

# Understanding the False Claims Act

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WITH PRACTICAL LAW LITIGATION

A Practice Note providing an overview of the False Claims Act (FCA) and highlighting the most important issues for counsel to consider when defending an FCA action. Specifically, this Note explains the key FCA liability provisions, the main differences between *qui tam* cases and cases where the government is involved, corollary state FCAs that may be applicable in certain cases, the potential defenses that may be asserted, and the damages and penalties a defendant faces if it is found liable under the FCA.

In the last three decades, the FCA, 31 U.S.C. §§ 3729-3733, has become the primary tool in the government's arsenal to combat fraud on the government. The FCA was enacted during the Civil War to address procurement fraud by suppliers to the Union Army, but was rarely used until it was amended in 1986. The 1986 amendments, along with amendments in 2009 and 2010, strengthened several key provisions of the statute, including the whistleblower and damages provisions, making it easier for the government and whistleblowers to file suit.

The FCA has been so effective that the government has been able to recover more than \$35 billion since 1986, of which almost \$9 billion was recovered in 2012 and 2013 (see *US Dep't of Justice, Civil Division, Fraud Statistics - Overview (Dec. 23, 2013)*). The government and whistleblowers' success under the FCA has been based primarily on five factors:

- **Mandatory treble damages.** These are reduced to mandatory double damages if the company self-discloses fraudulent activity.
- **Mandatory civil penalties of up to \$11,000 per false claim.** In cases concerning federal reimbursements, each invoice is considered a separate false claim.
- **Strong whistleblower incentives.** A whistleblower bringing a suit on behalf of the government can receive up to 30% of the recovery.

- **A permissive knowledge requirement.** "Knowledge" under the FCA includes reckless disregard and deliberate ignorance, not just actual knowledge.
- **Exposure of contractors to liability.** An entity or individual may be liable not only for directly submitting a false claim, but also for causing the submission of a false claim.

Although certain industries have been targeted for FCA enforcement, understanding FCA liability is important for any entity or person that does business, directly or indirectly, with the government. This Note examines:

- The potential liability under the FCA, including the specific types of conduct that the statute targets (see *Liability under the FCA*).
- The main differences between FCA cases prosecuted solely by private litigants and cases where the government is involved (see *Bringing an FCA Suit*).
- Corollary state FCAs that may be applicable in certain cases (see *State FCAs and Other Relevant Statutes*).
- Motions to dismiss an FCA complaint and other defenses that may be asserted in FCA cases (see *Moving to Dismiss an FCA Complaint and Defenses in an FCA Action*).
- The damages and penalties a defendant faces if found liable under the FCA (see *Damages and Penalties*).
- Steps that a company can take to minimize exposure to FCA liability, including implementing a strong compliance program and considering self-disclosure of any conduct subject to the FCA (see *Minimizing FCA Exposure*).

## LIABILITY UNDER THE FCA

The FCA creates liability for conduct involving fraud on the government. In particular, the statute:

- Identifies seven specific types of prohibited conduct (see *FCA Violations*).
- Applies a broad knowledge standard (see *Broad Knowledge Standard*).
- Imposes liability on contractors and other third parties (see *Contractor Liability*).
- Gives rise to liability for certain false implied statements (see *False Certification Liability*).



## FCA VIOLATIONS

The two liability provisions that are most often used in FCA litigation are:

- **The false claims provision.** This creates liability for knowingly presenting, or causing to be presented, a false or fraudulent claim for payment (31 U.S.C. § 3729(a)(1)(A)).
- **The false statement provision.** This creates liability for knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim (31 U.S.C. § 3729(a)(1)(B)).

A person or entity may also be liable under the FCA for:

- A reverse false claim, which involves improper conduct to avoid paying the government or improper retention of an overpayment by the government (31 U.S.C. § 3729(a)(1)(G)).
- Conspiring to commit a violation of any of the other liability provisions (31 U.S.C. § 3729(a)(1)(C)). This provision is frequently used in multi-defendant FCA litigations.

