A New Practitioner’s Guide
to the Federal False Claims Act

Brave New World
Recent Developments
in Federal and State
False Claims Act Litigation

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History and Purpose of the FCA

• The False Claims Act (Lincoln’s Law) was originally enacted in 1863, during the Civil War, to fight rampant fraud against the Federal Government and Union troops.

• A key to its success was its “qui tam” provisions, which allowed private citizen whistleblowers (“relators”) to sue on behalf of the United States and share in its recovery.

• In its original form, the law provided for double damages and assigned qui tam relators 50% of the recovery.
History and Purpose of the FCA (cont.)

• Congress severely curtailed the qui tam provisions of the False Claims Act ("FCA") in 1943, in response to perceived abuses:
  
  – Prior government “knowledge” of misconduct became grounds to dismiss qui tam suits. The Attorney General could still pursue such claims on behalf of the United States, however.
  
  – Potential rewards to relators were reduced generally, and no minimum whistleblower award was guaranteed, even for suits about fraud about which the Government had no prior information of any kind.
  
  – Qui tam actions under the FCA thus all but disappeared.
History and Purpose of the FCA (cont.)

• Qui tam provisions of the FCA were reinvigorated by 1986 Amendments:
  – Bi-partisan support for change resulted from widespread fraud in defense industries. Senator Charles Grassley (R-Iowa) and Representative Howard Berman (D-California) sponsored the amendments.
  – Eliminated Government knowledge defense, and substituted limitations on qui tam actions based on public disclosures.
  – Guaranteed qualified relators minimum awards and other protections, resulting in a resurgence of FCA suits and recoveries.
History and Purpose of the FCA (cont.)

- 2009 Amendments passed as part of the Fraud Enforcement and Recovery Act (“FERA”) in order to correct judicial misinterpretations of the intended reach of the 1986 Amendments, to otherwise clarify key provisions of the FCA, and to modernize the FCA in light of changes since 1986 in how the Government conducts its business.

- Most substantive corrections and clarifications became effective as of the date of enactment of FERA. Procedural changes and clarifications applied to all cases pending as of the date of enactment of FERA.
History and Purpose of the FCA (cont.)

• 2010 Amendments passed as part of the Patient Protection and Affordable Care Act ("PPACA") make it easier for whistleblowers to sue on Government’s behalf by limiting “Public Disclosures” and expanding the definition of “Original Source.” Pub. L. No. 111-148, 124 Stat. 119 (2010).

• Expansion applies to all FCA cases, not just those arising in the health care sector.

• Unlike FERA, PPACA is not retroactive and does not apply to cases pending at the time of its enactment.
Current Practice Under the FCA Liability Provisions

- 31 U.S.C § 3729(a)(1) – . . . 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) 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 . . . ;

  (D) has possession, custody or control of property used or to be used, by the Government and, knowingly delivers, or causes to be delivered, less than all of that money or property;
Current FCA Liability Provisions (cont.)

(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;

(F) 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 property; or

(G) conspires to commit a violation of subparagraph (A), (B), (C), (D), (E) or (F).
Current FCA Liability Provisions (cont.)
Treble Damages, Penalties, Etc.

• . . .is liable to the United States Government for a civil penalty of not less than [[$5,500]] and not more than [[$11,000]], as adjusted by the Federal Civil Penalties Inflation Act of 1990, plus 3 times the amount of damages, which the Government sustains because of the act of that person.

• Liability also exists under the FCA for reasonable costs, expenses and attorneys’ fees Relators pay or incur in successfully prosecuting qui tam actions.

Note: Damages may be reduced to double damages if a violator of the FCA self-reports the fraud pursuant to § 3729(a)(2), an event that seldom, if ever, occurs.
“Knowing”

- “Knowing” and “knowingly” mean that a person, with respect to information:
  - has actual knowledge that information presented is false,
  - acts in deliberate ignorance of the truth or falsity of the information, or
  - acts in reckless disregard of the truth or falsity of the information.

- No proof of specific intent to defraud is required.
Key Statutory Definitions

“material”

• The term “material” means:
  – Having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.
    • This test “focuses on the potential effect of the false statement when it is made, not on the actual effect of the false statement when it is discovered.” United States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 916-917 (4th Cir. 2003).
  – Congress adopted majority “natural tendency” standard over the minority “outcome materiality” approach.
Some Nuts and Bolts: Statute of Limitations
31 U.S.C. § 3731

- Six years from the date of the violation, or
- Three years after “facts material to the right of action” were known or should have been known “by the official of the United States charged with responsibility to act in the circumstances,” or
- 10-year statute of repose.
Qui Tam Provisions
31 U.S.C. § 3730(b)

• Cases may be filed under seal by private persons on behalf of the United States and themselves.

