The False Claims Act:
Enforcing USF Beneficiary Rules and Policing Fraud

FUNDAMENTALS
OF THE
CIVIL FALSE CLAIMS ACT
AND QUI TAM ENFORCEMENT

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Introduction

The civil False Claims Act, 31 U.S.C. §§ 3729 - 3733 (2006) (“FCA”), known as the “Informer's Act” or the “Lincoln Law,” was enacted in 1863 in response to allegations of fraud on the government during the Civil War. The statute fell into relative disuse after the Second World War, but it gained notoriety and prominence after amendments in 1986 re-energized its enforcement. Federal programs have expanded since its enactment, and opportunities for abuse—or perceived abuse—of government resources have also grown. Because the federal government typically distributes its wealth with many statutory and regulatory requirements attached, these requirements are sometimes used to expand the reach of the FCA as a mega-enforcement device for separate regulatory and statutory regimes.

The Department of Justice recovered nearly $3.6 billion under the civil False Claims Act (“FCA”) in fiscal year 2015, bringing total FCA recoveries to more than $48 billion since the 1986 amendments. The potential for sharing as much as 30 percent of the treble damages and mandatory penalties awarded under the law makes qui tam enforcement of the statute attractive to whistleblowers—private plaintiffs known as “qui tam relators.” The number of qui tam suits filed in fiscal year 2015 was 632, roughly six times the number of non-qui tam suits filed. More than $2.9 billion of the 2015 recovery was in qui tam cases brought by qui tam relators, who received a total “relator’s share” of $597.6 million. Without the government’s intervention, relators obtained only about 8 percent of the total recovery in qui tam suits that year.

The government initiates and litigates a substantial number of False Claims Act cases without the assistance of a qui tam relator. False Claims Act cases prosecuted
solely by the government may be initiated by the investigative branch of a government agency, or may be referred to the Civil Division of the Department of Justice from state or federal criminal prosecutors. Thirty states plus the District of Columbia, New York City, and Chicago, now have false claims acts with qui tam enforcement provisions similar to the federal statute. The considerable resources of the government—both federal and state—coupled with the seemingly limitless supply of whistleblowers willing to litigate FCA claims on the government’s behalf, virtually assure that the civil False Claims Act will remain one of the government’s most powerful fraud-fighting weapons.

Sweeping substantive and procedural amendments to the FCA were enacted as part of the effort to combat mortgage and financial frauds in the Fraud Enforcement and Recovery Act of 2009 ("FERA"). These FCA amendments were not limited to financial institutions, but instead applied to any business, institution, contractor, grantee, or individual who does business with the government or receives government funds. FERA’s amendments to the FCA’s liability provisions are substantive and they extended liability beyond previous limits.

In 2010, the FCA’s “public disclosure bar” to qui tam suits was revised under the comprehensive health care reform law, the Affordable Care Act ("ACA"), and the FCA’s retaliation provision was amended under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). The ACA narrowed the substantive grounds in the FCA’s public disclosure bar for dismissing qui tam suits, and Dodd-Frank expanded the FCA’s cause of action for retaliation and provided a three-year statute of limitations for retaliation actions. Again, those amendments are not limited to health care or financial entities, but apply to everyone who conducts the government’s business or receives government funds. 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 encompass more funds, cover more potential defendants, and narrow defenses to FCA suits in the years to come.

I. FCA Fundamentals –Overview

This paper provides an outline of the fundamentals of the civil False Claims Act, as amended: the sources of liability under the Act; the damages and penalties that may result; and the FCA’s enforcement mechanisms, including the Act’s unique qui tam enforcement provisions. Readers should note, however, that the civil False Claims Act is a complex law that has become more complex under its recent amendments in 2009 and

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2 The states that have state FCAs with qui tam enforcement are: California, Colorado, Connecticut, Delaware, 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.


To simplify the discussion that follows, some important features of the FCA should be noted:

- 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 $5,500 to $11,000 penalty in addition to damages.\(^5\)

- The FCA can be enforced not only by the powerful resources of the federal government, but also by 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.”\(^6\) 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.\(^7\) 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, however, and those steps are discussed in greater detail in Section VII, below.

- 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.\(^8\)

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7. See BOESE, § 1.01[A].
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.\(^9\) This FCA “tax bar” has been held to apply broadly whenever a false claim is made or a benefit is procured under the Internal Revenue Code, and is not limited to false income tax claims.\(^10\) Some state laws however, do not exempt tax claims.\(^11\)

II. Liability under the Civil False Claims Act

FERA’s Liability Amendments. The FCA’s primary liability provisions were revised and renumbered by FERA, and are now in 31 U.S.C. §§ 3729(a)(1)(A) - (G). Formerly, these seven liability provisions were in 31 U.S.C. §§ 3729(a)(1) - (7). (A shortened redline showing the FCA as amended by FERA, the ACA, and Dodd-Frank is attached as Appendix A.) The government (or the *qui tam* relator) bears the burden of proving each element of a False Claims Act violation, including damages, by a preponderance of the evidence.\(^12\)

When FERA’s Liability Amendments Apply. Generally, the 2009 liability provisions apply upon FERA’s date of enactment—May 20, 2009—with one exception. FERA provides that Section 3729(a)(1)(B) liability “shall take effect as if enacted on June 7, 2008, and apply to all claims . . . pending on or after that date.” (Emphasis added). Attempts to apply the amendment to FCA liability in Section 3729(a)(1)(B) retroactively have been challenged, and the courts are split as to the interpretation of the term “claims” in this effective date provision.\(^13\)

Because of the FCA’s extraordinarily long statute of limitations, which extends up to ten years, the FCA’s pre-FERA requirements will continue to be applied for many years in litigation that is based on conduct predating the 2009 amendments. Sealed *qui tam* complaints may still be based on conduct that occurred prior to May 20, 2009, which

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\(^9\) 31 U.S.C. § 3729(d) provides that "This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1954."


\(^12\) 31 U.S.C. § 3731(d).

\(^13\) Compare Hopper v. Solvay Pharmas., Inc., 588 F.3d 1318, 1327 n.3 (11th Cir. 2009), and United States *ex rel.* Baker v. Community Health Sys., Inc., 709 F. Supp. 2d 1084 (D.N.M. 2010) (defining “claims” as payment under the statute), with United States *ex rel.* Sanders v. Allison Engine Co., 703 F.3d 930 (6th Cir. 2012) (finding that “claim” was defined as a court case and that applying Section 3729(a)(1)(B) retroactively did not violate the *Ex Post Facto* or Due Process Clauses), and United States *ex rel.* Kirk v. Schindler Elevator Corp., 601 F.3d 94 (2d Cir. 2010) (applying Section 3729(a)(1)(B) to suit pending on June 7, 2008), rev’d on other grounds, 131 S. Ct. 1885 (2011).
also will be judged under the FCA’s pre-FERA liability requirements rather than FERA’s amendments. With these caveats in mind, this paper’s focus is on FCA liability as amended by FERA, beginning with liability under the four most commonly invoked sections of the FCA.

A. The Four Most Commonly Invoked Sources of Liability

Four subsections of Section 3729 are the most commonly invoked liability provisions of the Act:

- Section 3729(a)(1)(A) establishes liability for so-called “direct” false claims for payment or approval;
- Section 3729(a)(1)(B) imposes liability for making false records or false statements to support a false claim;
- Section 3729(a)(1)(C) involves conspiracy to commit a violation of Sections 3729(a)(1)(A) - (G); and
- Section 3729(a)(1)(G), the so-called “reverse false claim provision,” imposes liability for false records or statements material to an “obligation” to pay or transmit money or property to the government, or for concealing, avoiding, or decreasing an obligation to pay the government.

The remaining three subsections of Section 3729(a)(1), subsections (a)(1)(D), (a)(1)(E) and (a)(1)(F), tend to either be redundant or 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.\textsuperscript{14}

1. Section 3729(a)(1)(A): “Direct” False Claims

Section 3729(a)(1)(A) provides that:

Any person who --

knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval . . . is liable to the United States Government.