Other, less frequently invoked provisions of the FCA impose liability for:

- Knowingly and improperly withholding part or all of the government's money or property (31 U.S.C. § 3729(a)(1)(D)).
- Intending to defraud the government by making or delivering (with the authority to do so) a document certifying receipt of property used, or to be used, by the government without completely knowing if the information on the receipt is true (31 U.S.C. § 3729(a)(1)(E)).
- Knowingly buying, or receiving 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 is not permitted to sell or pledge the property (31 U.S.C. § 3729(a)(1)(F)).

The FCA also prohibits retaliatory actions against employees, contractors or agents who report or act to stop an FCA violation (31 U.S.C. § 3730(h)(1)).

Tax claims are specifically excluded from the FCA (31 U.S.C. § 3729(d)).

## BROAD KNOWLEDGE STANDARD

Liability under the FCA requires a defendant to act "knowingly," which the statute defines broadly to include:

- Actual knowledge.
- Deliberate ignorance of the truth or falsity of the information.
- Reckless disregard of the truth or falsity of the information.

Specific intent to defraud is not required. (31 U.S.C. § 3729(b)(1).)

## CONTRACTOR LIABILITY

The FCA imposes liability even where a company does not directly submit a claim to the government. A company may be liable for causing a false claim to be presented or made (31 U.S.C. § 3729(a)(1)(A)).

Indirect FCA liability is also supported by the FCA's definition of a "claim," which includes any request or demand for money or property made to a contractor, grantee or other recipient, if the money or property is:

- To be spent or used on the government's behalf, or to advance a government program or interest.

- Paid for or reimbursed by the government.

(31 U.S.C. § 3729(b)(2)(A)(ii).)

## FALSE CERTIFICATION LIABILITY

Traditional liability arises under the FCA when the government pays for products or services that a company knows, or is reckless in not knowing, are defective. False certification liability, by contrast, arises when a company fails to comply with ancillary requirements, such as contractual provisions, statutes and regulations.

A false certification can be either:

- **An express false certification.** This occurs when a company that submits a claim has expressly certified compliance with ancillary legal requirements, either accompanying the invoice for payment or at some other point.
- **An implied false certification.** This is based on the theory that a company implicitly certifies that it has complied with the relevant ancillary requirements each time it submits an invoice to the government for any work performed or product delivered, even if no express certification of compliance has been made.

The circuit courts are divided on the extent to which the implied false certification theory can give rise to FCA liability. In the seminal case on this issue, *U.S. ex rel. Mikes v. Straus*, the US Court of Appeals for the Second Circuit held that an implied certification theory is viable only where the underlying statute or regulation relied on by the plaintiff expressly states that the provider must comply with the statute or regulation to be paid (274 F.3d 687, 700 (2d Cir. 2001)). The following circuit courts of appeals have adopted the reasoning in *Mikes*:

- The Fifth Circuit (see *U.S. ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202, 206 (5th Cir. 2013) ("a false certification of compliance, without more, does not give rise to a false claim for payment unless payment is conditioned on compliance")).
- The Third Circuit (see *U.S. ex rel. Wilkins v. United Health Group, Inc.*, 659 F.3d 295, 306 (3d Cir. 2011)).
- The Sixth Circuit (see *U.S. ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 415 (6th Cir. 2002)).

Other circuits, including the DC Circuit, have not adopted the precondition to payment standard set out in *Mikes*. Instead, these courts permit claims under the implied false certification theory so long as they are based on a defendant's alleged non-compliance with a contractual or statutory provision or regulation that is material to the government's payment decision (see, for example, *United States v. Sci. Apps. Int'l Corp.*, 626 F.3d 1257, 1271 (D.C. Cir. 2010)).

## BRINGING AN FCA SUIT

Both the US Attorney General and private persons may bring a civil action under the FCA (31 U.S.C. § 3730). If brought by a private litigant, the government conducts an independent investigation to determine whether to file or intervene in an FCA suit. The FCA creates incentives for private litigants, who may receive up to 30% of any recovery, depending in part on whether the government intervenes.

