No End In Sight:

The Reach of the Federal False Claims Act

By Glenn V. Whitaker, Victor A. Walton, Jr. and Michael J. Bronson

While they rarely find much common ground, lawyers and clients on both sides of federal False Claims Act (FCA) litigation have to agree on at least this: In the last 20 years, the FCA has been transformed from an obscure Civil War relic into an established cash cow for the United States Treasury. From there, though, all characterizations of this unique statute get pejorative.

To the Department of Justice (DOJ) and a sophisticated bar representing FCA whistleblowers — called "relators" — the FCA has become the government's most potent weapon in deterring, remedying and punishing fraud against the United States. But to defense contractors, healthcare providers, and other entities participating in federal programs, the FCA is an instrument of litigation abuse by disgruntled or opportunistic employees that, ultimately, drives up the cost of doing business with the government.

Good or bad, there are no signs that FCA litigation will tail off any time soon. Since 1986, when Congress last amended the FCA to encourage whistleblower litigation and rejuvenate the statute, the United States has recovered more than $20 billion from FCA actions, with relators taking more than $2 billion in bounties.[1]

As these numbers have continued to swell, defendants and, in many cases, the courts themselves, have sought to set more restrictive and definable limits on the scope of potential FCA liability. Now, the relators' bar is poised to strike back. Both houses of the United States Congress and the Ohio House of Representatives are considering False Claims Act legislation that would remove nearly every significant pretrial defense available under current law, and would extend the reach of the FCA to conduct never previously implicated in the statute's 145-year history.

The Birth of Lincoln's Law

At the urging of President Abraham Lincoln, Congress enacted the FCA in 1863 to combat egregious war-profiteering by Union military suppliers. Newspapers in the Northern states reported instances of corrupt defense contractors providing soldiers with cardboard boots instead of the promised leather ones, sawdust in place of gunpowder, lame and dying mules and horses, defective muskets, and rancid food. Among the rumored perpetrators was "Commodore" Cornelius Vanderbilt, who reportedly gouged the Union Navy with un-seaworthy ships with rotting hulls.[2]

Lincoln considered these swindlers "worse than traitors in arms,"[3] but also recognized that the short-handed federal government did not have the resources to discover and investigate each claim of procurement fraud. As a result, Congress included in the FCA a legal device from the English Middle Ages that allowed—and induced — private citizens to bring allegations of fraud on the government's behalf. Originally, this *qui tam* provision handed the reins of the FCA almost entirely over to whistleblowers — it prohibited the government from intervening or interfering with the relator's lawsuit, and permitted a successful relator to keep half the damages awarded to the government.

In its infancy, "Lincoln's Law" was a powerful, if infrequently used, vehicle for vetting out government fraud. By World War II, however, this statute aimed at abuse became abused itself. While Congress had envisioned relators as inside informers, some crafty would-be relators began to haunt the offices of federal clerks of court, awaiting the filing of criminal indictments. They would then graft the government's criminal claims onto a *qui tam* complaint, and pursue the FCA's civil remedies — and bounty — for these allegations that provided no new information to the government.

After the Supreme Court — over the government's objection — approved this sort of parasitic lawsuit,[4] Congress amended the statute to curtail the rights and incentives for relators. Under these 1943 amendments, the Attorney General was authorized to take over a whistleblower's *qui tam* action, and the relator's share was reduced to a maximum of 25 percent. Additionally, as applied by the courts, this version of the FCA barred any *qui tam* claims based on information that was even constructively known to the government, even if the government had no intention of pursuing the claim itself.

A Dormant Volcano Erupts

Judging by the scale of FCA history, Congress's thumb was too heavy in 1943; during the 40 years that followed, the statute became largely a dead letter. But then the 1980s brought renewed public attention to alleged price-gouging by »

defense contractors. Reports that the Department of Defense had purchased $600 hammers and $1,000 toilet seats made their way to the media.

With the support of the Reagan Justice Department, Senator Charles Grassley and Congressman Howard Berman sponsored amendments to the False Claims Act to revitalize the statute, and in particular its *qui tam* provisions. All told, the 1986 amendments lowered the bar for liability, raised the available damages from double to treble, increased the statutory penalty to as much as $10,000 (now $11,000) per violation, and included an anti-retaliation section, which provides for reinstatement, double back pay, and special damages to any employee subjected to adverse action because of his involvement in FCA litigation. The amendments also increased the relator's share — a whistleblower can now win up to 30 percent of the government's recovery if it declines to intervene in the case — and awarded successful relators with attorneys' fees and costs.

