

# UNDERCONSTRUCTION

## False Statements and False Certifications – What Makes for a False Claims Act Violation?

Stan Martin

The federal government and most states have false claims acts, providing for civil or criminal penalties for any government contractor who pursues a “false claim.” Attorneys for government agencies, and attorneys for companies under contract with those government agencies, recognize the prevalence of false claims allegations in many government contractor disputes.

Government contracts, in addition to the normal routine of change orders and monthly requisitions, require various types of certifications by the contractor. What types of errors or misstatements in these documents will rise to the level of a “false claim?” Is it the nature of the request, or the degree of the misstatement, or the intent? Or, some combination of the foregoing? A review of relatively recent cases in several jurisdictions provides some guidance in assessing when a misstatement will lead to proof of a “false claim.” As used in this article, “FCA” refers to any false claims act, and the particular jurisdiction, when appropriate, is noted.

### Early Case Law

First, a look at early case law under the Federal False Claims Act.<sup>1</sup> One of the early decisions held that the federal FCA encompasses more than requests for money that is not due. Rather, it extends “to all fraudulent attempts to cause the Government to pay out sums of money.”<sup>2</sup> For example, the federal FCA applied to false statements made in a contractor’s loan application to a federal agency.<sup>3</sup> This demonstrates one consistent theme throughout a number of jurisdictions, that false statements for the purpose of procuring a contract will be considered a violation of the pertinent FCA.<sup>4</sup>

It is well-established that a contractor’s monthly requisitions will each constitute a “claim” when there is a material misstatement or misrepresentation embedded within the requisition. If the contractor falsely certified that it was qualified under the Small Business Administration 8(a) program, as in *Ab-Tech Constr. v. United States*, then each requisition submitted under the ill-gotten contract constituted a “claim” based on a material misrepresentation.<sup>5</sup> According to the court:

The payment vouchers represented an implied certification by Ab-Tech of its continuing adherence to the requirements for participation in the 8(a) program. Therefore, by deliberately withholding from SBA knowledge of the prohibited contract arrangement with Pyramid, Ab-Tech not only dishonored the terms of its agreement with that agency but, more importantly, caused the Government to pay out funds in the mistaken belief that it was furthering the aims of the 8(a) program. In short, the Government was duped by Ab-Tech’s active concealment of a fact vital to the integrity of that program.<sup>6</sup>

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## Recent Case Law

In June 2016, the U.S. Supreme Court in *Universal Health Services, Inc. v. United States ex rel. Escobar*,<sup>7</sup> focused on a materiality standard in assessing an FCA claim. Per the Supreme Court, the critical issue is “whether the defendant knowingly violated a requirement that the defendant knows is material to the Government’s payment decision.”<sup>8</sup>

More recently, in a District of Columbia federal court decision, where the government alleged that certain persons attempted to obtain SBA 8(a) contracts for related companies through misrepresentations and false certifications, the court allowed motions to dismiss FCA claims against some of the defendants who were neither at the center of the alleged scheme, nor directly involved in the claimed false statements. In doing so, the court distinguished between false statements made by those at the center of the claimed scheme, from those persons and companies who may have been in a position to know of the false statements but did not take any action thereon.<sup>9</sup> In that setting, the court was distinguishing between direct false claims and “reverse false claims,” where a party improperly fails to transmit money to the government based on a knowing false record or statement.

Similarly, under the Delaware FCA<sup>10</sup>, a person filing for unemployment compensation while otherwise employed in a new job was “knowingly present[ing] . . . a fraudulent claim for payment, in violation of that FCA.”<sup>11</sup> And under the California FCA,<sup>12</sup> a contractor who engaged in a practice of submitting excess requisitions from time to time provided the basis for a jury to decide that the contractor had violated that state’s FCA on more than one occasion.<sup>13</sup> From the decision, it is clear that the court believed the overstatement to be intentional, and almost in the nature of a game by the contractor to see how much it could seek without being challenged.