Thus, liability may be imposed upon

- any “person”

\textsuperscript{14} For a review of the limited case law arising under subsections (a)(1)(D), (a)(1)(E), (a)(1)(F), and their predecessors, see BOESE, §§ 2.01[G] - [J].
who presents, or causes another person to present

- a “claim” for payment or approval
- that is “false or fraudulent”
- “knowing” that the claim is false.

The individual elements of FCA liability (i.e., claim, knowledge, falsity, etc.) are discussed in greater detail below.

2. **Section 3729(a)(1)(B): False Records or False Statements**

Section 3729(a)(1)(B) states that:

Any person who --

knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim . . . is liable to the United States Government.

It is important to note that a prerequisite for liability under Section 3729(a)(1)(B) is a false record or statement material to a “false claim,” which requires a violation of Section 3729(a)(1)(A). Hence, all of the elements of an (a)(1)(A) violation are required in addition to the elements of an (a)(1)(B) violation. If those elements are proven, liability under Section 3729(a)(1)(B) may be imposed on:

- any “person” who
- “knowingly” makes or causes to be made
- a “false record” or statement
- “material” to a false or fraudulent claim.

Some courts have held that the plaintiff in an FCA case may not recover under both the direct and false statements liability sections for the same false claim, but both actions may be pled in the alternative.\(^\text{15}\)

3. **Section 3729(a)(1)(C): Conspiracy**

Section 3729(a)(1)(C) imposes liability upon:

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\(^{15}\) See, e.g., United States *ex rel.* Harris v. Bernad, 275 F. Supp. 2d 1, 6 (D.D.C. 2003). *See also* United States *ex rel.* Purcell v. MWI Corp., No. 98-2088 (GK), 2014 WL 521524 (D.D.C. Feb. 10, 2014) (rejecting plaintiff’s argument that the jury’s verdict punished the defendant twice for the same conduct).
Any person who --

conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G).

Because the basis of an (a)(1)(C) violation is the existence of a conspiracy, the elements of a conspiracy violation must be considered when the language of Section 3729(a)(1)(C) is parsed. Thus, an (a)(1)(C) violation of Section 3729(a)(1)(A) consists of the following basic elements:

- a “claim”
- for payment or approval\textsuperscript{16}
- that is “false or fraudulent”
- an agreement to submit the false or fraudulent claim
- an act in furtherance of the agreement
- specific intent to defraud\textsuperscript{17}

Prior to FERA, a conspiracy under the FCA only referred to a conspiracy to get a direct false claim paid, but did not cover other violations, such as a conspiracy to underpay the government, i.e., a “reverse false claim” (discussed below). After FERA, however, a conspiracy to violate all other FCA liability provisions are subject to liability under Section 3729(a)(1)(C). Thus, in addition to the basic elements listed above, a conspiracy to violate Section 3279(a)(1)(B) requires a false record or statement material to a false claim, and a conspiracy to violate Section 3279(a)(1)(G) requires concealing, avoiding, or decreasing an “obligation” rather than a false “claim.”

\textsuperscript{16} There has been some disagreement as to whether damages are a required element under Section 3729(a)(3). \textit{Compare} United States \textit{ex rel.} Wilkins v. North Am. Constr. Corp., 173 F. Supp. 2d 601, 639 n.33 (S.D. Tex. 2001) \textit{with} Blusal Meats, Inc. v. United States, 638 F. Supp. 824, 828 (S.D.N.Y. 1986), \textit{aff'd}, 817 F.2d 1007 (2d Cir. 1987). Express language in Section 3729(a)(3) requires the false or fraudulent claim to have been “allowed or paid,” but FERA removed this language from Section 3729(a)(1)(C).

Section 3729(a)(1)(G): the “Reverse False Claims” Provision

In 1986, Congress amended the FCA to add the so-called “reverse false claim” provision in Section 3729(a)(7). This provision was intended to address situations where money flows not from the federal government to a recipient, but rather from a person who has an obligation to pay the federal government. Reverse false claims may arise in many contexts. In the health care industry, for example, federal funds are distributed to some health care providers on a regular basis throughout the fiscal year. At the end of that period, a final reconciliation of the accounts is made using a cost reporting process. If the government has paid more to the provider than it should, the provider may be required to refund the difference to the government. If the provider instead submits false documents to the government indicating that it owes no money to the government, these documents may arguably give rise to a “reverse false claim” if all other elements of liability are proven.18 Reverse false claim allegations have also been raised in cases involving the alleged underpayment of royalties for natural resources (like timber, oil, and gas) removed from federal land.

FERA amended the reverse false claim liability provision in Section 3729(a)(1)(G) to provide:

Any person who --

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 . . . is liable to the United States Government.

When the language of subsection (a)(1)(G) is parsed, it reveals that there are two separate bases for reverse false claims liability. First, liability is imposed upon:

- any “person”
- who “knowingly” makes, uses, or causes to be made or used
- a “false” record or statement

18 See, e.g., United States ex rel. Bahmani v. ConAgra, Inc., 624 F.3d 1275 (10th Cir. 2010) (agreeing with defendants that Allison Engine’s intent requirement applied to claims under Section 3729(a)(7)); United States ex rel. Augustine v. Century Health Servs., Inc., 289 F.3d 409, 414-16 (6th Cir. 2002), petition for reh’g en banc denied, No. 01-5019, 2002 U.S. App. LEXIS 16358 (6th Cir. July 26, 2002) (affirming the imposition of liability where defendants failed to file amended cost reports reflecting fact that defendants did not comply with Medicare regulations relating to certain Employee Stock Ownership Plan payments, and where defendants allegedly were not entitled to retain Medicare funds paid by the government for the ESOP plan). The reader should note that the author was an expert witness for the defense on the issue of attorneys’ fees in Bahmani.
• “material” to
• an “obligation” to pay or transmit money or property to the federal government.

Liability under this provision is analogous to liability under Section 3729(a)(1)(B) in that it requires a statement that is “material” to an obligation to pay the government. FERA added another reverse false claim cause of action, however, under which simply knowingly concealing or knowingly and “improperly” avoiding an obligation to pay the government is actionable. For this liability, there is no need for a person to have taken the affirmative step of making a false record or statement in order to be liable.\(^{19}\) Thus, Section 3729(a)(1)(G) liability is also imposed upon:

• any “person”
• who “knowingly” conceals, or “knowingly and improperly” avoids or decreases
• an “obligation” to pay the federal government

What constitutes an “obligation to pay or transmit money or property to the federal government” is discussed in detail in Section III (E), below.

### III. Defining Terms Used in the Civil False Claims Act

As is true in any case of statutory interpretation, the meanings of words take on enormous significance in the context of litigating the rights and obligations of the parties to a civil FCA suit. Interpretations of certain terms in the current law are intensely disputed because much of the statutory language derives from the 1863 law, and also because Congress has not always been precise or consistent in drafting and amending it.

#### A. Who (and What) are “Persons” Subject to Liability Under the Act?

\(^{19}\)Legislative history indicates that only the individual or entity with the "obligation" to the government is subject to potential liability under Section 3729(a)(7). See, e.g., S. Rep. No. 345, 99th Cong., 2d Sess., at 18 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5283 (characterizing reverse false claims cases as arising when "a person attempts to defeat or reduce the amount of a claim or potential claim by the United States against him," and involving "a person's fraudulent attempt to reduce the amount payable by him to the United States") (emphasis added).
Section 3729(a), the section of the FCA that establishes liability under the Act, does not define the term “person.” Most courts have interpreted the FCA to impose liability upon virtually any individual or corporate entity. However, the Supreme Court’s decisions in Vermont Agency of Natural Resources v. United States ex rel. Stevens and Cook County, Illinois v. United States ex rel. Chandler discussed the application of the FCA to certain governmental entities and personnel.

1. States and State Entities

Until the Supreme Court issued its ruling in Stevens, courts were split as to whether states and state entities were “persons” subject to qui tam liability under the FCA, with a majority of courts holding that they were. The Court resolved that split in Stevens, holding that “the False Claims Act does not subject a State (or state agency) to liability in such actions.”

