pointed out that, under the benefit of the bargain framework that applied in this case, damages should be calculated by determining the amount the government paid minus the value of the goods or services provided, which is the standard measure under the FCA. Indeed, the evidence showed that the government agency, NRC, continued to use SAIC’s work product after its contract with SAIC was terminated in 1999, and an NRC project manager testified that SAIC’s “actual work product ‘constituted the opposite of a conflict,’ . . . due to its transparency and fairly conservative results.” The jury instruction erroneously removed this calculation from the case, and established an irrebuttable presumption that the services of an expert are worthless where a violation of a conflict of interest requirement has occurred. Because the district court’s instruction to the jury required them to assume that SAIC’s services had no value, the court vacated and remanded the damages for a new trial. This case ultimately settled for \$1.5 million.

In *United States v. Rogan*,⁹³ on the other hand, the district court did not apply a benefit of the bargain analysis in evaluating damages in the context of Stark Act and AKS violations. The court noted that the violations were “myriad” and “overwhelming,” and found that the government would not have paid anything for the claims of patients referred by physicians that had prohibited financial relationships with the hospital, citing the Stark Act. Rather than engaging in a benefit analysis, the court measured the damages as the entire federal share of these claims to Medicare and Medicaid.⁹⁴ After they were trebled, the damages were more than \$50 million. In addition, the court found that there were 18,000 penalties, bringing the total damages and penalties to over \$64 million. The Seventh Circuit affirmed the damages award in *Rogan*, adopting the lower court’s decision that placed no value on the medical services provided during the period of the unlawful payments for referrals and agreeing that “when the conditions [of the government’s payment] are not satisfied, nothing is due.”

More recently, in *United States ex rel. Wall v. Circle C Construction, LLC*,⁹⁵ the Sixth Circuit rejected the government’s claim that its entire payment for electrical work on dozens of warehouses was “tainted” by a subcontractor’s underpayment of some of the electricians who worked on the project (a Davis-Bacon Act violation). The court applied the benefit of the bargain analysis and emphasized that FCA damages are focused on actual damages, not the “hypothetical scenario” advanced by the government.⁹⁶ Exposing the incongruity between the

⁹² 626 F. 3d 1257 (D.C. Cir. 2010).

⁹³ 459 F. Supp. 2d 692 (N.D. Ill. 2006), *aff’d*, 517 F.3d 449 (7th Cir. 2008).

⁹⁴ *Id.* at 726-27.

⁹⁵ No. 14-6150, 2016 WL 423750 (6th Cir. Feb. 4, 2016). *See also* FraudMail Alert No. 16-02-10, *Sixth Circuit Rejects Government’s “Fairylnd” FCA Damages Theory* (Feb. 10, 2016), <http://www.friedfrank.com/siteFiles%2FPublications%2F021016-FINALVERSION-FRAUDMAIL-Civil%20False%20Claims%20Act%20Sixth%20Circuit.pdf>.

⁹⁶ *Id.* at *2.

government’s theory and its actual losses, the court observed that, in all of those warehouses, “the government turns on the lights every day.”⁹⁷ Applying the concrete question of whether the government “in fact got less value than it bargained for,” the court readily determined that the government received all of the value of the electrical work on all of the warehouses minus the wage shortfall.

As the decisions above reflect, a key feature of FCA liability is its treble damages provision. An important development on the application of this multiplier is the Seventh Circuit’s revisit of the question of whether net or gross damages are trebled when deducting the value of goods or services received by the government. Historically, the Justice Department advocated and employed the “gross trebling” method—which trebles the claim amount first and afterward deducts the value of goods and services provided—but that method distorts the government’s actual damages by severely diminishing the value of any benefit received. In *United States v. Anchor Mortgage Corp.*,⁹⁸ the Seventh Circuit held that the proper approach was “net trebling”—which subtracts the value of goods or services provided before multiplying the damages and thus accounts for the actual benefit that the government received. The Seventh Circuit based its holding on the finding that no FCA language or policy supported departure from the norm in civil litigation, where damages are based on net loss, and it rejected the Justice Department’s misreading of the Supreme Court’s decision in *United States v. Bornstein*.⁹⁹ Given the Ninth Circuit’s decision that applied gross trebling in *United States v. Eghbal*,¹⁰⁰ a circuit split has emerged on this issue.

Without question, one of the most feared remedies under the False Claims Act is the \$5,500-\$11,000 per claim penalty. FCA penalties are assessed on a per-claim basis regardless of the amount of the damages, except when the court finds that the result is an excessive civil penalty. A recent decision by the U.S. Court of Appeals for the Fourth Circuit in *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, unwittingly may have opened the door to a new and unsettling era in *qui tam* litigation.¹⁰¹ Dispensing with decades of Supreme Court jurisprudence—including one case argued by Chief Justice Roberts before he took the federal bench—the Fourth Circuit ordered the trial court to impose \$24 million in FCA penalties against the defendants following a trial at which the relator pointedly sought no FCA damages and no proof of economic harm to the United States was ever established. This result is squarely at odds with a number of constitutional protections, particularly the Eighth Amendment’s Excessive Fines Clause, as well as decisions applying that constitutional provision to FCA penalty awards.¹⁰² The Fourth Circuit’s sole reliance on intangible and non-economic factors such as “deterrent effects” and public policy considerations to override the traditional excessive fines

⁹⁷ *Id.* at *1.

⁹⁸ 711 F.3d 745 (7th Cir. 2013).

⁹⁹ *Id.* at 750. In *Bornstein*, the Court supported using the traditional market value approach to measure actual damages—and thus net trebling—but found that this approach did not apply to a *third party*’s settlement payments to the government, which were deducted after damages were multiplied. 423 U.S. 303, 317 n.13 (1976).

¹⁰⁰ 548 F.3d 1281 (9th Cir. 2008).

¹⁰¹ 741 F.3d 390, 408 (4th Cir. 2013), *cert. denied*, 83 U.S.L.W. 3184 (2014). The reader should note that the author represented one of the other defendants in the *Bunk* case, but was not involved in the trial or appeal.

¹⁰² See FraudMail Alert No. 13-12-20, *Fourth Circuit Holds That a \$24 Million FCA Penalty is Not an “Excessive Fine” Even Where the Relator Fails to Prove That the United States Suffered Any Economic Harm* (Dec. 12, 2013), <http://www.friedfrank.com/siteFiles%2FPublications%2FFINAL%20-%20FraudMail%20Alert%20-%202012-20-13%20-%20Fourth%20Circuit%20Holds%20That%20a%20%2424%20M%20FCA%20Penalty%20is%20Not%20an%20%E2%80%9CExcessive%20Fine%E2%80%9D.pdf>.

analysis lacks precedent. The Supreme Court declined to review this decision, however, and on remand, the trial court imposed the \$24 million *qui tam* award that it previously found excessive.