Knowledge of falsity of the certification is also a requirement of an FCA claim. So, when a contractor deducted fringe benefits from each worker’s paycheck based on a certain formula believed to be appropriate (based on advice from an accountant), the payroll certifications even though falsely certifying compliance with Davis-Bacon requirements were not knowingly false, and no FCA claim was proven.<sup>14</sup>

Where a relator alleged that certain work failed to comply with contract specifications, but no connection was demonstrated between the alleged noncompliance and requests for payment, the relator did not demonstrate a false certification in violation of the FCA, even assuming noncompliance.<sup>15</sup>

Direct requests for payment to the government, such as via monthly contractor requisitions, and if knowingly false fall clearly within the bounds of an applicable FCA. But what about the more indirect statements and certifications? Decisions indicate certain

tendencies, but as noted below, there are few clear lines for contractors and their counsel to rely upon in assessing liability for a FCA claim.

A seminal California appellate court decision, in the case of *Fassberg Construction Co. v. Housing Auth. of City of Los Angeles*,<sup>16</sup> held that weekly payroll certifications and change order proposals were not “claims” under the California FCA.<sup>17</sup> The court held that the California FCA, at that time,<sup>18</sup> authorized penalties for “false claims,” but not for a “false record or statement.” Looking at the project contract and the sequence leading to any change order, the court held that a change order proposal had to be accepted by the public authority before a change order could be written, and only after the change order had been written could the contractor seek payment thereon. There was no “claim” in a proposed change order. And weekly payroll certifications, even if containing misstatements, were records and not “claims” for purposes of the California FCA.

Since the *Fassberg* decision, however, the California legislature amended that state’s FCA. Under the amended law, the outcome may be different. In the case of *County of L.A. v. Superior Gunite*,<sup>19</sup> a trial court supported the contractor’s position that “change estimates” and “time extension requests” were not “claims” under the state FCA. But the appellate court noted the amendment of the FCA subsequent to *Fassberg*, whereby the FCA prohibited knowing use of “a false record or statement material to a false or fraudulent claim.”<sup>20</sup> In California, therefore, application of the FCA may well extend to change order proposals or other preliminary statements that will be used to support a more formal request for contract amendment and, eventually, payment for the same.

Where the wage certifications were false, under the federal FCA, the contractor was liable to the government for the discrepancy between wages paid and wages that should have been paid. But in that instance, the court also indicated its position that the amount of the violation was almost *de minimus* relative to the entire contract, perhaps even resulting from oversight or unintentional error.<sup>21</sup> However, contrary to the *Fassberg* decision in the California courts, the federal court considered payroll certifications to constitute “claims” under the FCA.

In New York, a court was faced with allegations of false statements of compliance with a DBE program. The court pointedly held that potential violation of the DBE program was not the issue. Rather, false statements claiming compliance with the DBE program, made with knowledge of their falsity, could support a claim for violation of the state law.<sup>22</sup> In fact, the contractor was not charged with violation of the DBE program, but with making false or fraudulent statements certifying compliance with the same.

*Continued on page 6*

# What Can We as a Forum Do to Encourage and Groom the Next Generation of Construction Lawyers?

**F**ace it, our demographics do not lie. We are an aging group of lawyers, with not enough “bench” behind us to take our place in the practice of construction law. It is not dissimilar to the quandary that many of our construction clients face when looking at the contracting construction labor pool. How do we replenish ourselves with people that are knowledgeable and capable?

The first and obvious response is that we need to attract more young and upcoming lawyers into the practice of construction law. That has been a challenge for many years because “construction” is not an area of the law generally taught at law schools (although there are more and more courses and construction law professors popping up across the country), and many law students and junior lawyers are simply unaware of it. I must admit that I never knew about, let alone contemplated pursuing, construction law when I graduated law school. Like many of you, I simply fell into it when I joined a firm with a construction law practice.