However, the government argues that states and state agencies are still subject to FCA liability in actions that are litigated by the government, rather than a qui tam relator. The government relies on a concurring opinion in Stevens that was authored by Justice Ginsburg and joined by Justice Breyer. In that concurrence, Justice Ginsburg interpreted “the Court's decision to leave open the question whether the word person encompasses States when the United States itself sues under the False Claims Act.” In United States v. University Hospital at Stony Brook, the court agreed with this position, holding that states are subject to FCA suits litigated by DOJ. This remains an open issue.

2. Local Governments

Before Stevens, courts generally held that other governmental agencies, such as municipalities and county governments, are “persons” subject to liability under the

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20 In United States v. Kansas Pac. Ry., 26 Fed. Cas. 680 (No. 15,506) (D. Kan. 1877) (the court held that a corporation is not a "person," but that view has not been followed in FCA cases. See United States ex rel. Stevens, note 6, supra.
24 Stevens, 529 U.S. at 787-88. See United States ex rel. King v. Univ. of Texas Health Science Ctr., No. 12-20795, 2013 WL 5881083 (5th Cir. Nov. 4, 2013) (ruling that the University’s Health Science Center-Houston was an arm of the state that was not subject to a qui tam suit). A separate question that remains unresolved is whether states and state entities are “persons” who may sue under the FCA. Section 3730(b)(1) of the FCA provides that “[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government,” but does not define the term "person" in this context, either. Although state sovereigns are not "persons" subject to qui tam liability under the FCA, some state agencies apparently consider themselves to be “persons” that can sue under the Act. See, e.g., United States ex rel. Woodard v. Country View Care Ctr., Inc., 797 F.2d 888 (10th Cir. 1986); United States ex rel. Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984).
25 Stevens, 529 U.S. at 789.
FCA. However, in reaching its decision in Stevens, the Supreme Court noted that the FCA’s treble damages are “essentially punitive in nature,” and that subjecting state entities to qui tam FCA liability was contrary to the general presumption against imposing punitive damages on governmental entities. Some courts extended that reasoning to apply to local governmental entities, which a majority of courts concluded were therefore not “persons” subject to qui tam liability under the FCA.

A circuit court split developed on this issue, and the Supreme Court resolved it during its 2002 term, in Cook County, Illinois v. United States ex rel. Chandler. In Chandler, the Court reiterated its characterization of FCA damages as “punitive,” but it also concluded that the FCA has remedial qualities. The presumption against imposing punitive damages on governmental entities was not compelling enough, the Court held, to overcome a competing presumption against implied repeals.

Although the term “person” is not defined in the liability provisions of the FCA, the Court noted that municipal corporations have been deemed to be “persons” that may sue and be sued since at least 1787. The original FCA was aimed primarily at war-profiteering, but the Court observed that local governments are now “commonly at the receiving end of all sorts of federal funding schemes and thus no less able than individuals or private corporations to impose on the federal fisc and exploit the exercise of the federal spending power.” After concluding that Congress originally intended to include municipalities within the reach of the 1863 Act, the Court reasoned from this point that Congress did not implicitly intend to repeal this susceptibility to FCA liability when it amended the FCA in 1986 and changed the damages provision to a punitive level. Under Chandler, therefore, local governments are “persons” that may be sued under the FCA by either qui tam relators or the government.

3. Official Immunities

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28 Stevens, 529 U.S. at 784-85.
29 Compare Garibaldi, 244 F.3d. at 493 ("We are convinced that the punitive damages regime of the False Claims Act discussed above reflects a congressional intent that the term 'person' in the liability provisions of the False Claims Act not include local governments.") with United States ex rel. Chandler v. Cook County, Ill., 277 F.3d 969, 981 (7th Cir. 2002) ("counties are not only amenable to the FCA but also are subject to the same penalties as other defendants.").
31 Id. at 132-34.
32 Id. at 125.
33 Id. at 129.
34 Id. at 133-34 (holding that "[i]t is simply not plausible that Congress intended to repeal municipal liability sub silentio by the very Act it passed to strengthen the Government's hand in fighting false claims.").
Official immunities protect certain state and federal government employees from liability under the FCA, but a Medicare fiscal intermediary or carrier can be subject to FCA liability for claims arising from contract obligations to the federal government.  

4. Government Agencies and Employees

Federal government agencies are not “persons” subject to the FCA. Certain government employees may be subject to liability under the FCA. If, for example, a government employee receives a bribe to facilitate the submission of a false claim, the employee may be liable as a co-conspirator. The submission of false pay, travel, or vacation vouchers may also give rise to liability for federal employees under the False Claims Act.

5. Subcontractors

Privity of contract is not necessarily required between the government and the defendant in order for liability to arise under the FCA. Therefore, a defendant who causes some third party to submit direct false claims to the government (i.e., a subcontractor that causes an innocent contractor to submit false claims) may be subject to liability under the FCA, even if there is no privity of contract between the subcontractor and the government.

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35 See United States ex rel. Gaudineer & Comito v. Iowa, 269 F.3d 932 (8th Cir. 2001) (“a state employee sued for money damages for actions taken in an official capacity stands in the shoes of the sovereign and is not a person under the FCA.”); Bly-Magee v. California, 236 F.3d 1014 (9th Cir. 2001) (state official has absolute official immunity for conduct performed in the course of their official duties); United States ex rel. Adrian v. Regents of Univ. of Cal., No. C 99-3864 TEH, 2002 U.S. Dist. LEXIS 3321 (N.D. Cal. Feb. 25, 2002). But see United States ex rel. Stoner v. Santa Clara County Office of Educ., 502 F.3d 116, 1125 (9th Cir. 2007) (declining to extend absolute immunity to state office of education employees for actions taken in their official capacities).


40 United States v. Voss, No. 89-1155 (D.D.C. Apr. 6, 1992) (government employee who falsified travel vouchers); United States v. Cheng, 184 F.R.D. 399 (D.N.M. 1998) (physician employed by Indian Health Service accused of various forms of leave abuse, and of being absent from his duty station while charging the government as though he had been present and providing services) (this case was dismissed with leave to amend under Rule 9(b), however, for failure to plead fraud with particularity).

B. What Constitutes a “Claim for Payment or Approval”? 

1. “Claim” Prior to FERA 

The early version of the False Claims Act did not define what constituted a “claim for payment or approval.” However, the 1986 amendments added the following language:

For purposes of this section, “claim” includes any request or demand . . . which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.42

According to its legislative history, this language was intended to clarify that FCA liability may extend to situations in which the claim is made to a grantee, such as a state or local government, rather than directly to the federal government. Many recipients of federal funding operate with funds from both federal and non-federal sources, and the D.C. Circuit Court of Appeals acknowledged, in United States ex rel. Yesudian v. Howard University, that FCA liability may not be appropriate “where the grantee's federal funds are an insubstantial percentage of its total budget, where there is little likelihood that any of a defendant's money actually came from the federal grant, or where there is little continuing contact between the grantee and the government once the grant is made.”43

In United States ex rel. Totten v. Bombardier Corp. (“Totten II”), claims were submitted to Amtrak, a federal grantee. Amtrak was not an agency or instrumentality of the United States, nor was there any allegation that the claims were ever passed on by the grantee to the federal government.44 The D.C. Circuit concluded, first, that the alleged claims fell outside the reach of the FCA because they had not been “presented to an officer or employee of the United States Government” pursuant to that explicit requirement in Section 3729(a)(1). Second, the court ruled that there was no liability under Section 3729(a)(2) based on the finding that the presentment requirement implicit in that provision was unmet. In Allison Engine Co. v. United States ex rel. Sanders, the Supreme Court disagreed with the Totten II majority’s second ruling, and held that presentment was not required under Section 3729(a)(2).45 Rather, the Court found that, based on the statutory language, liability for a false statement in support of a false claim was limited to a statement designed “to get” a false claim paid or approved “by the

42 31 U.S.C. § 3729(c).
43 153 F.3d 731, 738 (D.C. Cir. 1998).
Government.” Importantly, the Court also found that this limitation was necessary because without it, the FCA would be “boundless” and become an “all-purpose antifraud statute.”