• Served initially only on the Government, together with written state disclosure or substantially all material evidence and information the person possesses.

• Initial 60-day seal period is intended to give the United States time to investigate and can be extended by the court at the Government’s request.
Cases Jurisdictionally Barred
31 U.S.C. § 3730(e)

- No qui tam cases by members of Armed Forces against members of Armed Forces relating to such service.

- No qui tam cases against members of Congress, judges, or senior executive branch officials, if the Government already knows of the misconduct.

- First-to-file bar on subsequent qui tam actions. 31 U.S.C. § 3730(b)(5) & (e)(3).

- Public disclosure bar on qui tam actions (discussed more fully below).
Government Investigation of Qui Tam Cases

• During seal period, Government can issue subpoenas, interview witnesses, and take other steps typical of any federal investigation. (Relators and their counsel can be involved in the process to extent that Government counsel sees fit.)

• 2009 Amendments strengthened the civil investigative demand powers first provided to the Department of Justice (“DOJ”) under the 1986 Amendments (31 U.S.C. § 3733).

• Government investigates in order to determine whether to intervene in, settle, and/or dismiss the case.
Rights of Qui Tam Plaintiffs During the Investigation

- Right to be heard regarding Government requests for extensions of the seal to continue investigative efforts.

- Protection against efforts of anyone other than the Government to intervene in the case or to bring another qui tam action based on the same underlying facts.

- Right to be heard if the Government seeks to settle or dismiss the qui tam action.

- Right to participate financially in recovery if the Government pursues alternative remedies with respect to FCA liabilities.
Rights of Qui Tam Plaintiffs
If the Government Intervenes

• Right to continue as a fully participating party in the action, unless the Government or defendant demonstrates to the court good cause to limit that participation. The Government, however, assumes primary responsibility for the action and is not bound by any act of the qui tam plaintiff.

• Right to object to any proposed settlement and have the court determine whether it is fair, adequate, and reasonable under all the circumstances.

• Right, in most circumstances, to share in 15% to 25% of any recovery (multiplied damages and any FCA penalties or alternative remedies collected), and to recover reasonable costs, expenses and attorneys’ fees from defendants.

• Right to have court determine proper award share percentage.
Rights of Qui Tam Plaintiffs
If the Government Declines to Intervene

- Right to proceed with the action alone, unless the Government shows cause that the action should be dismissed.

- Government, however, has the right to request that it be served with copies of all pleadings filed and deposition transcripts, at its expense.

- Right to a 25% to 30% share of any recovery, plus the right to recover reasonable costs, expenses and attorneys’ fees from defendants.

- Whether the Government intervenes or not, a case can be dismissed only with the consent of the Attorney General (DOJ).
Circumstances that Can Reduce or Eliminate Relators’ Awards

• Planning or initiating the fraud—court can reduce any award otherwise authorized by as much as it finds warranted.

• Relators’ criminal conviction for conduct arising from relators’ role in the violation of the FCA will result in dismissal of relators from the action and no share award.

• Basing claims or actions on public disclosure—can result in loss of court jurisdiction over relators’ claims or reduction of relators’ maximum share of proceeds of the action to 10%.
Notable 2009 Changes to the Language of FCA Liability Provisions

- Elimination of the “presentment” language that previously existed in § 3729(a)(1) [which is now re-designated as § 3729(a)(1)(A)].

- This change reversed the result of case law that held that actual presentment of false claims to the U.S. was required under old § 3729(a)(1).

- Includes within actionable “claims” requests for money or property that the United States administers, but does not have title over, such as trust funds administered by the United States.

- Conspiracy provision expanded to apply to conspiracies to violate any of the other substantive violations.

- Including retention of overpayments in the definition of “obligation,” thereby including concealment and/or improper avoidance of any known overpayments of federal program funds among the categories of “obligation(s)” subject to liability under the “reverse false claim” provision.
Notable 2009 Changes to the Language of FCA Liability Provisions (cont.)

- Elimination of the requirement inferred to exist in old § 3729(a)(2) by the Supreme Court in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), that the making or use of false statements or records “to get” false claims paid or approved could be actionable under the 1986 version of FCA only if the defendant specifically intended that the United States itself would rely on the false statements or records to pay or approve a claim.

- The new provision—now found at § 3729(a)(1)(B)—clarifies that it is only necessary that such false records or statements be “material” to (i.e., capable of influencing) payment or approval of a claim that impacts federal program spending, whether or not the United States or a grantee or other recipient of federal funds ultimately pays or approves the claim.
Recent Judicial Developments

• Interpretation of “falsity” or “false claim.”
• Context: judicially created categories of claims (factually false v. legally false) and “certifications” (implied v. express) to cabin the breadth of potential FCA liability.
• First Circuit opinion in Blackstone as a “back to basics” rejection of the categories in favor of emphasis on knowledge and materiality.
Recent Judicial Developments (cont.)