FCA penalties are to increase in 2016 following legislation passed by Congress in October 2015 that requires government agencies to increase civil monetary penalties to account for inflation.¹⁰³ Drafted in the innocent-sounding verbiage of inflation adjustments tied to the Consumer Price Index, the impact of this legislation on civil fraud defendants is substantial. Congress required the first “catch up adjustment,” implemented through rulemaking, to take effect no later than August 1, 2016. Further, automatic annual adjustments are authorized without any agency assessment of the need for an increase. This annual adjustment provision raises the potential for an Administrative Procedure Act challenge. Increases in FCA penalties will exacerbate constitutional concerns in penalties-heavy FCA cases, particularly where there are large numbers of relatively small monetary claims.

9. Public Disclosure, Original Source, and First-to-File

In 2010, Congress amended the FCA’s public disclosure bar as part of the comprehensive health care reform initiative in the Affordable Care Act,¹⁰⁴ adding new limitations to the public disclosure provision in Section 3730(e)(4)(A) and expanding the original source exception in Section 3730(e)(4)(B). Section 3730(e)(4) now provides:

(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

- (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
- (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
- (iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, “original source” means an individual who has either—

- (i) prior to a public disclosure under subsection (e)(4)(A), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or
- (ii) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

Under the 2010 bar, if “substantially the same” allegations or transactions were publicly disclosed, then the *qui tam* relator must be an “original source,” unless the government opposes dismissal. While the 1986 public disclosure bar was considered a threshold *jurisdictional*

¹⁰³ See Bipartisan Budget Act of 2015, Pub. L. No. 114-74, § 701, 129 Stat. 584, 599-600 (2015) (amending the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note).

¹⁰⁴ ACA, Pub. L. No. 111- 148, 124 Stat. 119, 901-02 (2010) (amending 31 U.S.C. § 3730(e)(4)). See FraudMail Alert No. 10-03-24, *Here They Go Again—Newly Enacted Comprehensive Health Care Reform Law Contains More FCA Amendments* (attached as Appendix 3).

determination,¹⁰⁵ the 2010 amendments eliminate the word “jurisdiction,” and replace it with the requirement that “the court shall dismiss an action or claim . . . unless opposed by the Government.” Until recently, the government had not exercised this veto, but it has begun to do so.¹⁰⁶

In addition, the amendments narrow the definition of public disclosures to disclosures in *federal* sources—that is, disclosures in federal criminal, civil, or administrative hearings under Section 3730(e)(4)(A)(i), and in federal hearings, reports, audits, or investigations under Section 3730(e)(4)(A)(ii). These revisions effectively overrule the Supreme Court’s ruling in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, (“*Graham County II*”)¹⁰⁷ that *qui tam* allegations could be publicly disclosed by state and local sources, and eliminate defenses based on disclosures from state and local government sources unless the information is also disclosed in the news media or otherwise publicly disclosed. The defense to public disclosures in federal hearings is further narrowed to hearings in which the government or its agent is a party, thus excluding disclosures made in purely private litigation such as retaliation or negligence actions.

The amendments also revise the original source exception. Rather than requiring the original source to have both “direct” and “independent” knowledge of the alleged fraud, the original source exception is met by knowledge that is “independent” of and “materially adds” to the publicly disclosed allegations, which must be voluntarily disclosed to the government before filing suit. The courts have begun to apply this new statutory language. For example, in *United States ex rel. Paulos v. Stryker Corp.*, the Eighth Circuit rejected the relator’s claim that he had knowledge that materially added to the publicly disclosed allegations despite his claim that he was among the first to link the defendant’s medical device to the resulting disease, because, even if he discovered the link to chondrolysis *first*, Section 3730(e)(4)(B) does not provide an exception for “early discoveries or suspicions.”¹⁰⁸

Because of the ACA’s silence on the issue of an effective date for these *qui tam* amendments, the Supreme Court applied the presumption against retroactivity in *Graham County II*, limiting the impact of the ACA’s public disclosure amendments in cases pending at the time of enactment and leaving open the question of whether the amendments apply retroactively to prior conduct where no *qui tam* case was pending.¹⁰⁹

Under a separate bar in Section 3730(b)(5) known as the “first-to-file” bar, when a relator brings a *qui tam* action, “no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.” The primary purpose of this bar—the text of which has remained unchanged since its inclusion in the 1986 amendments—is to prevent multiple *qui tam* suits based on the same underlying conduct. Recently, a circuit court split developed on whether the phrase “pending action” is a timing requirement, as the Fourth Circuit

¹⁰⁵ See *Rockwell Int’l Corp. v. United States ex rel. Stone*, 127 S. Ct. 1397, 1406 (U.S. 2007).

¹⁰⁶ See, e.g., *United States ex rel. Szymoniak v. Am. Home Mortgage Serv. Inc.*, No. 0:10-cv-01465-JFA, 2014 WL 1910845 (D.S.C. May 12, 2014).

¹⁰⁷ 130 S. Ct. 1396 (U.S. 2010). The reader should note that the author filed an amicus brief on behalf of the Washington Legal Foundation and the Allied Educational Foundation in support of Petitioners in *Graham County II*.

¹⁰⁸ 762 F.3d 688, 694 (8th Cir. 2014).

¹⁰⁹ See *Graham County II*, 130 S. Ct. 1396, 1400 n.1 (2010). To the extent that it is not effectively foreclosed under *Schumer*, this will be a disputed issue, with defendants arguing, as they did in *Schumer*, that the *qui tam* amendments should not be given retroactive effect because they would enlarge liability and eliminate defenses in *qui tam* suits, and relators arguing in favor of retroactivity. See *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997).

interpreted it in *United States ex rel. Carter v. Halliburton Co.*,¹¹⁰ or whether it is a shorthand reference to the first-filed action that distinguishes the first action from subsequent actions, as the D.C. Circuit decided in *United States ex rel. Shea v. Cellco P'ship*.¹¹¹ In May 2015, the Supreme Court resolved this issue in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*.¹¹² The Court saw no reason to interpret the term “pending” other than by reference to its ordinary meaning, which Black’s and Webster’s defined as “remaining undecided.” Courts are divided on other interpretive questions not answered by the Court in *Carter*, such as what happens *after* dismissal of the original complaint that was pending when a subsequent related action was filed.¹¹³

10. Whistleblower Retaliation

In 1986, a whistleblower’s cause of action for retaliation was enacted in Section 3730(h) of the FCA, which provided that an employee who was discharged or otherwise discriminated against in the terms or conditions of employment by an “employer” because of lawful acts done by the “employee” in furtherance of an action under Section 3730 “shall be entitled to all relief necessary to make the employee whole.” FERA revised the definition of both protected persons and protected conduct in Section 3730(h) by (1) removing the specific reference to the “employer” (and thus the requirement of an employee-employer relationship) so that independent contractors could bring retaliation actions,¹¹⁴ and (2) replacing lawful acts “in furtherance of an action under this section” with the phrase “in furtherance of other efforts to stop 1 or more violations.” The new definition of protected conduct seemed to require the person to actually try to stop the fraud itself rather than simply take steps toward filing a *qui tam* action.

