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Theories of Liability and Defenses Under the False Claims Act

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**John T. Boese
Fried, Frank, Harris, Shriver & Jacobson LLP
Washington, D.C.
(202) 639-7220**

E-Mail: John.Boese@FriedFrank.com

John T. Boese is a litigation partner in the Washington, D.C. office of Fried, Frank, Harris, Shriver & Jacobson LLP, where he represents a broad spectrum of defendants in civil, criminal, debarment, and exclusion cases arising from federal fraud investigations of government contractors and grantees, health care providers, and other organizations. Mr. Boese is the author of the book *Civil False Claims and Qui Tam Actions* (Aspen Law & Business). The Third Edition of this two volume treatise was published in January 2006. It is routinely cited by courts at all levels on issues arising under the civil False Claims Act. The views reflected here present case law that remains subject to appeals and further review and reconsideration in other courts and cases. The statements herein do not necessarily present the position of the author's Firm or clients of the Firm, and should not be imputed to them.

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INTRODUCTION

More than \$2 billion was recovered by the government under the False Claims Act ("FCA") in fiscal year 2007, making it the seventh year out of the past eight in which recoveries have been over the billion dollar mark.¹ Of this amount, more than \$1.5 billion involved the health care industry.² Within the past year, recoveries under the FCA in the health care industry included a judgment of more than \$334 million in *United States ex rel. Tyson v. Amerigroup Ill., Inc.* that is now on appeal in the Seventh Circuit on several grounds, including that it is unconstitutionally excessive.³

At the end of the last legislative session in 2007, sweeping amendments to the FCA were introduced in both houses of Congress, S. 2041 and H.R. 4854, which would essentially rewrite every significant provision of the FCA, although they are deceptively entitled the "False Claims Act Correction Act of 2007."⁴ If enacted, these bills would expand FCA liability to cover false claims for "Government money or property" and extend it to a new broadly defined group of "administrative beneficiaries." They also would eliminate the "public disclosure" jurisdictional bar in the current law, extend the statute of limitations to ten years, and specifically provide that the government's complaints in intervention relate back to the original complaint in *qui tam* actions. Although the focus of this paper is not on the details of these proposals, those that would be subject to the new liability proposed in these bills should be aware of them.

I. Fundamentals of FCA Liability

This paper addresses liability and defenses under the False Claims Act. An in-depth discussion of the legal issues is beyond the scope of this paper, especially in light of the

¹ Press Release, Dep't of Justice, Justice Department Recovers \$2 Billion For Fraud Against the Government in FY 2007; More Than \$20 Billion Since 1986 (Nov. 1, 2007) ("DOJ's Nov. 1, 2007, Press Release"), http://www.usdoj.gov/opa/pr/2007/November/07_civ_873.html; see also Fraud Statistics, October 1, 1986 – September 30, 2007 (Appendix B) (attached).

² See Appendix B (Health & Human Services Fraud Statistics).

³ 488 F.Supp.2d 719 (N.D. Ill. 2007). FCA settlements in the health care industry in 2007 included a \$100 million settlement with Purdue Frederick Company concerning Oxycontin off-label marketing fraud allegations, and a \$26 million settlement with St. Joseph's Hospital of Atlanta for billing on an inpatient basis rather than on an outpatient or emergency room basis. See Denise LaVoie, *Cracking Down on Off-Label Marketing*, STAR LEDGER (Newark, N.J.), May 11, 2007, at 54; Press Release, Dep't of Justice, Saint Joseph's Hospital of Atlanta to Pay U.S. \$26 Million to Settle False Claims Allegations (Dec. 21, 2007). In 2006, FCA settlements included a \$920 million settlement with the second largest hospital chain in the country, Tenet Healthcare Corporation, and in 2005, a \$704 million settlement of off-label promotion allegations with Serono, S.A. and various subsidiaries, as well as a \$124 million settlement of improper pricing practices allegations with King Pharmaceuticals, Inc. See Press Release, Dep't of Justice, Justice Department Recovers Record \$3.1 Billion in Fraud and False Claims in Fiscal Year 2006; Largest Amount Ever Recovered in a Single Year (Nov. 21, 2006) ("DOJ's Nov. 21, 2006, Press Release"); Press Release, Dep't of Justice, Justice Department Recovers \$1.4 Billion in Fraud and False Claims in Fiscal Year 2005; More Than \$15 Billion Since 1986 (Nov. 7, 2005) ("DOJ's Nov. 7, 2005 Press Release"); *Drug Maker, DOJ Settle False Claims Charges; Whistleblower Suit*, NAT'L L.J., Nov. 7, 2005, at 13.

⁴ S. 2041, 110th Cong., 1st Sess. (2007); H.R. 4854, 110th Cong., 1st Sess. (2007).

exploding case law in this area. Examples in 2007 include the Supreme Court's decision on disputed issues involving the public disclosure jurisdictional bar and the original source exception in *Rockwell International Corp. v. United States ex rel. Stone*,⁵ and its grant of *certiorari* in *Allison Engine Co. v. United States ex rel. Sanders*⁶ on the issue of the necessity of "presentment" under Sections 3729(a)(2) and (a)(3) of the Act. A number of fundamentals of liability under the FCA are important to understand at the outset.

A. Liability Is Statutory

Liability under the civil False Claims Act is statutory, which requires the government or *qui tam* relator to prove that the defendant has violated one or more of the provisions found in 31 U.S.C. §§ 3729(a)(1)-(7). (See Appendix A for the text of the Act.) The most important provisions are, without question, those in subsection (a)(1) (false claim); subsection (a)(2) (false statement in support of a false claim); subsection (a)(3) (conspiracy to have a false claim paid); and subsection (a)(7) (the "reverse" false claim).