## PRIVATE LITIGANTS

An action commenced by a private person is in the name of the government. The person filing the suit is referred to as the relator or *qui tam* plaintiff. The term *qui tam* is derived from a Latin phrase meaning "who as well for the king as for himself sues in this matter." *Qui tam* plaintiffs are generally (but are not required to be) employees or contractors of the defendant companies who have "blown the whistle" on the company's activities.

*Qui tam* plaintiffs commencing an FCA lawsuit must:

- File the complaint under seal.
- Give the government a copy of the complaint and substantially all material evidence and information they possess.

(31 U.S.C. § 3730(b)(2).)

The government uses the information provided by the *qui tam* plaintiff to investigate the claims and may elect to intervene in the case, which it must do within 60 days of receiving the complaint. However, courts routinely extend this 60-day time period for good cause shown. The defendant company is not served or otherwise formally made aware of the litigation while the complaint remains under seal.

## GOVERNMENT INTERVENTION IN A QUI TAM CASE

Whether the government intervenes in a *qui tam* case is a major factor in determining the probable outcome and recovery in the case. According to the Department of Justice (DOJ), settlements and judgments in FCA cases in which the government intervened total more than \$26 billion, compared to less than \$1 billion where the government declined to intervene (see DOJ's Fraud Statistics - Overview).

When the government intervenes in a suit, it takes the place of the *qui tam* plaintiff and assumes primary responsibility for prosecuting the case. The government also has the discretion to limit the participation of the *qui tam* plaintiff, who still remains a party to the action. In practice, the government often continues to rely on the assistance and resources of *qui tam* counsel, for example, to review and analyze documents produced by the defendant.

## CIVIL INVESTIGATIVE DEMANDS

The main tools at the government's disposal for FCA investigations are civil investigative demands (CIDs). The FCA authorizes the DOJ to use CIDs to conduct depositions, issue interrogatories and make document requests before the defendant is served with formal notice of the suit or the *qui tam* plaintiff's complaint is unsealed (31 U.S.C. § 3733).

The DOJ's use of CIDs increased exponentially after the 2009 amendments to the FCA. Whereas previously, all CIDs had to be signed and issued directly by the Attorney General, the amendments delegated the issuance of CIDs to an Attorney General's designee, making them easier for prosecutors to obtain. In 2011, the DOJ authorized 888 CIDs, which is more than ten times the number of CIDs issued in the two years prior to the amendments (see Press Release, Office of Pub. Affairs, DOJ, Acting Assistant Attorney General Stuart F. Delery Speaks at the American Bar Association's Ninth National Institute on the Civil False Claims Act and Qui Tam Enforcement (June 7, 2012)).

## QUI TAM PLAINTIFF'S RECOVERY

If the FCA case is successful, the *qui tam* plaintiff stands to collect a percentage of any judgment or settlement regardless of whether the government intervenes in the action. The *qui tam* plaintiff can collect:

- Between 25% and 30% of the proceeds of any judgment or settlement if the government does not intervene.
- Up to 25% of the proceeds if the government intervenes. The specific amount depends on the extent to which:
  - *Qui tam* counsel contributed to the prosecution of the action.
  - The action was based on disclosures and information provided by the *qui tam* plaintiff.

*Qui tam* plaintiffs are also entitled to reasonable expenses and attorneys' fees. (31 U.S.C. §§ 3730(d)(1)-(2).)

The court can, however, significantly reduce or completely eliminate the *qui tam* plaintiff's share of the recovery if either:

- The court determines that the *qui tam* plaintiff planned or initiated the underlying violation.
- The *qui tam* plaintiff is convicted of criminal conduct arising from its role in the alleged violation of the FCA, in which case it is dismissed from the civil action and does not receive any share of the proceeds.

(31 U.S.C. § 3730(d)(3).)

## STATE FCAS AND OTHER RELEVANT STATUTES

In addition to the federal FCA, litigants should be aware of potentially applicable state FCAs because *qui tam* plaintiffs are increasingly bringing suits under both federal and state laws (see, for example, *U.S. ex rel. Ge v. Takeda Pharm. Co.*, No. 10-11043, 2012 WL 5398564, at \*1 (D. Mass. Nov. 1, 2012), *aff'd*, 737 F.3d 116 (1st Cir. 2013) (alleging violations of the federal FCA and more than 20 state FCAs)).