The following year, Congress provided a new definition of protected conduct under Section 3730(h) in the Dodd-Frank Wall Street Reform and Consumer Protection Act.¹¹⁵ This revision restores the original protection of lawful acts in furtherance of a *qui tam* action in addition to FERA’s “other efforts to stop 1 or more violations.” As amended, Section 3730(h) now provides:

Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and

¹¹⁰ 701 F.3d 171 (4th Cir. 2013), *cert. granted sub nom.* *Kellogg Brown & Root Servs. v. United States ex rel. Carter*, 134 S.Ct. 2899 (U.S. 2014).

¹¹¹ 748 F.3d 338 (D.C. Cir. 2014).

¹¹² No. 12-1497, 2015 WL 2456621 (U.S. May 26, 2015). See FraudMail Alert No. 15-05-26, *Supreme Court Squarely Rejects Justice Department’s Use of Wartime Suspension of Limitations Act in Civil FCA Actions, but Offers Hope to Relators with Its First-to-File Ruling* (May 26, 2015), http://www.friedfrank.com/siteFiles%2FPublications%2FFINAL%20-%20205-26-15%20-%20Fraudmail%20Alert%20-%20Supreme_Court_Squarely_Rejects_Justice_Dept.pdf.

¹¹³ Compare *United States ex rel. Chovanec v. Apria Healthcare Group, Inc.*, 606 F.3d 361, 362 (7th Cir. 2010) (ruling that subsequent related action must be dismissed if it was brought when related first-filed action was pending), and *United States ex rel. Carter v. Halliburton Co.*, No. 1:11cv602, 2015 WL 7012542 (E.D. Va. Nov. 12, 2015) (same), with *United States ex rel. Gadbois v. PharMerica Corp.*, 809 F.3d 1 (1st Cir. 2015) (ruling that Rule 15(d) allows second relator to amend complaint brought during pendency of a related first-filed action, which was subsequently dismissed, rather than “expose the relator to the vagaries of filing a new action”).

¹¹⁴ See BOESE, § 4.11[B][2][b] (discussing the term “employer” and the independent contractor issue).

¹¹⁵ Pub. L. No. 111-203, § 3301, 124 Stat. 1376 (2010). See FraudMail Alert No. 10-06-29, *Here They Go Again, Round III: Financial Reform Bill Contains More FCA Amendments* (attached as Appendix 4).

conditions of employment because of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor or agent, or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

The Dodd Frank amendments also provided, for the first time, a statute of limitations for retaliation that requires the action to be brought within three years of the date when the retaliation occurred.¹¹⁶

Courts are beginning to grapple with whether the new definitions in Section 3730(h) apply to a variety of employment relationships and conduct. In most cases, the term “employee” has been limited to persons in an employment-like relationship with the defendant, which does not include applicants or non-employer corporations.¹¹⁷ Recently, protected conduct has been interpreted to include reporting the fraud within the organization, such as informing a board member or the company’s corporate compliance arm in some cases.¹¹⁸ However, if the plaintiff was not reporting fraud to a supervisor in furtherance of an FCA claim and never said that the defendant committed fraud on the government, the retaliation claim has been dismissed.¹¹⁹ Refusing to participate in the fraud alone has not been deemed protected activity.¹²⁰

III. State False Claims Acts

As a result of the Medicaid fraud provisions in the Deficit Reduction Act of 2005 (“DRA”) and an economic incentive in the DRA that encourages every state without a state false claims act with *qui tam* provisions to adopt one, state legislatures have enacted state false claims laws with provisions that mirror, or exceed, the federal FCA.¹²¹ There are now 30 of these state laws, and they are increasing false claims visibility, enforcement actions, and recoveries.¹²² The states that have *qui tam* false claims statutes are: California, Colorado, Connecticut, Delaware,

¹¹⁶ 31 U.S.C. §3730(h)(3). *See* *Weslowski v. Zugibe*, 14 F. Supp.3d 295 (S.D.N.Y. Mar. 31, 2014) (rejecting plaintiff’s attempt to bring an action against his employer more than three years after his resignation and ruling that this “continuing violation” theory of liability could not be used because the FCA’s retaliation provision only applies to retaliatory conduct that occurred during the plaintiff’s employment).

¹¹⁷ *See, e.g.*, *Boegh v. Energysolutions, Inc.*, 772 F.3d 1056, 1064 (6th Cir. 2014) (finding that the “FCA’s legislative history and case law from other courts reinforce that “employee” is limited to employment-like relationships); *United States ex rel. Abou-Hussein v. Science Applications Int’l Corp.*, No. 2:09-1858-RMG, 2012 WL 6892716, at *3-4 (D.S.C. May 3, 2012) (reasoning that Congress intended to extend protection to “individuals who [a]re not technically employees within the typical employer[-]employee relationship, but nonetheless have a contractual or agent relationship with an employer”), *aff’d*, 475 Fed. App’x. 851 (4th Cir. 2012) (per curiam). *Cf.* *Tibor v. Michigan Orthopedic Inst.*, No. 14-10920, 2014 WL 6871320 (E.D. Mich. Dec. 5, 2014) (noting that the amended provision prohibits retaliation against independent contractors or “doctors without traditional employment relationships with hospitals” who are not technically “employees”).

¹¹⁸ *See, e.g.*, *United States ex rel. Si v. Laogai Research Found.*, No. 09CV2388 (KBJ), 2014 WL 5446487 (D.D.C. Oct. 14, 2014); *United States ex rel. Booker v. Pfizer, Inc.*, 9 F. Supp. 3d 34 (D. Mass. 2014). 9 F. Supp. 3d 34 (D. Mass. 2014).

¹¹⁹ *See* *Lee v. Computer Scis. Corp.*, No. 1:14cv581 (JCC/TCB), 2015 U.S. Dist. LEXIS 21998 (E.D. Va. Feb 24, 2015).

¹²⁰ *See* *United States ex rel. Tran v. Computer Scis. Corp.*, No. 11-cv-0852 (KBJ), 2014 WL 2989948 (D.D.C. July 3, 2014).

¹²¹ *See* Deficit Reduction Act of 2005, Pub. L. 109-171, § 6031 (2006). Updated guidelines for evaluating whether state FCAs conform to the current federal FCA were issued by HHS OIG in 2013. *See* Dep’t of Health & Human Servs., Office of Inspector Gen., *OIG Guidelines for Evaluating State False Claims Acts* (Mar. 15, 2013), available at <http://oig.hhs.gov/fraud/docs/falseclaimsact/guidelines-sfca.pdf>.

¹²² *See* BOESE, Chapter 6 (discussing individual state and municipal false claims laws).

Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, and Wisconsin. The District of Columbia, New York City, Philadelphia, and Chicago also have false claims laws with *qui tam* enforcement. Many states have amended their state false claims laws to include the far more onerous provisions in the FERA, ACA, and Dodd-Frank amendments in order to qualify for the DRA incentive.