The Forum has taken the mantle of trying to rectify this problem. In the past three years, the Forum has taken the initiative of reaching out to law schools across the country and sent teams of Forum ambassadors to law schools to educate law students about careers in construction law. Those efforts have been met with varying degrees of success (largely based on whether we serve food and beverages to the attendees), but overall the feedback has been extremely positive – and law student membership in the Forum has jumped exponentially.

The Forum also initiated the Young Lawyer Practicums at each of its national programs to educate junior lawyers regarding advocacy skills. These Practicums – taught mainly by senior lawyers with extensive experience as construction advocates – have been remarkably well received and well attended. We plan to continue those practicums at all of this year’s national programs and beyond. And, of course, the Forum has continued its

biannual offering of the Construction Trial Academy which offers a unique opportunity for junior (and even experienced) construction lawyers to hone their trial advocacy skills.

So, what more can you, me and the Forum be doing to make sure that we are growing the next generation of construction lawyers? Well, we can certainly start with our own law firms / practices by grooming the junior lawyers to not just support our established practices, but grooming them to grow their own. We need to give these junior lawyers the tools they need to be successful in this industry. That means introducing them to clients, having them take construction related CLE, and giving them opportunities to argue motions, take/defend depositions and even take a few witnesses at trial. Of course, not every associate (or even junior partner) will be ready for all of that, but we owe it to ourselves, our firms and our industry to at least give them the opportunity to grow and succeed.

We also need to show them how to market and develop business – and not just expect that they will learn it through osmosis. That means encouraging them to get involved in the Forum and trade associations, even if that means forgoing some billable work. We need to help them to identify opportunities, and then encourage them to actually pursue those opportunities without fear of repercussion – perhaps even incentivizing them to do so. The Forum is a logical home for many of these new “up and comers”, but we need to reinforce that by encouraging them to not only attend Forum events, but to get actively involved in the Forum through committees, writing, and speaking. And, for those of you who need the “business case” for doing so – tune into the next issue of *Under Construction*. ■



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## 2017 Diversity Fellowship

The Forum’s leadership has initiated a fellowship program for diverse construction lawyers with the goal of introducing the Forum to diverse construction lawyers and drawing these lawyers into the ranks of active, long-term members. The Forum’s Diversity Fellowship is intended to serve two purposes: (1) to introduce the Forum to diverse construction lawyers who may

be unaware of the Forum’s existence and what it has to offer; and (2) to make the benefits of Forum membership available to diverse construction lawyers who would like to actively participate in the Forum. Currently, up to six (6) three-year Fellowships are awarded by the Forum each spring.

Fellows receive the following benefits: Waiver of all registration fees for the Forum’s Fall, Midwinter, and Annual

Meetings; Reimbursement of reasonable travel and accommodation expenses associated with attending the Forum’s Annual Meeting held each spring (not to exceed \$1,500 per annum); Waiver of Forum membership dues; and Payment of ABA membership dues in the following amounts: 100% in Year 1; 66% in Year 2; and 33% in Year 3. For more information, please contact Arlan Lewis (alewis@babac.com).

## 2017 WRITING COMPETITION

### The Forum on Construction Law is Looking for the Best Law Student Writers in the Country

The prize is worth the chase. The author of the first place submission receives: a cash prize of \$2,000; travel expenses and registration to attend the next fall

meeting of the ABA Forum on Construction Law (where a first prize plaque will be presented); a one-year membership in the Forum and recognition in both the Forum newsletter, *Under Construction*, and on the Forum's website. In addition to the first place winner, one or more authors may be judged a finalist and recognized with a plaque and in Forum publications.

Students may submit articles on any topic related to construction law. The format of the articles should resemble the articles published in either of the Forum's two publications, *The*

*Construction Lawyer* (law journal format with guidelines in the link below) and *Under Construction* (newsletter format with articles of 1000-2000 words).

