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The Government's Main Weapon against Contractor Fraud

BY STEPHEN A. WOOD

The False Claims Act (FCA), 31 U.S.C. §§ 3729–3733, stands today as the federal government's primary anti-fraud weapon. The government has used this statutory scheme to extract major settlements and judgments from businesses across a wide variety of industries. The law applies to any organization or individual who does business with the federal government or whose business relies on payment by the federal government, directly or indirectly.

Broadly, the FCA imposes liability upon anyone who causes the government to pay money on a claim that is knowingly false in some material respect or who knowingly deprives the government of money or property, or conspires to do the same. Originally enacted during the Civil War, the law underwent major revision in 1986. Since that time, the government has collected in excess of $70 billion from defendants in settlements and judgments.[1] Congress continues to expand the reach of this law by incorporating anti-fraud provisions into other legislation and lowering hurdles to recovery.

The trend as to the number and size of judgments and settlements is increasing. The number of FCA suits rose from 200 or 300 on average in the 1980s to more than three times that number in some recent years.[2] Most of these suits were brought under the act's qui tam provisions—giving private citizens the right and incentive to pursue fraud claims on behalf of the government. In FY 2021, the federal government recorded $5.6 billion in settlements and judgments collected in civil cases involving fraud against the government, the second-largest one-year haul in the history of the law.[3]

No industry, organization, or person is exempt from this law. A review of the cases and Department of Justice press releases from the past 10 years reads like a Who's Who of America's leading companies. With increased incentives for whistleblower plaintiffs, reduced scienter requirements, and more state and local governments enacting versions of the FCA, enforcement efforts are likely to continue to increase.

Brief History of the False Claims Act

The FCA was enacted in 1863 in an effort to combat fraud perpetrated by suppliers to the Union Army.[4] It originally provided for civil penalties of $2,000 per false claim and doubling of the government's actual damages. It included provisions allowing private citizens to sue on behalf of the government, providing those "relators" with 50% of the amount the government recovered as a result of their cases. As with most of American law, the qui tam provisions of this law have their roots in the English common law. Qui tam is short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which translates literally to "who pursues this action on our Lord the King's behalf as well as his own."[5] Beginning as early as the 13th century, access to royal courts could only be gained by alleging harm to the King.[6]

In 1943, Congress passed significant amendments to the FCA, mainly altering the qui tam sections of the law largely as a result of a U.S. Supreme Court decision in *United States ex rel. Marcus v. Hess*.[7] In *Hess*, the relator alleged that contractors were involved in collusive bidding on government contracts. Those same defendants, however, had been criminally indicted prior to the filing of the relator's qui tam action. The Supreme Court nevertheless permitted the suit to proceed, finding that even if the relator was piggybacking on the criminal proceeding, the suit promoted the objectives of the FCA by allowing the government a greater recovery than it would receive solely from the imposition of a criminal penalty.[8] The 1943 amendments included a reduction in the relator's percentage recovery to 10% in the event the government participated in the case or 25% if it did not, and an outright prohibition on qui tam suits based on evidence or information already in the possession of the federal government. These changes prompted a dramatic decline in the number of qui tam actions.

By the 1980s, increased reports of fraud on the government, mainly in the area of defense procurement, likely a consequence of the expansion of defense spending during the Reagan administration, led to amendment of the FCA in

TIP: A robust compliance program informed by a thorough understanding of the False Claims Act's pitfalls is the main key to avoidance of liability.

1986. The recoverable damages increased from double to treble the government's losses. The statutory penalties were increased from $2,000 per false claim to a range from $5,000 to $10,000 per false claim.[9] The amendments increased the relator's recovery to a maximum of 25% in cases where the government intervened, and 30% in cases where the government elected not to intervene. What's more, a provision was added to permit relators to recover their attorney fees and costs. Finally, the 1986 amendments permitted a qui tam suit even where the government was in possession of the information as long as the relator was the original source of the information supplied to the government.