For each of these statutory provisions, the government/*qui tam* relator must allege in the complaint and prove at trial each element set forth in the statute. For example, the government must first prove for any of these violations that the defendant is a "person" subject to liability. The Supreme Court has decided two cases relating to governmental immunity from FCA liability. First, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens* it held that states and state entities are not "persons" subject to *qui tam* liability under the False Claims Act.⁷ However, the *Stevens* decision has been interpreted to leave open the question of whether states are persons subject to suit by the federal government. More recently, the Court held in *Cook County v. United States ex rel. Chandler* that county and municipal governments *are* persons subject to FCA liability, despite strong common law presumptions against imposing punitive damages on governmental entities.⁸

1. False Claim

In order to establish liability for submitting a false claim under Section 3729(a)(1), the government or the relator must prove:

- (1) that there was a claim;
- (2) that the claim was false;
- (3) that it was submitted to the government;
- (4) that the defendant either actually submitted it personally or caused another to submit it; and

⁵ 127 S. Ct. 1397 (2007).

⁶ No. 07-214.

⁷ 529 U.S. 765 (2000).

⁸ 123 S. Ct. 1239 (2003).

- (5) that the false claim resulted in some actual or potential loss to the Federal Treasury (a much debated principle).

2. False Statement

To prove a violation of Section 3729(a)(2), the government/*qui tam* relator must prove everything in subsection (a)(1) (because a false statement must support a *false claim*) plus:

- (1) that a statement was made;
- (2) that the statement was false; and
- (3) that the falsity was material to the government's funding decision.

This "materiality" requirement is critical for a number of reasons. In *United States ex rel. Hopper v. Anton*,⁹ for example, the Ninth Circuit affirmed the grant of summary judgment in favor of a Los Angeles School District because any false statement would not have affected the federal government's decision to provide funds to the District. The court held:

It is not the case that any breach of contract, or violation of regulations or law, or receipt of money from the government where one is not entitled to receive the money, automatically gives rise to a claim under the FCA This does not mean that other types of violation of regulations, or contracts, or conditions set for the receipt of moneys, or of other federal laws and regulations are not remediable; it merely means that such are not remediable under the FCA or the citizen's suit provisions contained therein.¹⁰

3. Conspiracy

To prove a violation of the conspiracy clause in Section 3729(a)(3), the government or relator must prove that an agreement existed and that a false claim was submitted. However, the diminished intent standard of (a)(1) and (a)(2) does not apply. Because the statute uses the word "fraud" in (a)(3), a specific intent to defraud is required under that provision.¹¹

4. Reverse False Claims

With regard to Section 3729(a)(7), the "reverse" false claim, the government/*qui tam* relator must prove:

⁹ 91 F.3d 1261 (9th Cir. 1996).

¹⁰ *Id.* at 1265.

¹¹ See *United States ex rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204 (E.D. Tex. 1998) and cases cited in Boese, *Civil False Claims and Qui Tam Actions*, § 2.01[C]

- (1) that a present, defined, fixed obligation existed to pay money to the United States;
- (2) that a statement was made to avoid that obligation; that the statement was false; and
- (3) that the statement was made with the requisite intent.

The Sixth Circuit affirmed the requirement that only fixed, existing obligations can give rise to liability under the FCA.¹² Contingent obligations, including potential fines and penalties, are not properly the source of liability under the reverse false claims provisions.

B. Damages And Penalties

Damages under Section 3729(a) of the FCA are "3 times the amount of damages which the Government sustains." The standard measure of damages under the civil False Claims Act is the difference between what the government paid and what the government received. In the classic upcoding case, *United States v. Halper*,¹³ the defendant billed the government under Medicare for a more expensive medical visit than was actually provided. The single damages were \$6: the difference between what the government received (a \$9 visit) and what the government paid for (a \$15 visit).

This damage calculation is difficult to apply if the government succeeds in arguing that violations of the Medicare/Medicaid Anti-Kickback Act create liability under the civil False Claims Act. An example of this problem is in the criminal case of *United States v. Jain*,¹⁴ where the court reversed a criminal conviction for mail and wire fraud on the basis that, under the facts presented at trial, the violation of the Medicare Anti-Kickback Act did not cause any harm to the government. In such a case under the FCA, it is impossible to show the government's damages.

Without question, the remedy most feared under the False Claims Act is the \$5,000-\$11,000 per claim penalty.¹⁵ FCA penalties are assessed on a per-claim basis regardless of the amount of the damages, except when the court finds that they are excessive.¹⁶

¹² See *American Textile Manufacturers Institute, Inc. v. The Limited, Inc.*, 190 F.3d 629 (6th Cir. 1999). The reader should note that the author was one of the attorneys who represented a number of the defendants in this case.

¹³ 490 U.S. 435 (1989).

¹⁴ 93 F.3d 436 (8th Cir. 1996).

¹⁵ 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 in the Federal Register, increasing these penalties to a minimum of \$5500 and a maximum of \$11,000 for violations occurring after September 29, 1999. See 28 C.F.R. § 85.3 (a)(9) (2002). Moreover, the Medicare Prescription Drug Bill passed by the Senate on June 26, 2003 increases the FCA penalty range to a minimum of \$7,500 and a maximum of \$15,000 per violation.

¹⁶ See, e.g., *United States v. 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).

II. FCA Liability and Defense Issues

A. Liability Based on Express and Implied False Certifications

Since the terms "false" and "fraudulent" are not defined in the FCA, they have been interpreted by the courts with reference to other contexts, such as criminal cases brought under 18 U.S.C. §§ 287 and 1001. Establishing falsity under both the FCA and the criminal False Claims or False Statements Act requires proof of "actual falsity."¹⁷ In the FCA context, resolving falsity questions often involves the interpretation of laws, regulations, or agreements.

Some of the most significant developments in the health care area arise in cases that base FCA liability on express and implied false certifications of compliance with other statutes or regulations. Recent *qui tam* complaints in health care cases have based allegations of FCA violations on false certifications of compliance with anti-kickback and self-referral statutes or conditions of participation in health care programs.

The more straightforward type of false certification case is one that is based on express certifications of compliance, where, for example, invoices submitted to the government contain explicit certifications that a product or service complies with particular regulatory requirements or standards and compliance is a prerequisite to payment. Basing FCA liability on an implied false certification is more removed from a false claim for payment from the government than an express certification. As a result, the implied certification theory has been rejected, questioned, or simply not applied in a number of jurisdictions.¹⁸ To the extent that courts recognize a false certification theory of FCA liability, many have limited its application to those few situations in which the government has explicitly conditioned its payment upon compliance with a statute or regulation.¹⁹

¹⁷ See *United States v. Diogo*, 320 F.2d 898 (2d Cir. 1963); *United States v. Lange*, 528 F.2d 1280 (5th Cir.1976).

