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False Claims Act Practice Guide 2017

Table of Contents

Introduction

Part One: The Statutory Framework

A. The Law ... 1

B. Typical Course of Enforcement ... 7

C. Damages ... 7

Part Two: Stumbling Blocks

A. Classic Theories of Liability ... 10

1. Getting What You Paid For ... 10
2. Truth in Negotiations Act ... 10
3. False Certification (Express or Implied) ... 11
4. Fraud in the Inducement ... 11

B. Common Trouble Areas ... 12

1. Prime Contractor Liability for Pass-through Claims ... 12
2. Performance Deficiencies ... 12
3. Prime Contractor Certifications for Subcontractors ... 13
4. Davis-Bacon and Service Contract Act Compliance ... 14
5. Statements Made in Relation to Requests for Payment ... 15
6. Failure to disclose Organizational Conflict of Interest ... 16
7. Buy American Act (“BAA”) Compliance ... 16
8. Contracting Set-Aside Issues ... 17
9. Multiple Award Schedule Compliance Issues ... 17
10. False Estimates ... 19

Part Three: Enforcement Trends and Notable Cases

A. 2016 Enforcement Statistics ... 20

B. *Escobar* Developments ... 20

C. Other Notable Cases ... 24

The Authors ... 32

Smith Pachter McWhorter FCA Practitioners ... 36

Introduction

Smith Pachter McWhorter PLC is pleased to present the 2017 edition of its False Claims Act Practice Guide. On one level, this Guide is meant to serve as a practical reference tool for our clients and friends, to provide guidance on how the statutory scheme works, where potential False Claims Act ("FCA") violations might be encountered, and what elements the government must prove for liability to attach. These topics are covered in Parts One and Two of this Guide. Part One ("The Statutory Framework") lays out the statute itself, explains the elements that must be proven to find a violation, reviews how a typical enforcement action might proceed, and discusses how damages are calculated. Part Two ("Stumbling Blocks") describes classic theories of liability that enforcement authorities have pursued and describes how and where these issues often arise for government contractors. With the material contained in Parts One and Two we hope to help clients anticipate and avoid the many issues that can arise under the FCA in contracting with the government by understanding and mitigating the risks, identifying and/or remediating potential violations, and dealing with enforcement authorities if they become involved.

At the same time, in Part Three ("Enforcement Trends and Notable Cases") the Guide also provides an update on recent enforcement activity and notable case law developments to ensure our clients understand how the government is focusing its enforcement efforts and what legal theories federal courts have constrained or expanded. Specifically, we describe a number of notable cases or trends we have seen in 2016-17, touching on various aspects of the FCA statutory scheme:

» The Supreme Court held in *State Farm Fire & Casualty Co. v. U.S ex rel. Rigsby* that despite the FCA's express requirement that a *qui tam* complaint be kept under seal, failure to do so does not always necessitate dismissal. The Court explained that dismissal remains one possible form of relief, along with remedies such as monetary penalties or attorney discipline, but declined to address the factors district courts should consider in deciding whether dismissal is appropriate.

» A circuit split has developed regarding whether the FCA's first-to-file bar is jurisdictional or instead bears on the merits of whether a *qui tam* plaintiff has stated a claim upon which relief can be granted. Developments on this issue merit further tracking due to its effect on the burden of proof. If the former, the plaintiff bears the burden of establishing the court has authority to adjudicate the case. If the latter, the defendant must raise the rule as an affirmative defense and bears the burden of proof.

» The Ninth Circuit affirmed summary judgment in favor of a government contractor because the relator alleged violations of regulations not incorporated into the contract.

» The D.C. Circuit clarified the circumstances in which public disclosure of the facts behind an FCA case deprive courts of jurisdiction. In that case a relator brought one FCA lawsuit, which settled, then brought a second action alleging additional false claims on other contracts. The contractor argued that the second action should have been dismissed with prejudice under the public disclosure bar, but the D.C. Circuit held the bar did not apply because the allegations of fraud were based on independent – not publicly available – information.

» The Fourth Circuit dismissed an interlocutory appeal on the question of whether sampling and extrapolation can be used to prove FCA liability. According to the Fourth Circuit, this was really a question of whether the district court may in its discretion allow the use statistical sampling to prove a case, and not a pure question of law suitable for interlocutory review.

In Part Three we also discuss recent case law developments related to the Supreme Court's 2016 ruling in *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). As discussed in last year's Guide, in *Escobar* the Supreme Court confirmed the viability of the "implied certification" theory of FCA liability while providing guidance to lower courts as to the requirements that must be met for liability to attach.[1] The *Escobar* decision in some ways upended the analysis to be undertaken regarding implied certification liability, and lower courts are just beginning to apply the opinion's analytical framework. Although many courts have strictly applied *Escobar*'s reasoning, in ways that reinforce the opinion's description of "demanding" standards, several lower court decisions interpret the case in ways that potentially expand implied certification liability. How the different circuits continue to interpret *Escobar*, and whether any circuit splits arise as a result of differing interpretations, will be a topic for continued scrutiny in the months and years ahead.

We hope you find this Guide useful in considering the potential FCA issues your company might face. And to the extent you find yourself facing a problem that requires guidance in addition to what we provide herein, please feel free to reach out to the authors or any of the practitioners listed at the end of this Guide.

[1] Smith Pachter McWhorter practitioners have published articles examining federal court decisions addressing "implied certification" before the Supreme Court issued the *Escobar* opinion, as well as articles examining the *Escobar* decision itself. *See, e.g., A Sensible Outcome for False Claims in* Universal Health Services, 106 Fed. Cont. Rep. (BNA) No. 4, at 97 (July 26, 2016); *A Look at False Claims Act Cases Through Scalia's Lens,* 105 Fed. Cont. Rep. (BNA) No. 14, at 310 (Apr. 12, 2016); *Encouraging Signs for False Claims Act Litigation: Recent Decisions Aligned to Guide Supreme Court Review,* 105 Fed. Cont. Rep. (BNA) No. 3, at 67 (Jan. 26, 2016).

Part One: The Statutory Framework

"The FCA was enacted as a reaction to rampant fraud and price gouging by merchants supplying the Union army during the Civil War." *United States ex rel. Customs Fraud Investigations, LLC. v. Victaulic Co.,* 839 F.3d 242, 247 (3d Cir. 2016). The Act is "the Government's primary litigative tool for combatting fraud." *Olson v. Fairview Health Servs. of Minnesota,* 831 F.3d 1063, 1069 (8th Cir. 2016). The Supreme Court, however, noted recently in *Escobar* that it is "'not an all-purpose antifraud statute,' . . . or a vehicle for punishing garden-variety breaches of contract or regulatory violations." *Escobar,* 136 S. Ct. at 2003 (citation omitted). Rather, in general terms the FCA creates civil and criminal penalties for those who submit certain false or fraudulent documents to the federal government, whether claims for payment or documentation concerning delivery of goods or services. Following is a discussion of the statute, the elements that must be proven for liability to attach, how an enforcement action might proceed, and how damages are calculated.

A. The Law

1. The Statute

FCA liability, civil or potentially criminal, attaches when any person:[2]

(**A**) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(**B**) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(**C**) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

(**D**) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

(**E**) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(**F**) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or

(**G**) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

31 U.S.C. § 3729(a)(1).

[2] The FCA does not apply to claims, records, or statements made under the Internal Revenue Code of 1986. 31 U.S.C. § 3729(d); *see also Canen v. Wells Fargo Bank, N.A.,* 118 F. Supp. 3d 164 (D.D.C. 2015) ("The FCA specifically excludes such claims from its purview in providing that it does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.") (citing *Ananiev v. Freitas,* 37 F. Supp. 3d 297 (D.D.C. 2014)). Section 3729(c) also clarifies that any information furnished pursuant to subsection (a)(2), which relates to cooperation with government investigation of a potential violation, shall be exempt from disclosure under the Freedom of Information Act (5 U.S.C. § 552).

Key definitions provided by the statute follow:

a. A person acts ***knowingly*** whenever that person, with respect to information, has actual knowledge of that information, acts in deliberate ignorance of the truth or falsity of the information, or acts with reckless disregard of the truth or falsity of the information. Note that **intent to defraud is not necessary** to prove a violation occurred. 31 U.S.C. § 3729(b)(1). This knowledge or *scienter* requirement has also been more fully developed in the case law, as described below.

b. A ***claim*** is any request or demand, whether under a contract or otherwise, for money or property (regardless of whether or not the United States has title to the money or property) that is presented to an officer, employee, or agent of the United States; or is 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, and if the United States Government either provides, or has provided, any portion of the money or property requested or demanded; or will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded. Claims do not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property. 31 U.S.C. § 3729(b)(2)(A)-(B).[3]

c. ***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).

d. ***Material*** is defined as having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property. 31 U.S.C. § 3729(b)(4). The materiality requirement has also been more fully developed in the case law, as described below.

2. The Elements

A violation of the FCA occurs when there has been: (1) a ***false statement or fraudulent course of conduct***; (2) made or carried out with ***knowledge of the falsity***; (3) that was ***material***; and (4) that ***involved a claim*** (i.e., a request or demand for money or property from the United States). *See United States v. Bollinger Shipyards, Inc.*, 775 F.3d 255, 259 (5th Cir. 2014). We examine each of these elements in turn.

a. Falsity

The FCA statutory language requires a claim to be false, but does not define falsity. *See* 31 U.S.C. § 3729. Courts have accordingly established definitions of false or fraudulent as those claims "aimed at extracting money the government otherwise would not have paid." *United States ex rel. Kester v. Novartis Pharm. Corp.,* 41 F. Supp. 3d 323, 328–29 (S.D.N.Y. 2014) (quoting *Mikes v. Straus*, 274 F.3d 687 (2d Cir. 2001)). Courts have further defined two categories of falsity, or reasons the government would not pay the claim if it knew the facts: factual falsity and legal falsity. *United States ex rel. Petratos v. Genentech Inc.,* 855 F.3d 481, 486 n.1 (3d Cir. 2017); *see also United States ex rel. Pervez v. Beth Israel Med. Ctr.,* 736 F. Supp. 2d 804, 812 (S.D.N.Y. 2010).

[3] Congress amended the FCA in 2009 to expressly define "claim." *U.S. ex rel. Heath v. Wisconsin Bell, Inc.,* 111 F. Supp. 3d 923, 926 (E.D. Wis. 2015). Although the statute defines claim, in part, as any request or demand for money or property from the United States, some courts have interpreted the term to mean "cases" in order to retroactively apply 2009 amendments to cases where defendants may otherwise escape FCA liability. *See United States ex rel. Garbe v. Kmart Corp.,* 824 F.3d 632, 642 (7th Cir. 2016). In *Kmart Corp*., the Seventh Circuit held "claims" did not mean "request[s] or demand[s] for . . . money or property." *Id.* Instead, the court noted it "held before that the word 'claims' in § 4(f)(1) refers to cases, not to individual requests for payment." *Id.* at 639. Through this interpretation of "claims," the court held the amendments "were effective as if subsection (a)(1)(B) had been enacted on June 7, 2008," such that the amendments then applied to all FCA claims pending on that date, rather than individual requests for payment. *Id.* The court went on to note the "majority of [its] sister circuits take the same position." *Id.* (citing cases).

Factual falsity occurs when a contractor makes a claim or request for reimbursement with "an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided." *United States ex rel. Forcier v. Computer Scis. Corp.,* 2017 WL 3616665, at *7 (S.D.N.Y. Aug. 10, 2017); *see also United States ex. rel. Dresser v. Qualium Corp.,* 2016 WL 3880763, at *5 (N.D. Cal. July 18, 2016) ("The literally false theory says that an FCA action may lie where 'the claim for payment is itself literally false or fraudulent.'").

Legal falsity, however, is "[m]ore difficult to assess," and occurs in cases where a "contractor falsely represents that it is in compliance with a particular federal statute or regulation." *Id.* Legal falsities include cases where a contractor has either expressly or impliedly certified compliance with some statutory, regulatory or contractual requirement. *United States ex rel. Schimelpfenig v. Dr. Reddy's Labs. Ltd.,* 2017 WL 1133956 (E.D. Pa. Mar. 27, 2017); *Novartis Pharm. Corp.,* 41 F. Supp. 3d 329 ("a 'legally false' claim is 'false' because it has been tainted by some underlying statutory, regulatory, or contractual violation made in connection with that claim, which renders the claim ineligible for reimbursement.").[4]

b. Knowledge / *Scienter*

Whether a contractor alleged to have violated the FCA acted with knowledge of the falsity, as required for liability to attach, is an evidentiary question, and courts look at the totality of the circumstances to resolve it. *See United States ex rel. Purcell v. MWI Corp.,* 807 F.3d 281, 290 (D.C. Cir. 2015). Courts have analyzed how relators or the government can prove this *scienter* requirement.

Under the FCA, a person acts "knowingly," or meets the *scienter* requirement, if he or she: "(1) has **actual knowledge** of the falsity; (2) **acts in deliberate ignorance** of the truth or falsity of the information; or (3) **acts in reckless disregard** of the truth or falsity of the information, and **no proof of specific intent to defraud is required**." *Lamb Eng'g & Constr. Co. v. United States,* 2002 WL 32933387, at *5 (Fed. Cl. Aug. 26, 2002) (emphasis added); *see also United States ex rel. Harper v. Muskingum Watershed Conservancy Dist.,* 842 F.3d 430, 437 (6th Cir. 2016) ("unless the circumstances of a case show that a defendant knows of, or 'acts in deliberate ignorance' or 'reckless disregard' of, the fact that he is involved in conduct that violates [the FCA], the defendant cannot be held liable.").

"Although proof of a specific intent to defraud is not required, the statute's language makes plain that liability does not attach to innocent mistakes or simple negligence." *United States ex rel. Phalp v. Lincare Holdings, Inc.,* 857 F.3d 1148, 1155 (11th Cir. 2017). This standard is "designed to address the problem of the 'ostrich-like' refusal to learn of information which an individual, in the exercise of prudent judgment, had reason to know." *Horn & Assocs., Inc. v. United States,* 123 Fed. Cl. 728, 763 (2015).

The key takeaway is that the FCA "covers not just those who set out to defraud the government, but also those who ignore obvious deficiencies in a claim." *Gulf Grp. Gen. Enter.'s Co. W.L.L. v. United States,* 114 Fed. Cl. 258, 313-14 (2013). In *Lamb Engineering & Construction*, the court held a "failure to make minimal examination of records constitutes deliberate ignorance or reckless disregard, and a contractor that deliberately ignored false information submitted as part of a claim is liable under the False Claims Act." 2002 WL 32933387, at *5 (quoting *UMC Elec. Co. v. United States,* 43 Fed. Cl. 776, 794 (1999)).

c. Materiality

FCA subsections (a)(1)(B) and (a)(1)(G) require the false record or statement to be *material* before liability is imposed. 31 U.S.C. §3729(a)(1)(B), –(G). The statute defines material as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." 31 U.S.C. § 3729(b)(4). Courts have noted that materiality is

[4] The express and implied certification theories of liability are described in more detail in Part Two, Section A.3, *infra*. The Supreme Court confirmed the viability of the implied certification theory of liability in *Escobar,* described in more detail at Part Three, Section B, *infra*.

a "mixed question of law and fact." *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999) (citing *United States ex rel. Berge v. Bd. of Trustees of Univ. of Ala.*, 104 F.3d 1453, 1460 (4th Cir. 1997)).