These amendments also resolved a dispute among the courts about whether it was necessary for the government to prove specific intent to defraud. The amended law required proof that the defendant either had actual knowledge of the falsity of the information or acted either in deliberate ignorance of it or with reckless disregard of the truth of the information.[10] The 1986 amendments also created a private right of action for any person who is discriminated or retaliated against for participating or aiding in an FCA enforcement action.[11] The prevailing claimant is entitled to recover double back pay, reinstatement, and any other relief necessary to make that person whole.[12]

In 2009, the Fraud Enforcement and Recovery Act (FERA) further amended the FCA. Notably, FERA codified a "materiality" requirement that previously existed as part of the common law, the logic being that not every false statement or representation made to the government should necessarily give rise to liability under the law. Only statements or representations that were material to the government's decision to pay the claim should lead to liability. Materiality is defined as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[13]

The 2010 passage of the Patient Protection and Affordable Care Act (ACA) and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) led to further refinements in the FCA. The ACA modified the public disclosure and original source limits on the FCA. The government now had "veto" authority to prevent dismissal of a qui tam suit despite public disclosure where it opposed dismissal.[14] The Dodd-Frank Act modified the provisions pertaining to retaliation. Now the FCA protects relators engaged in "lawful acts" as well as "other efforts to stop 1 or more violations" of the FCA.[15] And this protection extends to employees, contractors, and agents, as well as "associated others."[16]

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Elements of a Claim

The elements of a claim under the FCA are set forth in 31 U.S.C. § 3729(a)(1), delineated in seven subsections. As a general matter, conduct that knowingly causes the government to pay more than it is legally required to pay, or receive less than it is lawfully entitled to, gives rise to liability under the FCA. Under § 3729(a)(1)(A), the elements are:

1. the person must present or cause another to present a claim for payment or approval by the United States;
2. the claim must be false or fraudulent; and
3. the actor must know that the claim is false.[17]

Some courts have held that damages are not required if the foregoing elements are established. In that instance, statutory per-claim penalties can still be imposed.[18] These elements are discussed further below.

A claim for payment. The 1986 amendments defined "claim" as follows: "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."[19] In 2009, this was broadened to include claims for money or property regardless of whether the government had title to it, as long as the government provided the money or property or would reimburse a portion of it. The money or property also had to be expended on the government's behalf, or used for a government purpose.[20]

False or fraudulent. Falsity is an objective inquiry that requires consideration of all facts and circumstances. Often, an invoice is not false on its face, and consideration of the underlying contracts, regulations, etc., is necessary to determine whether it is false in fact.[21] Questions of falsity are often intertwined with the issue of intent, and the decisions on this issue often revolve around the exact meaning of contract and regulatory terms. Ambiguity tends to negate intent and/or falsity.[22]

Knowledge or intent. As noted above, the 1986 amendments relieved the government of the obligation to prove specific intent to defraud. The amended law required proof that the defendant either acted in deliberate ignorance of available information or with reckless disregard of the truth of the information.[23] Questions of ambiguity in the interpretation of contracts and regulations may lead to the conclusion that the defendant lacked intent as long as the defendant's interpretation is not unreasonable.[24] Also, circumstances involving mistake or mere negligence should not lead to liability.[25]

Materiality. Prior to the 2009 FERA amendments, the statute did not contain an explicit "materiality" requirement. Nonetheless, variously calling it materiality, causation, or reliance, most courts imposed such a requirement on the government and FCA relators. A materiality or reliance requirement prevents every knowing technical contract breach or regulatory violation—however minor—from becoming a basis for FCA liability.[26]

Causation. It should be obvious that the knowing submission of a false claim to the government does not result in FCA liability unless it is shown that this actually *caused* the government to make payment. Causation is an express element under 31 U.S.C. § 3729(a)(1)(A). As to the remaining bases for FCA liability, proof of causation is implicit. In many cases, the causal connection is clear. In some instances, however, the defendant's act is more attenuated or removed from the government's act of payment.[27]