Appendix 1

THE FEDERAL FALSE CLAIMS ACT

31 U.S.C. §§ 3729-3733

As amended by:

The Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621 (2009) (signed by the President on May 20, 2009)

The Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1303, 124 Stat. 119, 168 (2010) (signed by the President on Mar. 23, 2010)

The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1079A, 124 Stat. 1376, 2077 (2010) (signed by the President on July 21, 2010).

§ 3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.—~~Any~~

(1) IN GENERAL.—Subject to paragraph (2), any person who—

- ~~(A)~~ knowingly presents, or causes to be presented, ~~to an officer or employee of the United States Government or a member of the Armed Forces of the United States~~ a false or fraudulent claim for payment or approval;
- ~~(B)~~ knowingly makes, uses, or causes to be made or used, a false record or statement material to ~~get~~ a false or fraudulent claim ~~paid or approved by the Government~~;
- ~~(C)~~ conspires to ~~defraud the Government by getting a false or fraudulent claim allowed or paid~~ commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
- ~~(D)~~ has possession, custody, or control of property or money used, or to be used, by the Government and, ~~intending to defraud the Government or willfully to conceal the property,~~ knowingly delivers, or causes to be delivered, less ~~property than the amount for which the person receives a certificate or receipt~~ than all of that money or property;
- ~~(E)~~ is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to

defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

- (6F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge ~~the~~ property; or
- (7G) knowingly makes, uses, or causes to be made or used, a false record or statement material to ~~conceal, avoid, or decrease~~ an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), plus 3 times the amount of damages which the Government sustains because of the act of that person, ~~except that if,~~

(2) REDUCED DAMAGES.—If the court finds that—

- (A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;
- (B) such person fully cooperated with any Government investigation of such violation; and
- (C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of ~~the~~that person.

(3) COSTS OF CIVIL ACTIONS.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

- (b) ~~KNOWING AND KNOWINGLY DEFINED~~DEFINITIONS.—For purposes of this section,

==

(1) the ~~terms~~terms “knowing” and “knowingly””—

(A) mean that a person, with respect to information—

- (1i) has actual knowledge of the information;
- (2ii) acts in deliberate ignorance of the truth or falsity of the information; or
- (3iii) acts in reckless disregard of the truth or falsity of the information;; and

(B) require no proof of specific intent to defraud~~is required;~~

~~(e) CLAIM DEFINED. For purposes of this section,~~(2) the term “claim”includes”—

(A) means any request or demand, whether under a contract or otherwise, for money or property ~~which and whether or not the United States has title to the money or property, that—~~

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest, and if the United States Government —

(I) provides or has provided any portion of the money or property ~~which is requested or demanded;~~ ~~or if the Government~~

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual’s use of the money or property;

(3) the term “obligation” means 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; and

(4) the term “material” means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

~~(dc)~~ EXEMPTION FROM DISCLOSURE.—Any information furnished pursuant to ~~subparagraphs (A) through (C) of~~ subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

~~(ed)~~ EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

§ 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—

- (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.
- (2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.
- (3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.
- (4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—
 - (A) proceed with the action, in which case the action shall be conducted by the Government; or

- (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.
- (5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.
- (c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.—
 - (1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).
 - (2) (A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.
 - (B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.
 - (C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—
 - (i) limiting the number of witnesses the person may call;
 - (ii) limiting the length of the testimony of such witnesses;
 - (iii) limiting the person's cross-examination of witnesses; or
 - (iv) otherwise limiting the participation by the person in the litigation.
 - (D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the

defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

- (3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.
- (4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.
- (5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF.—

- (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or

transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

- (2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.
- (3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.
- (4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.—

- (1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.
- (2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.
 - (B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).
- (3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) ~~No~~The court shall ~~have jurisdiction over~~dismiss an action or claim under this section ~~based upon the public disclosure of, unless opposed by the Government, if substantially the same~~ allegations or transactions as alleged in the action or claim were publicly disclosed--

(i) in a Federal criminal, civil, or administrative hearing, in which the Government or its agent is a party;

(ii) in a congressional, ~~administrative, or~~ Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who ~~has direct and independent knowledge of~~either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which ~~the allegations are based~~allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section ~~which is based on the information.~~

- (f) GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.—The Government is not liable for expenses which a person incurs in bringing an action under this section.
- (g) FEES AND EXPENSES TO PREVAILING DEFENDANT.—In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

~~(h) — Any employee who~~ (h) Relief From Retaliatory Actions. —

(1) IN GENERAL. — Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or, contractor, agent, or associated others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief or other efforts to stop 1 or more violations of this subchapter.

(2) RELIEF. —Relief under paragraph (1) shall include reinstatement with the same seniority status such that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) LIMITATION ON BRINGING CIVIL ACTION. —A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

§ 3731. False claims procedure

(a) A subpoena [subpoena] requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought—

- (1) more than 6 years after the date on which the violation of section 3729 is committed, or
- (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but

in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

~~(e)~~(d) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

~~(d)~~ Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

§ 3732. False claims jurisdiction

(a) ACTIONS UNDER SECTION 3730.—Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) CLAIMS UNDER STATE LAW.—The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

(c) SERVICE ON STATE OF LOCAL AUTHORITIES.—With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.

§ 3733. Civil investigative demands

(a) IN GENERAL.—

(1) ISSUANCE AND SERVICE.—Whenever the Attorney General, or a designee (for purposes of this section), has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or making an election under section 3730(b), issue in writing and cause to be served upon such person, a civil investigative demand requiring such person—

- (A) to produce such documentary material for inspection and copying,
- (B) to answer in writing written interrogatories with respect to such documentary material or information,
- (C) to give oral testimony concerning such documentary material or information, or
- (D) to furnish any combination of such material, answers, or testimony.

The Attorney General may ~~not~~ delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served. Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation.

(2) CONTENTS AND DEADLINES.—

- (A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.
- (B) If such demand is for the production of documentary material, the demand shall—
 - (i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

- (ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and
 - (iii) identify the false claims law investigator to whom such material shall be made available.
- (C) If such demand is for answers to written interrogatories, the demand shall—
 - (i) set forth with specificity the written interrogatories to be answered;
 - (ii) prescribe dates at which time answers to written interrogatories shall be submitted; and
 - (iii) identify the false claims law investigator to whom such answers shall be submitted.
- (D) If such demand is for the giving of oral testimony, the demand shall—
 - (i) prescribe a date, time, and place at which oral testimony shall be commenced;
 - (ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;
 - (iii) specify that such attendance and testimony are necessary to the conduct of the investigation;
 - (iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and
 - (v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.
- (E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

- (F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.
- (G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. ~~The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.~~

(b) PROTECTED MATERIAL OR INFORMATION.—

- (1) IN GENERAL.—A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under—
 - (A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or
 - (B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.
- (2) EFFECT ON OTHER ORDERS, RULES, AND LAWS.—Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) SERVICE; JURISDICTION.—

- (1) BY WHOM SERVED.—Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.
 - (2) SERVICE IN FOREIGN COUNTRIES.—Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by any such person that such court would have if such person were personally within the jurisdiction of such court.
- (d) SERVICE UPON LEGAL ENTITIES AND NATURAL PERSONS.—
- (1) LEGAL ENTITIES.—Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by—
 - (A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;
 - (B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or
 - (C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.
 - (2) NATURAL PERSONS.—Service of any such demand or petition may be made upon any natural person by—
 - (A) delivering an executed copy of such demand or petition to the person; or
 - (B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to the person at the person’s residence or principal office or place of business.