The deadline for submission of articles for the 2017 competition is June 5, 2017. For complete rules, visit [http://www.americanbar.org/content/dam/aba/images/construction\\_industry/aba-const-forum-2016-17-writing-comp.pdf](http://www.americanbar.org/content/dam/aba/images/construction_industry/aba-const-forum-2016-17-writing-comp.pdf). All articles shall be submitted to Tamara Harrington (Tamara.Harrington@americanbar.org) and Marilyn Klinger (Marilyn.Klinger@sedgwicklaw.com) by email in Word format.

## #ABAUnderConstruction Online

<http://ambar.org/FCLUC>

The following additional articles appear in *Under Construction* Online together with the complete version of all articles in this issue.

- **Is Offering an Apology an Effective Strategy in Construction Mediation?** by Burns Logan, CH2M, Denver, CO
- **Private Arbitration Appellate Procedures** by Sara P. Bryant, Murtha Cullina LLP, Boston, MA
- **The Division 1 and YLD Advocacy Practicum Series** by Anthony D. Lehman, Hudson Parrott Walker, LLC, Atlanta, GA and Nicholas K. Holmes, Devine, Millimet & Branch, PA, Manchester, NH
- **On the Inside Looking Out: Pros and Cons of Life as In-House Counsel** by William S. Hale, Jessica R. Bogo, and Rebecca Tierney, Pillsbury Winthrop Shaw Pittman LLP, San Francisco, CA
- **Local Hiring Programs – Recent Updates and Legislation** by Erin Luke, Jack Clark, Heather A. Bartzi, Thompson Hine LLP, Cleveland, OH
- **Data Breach Notification: State Law Requirements** by Catherine Bragg, TRC Companies, Inc., New York, NY

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## NOMINATING COMMITTEE APPOINTMENTS

Per Section 6.1 of the Forum Bylaws, Forum Chair William M. Hill (2016-2017) announces that the following Forum Members have been appointed to the Nominating Committee:

Wendy K. Venoit (Chair)  
Gregory L. Cashion

William E. Franczek  
Joseph C. Kovars

Steven B. Lesser  
Tamara J. Lindsay

Erin L. Ebeler Rolf

The Nominating Committee as so constituted is charged per the Bylaws with nominating one Forum Member for the position of Chair-Elect, and four Forum Members for the four open positions on the Governing Committee. Those persons wishing to be considered for an open position should submit their expression of interest/self-nomination to the Chair of the Nominating Committee, Wendy K. Venoit (wvenoit@hinckleyallen.com), by Wednesday January 11, 2017.

Nominations may be made by the candidates themselves or by third-persons on their behalf. All nominations or expressions of interest should include a resume and a written submission that details the candidate's activities in the Forum, the ABA and the legal profession. In addition, the Committee is interested in why the candidate wishes to serve in this role, and if the candidate has any initiatives he or she may be interested in proposing if elected to the position sought. The Chair of the Nominating Committee will perform a confidential check of all candidate names against relevant bar association published disciplinary and ethics violations records. In accordance with the Forum's Bylaws, any nominee for Chair-Elect must have served at least two years on the Governing Committee.

The Nominating Committee will convene at the Midwinter Meeting to be held February 2 - 3, 2017 in Palm Desert, CA. An election to fill all open positions will be held at the business meeting of the Forum, to be held April 20, 2017 at the Forum's 2017 Annual Meeting in Washington, D.C. The Committee's report of the nominees so chosen will be posted on the Forum's website as provided in the Bylaws.



# How Do We Get the War Stories if We're Never Allowed to Go to Battle?

Tamara J. Lindsay and Brianna E. Kostecka

General George S. Patton once said, “Battle is the most magnificent competition in which a human being can indulge. It brings out all that is best; it removes all that is base.” While General Patton was glorifying physical combat in this remark, its essence rings true for litigators as well. The shores of Normandy are not our battlefield, but we become better, more skilled, more polished, more confident, and more respected through our courtroom sagas. The problem is, the practice of law has changed so dramatically that few young attorneys ever go to battle.

Seasoned attorneys have a treasure trove of war stories. From the time they were asked to argue a motion on a few hours’ notice, to watching their expert witness crumble during an arbitration, to that one time they made the opposing party hang their head in shame at a mediation. Veteran attorneys are not defined by their stories, but the stories become a part of their practice. Their reputation, their swagger.