The Supreme Court recently explained materiality under the FCA is a "fact-specific inquiry," and the standard is demanding. *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2002–03 (2016) ("materiality cannot rest on a single fact or occurrence as always determinative"). The Court also confirmed that the FCA is not a "vehicle for punishing garden-variety breaches of contract or regulatory violations," and elaborated that "materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Id*.

The materiality standard becomes more difficult to apply in the false certification context, when the government must demonstrate that the standard or fact to which a contractor falsely certified was actually material to the payment decision. In *Escobar*, the Court explained the Government's "decision to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive." *Id*. at 2003. The Court further clarified this point, explaining proof of materiality may include evidence the Government "consistently refuses to pay claims … based on noncompliance with the particular statutory, regulatory, or contractual requirement," and that a defendant submitted these claims despite that knowledge. *Id*. Or, "[c]onversely, if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." *Id*.[5]

Thus, materiality cannot rest on a single fact or occurrence as always determinative, and the outcome of each case is based on its own set of facts. *Id*. at 2001 (quoting *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 39 (2011) (internal quotations omitted). For a further discussion of *Escobar*'s impact on this materiality analysis, *see* Part Three, Section B, *infra*.

d. Presentation of a claim

To violate the FCA, the false or fraudulent statement must be associated with a "claim" as described by the statute, which is presented to the government. *United States ex rel. Prather v. Brookdale Senior Living Communities, Inc.,* 838 F.3d 750, 768 (6th Cir. 2016). The FCA "attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment." *United States v. Lang,* 2017 WL 1449674, at *3 (E.D.N.C. Apr. 21, 2017) (citing *Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 785 (4th Cir. 1999)).[6] *See also United States ex rel. Sheldon v. Kettering Health Network,* 816 F.3d 399, 411-12 (6th Cir. 2016); *United States ex rel. Clausen v. Lab. Corp. of Am.,* 290 F.3d 1301, 1311 (11th Cir. 2002) (holding the FCA "does not create liability merely for a health care provider's disregard of Government regulations or improper internal policies unless, as a result of such acts, the provider knowingly asks the Government to pay amounts it does not owe.").

Under the FCA, a typical false claim "involves an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided." *United States ex rel. Scott v. Pac. Architects & Engineers (PAE), Inc.,* 2017 WL 4075155, at *4 (D.D.C. Sept. 13, 2017). However, courts construe the FCA broadly and will interpret the term "false claims" generally to apply to demands for government funds, such as false applications for government loans, or fraudulent claims for federal assistance. *States v. Neifert–White,* 390 U.S. 228, 230 (1968); *Sell v. United States,* 336 F.2d 467, 474 (10th Cir. 1964).

In broadly construing the FCA, courts have held the "causes to be made" or "presented" prong of the FCA extends liability beyond a prime contractor, reaching any person knowingly assisting in causing the Government to pay claims grounded in fraud. *United States ex rel. Tran v. Computer Sciences Corp.,* 53 F. Supp. 3d 104, 126-27 (D.D.C. 2014).

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[5] We believe the Supreme Court's discussion of materiality in *Escobar* could potentially be open to varying interpretations of its breadth. *See* Part Three, Section B, *infra*.

[6] Depending on the number of claims submitted, liability could still be significant even if the government does not pay the claims. Contractors are liable for the statutory penalty applicable to each submitted claim, although there would be no damages (which are subject to trebling). *See* Part One, Section C, *infra*.

The "causes to be presented" prong will attach liability to a defendant whose conduct was "at least a substantial factor in causing, if not the but-for cause of, submission of false claims." *Id.* at 126 (citing *United States v. Toyobo Co.,* 811 F. Supp. 2d 37, 48 (D.D.C. 2011)). Thus, a prime contractor that submits false subcontractor claims to the federal government will be liable if the prime contractor knew of the falsity or acted with reckless disregard or deliberate ignorance of the falsity.

Where courts have considered the liability of a non-submitting party, so long as the person agreed to take critical actions in furtherance of the fraud, courts may find the party liable. In *United States v. President & Fellows of Harvard College,* 323 F. Supp. 2d 151 (D. Mass. 2004), the court held "[w]here a defendant has an ongoing business relationship with a repeated false claimant, and the defendant knows of the false claims, yet does not cease doing business with the claimant or disclose the false claims to the United States, the defendant's ostrich-like behavior itself becomes a course of conduct that allowed fraudulent claims to be presented to the government." *Id.* at 187 (internal quotation marks and citations omitted).

e. Statute of Limitations

The FCA has a two-tier statute of limitations. The first tier, 31 U.S.C. § 3731(b)(1), sets forth a general statute of limitations, allowing six years from the date of the alleged violation for the government or a *qui tam* relator to bring suit. *See, e.g., United States ex rel. Griffith v. Conn,* 117 F. Supp. 3d 961, 984 (E.D. Ky. 2015); *United States ex rel. Shemesh v. CA, Inc.,* 89 F. Supp. 3d 36, 53 (D.D.C. 2015). "The statute of limitations begins to run on an FCA claim on the date upon which the offender submits a false claim for payment, regardless of the date of payment." *United States ex rel. Jackson v. Univ. N. Tex.,* 673 Fed. Appx. 384, 387 (5th Cir. 2016) (per curiam).

However, if the defendant's fraudulent activity is concealed at the time of the actual violation, resulting in a delay in the government's knowledge of the wrongdoing, the FCA allows for a tolling of the typical six-year limitation period. This tolling period allows a plaintiff to bring suit **within three years of the date on which a government official knew or had reason to know** of the violation, but **not to exceed ten years from the date of the false claim.** 31 U.S.C. § 3731(b)(2); *see, e.g., Shemesh,* 89 F. Supp. 3d at 53-54. Circuit courts are split on whether this tolling period applies to *qui tam* relators, but all circuits agree that the tolling period applies in cases brought by the government. *See id.* As noted above, the tolling period only allows for a maximum of ten years within which to bring suit, meaning that regardless of when the government knew or should have known of the violation, actions under the FCA are limited to no more than ten years from the date of the violation.

f. *Qui Tam* Provision

The FCA's *qui tam* provision allows "private persons, known as 'relators,' to bring actions to recover damages on behalf of the United States." *United States ex rel. Wood v. Allergan, Inc.,* 246 F. Supp. 3d 772 (S.D.N.Y. 2017) (citing 31 U.S.C. § 3730(b)).[7] The relator is granted certain rights under the FCA but must cooperate with the government under certain circumstances. Any individual with knowledge of fraudulent activity against the government may file a claim as the plaintiff, and the relator need not have personally been harmed by the defendant in order to bring a *qui tam* suit.

The United States Department of Justice ("DOJ") is given the chance to be substantially involved in a *qui tam* relator's suit from its outset. *Qui tam* plaintiffs, who must be represented by an attorney, are required to file their claims under seal and to leave them under seal for at least 60 days.[8] At the end of the 60-day period, DOJ may file a motion showing good

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[7] *See also* United States Department of Justice, *False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits, available at* https://www.justice.gov/sites/default/files/usao-edpa/legacy/2012/06/13/InternetWhistleblower%20update.pdf.

[8] The requirement that *qui tam* cases be kept under seal has been the subject of recent litigation, as described in Part Three, Section C, *infra*. Once the complaint is filed, copies are provided to DOJ, including the local United States Attorney, and to the assigned judge of the relevant District Court. DOJ is also entitled to a "disclosure statement" from the relator, which must contain "substantially all" of the evidence in his or her possession, related to the complaint's allegations. *See* 31 U.S.C. § 3730(b)(2). These materials help the USDOJ in its investigation and evaluation of the case, and ultimately decision on intervention, described further below.

cause for the case to remain under seal, *see* 31 U.S.C. § 3730(b)(3), and such extension requests—often for six months at a time—are not uncommon.

Upon receiving notice of the complaint and a disclosure statement from the relator, DOJ is required to investigate the relator's allegations of fraud. *See* 31 U.S.C. § 3730(a). Once its investigation is complete, DOJ has several options:

1. *intervene* in one or more counts of the pending *qui tam* action. As a general matter, this signals more significant potential liability for the defendant, as intervention means the federal government, with all of its resources brought to bear, intends to participate as a plaintiff in prosecuting those counts of the complaint in which it has intervened. However, DOJ intervenes on any count in fewer than 25% of filed *qui tam* actions.

2. *decline* to intervene, in which case, the relator and his or her attorney may continue to prosecute the action on behalf of the United States. The United States is considered a party to the proceedings only insofar as it continues to receive pleadings and retains its right to any recovery, but is not considered a party for the purposes of discovery nor will it expend resources on the prosecution.[9]

3. *move to dismiss* the relator's complaint, either because it believes no violation has occurred, or the case conflicts with significant statutory or policy interests of the United States.[10]

The statute also details several circumstances in which a relator cannot file or pursue a *qui tam* action:

1. The relator was convicted of criminal conduct arising from his or her role in the FCA violation. 31 U.S.C. § 3730(d)(3).

2. Another *qui tam* concerning the same conduct already has been filed (the "first to file bar"). 31 U.S.C. §3730(b)(5).

3. The government already is a party to a civil suit or administrative money proceeding concerning the same conduct. 31 U.S.C. §3730(e)(3).

4. The *qui tam* action is based on information that has already been disclosed to the public by some other means, such as criminal, civil, or administrative hearings in which the government is a party, government hearings, audits, reports, or investigations, or through the media (the "public disclosure bar"). 31 U.S.C. §3730(e)(4)(A). Note, however, that there is an exception to the public disclosure bar where the relator was the original source of the information that was disclosed to the public.

These restrictions seek to prevent "parasitic" *qui tam* actions, where the relator has not helped the government uncover fraud (or have themselves benefitted from the fraud), but seek instead to profit from misconduct already known to the government. *United States ex rel. Shea v. Cellco P'ship,* 863 F.3d 923, 926 (D.C. Cir. 2017) (restrictions on *qui tam* actions created "to curtail abusive suits" and in response to "the danger of parasitic exploitation of the public coffers").

[9] In addition to impacting the resources brought to bear during the *qui tam* litigation, the decision to intervene has a significant effect on the percentage of proceeds a relator is entitled to if the FCA violation is proven. Specifically, if the government intervenes the relator is entitled to 15%-25% of the total amount awarded (penalty plus damages), but if the government declines to intervene the relator is entitled to 25%-30% of the total amount awarded. *See* 31 U.S.C. §3730(d)(1)-(2). The share of proceeds to which the relator is entitled can be reduced if the relator was involved in the fraud that led to the litigation, and if the relator is convicted of a criminal charge related to this involvement he is dismissed from the claim and can collect nothing. *See* §3730(d)(3).

[10] In practice, there are several other options DOJ may follow: it may settle the pending *qui tam* action with the defendant prior to the intervention decision, or advise the relator that the Department of Justice intends to decline intervention. Both options resolve the matter prior to litigation, although settlement can be costly as well.

B. Typical Course of Enforcement

FCA cases often arise after a government agency has audited a contractor and identified discrepancies in billing or failures in contract performance that the agency believes amount to FCA violations.[11] The agency can then issue an administrative subpoena, and federal agents and attorneys responsible for investigating the matter will be assigned, or describe its concerns to a local United States Attorney's office for investigation. Regardless of whether the subpoena is issued by a federal agency, a U.S. Attorney's office, or a grand jury, the subpoena is usually the first strong indicator that a targeted contractor is facing potential FCA liability.[12]

Subpoenas designed to help the government investigate potential FCA issues often request a range of documents such as emails or other communications, invoicing, contract performance documentation, and contractor cost information. The precise nature of the government's concern is often difficult to discern from the document requests themselves, however, such that a contractor would be well-served to have outside counsel conduct an internal investigation of the facts while responding to the subpoena.[13] To the extent the contractor learns that the government's concerns are based on a misunderstanding of contractual requirements or factual background, counsel can enter into discussions with the government in an attempt to resolve the situation. If the contractor learns that there may have been an FCA violation, counsel can defend the action or negotiate a settlement.[14]

C. Damages

FCA violations will result in a civil penalty per false claim, of not less than $10,781 and not more than $21,563, plus treble the government's actual damages. 31 U.S.C. § 3729(a)(1); 28 C.F.R. § 85.5 (2017). A person violating § 3729 will also be held liable for the government's costs for bringing a civil action to recover any penalty or damages. *Id.*[15]

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[11] We note also that contractors sometimes become aware of potential FCA violations through internal reviews of invoicing or contract performance (e.g., by a contractor's Internal Audit group) or anonymous allegations of fraud made through a whistleblower hotline. In such cases, contractors may need to disclose the potential violation to the federal government: FAR 52.203-13—which is required to be included in all prime contracts or subcontracts expected to exceed $5.5 million and with a performance period of 120 days or more—requires contractors themselves to disclose FCA violations to the relevant agency's Office of the Inspector General if they have "credible evidence" of such violations. Furthermore, because the FCA's "knowledge" element can be satisfied by reckless disregard or deliberate ignorance of the truth, potential liability is not avoided by refusing to investigate. The FCA does not apply to mere mistakes, however, such that in these circumstances a contractor would be well-advised to have outside counsel conduct a thorough internal investigation of the issue, determine whether it has credible evidence of an FCA violation (*i.e.,* all the required elements have been met) and if so, assist with the disclosure process. An investigation by outside counsel is best in these situations both to protect any fruits of that investigation as privileged attorney work product or attorney-client communications, and to enable the contractor to present a credible, third-party "outsider" to the government in the event a disclosure needs to be made.

[12] A subpoena can also be prompted when the government is investigating a *qui tam* relator's complaint, which will have been filed under seal such that the contractor would have no knowledge of it.

[13] As noted above, ensuring that the investigation is conducted by outside counsel is important both to protect investigation materials as privileged and to enable an "outsider" third party to negotiate with the government and/or defend the matter. To the extent the investigation reveals that the government's FCA concerns are not supported by the facts, law or contract requirements, outside counsel will likely be best positioned to press that case credibly with government investigators.

[14] We note that United States Attorneys' Offices only have authority to settle claims of $1,000,000 or less, or claims of up to $5,000,000 when the difference between the gross amount of the original claim and the proposed settlement does not exceed $1,000,000. *See* United States Attorneys' Civil Resource Manual at 46, *available at* https://www.justice.gov/usam/civil-resource-manual-46-redelegation-authority-compromise-civil-claims. Settlements outside of those parameters must be handled by the appropriate Branch or Office within the DOJ Civil Division.