(e) PROOF OF SERVICE.—A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) DOCUMENTARY MATERIAL.—

(1) SWORN CERTIFICATES.—The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by—

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) PRODUCTION OF MATERIALS.—Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) INTERROGATORIES.—Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by—

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) ORAL EXAMINATIONS.—

- (1) PROCEDURES.—The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.
- (2) PERSONS PRESENT.—The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.
- (3) WHERE TESTIMONY TAKEN.—The oral testimony of any person taken pursuant to a civil investigative demand served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.
- (4) TRANSCRIPT OF TESTIMONY.—When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness,

unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

- (5) CERTIFICATION AND DELIVERY TO CUSTODIAN.—The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.
- (6) FURNISHING OR INSPECTION OF TRANSCRIPT BY WITNESS.—Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.
- (7) CONDUCT OF ORAL TESTIMONY.—
 - (A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any question, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.
 - (B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18 [18 USCS §§ 6001 et seq.].

- (8) WITNESS FEES AND ALLOWANCES.—Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.
- (i) CUSTODIANS OF DOCUMENTS, ANSWERS, AND TRANSCRIPTS.—
- (1) DESIGNATION.—The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.
- (2) RESPONSIBILITY FOR MATERIALS; DISCLOSURE.—
- (A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).
- (B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, ~~who is authorized for such use under regulations which the Attorney General shall issue~~. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.
- (C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent is given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the

Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. ~~Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.~~

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe—

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) USE OF MATERIAL, ANSWERS, OR TRANSCRIPTS IN OTHER PROCEEDINGS.—Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) CONDITIONS FOR RETURN OF MATERIAL.—If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and—

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the

examination and analysis of all documentary material and other information assembled in the course of such investigation,

the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) APPOINTMENT OF SUCCESSOR CUSTODIANS.—In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly—

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) JUDICIAL PROCEEDINGS.—

(1) PETITION FOR ENFORCEMENT.—Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) PETITION TO MODIFY OR SET ASIDE DEMAND.—

(A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is

found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed—

- (i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or
- (ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) PETITION TO MODIFY OR SET ASIDE DEMAND FOR PRODUCT OF DISCOVERY.—

(A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of discovery. Any petition under this subparagraph must be filed—

- (i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

- (ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.
- (B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.
- (4) PETITION TO REQUIRE PERFORMANCE BY CUSTODIAN OF DUTIES.—At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require the performance by the custodian of any duty imposed upon the custodian by this section.
- (5) JURISDICTION.—Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.
- (6) APPLICABILITY OF FEDERAL RULES OF CIVIL PROCEDURE.—The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.
- (k) DISCLOSURE EXEMPTION.—Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.
- (l) DEFINITIONS.—For purposes of this section—
 - (1) the term “false claims law” means—
 - (A) this section and sections 3729 through 3732; and

- (B) any Act of Congress enacted after the date of the enactment of this section [enacted Oct. 27, 1986] which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;
- (2) the term “false claims law investigation” means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;
- (3) the term “false claims law investigator” means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;
- (4) the term “person” means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;
- (5) the term “documentary material” includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;
- (6) the term “custodian” means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); ~~and~~
- (7) the term “product of discovery” includes—
- (A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;
- (B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and
- (C) any index or other manner of access to any item listed in subparagraph (A); and
- (8) the term “official use” means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports;

communications between the Department of Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.

* * *

S. 386 Section 4(f):

EFFECTIVE DATE AND APPLICATION.—The amendments made by this section shall take effect on the date of enactment of the Act and shall apply to conduct on or after the date of enactment, except that—

(1) subparagraph (B) of section 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date; and

(2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.

Appendix 2



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CIVIL FALSE CLAIMS ACT: The False Claims Act is Amended for the First Time in More Than Twenty Years as the President Signs the Fraud Enforcement and Recovery Act of 2009

Last night, the Fraud Enforcement and Recovery Act of 2009 ("FERA") was signed into law by the President, marking only the second time in the history of the civil False Claims Act ("FCA") that all-embracing amendments have been made to this 1863 law. After its first large-scale revision in 1986, the FCA became the government's most successful weapon in its fight against suspected fraud on the United States, but it also became a weapon that competitors, disappointed bidders, disgruntled employees, and antagonistic agencies could use to punish and destroy those who opposed them. Congress's stated purpose in passing the FERA was to expand the FCA's liability provisions to reach frauds by financial institutions and other recipients of TARP and economic stimulus funds, but those funds were already covered by the FCA. The real purpose of these amendments is to overturn many decisions—like the unanimous Supreme Court decision last year in *Allison Engine Co. v. United States ex rel. Sanders*—which set logical and reasonable limits on the scope of the FCA, a punitive statute that has the power to destroy any individual, institution, municipal entity, or company subject to its provisions.

The new amendments will adversely affect everyone—all government contractors and subcontractors, all healthcare providers, every public and private grantee and sub-grantee, and every other person, company, and entity that pays money to the government or receives Federal funds—by making it far easier to conduct FCA investigations and to win FCA recoveries. Quite simply, many logical defenses have been eliminated, and those who deal in any way with the Federal government are entering a whole new world in which FCA liability is much broader and easier to prove.

Prior FraudMail Alerts have commented on the FCA amendments in the FERA throughout the legislative process. See FraudMail Alert Nos. [09-05-19](#); [09-05-15](#); [09-05-13](#); [09-05-06](#); [09-04-30](#). Here is a comprehensive look at these FCA amendments. A red-line version of the changes that have now become final is available [here](#). Attached is the [final version of the FCA](#) that is effective as of May 20, 2009.

Major FCA Amendments Expanding Liability

Under the FERA, the key liability sections of the FCA remain the provisions addressing false claims, false statements supporting false claims, conspiracy, and the reverse false claims and obligation provisions. These provisions have been renumbered as well as expanded to cover additional conduct. The new sections 3729(a)(1)(A), (B), (C), and (G) extend liability to any person who:

- (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
- (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
- [. . .] or
- (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

Many of the key changes are in the definitions, found in section 3729(b).