¹⁸ See, e.g., *El Dorado Irrigation Dist. v. Traylor Bros., Inc.*, No. CIVS03949LKKGGH, 2005 WL 3453913, at *2 (E.D. Cal. Dec. 16, 2005) (finding no compelling reason to certify false implied certification issue for immediate appeal because Ninth Circuit does not recognize the theory); *United States ex rel. Graves v. ITT Educ. Servs., Inc.*, No. 03-20460, 111 Fed. Appx. 296, 2004 U.S. App. LEXIS 21799, at *3 n.2 (5th Cir. Oct. 20, 2004) (*per curiam*) (stating that the Fifth Circuit had not specifically addressed the issue of whether FCA liability may be based on the implied certification theory); *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 787 n. 8 (4th Cir. 1999) (noting that implied certification claims are of questionable validity in the Fourth Circuit). See also cases cited in John T. Boese, *Civil False Claims and Qui Tam Actions* § 2.03 n. 557 (3d ed. 2006 & Supp. 2008-1).

¹⁹ See, e.g., *United States ex rel. Mikes v. Straus*, 84 F. Supp. 2d 427, 435 (S.D.N.Y. 1999) (The "implied false certification" theory applies "only in those exceptional circumstances where the claimant's adherence to the relevant statutory or regulatory mandates lies at the core of its agreement with the Government, or . . . where the Government would have refused to pay had it been aware of the claimant's non-compliance"), *aff'd*, 274 F.3d 687 (2d Cir. 2001); *United States ex rel. Bowan v. Education Am., Inc.*, No. 04-20384, 116 Fed. Appx. 531, 2004 WL 2712494 (5th Cir. Nov. 30, 2004) (false certification of compliance with regulations and statutes governing federal student financial aid programs did not violate FCA because relator did not allege defendants certified compliance with particular regulations on which payment was conditioned); *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 459 F. Supp. 2d 1081, 1087, 1089 (D. Kan. 2006) ("plethora of healthcare laws and statutes" establishing standards of care or conditions of participation with which defendant certified compliance were not express

In *United States ex rel. Landers v. Baptist Memorial Health Care Corp.*,²⁰ where the relator argued that the defendants failed to meet applicable standards of care and falsely certified compliance with Medicare conditions of participation, the court found no liability under the false certification theory. Relator alleged that nurse staffing in defendants' operating room and intensive care units was inadequate. The court granted summary judgment for the defendants, finding that the relator did not show that noncompliance with Medicare's conditions of participation violated the FCA under either the express or implied false certification theories because Medicare's payment was not conditioned on them:

Conditions of Participation are quality of care standards directed towards an entity's continued ability to participate in the Medicare program rather than a prerequisite to a particular payment.²¹

In *Mikes v. Straus*, the Second Circuit cautioned that the false certification theory should not be read expansively to cover medical standard of care conditions

because the False Claims Act was not designed for use as a blunt instrument to enforce compliance with all medical regulations--but rather only those regulations that are a precondition to payment--and to construe the impliedly false certification theory in an expansive fashion would improperly broaden the Act's reach.²²

Rather than using the false certification theory to enforce compliance with *all* medical regulations, the court pointed out that using it to enforce prerequisites to payment in the health care field

reconciles, on the one hand, the need to enforce the Medicare statute with, on the other hand, the active role actors outside the federal government play in assuring that appropriate standards of medical care are met. Interests of federalism counsel that "the regulation of health and safety matters is primarily, and historically, a matter of local concern."²³

Footnote continued from previous page

conditions of payment, nor was denial of payment the government's only remedy). *See also* cases cited in John T. Boese, Civil False Claims and *Qui Tam* Actions § 2.03 n. 565 (3d ed. 2006 & Supp. 2008-1).

²⁰ No. 2:99-cv-2097, 2007 WL 4380006 (W.D. Tenn. Dec. 17, 2007). The reader should note that the author was one of the attorneys representing the defendants in this case.

²¹ *Id.* at *4.

²² 274 F. 3d 687, 699 (2d Cir. 2001).

²³ *Id.* at 700 (quoting *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985); *accord* *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996)

Recent decisions on the false certification theory of liability in health care cases include the following:

- *United States ex rel. Crews v. NCS Healthcare of Ill., Inc.*, 460 F.3d 853, 858 (7th Cir. 2006) (conviction for making false statement about compliance with regulations on storage and handling of medications not a false claim because false certification alleged must be a prerequisite to payment).
- *United States ex rel. Yeager v. Medquest Assocs., Inc.*, No. 1:03-cv-00777-MHT-TFM, 2007 WL 3205285 (M.D. Ala. Oct. 31, 2007) (dismissing claims against defendant based on absence of certifications of compliance with Stark or AKS leading to payment by the government to which defendant was not entitled).
- *United States v. Rogan*, 459 F. Supp. 2d 692, 717 (N. D. Ill. 2006) (finding that compliance with AKS was condition of payment under Medicaid).
- *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.*, 459 F. Supp. 2d 1081, 1089 (D. Kan. 2006) (“plethora of healthcare laws and statutes” establishing standards of care or conditions of participation with which defendant certified compliance were not express conditions of payment, nor was denial of payment the government’s only remedy).

See also:

- *United States ex rel. Hendow v. University of Phoenix*, 461 F. 3d 1166 (9th Cir. 2006) (since the University allegedly violated a regulation banning enrollment incentive compensation, upon which payment was expressly conditioned in three ways, the complaint alleged statements and conduct that violated the FCA).
- *United States ex rel. Graves v. ITT Educational Servs., Inc.*, 284 F. Supp. 2d 487 (S.D. Tex. 2003) , *aff'd*, 2004 WL 2376217(5th Cir. Oct. 20, 2004) (dismissing FCA allegations involving restriction on enrollment incentive compensation because certifications of compliance with all applicable laws were not prerequisite to payment).