[15] The FCA is codified in two different places in the United States Code: 31 U.S.C. §§ 3729-3733 establishes civil liability and 18. U.S.C. § 287 imposes criminal liability. This Guide focuses on the former (*i.e.,* the Civil FCA). Generally speaking, the Criminal FCA requires the same elements but a more significant degree of intent. *See United States v. Maher,* 582 F.2d 842, 847 (4th Cir. 1978), *cert. denied,* 439 U.S. 1115 (1979) ("Under § 287, *the government must prove beyond a reasonable doubt that the defendant performed forbidden acts with a criminal intent*. The prohibition of the statute is absolute in that the defendant's liberty is at stake. Under [the Civil FCA], the government is empowered to enforce the underlying civil duty to submit to the government only valid claims for payment by bringing an action for imposition of civil penalties. The nature of the proceedings, the standards of proof, and the defendant's interests at stake are wholly different under these two statutes.") (emphasis added).

1. Treble Damages

In addition to the above penalties applicable on a per-claim basis, a contractor that has violated the FCA will be liable for treble the amount of damages sustained by the government as a result of the conduct. Although trebling actual damages is a straightforward concept, it can be more complicated when an FCA violation is based on a theory of liability implying that *every claim* submitted in connection with a particular contract is false or fraudulent (e.g., the Fraud in the Inducement and False Certification theories of liability, described in more detail *infra* at Part Three, Sections A.3 and 4). In such cases, courts must determine what value was received and *when* to apply the trebling factor; thus, different Circuits compute treble damages differently.

In the Seventh Circuit, courts apply a "net trebling approach," meaning they determine "the monopoly overcharge—the difference between the product's actual price and the price that would have prevailed in competition—and trebles that difference." *United States v. Anchor Mortg. Corp.,* 711 F.3d 745, 749 (7th Cir. 2013) (noting basing damages on net loss is the norm in civil litigation). The Ninth Circuit, however, applies the "gross trebling" approach the *Anchor Mortg. Corp*. court disfavored, which it defined as trebling "the monopolist's price, then subtract[ing] that price that would have prevailed in competition." *Id.; see also United States v. Eghbal,* 548 F.3d 1281, 1285 (9th Cir. 2008).

The D.C. Circuit has affirmatively rejected an aggressive government argument on treble damages in *United States v. Science Applications International Corp.,* 626 F.3d 1257 (D.C. Cir. 2010) ("*SAIC*"). In *SAIC*, the District Court found FCA liability due to an implied false certification regarding disclosure of organizational conflicts of interest; the government argued that damages should be calculated as *three times the amount of the full contract price*—plus civil penalties—despite the fact that *actual* damages related to the contract violation were computed as seventy-eight dollars. Ultimately, the District Court entered a judgment against SAIC of nearly $6.5 million. *SAIC,* 626 F.3d at 1264. The Circuit Court rejected this approach, explaining: "In a case where the defendant agreed to provide goods or services to the government, the proper measure of damages is the difference between the value of the goods or services actually provided by the contractor and the value the goods or services would have had to the government had they been delivered as promised. . . . [W]e see no basis for adopting an irrebuttable presumption—essentially what the government seeks—that treats services involving expert advice and analysis affected by potential organizational conflicts as categorically worthless." *SAIC,* 626 F.3d at 1278-80.[16]

Finally, as noted above, due to the FCA's statutory penalties a person need not have successfully defrauded the government for liability to attach. *See, e.g., Lamb Eng'g & Constr. Co. v. United States,* 58 Fed. Cl. 106, 111 (2003). The Court of Federal Claims has confirmed that "a contractor who submits a false claim for payment may still be liable under the FCA for statutory penalties, even if it did not actually induce the government to pay out funds or to suffer any loss." *Id.* at 111. Thus, the FCA attaches liability to the "claim for payment," rather than the underlying fraudulent activity or to the government's wrongful payment. *Id.* (noting "the government need not prove actual damages in order to recover statutory penalties").

[16] The Sixth Circuit rejected a similar damages calculation in *U.S. ex rel. Wall v. Circle C Construction,* LLC, 813 F.3d 616 (6th Cir. 2016), which is described in more detail in Part Two, Section B.4. The government in that case had argued for and received damages in the amount of the entire contract value ($763,000), based on an underpayment of statutorily-required wages of just $9,900. In reversing the damages award the Circuit court commented that these damages were not "grounded in reality" and were "fairyland rather than actual." *Id.* at 618.

2. Reduced Monetary Liability

If the court finds that the following factors exist, the court may assess no less than two times, rather than three times, the amount of damages which the government sustains because of the FCA violation:

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

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

(**C**) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation.

See 31 U.S.C. §3729(a)(2).

Part Two: Stumbling Blocks

There are situations where the elements required for FCA liability—false statements, made with knowledge, that are material to the government's payment decision—are more likely to arise. Below we detail common theories of liability pursued by the government, followed by typical fact patterns through which those theories of liability can be proven.

A. Classic Theories of Liability

Below are classic theories of liability pursued by the government.

1. Getting What You Paid For

The "typical" claim "under the FCA alleges that a person or company submitted a bill to the government for work that was not performed or was performed improperly, resulting in an undeserved payment flowing to that person or company." *United States ex rel. Customs Fraud Investigations, LLC. v. Victaulic Co.,* 839 F.3d 242, 247 (3d Cir. 2016). FCA liability arises when contractors provide goods to the government but knowingly use inferior or defective parts or materials. *See, e.g., United States ex rel. Westrick v. Second Chance Body Armor Inc.,* 128 F. Supp. 3d 1 (D.D.C. 2015) (involving FCA charges "in connection with allegedly defective body armor material made or sold by the defendants involving federally-funded purchases"). In *Second Chance*, the government alleged a subcontractor supplied material for bulletproof vests—ultimately purchased by the government—knowing the material was deficient, causing the vests to be defective. *See also United States ex rel. Roby v. Boeing Co.,* 100 F. Supp. 2d 619 (S.D. Ohio 2000) (involving allegations that a contractor violated the FCA by knowingly "manufacturing and selling defective transmission gears to the United States.").

FCA liability also arises when contractors knowingly provide deficient services. *See, e.g., United States v. Triple Canopy, Inc.,* 857 F.3d 174 (4th Cir. 2017). *Triple Canopy* involved a contract for security services in Iraq that required the contractor to supply guards who had received weapons training and passed tests demonstrating marksmanship competency. *Id.* at 175-76. Relators alleged the contractor invoiced for guards that the contractor knew had failed to satisfy the contract's marksmanship requirements. *Id.* According to the Fourth Circuit, the contractor would be liable under the FCA if the relators proved it knowingly employed and invoiced for guards who "could not, for lack of a better term, shoot straight." *Id.* at 179.

2. Truth in Negotiations Act

In 1962, Congress passed the Truth in Negotiations Act ("TINA"), 10 U.S.C. §§ 2306a *et seq.,* to counter what Congress perceived as an imbalance between the negotiating strengths of the government and potential contractors. *Aerojet Solid Propulsion Co. v. White,* 291 F.3d 1328, 1330 (Fed. Cir. 2002). Congress believed contractors were failing to disclose important facts regarding the probable cost of non-competitive contracts when negotiating with the government, and that the government lacked adequate negotiating tools to address the nondisclosures. *Unisys Corp. v. United States,* 888 F.2d 841, 844 (Fed. Cir. 1989). Contractors, according to Congress, overstated costs of future contract performance, resulting in frequent, excessively priced fixed price contracts. *Lockheed Martin Corp.,* ASBCA No. 50464, 02-1 BCA ¶ 31,784, at 156,942.

TINA attempts to redress the purported imbalance between the government and contractors by requiring contractors to make disclosures of factual data before the parties agree on a price for non-competitive contracts, and of certain subcontracts. *United States v. United Techs. Corp.,* 255 F. Supp. 2d 787, 788 (S.D. Ohio 2003). Stated differently, TINA is a disclosure statute that lacks any prescription regarding pricing requirements for potential contractors, who are free to negotiate whatever prices and terms the government will accept. *Motorola, Inc. v. United States,* 125 F.3d 1470, 1474 (Fed. Cir. 1997). Nevertheless, the disclosures TINA requires during the negotiation process must be current, accurate and complete.

Because TINA requires these disclosures to the government, FCA liability can attach when the disclosures amount to false statements. Specifically, FCA charges can arise when a contractor invoices the government after *knowingly* violating TINA during the negotiation process. *See, e.g., United States v. BAE Sys. Tactical Vehicle Sys.,* LP, 2016 WL 894567 (E.D. Mich. Mar. 9, 2016) (government brought FCA charges alleging contractor violated TINA by failing "to meet its obligation to provide cost or pricing data that was accurate, complete, and current"); *Sanders v. Allison Engine Co.,* 703 F.3d 930 (6th Cir. 2012) (involving "allegations that the defendants withheld cost and pricing data during their negotiations with the government's agent in violation of the Truth in Negotiations Act and the FCA"); *United States v. United Techs. Corp., Sikorsky Aircraft Div.,* 51 F. Supp. 2d 167 (D. Conn. 1999).

3. False Certification (Express or Implied)

As noted above, federal courts have defined two types of false statements that can create FCA liability—"factually" vs. "legally" false statements. *United States ex rel. Wilkins v. United Health Grp., Inc.,* 659 F.3d 295, 305 (3d Cir. 2011) ("There are two categories of false claims under the FCA: a factually false claim and a legally false claim."). A "factually false" FCA case is the straightforward or "paradigmatic" case, involving "an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided." *United States v. Sci. Apps. Int'l Corp.,* 626 F.3d 1257, 1266 (D.C. Cir. 2010).

"Legally false" claims are premised on a "certification theory" of liability; that is, the claims involve "a false representation of compliance with a federal statute or regulation or a prescribed contractual term." *Mikes v. Straus,* 274 F.3d 687, 696 (2d Cir. 2001). Legally false certification claims "can rest [on] one of two theories—express false certification, and implied false certification." *United States ex rel. Conner v. Salina Reg'l Health Ctr., Inc.,* 543 F.3d 1211, 1217 (10th Cir. 2008). "In an express false certification, the defendant is alleged to have signed or otherwise certified to compliance with some law or regulation on the face of the claim submitted." *United States ex rel. Hobbs v. MedQuest Assocs., Inc.,* 711 F.3d 707, 714 (6th Cir. 2013). "The payee's 'certification' need not be a literal certification, but can be any false statement that relates to a claim." *United States ex rel. Lemmon v. Envirocare of Utah, Inc.,* 614 F.3d 1163, 1168 (10th Cir. 2010).

"An implied false certification claim is based on the notion that the act of submitting a claim for reimbursement itself implies compliance with governing federal rules that are a precondition to payment." *Mikes,* 274 F.3d at 699. The implied certification theory is discussed in more detail below in Part Three, Section B, which addresses federal court interpretations of the U.S. Supreme Court's 2016 decision in *Universal Health Services, Inc. v. United States ex rel. Escobar.*

4. Fraud in the Inducement

FCA liability can attach for fraudulent inducement claims. *See, e.g., United States ex rel. Campie v. Gilead Scis., Inc.,* 862 F.3d 890, 902 (9th Cir. 2017). An FCA fraudulent inducement claim occurs where the government awards a contract or provides some other benefit on the basis of false statements or conduct. *United States ex rel. Barko v. Halliburton Co.,* 241 F. Supp. 3d 37, 52 (D.D.C. 2017). "Under the fraudulent inducement theory, liability attaches under [the FCA] for each claim submitted to the Government under a contract which was procured by fraud, even in the absence of evidence that the claims were fraudulent in themselves." *United States ex rel. Morsell v. Symantec Corp.,* 130 F. Supp. 3d 106, 120-21 (D.D.C. 2015).

B. Common Trouble Areas

The above theories of liability are often pursued in particular factual circumstances or in the context of various specific contractual requirements. The most common of these circumstances or contractual requirements are detailed below.

1. Prime Contractor Liability for Pass-through Claims

Prime contractors and subcontractors are subject to FCA liability when presenting pass-through claims to the government: "[i]n False Claims Act actions, statements of the subcontractor, when submitted by the general contractor, may serve as a basis for liability against the general contractor." *United States ex rel. Ervin & Assocs., Inc. v. Hamilton Sec. Grp., Inc.,* 370 F. Supp. 2d 18, 41 (D.D.C. 2005). A subcontractor's false claim can be "attributed to" the prime contractor; "where the prime contractor allegedly knows that a material certification by a subcontractor was false," courts hold "as a matter of law that the prime contractor has adopted the subcontractor's certification by submitting it to the government." *Harrison v. Westinghouse Savannah River Co.,* 176 F.3d 776, 793 (4th Cir. 1999); *see also Blake Constr. Co. v. United States,* 28 Fed. Cl. 672, 681 (1993) (pass-through claim requires that the prime "considers there are good grounds for the claim, and that [the prime] intends for it (not [the subcontractor]) to be held liable for any possible fraud attributable to assertion of the claim").

Subcontractors are also subject to FCA liability when a prime contractor submits a pass-through claim. *United States ex rel. DRC, Inc. v. Custer Battles, LLC,* 562 F.3d 295, 304 (4th Cir. 2009) ("[A] subcontractor could be liable for submitting a false claim to a prime contractor of the United States."). A subcontractor incurs FCA liability when it "causes" a false claim to be presented to the government. 31 U.S.C. § 3729(a)(1)(A). Subcontractors incur FCA liability despite not submitting claims directly to the government. *United States v. Carell,* 782 F. Supp. 2d 553 (M.D. Tenn. 2011) (allegations that defendants submitted fraudulent claims through intermediaries who passed claims to the federal government). Liability also attaches "if the subcontractor caused the presentation of false claims by the prime contractor," even if the subcontractor did not actually submit a false claim to the prime contractor. *U.S. ex rel. Smith v. Boeing Co.,* 505 F. Supp. 2d 974, 984 (D. Kan. 2007). FCA liability also attaches regardless of whether a subcontractor knows the prime contractor will submit its claim to the government. *United States v. Sequel Contractors, Inc.,* 402 F. Supp. 2d 1142, 1151 (C.D. Cal. 2005) (holding FCA plaintiff "need not allege that Defendants knew their claim would be presented to the federal government").

2. Performance Deficiencies

Liability under the FCA can arise through a contractor's deficient or otherwise inadequate performance of contract work. In *Commercial Contractors, Inc. v. United States,* the U.S. Court of Appeals for the Federal Circuit affirmed a lower court's ruling that a contractor was liable for violations of the FCA based on submission of false claims for additional compensation related to its contract work. 154 F.3d 1357 (Fed. Cir. 1998). Commercial Contractors, Inc. ("CCI") entered into a contract with the Army Corps of Engineers for construction of several segments of the Telegraph Canyon Channel in Chula Vista, California as part of a flood control project. *Id.* at 1361. CCI's contract work included excavating for the channel segments, constructing the segments by setting forms and pouring concrete into the forms, and then backfilling the excavated area around the forms. *Id.* CCI filed suit on its claims for additional compensation and the government counterclaimed for violations of the FCA and the Forfeiture of Fraudulent Claims Act, 28 U.S.C. §2514.