2. “Claim” After FERA

Despite the Supreme Court’s finding that this limitation was necessary to avoid boundless liability, FERA eliminated the “to get” language and the “by the Government” limitation in new language adopted in Section 3729(a)(1)(B). In addition, FERA’s new definition of “claim” in Section 3729(b)(2) is broader than the old one in the sense that it specifically encompasses funds that the government provided before “claims” were submitted and to which the government no longer holds title. This potentially broad reach is subject to a nexus to the government limitation, which is that the requested money or property “is to be spent or used on the Government’s behalf or to advance a Government program or interest.” Thus, the new definition is intended to cover “claims” to nongovernmental entities to whom the government provides funds, like Amtrak, or claims submitted to the government’s employees or agents, such as the government personnel who accepted the claims for the Coalition Provisional Authority, but it remains to be seen whether it extends much beyond that.

As pointed out earlier in the discussion of when FERA’s amendments apply, FERA’s effective date attempts to apply the amendment to Section 3729(a)(1)(B) liability to all “claims” that are pending on or after June 7, 2008—two days before the Supreme Court’s decision in Allison Engine was issued. Some courts have applied this liability retroactively to conduct predating the amendments in pending cases. Other courts have defeated retroactivity by ruling that no “claims” were pending as of June 7, 2008 based on the statutory definition of “claim” as requests or demands for money or property that the government provides or has provided. Interestingly, the district court in the remanded Allison Engine case found that imposing this liability retroactively violates the

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46 Id. at 2128, 2130.
47 See United States ex rel. DRC v. Custer Battles, 562 F.3d 295 (4th Cir. 2009) (ruling that claims submitted to U.S. government personnel who worked for the CPA met the statutory requirement of presentment to officers or employees of the United States). The reader should note that the author represented the defendants in Custer Battles through the summary judgment phase of the case.
Ex Post Facto Clause and is unconstitutional.\textsuperscript{51} However, that decision was reversed by the Sixth Circuit.\textsuperscript{52}

Other noteworthy aspects of a “claim” include the following:

- The presentment requirement in Section 3729(a)(1)(A) and in the definition of “claim” in Section 3729(b)(2)(A)(i) make clear that presentment must be directly to the government. In \textit{United States ex rel. Nathan v. Takeda Pharm. N.A., Inc.}, the Fourth Circuit emphasized that this requirement is still of primary importance under Section 3729(A)(1)(A) and it 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."

  707 F.3d 451, 456 (4th Cir. 2013) (internal citations omitted)), \textit{cert. denied}, 2014 U.S. LEXIS 2309 (U.S. Mar, 31, 2014). The Fourth Circuit compared the Nathan relator’s allegations with those in \textit{United States ex rel. Grubbs v. Kanneganti}, 565 F.3d 180 (5th Cir. 2009), and \textit{United States ex rel. Duxbury v. Ortho Biotech Products}, 579 F.3d 13 (1st Cir. 2009),\textsuperscript{53} 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.

- Mere bids are not “claims” within the meaning of the FCA, but rather are offers that do not create rights and obligations until the offeree accepts, and a contract exists.\textsuperscript{54}

- Claims or demands for payment that are inchoate, or that require an intervening act to trigger the government’s payment, do not become claims to the government until that intervening act has occurred. In \textit{United States ex rel.}


\textsuperscript{52} \textit{Allison Engine}, 703 F.3d 930 (6th Cir. 2012).

\textsuperscript{53} It should be noted that the scope of the claims in \textit{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. \textit{See United States ex rel. Duxbury v. Ortho Biotech Prods., LP}, 719 F.3d 31 (1st Cir. 2013).

For example, the defendant supplied an allegedly false invoice to the relator, who refused to submit the claim to the government. The court held that because the invoice was presented to the relator, and not to the government, it was not a “claim” within the meaning of the False Claims Act. Id. at *5.

Claims subject to liability under the FCA may include direct claims for property and for government services. In United States v. Alperstein, 183 F. Supp. 548 (S.D. Fla. 1960), aff’d, 291 F.2d 455 (5th Cir. 1961), the court imposed FCA liability on a person who falsely and explicitly claimed that he was eligible for free government health care.

C. When is a Claim “False” Within the Meaning of the Act?

To be a source of liability under the FCA, a claim must actually be “false.” 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. Under both the FCA and the criminal False Claims or False Statements Act, establishing falsity requires proof of “actual falsity.” Whether a claim is false typically depends on interpretation of the statutes, regulations, and contract terms establishing the conditions for the government’s payment to the recipient of federal funding. However, a few generalizations can be made:

- **Scientific conclusions.** Disagreements based on matters that are the subject of legitimate scientific dispute are not “false” within the meaning of the FCA.\(^{56}\)

- **Ambiguous requirements.** Defendants commonly argue that claims are not false because they reasonably interpreted the relevant regulation, statute, or contract to allow the claims. In cases where the relevant term is ambiguous, courts have determined whether the FCA defendant’s interpretation of the ambiguous term was reasonable, and if so, they have found that the FCA’s intent standard was not met.\(^{57}\) Recently, a court applied the interpretive rule known as the *contra proferentem* that was drafted by the government, accepting the contractor’s reasonable interpretation, and denying the

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\(^{55}\) See United States v. Diogo, 320 F.2d 898 (2d Cir. 1963); United States v. Lange, 528 F.2d 1280 (5th Cir. 1976).


\(^{57}\) 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. K & R Ltd. P’ship v. Massachusetts Hous. Fin. Agency, 530 F.3d 980 (D.C. Cir. 2008); United States ex rel. Farmer v. City of Houston, 523 F.3d 332 (5th Cir. 2008). 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
proferentem doctrine to an ambiguous contract provision in an FCA case.\textsuperscript{58} Under this interpretive rule, a latent ambiguity in a contract provision is construed against the party that drafted the provision. The rule is based on a principle of fundamental fairness: a party that drafts and imposes an ambiguous term should not benefit from that ambiguity. The rationale of contra proferentem also applies to ambiguous provisions in other documents drafted by the government, and FCA defendants should also be able to assert the doctrine as a defense in cases premised on ambiguous provisions in other agreements, grants, and regulations drafted by the government.

Many FCA cases are based not on a facially or “factually false” claim, but on an alleged false certification 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 price. For example, a hospital 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. The hospital may have violated one or more “conditions of participation” in the course of delivering the necessary services to the eligible beneficiary. The hospital may have expressly certified compliance with the conditions, or, under the expansive false implied certification theory, its certification may be implied.

- **Prerequisites to payment analysis.** Technical violations of federal laws and regulations that are “conditions of participation” but not prerequisites to payment do not render a claim “false” for purposes of the FCA. Some courts limit liability to situations in which the government explicitly conditioned its payment on compliance with the regulations or laws violated, and refuse to infer a false claim if the claimant was not expressly required to certify compliance in order to

receive payment. However, other courts have affirmed the imposition of liability even in the absence of express false certifications of compliance.

Recent cases have underscored that FCA liability turns on falsity, and that the determining factor in that analysis is the prerequisite to payment requirement. In United States ex rel. Steury v. Cardinal Health, Inc., 625 F.3d 262 (5th Cir. 2010), the relator 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 false certification simply because the FAR included warranty of merchantability provisions. The court concluded 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 held that “a false certification, without

59 See, e.g., United States ex rel. Mikes v. Straus, 274 F.3d 687, 697 (2d Cir. 2001) (“a claim under the Act is legally false only where a party certifies compliance with a statute or regulation as a condition to governmental payment.”); United States ex rel. Siewick v. Jamieson Sci. & Eng’g, Inc., 214 F.3d 1372, 1376 (D.C. Cir. 2000) (relator’s implied certification theory was “doomed by the rule, adopted by all courts of appeals to have addressed the matter, that a false certification of compliance with a statute or regulation cannot serve as the basis for a qui tam action under the FCA unless payment is conditioned on that certification.”); United States ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1019 (7th Cir. 1999).

60 See, e.g., Augustine, supra note 18; Shaw v. AAA Eng’g & Drafting, Inc., 213 F.3d 519 (10th Cir. 2000) (affirming the imposition of liability for allegedly false implied certifications of contractual compliance). See also United States ex rel. Hutcheson v. Blackstone Med., Inc., 647 F.3d 377 (1st Cir. 2011) (rejecting the argument that, in the absence of an express legal representation or factual misstatement, a claim can only be false or fraudulent if it fails to comply with a precondition of payment expressly stated in a statute or regulation, finding that the non-defendant hospital’s claims to Medicare could be rendered false by alleged underlying kickback violations of other defendants, and ruling that the alleged kickbacks violated preconditions to Medicare’s payment in the physicians’ and hospital’s provider agreements and in the hospital’s cost reports).