Note that liability arises where one knowingly "causes another" to submit a claim that is false or fraudulent. Thus, liability under the FCA does not depend on the knowledge of the person actually submitting the claim. As long as someone in an organization acts knowingly in causing a business or contractor to submit a false claim, liability can arise. For example, where a final inspector signs off on work that they know was not done, it matters not that the department responsible for processing and submitting the claim for payment is unaware. Likewise, a subcontractor who knowingly submits a false statement of charges to the general contractor who then passes that along to the government violates the FCA.

Several courts have held that one who knowingly makes false statements in order to obtain a contract with the government can also be liable under the FCA. This is sometimes referred to as "fraud in the inducement." In one such case, the Supreme Court held that every claim for payment submitted after the defendant was found to be involved in collusive bidding was false.[28] FCA liability may also be found where one relies on a false record to get a claim paid,[29] where one participates in a conspiracy to submit a false claim,[30] or where one avoids an obligation to transmit money or property to the government.[31]

The latter is often referred to as a "reverse false claim." For liability to attach, there must be a clear obligation to pay that is not merely speculative or contingent. This provision was at issue in *United States v. Pemco Aeroplex, Inc.*[32] The defendant submitted a parts schedule to the Air Force showing that the defendant was in possession of an inventory of aircraft wings above what was necessary to fulfill its contract. The defendant valued the wings on the schedule between $750 and $1,125. The government agreed to sell the wings to the defendant for scrap, and the defendant later resold them for $1.5 million. Although a panel of the Eleventh Circuit Court of Appeals affirmed the district court's dismissal of the action, the appellate court, sitting en banc, vacated and reversed, holding that there was an obligation to either return the wings to the government or pay the government their fair value.[33]

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Qui Tam Actions under the False Claims Act

The qui tam provisions of the FCA permit someone other than the government, called a relator, to initiate an action under the FCA. The relator may pursue the action even if the government shows no interest in it or declines involvement. In the event of a recovery against the defendant, the relator shares in the recovery.

A relator brings an FCA action on behalf of the United States. Virtually anyone has standing to bring suit under the FCA as long as that person or entity possesses nonpublic knowledge of the fraud or was the original source of what has become public.[34] Note that this standing extends only to the pursuit of claims allowed under the FCA and does not extend to common-law claims or other claims that the government might bring (e.g., for common-law fraud, unjust enrichment, breach of contract, etc.) after it intervenes in an action.[35]

A relator who initiates an FCA action files the complaint under seal and serves the complaint upon the government along with a "written disclosure of substantially all material evidence and information the person possesses."[36] The purpose behind this requirement is to permit the government to investigate the claims to determine whether or not to intervene in the suit.[37] The complaint remains under seal for at least 60 days.[38] The statute permits the government to seek extensions of the 60-day time period "for good cause shown."[39]

At the expiration of the period of time allowed for investigation, the government must either (1) intervene in the action and take it over, (2) decline to intervene, (3) seek dismissal, or

(4) attempt to settle the claim. If the government declines to intervene, it can still attempt to do so later for "good cause."[40] If the government elects to intervene in the action, it has primary responsibility for prosecuting the action and is not bound by any acts or statements of the relator.[41] The relator may, nevertheless, continue as a party to the action.

If the government declines to intervene, the relator may still prosecute the case without government involvement. Even if the relator is ultimately successful in recovering against the defendant, the government will still share in at least 70% of the recovery. The government has the right, however, to pursue dismissal of the qui tam action as long as the relator is given notice and an opportunity for a hearing.[42] Government motions for dismissal under 31 U.S.C. § 3730(c)(2)(A) have been the subject of significant litigation in recent years, with some courts holding the government's dismissal authority to be beyond the purview of the courts, while others have held that the government must identify a valid government purpose and a rational relation between dismissal and accomplishment of that purpose.[43]

The relator receives a share of the recovery from an action brought under the FCA along with reasonable expenses, including attorney fees.