B. The Materiality Standard

In determining whether a claim or statement is false or fraudulent, most courts either explicitly or implicitly require an additional factor commonly known as “materiality” in order to find liability under the False Claims Act. Confronted with the growing number of false certification cases, courts have naturally been forced to sift through those regulatory, statutory, and/or contractual violations that are material to the government's payment decisions and those that are not. In this process, the courts have struggled with the problem of the proper test of materiality to apply. A sharp conflict has developed in the circuits over what the proper test should be. Decisions discussing materiality fall into two groups: those that require the government (or relator) to meet a higher standard of materiality (the “prerequisite to payment” test) and those that require a lower standard (the “capable of influencing” test).

The Second Circuit in *United States ex rel. Mikes v. Straus*,²⁴ provided a very stringent test for materiality (while stating that it was not deciding whether materiality was an essential element of FCA liability) which was dependent on whether the claim “certifies compliance with a statute or regulation as a condition to government payment.” In *United States ex rel. Harrison v. Westinghouse Savannah River Co. (Harrison II)*,²⁵ on the other hand, the Fourth Circuit applied a lower standard, which based materiality on the “potential effect of the false statement when it is made.”

In *United States ex rel. Landers v. Baptist Memorial Health Care Corp.*, the court noted that the alleged noncompliance with Medicare's conditions of participation could lead the government to take corrective action or even to terminate the defendants' participation in the program, but found that there was no evidence showing that it would lead to nonpayment of the defendants' claims. Applying the Sixth Circuit's "natural tendency" test of materiality to the alleged false certifications of compliance with the conditions of participation, the court found that

Conditions of Participation do not condition payment on certifications of compliance. Therefore, any alleged false certifications of compliance would not have a natural tendency to influence the Government's payment decisions.²⁶

Both tests of materiality continue to be applied, but in the area of health care regulation, particularly when allegations are based on violations of conditions of participation, the Second Circuit's analysis in *Mikes* is often applied so that the test of materiality includes a prerequisite to payment requirement.

See, e.g.:

- *United States ex rel. Pogue v. Diabetes Treatment Ctrs.*, No. 99-3298 (RCL), 2007 U.S. Dist. LEXIS 81730 (D.D.C. Nov. 6, 2007) (allowing into evidence expert witness testimony that HHS did not view compliance with anti-kickback laws as a condition precedent to government's decision to pay Medicare claims).
- *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, No. 2:99-CV-00086, 2007 U.S. Dist. LEXIS 67896, at *2 (D. Utah Sept. 12, 2007) (rejecting allegation premised on condition of participation rather than prerequisite to payment by Medicare).
- *United States ex rel. Mathews v. HealthSouth Corp.*, No. 99-604, 2007 U.S. Dist. LEXIS 52397 (W.D. La. July 18, 2007) (holding that compliance with the 75 percent rule

²⁴ 274 F.3d 687, 697 (2d Cir. 2001).

²⁵ 352 F.3d 908, 923 (4th Cir. 2003).

²⁶ No. 2:99-cv-2097, 2007 WL 4380006, at *5 (W.D. Tenn. Dec. 17, 2007).

was not material based on the finding that there was no evidence that noncompliance would have necessarily resulted in payment).

C. Causation

Section 3729(a)(1) of the FCA imposes liability on any person who “knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval.” Liability under this provision specifically requires a causal link between the defendant and the false submission to the government, but the Act does not include a definition of causation. Principles of causation from tort law have been applied by some courts, but their application to FCA allegations can stretch these principles beyond their legal foundations. Since the provisions of the civil FCA and the criminal false claims statute were historically the same until relatively recently, and in view of the FCA's punitive nature, a strong argument has been made for strictly construing undefined or ambiguous provisions such as causation under the FCA as is the case under criminal statutes.

Decisions on the developing test for causation under the FCA include:

- ***United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah***, 472 F.3d 702 (10th Cir. 2006). In *Sikkenga*, the Tenth Circuit applied the tort standard of proximate cause to determine whether the district court's dismissal of allegations that a Utah Medicare carrier's acceptance of a disputed code caused providers to submit false claims to Medicare. Applying that standard, the court noted that the carrier had engaged in certain actions—such as assuring providers that it would continue to accept claims with the disputed code—that assisted the providers in continuing to file false claims. *Id.* at 714-15.

Judge Hartz concurred in the court's decision that the complaint encompassed an allegation that the carrier caused the providers to submit false claims, but would not apply tort principles to judge FCA causation because of the punitive nature of the FCA and its long-term congruence with the criminal false claims statute. *Id.* at 733-34.

- ***United States ex rel. Schmidt v. Zimmer, Inc.***, 386 F.3d 235 (3d Cir. 2004) (noting that, under causation principles of negligence law, jury could find that Zimmer caused false filing if it was a "normal consequence of the situation created by" Zimmer's marketing scheme).
- ***United States ex rel. Drescher v. Highmark, Inc.***, 305 F. Supp. 2d 451 (E.D. Pa. 2004) (cautioning the government that basing causation on medical insurers' incorrect denial or incorrect payment of claims and subsequent submission of false claims by secondary insurer was "novel" theory that would require evidence of direction and control on medical insurer's part and few options on the part of secondary insurers).
- ***United States ex rel. Franklin v. Parke-Davis***, No. Civ. A. 96-11651PBS, 2003 WL 22048255 (D. Mass. Aug. 22, 2003) (applying theory of proximate cause to find that

Parke-Davis could have foreseen that its marketing of Neurontin would result in medical professionals' submission of false Medicaid claims).

D. Intent Defined as "Knowledge"

Liability may be imposed under the FCA if it is proved that the defendant “knowingly” violated the FCA. Under Section 3729(b), a defendant is deemed to have acted knowingly if the defendant (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. No proof of specific intent to defraud is required, except for conspiracy claims under § 3729(a)(3).