Over 30 states and municipalities have enacted FCAs of their own, particularly after the Deficit Reduction Act of 2005 (DRA) created federal incentives for states to enact false claims laws targeting Medicaid fraud. The DRA amended Section 1909 of the Social Security Act, which now provides that states can recover for themselves a larger percentage of the federal recovery in state FCA suits involving Medicaid fraud. To be eligible for this increased incentive, the state law must comply with four requirements tethering it to standards found in the federal FCA. The state law must:

- Establish liability for the same false or fraudulent claims described in the federal FCA with respect to any federally-funded Medicaid expenditure.
- Be at least as effective in rewarding and facilitating *qui tam* actions for false or fraudulent claims as the federal FCA.
- Require an action to be filed under seal for 60 days with review by the Attorney General.
- Impose a civil penalty that is not less than the penalty authorized under the federal FCA.

(*Social Security Act* § 1909(b).)

While some state FCAs target only Medicaid fraud, others are as broad as (or even broader than) the federal FCA. For example, the New York FCA (*N.Y. State Fin. Law* §§ 187-194) includes liability for tax claims, which are specifically exempted under the federal statute.

## MOVING TO DISMISS AN FCA COMPLAINT

There are several defenses that can be made by entities or individuals facing an FCA complaint. Procedurally, a defendant may make a motion to dismiss to try to dispose of the case in the early stages of the lawsuit.

The most common grounds to dismiss FCA cases are:

- Failure to plead fraud with particularity under Federal Rule of Civil Procedure (FRCP) 9(b) (see *Failure to Plead Fraud with Particularity*).
- Failure to state a claim upon which relief can be granted under FRCP 12(b)(6) (see *Failure to State a Claim*).
- The public disclosure bar (see *Public Disclosure Bar*).
- The first-to-file bar (see *First-to-File Bar*).
- The statute of limitations (see *Statute of Limitations*).

### FAILURE TO PLEAD FRAUD WITH PARTICULARITY

The most common and effective motion to dismiss an FCA complaint is under FRCP 9(b) for failure to plead fraud with sufficient particularity. The circuit courts, however, are split on this pleading standard for FCA complaints.

The Eighth Circuit recently upheld the heightened pleading standard of FRCP 9(b), requiring an FCA complaint to plead facts such as:

- The time, place and contents of the defendant's false representations.
- The details of the defendant's fraudulent acts, including:
  - when the acts occurred;
  - who engaged in them; and
  - what was obtained as a result.

(*U.S. ex rel. Dunn v. N. Mem'l Health Care*, 739 F.3d 417, 420 (8th Cir. 2014).)

Other circuits have applied a more lenient standard.

The US Supreme Court denied a petition for writ of certiorari, declining to decide whether FRCP 9(b) requires an FCA complaint to allege with particularity that specific false claims were presented to the government for payment (as required by the Fourth, Sixth, Eighth and Eleventh Circuits), or whether it is sufficient to allege particular details of the scheme to submit false claims and sufficient indicia that false claims were submitted (as held by the First, Fifth, Seventh and Ninth Circuits) (see *U.S. ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451 (4th Cir. 2013), cert. denied, No. 12-1349, 2014 WL 1271321 (Mar. 31, 2014)).

### FAILURE TO STATE A CLAIM

Defendants may move to dismiss an FCA complaint under FRCP 12(b)(6) for failing to state a claim upon which relief can be granted, which is usually made in conjunction with an FRCP 9(b) motion. These motions are often filed in false certification cases. Common grounds for an FRCP 12(b)(6) motion include failure to adequately plead knowledge, falsity or materiality.

In *U.S. ex rel. Ge v. Takeda Pharmaceutical Co.*, for example, the defendant company failed to comply with certain Food and Drug Administration (FDA) reporting requirements for pharmaceuticals.