– “The text of the FCA does not refer to ‘factually false’ or ‘legally false’ claims, nor does it refer to ‘express certification’ or ‘implied certification.’ Indeed, it does not refer to ‘certification’ at all. In light of this, and our view that these categories may do more to obscure than clarify the issues before us, we do not employ them here.”

Recent Judicial Developments (cont.)

- “Because compliance with the [Medicare Anti-Kickback Statute] is a fundamental condition of payment in federally-funded health insurance programs, claims seeking payment for services tainted by kickbacks are ‘false’ (i.e., the services are not what the government bargained for), and the FCA imposes liability where a defendant knowingly causes such a claim to be presented.”

Collective Knowledge Theory: Background

- In cases against a corporate defendant where the Government cannot prove any person knew of the falsity of a claim, the Government attempts to prove scienter by combining the knowledge of multiple employees.
- The theory has been applied sparingly in criminal cases where proof of criminal intent is not required and has been rejected as inappropriate to prove intent in civil cases.
- Although the 1986 Amendments eliminated the requirement to prove specific intent to defraud, it appears that courts still reject the application of collective knowledge:
Recent Judicial Development: SAIC Case and Collective Knowledge

• D.C. Circuit rejected the collective knowledge doctrine as inappropriate for FCA cases.
  – The court vacated a jury verdict in favor of the plaintiff on the grounds that the collective knowledge instruction allowed “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” and because there was no distinction made between the knowledge of corporate officers and “potentially thousands of ordinary employees.” United States v. Science Applications Int’l Corp., 626 F.3d 1257 (D.C. Cir. 2010) (SAIC).

• The court ultimately found that the doctrine “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.”
The Public Disclosure Bar  
“Pre-PPACA”

- Created in 1986 to replace the overbroad Government knowledge bar to qui tam actions, but to continue to protect the Government, in the words of the sponsors of the legislation, from truly “parasitic” cases.

- Has become the most litigated provision of the FCA, but almost always used by defendants to dismiss non-intervened cases or to deny the Government the help of relators and their counsel in intervened cases going into active litigation.

- Continued hot topic for potential FCA amendments in near future.
Notable 2010 Changes to the Public Disclosure Bar

• PPACA makes three major changes:
  – Eliminates the FCA’s absolute jurisdictional bar against cases that do not pass the test of 31 U.S.C. § 3730(e)(4);
  – Narrows the definition of “publicly disclosed” to information made public by federal proceedings only;
  – Expands the definition of “original source” by eliminating the requirement that the individual have “direct” knowledge of the underlying allegations or transactions at issue.
Public Disclosure Post-PPACA: Jurisdictional Discretion

• Public disclosure is now an affirmative defense instead of a jurisdictional bar.
  – The FCA previously stated, “no court shall have jurisdiction” over an action based upon publicly available information, unless the relator was an original source of that information. 31 U.S.C. § 3730(e)(4)(A).

• The Government may oppose a defense motion to dismiss based upon publicly disclosed information.
  – “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 . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.” Pub. L. No. 111-114, § 10104(j)(2) amending 31 U.S.C. § 3730(e)(4) (emphasis added).
Public Disclosure Post-PPACA (cont):
Only Federal Disclosures Count

- The PPACA limits the jurisdictional restriction to information obtained in, “(i) 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.”


- This provision ends a circuit split on the issue of whether allegations publicly disclosed by state agencies or investigations were considered “public disclosures” under the FCA. The Supreme Court decision in *Graham County*—holding state and local reports qualify as public disclosures—applies only to cases pending before the enactment of the PPACA.
Public Disclosure Post-PPACA (cont): Original Source Expanded

• Under the 1986 Amendments, a relator had to have “direct and independent knowledge of information on which the allegations are based” in order to qualify as an “original source.” 31 U.S.C. § 3730(e)(4)(B)

• The PPACA now requires only that the relator have “independent” knowledge that “materially adds” to the publicly disclosed information, or disclose the information to the Government prior to public disclosure.
  – “For purposes of this paragraph, ‘original source’ means an individual who either (1) 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) 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.” Pub. L. No. 114-111, § 10104 (j)(2), amending 31 U.S.C. § 3730(e)(4)(B) (emphasis added).
PPACA and Other Potential FCA Liability

• Health Insurance Exchanges
  – The PPACA creates state-run health insurance “exchanges,” where individuals may compare qualified health care packages and purchase insurance. Under PPACA § 1313, payments that include federal funds and are made “by, through, or in connection with” an exchange are subject to the FCA.