61 See, e.g., United States ex rel. Rostholder v. Omnicare, Inc., 745 F.3d 694 (4th Cir.), cert. denied, 135 S. Ct. 85 (2014) (holding that claims for drugs re-packaged in violation of FDA processing regulations were not “false”); United States ex rel. Steury v. Cardinal Health, Inc., 625 F.3d 262 (5th Cir. 2010) (ruling that an “underlying claim for payment is not ‘false’ within the meaning of the FCA if the contractor was not required to certify compliance in order to receive payment”); United States ex rel. Hobbs v. MedQuest Assocs., Inc., 711 F.3d 707 (6th Cir. 2013 (holding that “approved physician” and updating enrollment information requirements were not conditions of Medicare payment); United States ex rel. Hill v. City of Chicago, 772 F.3d 455 (7th Cir. 2014) (affirming dismissal of relator’s false certification allegation that program as implemented differed from the City’s grant application for lack of falsity); United States ex rel. Ketroser v. Mayo Found., 729 F.3d 825 (8th Cir. 2013) (“[t]he absence of a clear requirement that a written report must underlie or support each claim for surgical pathology services means that Relators pleaded a claim of regulatory noncompliance, not a plausible claim that Mayo submitted false or fraudulent claims for Medicare payment.”). See also FraudMail Alert No. 10-11-03, Fifth Circuit Holds “Prerequisite to Payment” is a Fundamental Requirement in Establishing “Falsity” in a False Certification Case (Nov. 3, 2010), available at http://www.friedfrank.com/siteFiles%2FPublications%2FFried%20Frank%20FraudMail%20Alert%20No._%2010-11-03.pdf; FraudMail Alert No. 11-08-31, Sixth Circuit Joins Second and Fifth Circuits in Holding That FCA Claims Based on Implied False Certifications Must Allege and Prove That the Alleged Violation Was a Prerequisite to Payment (Aug. 31, 2011), available at http://www.friedfrank.com/siteFiles%2FPublications%2FFried%20Frank%20FraudMail%20Alert%C2%A E%20No.%2011-08-31.pdf.
more, does not give rise to a false claim for payment unless payment is conditioned on compliance.” 625 F.3d at 269. As the Third Circuit explained in United States ex rel. Chesbrough v. Visiting Physicians Ass’n, 655 F.3d 461 (6th Cir. 2011), the FCA should not be interpreted to “enforce compliance with all medical regulations” such as those that require resolving medical issues that are not requirements for reimbursement.

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 viewed. Certiorari was granted in Universal Health Services, Inc. v. United States ex rel. Escobar, No. 15-7 (U.S. Dec. 4, 2015) late last year, and the Petitioner’s brief (the defendant below) is due January 19, 2016. 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. The circuits are divided on both the validity of this theory and its application. With the 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 explained above as a limit on liability under the false certification theory.

- **Materiality, causation, and reliance.** False certification cases also raise issues relating to the materiality of the allegedly false certification. However, the absence of the word “material” in new subsection (a)(1)(a)—the fundamental provision for false claim liability on which liability in every other false claim provision is based—supports the concept that the “materiality” of a false claim is relevant only if the primary falsity requirement, a prerequisite to payment violation, has been established or proved. While new subsection (a)(1)(B) requires a false record or statement to be “material” to a false claim, this requirement assumes that there is a false claim, and thus liability under (a)(1)(B) depends on a prerequisite to payment violation as well. In addition, while violations of contractual, regulatory, or statutory provisions may lead to a false claim if the violations are prerequisites to payment and the false statements are “material” to the false claim, a False Claims Act plaintiff must prove that an alleged falsity actually caused the government to pay claims it otherwise would not have paid.62 The evolving case law on the need to prove materiality,

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62 See, e.g., Blackstone, 647 F.3d 377 (1st Cir. 2011) (noting that “[o]nly persons who knowingly submit or cause the submission of a false or fraudulent claim can be held liable for violating the FCA,” that “[t]he term ‘causes’ is hardly boundless,” and that “it has been richly developed as a constraint in various areas of the law”); United States ex rel. Southland Mgmt. Corp., 326 F.3d 669 (5th Cir. 2003) (en banc); United States ex rel. Tessitore v. Infomedics, Inc., 847 F. Supp. 2d 256 (D. Mass. 2012) (rejecting relator’s theory—that drug manufacturer’s failure to report adverse events kept FDA from requiring warnings sooner, causing more prescriptions for Paxil to be written by physicians and more claims for reimbursement to the government—as an unsupported hypothetical that called for inferences that went
causation, and reliance in False Claims Act cases is discussed in detail in BOESE, §§ 2.04 and 2.05.

D. What is the “Materiality” Requirement?

Under FERA, the statutory definition of “material” is “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” In adopting this materiality standard, FERA made explicit a previously implicit requirement under the prior law. The standard itself is not new. Many courts have interpreted it as strongly limiting FCA liability to false statements that directly affect the government’s payment decision, and several courts have held that violations of “conditions of participation” in a federal healthcare program did not result in FCA violations. For example, in United States ex rel. Conner v. Salina Regional Health Center, the Tenth Circuit found that sweeping, general certifications were not specific conditions of payment. Similarly, in United States ex rel. Landers v. Baptist Memorial Health Care Corp., the 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.

A false record or statement on which liability is premised under Section 3729(a)(1)(B) and Section 3729(a)(1)(G) must be “material” to a false claim or obligation, and while many government and relator lawyers are hopeful that FERA’s definition of that term will undermine the basis for the interpretations in Conner and Landers, or dictate a different interpretation of this standard, this has not happened, and the statutory definition itself does not dictate that result. In fact, under the definition of “material,” the conduct must influence or be capable of influencing “the payment or receipt of money or property” rather than any other interest. Significantly, the conduct upon which liability for false statements under Section 3729(a)(1)(B) and Section 3729(a)(1)(G) are based is tied to payment or its equivalent.

A recurring problem with the natural tendency test of materiality is that, in determining whether the government could have refused to pay or approve a claim, it is rarely deemed necessary under that standard to consider the government officials’ actual responses to the alleged false claims. This approach leaves out the key interest of the government officials involved in the transaction, who have the public interest in mind when deciding whether or not to pay the claim. For this reason, the author has proposed

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63 See Appendix A at 3 (referencing 31 U.S.C. § 3729(b)(4)).
64 543 F.3d 1211 (10th Cir. 2008).
65 525 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.
66 See, e.g., United States v. Rogan, 517 F.3d 449 (7th Cir. 2008) (applying the “capable of influencing” test of materiality and finding that testimony of a government official showing that it would not have paid was not a required component of materiality).
that courts will find a legal way to reinstate the “prerequisite to payment” requirement.\(^\text{67}\) That result is precisely what happened in the Chesbrough and Steury decisions noted in the discussion of “falsity” above.

\section*{E. What is an “Obligation” to Pay or Transmit Money or Property to the Government?}

As noted above, the FCA’s “reverse false claims” provision, 31 U.S.C. § 3729(a)(1)(G), formerly Section 3729(a)(7), is intended to provide a potential remedy to the government when the flow of money or property is from a person with an obligation to the government, rather than the more common situation, in which money flows from the government to a recipient.

