OVERVIEW OF FALSE CLAIMS ACT

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A. Background.

The False Claims Act (FCA), 31 U.S.C. §§ 3729 - 3733 was enacted in 1863 to deal with widespread fraud by suppliers of goods to the Union Army during the Civil War. The FCA provided that any person who knowingly submitted false claims to the government was liable for double the government's damages plus a penalty of $2,000 for each false claim. Since then, the FCA has been amended several times. In 1986, there were significant changes to the FCA, including increasing damages from double damages to treble damages and raising the penalties from $2,000 to a range of $5,000 to $10,000. The FCA has been amended three times since 1986. Over the life of the statute it has been interpreted in hundreds of sometimes conflicting federal courts decisions.

B. Liability.

§ 3729(a) describes the conduct that creates FCA liability. §§ 3729(a)(1)(A) and (B) provide for FCA liability for any person who knowingly submits a false claim to the government or causes another to submit a false claim to the government or knowingly makes a false record or statement to get a false claim paid by the government. §3729(a)(1)(G) is known as the reverse false claims section; it provides liability where one acts improperly – not to get money from the government, but to avoid having to pay money to the government. § 3729(a)(1)(C) creates liability for those who conspire to violate the FCA. §§ 3729(a)(1)(D), (E), and (F) are rarely invoked.

C. Definition of Claim

The FCA defines a claim as a demand for money or property made directly to the Federal Government or to a contractor, grantee, or other recipient if the money is to spent on the government's behalf and if the Federal Government provides any of the money demanded or if the Federal Government will reimburse the contractor or grantee.

1. FCA liability attaches to express and implied false certification. *Ebeid v. Lungwitz*, 616 F. 3d 993 (9th Cir. 2010)
    a. Express false certification means that the entity seeking payment certifies compliance with a law, rule or regulation as part of the process through which the claim for payment is submitted.
    b. Implied false certification occurs when an entity has previously undertaken to expressly comply with a law, rule or regulation and that obligation is implicated by submitting a claim for payment even a

certificate of compliance is not required in the process of submitting the claim.

2. Includes false estimates and underbidding.
3. The FCA does not apply to tax claims under the Internal Revenue Code.

D. Scienter

To violate the FCA a person must have knowingly submitted, or caused to be submitted, a false claim (or made a false statement or record). §3729(b)(1) defines knowingly as: (1) actual knowledge, (2) deliberate ignorance of the truth or falsity of the information, or (3) reckless disregard of the truth or falsity of the information.

E. Materiality

§3729(b)(4) defines "material" as " having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

F. Damages

After listing the seven types of conduct that result in FCA liability, the statute provides that one who is liable must pay a civil penalty of between $5,000 and $10,000 for each false claim (those amounts are adjusted from time to time; the current amounts are $5,500 to $11,000) and treble the amount of the government's damages. Where a person who has violated the FCA reports the violation to the government under certain conditions, the FCA provides that the person shall be liable for not less than double damages.

G. Qui Tam provisions.

The FCA allows private persons to file suit for violations of the FCA on behalf of the government. A suit filed by an individual on behalf of the government is known as a "*qui tam*" action, and the person bringing the action is referred to as a "relator."

1. Filing a qui tam complaint.

The *qui tam* provisions begin at § 3730(b) of the FCA; § 3730(b)(1) states that a person may file a *qui tam* action. § 3730(b)(2) provides that a *qui tam* complaint must be filed with the court under seal. The complaint and a written disclosure of all the relevant information known to the relator must be served on the U.S. Attorney for the judicial district where the *qui tam* was filed and on the Attorney General of the United States.

2. Government investigation

The *qui tam* complaint is initially sealed for 60 days. The government is required to investigate the allegations in the complaint; if the government cannot complete its investigation in 60 days, it can seek extensions of the seal period while it continues its investigation. The government must then notify the court that it is proceeding with the action (generally referred to as "intervening" in the action) or declining to take over the action, in which case the relator can proceed with the action.

3. Rights of the parties in a *qui tam* action

If the government intervenes in the *qui tam* action it has the primary responsibility for prosecuting the action. § 3730(c)(1). It can dismiss the action, even over the objection of the relator, so long as the court gives the relator an opportunity for a hearing (§ 3730(c)(2)(A)) and it can settle the action even if the relator objects so long as the relator is given a hearing and the court determines that the settlement is fair. § 3730(c)(2)(B). If a relator seeks to settle or dismiss a *qui tam* action, it must obtain the consent of the government. § 3730(b)(1). When the case is proceeding, the government (§ 3730(c)(2)(C)) and the defendant (§ 3730(c)(2)(D)) can ask the court to limit the relator's participation in the litigation.

4. Award to the relator

If the government intervenes in the *qui tam* action, the relator is entitled to receive between 15 and 25 percent of the amount recovered by the government through the *qui tam* action. If the government declines to intervene in the action, the relator's share is increased to 25 to 30 percent. Under certain circumstances, the relator's share may be reduced to no more than ten percent. If the relator planned and initiated the fraud, the court may reduce the award without limitation. The relator's share is paid to the relator by the government out of the payment received by the government from the defendant. If a *qui tam* action is successful, the relator also is entitled to legal fees and other expenses of the action by the defendant. All of these provisions are in § 3730(d) of the FCA. The FCA also provides that if the government chooses to obtain a recovery from the defendant in certain types of proceedings other than the relator's FCA suit, this is known as an alternate remedy and the relator is entitled to the same share of the recovery as if the recovery was obtained through the relator's FCA suit. §3730(c)(5).

5. Statutory bars to *qui tam* actions

The FCA provides several circumstances in which a relator cannot file or pursue a *qui tam* action:

a. The relator was convicted of criminal conduct arising from his or her role in the FCA violation. § 3730(d)(3).

b. Another *qui tam* concerning the same conduct already has been filed (this is known as the "first to file bar"). §3730(b)(5).

c. The government already is a party to a civil or administrative money proceeding concerning the same conduct. §3730(e)(3).

d. The *qui tam* action is based upon information that has been disclosed to the public through any of several means: criminal, civil, or administrative hearings in which the government is a party, government hearings, audits, reports, or investigations, or through the news media (this is known as the "public disclosure bar.") §3730(e)(4)(A). There is an exception to the public disclosure bar where the relator was the original source of the information.

6. Other defenses

1. Civil Rule 8(a) – plausibility of claim under *Ashcroft v. Iqbal*
2. Civil Rule 9(b) – specificity
3. Statute of Limitations. Note: 4th Cir. and S.D. Tex. have held that the FCA six-year limitations period tolled by the Wartime Suspension of Limitations Act.