• Return of Overpayment
  – PPACA § 6402 requires reporting and return of Medicare or Medicaid overpayments within 60 days of discovery in order to avoid FCA liability (amending the Social Security Act).

• Anti-Kickback Implications
  – PPACA § 6402 also provides that claims submitted in violation of the Anti-Kickback statute constitute false and fraudulent claims for the purposes of the FCA (amending the Social Security Act).
Whistleblower Protections Against Retaliation
31 U.S.C. § 3730(h)

Relief includes:

• Reinstatement with seniority preserved.
• Two times back pay, interest on the back pay, and compensation for any special damages.
• Litigation costs and attorneys’ fees.
Intended Scope of New Protections

• Protect all lawful efforts taken by employees in furtherance of an actual or potential FCA action, as the 1986 version has done.

• Expand protections to classifications of workers who are not technically “employees” under the law, such as contract workers.

• Prohibit retaliation against whistleblowers’ families and friends by employers who know they cannot legally retaliate directly against whistleblowers.

• Include efforts to stop and refusal to participate in fraud against the United States.
Other Whistleblower Laws to Keep in Mind:

- **State and City False Claims Acts**
  - For a list and to view the text of current such laws, see www.phillipsandcohen.com/CM/StateFalseClaimsLaws/StateFalseClaimsLaws152.asp

- **IRS Whistleblower Laws**
  - See 26 U.S.C. § 7623(a) & (b)

- **Qui Tam Statutes Relating to Fraud Against Insurance Companies** (California and Illinois)

- **Securities whistleblower incentives and protection (including FCPA)**
  - See 15 U.S.C. § 78u-6

- **Commodity whistleblower incentives and protection**
  - See 7 U.S.C. § 26
Damages: Recent Figures

• As of December 2011, the DOJ reported more than $3 billion in recovery from civil FCA settlements and judgments, primarily in the health care fraud area.

• Qui tam suits accounted for $2.8 billion of the 2011 recoveries and relators earned over $532 million in shared awards (the highest yearly recovery yet).

• New theories of liability and more relaxed requirements under the 2009 and 2010 Amendments may result in even greater recoveries in 2012.
Limiting Damages: SAIC

SAIC, 626 F.3d 1257 (D.C. Cir. 2010):

• The Government’s arguments:
  – False Statements: Based on the jury’s finding that SAIC made 17 false statements regarding its contractual conflict of interest obligations, the Government argued that each of these “express [false] representations are plainly sufficient in and of themselves to give rise to [FCA] liability.”
  – Calculating Damages: At trial, the Government presented a “proximate cause” theory of damages, arguing had it known about SAIC’s organizational conflicts, it would not have paid for any of the services it received. Accepting this argument on appeal, the district court upheld the jury’s damages award and concluded the “actual value of SAIC’s work was ‘irrelevant.’”
  – Implied Certification: The Government relied on a prior case where the court seemed to endorse the proposition that a defendant’s withholding of information “critical” to the Government’s decision to pay could result in culpability, even if no express condition of payment existed relating to that information.
Limiting Damages:  **SAIC** (cont.)

SAIC, 626 F.3d 1257 (D.C. Cir. 2010) (cont.):

- The D.C. Circuit’s Conclusions:
  - **False Statements:** While “knowingly false statements” are separately actionable under the FCA, the contractor must have used those statements to *get payment* from the Government on a false or fraudulent claim in order to be liable.
  - **CalculatingDamages:** The Government must show “not only that the defendant’s false claims caused [it] to make payments it would have otherwise withheld, but also that the performance the Government received was worth less than what it believed it had purchased.”
  - **Implied Certification:** Although implied certification is a viable theory of FCA liability, the potential for abuse by the Government and qui tam relators who would “seek to take advantage of the FCA’s generous remedial scheme,” by “turn[ing] the violation of minor contractual provisions into an FCA action,” must be limited by “strict enforcement of the Act’s materiality and scienter requirements.”
Damages: *Longhi’s Implications*

• While the U.S. Government’s Small Business Innovation Research Program (“SBIR”) can be a valuable source of R&D funding for small businesses, companies must be aware that the risk of FCA liability attaches when submitting proposals to the Government.

• The Fifth Circuit recently found a small technology company liable for treble damages and civil penalties totaling more than $5 million for making false statements in its proposal to secure Government funding, including misstating prior experience, referring to facilities under construction as complete, embellishing corporate relationships, and failing to make required disclosure of “related work” for another SBIR agency. *United States ex rel. Longhi v. Lithium Power Tech., Inc.*, 575 F.3d 458 (5th Cir. 2009).