Almost all courts seem to agree that "reckless disregard" means something more than negligence, but less than intent.²⁷ Recently, in *Safeco Insurance Co. v. Burr*,²⁸ the Supreme Court held that when a defendant's interpretation of an ambiguous statutory provision is reasonable, even if it is incorrect, the defendant is not in reckless disregard of the provision, regardless of subjective intent, when no authoritative guidance from courts or the regulating government agency has been given on the ambiguity. The Court found that "reckless disregard" was an objective standard, requiring an "unjustifiably high" risk of harm that is known or reasonably should have been known.

Although the standard of intent addressed in *Safeco* was in the Federal Credit Reporting Act rather than the FCA, there is no rational basis for distinguishing the Court's approach to reckless disregard in that context from others, including the FCA, where the same standard of intent applies.²⁹

E. Rule 9(b) Defenses

Rule 9(b) of the Federal Rules of Civil Procedure requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." Every major federal court of appeals has held that Rule 9(b) applies to FCA complaints. Courts have also held that the rule serves a number of important purposes:

²⁷ See, e.g., *Minnesota Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp.*, 276 F.3d 1032, 1053 (8th Cir. 2002) ("it is important to remember that the standard for liability is knowing, not negligent, presentation of a false claim"); *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F. 3d 810, 815-16 (9th Cir. 1995) ("The requisite intent is the knowing presentation of what is known to be false,' as opposed to innocent mistake or mere negligence"); *United States ex rel. Mathews v. HealthSouth Corp.*, 140 F.Supp.2d 706 (W.D. La. 2001) (dismissing relator's claims, holding that at worst, relator alleged that defendant negligently failed to monitor its compliance with applicable Medicare regulations).

²⁸ 127 S. Ct. 2201 (2007).

²⁹ See Roger S. Goldman, Katherine A. Lauer Eric S. Volkman, *The Real Good News from GEICO: Reasonable Interpretations Negate Scienter Under the False Claims Act*, GOV'T CONT., Nov. 19, 2007, at 6.

- it eliminates fraud actions in which all of the facts are learned through discovery;
- it requires plaintiffs to provide defendants with sufficient notice of the allegations to allow defendants to mount a defense, including the filing of dispositive motions;
- it protects defendants from unwarranted harm to their goodwill and reputation; and
- plaintiffs are prevented from unilaterally imposing the high costs of litigation on society without sufficient factual basis.³⁰

Rule 9(b) is often discussed in the context of FCA procedure. However, Rule 9(b) also plays a significant role in defining the boundaries of *liability* under the False Claims Act. Two approaches by courts in applying Rule 9(b) to FCA complaints are particularly noteworthy. First, courts hold that it is not sufficient to provide a list of alleged statutory, contractual, and/or regulatory violations with the expectation that discovery can be used to buttress those allegations into colorable FCA claims.³¹ Second, and more importantly, in defining what must be pled under a particular theory of liability, courts are also defining what must be *proven* in order to succeed with an FCA case. Increasingly, they have required detailed information about the false claims submitted to the government to be pled.

See, e.g.:

- *United States ex rel. Atkins v. McInteer*, No. 04-16167, 2006 WL 3461441 (11th Cir. Dec. 1, 2006) (finding that, as in *Clausen*, without professing first hand knowledge of any false claims, relator's descriptions of patients, dates, and medical records for services alleged to be ineligible for reimbursement, were insufficient under 9(b)).
- *United States ex rel. Rost v. Pfizer Inc.*, 4446 F. Supp. 2d 6 (D. Mass. 2006) (granting motion to dismiss because complaint did not identify an actual false claim submitted to the government for an off-label prescription for Genotropin). The court observed that

[n]o matter how likely the existence of false claims, this court cannot speculate that such claims inevitably flowed from Defendants' activities. Without specific details of even one actual false claim that was submitted to any federal or state government, Plaintiff fails to satisfy Rule 9(b)'s heightened pleading requirements. . . (footnote omitted). *Id.* at 28.

F. The Public Disclosure Bar and the Original Source Exception

The "public disclosure bar" in Section 3730(e)(4)(A) of the FCA prohibits an action that is based upon public disclosure of:

³⁰ See John T. Boese, *Civil False Claims and Qui Tam Actions*, § 5.04 (Aspen Publishers 3d ed. 2006 & Supp. 2008-1) (citing cases).

³¹ *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, No. 03-1901, 2004 WL 324465 (1st Cir. Feb. 23, 2004); *United States ex rel. Clausen v. Laboratory Corp. of Am., Inc.*, 290 F.3d 1301, 1313 n.24 (11th Cir. 2002); *United States ex rel. Russell v. Epic Healthcare Mgmt. Group*, 193 F.3d 304, 309 (5th Cir. 1999).

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, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.³²

If the allegations or transactions have been publicly disclosed, an exception in Section 3730(e)(4)(B) allows an action to be brought only by the Attorney General, or by a person who is an "original source" of the information. Section 3730(e)(4)(B) defines "original source" as

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.³³

The purpose of the public disclosure/original source bar is to limit *qui tam* enforcement to persons who know the details of the fraud and thus help the government recover losses from fraud that would otherwise go undetected. Applying these poorly drafted provisions has resulted in numerous conflicting interpretations of the statutory terms.

Several of conflicting interpretations of the public disclosure bar and the original source exception were resolved in the Supreme Court's decision in *Rockwell International Corp. v. United States ex rel. Stone* in March of 2007.³⁴ Among the Court's conclusions in *Rockwell* were the following holdings: the public disclosure and original source provisions are jurisdictional and must be satisfied at every stage of the proceeding; the information relevant to these provisions is not the publicly disclosed information, but information on which the relator's allegations are based; and the relator's knowledge must cover the information on which the allegations in the complaint—as amended—are based.

See also:

- *United States ex rel. Bly-Magee v. Premo*, 470 F.3d 914 (9th Cir. 2006) (finding that a state audit report was within the meaning of public disclosure under Section 3730(e)(4)(A)), *cert. denied*, (U.S. Jan. 22, 2008).
- *United States ex rel. Rost v. Pfizer Inc.*, 446 F. Supp. 2d 6 (D. Mass. 2006) (adopting minority view that "based upon" means "derived from" rather than "supported by").

³² 31 U.S.C. § 3730(e)(4)(A).

³³ 31 U.S.C. §3730(e)(4)(B).