The relator alleged that every claim for the drugs at issue (including for Medicare or Medicaid reimbursement) contained an implied representation of compliance with the FDA reporting requirements. The court dismissed the complaint because the relator failed to demonstrate that compliance with the reporting requirements was a material precondition to payment from the government. (2012 WL 5398564, at \*5-6.)

### PUBLIC DISCLOSURE BAR

A *qui tam* action must be dismissed if substantially the same allegations or transactions in the complaint were publicly disclosed in any of the following:

- A federal criminal, civil or administrative hearing in which the government or its agent is a party.
- A congressional, Government Accountability Office or other federal report, hearing, audit or investigation.
- The news media.

(31 U.S.C. § 3730(e)(4)(A).)

There is an exception to the public disclosure bar if the relator is an "original source" of the information. To be an original source, the relator must have either:

- Conveyed the information to the government prior to the public disclosure.
- Had independent knowledge that materially adds to the publicly disclosed allegation and provided that information to the government before filing the FCA action.

(31 U.S.C. § 3730(e)(4)(B).)

In *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, the Supreme Court resolved a circuit court split on whether a federal agency's response to a Freedom of Information Act (FOIA) request disclosing an alleged fraud, is a federal "report" that would trigger the public disclosure bar. The relator in *Schindler* alleged that his former employer submitted hundreds of false claims regarding the veteran status of its employees, and supported his complaint using information obtained through an FOIA request to the Department of Labor. The court held that the FOIA response is a report within the definition of the public disclosure bar. (131 S. Ct. 1885, 1890-96 (2011).)

### FIRST-TO-FILE BAR

The first-to-file bar prevents a second relator from bringing another action based on the same facts underlying the pending action (31 U.S.C. § 3730(b)(5)). The first-to-file bar creates an incentive for relators to "race to the courthouse" to preserve their ability to receive part of the recovery.

The first-to-file bar keeps new claims out of court only while the related claims are still pending. Once the related claims are dismissed, these claims are no longer considered to be pending (*Kellog Brown & Root Services, Inc., et al. v. United States ex rel. Carter* (No. 12-1497, 2015 WL 2456621, at \*9 (May 26, 2015)); (holding that a second relator's *qui tam* claim was improperly dismissed with prejudice pursuant to the first-to-file bar where the first relator's claim was dismissed for failure to prosecute)).

## STATUTE OF LIMITATIONS

The statute of limitations for federal FCA claims is either:

- Six years after the date on which the violation is committed.
- Three years after the date when the US official responsible to act in the circumstances knew of or reasonably should have known the facts material to the right of action, but not more than ten years after the date on which the violation is committed.

(31 U.S.C. § 3731(b).)

Although courts are split on whether a *qui tam* plaintiff can take advantage of the three-year tolling provision, the majority of courts hold that the provision applies only to cases in which the government intervenes (see, for example, *U.S. ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 725-26 (10th Cir. 2006); *U.S. ex rel. Amin v. George Washington Univ.*, 26 F. Supp. 2d 162, 172 (D.D.C. 1998)). Other courts, however, hold that the tolling provision was intended to apply to *qui tam* plaintiffs, as well as the Attorney General (see, for example, *U.S. ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1216 (9th Cir. 1996)).

The Wartime Suspension of Limitations Act (WSLA) may also toll the FCA statute of limitations. If the US is at war, the WSLA suspends the statute of limitations for criminal offenses until five years after the termination of the war or hostilities (18 U.S.C. 3287). The WSLA does not toll the FCA statute of limitations for civil claims (*United States ex rel. Carter* (No. 12-1497, 2015 WL 2456621, at \*8 (May 26, 2015))).

## DEFENSES IN AN FCA ACTION

A defendant in an FCA action may assert defenses based on statutory requirements that *qui tam* plaintiffs or the government must satisfy to establish liability. These defenses may also serve as grounds for dismissal under FRCP 12(b)(6). They include:

- Lack of knowledge (see *Lack of Knowledge*).
- Lack of a false statement (see *Lack of Falsity*).
- Lack of materiality (see *Lack of Materiality*).