Relators, Start Your Engines

The 1986 amendments were slow to take hold. In 1987, only 31 *qui tam* actions were filed, and less than $90 million total was recovered under the FCA — all from direct actions by the United States. There was no recovery from *qui tam* cases, and relators did not earn a penny in bounties in the entire fiscal year.[5]

From that faint spark, however, emerged a roaring fire. The number of *qui tam* actions grew steadily throughout the 1990s until, by the last third of the decade, approximately 500 new *qui tam* matters were filed annually — more than tripling the number of direct government actions.[6]

Since 2000, the number of new lawsuits has leveled off, but FCA recoveries have skyrocketed. In all but one year since 2000, the government has recovered more than a billion dollars under the FCA, reaching an apex of $3.2 billion in 2006. *Qui tam* actions account for nearly 70 percent of the $14-plus billion recovered in this time, with whistleblowers taking more than $1.5 billion in relator's shares from those recoveries.[7]

To Healthcare And Beyond

There are a number of reasons for the recent crescendo in litigation and recoveries, but the most obvious cause is the marriage of the modern FCA with the government's burgeoning interest in healthcare abuse. What began as a statute aimed directly at procurement fraud has now become the atomic bomb for providers, intermediaries, pharmaceutical companies, and insurers who participate in Medicare and Medicaid. The top 20 recoveries in the history of the FCA have all come in healthcare cases; 18 of these have been obtained since 2000, including a $900 million settlement by Tenet in 2006 and a $650 million settlement by Merck earlier this year.[8]

Having conquered the healthcare arena, the next frontier for *qui tam* relators could return the statute to something closer to its roots. In light of the nearly $300 billion in Department of Defense ("DOD") expenditures in 2006 alone, Iraq reconstruction contracts appear primed to generate a new class of *qui tam* actions by whistleblowers who, looking at large government contractors such as Custer Battles and KBR, see war profiteers providing the modern day equivalents of lame horses and cardboard boots. Although relatively few cases have become public, it is likely that dozens of *qui tam* actions alleging contractor fraud in Iraq are under seal and being investigated.

In addition to new DOD cases, reports suggest that as many as 11,000 potential fraud cases originating from Homeland Security's involvement with Hurricane Katrina relief efforts are under investigation.[9] Universities and other institutions that receive federal grant money are also confronting a wave of FCA litigation. After paying $9.8 million to settle administrative claims that it defrauded the Department of Education, the University of Phoenix now faces a *qui tam* FCA trial based on the same allegations that underlie the settlement agreement; the University's exposure in the case could exceed $1 billion.[10]

Reasonable Limits?

The increase in the number and breadth of FCA lawsuits has prompted courts to impose some significant liability-limiting principles. Every United States Circuit Court to address the issue, including the Sixth Circuit, has held that the FCA contains a materiality requirement;[11] that is, to be actionably "false," a misrepresentation or omission must have been material to the government's decision to pay a claim. Similarly, courts have agreed that Rule 9(b) serves as a pleading gatekeeper in FCA cases. While the Rule 9(b) standard can be malleable, the Sixth Circuit attempted recently to draw an objective line in the sand — at a minimum, a relator must allege representative examples of actual, specific false claims with particularity.[12]

The Supreme Court has also begun to express concern over the FCA's scope. While it has granted *certiorari* in only seven civil FCA cases since the enactment of the 1986 amendments, the Court has heard five of those cases since 2000. In the last four years alone, the Court has heard three FCA cases, all of which have addressed the rights of relators and the parameters of liability.

First, in *Graham County Soil & Water Conservation Dist. v. U.S. ex rel. Wilson,* the Court ruled that the statute of limitations for FCA retaliation claims is not the six-year bar for *qui tam* causes of action, but rather the (typically shorter) period provided by each state's corresponding whistleblower protection statute.[13] Then, last term, in *Rockwell International Corp. v. U.S. ex rel. Stone*, the Court curbed subject matter jurisdiction over relators' actions, holding that, to share in the government's recovery based on fraud allegations that are already in the public domain, a relator must have direct and independent knowledge of the information underlying any meritorious claims.[14]

Finally, this past February, the Supreme Court heard oral argument in *Allison Engine Co., Inc. v. U.S. ex rel. Sanders*, a case that arose from the Southern District of Ohio. *Allison Engine* concerns whether an FCA plaintiff must prove that a false claim was actually submitted to the United States to trigger liability. After the District Court — citing the relators' failure to introduce evidence that any false claim ever reached the government — directed a

verdict for the defendants, the Sixth Circuit reversed, holding that FCA liability can attach if a false claim to a private entity is paid with "government money." By its decision, the Sixth Circuit created a conflict on this "presentment" issue with a D.C. Circuit decision authored by then-Judge, now-Chief Justice John Roberts.[15] Later this term, the Supreme Court will decide whether the FCA reaches all entities in federally funded programs, regardless of whether the government itself ever receives a false claim.*

Taking The Fight To Congress

Instead of leaping these hurdles established by the courts, the relators' bar has set out to knock them down. With the sponsorship of some familiar faces — Senator Grassley and Congressman Berman — amendments to the FCA are currently pending in both the Senate and the House.