Elimination of *Allison Engine's* Intent Requirement: Under the Supreme Court's unanimous decision in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), FCA liability was limited to fraudulent statements that were designed "to get" false claims paid or approved "by the Government." See [FraudMail Alert No. 08-06-09](#). See also John. T. Boese, Civil False Claims and Qui Tam Actions §2.06[G] (3d ed. 2006 & Supp. 2009-1). The Supreme Court's interpretation in *Allison Engine* no longer applies after the FERA because the new law removes both the "to get" language and the "by the Government" limitation in section 3729(a)(2)—as well as comparable language in sections 3729(a)(3) and (a)(7). Further, it attempts to make those changes in section 3729(a)(1)(B) effective as of June 7, 2008—the date *Allison Engine* was decided.

The Court in *Allison Engine* found that, without a clear link between a false claim and payment or approval by the government, the FCA would be "boundless" and become an "all-purpose antifraud statute." 128 S. Ct. at 2128, 2130. To replace this rational limitation, the FERA adds a new definition of "claim," and FCA liability will be limited only by requiring some sort of nexus to the government. The FCA now covers requests for funds to a contractor, grantee, or other recipient, if the money or property requested "is to be spent or used on the Government's behalf or to advance a Government program or interest." The legislation does not define the key terms "used on the Government's behalf" or "to advance a Government program or interest," and presumably courts will have to decide their meaning on a case by case basis. No one knows the scope. Are government funds invested in GM or AIG "advanc[ing] a Government program" so that a false

claim to those entities will violate the FCA and be enforced by *qui tam* relators? Recognizing that this new language is not very clear, Senator Kyle attempted to limit its scope:

[p]revious understanding, as well as commons sense, dictate that a particular transaction does not “advance a Government program or interest” unless it is predominantly federal in character—something that at least would require . . . that the claim ultimately results in a loss to the government . . . [rather than] any garden-variety dispute between a general contractor and a subcontractor simply because the general receives some federal money.

155 Cong. Rec. S4540 (daily ed. Apr. 22, 2009) (statement of Sen. Kyl). One hopes that Senator Kyle’s interpretation is accepted. Future FCA case law will determine whether and to what extent Congress succeeded in overturning *Allison Engine* through the FERA.

Materiality Requirement: In addition to the nexus to the government requirement, the FERA, at long last, specifically incorporates a materiality requirement in the False Claims Act (a position the government and relators fought, without success, for over 15 years), but it defines “material” as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property,” which is the “weaker” materiality standard that has been applied in some FCA cases. See John T. Boese, *Civil False Claims and Qui Tam Actions* §2.04 (Aspen Publishers) (3d ed. & Supp. 2009-2). How much of a difference will this make? That depends entirely on how literally courts will read this provision. Almost every violation or mistake is arguably “capable of influencing” a payment decision by the government, but many courts in the past have read this test as strongly limiting the application of the FCA. For example, despite applying this “weaker” materiality standard, at least two courts have held that violations of “conditions of participation” in a Federal healthcare program do not result in FCA violations. See *United States ex rel. Conner v. Salina Reg’l Health Ctr.*, 543 F.3d 1211 (10th Cir. 2008); *United States ex rel. Landers v. Baptist Mem’l Health Care Corp.* 525 F. Supp. 2d 972 (W.D. Tenn. 2007).

Conspiracy: Under the prior FCA, the conspiracy section was drafted to cover only a conspiracy “to get a false claim paid or approved.” Courts had properly interpreted this language to limit the conspiracy section to apply only to violations of then-subsection 3729(a)(1), and not to violations of the reverse false claim provision. Moreover, the conspiracy section required that the government pay the false claim. The new conspiracy section, 31 U.S.C. § 3729(a)(1)(C), expands the conspiracy section to include a conspiracy to commit a violation of any other substantive section of the FCA. The amendment also eliminates the need for the false claim to be paid or approved, and assesses liability for conspiring to commit the violation. Importantly, the word “knowingly” still does not appear in the language of the new conspiracy section, so the argument remains that a common law liability, including specific intent, is still required to prove a conspiracy under the FCA.

Liability for Overpayments: The amended reverse false claims liability provision in section 3729(a)(1)(G) quoted above extends new liability to “knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money or property to the Government.” Under this provision, there is no need for a person to have taken an affirmative act—a false statement or record—in order to conceal, avoid, or decrease the obligation to the government. This new

provision is even more dangerous because an “obligation” is specifically defined to include within the scope of FCA liability the retention of an overpayment from the government. The term “improperly” is intended to limit this liability, and would presumably exclude overpayments such as those under Medicaid that undergo a reconciliation process. Practitioners will be required, almost immediately after passage, to begin to advise clients whether they have received “overpayments” and the potential liability that could result from retention of such overpayments. Moreover, even though this provision is not retroactive, an overpayment is an overpayment, whether it occurred before or after May 20, 2009. The government and relators are almost certain to argue that this provision applies to overpayments made before the date of the legislation.

Expanded Definition of “Obligation”: The definition of “obligation” that triggers reverse false claims liability is expanded to encompass “an established duty, whether or not fixed” that arises from a contractual, grantee, licensee, or fee-based relationship, from a statute or regulation, or from the retention of any overpayment. According to government statements, this is intended to overturn, among other cases, the Sixth Circuit’s decision 10 years ago in *United States ex rel. American Textile Manufacturers Institute, Inc. v. The Limited, Inc.*, 190 F.3d 729 (6th Cir. 1999) (“*ATMI*”), which defined “obligation” to include only established obligations to pay money to the government. In addition to extending new liability to the retention of overpayments, this expanded definition seeks to extend liability to duties to pay fees that were not covered previously because they were not fixed in all particulars. Whether much of an expansion is actually achieved under this provision remains to be seen because even the DOJ concedes that the new language is not intended to extend FCA liability to penalties or fines. (The reader should note that the author represented many of the defendants in the *ATMI* case.)

Effective Date: Under the effective date provision in the FERA, the FCA liability amendments would apply prospectively, with one important exception. The amendment to section 3729(a)(2) takes effect on the date that *Allison Engine* was decided—June 7, 2008—making that amendment retroactive. The retroactivity of this amendment will raise a host of practical problems in pending cases, and is almost certain to be challenged as unconstitutional because conduct which the Supreme Court defined as outside the scope of FCA liability is, retroactively, now a violation. Were this a normal civil statute, such retroactivity would be allowable. But the Supreme Court has already defined the FCA as an “essentially punitive” statute. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000). Whether a clearly punitive statute can be applied retroactively is a completely different question.

Additional FCA Amendments

In addition to amending the FCA’s liability provisions, the FERA includes four other amendments that make recoveries and investigations under the FCA easier. These amendments are as follows:

Retaliation: The prohibition against retaliation is expanded to include a “contractor, or agent,” in addition to an employee—without requiring prohibited retaliatory acts to be taken by an “employer.” Under this unusually broad definition, a retaliation action could be based on many different types of relationships that do not involve an employment contract, which could lead to unintended consequences.