### LACK OF KNOWLEDGE

As discussed above, the FCA requires a defendant to act "knowingly," which includes actual knowledge, deliberate ignorance, or reckless disregard of the truth or falsity of information on which the claim is based (31 U.S.C. § 3729(b)(1)(A)). If the defendant does not possess the requisite knowledge, FCA liability cannot issue.

### Collective Knowledge

A defense based on lack of knowledge is used in cases against corporate defendants where the government cannot prove that any one person knew of the falsity of the relevant claims. In these cases, the government often attempts to satisfy the knowledge requirement by proving collective knowledge of the company's employees. The DC Circuit, however, rejected the collective knowledge theory because it allows "a plaintiff to prove scienter by piecing together scraps of 'innocent' knowledge held by various corporate officials, even if those officials never had contact with each other or knew what others were doing in connection with a claim seeking government funds" (*Sci. Apps. Int'l*, 626 F.3d at 1275 (quoting *U.S. ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 918 n.9 (4th Cir. 2003))).

### Prior Government Knowledge

While not a statutory defense under the FCA, courts have held that prior government knowledge and approval of facts underlying a false claim can negate the government's ability to prove a "knowing" submission of a false claim. When the government authorizes a false claim with knowledge of the facts underlying the claim, there is an inference that the defendant has not knowingly presented a false claim (see *U.S. ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 951-52 (10th Cir. 2008)). The Ninth Circuit, for example, found no evidence of fraud in certain testing done for the Air Force because the Air Force was aware of and approved the testing methods, even though they were not done as specified in the applicable contracts (*U.S. ex rel. Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1050-51 (9th Cir. 2012); see also *U.S. ex rel. Ubl v. IIF Data Solutions*, 650 F.3d 445, 452-53 (4th Cir. 2011)).

### LACK OF FALSITY

The terms "false" and "fraudulent" are not defined in the FCA, creating a pathway for various judicially constructed categories of falsity.

#### Factual vs. Legal Falsity

The straightforward case is factual falsity, which is a false statement of a fact (for example, an invoice states that 100 widgets were sold when only 50 were provided).

Legal falsity, on the other hand, arises when the claim is factually correct (100 widgets were provided), but it misrepresents compliance with underlying statutes, regulations or contract terms through an express or implied certification (see above *False Certification Liability*). In circuits where certified compliance must be a precondition to payment, a defendant can argue that the alleged falsity did not relate to a precondition of payment (see, for example, *Mikes*, 274 F.3d at 697 (joining the Fourth, Fifth, Ninth and DC Circuits in ruling that a claim under the FCA is legally false only where a party certifies compliance with a statutory condition to governmental payment)).

#### Reasonable Interpretation

A defendant can also argue lack of falsity where the alleged false claim is based on a reasonable interpretation of underlying contract terms or regulations. For example, the DC Circuit affirmed dismissal of FCA allegations that were premised on ambiguous requirements in certain mortgage notes. The court found that the defendant's interpretation of the ambiguous terms was reasonable and therefore a finding of "reckless disregard" as to the falsity of the information could not be supported. (*U.S. ex rel. K & R Ltd. P'ship v. Mass. Hous. Fin. Agency*, 530 F.3d 980, 983-84 (D.C. Cir. 2008); see also *Chapman Law Firm, LPA v. United States*, 103 Fed. Cl. 28, 46 (Fed. Cl. 2012) (applying the doctrine of *contra proferentem* in an FCA case and construing an ambiguous contract term against the government, who selected the language).)

### LACK OF MATERIALITY

The FCA specifically includes a materiality requirement for certain violations. Defendants are liable:

- Under the false statement provision of the FCA only for a false statement that is material to a false or fraudulent claim (31 U.S.C. § 3729(a)(1)(B)).

- Under the reverse false claim provision of the FCA only for false records or statements material to an obligation to pay the government (31 U.S.C. § 3729(a)(1)(G)).

The FCA defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment of receipt of money or property" (31 U.S.C. § 3729(b)(4)).

