Questions And Answers About The Qui Tam Provision Of The False Claims Act

Jason Zuckerman, recognized by *Washingtonian Magazine* as a "Top Whistleblower Lawyer," litigates whistleblower retaliation, qui tam, and wrongful discharge cases. He has lectured extensively on whistleblower law and employment law, especially on Sarbanes-Oxley and False Claims Act actions, and has written several articles on whistleblower protections. Mr. Zuckerman co-authored a chapter on litigating whistleblower cases for ***Whistleblowing: The Law of Retaliatory Discharge*** (BNA Books) and presently serves as Co-Chair of the National Employment Lawyers Association's Whistleblower Committee and Co-Chair of the Whistleblower Committee of the District of Columbia Bar's Labor and Employment section. JZuckerman@employmentlawgroup.com.

R. Scott Oswald represents executives, many of whom have uncovered corporate or government wrongdoing, in state and federal courts and administrative tribunals. He has tried more than two dozen cases to verdict. His successes have been featured in several publications including ***The National Law Journal, BNA's Daily Labor Report,*** and ***Employment Law360***. Notably, Mr. Oswald was Sheila Kalkunte's lead trial counsel in the ground-breaking Sarbanes-Oxley (SOX) whistleblower case of ***Kalkunte v. DVI,*** which remains one of the few SOX whistleblower cases in which the SOX whistleblower prevailed at the trial level. He can be reached at SOswald@employmentlawgroup.com.

Jason Zuckerman and R. Scott Oswald

Make sure that your client's decision to blow the whistle is an informed one.

ENACTED DURING the Reconstruction era to punish war profiteering, the federal False Claims Act (FCA), 31 U.S.C. sections 3729 through 3733, has been the government's primary tool for recovering losses resulting from contractor fraud. Indeed, more than $20 billion recovered by the U.S. government since 1986 resulted from actions initiated by qui tam relators, i.e., individuals who bring suit under the FCA on behalf of the United States. This article summarizes the qui tam provision of the FCA and the FCA's prohibition against whistleblower retaliation.

1. What Is A False Claim?

A false claim is a request or demand for payment submitted to the government for services provided that were not in accordance with program requirements, or for services that were not provided at all. 31 U.S.C. §3729(a). For example, falsely certifying compliance with the terms of a government contract is a violation of the FCA. *Shaw v. AAA Eng'g & Drafting, Inc.*, 213 F.3d 519, 531 (10th Cir. 2000).

2. What Types Of Fraud Are Prohibited Under The False Claims Act?

The FCA prohibits several types of fraud involving any federally-funded contract or program, including the following activities:

- Knowingly presenting, or causing to be presented, a false or fraudulent claim for payment or approval by the government;
- Knowingly making, using or causing to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
- Conspiring to defraud the Government by getting false or fraudulent claims approved or paid by the Government;
- Authorizing the making or delivery of a document that certifies the receipt of property used or to be used by the Government and intending to defraud the Government by making or delivering the receipt without completely knowing that the information on the receipt is accurate;
- Knowingly buying or receiving an obligation or debt from the Government illegally; and
- Knowingly making, using or causing to be used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit property to the federal government.

31 U.S.C. §3729 (a)(1)-(7). Examples of fraud against the government include billing the Department of Defense for defective assault weapons; defrauding Medicare by billing for unnecessary medical procedures; billing the government for costs that are not related to a government-funded grant; falsifying research data; billing Medicare for an off-label use of a drug; and underpaying royalties to the government for oil extracted from land owned by the federal government.

3. What Types Of Claims Are Actionable?

Under the FCA, there are two primary types of actionable claims: factually false claims and legally false claims. In proving falsehood in a factually false claim, a relator must show that a contractor, grantee, or other recipient of federal funds submitted an incorrect description of goods or services provided, and requested payment from the government for such goods. *See United States ex rel. Karvelas v. Melrose-Wakefield Hosp.,* 360 F.3d 220, 232 (1st Cir. 2004) *cert. denied,* 543 U.S. 820 (2004) ("[A] [defendant's] violation of government regulations or engagement in private fraudulent schemes does not impose liability under the False Claims Act unless the provider submits false or fraudulent claims to the government for payment based on [the violation]").

Legally false claims can rest on either an express false certification of compliance with a statute or regulation as a condition to payment, or an implied false certification. An express false certification is actionable where payment of the claim is conditioned on certification of compliance with a specific requirement in a contract or with a statute or regulation. *See United States ex. rel. Siewick v. Jamieson Sci. & Eng'g Inc.,* 214 F.3d 1372, 1376 (D.C. Cir. 2000). An implied false certification claim is based not on a contractor's actual affirmative certification of compliance, but instead where "the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition to payment." *Mikes v. Straus,* 274 F.3d 687, 699 (2d Cir. 2001).