\subsection*{1. “Obligation” Prior to FERA}

What constitutes an “obligation” to pay or transmit money or property to the government was once hotly disputed, but, prior to FERA, it had become relatively settled. This was largely due to the Sixth Circuit’s decision declining to adopt the DOJ’s position in American Textile Manufacturers Institute, Inc., v. The Limited, Inc. (“ATMI”), holding instead that liability could arise under Section 3729(a)(7) only if the defendant “made a false record or statement at a time that the defendant owed to the government an obligation sufficiently certain to give rise to an action of debt at common law.”\(^\text{68}\) The Sixth Circuit emphasized that the obligation must exist before the false claim or statement was made in order for liability to arise under Section 3729(a)(7).\(^\text{69}\)

\subsection*{2. “Obligation” After FERA}

After FERA, “obligation” is defined in Section 3729(b)(3) as:

\begin{quote}
\textit{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.}
\end{quote}

\begin{footnotes}
\footnote{190 F.3d 729, 736 (6th Cir. 1999). The reader should note that the author represented the defendants in the ATMI case.}
\end{footnotes}
Using this definition, reverse false claims liability under Section 3729(a)(1)(G) may be based on an established duty, fixed or unfixed, arising from a contractual, grant, or license relationship. The legal obligations that arise under these relationships are relatively clear and easy to define. And, this definition is not intended to encompass penalties and fines, because “contingent” duties were specifically stricken from the legislation prior to passage.70 A considerable body of case law supports the view that the government’s ability to pursue reimbursement for overpayments does not constitute an “obligation.”71 While that has been the general understanding, one court has interpreted the duty arising from a “statute or regulation” to cover a potential penalty, a view that, if followed, could create extensive and unforeseen reverse false claim liability.72

Also, it is not clear precisely how a duty arises from the retention of an overpayment and when that duty becomes “established.” The Senate Report accompanying FERA explained that the statutory 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.”73 However, under the Affordable Care Act of 2010 (“ACA”), an overpayment retained beyond the deadline for reporting and returning it is an “obligation” as defined in the FCA,74 linking FERA’s new overpayment liability, the ACA’s new deadline, and FCA liability. The ACA’s 60-day rule for reporting and returning “identified” overpayments and the link to FCA liability raised a plethora of questions from health care providers.75 In February 2012, the Centers for Medicare and Medicaid Services (“CMS”) proposed rules to implement the ACA’s deadline,76 but these rules adopt an overly expansive approach to the process of identifying overpayments as well as stringent new requirements that would create enormous time pressures for providers in order to avoid FCA liability, liability under the Civil Monetary Penalties Act, and exclusion from healthcare programs. As a result, comments by the health care industry on the proposed rule were overwhelmingly negative, and no final rule has been issued yet.

IV. The FCA’s Scineter Requirement—the “Knowing” Element

70 See 155 Cong. Rec. S4539 (daily ed. Apr. 22, 2009) (statement of Sen. Kyl). At one point in the legislative process, there was an intent to overturn the Sixth Circuit’s decision in ATMI, but whether the law as enacted actually did so is questionable because the court found the penalties and duties in ATMI “contingent,” and the definition of “obligation” in Section 3729(b)(3) excludes “contingent” duties.
75 The ACA 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, without defining the term “identified,” for example.
When Congress amended the FCA in 1986, it defined, for the first time, the intent necessary to give rise to liability under the civil FCA. Before 1986, some courts had imposed a scienter requirement that was comparable to a criminal standard. Section 3729(b) now defines “knowingly” as:

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(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.

Reckless disregard. “Reckless disregard” is not capable of easy definition. It is certainly not mere negligence, or even “gross negligence.” It is, however, a lesser degree of knowledge than required under common law fraud. In defining “knowingly,” the FCA expressly states that “no proof of specific intent to defraud” is required. However, prior to FERA, the elements of the FCA conspiracy violation did require specific intent to defraud, because the language of Section 3729(a)(3) imposed liability upon a person who “conspires to defraud the Government,” and the use of the word “defraud” invokes common law intent requirements. After FERA, the conspiracy provision in Section 3729(a)(1)(C) no longer contains the word “defraud,” but the absence of the word “knowingly” and the use of the word “conspires” indicate that the common law intent standard is necessary to prove a conspiracy violation under the FCA.

In Safeco Insurance Co. v. Burr, the Supreme Court held that the reckless disregard standard was an objective one. Under that objective standard, the Court found that a defendant’s incorrect interpretation of an ambiguous 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. Safeco and K & R make examinations of subjective intent unnecessary in FCA cases involving reasonable interpretations of ambiguous requirements where the government has not provided

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78 See cases cited in note 16, supra.
79 127 S. Ct. 2201 (U.S. 2007).
80 Id. at 2215.
81 530 F.3d 980 (D.C. Cir. 2008). See also United States ex rel. Walker v. R & F Props., Inc., 433 F.3d 1349 (11th Cir. 2005), cert. denied 549 U.S. 1027 (2006) (finding that the regulation was ambiguous, but ruling that the question of falsity was improperly decided on summary judgment by the court below). The reader should note that the author’s firm represented the defendant in the R & F Properties case.
guidance.\textsuperscript{82} More recently, in \textit{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.\textsuperscript{83} This decision reinforced the important principle 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.” 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.”

**Collective knowledge.** 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, but this fundamentally misconstrues the nature of the statute, particularly in light of rulings characterizing FCA damages and penalties as punitive. In \textit{United States v. Science Applications International Corp.}, the D.C. Circuit definitively rejected the government’s argument that collective knowledge can be used to prove intent under the False Claims Act.\textsuperscript{84} 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 because it lacks balance and precision, the court concluded, and would allow “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.”\textsuperscript{85}

The SAIC case includes another 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

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\textsuperscript{82} See also \textit{United States ex rel. Lockyer v. Hawaii Pacific Health Group Plan}, 343 F. App’x. 279 (9th Cir. 2009) (good faith interpretation of “incident to” regulations foreclosed FCA liability); \textit{United States ex rel. Bott v. Silicon Valley Colls.}, 262 F. App’x. 810 (9th Cir. 2008) (relators could not show scienter where defendants complied with facially valid safe harbor regulation on recruiters’ pay); \textit{United States ex rel. Lee v. Corinthian Colls.}, No. CV07-1984 PSG, 2009 WL 4730890 (C.D. Cal. Dec. 4, 2009) (finding that Colleges reasonably relied on safe harbor provision and therefore could not have acted with scienter).


\textsuperscript{84} 626 F.3d 1257 (D.C. Cir. 2010). Cf. \textit{United States ex rel. Chilcott v. KBR, Inc.}, No. 09CV4018, 2013 WL 5781660 (C.D. Ill. Oct. 25, 2013) (distinguishing \textit{Safeco} and agreeing with the government that the “knowingly” requirement protects the government from those who knowingly take advantage of an “erroneous, but ‘reasonable’ interpretation of a contract term”).

\textsuperscript{85} \textit{Id.} at 1275 (quoting \textit{United States ex rel. Harrison v. Westinghouse Savannah River Co.}, 452 F.2d 908, 918 n.9 (4th Cir. 2003)).
that obligation was material to the government’s decision to pay.\textsuperscript{86}

This knowledge standard places a critical limit on the use of the implied certification theory of liability because it requires the government or the relator to prove that the defendant knew that the government’s paying agent considered the violation to be material. Whether this rational limitation on false certification theory is adopted by other circuits is a question of time.\textsuperscript{87}

\textbf{V. The Necessity of Damages}

Although the express language of the False Claims Act describes damages as an “essential element of the cause of action,” which must be proven by the preponderance of the evidence,\textsuperscript{88} most decisions tend to hold that liability may arise even in the absence of actual damages.\textsuperscript{89} In such cases, the courts focus on intangible injuries and the costs of investigation and prosecution.\textsuperscript{90} These courts also frequently note that FCA penalties may be imposed even in the absence of damages. However, whether or not a court finds that damages are a required element of an FCA violation, no damages may be recovered unless the purpose and effect of the alleged illegal act was to cause financial loss to the federal government,\textsuperscript{91} and the evidence needed to establish and calculate that loss is the amount the government paid over and above what the government would have paid if not for the fraudulent activity.