The contract required CCI to excavate per contract drawings, and based on the evidence presented at trial, the trial court found that CCI submitted false cross-sections and quantity surveys indicating that it excavated up to the contract lines. *Id.* at 1363. CCI did not dispute that excavation was not within the contract lines, but instead argued that it interpreted the contract to allow submission for payment based on the volume of excavation. Therefore, CCI argued that it did not knowingly submit false excavation claims. The court held CCI's interpretation of the contract was untenable based on the clear and unambiguous contractual requirements. Accordingly, the trial court held "CCI either knew or acted in reckless disregard of whether the cross-sections and quantity surveys it submitted in support of its claims were false." *Id.* at 1363. The Court of Appeals affirmed the lower court's finding.

CCI was also found liable for false claims related to the amount of backfill claimed, the composition of its backfill actually utilized by CCI, and other performance-related issues. The Court of Appeals affirmed the trial court's ruling that CCI violated the FCA and further that CCI forfeited its affirmative claims through the submission of false claims with the intent to deceive the government.

3. Prime Contractor Certifications for Subcontractors

Under the Contract Disputes Act ("CDA"), 41 U.S.C. §§ 7101 *et seq.*, claims over $100,000 must include certifications that the claim is made in good faith, the supporting data are accurate and complete, and the amount requested accurately reflects the amount for which the government is liable. 41 U.S.C. § 7103(b). When "passing-through" subcontractor claims to the government, prime contractors must make this certification. *AAB Joint Venture v. United States,* 68 Fed. Cl. 363, 367 (2005) (dismissing pass-through claim where prime contractor failed to provide CDA certification). A prime contractor's false certification of its subcontractor's costs in a pass-through claim gives rise to liability under the FCA. *See, e.g., Daewoo Eng'g & Constr. Co. v. United States,* 557 F.3d 1332 (Fed. Cir. 2009) (holding prime contractor violated FCA by submitting false claim that included subcontractor costs).

When submitting pass-through claims, prime contractors need not "believe the subcontractor's claim to be certain. Rather, the prime contractor need only believe that there is good ground for the claim." *Century Constr. Co. v. United States,* 22 Cl. Ct. 63, 65 (1990) (citing *United States v. Turner Constr. Co.,* 827 F.2d 1554, 1561 (Fed. Cir. 1987)). In *United States v. Turner Construction,* the Federal Circuit held that in addition to certifying there is "good ground" for the subcontractor's claim:

> [H]ow the prime contractor itself would resolve the dispute should not be relevant to the certification issue; the prime contractor should not, through the requirement that it certify subcontractor claims, be used as a substitute for the contracting officer or the board in the determination of the merits of the submitted claims under the CDA.

Turner Constr. Co., 827 F.2d at 1561 (internal citations omitted).

Although "the prime contractor [is] required to review and manage the claims of the subcontractor in order to prevent fraudulent or frivolous claims by the subcontractor," a prime contractor need only make "a good faith effort to comply" with its legal obligations when submitting pass-through claims. *Arnold M. Diamond, Inc. v. Dalton,* 25 F.3d 1006, 1010-11 (Fed. Cir. 1994). Accordingly, prime contractors can protect against FCA liability for pass-through claims, and against "expos[ure] to liability for a false certification," because the prime contractor "is permitted to qualify its certification of the claim under the CDA by relying on the subcontractor's representations." *George Hyman Constr. Co. v. United States,* 30 Fed. Cl. 170, 176 n.11 (1993) (citing *Transamerica Ins. Corp. v. United States,* 973 F.2d 1572, 1580 (Fed. Cir. 1992)); *see also Century Constr. Co.,* 22 Cl. Ct. at 65 (prime contractor "must provide 'minimum assurances' of its own belief in a subcontractor claim.").

4. Davis-Bacon and Service Contract Act Compliance

The Davis-Bacon and Related Acts ("Davis-Bacon"), 40 U.S.C. §§ 3141 *et seq.,* require submission of certified information related to the payment of workers on federally funded projects. 40 U.S.C. § 3145. The falsification or misrepresentation of such information may result in liability under the FCA. *See United States v. Fulton Cty., Georgia,* 2016 WL 4158392 (N.D. Ga. Aug. 5, 2016). A purpose of Davis-Bacon is to "give local laborers and contractors fair opportunity to participate in building programs when federal money is involved and to protect local wage standards by preventing contractors from basing their bids on wages lower than those prevailing in the area." *William J. Lang Land Clearing, Inc. v. Adm'r, Wage & Hour Div.,* 520 F. Supp. 2d 870, 877 (E.D. Mich. 2007).

Under Davis-Bacon, all contractors and subcontractors performing work on federally funded or federally assisted contracts for the construction, alteration, or repair (including painting and decorating) of public buildings or public works in excess of $2,000 must pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits, as determined by the Secretary of Labor. To ensure compliance, contractors and subcontractors subject to Davis-Bacon must furnish weekly wage payroll certifications pertaining to each employee, and prime contractors are responsible for submitting copies of payrolls by all subcontractors and ensuring compliance by subcontractors. *See* 40 U.S.C. § 3145(a) and 29 C.F.R. § 5.5(a)(3)(ii)(A), (a)(6).

A contractor may be subject to FCA violations where it submits falsified or otherwise inaccurate payroll certifications, as discussed in *United States ex rel. Wall v. Circle Constr., LLC,* 700 F. Supp. 2d 926, 932 (M.D. Tenn. 2010), *aff'd in part, rev'd in part sub nom. United States ex rel. Wall v. Circle C Constr., L.L.C.,* 697 F.3d 345 (6th Cir. 2012). In that case, Circle C contracted with the Army to construct buildings at a military base. Circle C subcontracted 98% of the electrical work to a subcontractor, Phase Tech. However, in Circle C's submission of payroll certifications to the government, Circle C failed to include any of Phase Tech's employees, nor did Circle C ensure that Phase Tech complied with the Davis-Bacon prevailing wage requirements. Because Phase Tech did not pay the prevailing wage, the trial court found that the Army would not have paid Circle C the entire amount of electrical work under the contract – $553,807.71 – if the government had known about the false certifications. Accordingly, the trial court concluded that pursuant to the FCA, Circle C was liable for $1,661,423.13 (three times the amount of the government's alleged damages).

On appeal, the U.S. Court of Appeals for the Sixth Circuit affirmed and found Circle C liable for FCA violations, but reduced the award based on a finding that the government's actual damages were $9,916—the difference between what Phase Tech was required to pay its workers and the amounts that were actually paid. The Sixth Circuit refused to accept that the entire sum paid for electrical work constituted the government's actual damages:

> [A]ctual damages are the difference in value between what the government bargained for and what the government received. Here, the government bargained for two things: the buildings, and payment of Davis–Bacon wages. It got the buildings but not quite all of the wages. The shortfall was $9,916. That amount is the government's actual damages.

United States ex rel. Wall v. Circle C Constr., LLC, 813 F.3d 616, 617 (6th Cir. 2016).

The McNamara-O'Hara Service Contract Act of 1965 ("SCA"), 41 U.S.C. §§ 6701, *et seq.,* requires that applicable contracts with the federal government "include provisions specifying the contract's 'wage determination,' which sets the wage rates and fringe benefits that must be paid to various classes of covered service employees." *Call Henry, Inc. v. United States,* 855 F.3d 1348, 1350 (Fed. Cir. 2017). "The SCA insures that service employees who were protected by a collective bargaining agreement with one contractor are not deprived of the wages and benefits negotiated in that collective bargaining agreement when the contract they work on is competitively awarded to a new contractor." *Id.* at 1350. "The SCA restricts employee remedies for violations of the Act to administrative channels," meaning the Act lacks "a private right of action to employees; the Secretary of Labor has the exclusive right to enforcement." *Trowbridge v. Wernicki,* 2015 WL 3746346, at *5 (D. Conn. June 15, 2015).

At least one court, however, has determined that *qui tam* relators can bring FCA claims alleging an employer "fraudulently reported to the United States that it was in compliance with the Service Contract Act." *U.S. ex rel. Sutton v. Double Day Office Servs., Inc.,* 121 F.3d 531, 532 (9th Cir. 1997). Under this theory, an employer can be held to have "violated the FCA when it submitted a claim for payment to the United States falsely stating that it had complied with the SCA." *Id.* at 534.

5. Statements Made in Relation to Requests for Payment

The submission of requests for payment to the government are a common administrative function on government contracts. The Federal Acquisition Regulation ("FAR") provides requirements for the submission of payment requests, which are largely governed by the type of contract. Inherent in the payment process are certifications made by contractors to the government. These certifications, where containing false or fraudulent information "knowingly" made, may result in violations of the FCA.

a. Bond Premiums

FAR 52.232-5(g), Payments Under Fixed-Price Construction Contracts, provides for reimbursement of bond premiums "after the contractor has furnished evidence of full payment to the surety." In *Morse Diesel International, Inc. v. United States*, 74 Fed. Cl. 601 (2007), the contractor submitted progress payment applications seeking reimbursement for performance and payment bonds procured for the subject project. Those payment requests, however, included rebates that the surety reimbursed to the parent company of the contractor. Therefore, the requests for payment containing amounts that were reimbursed by the surety "were false and knowingly used by Plaintiff to get a fraudulent claim paid by the Government in violation of the False Claims Act." *Id.* at 625.

b. Payments to Subcontractors and Suppliers

FAR 52.232-5(c) provides a certification requirement for fixed-price construction contracts requiring contractors to certify that "[a]ll payments due to subcontractors and suppliers from previous payments received under the contract have been made, and timely payments will be made from the proceeds of the payment covered by this certification . . . This request for progress payments does not include any amounts which the prime contractor intends to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract." Falsely certifying compliance with this clause in order to receive payment from the government can result in liability under the FCA.

In *Lamb Engineering & Construction Co. v. United States,* 58 Fed. Cl. 106 (2003), Lamb Engineering and Construction, Co. ("Lamb") entered into a fixed price contract for the construction of an electrical substation. During performance, Lamb submitted five progress billings and certified that payments had been made to its subcontractors and suppliers. With respect to its fifth invoice, Lamb requested $1,121,073.03, certified that all subcontractors had been paid from previous progress payments, and that Lamb was not withholding any amounts. However, Lamb had not fully paid its subcontractors from funds provided under previous progress payments.

The court found that Lamb's inclusion of clauses in its subcontracts "providing for it to retain funds in violation of the FAR and [Prompt Payment Act] PPA, which require that subcontractors be paid within seven days," satisfied the FCA *scienter* requirement. *Id.* at 110–11. In addition, the court held that Lamb's submission of a certified invoice, despite having failed to pay its suppliers and subcontractors, convinced the court that Lamb "acted knowingly, or in deliberate ignorance with reckless disregard of falsehoods, when it certified this final progress billing." *Id.* The court also found that "the certification provided with Progress Billing No. 5 was also, on its face, false. It therefore will be treated as a separate violation of the FCA." *Id.* Accordingly, the court held that each request for payment containing the false certification was a separate claim for which civil penalties under the FCA should be assessed.

6. Failure to Disclose Organizational Conflict of Interest

Companies failing to disclose organizational conflicts of interest ("OCI") in proposals are subject to liability under the FCA. Failure to disclose OCIs may constitute an implied false certification under the FCA. *United States v. Sci. Applications Int'l Corp.,* 555 F. Supp. 2d 40, 51 (D.D.C. 2008); *see also United States ex rel. Ervin & Assocs., Inc. v. Hamilton Sec. Grp., Inc.,* 370 F. Supp. 2d 18, 51-52 (D.D.C. 2005) ("A government contractor's failure to disclose an organizational conflict of interest constitutes a false claim under the False Claims Act").

FCA liability can also attach when a contractor mistakenly certifies no OCIs exist. *United States ex rel. Harrison v. Westinghouse Savannah River Co.,* 352 F.3d 908 (4th Cir. 2003). In *Harrison,* just one of a contractor's employees knew of the OCI, but that employee did not know the contractor certified no OCI existed. *Id.* at 919-20. At the same time, a different employee certified no OCI existed, without knowledge of the OCI. *Id.* According to the court, through a single employee "alone" the contractor knew "that the substance of the no-OCI certification was false" when the contractor submitted the certification to the government. *Id.* at 120.

7. Buy American Act ("BAA") Compliance

The Buy American Act ("BAA"), 41 U.S.C. §§ 8301 *et seq.,* creates a preference for domestic construction material and products and applies to the supply of goods and services on supply and construction contracts with the federal government. Beginning in 2016, and for the foreseeable future, compliance with the BAA will likely be an area of increased emphasis. On April 18, 2017, President Trump issued an executive order seeking to "maximize" use of laws, such as the BAA, for all Federal procurements. Exec. Order No. 13788, 82 Fed. Reg. 18837 (Apr. 18, 2017). The order requires agencies to "scrupulously" monitor and enforce laws such as the BAA. As a result, FCA actions could increase because non-compliance with the BAA may serve as a basis for FCA violations. *See, e.g., United States v. Rule Indus., Inc.,* 878 F.2d 535 (1st Cir. 1989); *S.J. Amoroso Constr. Co. v. United States,* 12 F.3d 1072, 1077 (Fed. Cir. 1993).

In *United States ex rel. Kress v. Masonry Sols. Int'l, Inc.,* 2015 WL 3604760 (E.D. La. June 8, 2015), a relator alleged Masonry Solutions, Inc. ("MSI") violated the FCA by seeking payment for products furnished to a federally funded construction project that were not compliant with the BAA. MSI was a subcontractor on a project to reinforce masonry walls of pumping stations in New Orleans, LA. The relator alleged that MSI violated the BAA by supplying certain spiral bars that were packaged with the label "Made in the USA" when in fact the bars were from England. MSI countered that bars were purchased from England, but England is a designated county exempt from BAA requirements and also that the bars came in a kit that contained materials manufactured in MSI's Maryland facility. With respect to other material that was purchased from China and supplied by MSI, MSI argued that such material went through a "substantial transformation, without which the product would be useless, and thus created a new construction component that is manufactured in the United States." *Id.* at *7 (citing 48 C.F.R. § 52.225–11).

On MSI's motion for summary judgment seeking to have the case dismissed, the court found that no genuine issue of material fact existed as to MSI's liability under the FCA. However, under different facts, it is clear that BAA violations could have produced FCA consequences for MSI.