As noted, the relator receives a share of the recovery from an action brought under the FCA. Where the government has intervened, the relator's recovery is limited to between 15% and 25%, with the exact percentage subject to the discretion of the court. The statute offers little guidance beyond "the extent to which the person substantially contributed to the prosecution of the action."[44] The Department of Justice has issued a memorandum listing several nonexclusive factors that should be considered in negotiating or adjudicating a relator's share of the recovery.[45] When the relator pursues an FCA action without government involvement, the percentage of the recovery increases to a range of between 25% and 30%.[46]

The relator's share of any recovery can be reduced if the court finds that the relator was involved in perpetrating the fraud.[47] If the relator was someone who planned and initiated the violation that led to the FCA action, the court has discretion to reduce the award as it deems appropriate, regardless of whether the government intervenes in the action. If the relator is prosecuted and convicted of criminal violations in connection with the fraud, however, the relator must be dismissed from the action without prejudice to the government's right to pursue it.[48]

The FCA also allows the relator to recover, upon motion, an amount for reasonable expenses, including reasonable attorney fees and costs, incurred in prosecuting the action, whether the relator recovers by way of judgment or settlement.[49]

Out of concern that relators could be subject to retaliation for bringing claims under the FCA, Congress, as part of the 1986 amendments, incorporated a statutory cause of action that can be asserted by anyone subject to discharge or discrimination in the terms and conditions of employment for lawful actions taken in furtherance of an action brought under the FCA.[50] Relators so claiming were entitled to "all relief necessary to make the person whole."[51] The amendments of 2009 modified the class of persons protected to make clear that independent contractors who were harmed by retaliatory actions of an FCA defendant were also covered. The definition of protected conduct was amended further in the Dodd-Frank Act of 2010 to make clear that the protection applied to persons acting in furtherance of an FCA action, or engaged in other "efforts to stop 1 or more violations of this subchapter."[52] The relator must be engaged in conduct protected under the FCA, not merely in the assigned duties of employment, and there must be a causal nexus between the relator's conduct and the adverse employment action.[53]

Damages and Penalties

Section 3729(a)(1) provides that the government recovers "3 times the amount of damages" it incurs as a result of the defendant's illegal act. The calculation is logically stated as the amount of money the government actually paid less the amount it would have paid had the claim not been false.[54] Damages in cases where the government is charged incorrectly for services or products provided—either billed for something not provided or overcharged—are relatively easy to determine.

In the event of a reverse false claim, the basic formula can be restated as the difference between what the government received and what it would have received absent knowing falsity. In the simplest case, where there is a failure to pay an amount owing under a contract (a lease payment, for example), the government's damages will equal the amount withheld. But the damages can be particularly difficult to determine when the underlying obligation is unclear or contingent.[55]

In cases involving substandard products or services, the central determinant is the value assigned to the product or service supplied. In *United States v. Bornstein*, a substandard product case, the Supreme Court adopted a "benefit of the bargain" formula: the difference between the market value of the product received and the market value of the product contracted for.[56] In *United States ex rel. Roby v. Boeing Co.*, another substandard product case, an Army helicopter crashed as a result of a defective transmission gear, resulting in a total loss of the aircraft.[57] The majority in *Roby* rejected the defendant's argument that the benefit of the bargain formula would limit the damages to the cost of the defective component, noting that the defendant billed the government for the cost of the helicopter as a unit.[58]

In addition to damages, the FCA imposes penalties for each false claim. The case law reveals wide variability in the manner of calculating the number of claims and penalty assessments. Although the FCA provides for a penalty range, the statute provides no guidance to courts on how to determine the amount of the per-claim penalty within that range.[59] Most courts have held that penalties should attach to each demand for payment, as opposed to each false record submitted with a single demand for payment.[60]