4. Are Qui Tam Relators Required To Satisfy A Heightened Pleading Requirement?

Courts apply the heightened pleading requirements of Fed. R. Civ. P. 9(b) to qui tam actions to ensure that the complaint provides a defendant with fair notice of the claim and adequate information to frame a response. *See United States ex rel. Gross v. AIDS Research Alliance-Chicago,* 415 F.3d 601, 604 (7th Cir. 2005); *see also* Fed R. Civ. P. 9(b); *see also Ackerman v. Nw. Mut. Life Ins. Co.,* 172 F.3d 467, 469 (7th Cir. 1999) *cert. denied,* 528 U.S. 874 (1999) (holding the heightened pleading standard requires the plaintiff to do more than the usual investigation because public charges of fraud can harm a company's reputation). Accordingly, a complaint must identify actual false or fraudulent claims submitted to the government to preclude dismissal on summary judgment. *See, Karvelas,* supra (dismissing a 93-page complaint, finding the detailed and lengthy complaint failed to state a claim under the FCA because it did not allege with sufficient particularity any actual false claims submitted to the government).

5. What Is The Public Disclosure Bar?

The original 1863 qui tam provisions of the FCA imposed no limits on who could serve as a qui tam relator. As a result, there were some opportunistic lawsuits in which relators sued based on information already made known to the public and received shares of recoveries that the government could have obtained without the relators' assistance. To reduce this risk, Congress included the public disclosure bar in the 1986 amendments of the FCA, under which courts lack jurisdiction over a qui tam action based on information already in the public domain, including information provided by: (1) a criminal, civil, or administrative hearing; (2) a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation; or (3) the news media. 31 U.S.C. §3730(e)(4)(A). The public disclosure bar, however, does not apply where a relator is an "original source."

6. What Is An "Original Source"?

The FCA defines an original source as someone who voluntarily provides information to the federal government about fraud before filing suit. 31 U.S.C. §3730(e)(4)(B).

An original source must have "direct and independent knowledge" of the information underlying the allegations in the lawsuit, rather than information that was the basis for prior public disclosure. *Rockwell Int'l Corp. v. U.S.,* 549 U.S. 457, 470-71 (2007). In other words, the relator must have gained the information through his own experience or investigation. *United States ex rel. Hansen v. Cargill, Inc.,* 107 F. Supp. 2d 1172 (N.D. Cal. 2000) (finding relator was not original source where relator was not witness to facts upon which allegations were based and did not have firsthand knowledge). For example, a relator cannot pursue a qui tam action against a hospital for an alleged "kickback scheme" based on information obtained from patient complaints and informal discussions in lounges and staff meetings. *United States ex rel. Lam v. Tenet Healthcare Corp.* 287 Fed. Appx. 396, 401 (5th Cir. 2008). Additionally, the public disclosure bar precludes the original source exception when the relator's knowledge depends on a review of public information, even if that information is not a "public disclosure" within the meaning of the FCA's public disclosure provisions. *United States ex rel. Atkinson v. PA. Shipbuilding Co.,* 473 F.3d 506 (3d Cir. 2007).

7. Does A Relator Get A Reward For Blowing The Whistle On Fraud?

A successful qui tam relator can recover 15 percent to 30 percent of the government's total recovery, which varies primarily based on whether or not the government does not intervene. 31 U.S.C. §3730(d)(1)-(2). The Department of Justice (DOJ) has issued guidelines on calculating the relator's share. Factors to consider for a possible increase in the relator's share include:

- The relator reported the fraud promptly;
- The relator tried to stop the fraud or reported it to a supervisor or the government as soon as she learned of the fraud;
- The qui tam filing, or the ensuing investigation, caused the offender to stop the fraudulent practices;
- The complaint warned the government of a significant safety issue;
- The complaint exposed a nationwide practice;
- The relator provided extensive, firsthand details of the fraud to the government;
- The government had no knowledge of the fraud;

- The relator provided substantial assistance during the investigation and/or pre-trial phases of the case;
- The relator was a credible witness at her deposition and/or trial;
- The relator's counsel provided substantial assistance to the government;
- The relator and her counsel supported and cooperated with the government during the entire proceeding;
- The case went to trial;
- The FCA recovery was relatively small; and
- The filing of the complaint had a substantial adverse impact on the relator.

Factors that can decrease a relator's share include:

- The relator participated in the fraud;
- The relator substantially delayed in reporting the fraud or filing the complaint;
- The relator, or relator's counsel, violated FCA procedures (complaint served on defendant or not filed under seal, or the relator publicized the case while it was under seal, or statement of material facts and evidence not provided);
- The relator had little knowledge of the fraud or only suspicions;
- The relator's knowledge was based primarily on public information;
- The relator learned of the fraud in the course of his government employment;
- The government already knew of the fraud;
- The relator, or relator's counsel, did not provide any help after filing the complaint, hampered the government's efforts in developing the case, or unreasonably opposed the government's position in litigation;
- The case required a substantial effort by the government to develop the facts to win the lawsuit;
- The case settled shortly after the complaint was filed or with little need for discovery; or
- The FCA recovery was relatively large.