8. Contracting Set-Aside Issues

According to the Small Business Administration ("SBA"), the current, government-wide procurement goal stipulates that at least 23% of all federal government contracting dollars should be awarded to small businesses. There are additional targeted sub-goals for certain categories of small business such as 8(a) businesses, Women Owned Small Businesses, and Service Disabled Veteran Owned Small Businesses. However, contractors found to have falsely certified compliance with SBA programs may be subject to FCA penalties and debarment from government contracting.

a. Service Disabled Veteran Owned Small Business ("SDVSOB")

In March 2015, the Gilbane Building Company agreed to pay the government more than $1.1 million to settle false claims allegations that a company with which it merged, W.G. Mills Incorporated ("WGM") violated the FCA by creating a front company, Veteran Constructors Incorporated ("VCI"), in order to receive a Coast Guard contract that was designated for Service Disabled Veteran Owned Small Businesses (SDVOSBs). The government alleged that VCI did not perform the work required under the Coast Guard contract and instead such work was performed by WGM. Further, that if the Coast Guard was aware that WGM would be performing the work it never would have awarded the contract to VCI.

b. SBA 8(a) Program

In July 2015, LB&B Associates Inc. ("LB&B") and its principals agreed to pay the government $7.8 million to settle claims that they made false statements to obtain contracts through the Small Business Administration's 8(a) Business Development Program for Small Disadvantaged Businesses. Relators alleged that LB&B falsely represented that one of its principles—who satisfied the criteria for a socially and economically disadvantaged person under the program—controlled the operations of LB&B. Through the performance of contracts awarded to LB&B as an 8(a) business, the qualifying principal allegedly failed to exercise control over the company's operations.

c. Historically Underutilized Business Zone

Lusk Mechanical Contractors, Commonwealth Technologies and the companies' owners were alleged to have made false certifications to the SBA representing that it was a small business within a Historically Underutilized Business Zone ("HUBZone") and then used such certification to obtain Army contracts to build a courthouse in Fort Knox, KY. According to the government's allegations, Commonwealth applied for status as a HUBZone contractor but operated out of Lusk's offices, which were not located in a HUBZone. Further, the government noted that Commonwealth did not disclose on its SBA application that it shared facilities, equipment, personnel, insurance and bonding with Lusk. To settle the allegations, Lusk, Commonwealth and their owners agreed to pay $3.7 million and forfeit another $2.5 million seized by federal agents.

9. Multiple Award Schedule Compliance Issues

"The General Services Administration of the United States ('GSA') negotiates, awards, and manages Multiple Award Schedule ('MAS') contracts, which provide federal agencies with a simplified process for obtaining commercial supplies and services at fair and reasonable prices." *United States ex rel. Frascella v. Oracle Corp.,* 751 F. Supp. 2d 842, 844 (E.D. Va. 2010) (citing 48 C.F.R. § 8.402). Through the MAS program, which is also known as the Federal Supply Schedule ("FSS") program, "GSA negotiates and administers long-term, government-wide contracts, ensuring at the time of negotiation that these contract prices are fair and reasonable." *K-Lak Corp. v. United States,* 98 Fed. Cl. 1, 2 n.3 (2011).

Participating contractors agree to provide supplies and services "at stated prices for given periods of time," 48 C.F.R. 8.402(a), and to publish a listing of the items offered, "as well as the pricing, terms, and conditions applicable to each item." *Sharp Elecs. Corp. v. McHugh,* 707 F.3d 1367, 1369 (Fed. Cir. 2013).

Contractors who participate in the MAS program can face liability under the FCA, often as a result of the information they must provide to GSA during the negotiation or performance of MAS contracts. *See, e.g., United States ex rel. Ubl v. IIF Data Sols.,* 650 F.3d 445 (4th Cir. 2011) (*qui tam* action alleging contractor "made various material false representations about its prior pricing and discounting practices" when applying for MAS contract); *United States ex rel. Shemesh v. CA, Inc.,* 89 F. Supp. 3d 36 (D.D.C. 2015) (*qui tam* action alleging contractor made false statements in "the process of negotiating the GSA MAS contract, . . . and as a result, all claims submitted by [the contractor] pursuant to the contract . . . were false"); *United States v. Second Chance Body Armor Inc.,* 2016 WL 3033937 (D.D.C. Feb. 11, 2016) (involving allegations contractor sold defective body armor through MAS program).

a. CSP submission

GSA contractors must follow commercial sales practices reporting ("CSP") requirements of providing historical data on commercial sales for all products offered on the contractor's MAS contract. FCA charges can arise if a contractor knowingly fails to comply with the CSP clause. *United States ex rel. Morsell v. Symantec Corp.,* 130 F. Supp. 3d 106 (D.D.C. 2015) (*qui tam* action alleging contractor's "failure to disclose reseller back-end rebates rendered its CSPs and other disclosures false"); *United States ex rel. Brown v. Merant Inc.,* 2002 WL 487160 (E.D. Pa. Mar. 29, 2002) (granting summary judgment to contractor and dismissing complaint involving allegations of falsified disclosures of "commercial sales practices to the General Services Administration (GSA)").

b. Price Reduction Clause Compliance

GSA contracts also typically include a Price Reductions Clause ("PRC"), GSAR 552.238-75, "which requires GSA contractors to maintain a static relationship between GSA's negotiated discounts or prices and those for a designated customer or category of customers, as identified and agreed upon during contract negotiations. Such designated customers are known as Basis of Award ("BOA") customers. If the relationship between the prices charged to the government and those charged to the BOA customer changes during the life of a MAS contract, the contractor must disclose the change to GSA and offer discounts or prices that restore the static relationship." *United States ex rel. Frascella v. Oracle Corp.,* 751 F. Supp. 2d 842, 845 (E.D. Va. 2010).

FCA charges can arise if a contractor knowingly fails to comply with the Price Reduction Clause. For example, in *Frascella*, the government brought FCA charges alleging "Oracle breached the PRC in its Contract by failing to report or offer to GSA certain software license discounts that Oracle purportedly gave to its commercial customers." According to the government, Oracle "routinely" granted its commercial customers discounts exceeding the discounts disclosed to GSA, and knowingly submitted false certifications that its commercial discount and pricing practices had remained consistent. *Id.* at 846-47. Additionally, the government alleged Oracle "consistently manipulated its sales of software licenses to Commercial End Users" to evade PRC reporting obligations. *Id.* at 847; *United States ex rel. Morsell v. Symantec Corp.,* 130 F. Supp. 3d 106 (D.D.C. 2015) (*qui tam* action involving allegations contractor violated Price Reduction Clause by failing to disclose discounts larger than those extended to GSA).

10. False Estimates

The act of underbidding a job does not by itself create liability under the FCA. However, where a contractor "knowingly" underbids a contract solicitation to increase the chances of winning an award, then the contractor may be liable for violations of the FCA. In *Hooper v. Lockheed Martin Corp.,* 688 F.3d 1037 (9th Cir. 2012), a relator brought an action against Lockheed alleging, *inter alia,* that Lockheed "submit[ed] a fraudulently low bid, based on knowing underestimates of its costs, to improve its chances of winning the Air Force RSA IIA contract." *Id.* at 1047. In a matter of first impression for the Ninth Circuit Court of Appeals, the court, relying on precedent from the First and Fourth Circuits, held "that false estimates, defined to include fraudulent underbidding in which the bid is not what the defendant actually intends to charge, can be a source of liability under the FCA, assuming that the other elements of an FCA claim are met." *Id.* at 1049.

Part Three: Enforcement Trends and Notable Cases

The federal government remains very active in pursuing FCA cases against contractors it believes have submitted false or fraudulent claims.

A. 2016 Enforcement Statistics

In the 2016 fiscal year, DOJ obtained $4.7 billion in settlements and judgments from civil cases involving fraud and false claims against the government. This was the third highest annual recovery in FCA history and brought the fiscal year average to almost $4 billion since fiscal year 2009.[17]

1. Targeted Industries

Of the $4.7 billion recovered in 2016, the largest recovery came from the health care industry, with $2.5 billion coming from companies and individuals allegedly providing unnecessary or inadequate care, paying kickbacks to health care providers to induce the use of certain goods and services, or overcharging for goods services paid for by Medicare, Medicaid, and other federal health care programs. Housing and Mortgage Fraud came in second with approximately $1.7 billion recovered from matters related to the housing and mortgage crisis repercussions. The DOJ also recovered $52.6 million from for-profit schools on allegations of deceptive and misleading recruiting practices. Importers seeking an unfair advantage by evading customs paid $50 million. The increase of approximately 26% from 2015 to 2016 in claims recovered indicates that the DOJ will continue to enforce FCA claims vigilantly.[18]

2. *Qui tam* statistics

Of the $4.7 billion recovered in fiscal year 2016, $2.9 billion related to *qui tam* matters, and the government paid out $519 million in total to relators. There were 702 *qui tam* lawsuits filed in fiscal year 2016, or an average of 13.5 new cases each week. Total recoveries from *qui tam* suits have increased over time, totaling nearly $24 billion from January 2009 through the end of fiscal year 2016; the government paid out more than $4 billion in whistleblower awards during the same period.[19]

B. *Escobar* Developments

Federal courts have continued to interpret the Supreme Court's June 2016 decision in *Universal Health Servs., Inc. v. United States ex rel. Escobar,* which redefined the circumstances in which an implied certification can be the basis of liability under the FCA.[20] Specifically, *Escobar* described three key elements necessary for an implied certification theory to succeed: 1) "the claim does not merely request payment, but also makes specific representations about the goods or services provided;" 2) "the defendant's failure to disclose noncompliance with … statutory, regulatory, or contractual requirements makes those representations misleading half-truths;" and 3) the misrepresentation is material to the government's payment decision.[21] *Escobar's* approach requires trial courts to evaluate FCA claims in a holistic way, and typically no one element controls this type of analysis. Nevertheless, lower federal courts have provided useful guidance to

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[17] *See* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, *Justice Department Recovers Over $4.7 Billion from False Claims Act Cases in Fiscal Year 2016* (Dec. 14, 2016), *available at:* https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016.

[18] *Id.*

[19] *Id.*

[20] *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

[21] *See Escobar*, 136 S. Ct. at 1996, 2001. The misrepresentations must also be made with the requisite *scienter*.

government contractors indicating how each element can be interpreted to reach liability. Indeed, in several cases, courts seem to have interpreted the requirements in ways that undermine the limitations described in *Escobar.*

a. Specific Representations

Escobar limits the scope of FCA liability, requiring proof that the contractor submitted specific representations to the government payor. However, *Escobar* did not resolve whether all claims for payment are inherently specific representations "that the billing party is entitled to payment." In *United States ex rel. Schimelpfenig v. Dr. Reddy's Labs. Ltd.,* plaintiffs violated the Poison Prevention Packaging Act, failing to test drug packaging from India for child resistance according to American standards. On the issue of specific representations, the government argued *Escobar* did not overrule preexisting cases upholding a broader view of implied certification that did not require demonstrating specific false statements to qualify as an FCA claim.[22] The court did not agree, holding that requests for payments were insufficient to demonstrate FCA violations because they did not contain "specific representations about the products" the government reimbursed. According to the trial court, the Third Circuit had extended *Escobar's* "specific representations" standard into its FCA analysis, and plaintiffs failed to meet this prong.

Similar conclusions were reached in the Ninth Circuit in *United States ex rel. Kelly v. Serco, Inc.* and again (at the district court level) in *United States ex rel. Mateski v. Raytheon Co.*[23] In *Serco,* the contractor used a billing format and provided cost-tracking reports that were not in accordance with the system required under applicable FAR and DFARS clauses. According to the plaintiff, these reports did not give the Navy a clear breakdown of the services Serco was providing, although the contractor claimed the government agreed to a modified reporting format. The court held that the documents provided to the government did not contain "any specific representations about Serco's performance" and the "implied false certification claim … fails as a matter of law" as a result.[24] In *Mateski,* the court explained that *Escobar* (and *Serco*) now governed the implied certification analysis, but noted the plaintiff had not "identifie[d] specific representations made in Raytheon's claims for payment" and held the complaint was inadequate as a result.[25]

b. What Omissions Create Falsity?

One aspect of *Escobar* that has not been fully explored in the lower courts is what types of omissions create falsity – *i.e.,* when does an omission convert the specific statements included with the claim for payment into "misleading half-truths"? Although this issue has certainly come up, courts' analyses are typically fact-specific and tied either to the "specific representation" or "materiality" prong. In *United States ex rel. George v. Fresenius Medical Care Holdings, Inc.,* for example, the plaintiff argued that the contractor had shortened dialysis run times to cut costs, and that related claims for payment were therefore fraudulent. The court explained its view that this was insufficient under the *Escobar* framework, but its analysis focused on the lack of detail provided by the plaintiff as to the amount of time the sessions were shortened, which impacted materiality:

> [T]he court finds that George cannot show that Fresenius submitted a false claim under the implied false certification theory. … [A]lthough Medicare does not ask dialysis providers to submit information on the duration of its dialysis treatments, it is an inherent assumption underpinning the dialysis reimbursement scheme that a patient receive treatment of a sufficient duration so that the significant benefits of dialysis are realized. However, not all deviations from treatment are "material" under *Escobar*. That is, even taking George's facts in the light most favorable to George and finding that Fresenius did shorten run times, the claim still fails because George has not identified by how many minutes these run times were cut short. Instead,

[22] *United States ex rel. Schimelpfenig v. Dr. Reddy's Labs. Ltd.,* No. CV 11-4607, 2017 WL 1133956, at *5 (E.D. Pa. Mar. 27, 2017).

[23] *United States ex rel. Kelly v. Serco, Inc.,* 846 F.3d 325, 333 (9th Cir. 2017); *United States ex rel. Mateski v. Raytheon Co.,* No. 206CV03614ODWKSX, 2017 WL 1954942 (C.D. Cal. Feb. 10, 2017).

[24] *Serco*, 846 F.3d at 333.

[25] *Mateski*, 2017 WL 1954942 at *5.

> George has left the court only to speculate .... Without additional facts, the court cannot determine whether reimbursements on these treatments omitted "critical qualifying information" that would have been "material to the Government's payment decision" under the FCA.[26]

In *United States ex rel. Badr v. Triple Canopy,* by contrast, the Fourth Circuit seemed to take the view that the importance of the contractor's omission – which dealt with the core qualifications of the guards supplied under the contract – made false claims for payment that on their face did not appear to contain specific representations about the services provided.[27] The invoices in *Triple Canopy* indicated only "the number of guards and hours worked," but nevertheless the court agreed with plaintiffs that the contractor's omission of information that guards had failed marksmanship tests (a contract requirement) made those claims false:

> We conclude that the Government has sufficiently alleged falsity. Simply, the *Universal Health* rule is not as crabbed as Triple Canopy posits. In announcing the rule, the Court made clear that it was targeting omissions that "fall squarely within the rule that half-truths—representations that state the truth only so far as it goes, while omitting critical qualifying information—can be actionable misrepresentations." ... That "half-truth" is exactly what we have here: although Triple Canopy knew its "guards" had failed to meet a responsibility in the contract, it nonetheless requested payment each month from the Government for those "guards." Just as in *Universal Health*, anyone reviewing Triple Canopy's invoices "would probably—but wrongly—conclude that [Triple Canopy] had complied with core [contract] requirements."[28]

c. <u>Materiality</u>

The cases described above also dealt with *Escobar's* materiality prong. In *Triple Canopy*, for example, the Fourth Circuit easily disposed of the materiality question by relying on an example provided in *Escobar* itself: "Guns that do not shoot are as material to the Government's decision to pay as guards that cannot shoot straight."[29] The Ninth Circuit in *Serco* also considered materiality, even though the plaintiff's claim failed as a matter of law because no "specific representations" were made in the claim. The court quoted *Escobar's* language describing a "demanding" materiality standard and explained that the plaintiff's claims did not meet it:

> Here, it is undisputed that compliance with ANSI–748 was not an express [contract] term .... It is also undisputed that the CDRLs governing Serco's performance ... provided for EVM reports in "contractor format" using Microsoft Office applications, which is what Serco delivered. It is further undisputed that [the government] ... agreed that Serco could provide its reporting on MS Excel spreadsheets using manually tracked and compiled data rather than an EVM system. And it is undisputed that SPAWAR accepted monthly cost reports from Serco that utilized a single task charge code. In addition, it is undisputed that Serco periodically submitted public vouchers and received payment for its work[.] ... Kelly has failed to establish a genuine issue of material fact regarding the materiality of Serco's obligations to comply with ANSI–748 or provide valid EVM reports. Given the demanding standard required for materiality under the FCA, the government's acceptance of Serco's reports despite their non-compliance with ANSI–748, and the government's payment of Serco's public vouchers for its work ..., we conclude that no reasonable jury could return a verdict for Kelly on his implied false certification claim.[30]

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[26] *United States ex rel. v. Fresenius Medical Care Holdings, Inc.,* No. 2:12-CV-00877-AKK, 2016 WL 5361666, at *18 (N.D. Ala. Sept. 26, 2016).