### DAMAGES AND PENALTIES

A company found in violation of the FCA is liable for:

- A civil penalty of \$5,500 to \$10,000 (as adjusted from time to time), plus three times the amount of damages the government sustains (31 U.S.C. § 3729(a)(1)).
- The costs of bringing the civil action to recover penalties and damages (31 U.S.C. § 3729(a)(3)).

### REDUCED DAMAGES

The court may reduce the treble damages to double damages if:

- The company furnished to the government all information about the violation within 30 days after the date on which the company first obtained the information.
- The company fully cooperated with any government investigation into the violation.
- At the time of the self-disclosure:
  - a criminal prosecution, civil action or administrative action had not been commenced with respect to the violation; and
  - the company did not have actual knowledge of the existence of an investigation into the violation.

(31 U.S.C. § 3729(a)(2).)

### DAMAGES IN A RETALIATION ACTION

In the case of a retaliation action, a prevailing employee may be entitled to:

- Reinstatement with the same seniority status.
- Twice the amount of back pay plus interest.
- Compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

(31 U.S.C. § 3730(h)(2).)

### DAMAGES MULTIPLIER

There is a circuit court split on the method used to calculate the doubling or trebling of damages when there are potential offsets. Courts use either:

- **The gross multiplier rule.** Under this rule, the court trebles the amount paid by the government and only then subtracts any value received by the government.
- **The net multiplier rule.** Under this rule, the court deducts the value received by the government from the single damages figure before it is trebled or doubled.

The gross multiplier rule is derived from the decision of the Supreme Court in *United States v. Bornstein*, where the court held that "damages should be [multiplied] before any compensatory payments are

deducted, because that method of compensation most faithfully conforms to the language and purpose of the Act" (423 U.S. 303, 314 (1976); see also *United States v. Eghbal*, 548 F.3d 1281, 1285 (9th Cir. 2008) (citing *Bornstein* in support of the gross multiplier rule)).

However, the Seventh Circuit recently rejected the gross multiplier approach to calculating damages (*United States v. Anchor Mortgage Corp.*, 711 F.3d 745, 751 (7th Cir. 2013)). In adopting the net multiplier rule, the Seventh Circuit joined the Second, Sixth and DC Circuits (see *U.S. ex rel. Feldman v. van Gorp*, 697 F.3d 78, 87-88 (2d Cir. 2012); *United States v. United Techs. Corp.*, 626 F.3d 313, 321-22 (6th Cir. 2010); *Sci. Apps. Int'l*, 626 F.3d at 1278-79).

### EXCESSIVE FINES

The amount of penalties under the FCA may be limited by the Eighth Amendment to the US Constitution, which prohibits imposing excessive fines (*U.S. Const. amend. VIII*). Challenges under the Excessive Fines Clause have been brought against FCA judgments in cases where there are a large number of false claims, but each individual claim involves a small or negligible amount of actual damages. Additionally, in federal reimbursement cases, where each invoice can trigger a separate mandatory penalty of at least \$5,500, these cumulative penalties can substantially outweigh the actual damages.

The Fourth Circuit, however, recently held that a \$24 million FCA penalty is not an excessive fine even where the relator failed to prove economic harm (*U.S. ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 409 (4th Cir. 2013)).

The action was commenced in the district court, when the relator alleged that the defendant moving companies had engaged in a price-fixing agreement in connection with their bid for a contract to move military members' household goods. At trial, the relator declined to pursue a damages judgment and focused solely on the statutory violations, which are easier to prove. Based on 9,136 invoices the defendant had submitted, the district court calculated that the minimum civil penalty under the FCA was \$50,248,000 (\$5,500 for each invoice) but deemed it unconstitutionally excessive and declined to impose a penalty. The plaintiff proposed to lessen the penalty to \$24 million, but the district court still found it grossly disproportionate to any harm caused by the defendants and in violation of the Eighth Amendment. (*U.S. ex rel. Bunk v. Birkart Globistics GmbH & Co., Nos. 02-1168, 07-1198, 2012 WL 488256, at \*14 (E.D. Va. Feb. 14, 2012).*)

On appeal, the Fourth Circuit reinstated the \$24 million dollar penalty as being within constitutional limits, noting that the amount appropriately reflected the gravity of the defendants' offenses and served as an appropriate deterrent (*Bunk*, 741 F.3d at 409). The case represents a boon to *qui tam* counsel in cases where damages are difficult to prove but the submission of a large number of false claims is not.