Civil Investigative Demands: Under the FCA as passed in 1986, the Attorney General had to personally approve a CID, which can require deposition testimony under oath, clearly a power and a potentially abusive power. Under FERA, the Attorney General is now authorized to appoint a designee to approve a civil investigative demand, and the Attorney General or designee may share the information obtained with “any *qui tam* relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation.” In addition, “official use” is broadly defined, allowing the Justice Department to use the information in communications with government personnel, consultants, and counsel for other parties in matters concerning an investigation, case, or proceeding. The expanded use and sharing of CID responses with any *qui tam* relator, consultant, and counsel is potentially harmful to businesses and individuals, and in recognition of this, one hopes it will be narrowly and carefully circumscribed by the Justice Department to curb abuses.

Relation Back: The government's complaint in intervention or amendment to a relator's complaint relates back to the date of the original complaint. Under this amendment, the government could delay its intervention in ways that could dramatically undermine a defendant's ability to defend itself. See, e.g., *United States v. Baylor Univ. Med. Ctr.*, 469 F.3d 263 (2d Cir. 2006); *United States ex rel. Health Outcomes Techs. v. Hallmark Health Sys., Inc.*, 409 F. Supp. 2d 43 (D. Mass. 2006).

Service on State or Local Authorities: The seal provision would not prevent the government or relator from serving the written disclosure, a *qui tam* complaint, or other pleading on state and local law enforcement authorities that investigate the case.

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Appendix 3



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CIVIL FALSE CLAIMS ACT: Here They Go Again – Newly Enacted Comprehensive Health Care Reform Law Contains More FCA Amendments

In May of last year, Congress enacted a dramatic revision to the substantive provisions of the civil False Claims Act, but left alone the key jurisdictional “public disclosure / original source” bar put in place by Congress in 1986 to avoid parasitic *qui tam* suits. See [FraudMail Alert No. 09-05-21](#) (discussing FCA amendments in the Fraud Recovery and Enforcement Act of 2009 (“FERA”). In the FCA amendments in FERA, Congress refused to weaken the public disclosure bar, but that restraint did not last a full year.

The Patient Protection and Affordable Care Act, signed into law by the President on March 23, 2010, directly amends the FCA’s public disclosure bar and original source exception to expand private enforcement of *qui tam* actions beyond these long-established boundaries. The FCA-related amendments are not limited to FCA actions against health care companies, but instead apply to all individuals and organizations covered by the FCA. The new law also contains confusing provisions that attempt to bootstrap FCA definitions such as “knowingly” and “obligation” to enforcement actions against participants in health care programs without amending the FCA. Similarly, it defines certain conditions of eligibility as “material” conditions of entitlement to receive payment, a designation that does not necessarily accord with FCA case law on conditions of eligibility. There is no substantive legislative history on these FCA-related provisions and amendments, which is unfortunate for those trying to understand and abide by them. As with past FCA amendments, these changes will trigger extensive litigation, and courts will be forced to grapple with how to apply them in the years to come.

A red-line version of the new public disclosure provision can be found [here](#).

The FCA’s Public Disclosure Bar is Amended

The FCA’s public disclosure bar is amended in major ways. The new law provides:

(4)(A) The court shall dismiss an action or claim under this section, *unless opposed by the Government*, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed--

(i) in a *Federal* criminal, civil, or administrative hearing *in which the Government or its agent is a party*;

(ii) in a congressional, Government Accountability Office, or other *Federal* report, hearing, audit, or investigation; or

(iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, “original source” means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and *materially adds* to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action under this section.

H.R. 3590, § 10104(j), 111th Cong. (2009) (emphasis added).

The new public disclosure bar maintains the essential structure of the prior bar by requiring a court to dismiss a whistleblower’s *qui tam* suit if the allegations were “publicly disclosed,” unless the relator is an “original source” of the information underlying the allegations. However, the reach of the new public disclosure provision is limited by the following revisions:

- Dismissal is not required if the government opposes it;
- Only *federal* hearings in which the government “or its agent” is a party are considered public disclosures of *qui tam* allegations;
- Only a *federal* report, hearing, audit or investigation qualifies as a public disclosure.

While the word “jurisdiction” has been removed, the use of the words “shall dismiss” means that the provision is similar to jurisdiction in that this issue should be resolved before the substantive case goes forward. Because the public disclosure bar is limited to federal hearings, however, fewer proceedings will be considered “public” and trigger the bar; fewer reports, audits, or investigations will trigger it for the same reason. Thus, although the question of whether a state report qualifies as a public disclosure is currently pending before the Supreme Court in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, No. 08-304, that issue would be moot in future cases to which the amendment applies. See [FraudMail Alert No. 09-11-30](#). Importantly, the “news media” prong of the public disclosure bar is unchanged.

The new “original source” amendments also expand the exception to the public disclosure bar by eliminating the requirement that a person must have “direct” knowledge of the information underlying the allegations. This revision, however, does not eliminate the need for some firsthand knowledge, which is the very essence of a true whistleblower; otherwise, it would allow anyone who acquired information secondhand from public sources to bring a *qui tam* suit and share in any recovery. With the new changes, a person with such “independent” knowledge must “materially add” to the publicly disclosed allegations to qualify as an original source. It is not clear exactly what is intended by the language “materially add,” which is not defined in the law. There does not

appear to be any intent by Congress, however, to overturn the result in *Rockwell International Corp. v. United States ex rel. Stone*, 549 U.S. 457 (2007), where the Supreme Court required the relator's knowledge to encompass the allegations of fraud that were actually tried in the case, rather than simply to predict the ineffectiveness of a planned method of waste disposal that was never used. See [FraudMail Alert Nos. 07-04-11](#) and [07-03-27](#). More importantly, the dual purposes of the bar--encouraging whistleblowers to alert the government to fraud while preventing parasitic suits--which date back to the statute's origins, appear to remain intact after this revision.

Nothing in the new amendments to the FCA appears to express congressional intent for any of these changes to apply retroactively. Under the teaching of *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), that should mean that this new language would apply only to conduct occurring after March 23, 2010.

Attempts to Apply FCA Liability and Definitions in New Health Care Contexts

The other FCA "amendments" in the new health law are truly bizarre. The new law attempts to apply several of the FCA's definitions to various health care transactions without amending the FCA's liability provisions to cover these transactions. For example, a program integrity provision governing enforcement of retained overpayments states that an overpayment retained beyond the deadline for reporting and returning it is an "obligation" as defined in the FCA. See H.R. 3590, § 6402(a). The provision also states that "knowingly" is defined as it is defined for purposes of the FCA, but the term "knowingly" does not appear in the provision on overpayments. Rather, the new provision requires reporting or return of an overpayment within 60 days after it was "identified"--a term that the provision does not define.

Despite this attempt to attach FCA liability using the definitions (or lack thereof) provided in the new enforcement provisions, the FCA itself governs liability based on "knowingly" avoiding or decreasing an "obligation." Under the FCA, "obligation" is defined to include retention of an overpayment, but the FCA's reverse false claims liability is limited to "knowingly and improperly" avoiding or decreasing an obligation, which requires the element of bad faith rather than the "identification"--however that term is defined--of an overpayment. See John T. Boese, *Civil False Claims and Qui Tam Actions* § 2.01[L] (Aspen Law & Business) (3d ed. 2006 & Supp. 2010-1).