Defenses and Responses to Claims

Public disclosure, lack of original source, first-to-file bar. As noted, proper relators must, under the statute, bring their claims based on information that has not been disclosed to the public.[61] Alternatively, if the information is in the public domain, the relator must be the original source of the information.[62] These requirements, if not met, can serve as a basis for dismissal of the qui tam action.[63] The first-to-file bar prevents subsequent relators from piggybacking on the efforts of the first relator to file by precluding qui tam actions based on the same facts that gave rise to the first-filed action.[64]

Failure to plead fraud with particularity under Rule 9(b). Federal Rule of Civil Procedure 9(b) imposes special pleading requirements in cases of fraud: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." To pass muster under this rule, a plaintiff must usually identify dates, names of persons, names of products, statements made, documents used, amounts at issue, etc.[65] Allegations of fraud are subjected to heightened pleading requirements for various reasons. They imply, for example, a violation of moral, not just legal, principles and thus present greater reputational harm.[66]

Statute of limitations. Actions brought under the FCA, either by the government or by a qui tam relator, must be timely. The 1986 amendments to the FCA provided that civil actions must be brought within six years after the date on which the violation is committed, or within three years of the date an official of the United States charged with responsibility to act knew or should have known of the facts material to the right of action, whichever occurs later, but in no event more than 10 years after the date on which the violation occurred.[67] This statute thus incorporates a limitations period, a discovery rule or tolling provision that can extend the period (three years after facts were known or knowable), and a statute of repose that precludes liability more than 10 years post-violation. Although the statute states that the limitations clock commences on the date the violation is committed, it provides no further guidance as to when, for limitations purposes, a violation exists. Courts have differed on this issue.[68]

Lack of materiality, lack of scienter, lack of falsity. Although these are elements of the plaintiff's case-in-chief, and thus not defenses per se, they nevertheless represent key issues upon which FCA liability, more often than not, fundamentally depends. The burden of proof on these elements remains with the plaintiff. If the plaintiff lacks proof on one of these issues, the FCA defendant should be entitled to summary judgment.[69]

Counterclaims against the relator and third-party actions. Where the relator engaged in wrongdoing of some sort that causes damage or harm to the defendant, the defendant may be able to assert a counterclaim. Typically, courts have not favored counterclaims for contribution or indemnity.[70] Claims that seek to shift liability from the defendant to a relator caught up in the fraud have been met with disfavor, with courts holding that such counterclaims would have a chilling effect on fraud reporting.[71] This prohibition, however, does not necessarily apply to actions against third parties.[72]

State and Municipal False Claims Laws

A majority of states have enacted legislation modeled on the federal FCA, and nearly all of these incorporate qui tam provisions offering financial incentives to private litigants. While most are similar to the FCA, these laws have various unique or distinguishing features. Frequently, qui tam plaintiffs allege violations not only of the federal law but also of the state law where fraudulent conduct is alleged to have impacted both the state and federal treasuries. A detailed description of state false claims laws is beyond the scope of this article.

Some cities have followed suit by enacting local laws prohibiting fraud and offering incentives to whistleblowers to pursue false claims. The City of Chicago enacted an ordinance in 2005 that incorporated many of the provisions of the Illinois state and federal acts.[73] The law was later amended to provide for protection of whistleblowers from retaliation.[74] It varies from the federal law in certain respects. For example, the law allows for liability in the event of a false claim made in connection with a bid or proposal, even when the bid or proposal was rejected by the city.[75] New York City also has adopted a municipal version of the FCA.[76]

Conclusion

The foregoing discussion provides an overview of the key liability and damages provisions of the False Claims Act, as well as the unique qui tam section of the law that permits private persons to bring claims in the name of the federal government in exchange for a share of the recovery. As noted at the outset, FCA claims and litigation have been on the rise for more than a decade. Companies that depend on government revenue (federal, state, or local) need to be aware of the pitfalls associated with this law so that they can implement robust compliance programs aimed at avoiding potential violations, as well as effectively defend these claims when they are brought. ◄

Notes

1. *See* Press Release, U.S. Dep't of Just., Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021 (Feb. 1, 2022), https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year.