These factors are not an exhaustive list of the criteria considered for determining an appropriate award for a relator, but rather a list of factors routinely considered in determining the relator's share.

8. Are There Unique Procedures That Govern Qui Tam Actions?

A relator alleging fraud must disclose knowledge of the fraud to the DOJ before filing suit. The qui tam action is then filed under seal in federal court. The government has 60 days within which to investigate the alleged fraud and determine whether to intervene. 31 U.S.C. §3730(b)(2). Courts routinely grant the government extensions, and some cases remain under seal for years before the government decides to intervene. If the government intervenes, DOJ takes over the prosecution of the case. When the government exercises its right to intervene, the case is unsealed and the defendant is served. A relator is entitled to notice of any settlement and is entitled to a hearing on the relator's share of the settlement. If the government declines to intervene in the qui tam action, the relator may proceed with the action against the defrauding contractor or entity, at which time the action will be unsealed and served on the defendant. 31 U.S.C. §3730(c)(3). As qui tam actions typically entail substantial discovery, it is critical to retain counsel experienced in prosecuting qui tam actions and able to invest the substantial resources necessary to zealously prosecute the case.

9. Is The Relator Required To Prove Presentment?

There is some dispute as to whether or not a qui tam action requires a showing that the defendant presented a false claim directly to the government. In *Totten*, for example, the D.C. Circuit Court held that the FCA is violated only if a false claim is presented directly to the government for payment.

United States ex rel. Totten v. Bombardier Corp., 380 F.3d 488 (D.C. Cir. 2004) *cert. denied,* 544 U.S. 1032 (2005) (explaining contractor's submission of false claims to Amtrak, a non-government entity, failed to satisfy the FCA's presentment requirement).

The "presentment" requirement was recently addressed by the Supreme Court in *Allison Engine.* Two relators alleged that their former employer and another company, both subcontractors on a Navy contract, violated the FCA by submitting to the contractor certificates of conformance that falsely certified that their work satisfied the specifications listed in the Navy's contract with the contractor in order to receive payment. *Allison Engine Co. v. United States ex rel. Sanders and Thacker,* 128 S. Ct. 2123 (2008). The district court held that there was no liability under the FCA because there was no evidence that the invoices were submitted directly to the Navy. *Id.* at 2127-28. The Sixth Circuit reversed, holding that while section 3729(a)(1) requires a showing that the false or fraudulent claim was presented to the government, no such requirement exists under sections 3729(a)(2) and 3729(a)(3). *Id.* at 2728. The Supreme Court agreed with the Sixth Circuit, concluding that there is no presentment requirement in sections 3729(a)(2) or (a)(3). *Id.* at 2130-31. According to the Court, evidence that a claim has been "paid or approved" with government funds provides a sufficient relation to the government, thereby making it unnecessary to present evidence that the claim was actually presented to the government. *Id.*

10. Must The Relator Prove Materiality?

The text of the FCA does not explicitly include a materiality requirement, but the majority of courts have held that the requirement is implicit in the Act. *United States ex rel. Berge v. Bd. of Trustees of the Univ. of Ala.,* 104 F.3d 1453, 1459 (4th Cir. 1997) *cert. denied,* 522 U.S. 916 (1997). Accordingly, a qui tam relator must be able to prove that the defendant's false statement had the "natural tendency" to cause the payment of a false claim at the time the false statement was made. *See, e.g., United States v. United Technologies Corp.,* 2008 WL 3007997 (S.D. Ohio. Aug. 1, 2008) (holding invoices submitted by the defendant violated the FCA because the natural consequence of the defective pricing data was to cause an overstated price).

In *Allison Engine,* supra, the Supreme Court addressed the issue of materiality, holding that a relator asserting claims under sections 3729(a)(2) and (a)(3) of the FCA cannot simply show that the defendant's use of a false record or statement resulted in payment or approval of a false claim, but must also show that the defendant intended that the false record or statement be material to the government's decision to pay or approve the false claim.

11. Does The FCA Protect Whistleblowers From Retaliation?

The FCA prohibits an employer from retaliating against an employee "because of lawful acts done by the employee…in furtherance of an action" under the FCA. 31 U.S.C. §3730(h). Prohibited retaliation includes termination, suspension, demotion, harassment, and any other act that would dissuade a reasonable person from reporting a violation of the FCA. An employee must prove: (1) that the employee had engaged in protected activity; (2) that the employer knew that the employee was engaged in protected activity; and (3) that the employer discriminated against the employee because of his protected activity.