Young attorneys, on the other hand, typically go from classrooms and textbooks (with relatively little practical experience before the day they are sworn in) to the shadow of computer screens. It is increasingly common for young attorneys to spend virtually no billable time in court, at a deposition, or on a site visit. Instead, young attorneys begin their career scouring through thousands of pages of document review and researching discreet issues of law hoping to earn the right to argue before a court or conduct witness examinations. Unfortunately, given the legal climate in which attorneys are currently practicing, the timeframe for that hope becoming a reality appears to be taking longer and longer. And the consequence is that young attorneys are given fewer and fewer opportunities to earn their stripes.

After practicing for four to six years, a young attorney is often expected to have the experience and skills necessary to take and defend depositions or argue a motion in court and to do both well. In reality, however, many attorneys at that point in their career will only have had the opportunity to observe rather than participate. It’s a catch 22 – the only way to perform expertly in the legal battlefield is to have experience, but young attorneys are finding it difficult to obtain that experience because they are ... inexperienced. One commentator has noted that this dilemma is similar to a union shop where “in order to get a union card, you have to have experience, but you can’t get experience unless you have a union card[.]” See <http://abovethelaw.com/2016/03/old-lady-lawyer-we-learn-by-doing-not-just-by-watching/?rf=1> (last visited July 29, 2016).

In recent years, some law firms have made efforts to fill in the experience gap for young attorneys with training programs and pro bono opportunities. While these efforts provide a partial solution, the experience gap continues to widen. Training programs, for all their worth, are no substitute for running to the court house to argue for an injunction. Moreover, junior to mid-level associates are typically so overwhelmed with billable work and billable hours requirements that the thought of devoting what little time remains in their day to a pro bono case is a tough sell. But young attorneys are eager for experience.

## Judges Take Steps to Increase Young Attorney's Courtroom Experience

Recognizing that young attorneys not only represent the future of the legal industry but also that this demographic is primed for battle, a few noteworthy judges have taken steps to address the decline in tangible courtroom experience for young attorneys.

Judge William Alsup – United States District Court Judge for the Northern District of California – issued a “Case Management Order re Law Firm Plan for In Court Opportunities for Young Lawyers” in *B&R Supermarket, Inc., et al. v. Visa, Inc., et al.*, No. 16-01150 (Rec. Doc. 37). Therein, Judge Alsup acknowledged the “need to provide arguments and courtroom experience to the next generation of practitioners” as it “is the way one generation will teach the next to try cases and to maintain our district’s reputation for excellence in trial practice.” The order required each law firm to submit a plan for how it will provide opportunities for young lawyers to “argue motions, take depositions, and examine witnesses at trial[.]” including the names of the specific associates who would be assigned to specific tasks.

Each of the firms involved in the *B&R* matter submitted a response to Judge Alsup’s order and outlined in detail the opportunities that would be provided to young attorneys in that matter.

Judge Paul Grewal, also a United States District Court Judge for the Northern District of California, recognized in the complex intellectual property matter *GSI Technology v. United Memories*, No. 13-01081, that “[i]n a technology community like ours that prizes youth – at times unfairly – there is one place where youth and inexperience seemingly comes with a cost: the courtroom.” See Rec. Doc. 1112. So, in March of this year, Judge Grewal ordered as follows:

[W]ith no fewer than six post-trial motions set for argument next week, surely an opportunity can be made to give those associates that contributed

mightily to this difficult case a chance to step out of the shadows and into the light. To that end, the court expects that each party will allow associates to present its arguments on at least two of the six motions being heard. If any party elects not to do this, the court will take its positions on all six motions on the papers and without oral argument.

Sadly, the firms involved in the GSI matter, elected to have their motions decided on the papers rather than permitting young attorneys to argue two of the six post-trial motions. A variety of factors and considerations no doubt played into the firms' decision, but Judge Grewal still felt compelled to deliver a "stinging rebuke" nonetheless.