Among other measures intended to lower the threshold for FCA liability and grease the skids for relators, these bills place the Supreme Court's recent case law squarely in their sights. The Senate version of the bill would overrule *Graham County* by extending the FCA's statute of limitations to ten years for all causes of action, including retaliation claims; would overrule *Rockwell* by effectively eliminating the "public disclosure" bar as a defense in FCA cases; and would essentially codify the Sixth Circuit's decision in *Allison Engine*, mooting any potential requirement that a false claim reach the government to create liability.[16] The companion House bill would do all these things and more — it also seeks to preclude the application of Rule 9(b) in FCA cases and to dispose of materiality as an element of liability.[17]

In addition to the looming extensions of the federal FCA, a parallel false claims statute may soon be arriving closer to home. The General Assembly is now considering House Bill 355, a Medicaid false claims act that would make Ohio the 24th state (along with the District of Columbia) to enact a state law mirroring the federal FCA.

Bigger Stakes, More Trials?

The pending FCA legislation has caused a rare crack in the alliance between the Department of Justice and the relators' bar. Normally a loyal friend to relators and advocate of a broad FCA, the DOJ has indicated that, in some respects, even the more moderate Senate bill goes too far.

Of particular concern to the DOJ is the proposed diminution of the public disclosure defense, which would cut into government recoveries and threaten the return of the enterprising prospective relator waiting on the courthouse steps for an indictment that might translate into a *qui tam* complaint. Similarly, the DOJ is troubled by the ambiguity and scope of the bill's provisions intended to adopt the Sixth Circuit's holding that any false claim for "government money" is actionable;[18] as Justice Breyer suggested in the *Allison Engine* oral argument, since "government money today is in everything[,]" this language would mean that "everything is going to become subject to this False Claims Act."[19]

Despite the government's initial "if it ain't broke/don't fix it" view of the statute, it will ultimately support FCA amendments, and it appears likely that some version of the current legislation will eventually pass through Congress. The success of those amendments will mean the demise of most procedural and substantive barriers to FCA liability, generally leaving a company that finds itself on the business end of an FCA suit facing a very stark choice at the outset of each case: settle immediately or prepare for a trial. With the Department of Justice and an aggressive, well-heeled relators' bar girded for battle on a favorable playing field, the FCA will soon infiltrate the courts and commerce in ways Honest Abe never could have imagined.

**The authors represent Allison Engine Company in* Allison Engine Company, Inc., et al. v. U.S. ex rel. Sanders, et al., *which was argued before the United States Supreme Court on Feb. 26, 2008.*

1 *See Fraud Statistics — Overview*, available at www.taf.org/STATS-FY-2007.pdf.
2 Wayne Andrews, *The Vanderbilt Legend*, 77-84. New York: Harcourt, Brace & Co., 1941.
3 President Abraham Lincoln: "Worse than traitors in arms are the men who pretend loyalty to the flag, feast and fatten on the misfortunes of the nation while patriotic blood is crimsoning the plains of the south and their countrymen are moldering in the dust."
4 *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).
5 *See Fraud Statistics — Overview, supra* n.1.
6 *Ibid.*
7 *Ibid.*
8 See www.taf.org/top20.htm.
9 See www.usatoday.com/news/nation/2007-07-05-katrina-fraud_N.htm.
10 See Matthew Hirsch, *The Legal Intelligencer*, Vol. 236, No. 38, "Plaintiffs Bar Eyes Big False Claims Case Against University" (Aug. 23, 2007).
11 *See U.S. ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428 (6th Cir. 2005).
12 *U.S. ex rel. Bledsoe v. Community Health Sys., Inc.*, 501 F.3d 493 (6th Cir. 2007).
13 *Graham County*, 545 U.S. 409 (2005).
14 *Rockwell*, 127 S.Ct. 1397 (2007).
15 *Compare U.S. ex rel. Sanders v. Allison Engine Co., Inc.*, 471 F.3d 610 (6th Cir. 2006), *cert. granted*, 128 S.Ct. 491 (2007), *with U.S. ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004).
16 S. 2041, False Claims Act Correction Act of 2007.
17 H.R. 4854, False Claims Act Correction Act of 2007.
18 Position Statement Correspondence from Principal Deputy Assistant Attorney General Brian A. Benczkowski to Hon. Patrick J. Leahy, Chairman of Senate Judiciary Committee (Feb. 21, 2008).
19 Transcript available at www.supremecourtus.gov/oral_arguments/argument_transcripts.html.

Glenn V. Whitaker, a partner at Vorys, Sater, Seymour and Pease, LLP, has represented defendants in complex civil litigation, white collar crime, and a wide variety of qui tam *False Claims Act actions. His expertise includes* qui tam *and false claims litigation, environmental issues, construction law, toxic torts, health care fraud and abuse, and government procurement and antitrust violations. Victor A. Walton, Jr., a partner at Vorys, has extensive experience in complex civil litigation, and has particular expertise defending corporations for alleged violations of the False Claims Act. He also represents health care providers and physician groups. Michael J. Bronson, an associate at Vorys, practices in general litigation with a focus on defending corporations in* qui tam *and False Claims Act cases. He also has experience in white collar criminal matters and complex commercial litigation, including arbitration. Whitaker, Walton, and Bronson have lectured extensively on the False Claims Act and whistleblower actions.*

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