2. *Id.*

3. *Id.* The government's 2021 recoveries eclipsed FY 2020 due primarily to the first quarter 2021 recovery of $2.8 billion from Purdue Pharmaceuticals stemming from the company's role in the opioid crisis.

4. Erickson *ex rel.* United States v. Am. Inst. of Biological Scis., 716 F. Supp. 908, 915 (E.D. Va. 1989).

5. *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000).

6. *See* Note, *The History and Development of Qui Tam*, 1972 Wash. U. L.Q. 81, 85 (1972).

7. 317 U.S. 537 (1943).

8. *See id.* at 545.

9. Today, these penalties are adjusted for inflation pursuant to the Bipartisan Budget Act of 2015, and range from $12,537 to $25,076 per FCA violation. *See* 28 C.F.R. § 85.5.

10. *See* 31 U.S.C. § 3729(b).

11. *See id.* § 3730(h).

12. *Id.* The amendments also included a provision that reduced the damages recoverable against a defendant who voluntarily disclosed and cooperated with the government to "not less than 2 times the amount of damages." *See id.* § 3729(a).

13. *Id.* § 3729(b)(4). The U.S. Supreme Court added its gloss to the materiality requirement in *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016) (holding that the materiality requirement is "demanding"). In *Escobar*, the Supreme Court held that the law supported liability for a category of "false certification" claims, involving the express or implied certification of compliance with contract or regulatory requirements.

14. *See* 31 U.S.C. § 3730(e)(4)(A).

15. *Id.* § 3730(h).

16. *Id.*

17. United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Ins. Co., 721 F. Supp. 1247, 1258–59 (S.D. Fla. 1989).

18. *See* United States *ex rel.* Aakhus v. Dyncorp, Inc., 136 F.3d 676, 681 (10th Cir. 1998).

19. 31 U.S.C. § 3729(c) (1986).

20. *See, e.g.*, United States *ex rel.* Laird v. Lockheed Martin Eng'g & Sci. Servs. Co., 491 F.3d 254, 260 (5th Cir. 2007) (contract underbid not a false claim).

21. *See, e.g.*, United States v. Davis, 803 F. Supp. 830 (S.D.N.Y. 1992), *aff'd in part and rev'd in part sub nom.* United States v. Gen. Dynamics Corp., 19 F.3d 770 (2d Cir. 1994) (evidence bearing on falsity of claims relating to cost estimations).

22. *See, e.g.*, United States *ex rel.* Wilson v. Kellogg Brown & Root, Inc., 525 F.3d 370, 378 (4th Cir. 2008) (relator cannot base a claim on nothing more than his interpretation of imprecise contract term); Crane Helicopter Servs., Inc. v. United States, 45 Fed. Cl. 410 (1999) (government failed to prove falsity where the evidence on issue of defendant's knowledge and accuracy of representations made to the Federal Aviation Administration was equivocal).

23. *See* 31 U.S.C. § 3729(b).

24. *See, e.g.*, United States *ex rel.* Oliver v. Parsons Co., 195 F.3d 457, 464 (9th Cir. 1999) (good faith nature of defendant's interpretation of accounting regulation precluded FCA liability).

25. *See* Wang v. FMC Corp., 975 F.2d 1412, 1421 (9th Cir. 1992) ("known to be false" does not include that which is merely untrue, but rather that which is a lie; "[t]he Act is concerned with ferreting out 'wrongdoing,' not scientific errors").

26. *See* United States *ex rel.* Berge v. Bd. of Trs. of the Univ. of Ala., 104 F.3d 1453, 1459 (4th Cir. 1997) (making explicit the government's burden to prove materiality in FCA actions). The FERA amendments codified this requirement at 31 U.S.C. § 3729(a)(1). In the wake of the Supreme Court's decision in *Escobar*, *supra* note 13, the FCA's materiality requirement has become a significant focus of dispute in litigation.