The amendments provide a sense of the Congress relating to false claims and "payments made by, through, or in connection with an Exchange." For example, the law's tax credit and cost-sharing reduction provisions, which apply to health insurance exchanges, contain the statement that any payment in connection with an exchange that includes federal funds is subject to the FCA. The amendments contain language that would raise the FCA damages for such false claims to exchanges to an amount "not less than 3 times and not more than 6 times the amount of damages which the Government sustains," but in another amendment, that language is declared null and void. See H.R. 3590, § 10104(j)(1).

Finally, the amendments provide:

Compliance with the requirements of this Act concerning eligibility for a health insurance issuer to participate in the Exchange shall be a material condition of an

issuer's entitlement to receive payments, including payments of premium tax credits and cost-sharing reductions, through the Exchange.

H.R. 3590, § 1313(a)(6). This provision equates requirements for eligibility--whether important, unimportant, general, or specific--with a material condition of entitlement to payment. But, under the FCA, conditions of eligibility are not necessarily conditions of payment without a strong showing of materiality. See, e.g., *United States ex rel. Conner v. Salina Reg'l Health Ctr.*, 543 F.3d 1211 (10th Cir. 2008); *United States ex rel. Landers v. Baptist Mem'l Health Care Corp.*, 525 F. Supp. 2d 972 (W.D. Tenn. 2007). While these conditions of eligibility--many of which are yet to be established--may indeed be material under the FCA, a general statement that includes all of them does not necessarily suffice under the FCA. See John T. Boese, *Civil False Claims and Qui Tam* Actions, § 2.04 & n. 637 (citing cases). Also, the new law does not explain whether or how improper tax credit claims could be subject to FCA liability in light of the FCA's tax exception. See 31 U.S.C. § 3729(d).

* * *

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Appendix 4



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CIVIL FALSE CLAIMS ACT: Here They Go Again, Round III: Financial Reform Bill Contains More FCA Amendments

It seems that Congress cannot let any opportunity to amend the False Claims Act go to waste, and this month's legislative frenzy brings with it yet another amendment to the FCA, the third amendment in a little over a year. The House-Senate Conference Committee for the financial reform bill has approved two amendments to the so-called "whistleblower protection" provision of the FCA, 31 U.S.C. § 3730(h). See H.R. 4173, 111th Cong. (2010). After Congress completely botched the amendment of this section in the FERA amendments in 2009, see [FraudMail Alert No. 09-05-21](#), the Committee has approved amendments that will (1) once again revise the definition of "protected conduct," and (2) provide, for the first time, a three-year statute of limitations for actions brought under Section 3730(h), resolving the issue the Supreme Court addressed in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 545 U.S. 409 (2005) ("*Graham County I*"). See [FraudMail Alert No. 05-06-20](#). A [redline comparison](#) of the Committee's and FERA's retaliation amendments is attached.

Because the Committee's amendments redefining "protected conduct" would remove defenses to retaliation suits, if enacted, these amendments should only apply prospectively to conduct occurring after their date of enactment. Even applying the amendments prospectively introduces new terms and issues for interpretation that will add to the thicket of alternatives already facing litigants and judges in this fast-changing area of the law.

"Protected Conduct" Amendments

Prior to the FCA amendments in the Fraud Enforcement and Recovery Act of 2009 ("FERA"), a retaliation claim under Section 3730(h) required three basic elements: (1) the employee engaged in "protected conduct," defined as lawful acts in furtherance of an FCA action, (2) the employer knew about the protected conduct, and (3) the employer retaliated against the employee because of the protected conduct. See John T. Boese, *Civil False Claims and Qui Tam Actions* §4.11[B] (Aspen Publishers, Wolters Kluwer Law & Business) (3d ed. 2006 & Supp. 2010-1). FERA expanded the group of protected persons to "any employee, contractor, or agent," and it removed the reference to discrimination by an "employer." The reason for these changes was to eliminate the requirement that an employee-employer relationship was necessary for a retaliation violation—a requirement that excluded independent contractors from bringing retaliation actions. See *id.* at §4.11[B][2][b].

FERA also changed the conduct required for protection—from lawful acts “in furtherance of an action under this section,” to “other efforts to stop 1 or more violations.” Thus, to prove retaliation under FERA, rather than investigating the fraud in order to file a *qui tam* suit, the person must actually try to stop the fraud itself. This narrowed, rather than enlarged, the retaliation cause of action. The Committee’s amendment restores the original scope of protected conduct so that lawful acts in furtherance of a *qui tam* suit as well as “other efforts to stop 1 or more violations” are both covered. However, the Committee amendment also broadens the definition of conduct beyond the new boundaries established under FERA by expanding the group of actors who may engage in the conduct to include “associated others.” This ambiguous terminology undoubtedly will be used to support whistleblower retaliation claims based on the conduct of persons and businesses that are not in any relationship with employers, and therefore would apply in circumstances well beyond FERA’s independent contractor rationale. The only other requirement for this protection is that the conduct of the associated others must be “lawful.”

In any event, the new relationships and requirements in FERA and the latest amendments are subject to conflicting interpretations. Defining protected conduct of an “employee,” “contractor,” “agent,” and “associated others,” as well as determining what qualifies as discrimination “in the terms and conditions of employment” by non-employers, will surely be subject to debate and litigation. Because these amendments are substantive—they seemingly would enlarge liability and remove defenses—any dispute over which version of Section 3730(h) applies should be resolved under the principles that govern retroactive application of amendments to conduct occurring before their enactment, rather than by simply applying the newest version of the law. See *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 130 S. Ct. 1396, 1400 n.1 (2010); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 948 (1997).

Statute of Limitations Amendment

For the first time, the Committee has added a statute of limitations for retaliation in Section 3730(h), which requires these claims to be brought no more than three years from the date when the retaliation occurred. The lack of any statute of limitations for retaliation had prompted the Supreme Court to determine what limitation should be applied in *Graham County I*. The relator and the United States took the position in *Graham County I* that applying the FCA’s six-year limitation on *qui tam* actions would serve the purposes of uniformity and certainty, but the Court rejected their interpretation as unsupported by the statute itself and because it would lead to absurd results. Indeed, the Court found that substantive FCA violations and retaliation were separate causes of action, that a substantive violation of the FCA was not required for a violation of Section 3730(h), and that the limit for retaliation should begin to run when the cause of action for that violation accrued rather than when a substantive FCA violation occurred. The Court established a default rule under which state statutes of limitations for analogous state causes of action are applied to FCA retaliation actions.

The Committee’s three-year statute of limitations amendment finally fills the void that the Supreme Court’s default rule addressed in *Graham County I*. While a three-year limitation is longer than many analogous state statutes of limitations, uniformity will eventually be achieved when this amendment takes effect.

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