\textbf{VI. Damages and Penalties under the FCA}

\textbf{A. FCA Damages}

Until recently, courts rejected the argument that FCA damages are punitive. Almost universally, however, those courts were relying on older case law interpreting a pre-1986 version of the False Claims Act. Those cases, which held that the FCA is primarily a remedial statute, were interpreting a statute that imposed only double damages at the time.\textsuperscript{92} The Supreme Court recognized this distinction in \textit{Stevens}, when it

\textsuperscript{86} Id. at 1271.
\textsuperscript{87} See United States \textit{ex rel.} Badr v. Triple Canopy, Inc., 775 F.3d 628, 637 n.5 (4th Cir. 2015) (“Because the FCA violations must be ‘knowing,’ the Government must establish that both the contractor and the Government understood that the violation must be material”).
\textsuperscript{88} 31 U.S.C. § 3731(d) provides: “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.”
\textsuperscript{90} See \textit{Boese, Civil False Claims and Qui Tam Actions}, § 2.01[A][4].
\textsuperscript{91} See Marcus v. Hess, 317 U.S. 537, 551-52 (1943) (“We think the chief purpose of the statutes here was to provide for \textit{restitution to the government of money taken from it by fraud}”) (emphasis added); \textit{Hutchins}, 253 F.3d 176, 184. See also \textit{Boese, Civil False Claims and Qui Tam Actions}, § 2.01[A][4].
observed that the treble damages imposed under the current version of the FCA “are essentially punitive in nature.” 93 More recently, the Supreme Court engaged in a lengthy analysis of the character of FCA damages in the Chandler decision. As is noted briefly above, the Court held in Chandler that the FCA’s treble damages provision has both punitive and compensatory components. The Court declined to establish a general formula for identifying the “tipping point” between compensation and punishment, but concluded that something more than single damages is necessary to compensate the government for the costs of a fraud. 94 However, the Court resolved that consequential damages are not recoverable under the False Claims Act, but rather are recovered by the government through the treble damages provision. 95

B. Measuring Damages

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. 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., 96 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, 97 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

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93 Stevens, 529 U.S. at 784.
95 Id. at 131 n.9.
96 626 F. 3d 1257 (D.C. Cir. 2010).
that SAIC’s services had no value, the court vacated and remanded the damages for a new trial.

In United States v. Rogan,98 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 the claims to Medicare and Medicaid and trebled the entire overpayment amount without considering the value of the services provided.99 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.”

If the government or qui tam relator is able to prove that false claims were filed, but is unable to demonstrate that the government was injured in any way, some courts have awarded only penalties. In United States ex rel. Harrison v. Westinghouse Savannah River Co., for example, an appellate panel affirmed the trial court’s refusal to award damages in the entire amount of a contract obtained under a false certification, because relator failed to prove that the government did not receive the benefit of the work actually performed under the subcontract or that another firm could have performed the work for less.100

C. Treble Damages

A key feature of FCA liability is its treble damages provision. An important recent development on the application of this multiplier is the Seventh Circuit’s revisitation 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.,101 the Seventh

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98 459 F. Supp. 2d 692 (N.D. Ill. 2006), aff’d, 517 F.3d 449 (7th Cir. 2008).
99 Id. at 726-27.
100 352 F.3d 908, 923 (4th Cir. 2003). See also United States ex rel. Bunk v. Birkart Globistics GMBH & Co., No. 1:02CV1168 (AJT/TRJ), 2012 WL 488256 (E.D. Va. Feb. 14, 2012) (concluding that the plaintiffs failed to establish that defendants’ conduct caused the government any economic harm, that the minimum penalty was grossly disproportional to the harm caused by defendants’ conduct, and that the penalty would violate the Excessive Fines Clause of the U.S. Constitution). The reader should note that the author represented a co-defendant in an earlier stage of this matter but did not play any role in this decision.
101 711 F.3d 745 (7th Cir. 2013).
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. There is an emerging circuit split on this issue, given the Ninth Circuit’s decision in United States v. Eghbal, 548 F.3d 1281 (9th Cir. 2008).

D. Consequential Damages, Interest, and Costs of Investigation Are Not Separately Recoverable as Damages under the FCA

One rationale offered for the FCA’s potentially draconian penalties is that they serve as a form of liquidated damages in cases where damages are difficult to prove. However, consequential damages—those that do not flow directly and immediately from the false claim, but rather from some consequence or result—are not recoverable under the FCA. Legislative history to the 1986 Amendments indicates that the FCA’s treble damages provision was considered to provide adequate recovery for consequential damages, a point that the Supreme Court confirmed in the Chandler decision, discussed above. Nor are investigative expenses or interest recoverable in addition to damages. These ancillary costs are also included in the statutory recovery.

E. FCA Penalties

Without question, the remedy most feared under the False Claims Act is the $5,500-$11,000 per claim penalty. Most courts view the penalty provision to be mandatory once liability is established. 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. In United States v. Mackby, a panel of the Ninth Circuit concluded that FCA penalties (like damages), have a punitive purpose, and as

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102 423 U.S. 303 (1976). 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. at 317 n.13.


106 Under the 1986 amendments, FCA penalties range from $5,000 to $10,000 per violation. However, on August 30, 1999, the Justice Department published a final rule that increased these penalties to a minimum of $5,500 and a maximum of $11,000 for violations occurring after September 29, 1999. See 28 C.F.R. § 85.3 (a)(9) (2002).


108 See, e.g., Cabrera-Diaz, 106 F. Supp. 2d 234 (D.P.R. 2000) (refusing to impose any penalties at all, because they would be excessive). See also United States v. Mackby, 261 F.3d 821 (9th Cir. 2001) (holding that FCA damages and penalties are subject to Eighth Amendment limitations).

109 United States v. Mackby, 261 F.3d 821 (9th Cir. 2001).
such, are subject to limitations imposed under the Eighth Amendment’s prohibition against excessive fines and penalties. As a result, the case before the Ninth Circuit in Mackby was remanded to the district court for a determination as to whether the judgment imposed was excessive. Although the district court concluded that it was not, the Ninth Circuit’s decision seems to require courts to make this determination in every case resulting in a finding of liability under the FCA. Under Supreme Court Eighth Amendment jurisprudence, a court imposing damages and penalties under the FCA must consider the proportionality of the forfeiture in relation to the actual damages (if any) suffered by the government.

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. 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. 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 analysis lacks precedent, but the Supreme Court declined to review this case.

VII. A Brief Overview of the Qui Tam Provisions

A. Qui Tam Procedure

- *Qui tam* suits are brought under the FCA “for the person and for the United States Government,” in the name of the United States.

- The False Claims Act requires the suit to be filed under seal, and the government is given 60 days to investigate the relator’s claims. However, the government is usually granted lengthy extensions to conduct its investigations. The relator is required to file a “written disclosure of

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111 741 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.
112 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).
substantially all material evidence and information the person possesses.”\textsuperscript{115}

- The relator must voluntarily disclose his or her allegations to the government before filing suit in order to satisfy complex jurisdictional requirements relating to public disclosures of the alleged fraud.\textsuperscript{116}

Once the government has investigated the relator’s allegations, it may either:

- notify the court that it will intervene in the suit and take over responsibility for the litigation;\textsuperscript{117}

- formally decline intervention, thus allowing the relator to conduct the litigation;\textsuperscript{118}

- move to dismiss the litigation, even over the relator’s objection;\textsuperscript{119} or

- seek to settle the case before formally intervening in the litigation.

Once the government determines whether to intervene and the case is unsealed, False Claims Act litigation is conducted much as any other federal civil litigation.

**B. The “Public Disclosure” Jurisdictional Bar**

1. **The 1986 Bar**

To avoid the litigation of “parasitic” suits, in which plaintiffs merely echo allegations and information that are already public knowledge, or are otherwise publicly available, Congress enacted a new jurisdictional bar in 1986. This jurisdictional bar, in Section 3730(e)(4), provided in relevant part:

Certain actions barred:

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media,

\textsuperscript{115} Id.


\textsuperscript{117} 31 U.S.C. § 3730(b)(4)(A).


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 the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section, which is based on the information.

Under these provisions, relators bore the burden of demonstrating that subject matter jurisdiction existed in a False Claims Act suit, and doubts were to be resolved against federal jurisdiction. This complex jurisdictional bar has been criticized as representing less than careful drafting, has resulted in numerous circuit court splits, and has been revised by Congress in the Affordable Care Act in 2010 (“ACA”). It also has been the subject of three Supreme Court decisions in the past five years:

- **Rockwell Int’l Corp.** In 2007, in *Rockwell International Corp. v. United States ex rel. Stone*, 549 U.S. 457 (2007), the Supreme Court clarified key issues raised under the original source exception to the public disclosure bar. Among the Court's conclusions in *Rockwell* were the following: that the public disclosure and original source provisions were jurisdictional and must be satisfied at every stage of the proceeding; that the relator must have knowledge of the information on which the allegations actually litigated—not just those in the original complaint—are based; and that the relator’s original source status must be established claim by claim. A recent case, citing *Rockwell*, held that the relator must be the original source of both the claims in the original complaint and any claims in the amended complaint.