27. *See, e.g.*, United States *ex rel.* Franklin v. Parke-Davis, Div. of Warner-Lambert Co., No. 96-11651PBS, 2003 WL 22048255, at *4–5 (D. Mass. Aug. 22, 2003) (using tort principles, finding defendant's actions to be substantial factor in causing payment in "off-label" drug promotion case); *cf.* United States *ex rel.* Sikkenga v. Regence Bluecross Blueshield of Utah, 472 F.3d 702, 734 (10th Cir. 2006) (cautioning against using tort principles to construe a statute that is punitive in nature).

28. *See* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 543–44 (1943); United States *ex rel.* Lamers v. City of Green Bay, 168 F.3d 1013, 1018 (7th Cir. 1999).

29. 31 U.S.C. § 3729(a)(1)(B).

30. *Id.* § 3729(a)(1)(C).

31. *Id.* § 3729(a)(1)(G).

32. 166 F.3d 1311, 1312 (11th Cir.), *reh'g granted and opinion vacated*, 179 F.3d 1327 (11th Cir.), *and on reh'g en banc*, 195 F.3d 1234 (11th Cir. 1999).

33. The FERA amendments brought about changes to reverse false claims liability. It was no longer necessary to prove specific intent to avoid payment or an obligation. Mere knowledge was sufficient. Obligation is defined as "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." 31 U.S.C. § 3729(b)(3).

34. *See id.* § 3730(e)(4). Prior to the 2010 enactment of the ACA, the public disclosure requirement was held to be jurisdictional. Rockwell Int'l Corp. v. United States, 549 U.S. 457, 467–68 (2007). With the enactment of the ACA, this provision was amended to direct the court to "dismiss" an action where there was advance

public disclosure, unless the government opposed dismissal, or unless the action was brought by the government or the relator was the original source of the information. 31 U.S.C. § 3730(e)(4)(A).

35. *See* United States *ex rel.* O'Keefe v. McDonnell Douglas Corp., 918 F. Supp. 1338 (E.D. Mo. 1996).

36. 31 U.S.C. § 3730(b)(2).

37. An issue that arises with some frequency is the discoverability of the relator's written disclosure to the government. To the extent attorney work product is included in the disclosure to government attorneys, some courts, after conducting an in camera review, have declined to order production. *See, e.g.*, Grand *ex rel.* United States v. Northrop Corp., 811 F. Supp. 333 (S.D. Ohio 1992). *But see* United States *ex rel.* Burns v. A.D. Roe Co., 904 F. Supp. 592, 593 (W.D. Ky. 1995) (disclosure not protected by work-product doctrine). *See also* United States *ex rel.* Yannacopolous v. Gen. Dynamics, 457 F. Supp. 2d 854, 860 (N.D. Ill. 2006) (ordering sealed filings by government to be unsealed).

38. 31 U.S.C. § 3730(b)(2).

39. *Id.* § 3730(b)(3).

40. *See id.* § 3730(c)(3).

41. *Id.* § 3730(c)(1).

42. *Id.* § 3730(c)(2)(A).

43. *See* Swift v. United States, 318 F.3d 250, 252 (D.C. Cir. 2003); *cf.* United States *ex rel.* Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1145 (9th Cir. 1998) (affirming district court's ruling that government's right to dismiss is subject to judicial review).

44. 31 U.S.C. § 3730(d)(1).

45. *See* United States *ex rel.* Alderson v. Quorum Health Grp., Inc., 171 F. Supp. 2d 1323, 1333–34 (M.D. Fla. 2001) (referring to the guidelines and noting that they might be useful as a checklist for negotiation).

46. 31 U.S.C. § 3730(d)(2).

47. *See id.* § 3730(d)(3).

48. *Id.*

49. *Id.* § 3730(d)(1).