³⁴ 127 S. Ct. 1397 (2007).

- *United States ex rel. Mistick PBT v. Housing Auth.*, 186 F.3d 376, 388 (3d Cir. 1997) ("a *qui tam* action is 'based upon' a qualifying disclosure if the disclosure sets out either the allegations advanced in the *qui tam* action or all of the essential elements of the *qui tam* action's claims").

G. The FCA's Statute of Limitations, Government Knowledge, and Relation- Back

Under the FCA's statute of limitations provisions in Section 3731(b), an action 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.

One of the factors considered in determining when the statute of limitations begins to run under this provision is when the material facts are known or reasonably should have been known by an appropriate government official.

In *United States v. Baylor University Medical Center*,³⁵ the Second Circuit decided that the dates on which the government's complaints-in-intervention were filed--2002 and 2003--commenced the government's suits for statute of limitations purposes. Since the alleged FCA violations occurred from 1986 to 1995, the government's allegations based on these violations were time-barred under the six-year statute of limitations in Section 3731(b)(1), the court held. The three-year tolling provision in Section 3731(b)(2) did not rescue the government's claims, the court found, because the relator's *qui tam* complaint gave the government knowledge of the alleged violations. The statutory period therefore commenced to run when it was filed in 1994.

An important related issue in *Baylor* was whether the government's claims could relate-back to the relator's complaint under Rule 15. Rule 15(c)(2) provides:

An amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading.

The Second Circuit declined to apply this rule to allow the government's complaint in intervention to relate back to the original complaint based on the incompatibility of the scheme created under the False Claims Act with Rule 15(c)(2). The court noted that Section 3730(b) of the FCA, which authorizes relators to bring suit on behalf of the government under seal, deprives

³⁵ 469 F.3d 263 (2d Cir. 2006).

defendants of the notice usually given by a complaint.³⁶ The court found that the secrecy of this scheme was not compatible with notice to defendants, which is the touchstone of Rule 15(c)(2)'s relation-back mechanism:

Under [Rule] 15(c), the central inquiry is whether adequate notice of the matters raised in the amended pleading has been given to the opposing party within the statute of limitations by the general fact situation alleged in the original pleading.³⁷

Since defendants did not receive notice of the *qui tam* complaint and the core requirement for relation-back of subsequent amendments to the original complaint was not met, the court held that the statute of limitations continued to run.

H. State False Claims Laws

Twenty-two states and the District of Columbia have enacted state false claims laws with *qui tam* enforcement provisions. These states are:

California
Delaware
Florida
Georgia
Hawaii
Illinois
Indiana
Louisiana
Massachusetts
Michigan
Montana
Nevada
New Mexico
New Hampshire
New Jersey
New York
Oklahoma
Rhode Island
Tennessee
Texas
Virginia
Wisconsin.

³⁶ *Baylor*, 469 F.3d at 269.

³⁷ *Id.* at 270 (quoting *Rosenberg v. Martin*, 478 F.2d 520, 526 (2d Cir. 1973)).

These state laws have been critical in many fraud investigations in health care and other industries. Five of these are limited to certain types of healthcare fraud.³⁸

A large number of these laws were enacted in response to a financial incentive provision in the Deficit Reduction Act of 2005 ("DRA") that became effective on January 1, 2007. Under this incentive provision, states with false claims laws that are "at least as effective" as the federal FCA receive a ten percent reduction in the amount they owe to the federal government under Medicaid.³⁹ The Office of the Inspector General of the Health and Human Services Department assesses these state false claims laws to determine whether they qualify for the incentive, and has basically required them to strictly conform to the federal law.⁴⁰ More of these state false claims laws are expected to be enacted. FCA bills were recently introduced in Arkansas, Colorado, Connecticut, Iowa, Minnesota,, North Carolina, Pennsylvania, Ohio, and South Carolina.

³⁸ The *qui tam* statues of Georgia, Louisiana, Michigan, New Hampshire, and Texas are limited to health care fraud. New Mexico and Tennessee have both general and health care fraud *qui tam* statutes.

³⁹ See J. Boese, *Quietly Expanding Qui Tam: Federal Law Encourages New State False Claims Acts*, WLF Legal Opinion Letter (March 10, 2006), available at <http://www.wfl.org/upload/boese.pdf>. See also FraudMail Alert No. 06-02-08, available at <http://friedlive.icvmgroup.net/siteFiles/ffFiles/fm060208.pdf>.

⁴⁰ See FraudMail Alert No. 06-08-18, available at <http://friedlive.icvmgroup.net/siteFiles/ffFiles/fm060818.pdf>

FALSE CLAIMS ACT*
31 U.S.C.

§3729. False claims

(a) LIABILITY FOR CERTAIN ACTS.- - Any person who - -

(1) 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;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) 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, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) 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;

(6) 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

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

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that - -

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such

violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) **KNOWING AND KNOWINGLY DEFINED.** For purposes of this section, the terms "knowing" and "knowingly" 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 no proof of specific intent to defraud is required.

(c) **CLAIM DEFINED.** - - For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property 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.

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

(e) **EXCLUSION.** - - This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1954.

§3730. Civil actions for false claims

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

(b) **ACTIONS BY PRIVATE PERSONS.**

(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any

such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60 day period or any extensions obtained under paragraph (3) the Government shall - -

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) RIGHTS OF THE PARTIES TO QUI TAM ACTIONS.

(1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as - -

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so

requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60 day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion is not subject to judicial review.

(d) AWARD TO QUI TAM PLAINTIFF. - -

(1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceedings, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) CERTAIN ACTIONS BARRED.

(1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in section 201(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative proceeding in which the Government is already a party.

(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, 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.

(f) **GOVERNMENT NOT LIABLE FOR CERTAIN EXPENSES.** The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) **FEES AND EXPENSES TO PREVAILING DEFENDANT.** In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who 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 shall include reinstatement with the same seniority status such employee 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 in the appropriate district court of the United States for the relief provided in this subsection.

§3731. False claims procedure

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

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

§3732. False claims jurisdiction

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

(b) Claims under state law.--The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local Government if the action arises from the same transaction or occurrence as an action brought under section 3730.