[27] *Id.*

[28] *Triple Canopy,* 857 F.3d at 178 (*quoting Escobar,* 136 S. Ct. at 2000) (citations omitted).

[29] *Triple Canopy,* 857 F.3d at 179.

[30] *United States ex rel. Kelly v. Serco, Inc.,* 846 F.3d 325, 334 (9th Cir. 2017).

In *United States ex rel. Schimelpfenig v. Dr. Reddy's Labs. Ltd.,* the court described the materiality discussion from *Escobar* and noted the plaintiffs had not identified any of the factors that might demonstrate materiality: "Plaintiffs do not identify a single statutory, regulatory, or contractual provision identifying compliance with federal packaging requirements as a condition of Government payment; Plaintiffs do not allege an instance wherein the Government refused payment of a claim on the basis of noncompliance with federal packaging requirements; and Plaintiffs do not allege an instance wherein the Government initiated an action to recover monies paid for goods noncompliant with federal packaging requirements."[31] Although the plaintiffs in that case had pled "an abundance of research highlighting the importance of child-proofing prescription medications and note Congress's decision to regulate the issue of child safety in drug manufacturing" the court held this was insufficient to allege materiality.[32]

Conversely, a Central District of California court held in *United States v. Celgene Corp*. that selling off-label prescription drugs that were not for medically accepted indications constituted a material false representation. Defendants argued that the plaintiff had not met the two-prong test from *Escobar*, but the district court rejected this argument, stating that those two conditions (*i.e.,* that the claim made specific representations about the goods or services provided, and the failure to disclose some material noncompliance made those representations misleading half-truths) did not "describe the outer reaches of FCA liability," because the Court "stated that liability could be found 'at least' where these conditions were satisfied."[33] The *Celgene* court explained its view that off-brand marketing could be actionable because medical acceptance was an explicit condition for payment under Medicare; the "statutory requirement may be so central to the functioning of a government program that noncompliance is material as a matter of law."[34]

d. <u>United States of America ex rel. Campie v. Gilead Sciences, Inc.</u>

The Ninth Circuit provided an interesting interpretation of *Escobar's* implied certification test in July 2017. In *United States of America ex rel. Campie v. Gilead Sciences, Inc.,* two former employees accused Gilead of a fraudulent course of conduct related to the Food and Drug Administration (FDA) approval process for drugs for which the company later sought reimbursement under federal programs such as Medicare and Medicaid.[35] According to the complaint, Gilead used ingredients from unapproved Chinese facilities and obscured or augmented labeling and paperwork to ensure that its medications received or retained FDA approval, which in turn made the drugs eligible for such reimbursement. The relators alleged several different theories of liability, including nonconforming goods, fraud in the inducement, and implied certification. The Ninth Circuit found that each such theory of liability was viable and analyzed implied certification under the *Escobar* test.[36]

First, the court explained its view that inclusion of the specific drug *names* at issue in claims for payment was a sufficient "specific representation[] about the goods or services provided" to meet this element of the *Escobar* test: "Just as payment codes correspond to specific health services, *Escobar*, 136 S. Ct. at 2000 … these drug names necessarily refer to specific drugs under the FDA's regulatory regime."[37] The court further found sufficient the relators' allegation that these "specific representations" were false or misleading because Gilead requested payments for drugs that "fell outside of that approval and omitted critical information regarding compliance with FDA standards."[38] Finally, the court agreed that relators' arguments on materiality were sufficient, despite the fact that 1) the false statements were not made to the payor agency;

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[31] *United States ex rel. Schimelpfenig v. Dr. Reddy's Labs. Ltd.,* No. CV 11-4607, 2017 WL 1133956, at *7 (E.D. Pa. Mar. 27, 2017).

[32] *Id.*

[33] *United States v. Celgene Corp.,* 226 F. Supp. 3d 1032, 1044-45 (C.D. Cal. 2016).

[34] *Id.* at 1049.

[35] *United States ex rel. Campie v. Gilead Scis., Inc.,* 862 F.3d 890 (9th Cir. 2017).

[36] Although the government had not intervened in the case, it filed a Statement of Interest with the court, describing several of the positions the court ultimately adopted.

[37] *Gilead,* 862 F.3d at 902-03.

[38] *Id.* at 903.

and 2) the government allegedly continued to pay for the medications (which retained their FDA approval at all relevant times) after it became aware of the FDA violations that formed the basis of the alleged fraud.

Although each of these determinations may be appropriate given *Gilead's* specific facts, together they seem to establish a low bar in the Ninth Circuit to meet *Escobar's* implied certification test. First, it remains difficult to see when a claim for payment does *not* contain the "specific representations" required by *Escobar* if the very name of the product is such a representation. Although the drug names in *Gilead* referenced FDA-approved items, product identifications in other circumstances could easily be converted into "specific representations" by referring back to a contract specification or other requirement. It is also unsettling that the court found these falsehoods could have been material to the payment decision, despite the fact the statements were not made to the payor agency making that decision.[39] The Ninth Circuit, while recognizing that "it is not the purpose of the False Claims Act to ensure regulatory compliance," asserted its view that the relators had alleged "more than the mere possibility that the [Center for Medicare & Medicaid Services] would be entitled to refuse payment" if it were aware of the earlier false statements to the FDA, thus "sufficiently pleading materiality at this stage of the case."[40] Again, one can envision a number of regulatory violations, about which implied representations are made to non-payor agencies, which would allow relators to plead "more than the mere possibility" the government would be entitled to refuse payment if it knew of those violations.

The procedural posture of *Gilead* should also be kept in mind. Specifically, as a reconsideration of a Fed. R. Civ. P. 12(b)(6) dismissal at the district court level, the Ninth Circuit took all factual allegations as true and examined only whether those allegations could support a cause of action. As the facts of this case are further developed in the trial court, the application of the Ninth Circuit opinion could be cabined in some ways. Nevertheless, we believe this opinion's broad reading of *Escobar's* requirements reflects the increased risk for companies doing business with the government of being subject to FCA liability on an "implied certification" theory in the post-*Escobar* era.

C. Other Notable Cases

As described in further detail below, in addition to cases applying *Escobar*, there have been a number of other notable, recent developments in FCA case law since publication of last year's guide in October 2016.

1. Supreme Court Holds that Violating the FCA's "Seal" Provision Does not Always Require Dismissing Complaint

State Farm Fire & Casualty Co. v. U.S ex rel. Rigsby, 137 S. Ct. 436 (2016)

On December 6, 2016, the Supreme Court addressed an issue that had divided the Federal courts of appeal: whether all violations of the FCA's seal requirement at 31 U.S.C. § 3730(b)(2) – which requires *qui tam* complaints to remain under seal while the government decides whether to intervene – mandate dismissal of the complaint with prejudice. The Court held that, despite the FCA's express requirement that an FCA complaint be kept under seal, failure does not always necessitate dismissal.

[39] The Ninth Circuit noted that because the FDA and the Center for Medicare & Medicaid Services are both part of Health and Human Services (HHS), the "fraud was, at all times, committed against" HHS. *Id.* The court further explained, however, that this was not necessary for potential liability to attach: "But more importantly, the False Claims Act imposes no such limitation. … It is not the distinction between the agencies that matters, but rather the connection between the regulatory omissions and the claim for payment." *Id.* (citation omitted).

[40] *Id.* at 905, 907. With respect to whether the government had knowledge of the false statements, the court noted this was a factual question to be developed at trial. The Fifth Circuit, in *United States ex rel. Harman v. Trinity Industries Inc.*, 2017 WL 4325279 (5th Cir. Sept. 29, 2017), recently held that allegations of fraud are *not* material when agencies affirm approval of a product after learning of the allegations. The Fifth Circuit distinguished *Gilead* by noting that in that case the government's actual knowledge was in dispute, and that in any event the government's continued payment for the goods – which was a key factor in *Trinity Industries* – occurred "after the alleged noncompliance had terminated." *Trinity Industries*, 2017 WL 4325279 at *13. *Trinity Industries* is discussed in more detail in Section Part Three, Section C, *infra*.

Relators alleged State Farm submitted false claims seeking payment under flood insurance policies seeking to recover costs arising from damage caused by Hurricane Katrina. A federal program provides government-backed flood insurance that private companies such as State Farm issue and administer. *Id.* at 440. State Farm also issued insurance policies to the same customers, providing coverage for wind damage but excluding coverage for flood damage. *Id.* Unlike claims under the flood insurance policies—which the government compensated—the government did not compensate claims submitted under State Farm's wind damage policies. *Id.* Stated differently, State Farm "would be responsible for paying for wind damage, while the Government would pay for flood damage." *Id.* According to relators, State Farm wrongfully characterized claims as resulting from flood damage—which the government paid—while minimizing wind claims, which State Farm itself paid. *Id.* at 441.

Before the court lifted the seal, relators' attorney e-mailed sealed evidence disclosing the complaint's existence to journalists at ABC, the Associated Press, and the New York Times. All three outlets issued stories discussing relators' allegations of fraud against State Farm, but did not specifically mention the FCA complaint. *Id.* State Farm argued that the district court should have dismissed the complaint due to relators' repeated and intentional violations of the FCA's seal provision, 31 U.S.C. § 3730(b)(2). *Id.* This provision requires that in *qui tam* actions, a "copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the government." The complaint must be filed *in camera* and remain under seal until the court orders the complaint served on defendant.

The FCA, however, fails to address what punishment courts should impose when a relator violates the seal provision. As a result, the Federal courts of appeal had issued conflicting decisions regarding whether a *qui tam* relator's violation of the seal provision mandated dismissal of the complaint. *See, e.g., United States ex rel. Summers v. LHC Grp. Inc.,* 623 F.3d 287 (6th Cir. 2010) (holding "any violation of the seal requirement, no matter how trivial, requires dismissal"); *United States ex rel. Lujan v. Hughes Aircraft Co.,* 67 F.3d 242 (9th Cir. 1995) (applying three-factor balancing test); *United States ex rel. Pilon v. Martin Marietta Corp.,* 60 F.3d 995 (2d Cir. 1995) (focusing on whether relator's violation frustrates Congress' goals underlying the FCA's *qui tam* provisions); *Smith v. Clark/Smoot/Russell,* 796 F.3d 424 (4th Cir. 2015) (same).

The Court rejected State Farm's argument that "a violation of the seal provision necessarily requires a relator's complaint to be dismissed," noting that the "FCA does not enact so harsh a rule." *Id.* at 442. Although certain provisions of the FCA expressly require dismissal, the seal provision does not. Accordingly, the Court inferred "that, had Congress intended to require dismissal for a violation of the seal requirement, it would have said so." *Id.* In short, there is "no textual indication in the statute suggesting that the relator's ability to bring suit depends on adherence to the seal requirement." *Id.* at 444.

In addition, the seal provision "was intended in main to protect the Government's interests," meaning "it would make little sense to adopt a rigid interpretation of the seal provision that prejudices the Government." *Id.* at 443. Accordingly, "the question whether dismissal is appropriate should be left to the sound discretion of the district court." *Id.* at 444. The Court, however, declined to address the factors district courts should consider in deciding whether to dismiss a complaint, stating that the "standards can be discussed in the course of later cases." *Id.* Although dismissal "remains a possible form of relief," remedies such as monetary penalties or attorney discipline are available if a *qui tam* relator violates the seal requirement.

2. Circuit Split on First-to-File Rule

United States ex rel. Carson v. Manor Care, Inc., 851 F.3d 293 (4th Cir. 2017)
United States ex rel. Hayes v. Allstate Ins. Co., 853 F.3d 80 (2d Cir. 2017)

The Federal courts of appeal disagree regarding whether the FCA's first-to-file bar is jurisdictional or instead bears on the merits of whether a *qui tam* plaintiff has stated a claim upon which relief can be granted. If the first-to-file rule is jurisdictional, *qui tam* plaintiffs bear the burden of establishing the court has authority to adjudicate the case. *United States ex rel King v. Solvay Pharm., Inc.*, 2017 WL 4003473, at *3 (5th Cir. Sept. 12, 2017) (holding in FCA case that relators bear burden because "It is well established that the party invoking federal jurisdiction carries the burden of establishing that jurisdiction is proper."). If the first-to-file rule applies to the merits of a claim, the defendant bears the burden of proof and must raise the rule as an affirmative defense.

The first-to-file rule provides that once a relator brings a *qui tam* action, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). "The purpose of this restriction is to provide incentives to relators to promptly alert the government to the essential facts of a fraudulent scheme, while also keeping in mind the FCA's goal of maintaining the balance between encouraging citizens to report fraud and stifling parasitic lawsuits." *United States ex rel. Carson v. Manor Care, Inc.,* 851 F.3d 293, 302 (4th Cir. 2017).

In 2017, the Fourth Circuit affirmed dismissal of a complaint for lack of subject matter jurisdiction under the first-to-file rule, holding that the rule "mandates dismissal of a relator's action that was brought while related actions were pending, even after the related actions have been dismissed and the relator's complaint has been amended, albeit without mention of the related actions." *United States ex rel. Carter v. Halliburton Co.,* 866 F.3d 199 (4th Cir. 2017). That case arose from KBR's provision of "logistical services to the United States military during the armed conflict in Iraq." *Id.* at 202. A relator "alleged that KBR had violated the FCA by fraudulently billing the government in connection with its water purification services." *Id.* When the relator filed his complaint, two related actions were already pending, but both related actions were later dismissed.

The Fourth Circuit rejected Carter's argument that dismissal of the earlier filed actions provided the district court with jurisdiction over his later filed complaint. *Id.* at 206. Courts deciding whether to dismiss *qui tam* complaints under the first-to-file bar must "look at the facts as they existed when the claim was brought to determine whether an action is barred." *Id.* The FCA the first-to-file analysis uses the "facts in existence at the time that the FCA action under review is commenced," meaning later facts, "such as the dismissals of earlier-filed, related actions pending at the time the relator brought his or her action, do not factor into this analysis." *Id.* at 207. The Fourth Circuit held that Carter violated the first-to-file rule and that "the only remedy for such a violation is dismissal." *Id.* at 210. Accordingly, the Fourth Circuit affirmed the district court's dismissal of the *qui tam* action for lack of subject matter jurisdiction.