I would be remiss if I did not observe the irony of another missed opportunity to invest in our profession's future when two of the motions originally noticed for hearing seek massive fees and costs. To be clear, GSI asks for \$6,810,686.69 in attorney's fees, \$1,828,553.07 in non-taxable costs and \$337,300.86 in taxable costs, while UMI asks for \$6,694,562 in attorney's fees, \$648,166 in expenses and \$302,579.70 in taxable costs. That a few more dollars could not be spent is disappointing to me. My disappointment, however, is unlikely to compare to the disappointment of the associates, who were deprived yet again of an opportunity to argue in court.

See <http://abovethelaw.com/2016/03/judge-delivers->

[stinging-rebuke-to-partners-for-freezing-out-associates/](#) (last visited July 29, 2016).

### Send Your Young Attorneys to Battle; It Just Might Bring Out the Best in Them!

Law firms today are under increased pressure from clients and other external factors that sometimes make it unrealistic for associates to appear in bet-the-company cases or to argue dispositive motions right out of the gate. But, the practice of law is just that – a practice! Without the opportunity to practice, to make mistakes, to observe veteran attorneys in action, and to interact with judges, young attorneys' abilities will stagnate. There are likely many other judges adopting positions similar to Judge Alsop and Judge Grewal. While this practice may be far from the norm, the fact that the judiciary is recognizing the need for young attorneys to become more active participants in all aspects of litigation signals that the experience gap is not only very real but also not being adequately addressed by the private sector.

So, send your young attorneys to battle. It just might bring out the best in them! ■



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(government contracting) Member; and **BRIANNA E. KOSTECKA**, Esq., King & Spalding, New York, NY, Young Lawyers Division, Division 12 and Division 1 Member

## False Statements and False Certifications — What Makes for a False Claims Act Violation?

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Certification of compliance with specified criteria may be an FCA violation if the certification was knowingly false when made, and was further made in support of requests for payment. *United States v. Kiewit Pac. Co.*<sup>23</sup> In that case a relator was given leave to file an amended complaint, based on an underlying claim that the contractor had falsely certified compliance with a specific retaining wall requirement while directing others to ignore the same.

A recent New York trial court decision denied a motion to dismiss FCA claims arising from alleged improper certification of ownership of a company whose principals had been arrested and subsequently pled guilty to bribing public officials.<sup>24</sup> The New York City Housing Authority will be able to proceed with FCA claims that it was fraudulently induced to enter into contracts, based on false certifications that the convicted persons had no further or continued involvement with the contracting companies.

Where a contractor may have improperly substituted subcontractors in violation of a procurement law, this

violation would not be considered to affect the contractor's requisitions. In that event, even assuming contravention of the state laws, there was neither a "false claim" nor a "false record or statement material to a false claim."<sup>25</sup>

With prevailing wage requirements, courts have drawn a distinction between falsely certifying that workers were being paid properly, which would be an FCA violation, and improperly misclassifying workers among different trades, which could be a statutory violation but not amount to an FCA violation.<sup>26</sup>

If the certification concerns a matter that is subject to interpretation or to varying standards, then it will not result in a violation of the FCA. Thus, where there were varying interpretations of the amount of experience required for engineering inspectors, an FCA claim predicated on the allegation that certain persons were improperly deemed to be qualified was not upheld.<sup>27</sup>

One decision in Massachusetts, not strictly under the state FCA (although such a claim was presumably available to the public authority), is nonetheless apropos of

this topic. In the case of *G4S Technology, LLC v. Mass. Technology Park Corp.*,<sup>28</sup> the public authority challenged the contractor's right to pursue a contract action, due to the contractor's false certifications on multiple requisitions. The false statements were that subcontractors had been paid all amounts due to them from prior requisitions; there was apparently ample evidence to the contrary, for what the court clearly considered to be an improper reason.<sup>29</sup> Although the public authority did not pursue a FCA claim, the court held that the false statement was both material and went to the heart of a contract obligation.<sup>30</sup> Due to the contractor's false payment certifications, the court barred the contractor's contract claims and *quantum meruit* claims, the latter on the grounds that false certifications meant the contractor had failed to substantially perform in good faith.