"Acting in furtherance" of a qui tam action includes: (1) investigating a violation of the FCA; (2) initiating an FCA action; (3) testifying for an FCA action; or (4) assisting in an FCA action. Specific examples of protected activity include:

- Bringing illegal conduct to an employer's attention;
- Refusing to participate in a scheme to defraud the government;
- Reporting to a supervisor that flawed devices were being provided to the military; and

- Reporting internally the existence of fraudulent activity.

To prevail under section 3730(h), a plaintiff need not prove an actual violation of the FCA. Protected conduct under §3730(h) is broadly construed. *See Eberhardt v. Integrated Design & Constr., Inc.,* 167 F.3d 861, 866-68 (4th Cir. 1999). In particular, "an employee engages in protected activity when litigation is a 'distinct possibility,'...when the conduct 'reasonably could lead to a viable FCA action,'...or when... litigation is a 'reasonable possibility.'" *Id.* at 869. The legislative history of section 3730(h) demonstrates that Congress intended that the FCA's whistleblower protections be interpreted broadly. See S. Rep. No. 99-345, at 34 (1986) ("[T]he committee believes protection should extend not only to actual qui tam litigants, but those who assist or testify for a litigant, as well as those who assist the government in bringing a false claims action. Protected activity should therefore be interpreted broadly"). Further, the FCA does not require that an FCA retaliation plaintiff "must already have discovered a completed case" to be protected. *See United States ex rel. Yesudian v. Howard Univ.,* 153 F.3d 731, 739-40 (D.C. Cir. 1998). Instead, the FCA protects employees "while they are collecting information about a possible fraud before they have put all the pieces together." *See Fanslow v. Chicago Mfg. Center,* 384 F.3d 469, 481 (7th Cir. 2004), *citing Neal v. Honeywell Inc.,* 33 F.3d 860, 864 (7th Cir. 1994).

The heightened pleading requirement of Rule 9(b) does not apply to FCA retaliation claims, and instead an FCA retaliation plaintiff's claims need only meet the Rule 8(a) notice pleading standard. *Mendiondo v. Centinela Hosp. Med. Ctr.,* 521 F.3d 1097, 1103 (9th Cir. 2008); *U.S. ex rel. Williams v. Martin-Baker Aircraft Co.,* 389 F.3d 1251, 1256 (D.C. Cir. 2004).

A prevailing plaintiff in an FCA retaliation action is entitled to reinstatement, double back pay, special damages, interest on back pay, litigation costs and reasonable attorneys' fees.

12. Does The FCA Prohibit Fraud In Contracts With State Governments?

Finally, if a claim for payment entails solely state funds, the False Claims Act does not apply. Twenty-two states and the District of Columbia have adopted False Claims Acts, which are substantially similar to those of the federal False Claims Act:

- Arkansas, Ark. Code Ann. §20-77-901;
- California, Cal. Gov't Code §12650 et seq.;
- Delaware, Del. Code Ann., tit.6, §1201 et seq.;
- District of Columbia, DC ST § 2-308.15;
- Florida, Fla. Stat. Ann., 68.081 et seq.;
- Georgia, Ga. Code Ann. §49-4-168 et seq.;
- Hawaii, Haw. Rev. Stat., Sec. 661-22 et seq.;
- Illinois, 740 Ill. Comp. Stat. Ann., Sec 175/1 et seq.;
- Indiana, Ind. Code Ann. §5-11-5.5;
- Louisiana, La. Re. Stat. Ann. § 439.1 et seq.;
- Massachusetts, Mass Ann. Laws, Ch. 12 §5(A)–(0);
- Michigan, Mich. Comp Laws. Ann. §400-601 et seq.;
- Missouri, Mo. Rev. Stat. §191.900 et seq.;
- Montana, Mont Code Ann. §17-8-401 et seq.;
- Nevada, Nev. Rev. Stat Ann. §357.010 et seq.;
- New Hampshire, N.H. Rev. Stat. Ann. §167:61-b et seq.;
- New Jersey, N.J. Stat. Ann. §2A:32C-1 et seq.;
- New Mexico, N.M. Stat. Ann. §27-14-1 et seq.;
- New York, N.Y. State Fin. Law §187 et seq.;
- Oklahoma, Okla. Stat. tit. 63; §5053 (2009);
- Rhode Island, R.I. Gen. Laws §9-1.1-1 et seq.;
- Tennessee, Tenn. Code Ann. §71-5-181 et seq.;
- Texas, Tex. Hum. Res. Code Ann. §36.001 et seq.;
- Utah, Utah Code Ann. §26-20-1 et seq.;
- Virginia, Va. Code Ann. §8.01-216.1 et seq.;
- Wisconsin, Wis. Stat. Ann. §20-931 et seq.