In contrast to *Carter,* which applied the first-to-file rule to dismiss a *qui tam* complaint for lack of subject matter jurisdiction, in 2017 the Second Circuit held that the bar is not jurisdictional, but rather "bears only on whether a *qui tam* plaintiff has properly stated a claim." *United States ex rel. Hayes v. Allstate Ins. Co.,* 853 F.3d 80, 86 (2d Cir. 2017).[41] The court in *Hayes* reviewed the first-to-file bar's language, noting the clause "speaks only to who may bring a private action and when." *Id.* The provision does "not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 86. Other provisions of the FCA, in contrast, "explicitly invoke the jurisdiction of the district courts." *Id.* (citing 31 U.S.C. § 3730(e)(1), *id.* § 3730(e)(2)(A)). Because "the FCA's first-to-file rule bears only on whether a *qui tam*

[41] Previously, the D.C. Court of Appeals had been the first court to hold that "the first-to-file rule is not jurisdictional." *U.S. ex rel. Heath v. AT & T, Inc.*, 791 F.3d 112, 119 (D.C. Cir. 2015).

plaintiff has properly stated a claim, a district court does not lack subject matter jurisdiction over an action that may be barred on the merits by the first-to-file rule." *Id.*

A district court in the Seventh Circuit similarly held in 2017 that first-to-file bar is not jurisdiction, but rather "functions more like a preclusion defense rather than a jurisdictional ban." *United States ex rel. Berkowitz v. Automation Aids*, 2017 WL 1036575, at *10 (N.D. Ill. Mar. 16, 2017).

3. Non-Conforming Goods

United States ex rel. Campie v. Gilead Scis., Inc., 862 F.3d 890 (9th Cir. 2017)

Although *Campie* involved alleged fraud under federal health care programs, the Court addressed issues that frequently arise in the federal government contracts context. Two former employees accused Gilead of a fraud related to the Food and Drug Administration's (FDA) process for approving drugs for which the company later sought reimbursement under Medicare and Medicaid. According to the complaint, Gilead used ingredients from unapproved Chinese facilities, and obscured and augmented labeling and paperwork to ensure that its medications received or retained FDA approval, which in turn made the drugs eligible for such reimbursement.

The court held that relators' complaint stated a claim that Gilead provided "nonconforming goods" to the government, meaning Gilead misrepresented the goods it provided. *Id.* at 900. Under this theory, the mere fact that "the item supplied under contract is as good as the one contracted for does not relieve defendants of liability if it can be shown that they attempted to deceive the government agency." *Id.* The goods supplied to the government may perform equally well, but FCA liability still arises because a contractor substitutes different goods and makes "them appear to be the genuine article." *Id.* Applying *Escobar*, the court determined that "a claim for nonconforming goods is not limited to situations where there is an express specification in a payment contract between a supplier and the government regarding the disputed aspect of the product to be supplied." *Id.* A claim for nonconforming goods, however, "must include an intentionally false statement or fraudulent course of conduct that was material to the government's decision to pay." *Id.* at 901.

4. FCA Liability for Breaches of Contract or Regulatory Violations

United States ex rel. McBride v. Halliburton Co., 848 F.3d 1027 (D.C. Cir. 2017)

In *McBride,* the D.C. Circuit affirmed summary judgment for a government contractor in a *qui tam* case brought by a relator who alleged the contractor inflated "headcount" data that tracked U.S. troops frequenting recreation centers at U.S. military bases in Iraq. Under the LOGCAP III contract, the U.S. Army awarded KBR tasks orders for "a wide range of logistical services," which included "maintaining recreation centers where U.S. troops could exercise, play games, watch television, and use the internet, among other things." *Id.* at 1028-29. McBride, a former KBR employee, alleged that KBR falsified and inflated "headcount" data that "purported to reflect how many troops had used the facilities each day." *Id.* at 1029.

In affirming summary judgment, the court held that KBR's contract lacked any specific requirement to maintain headcount data, much less produce the data to the government. Rather, "KBR voluntarily undertook to track this data and, at times, provided it to the Government." *Id.* at 1032. Because KBR's contract lacked a headcount requirement, McBride argued that KBR violated FAR 31.201, which provides that costs charged to the government must be "reasonable," and which required KBR to maintain adequate supporting documentation for its costs. *Id.* McBride, however, failed to offer failed to offer any evidence "that accurate headcount data was relevant to determining the reasonableness of costs." *Id.* at 1033.

Moreover, the Army's Rule 30(b)(6) designee testified that "headcount data (false or not) had no bearing on costs billed to the Government." *Id.* The Administrative Contracting Officer ("ACO") testified that the government "might" have disallowed costs had it known of the false headcount data. *Id.* The court, however, held that such a "speculative statement" was insufficient given the FCA's "rigorous" and "demanding" materiality standard that must be met. *Id.* Additionally, "DCAA investigated McBride's allegations and did not disallow any charged costs," and "KBR continued to receive an award fee for exceptional performance . . . even after the Government learned of the allegations." *Id.* at 1034.

United States ex rel. Kelly v. Serco, Inc., 846 F.3d 325 (9th Cir. 2017)

Similar to *McBride*, in *Kelly* the court affirmed summary judgment in favor of a government contractor because the relator alleged violations of regulations not incorporated into the contract. The Department of Defense awarded Serco a contract "to provide project management, engineering design, and installation support services for a range of government projects." *Id.* at 328. Delivery orders let under the prime contract required Serco "to provide project management and cost reports" each month the government. *Id.* Kelly alleged that Serco falsified its monthly reports and failed to meet regulatory requirements providing criteria for an earned value management system (EVMS).

Although the FAR and DFARS required Serco's contract to include clauses applicable to the EVMS, it was undisputed that Serco's contract and the delivery orders at issue lacked the clauses. *Id.* at 330-331. The court affirmed summary judgment because Serco's contracts failed to incorporate criteria applicable to EVMS, Serco delivered its monthly reports in a format acceptable to the government, and because the government paid Serco's vouchers despite its non-compliance with the EVMS criteria. Moreover, no evidence existed that Serco's vouchers sought payment for work that its employees failed to perform or that Serco's vouchers contained false or inaccurate statements.

5. <u>The FCA's Public Disclosure Bar</u>

United States ex rel. Shea v. Cellco Partnership, 863 F.3d 923 (D.C. Cir. 2017)

The FCA's public disclosure bar, 31 U.S.C. § 3730(e)(4)(A), "deprives courts of jurisdiction over *qui tam* suits when the relevant information has already entered the public domain through certain channels." *Graham Cty. Soil & Water Conserv. Dist. v. U.S. ex rel. Wilson,* 559 U.S. 280, 285 (2010). An exception exists if the relator is "an original source" of the information upon which the lawsuit is based. *Bellevue v. Universal Health Servs. of Hartgrove, Inc.,* 867 F.3d 712, 718 (7th Cir. 2017).

In *Shea*, a former employee alleged that a government contractor overbilled the government under telecommunications contracts by charging "for non-billable taxes and surcharges." 863 F.3d at 927. Charging for the taxes and surcharges, according to the relator, were prohibited under the contracts. *Id.* After bringing an original suit, which settled, the relator brought a second action alleging that the company overbilled on additional contracts. *Id.* The contractor argued that Shea's second action should have been dismissed with prejudice under the public disclosure bar. *Id.* at 932.

The court held that the bar did not apply because "Shea did not base his allegations of fraud on publicly available information." *Id.* Rather, Shea's second action "contributed significant independent information about a possible fraud." *Id.* As a former employee, Shea used "non-public" information in the form of his firsthand knowledge regarding the contractor's commercial billing practices. *Id.* at 934. He also obtained a nonpublic document allegedly collecting taxes and surcharges billed, determining the contractor billed its commercial and government customers for both. *Id.* Shea also based the allegations in his second action on information obtained from a former, longtime employee of the contractor. *Id.* According to the court, "without Shea's nonpublic sources," "there was insufficient information to conclude" that the contractor overbilled the government in violation of its contracts. *Id.* at 935.

6. Recovery of Damages for FCA Violations

United States ex rel. Landis v. Tailwind Sports Corp., 234 F. Supp. 3d 180 (D.D.C. 2017)

In *Landis,* the court addressed FCA damages in a case involving alleged false claims submitted by Lance Armstrong under his cycling team's $32 million sponsorship agreement with the U.S. Postal Service. 234 F. Supp. 3d at 185. The agreement assured "to USPS that the team would abide by the rules of professional cycling and compete drug-free." *Id.* Armstrong, however, admitted that "and his teammates had used performance enhancing drugs ('PEDs') throughout the course of the sponsorship." *Id.*

Armstrong's teammate, Floyd Landis, brought an FCA suit, in which the government intervened, alleging Armstrong and the team's owner "violated the FCA by issuing payment invoices to the Postal Service under the sponsorship agreements (or causing them to be issued) while actively concealing the team's violations of the agreements' anti-doping provisions." *Id.* The government sought "nearly $100 million in actual damages, calculated at three times the total amount of USPS's sponsorship payments." *Id.* at 186. Armstrong moved for summary judgment on the issue of damages, arguing the government "suffered no actual damages." *Id.* According to Armstrong, the government's actual damages were "zero" because "the benefits USPS reaped from the sponsorship exceeded its $32 million price tag." *Id.*

Although Armstrong's motion presented a "close question," the court denied the motion, holding that the government was entitled to the "benefit of the bargain." Stated differently, the government was entitled to the difference between the monetary value it would have received from a "clean" USPS cycling team and the monetary value of what the government actually received—a "doping" team. *Id.* at 200. Armstrong argued that the government could not "prove it sustained any losses" to which the government responded that its actual damages were "three times the entire $32.3 million in sponsorship payments because the cycling sponsorship would have been worthless to USPS had it learned of Armstrong's PED use." *Id.* at 198-99. The court rejected both arguments.

The court agreed with Armstrong that the USPS benefited from the sponsorship agreement. The government, however, could "attempt to prove that the positive benefits of the sponsorship were reduced—or even eliminated altogether—by the negative publicity that accompanied the subsequent investigation and disclosure of Armstrong's doping." *Id.* at 201.

7. Use of Statistical Sampling to Prove FCA Liability

United States ex rel. Michaels v. Agape Senior Community, Inc., 848 F.3d 330 (4th Cir. 2017)

As we noted last year, *qui tam* relators and the government are using increasingly aggressive tactics to argue that statistical sampling and extrapolation are proper methods to prove FCA liability in the first instance, rather than damages after entitlement had been established. Using these methods, FCA plaintiffs evaluate a random subset of the allegedly false claims "to extrapolate results from a small sample to a large population." *In re Countrywide Fin. Corp. Mortgage-Backed Sec. Litig.,* 984 F. Supp. 2d 1021, 1038 (C.D. Cal. 2013). "Numerous courts have upheld its use in the context of state and federal government agencies seeking to recoup alleged . . . overpayments." *Garden City Treatment Ctr., Inc. v. Coordinated Health Partners, Inc.,* 852 A.2d 535, 546, 548 (R.I. 2004) (Flanders, J., concurring) (discussing use of statistical sampling in breach of contract claim to recover alleged medical overpayments). FCA cases involving government contractors and health care providers can involve thousands of allegedly false invoices. *See, e.g., U.S. ex rel. Bunk v. Gosselin World Wide Moving, N.V.,* 741 F.3d 390, 395 (4th Cir. 2013) (involving allegation that government contractor submitted 9,136 false invoices); *U.S. ex rel. Loughren v. UnumProvident Corp.,* 604 F. Supp. 2d 259 (D. Mass. 2009) (rejecting relator's use of statistical sampling to contend 8,027 of 468,641 claims were false).

In *Michaels,* the district court certified for interlocutory appeal the issue of whether FCA plaintiffs may use statistical sampling to prove FCA liability. *U.S. ex rel. Michaels v. Agape Senior Cmty., Inc.,* 2015 WL 3903675 (D.S.C. June 25, 2015) (district court opinion). Relators had alleged that defendants "orchestrated a widespread fraudulent scheme of submitting false claims to the federal healthcare programs … seeking reimbursement for nursing home-related services." Relators' allegations involved over 10,000 patients and over 50,000 claims. *Id.* at *1. To review treatment received by all 10,000 patients, relators' experts projected they would incur between "$16.2 million and $36.5 million" in costs, "not including depositions, trial testimony, and the like." *Id.* Relators sought to use sampling and extrapolation to prove liability, but the district court rejected relators' attempt to do so. According to the district court, the relators were "required to prove each and every claim based upon the evidence relating to that particular claim." *Id.* at *6.In certifying the issue for interlocutory appeal, the district court noted "the cases are legion on each side of the issue," *i.e.,* use of statistical sampling in FCA cases, but determined that requiring relators to prove each false claim without resort to sampling and extrapolation was the "fairest course of action based upon the facts presented and the claims asserted." *Id.* at *8.

Despite granting the petitions for permission to appeal the issue, the Fourth Circuit dismissed "as improvidently granted the relators' appeal as to" whether sampling and extrapolation can be used to prove FCA liability. *United States ex rel. Michaels,* 848 F.3d at 333. According to the Fourth Circuit, the issue was "whether the district court may, in its discretion, allow the relators to use statistical sampling to prove their case." *Id.* at 341. Because the issue did "not present a pure question of law that is subject to our interlocutory review under" 28 U.S.C. § 1292(b), the court dismissed the appeal.

8. The FCA's Materiality Requirement

United States ex rel. Harman v. Trinity Industries Inc., 2017 WL 4325279 (5th Cir. Sept. 29, 2017)

In *Trinity Industries,* the government's continued payment despite knowledge of alleged regulatory violations resulted in dismissal for want of materiality. Trinity manufactured a system to make guardrails safer during head-on collisions (the "ET-Plus" system). Trinity sold the system to contractors, which installed guardrails with the ET-Plus systems. The Federal Highway Administration ("FHWA") approved Trinity's system as compliant with federal safety standards, and the government reimbursed states that purchased guardrails with the system. In 2005, Trinity modified the ET-Plus, and Trinity's report to FHWA addressing the modifications discussed some, but not all, of the changes. FHWA approved Trinity's modified system.

A *qui tam* relator alleged Trinity failed to disclose changes in the modified system and presented his allegations to FHWA, which after an investigation affirmed that the modified ET-Plus system was eligible for reimbursement. Before trial, FHWA released an official memorandum stating that Trinity's system had been tested, met federal safety requirements, and remained eligible for reimbursement. After the jury returned a verdict for the relator, but before the district court entered judgment, an independent joint task force examined over one thousand guardrails installed with Trinity's system. The federal government confirmed that Trinity's system was compliant with federal safety standards. After the task force released its findings and the federal government affirmed its approval of Trinity's system, the district court entered a $663 million judgment against Trinity.