50. *See id.* § 3730(h).

51. 31 U.S.C. § 3730(h) (1986).

52. 31 U.S.C. § 3730(h).

53. *See* McBride v. Peak Wellness Ctr., Inc., 688 F.3d 698, 704 (10th Cir. 2012) (reporting violation of internal procedures was not protected and did not overcome presumption plaintiff was acting in accord with employment duties; presumption can be overcome by notifying defendant of intent to bring or assist in bringing FCA action); United States *ex rel.* Williams v. Martin-Baker Aircraft Co., 389 F.3d 1251, 1262 (D.C. Cir. 2004) (temporal association between relator's report to government and discharge was evidence of causation).

54. *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 785–86 (2000). This holds unless, of course, the defendant avails itself of the provision pertaining to voluntary disclosure, in which case its damages may be limited to merely *double*.

55. *See, e.g.*, United States v. Universal Fruits & Vegetables Corp., 370 F.3d 829 (9th Cir. 2004) (defendant shipped goods through South Korea to avoid an anti-dumping duty; $2 million verdict overturned on appeal because this was an attempt to collect customs duties, jurisdiction over which lies in the Court of International Trade).

56. 423 U.S. 303, 316 n.13 (1976); *see also* United States *ex rel.* Roby v. Boeing Co., 302 F.3d 637, 646–47 (6th Cir. 2002).

57. 302 F.3d at 646–47.

58. *Id.*

59. *See, e.g.*, United States v. Peters, 927 F. Supp. 363, 369 (D. Neb. 1996) (assessing $5,000 penalty per claim because government already recovered a windfall from the trebling of damages); United States v. Murphy, 937 F.2d 1032, 1035 (6th Cir. 1991) (maximum penalty awarded government due to defendant's prior involvement in bid-rigging).

60. *See, e.g.*, *Bornstein*, 423 U.S. at 309 n.4.

61. 31 U.S.C. § 3730(e)(4)(A) ("The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) from the news media[.]").

62. *See id.*

63. *See id.*

64. *Id.* § 3730(b)(5).

65. *See* United States *ex rel.* Ge v. Takeda Pharm. Co., 737 F.3d 116, 123 (1st Cir. 2013).

66. *See* Segal v. Gordon, 467 F.2d 602, 607 (2d Cir. 1972) (specificity requirement intended to protect reputations of defendants resulting from vague accusations of serious wrongdoing).

67. 31 U.S.C. § 3731(b).

68. *See, e.g.*, United States *ex rel.* Kreindler & Kreindler v. United Techs. Corp., 985 F.2d 1148 (2d Cir. 1993) (violation committed when the claim is paid by the government). *But see* United States *ex rel.* Bauchwitz v. Holloman, 671 F. Supp. 2d 674 (E.D. Pa. 2009) (statute commences when the false grant application was submitted).

69. *See* Universal Heath Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176 (2016) (unanimous decision approving implied certification theory of liability, but holding that the materiality standard is demanding).

70. *See* United States *ex rel.* Head v. Kane Co., 668 F. Supp. 2d 146, 153 (D.D.C. 2009) (allowing counterclaim for defamation); United States *ex rel.* Madden v. Gen. Dynamics Corp., 4 F.3d 827, 831 (9th Cir. 1993) (allowing counterclaims for breach of fiduciary duty and misappropriation of trade secrets).

71. *See* United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 190 F.3d 963, 967 (9th Cir. 1999) (dismissing counterclaim for contribution or indemnity against relator).

72. *See* Cell Therapeutics Inc. v. Lash Grp., Inc., 586 F.3d 1204 (9th Cir. 2009) (allowing third-party action for indemnification).

73. Chi., Ill., Mun. Code §§ 1-21-010 to 1-22-060.

74. *Id.* § 2-152-171.

75. *Id.* § 1-22-010.

76. N.Y.C. Admin. Code §§ 7-801 to -810.