- **Graham County.** The Supreme Court answered one of these questions in *Graham County Soil & Water Conservation District v. United States ex rel.*

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121 See, e.g., Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson, No. 08-304, 2010 WL 1189557, at *9 n.15 (quoting BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 4.02[A]) (“the sponsors’ interpretations of the provision ultimately enacted . . . are spare, often incorrect, and wide-ranging enough to provide some support for almost any construction of its many ambiguities”); United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh, 186 F.3d 376, 387 (3d Cir. 1999) (“Section 3730(e)(4)(A) does not reflect careful drafting or a precise use of language. To begin with a small example, this section refers to the General Accounting Office as the ‘Government Accounting Office’ and thus misnames an instrumentality that Congress has consistently viewed as its own”).

Wilson, 130 S. Ct. 1396 (U.S. 2010) (“Graham County II”). Specifically, the Supreme Court held that an audit and investigation performed by a state or its political subdivision was an “administrative report” that qualified as a public disclosure within the meaning of Section 3730(e)(4)(A), and that the sources of disclosure were not limited to “federal” sources under this section. Congress effectively overruled the Court’s decision in the Affordable Care Act, however, as discussed below.

- **Schindler Elevator**. The Supreme Court decided another dispute under the public disclosure bar in Schindler Elevator Corp. v. United States ex rel. Kirk, 131 S. Ct. 1885 (2011). A majority of the Court found that a federal agency’s written response to a Freedom of Information Act request is a “report” within the meaning of the FCA’s public disclosure bar based on the plain meaning of that term. The Court’s decision on this question illustrates the extent to which the 1986 public disclosure bar continues to be important in FCA cases even after revisions to this bar were adopted in the 2010 ACA amendments. Among the issues that the Court did not decide in Schindler Elevator are whether records released under FOIA but not attached to a written FOIA response fall within the public disclosure bar, and whether an agency’s search in response to a FOIA request also qualifies as an “investigation.” The courts will continue to grapple with these and other questions under the public disclosure bar in the years to come.

2. **The 2010 Bar**

In 2010, Congress amended the FCA’s public disclosure bar as part of the comprehensive health care reform initiative in the Affordable Care Act, 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.

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123 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.

(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.

While the 1986 public disclosure bar was considered a threshold jurisdictional determination, the 2010 amendments eliminate the word “jurisdiction,” and replace it with the requirement that “the court shall dismiss . . . an action or claim.” Thus, instead of statutorily withdrawing jurisdiction if the relator is not an original source of allegations that were publicly disclosed, the new language directs the court to dismiss the qui tam action or claim, “unless opposed by the Government.” Until last year, the government had not exercised this veto, but it has begun to do.

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 II 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 “materially adds” requirement is not specifically defined in the statute, but to the extent that it could be met by someone other than an insider, it would represent a significant change in the law. “Materially” adding to publicly disclosed allegations indicates a qualitative addition, and because the standard is still knowledge-based, speculation or a prediction does not satisfy it. The first prong of the


126 Cf. 31 U.S.C. § 3730(b)(4)(B) (clearly setting forth procedures for the government to notify the court of its decision not to take over a qui tam action).

exception is met by voluntarily disclosing the information underlying the allegations to the government prior to the public disclosure.

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.128

### C. The First-to-File Bar

The first-to-file bar, 31 U.S.C. §3730(b)(5), provides:

> 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.

This provision is intended to prevent relators from litigating parasitic suits that provide no additional benefit to the public and would subtract from the government’s recovery. Even though this provision has remained unchanged since it was enacted in 1986, disputes about the meaning and application of “related action” and “pending action” continue to arise. Relator agreements that attempt to circumvent the first-to-file rule are a continuing concern.

In May 2015, the Supreme Court resolved a circuit court split concerning the proper interpretation of the phrase “pending action” in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*.129 KBR argued that “pending action” was a shorthand reference to the earlier-filed action, but the Court rejected that view. 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.”

### D. The Relator’s Share

Successful relators who have not participated in the alleged fraud may be awarded between 15 and 25% of the proceeds of their *qui tam* suit. (Relators who participated in the fraud may still recover a bounty unless they are convicted of criminal charges relating to Medicare patients did not meet “materially adds” standard); United States ex rel. Paulos v. Stryker Corp., 762 F.3d 688 (8th Cir. 2014) (finding “early discoveries or suspicions” linking device to disease insufficient); Davis, 679 F.3d 832, 839 n.4 (D.C. Cir. 2012) (“materially adds” amendment provides incentives only to relators “whose information adds value”).

128 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).

to the fraud, but the court has discretion to reduce the relator’s award in such circumstances.) The FCA provides for awards of between 25 and 30% in cases litigated by relators when the government declines intervention. Justice Department statistics reveal that the average amount paid to a relator is roughly 16% of the recovery in *qui tam* cases.

E. **Attorneys’ Fees and Costs**

The FCA provides for the award of reasonable attorneys’ fees and costs to successful relators. These amounts are over and above the bounty obtained by the relator, and many relators’ counsel also enter into contingency fee agreements with their clients.

Prevailing defendants may also seek recovery of attorneys’ fees and costs under certain circumstances. If the government litigated the case, a limited class of defendants with relatively small net worth may seek fees and costs from the government under 28 U.S.C. § 2412(d). Where the government declines intervention, and the case is litigated by a relator, a prevailing defendant may seek attorneys’ fees and costs where the claim was “clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.”

F. **Whistleblower Retaliation**

In 1986, the FCA provided remedies for persons wrongfully discharged or otherwise discriminated against in terms of their employment by an “employer” because of lawful acts done by the “employee” in furtherance of an action under Section 3730. FERA revised the definition of both protected persons and protected conduct in Section 3730(h). It removed the specific reference to the “employer” (and thus the requirement of an employee-employer relationship) so that independent contractors could bring retaliation actions under Section 3730(h). It also revised the definition of protected conduct, under which lawful acts “in furtherance of an action under this section” was replaced by the phrase “in furtherance of other efforts to stop 1 or more violations,” which did not make sense because it eliminated the longstanding basis for protecting a whistleblower while seeming to require the person to actually try to stop the fraud itself rather than simply take steps toward filing a *qui tam* action.

The year after FERA’s FCA amendments were enacted, Congress once again revised the definition of “protected conduct” under Section 3730(h) in the Dodd-Frank Wall Street Reform and Consumer Protection Act. This revision restored the original definition of protected conduct that covered lawful acts in furtherance of a *qui tam* suit, and retained FERA’s other substantive amendments. Section 3730(h) now provides:

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

Under the Dodd-Frank amendments, for the first time, Section 3730(h) provides a statute of limitations for retaliation that requires the action to be brought within three years of the date when the retaliation occurred.

With these revisions, the analytical framework for the retaliation cause of action remains the same as it was under the 1986 provision:

- the employee (or independent contractor) was engaged in conduct protected under the FCA;
- the employer was aware of the employee’s (or independent contractor’s) conduct; and
- the employee (or independent contractor) was discriminated against because of that conduct.\textsuperscript{134}

Appendix A

THE FEDERAL FALSE CLAIMS ACT

31 U.S.C. §§ 3729-3733

As amended by:


§ 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.
(5E) 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

* * *

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

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

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

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the
information; or

(3) acts in reckless disregard of the truth or falsity of the
information; and

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

(c) CLAIM DEFINED.—For purposes of this section, 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.

§ 3730. Civil actions for false claims

(b) (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.

(e) CERTAIN ACTIONS BARRED.—
(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) 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 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.

(h) Any employee who shall be entitled to all relief necessary to make that employee whole if that employee 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 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.

* * *
Appendix B
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:

> previous 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.


**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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