In reversing the jury, the Fifth Circuit held that allegations of fraud are not material when agencies affirm approval of a product after learning of the allegations. The court cited the First Circuit approvingly, explaining that in those instances, allowing an FCA claim to proceed would "turn the FCA into a tool with which a jury of six people could retroactively eliminate" an agency's approval "and effectively require that a product be withdrawn from the market" despite that approval. *Trinity Industries,* 2017 WL 4325279 at *12 (quoting *D'Agnostino v. ev3, Inc.,* 845 F.3d 1, 7 (1st Cir. 2016)). The FCA "exists to protect the government from paying fraudulent claims, not to second-guess agencies' judgments about whether to rescind regulatory rulings." *Id.*

The FHWA insisted that Trinity's "2005 changes did not affect the decision to purchase the systems." *Id.* at *11. According to the Fifth Circuit, "continued payment by the federal government after it learns of the alleged fraud substantially increases the burden on the relator in establishing materiality." *Id.* at *13. Moreover, FHWA's rejection of the relator's allegations, "if in error, risked the lives on our nation's highways, not just undue expense." *Id.* If alleged statutory, regulatory, or contractual violations "involve potential for horrific loss of life and limb, the government has strong incentives to reject nonconforming products." *Id.*

A jury's "determination of materiality cannot defy the contrary decision of the government," the alleged victim. *Id.* at *18. "When the government, at appropriate levels, repeatedly concludes that it has not been defrauded, it is not forgiving a found fraud—rather it is concluding that there was no fraud at all." *Id.*

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Mr. Covington has over 35 years of white collar litigation and counseling experience in the domestic and international marketplaces, with expert knowledge of the False Claims Act (FCA), the Foreign Corrupt Practices Act (FCPA), the Anti-Kickback Act, and other criminal and civil fraud statutes and regulations. Mr. Covington has two decades of experience with the FCA and its *qui tam* provisions. He has investigated and litigated numerous FCA cases, identifying and implementing strategies to resolve these cases. He has represented corporate and individual clients involving a range of other federal statutes and regulations, including those governing conflicts of interest, procurement integrity, and anti-competitive behavior. Mr. Covington is also well-versed in the mandatory and voluntary disclosure obligations of government contractors and has represented numerous clients in those matters.

Mr. Covington's FCPA experience began in 1977 as a trial attorney in the Fraud Section at the Department of Justice investigating foreign bribery cases, and later served as head of DOJ's FCPA prosecution unit, after which Mr. Covington entered private practice. Mr. Covington has successfully represented hundreds of corporate clients in FCPA internal investigations, government investigations, and compliance matters, in countries ranging from Albania to Zimbabwe. He has counseled clients on post-violation remediation, guided them in establishing and maintaining compliance programs, and advised on third-party due diligence and contracting issues. Mr. Covington recently was appointed by the International Bank for Reconstruction and Development and International Development Association (World Bank) as the Independent Compliance Monitor for SNC-Lavalin Group Inc., with a mandate to review and evaluate the company's global anti-corruption compliance program.

Mr. Covington has represented companies before government agencies including the Department of Justice Civil and Criminal Divisions, the Securities and Exchange Commission, the Special Investigator General for Afghan Reconstruction, and other investigatory bodies as well as suspension and debarment officials.

Mr. Covington is AV Peer Review Rated, Martindale-Hubbell's highest peer recognition for ethical standards and legal ability. In 2012, Mr. Covington was named a DC Super Lawyer in White Collar Defense. Before his legal career, he served in the United States Army in combat in Vietnam and received a Purple Heart.

University of Virginia School of Law (J.D., 1973)
University of Virginia (B.A. History, 1968)
Washington DC *Super Lawyers*, Criminal Defense: White Collar (2012)

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Stephen D. Knight

Member

Mr. Knight counsels and represents clients in litigation on all aspects of government contracts. Mr. Knight places special emphasis on claims and disputes, government contract cost accounting, cost allowability, Cost Accounting Standards, defective pricing, government audits, and contract compliance.

He has substantial expertise in performance issues, including defective specifications, delay and disruption, changes, and terminations. Mr. Knight also has significant experience in procurement fraud matters, representing clients during grand jury and Inspector General criminal investigations, as well as civil investigations and litigation pursuant to the Civil False Claims Act.

Mr. Knight is a frequent author and speaker on government contract issues. Some of his publications include: Co-author, "*Metron, Inc.:* A Primer for Proving Compensation Cost Reasonableness," 98 Federal Contracts Report 254, The Bureau of National Affairs, Inc., August 20, 2012; Co-author, "Maropakis: The Federal Circuit Imposes Forfeiture of Defenses to Government Claims When Contractor Fails to Certify Them as Contractor Claims," 94 Federal Contracts Report 221, The Bureau of National Affairs, Inc., July 27, 2010; "Certified Estimates and Mandatory Disclosure: A Bad Decision Makes for a Worse Regulation," The Procurement Lawyer, Vol. 44, No.4, Summer 2009; "*Geren v. Tecom, Inc.:* The Federal Circuit Creates A New FAR Cost Principle," Government Contract Costs, Pricing & Accounting Report, Vol. 4, No. 4 ¶ 27, July 2009 (with Richard C. Johnson, John S. Pachter and D. Joe Smith); "Federal Circuit Cost Decisions Bode Ill for Contractors," The Procurement Lawyer, Vol. 39, No. 2, Winter 2004; and "Compliance Problems for American Contractors in Iraq," The Construction Lawyer, Vol. 24, No. 2, Spring 2004.

Mr. Knight is bilingual in English and French. As an adjunct professor of law with the George Washington University Law School, Mr. Knight teaches in the university's LL.M. in Government Procurement Law Program.

University of Virginia School of Law (J. D., 1978)
University of Virginia (B.A. with Honors, 1975)

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Jennifer A. Mahar

Member

Ms. Mahar's practice focuses on commercial disputes in the government contracting and construction industries. She represents contractors, subcontractors, owners and sureties in all phases of project development and construction including contract formation, project management and dispute resolution. Her experience includes the prosecution and defense of claims in litigation, as well as the successful resolution of claims through various forms of ADR. She is Chair of the Construction Law and Public Contracts Section of the Virginia State Bar.

Ms. Mahar served as an Assistant Commonwealth's Attorney for the City of Portsmouth, Virginia.

Catholic University of America, Columbus School of Law (J.D., 1995; *cum laude*); Journal of Contemporary Health Law and Policy
The College of William and Mary (B.S. Biology, 1991)

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Kathryn T. Muldoon Griffin

Member

Ms. Griffin represents contractors across a range of industries on federal, state, and private projects. She has extensive experience assisting government contractors with the full spectrum of contracting issues including those involving audits and investigations and procurement fraud allegations. Her experience includes assisting contractors in developing and evaluating their ethics and compliance programs, as well as representing contractors who have been suspended or proposed for debarment. In addition, she is experienced in the conduct of internal investigations and employee interviews pertaining to compliance issues and in support of independent monitor engagements.

Ms. Griffin also regularly represents contractors in resolving contract claims and disputes with the federal government and prime-subcontractor disputes. She has a depth of experience in claim analysis and presentation, including work with technical experts, scheduling experts, and cost and pricing experts. In addition, she has worked with national, international, and local construction and engineering firms on major contracting issues including defective specifications, differing site conditions, constructive changes, contractor performance evaluations, and liquidated damages. She currently serves as the Vice President of the Board of Contract Appeals Bar Association.

Pepperdine University School of Law (J.D., 2006)
University of Virginia – McIntire School of Commerce (B.S. Commerce – Accounting Concentration, 2002)

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John S. Pachter

Member

A practitioner of government contract law for more than 40 years, Mr. Pachter has engaged in substantial litigation before the Boards of Contract Appeals, the United States Court of Federal Claims, Federal District Courts, and the United States Court of Appeals for the Federal Circuit. He has prosecuted bid protests before the Government Accountability Office, the General Services Board of Contract Appeals, the United States Court of Federal Claims and Federal District Courts.

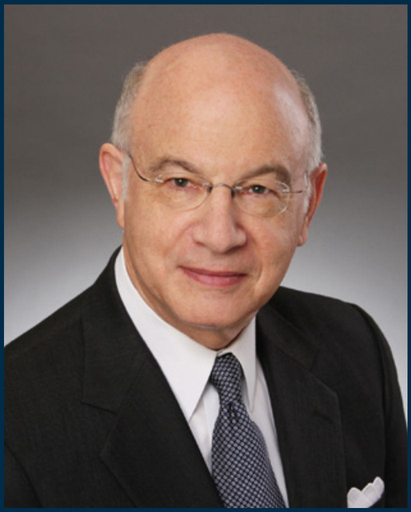
Mr. Pachter has represented and counseled clients on fraud and compliance investigations, audits, corporate governance and ethics, and defense of *qui tam* actions. Other work has included defective pricing, cost determination, requests for equitable adjustment, licensing of intellectual property, subcontractor performance issues, small and small disadvantaged business matters, terminations for default and convenience, GSA schedule contracts, task order contracting, multiple awards, commercial products and requests for government information. His practice has involved dispute resolution in all areas of government contract law, including prime-subcontractor disputes, both in litigation and under alternative dispute resolution procedures. Mr. Pachter has represented a number of clients in the debarment area, and obtained the first reversal in federal court of a Service Contract Act debarment. Federal Food Service, Inc. v. Donovan, 658 F.2d 830 (D.C. Cir. 1981).

In 2012 Mr. Pachter was the first recipient of the Allan J. Joseph Excellence in Leadership Award, conferred by the ABA's Section of Public Contract Law. The award recognizes "exceptional effort and accomplishments" as well as "extraordinary contributions" to the Section.

In October 2007, the Department of the Army appointed Mr. Pachter to serve as Independent Monitor to supervise ITT Corporation's performance under an Administrative Compliance Agreement, which ITT entered into in connection with a Guilty Plea and Deferred Prosecution Agreement regarding violations of the Arms Export Control Act at the Night Vision component of ITT Defense Electronics & Services.

In 2004, the Legal Times recognized Mr. Pachter as a Leading Lawyer in Government Contracts. He has also been listed in Virginia Super Lawyers, and in Chambers USA, America's Leading Lawyers for Business and Nationwide Leading Lawyers.

George Washington University (J.D., with honors, 1966)
George Washington University (L.L.M. in Government Procurement Law, 1970)
Tulane University (B.A., 1963)



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Armani Vadiee

Member

Mr. Vadiee's practice focus is government contracts, commercial contracts, compliance, white collar and construction matters. Mr. Vadiee provides counsel to domestic and international clients on a wide range of issues including contract negotiation, contract terms and conditions, bid protests, contract changes and claim preparation, contract termination settlements, regulatory audit and compliance litigation and oversight on independent monitor engagements. Mr. Vadiee provides regulatory compliance counseling on wide range of areas including export controls, subcontractor evaluations and mandatory reporting requirements. Mr. Vadiee has experience litigating contract disputes in federal and state courts and administrative bodies including before the Civilian Board of Contract Appeals, the Armed Services Board of Contract Appeals, the United States Government Accountability Office, the United States Court of Federal Claims and the United States Court of Appeals for the Federal Circuit.

Prior to law school, Mr. Vadiee was a contracting officer for a U.S. Department of Energy research laboratory and during law school clerked at the U.S. Government Accountability Office.

Mr. Vadiee is multi-lingual in English, Farsi (Bilingual Proficiency), and Spanish (Limited Working Proficiency). As an active member of the American Bar Association Section of Public Contract Law and the Federal Bar Association's Government Contracts Section, Mr. Vadiee instructs courses in Cost and Price Realism in Government Contracts, Government Contracts Ethics and Compliance, and Cybersecurity and the impact on law firms.

University of Maryland School of Law (J.D., 2010)
University of New Mexico, Anderson Graduate School of Management (M.B.A., 2004)
University of New Mexico, Anderson School of Management (B.B.A., 2002)

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Erica J. Geibel

Associate

Ms. Geibel represents clients in both the government contracts and construction practice areas. Ms. Geibel's government contracts experience includes work on costing and pricing issues involving cost allocability and allowability, contractor responsibility and integrity issues, internal investigations, False Claims Act issues, Foreign Corrupt Practices Act compliance counseling, small business issues, contract claims and disputes, bid protests, Service Contract Act disputes, contract negotiations, contract review and contract drafting. Ms. Geibel has significant experience in the area of compliance and regularly reviews ethics and compliance programs, assists in training, and evaluates and tests internal controls.

Ms. Geibel has represented major national and international contractors, as well as local contractors on a wide variety of construction issues. Her construction experience includes work on general negligence, differing site conditions, defective specifications, design changes, payment and performance bond disputes, contract interpretation issues, payment disputes, insurance and warranty issues, delay, constructive changes, and analysis of contractor claims. She has litigated disputes at the federal, state, city and private levels and has been involved in dispute resolution through negotiation and mediation. She is an active member of the ABA Section of Public Contract Law and is Co-Chair of the Fairfax Bar Association Government Contracts Section.

Prior to joining Smith Pachter McWhorter, Ms. Geibel served as a law clerk for the United States Attorney's Office for the District of Columbia.

George Mason University School of Law (J.D., 2009; *cum laude*); Moot Court Board; Trial Advocacy; Writing Fellow
George Mason University (B.A., 2005; Government & International Politics, Departmental Honors, *cum laude*)

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Sean K. Griffin

Associate

Sean K. Griffin's practice areas include government contracts, construction, and white collar law. Prior to joining Smith Pachter McWhorter in 2015, he served as a Law Clerk, and then as an Honors Attorney, for the United States Civilian Board of Contract Appeals, focusing on government contract claims under the Contract Disputes Act. Mr. Griffin is experienced in the mediation and litigation of government contracts and construction disputes involving terminations, constructive changes, equitable adjustments, and delay damages. Mr. Griffin is also practiced in e-discovery collection, review, and production for internal investigations and audits, and False Claims Act matters.

Mr. Griffin is a graduate of the American University, Washington College of Law, where he worked as a Dean's Fellow for the Business Law Program, and as Student Attorney for the Community and Economic Development Law Clinic. During law school, he served on the American Bar Association's Administrative Law Review, the Alternative Dispute Resolution Honor Society, and the Business Law Society's Executive Board.

American University, Washington College of Law (J.D., 2014)
University of California, Santa Cruz, Political Science (B.A., 2008)

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Erica A. Reed

Associate

Ms. Reed has extensive experience representing corporate entities and their executives in connection with litigation and investigations arising out of white collar criminal prosecutions, grand jury investigations, criminal antitrust investigations, and corporate compliance matters. She has conducted numerous internal investigations and employee interviews across the globe pertaining to FCPA investigations, government investigations, and in support of independent monitor engagements. A seasoned litigator who has successfully handled numerous cases in federal and state courts, Ms. Reed has also represented her clients in civil matters such as breach of contract, tortious interference, business conspiracy, fraud, securities litigation and arbitration, and class actions.

Prior to returning to private practice, Ms. Reed was an Assistant United States Attorney for the District of Columbia and the Northern District of Florida. Ms. Reed also served as a Trial Attorney in the Department of Justice's (DOJ) Civil Division, National Courts Section. While in the National Courts Section, Ms. Reed represented the United States in government contract and procurement dispute litigation.

While in law school, Ms. Reed was an intern for the Hon. Eric Washington, Chief Judge, of the District of Columbia Court of Appeals.

Fordham University (B.A., 2002)
New York University School of Law (J.D., 2005)
New York University School of Law, Trade Regulation (L.L.M., 2009)

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