### Requests for Payment and Statements Concerning Eligibility Consistently Considered FCA Claims

On balance, there is consistency among the courts in holding that direct requests for payment, and statements made directly affecting the contractor's eligibility for the contract in question, will all be considered "claims" under the applicable FCA. Proposals, estimates, or other preliminary contract documents may not be considered "claims" depending on the exact language of the pertinent FCA. And, perhaps depending as well on context. On this aspect a consistent line has not been drawn by various courts.

When it comes to other statutory requirements, the courts seem inclined to draw a distinction between actual compliance, versus statements or certifications made as to such compliance. Failure to comply may not be considered a material violation, thus amounting to a "claim" under the FCA or a violation of the FCA. On the other hand, false or fraudulent statements or certifications, verifying or attesting to compliance when the person providing the statement or certification knows otherwise, will likely be considered a violation of the pertinent FCA.

Finally, when it comes to other project documents that may be false or at least incorrect, the courts appear to rely more heavily on context to evaluate whether those false or incorrect statements or certifications rise to a level of materiality to become a breach of contract, or to support application of FCA sanctions. ■



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### Endnotes

1. 31 U.S.C. §§ 3729-3733.
2. *United States v. Neifert-White Co.*, 390 U.S. 228, 233, 19 L. Ed. 2d 1061, 88 S.Ct. 959 (1968).
3. *Id.*
4. See, e.g., the decisions cited at notes 7 and 19 below.
5. *Ab-Tech Constr. v. United States*, 31 Fed. Cl. 429, 1994 U.S. Claims

LEXIS 103, 93 Cont. Cas. Fed. (CCH) ¶76,668 (Ct. Fed. Cl. 1994).

6. *Id.* at 434, 1994 U.S. Claims LEXIS 103 at \*\*12.

7. 579 U.S. \_\_\_\_ (2016).

8. *Id.* at \_\_\_\_.

9. *United States ex. rel. Scollick v. Narula*, 2016 U.S. Dist. LEXIS 143174 (D. D.C. 2016).

10. 6 Del. C. § 1201.

11. *State v. Pasquale*, 2015 Del Super. LEXIS 488, Unemployment Ins. Rep. (CCH) ¶8485 (2015).

12. Gov. Code, §§ 12650, et seq.

13. *Sacramento Mun. Util. Dist. V. FCC Corp.*, 2012 Cal. App. Unpub. LEXIS 5027 (3d App. Dist. 2012). Two examples cited in the decision were (a) a requisition originally submitted to claim achievement of 13 contract milestones for a total due of \$8.7 million, reduced by the owner to 5 milestones and \$4 million, and (b) a requisition claiming 13 milestones and \$8.5 million due, reduced by the owner to 11 milestones and \$8 million. The owner's expert testified that the contractor's pay applications "could not have been honest in light of its pattern of claims for unachieved milestones."

14. *United States ex. rel. Sheet Metal Workers Int'l Ass'n, Local Union 20 v. Horning Invs., LLC*, 828 F.3d 587 (7th Cir. 2016).

15. *Klusmeier v. Bell Constructors, Inc.*, 469 Fed. Appx. 718 (11th Cir. 2012).

16. 152 Cal. App. 4th 720, 60 Cal. Rptr. 3d 375, 2007 Cal. App. LEXIS 1110 (2007).

17. See note 9, *supra*.

18. The California FCA was subsequently amended, perhaps in response to the *Fassberg* decision, see note 16 below.

19. 2015 Cal. App. Unpub. LEXIS 3447 (2d App. Dist., Div. 4, 2015).