### MINIMIZING FCA EXPOSURE

Companies that do business with the government can minimize their exposure to FCA liability by:

- Implementing strong compliance programs (see *Compliance Programs*).
- Self-disclosing promptly any conduct that may be subject to the FCA (see *Self-Disclosure*).

In particular, the industries that have been the primary targets of FCA enforcement to date are:

- Pharmaceutical.
- Medical device.
- Healthcare.
- Financial services.
- Housing and mortgage.
- Insurance.
- Construction.
- Defense contracting.

Other industries that have been increasingly exposed to FCA liability are:

- Stimulus projects and alternative energy.
- Educational lending.
- Technology.

### COMPLIANCE PROGRAMS

A strong compliance program is an effective tool to avoid FCA exposure and minimize potential liability. Plaintiffs often use defendants' weak or non-existent compliance programs to support the argument that defendants acted with deliberate ignorance or reckless disregard of the allegedly unlawful conduct. Defendants may use a comprehensive and well-implemented compliance program to demonstrate that even if unlawful conduct did occur, it was carried out by rogue actors and without company knowledge or acquiescence.

Effective compliance programs include:

- A lead compliance officer at the senior management level.
- Requirements that middle management periodically certify FCA compliance for their units.
- An anonymous whistleblower hotline or e-mail system.
- Regular notifications sent to employees informing them how to report a potential FCA or other problem.
- Consistent follow-up on all internal reporting and whistleblowing tips.
- Internal audits of business systems.
- Recurring training regarding the FCA, anti-fraud and anti-kickback policies, and employees' obligation to report potential wrongdoing.
- Widespread availability of an updated compliance guidebook tailored to the company's industry and policies.
- Consistent messaging from management and supervisors emphasizing the importance of compliance.
- Requirements that business partners, agents, vendors, distributors, contractors and potential acquisition targets abide by the same compliance standards as the company.
- Due diligence regarding compliance issues when considering potential acquisitions.
- Strong anti-retaliation policies toward whistleblowers.

### SELF-DISCLOSURE

If a company discovers conduct that might give rise to FCA liability, it should consider self-disclosure. The FCA reduces damages where the person or company committing the violation furnishes all information regarding the violation within 30 days of obtaining it, and cooperates fully with the government investigation (31 U.S.C. § 3729(a)(2)). In these cases, the court may assess double, instead of treble, damages. However, reduced damages are only available if at the time of self-disclosure, no criminal prosecution, civil or administrative action has yet commenced.

A company considering self-disclosure is under significant time constraints to:

- Conduct a quick, but thorough, investigation.
- Implement corrective action to terminate and remedy any improper conduct.
- Disclose the improper conduct to the appropriate agency or US Attorney's Office.

Despite these constraints, self-disclosure has various benefits when compared to the prospect of facing FCA prosecution. In addition to reduced fines, self-disclosure can curtail a whistleblower lawsuit, which may be dismissed if the company has already publicly disclosed the information.

Moreover, some self-disclosures may be mandatory under parallel laws and regulations. For example:

- The Patient Protection and Affordable Care Act (PPACA) amended the Social Security Act to require companies to report and return overpayments to the government within 60 days (*Pub. L. No. 111-148 § 6402(a)*).
- Government contractors subject to the Federal Acquisitions Regulations (FAR) are required to "timely disclose" to the Inspector General or their contracting officer whenever the contractor has "credible evidence" of a violation of federal criminal law involving fraud, conflicts of interest, bribery or gratuities, or a violation of the FCA (48 C.F.R. § 521.203-13).

A company or its officers may be excluded, suspended or disbarred from government programs if these mandatory PPACA and FAR disclosures are not timely made.

Because of the complex considerations and requirements for self-disclosure and a tight timeline, a company should seek the advice of counsel as soon as it considers any self-disclosure to the government.

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