*31 U.S.C. § 3733, containing the False Claims Act's Civil Investigative Demand provisions, is intentionally omitted because of its length.

FRAUD STATISTICS - OVERVIEW

October 1, 1986 - September 30, 2007

FY	NEW MATTERS ¹		SETTLEMENTS AND JUDGMENTS ²				RELATOR SHARE AWARDS ³			
	NON QUI TAM	QUI TAM	NON QUI TAM ²	QUI TAM		TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINE	TOTAL	
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED					TOTAL
1987	340	31	86,479,949	0	0	0	86,479,949	0	0	0
1988	210	43	173,287,663	2,309,354	33,750	2,343,104	175,630,767	88,750	8,437	97,187
1989	221	88	197,202,180	15,111,719	1,681	15,113,400	212,315,580	1,446,770	200	1,446,970
1990	240	75	189,564,367	40,483,367	75,000	40,558,367	230,122,734	6,590,936	20,670	6,611,606
1991	234	84	270,445,467	70,384,431	154,500	70,538,931	340,984,398	10,667,537	18,750	10,686,287
1992	285	113	137,358,206	134,549,447	994,456	135,543,903	272,902,109	24,196,648	259,784	24,456,432
1993	304	138	181,945,576	183,643,787	6,078,000	189,721,787	371,667,363	27,576,235	1,766,902	29,343,137
1994	279	219	706,022,897	379,018,205	2,822,323	381,840,528	1,087,863,425	69,453,350	838,896	70,292,246
1995	232	269	269,989,642	239,024,292	1,635,000	240,659,292	510,648,934	45,162,296	465,800	45,628,096
1996	186	344	247,357,271	124,361,203	13,390,011	137,751,214	385,108,485	22,119,619	3,731,978	25,851,597
1997	187	546	465,568,061	621,919,274	6,021,200	627,940,474	1,093,508,535	65,857,419	1,658,485	67,515,904
1998	118	467	151,435,793	438,834,846	30,248,075	469,082,921	620,518,714	70,264,372	8,486,645	78,751,017
1999	140	493	195,390,485	492,924,785	5,067,503	497,992,288	693,382,773	63,018,064	1,374,487	64,392,551
2000	95	363	367,887,197	1,208,715,188	1,688,957	1,210,404,145	1,578,291,342	183,682,977	375,143	184,058,120

FRAUD STATISTICS - OVERVIEW

October 1, 1986 - September 30, 2007
Civil Division, U.S. Department of Justice

FY	NEW MATTERS ¹		SETTLEMENTS AND JUDGMENTS ²				RELATOR SHARE AWARDS ³			
	NON QUI TAM	QUI TAM	NON QUI TAM ²	QUI TAM		TOTAL QUI TAM AND NON QUI TAM	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINE	TOTAL	
			TOTAL	WHERE U.S. INTERVENED OR OTHERWISE PURSUED	WHERE U.S. DECLINED					TOTAL
2001	86	311	492,196,974	1,167,531,786	128,587,151	1,296,118,937	1,788,315,911	186,908,812	30,701,881	217,610,693
2002	62	318	119,598,292	1,077,375,794	25,786,140	1,103,161,934	1,222,760,226	160,914,076	4,582,319	165,496,395
2003	92	334	703,003,368	1,512,457,284	5,185,911	1,517,643,195	2,220,646,563	331,873,857	1,382,741	333,256,598
2004	120	431	115,656,023	557,080,136	9,261,879	566,342,015	681,998,038	110,113,220	2,376,128	112,489,348
2005	107	406	276,914,983	1,148,057,102	7,081,143	1,155,138,245	1,432,053,228	168,409,043	1,911,560	170,320,603
2006	85	384	1,714,824,081	1,482,048,337	22,493,863	1,504,542,200	3,219,366,281	218,392,497	5,598,336	223,990,833
2007	128	356	559,255,115	1,436,468,132	15,370,120	1,451,838,252	2,011,093,367	173,221,033	4,169,498	177,390,531
TOTAL	3,751	5,813	7,621,383,590	12,332,298,469	281,976,663	12,614,275,132	20,235,658,722	1,939,957,511	69,728,640	2,009,686,151

NOTES:

- "New Matters" refers to newly received referrals, investigations, and *qui tam* actions.
- Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
- Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

FRAUD STATISTICS - HEALTH & HUMAN SERVICES¹

October 1, 1986 - September 30, 2007
Civil Division, U.S. Department of Justice

FY	NEW MATTERS ²		SETTLEMENTS AND JUDGMENTS ³			TOTAL QUI TAM AND NON QUI TAM
	NON QUI TAM	QUI TAM	NON QUI TAM ³	QUI TAM		
			T O T A L	TOTAL	RELATOR SHARE ⁴	
1987	12	3	11,361,826	0	0	11,361,826
1988	8	5	2,182,675	355,000	88,750	2,537,675
1989	20	16	350,460	5,099,661	50,000	5,450,121
1990	27	11	10,327,500	903,158	119,474	11,230,658
1991	22	12	8,670,735	5,420,000	861,401	14,090,735
1992	29	15	9,821,640	2,192,478	446,648	12,014,118
1993	22	38	12,523,165	151,760,404	22,946,101	164,283,569
1994	42	76	381,470,015	6,520,815	1,185,597	387,990,830
1995	26	87	96,290,779	85,681,789	14,803,782	181,972,568
1996	20	179	63,059,873	51,576,698	9,374,568	114,636,571
1997	50	274	351,440,027	579,079,581	58,872,855	930,519,608
1998	35	275	40,107,920	258,638,736	47,822,301	298,746,656
1999	28	315	38,000,792	408,128,379	45,492,385	446,129,171
2000	36	210	208,899,015	725,011,203	115,759,246	933,910,218
2001	35	177	433,549,179	900,260,345	147,318,543	1,333,809,524
2002	24	194	74,567,427	960,450,528	153,825,657	1,035,017,955
2003	26	219	536,834,879	1,287,796,031	279,770,601	1,824,630,910
2004	28	275	34,816,447	475,370,142	97,434,278	510,186,589
2005	34	271	204,821,548	911,972,558	122,597,758	1,116,794,106
2006	18	223	1,047,745,714	1,239,957,154	166,506,405	2,287,702,868
2007	22	196	461,582,993	1,084,809,242	153,138,241	1,546,392,235
TOTAL	564	3,071	4,028,424,609	9,140,983,902	1,438,414,591	13,169,408,511