20. Gov. Code § 12651(a)(2). Per the court in *County of L.A.*, "the apparent effect of the amendments is to broaden potential liability for false claims and the use of records and statements to support such claims." *County of L.A. v. Superior Gunitite*, *supra*, 2015 Call. App. Unpub. LEXIS 3447 at \*\*13.

21. *United States ex. rel. Wall v. Circle C Constr., LLC*, 2016 U.S. App. LEXIS 1871 (6th Cir., Feb. 4, 2016).

22. It appears that the contract at issue incorporated the federal DBE laws and regulations.

23. 2013 U.S. Dist. LEXIS 153135 (N.D. CA 2013).

24. *Metropolitan Bridge & Scaffolding Corp. v. New York City Housing Auth.*, 2016 N.Y. Misc. LEXIS 3127 (2016).

25. *State of Calif. ex. rel. Standard Elevator Co., Inc. v. West Bay Builders, Inc.*, 197 Cal. App. 4th 963, 130 Cal. Rptr. 3d 99, 2011 Call App. LEXIS 955 (1st App. Dist., Nov. 4, 2011).

26. *United States ex. rel. Wall v. Circle C. Construction, LLC*, 697 F.3d 345 (6th Cir. 2012).

27. *United States DOT ex. rel. Arnold v. CMC Eng'g, Inc.*, 947 F. Supp. 2d 537 (W.D. Pa. 2013), *aff'd*, 567 Fed. Appx. 166 (3rd Cir. 2014).

28. 2016 Mass. Super. LEXIS 36, 33 Mass. L. Rep. 301 (2016).

29. Multiple emails were cited to the effect that the contractor was holding onto funds near the end of each quarter so as to bolster its financials and without regard to its payment obligations to the subcontractors.

30. The contract was funded in part through ARRA, for which a stated purpose was to improve conditions for many companies through federally-financed work. Thus, processing of project payment down through all tiers was considered an essential element of the program.

## ON CORPORATE COUNSEL'S DESK

Nearly every state has a data breach notification law that requires companies to make certain disclosures following a cyberattack that compromises sensitive personal information. Failure to comply can result in significant fines and penalties. In her *Under Construction* article available online (<http://ambar.org/FCLUC>), *Catherine Bragg*, with TRC Companies, Inc. in New York, NY, describes commonalities of these data breach notification laws the so that your company and/or client can better understand its compliance obligations.



# UNDERCONSTRUCTION

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## MIDWINTER 2017 MEETING: FEBRUARY 2–3, 2017 JW. MARRIOTT DESERT SPRINGS, PALM DESERT, CA

### EARTH, WIND, FIRE AND WATER Sustainable Construction in a Changing Environment

In a changing environment, the need to learn legal issues at each step of the development life cycle, from planning and contracting to performance and retrofitting, has never been more important. The Forum on Construction Law's 2017 Midwinter Meeting co-sponsored with the ABA's Section of Environment, Energy, and Resources (SEER) will arm you with what you need to know to advise your clients about changes in this growing field and to avoid traps for the unwary.

#### Highlights:

- **Green** is staying and is growing in importance across all areas of law, regardless of whether we call it "green building," "sustainable development" or "environmental law";
- **Environmental issues**, affect your clients' businesses—to represent them well and to retain them as clients, you must be able to spot environmental issues as they arise;
- **How a changing environment** – including rising tides, changing weather and storm patterns,



water scarcity, and evolving temperature trends is impacting construction;

- **Top industry leaders** are coming to Palm Desert to share the latest developments in the field to help you identify important issues and stay ahead of the curve to guide your clients; and
- **Hear Dr. Steven Chu**, former US Secretary of Energy, co-recipient of the Nobel Prize for Physics (1997) and world renowned physicist discuss climate change and sustainability.

The Forum is more than just CLE—meet colleagues and escape to Palm Desert in February. Activities include the Palm Springs Aerial Tram, Sustainable Energy or Architectural and Celebrity Home Tour, Off Road Jeep Tour, Nature Hike, Picnic, Forum Golf Scramble and more.

Register at <http://bit.ly/2eZYvgJ>. #MWM17.