NOTES:

1. The information reported in this table covers matters in which the Department of Health and Human Services is the primary client agency.
2. "New Matters" refers to newly received referrals, investigations, and *qui tam* actions.
3. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

FRAUD STATISTICS - DEPARTMENT OF DEFENSE¹

October 1, 1986 - September 30, 2007
Civil Division, U.S. Department of Justice

FY	NEW MATTERS ²		SETTLEMENTS AND JUDGMENTS ³			
	NON QUI TAM	QUI TAM	NON QUI TAM ³	QUI TAM		TOTAL QUI TAM AND NON QUI TAM
			T O T A L	TOTAL	RELATOR SHARE ⁴	
1987	236	22	27,897,128	0	0	27,897,128
1988	122	28	149,136,213	33,750	8,438	149,169,963
1989	119	32	154,588,297	10,002,058	1,394,770	164,590,355
1990	74	41	117,715,978	21,743,463	3,804,470	139,459,441
1991	78	44	227,813,245	57,327,000	8,636,300	285,140,245
1992	73	61	62,003,695	129,294,456	23,874,784	191,298,151
1993	93	53	83,742,840	29,707,641	4,951,923	113,450,481
1994	62	82	226,083,266	370,666,206	68,163,879	596,749,472
1995	54	87	111,424,866	140,563,237	28,348,711	251,988,103
1996	44	81	78,085,099	61,833,653	12,522,473	139,918,752
1997	46	82	33,723,347	36,528,913	6,392,620	70,252,260
1998	29	62	71,063,139	150,180,185	20,511,801	221,243,324
1999	33	70	30,522,711	15,859,646	2,863,936	46,382,357
2000	10	46	53,007,693	96,287,825	15,812,059	149,295,518
2001	10	42	17,715,878	116,188,794	25,067,682	133,904,672
2002	16	44	15,017,365	19,407,658	2,957,196	34,425,023
2003	10	36	107,337,000	205,124,468	48,640,795	312,461,468
2004	16	50	10,098,491	17,684,000	3,031,610	27,782,491
2005	16	49	19,049,935	102,234,052	21,649,855	121,283,987
2006	13	74	586,430,385	48,809,599	10,488,996	635,239,984
2007	22	66	16,400,000	32,035,609	1,681,419	48,435,609
TOTAL	1,176	1,152	2,198,856,571	1,661,512,213	310,803,717	3,860,368,784

NOTES:

1. The information reported in this table covers matters in which the Department of Defense is the primary client agency.
2. "New Matters" refers to newly received referrals, investigations, and *qui tam* actions.
3. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

FRAUD STATISTICS - OTHER (NON-HHS, NON-DOD)¹

October 1, 1986 - September 30, 2007
Civil Division, U.S. Department of Justice

FY	NEW MATTERS ²		SETTLEMENTS AND JUDGMENTS ³			
	NON QUI TAM	QUI TAM	NON QUI TAM ³	QUI TAM		TOTAL QUI TAM AND NON QUI TAM
			T O T A L	TOTAL	RELATOR SHARE ⁴	
1987	92	6	47,220,995	0	0	47,220,995
1988	80	10	21,968,775	1,954,354	0	23,923,129
1989	82	40	42,263,423	11,681	2,200	42,275,104
1990	139	23	61,520,889	17,911,746	2,687,662	79,432,635
1991	134	28	33,961,487	7,791,931	1,188,586	41,753,418
1992	183	37	65,532,871	4,056,969	135,000	69,589,840
1993	189	47	85,679,571	8,253,742	1,445,113	93,933,313
1994	175	61	98,469,616	4,653,507	942,770	103,123,123
1995	152	95	62,273,997	14,414,266	2,475,603	76,688,263
1996	122	84	106,212,299	24,340,863	3,954,557	130,553,162
1997	91	190	80,404,687	12,331,980	2,250,430	92,736,667
1998	54	130	40,264,734	60,264,000	10,416,915	100,528,734
1999	79	108	126,866,982	74,004,263	16,036,231	200,871,245
2000	49	107	105,980,489	389,105,117	52,486,815	495,085,606
2001	41	92	40,931,918	279,669,798	45,224,468	320,601,716
2002	22	80	30,013,500	123,303,748	8,713,542	153,317,248
2003	56	79	58,831,489	24,722,697	4,845,202	83,554,186
2004	76	106	70,741,084	73,287,873	12,023,461	144,028,957
2005	57	86	53,043,500	140,931,636	26,072,989	193,975,136
2006	54	87	80,647,982	215,775,447	46,995,431	296,423,429
2007	84	94	81,272,122	334,993,400	22,570,872	416,265,522
TOTAL	2,011	1,590	1,394,102,410	1,811,779,018	260,467,847	3,205,881,428

NOTES:

1. The information reported in this table covers matters in which the primary client agency is neither the Department of Health and Human Services nor the Department of Defense.
2. "New Matters" refers to newly received referrals, investigations, and *qui tam* actions.
3. Non *qui tam* settlements and judgments do not include matters delegated to United States Attorneys' offices. The Civil Division maintains no data on such matters.
4. Relator share awards are calculated on the portion of the settlement or judgment attributable to the relator's claims, which may be less than the total settlement or judgment. Relator share awards do not include amounts recovered in subsection (h) or other personal claims. See 31 U.S.C. § 3730(h).

FRAUD STATISTICS
***QUI TAM* INTERVENTION DECISIONS & CASE STATUS**
 As of September 30, 2007

Civil Division, U.S. Department of Justice

	ACTIVE	SETTLEMENT OR JUDGMENT	DISMISSED	UNCLEAR	TOTAL
U.S. Intervened	93	947	52	2	1,094
U.S. Declined	363	212	3,170	7	3,752
Under Investigation					967
					5,813