The Effectiveness of State False Claims Acts in Protecting State Transportation Funding

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Background
State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. The NCHRP Legal Research Digest and the Selected Studies in Transportation Law (SSTL) series are intended to keep departments up-to-date on laws that will affect their operations.

Foreword
The purpose of this digest is to provide an in-depth assessment of state and federal statutes and case law relating to false claims in the area of highway and transportation contracting. The comprehensive federal False Claims Act has served to protect federal highway and transportation funds since its inception. For the past decade, the federal False Claims Act has unquestionably applied to fraud involving federal funds granted to state transportation agencies. Furthermore, most U.S. state legislatures have enacted false claims statutory provisions, regularly patterned after the federal False Claims Act, that may also serve to protect transportation funds of states and political subdivisions. With few exceptions, most state false claims procedures, including those that relate to qui tam actions, mirror federal procedure, although there are subtle differences from state to state. State false claims acts are commonly used to combat Medicaid and healthcare fraud, and have not been broadly applied to claims made to state transportation agencies and political subdivisions involving highway and transportation funds. This digest focuses on how state false claims acts could be used to better protect funds of state and local transportation agencies. This digest also addresses legislative developments associated with the rights of “whistleblowers” and legal prohibitions against employer retaliation.

With increasing emphasis on transparency of public institutional activities, this digest should prove valuable to federal and state employers and employees, transportation contractors and subcontractors, attorneys, and others whose work involves personnel management and processing payment invoices and other types of state and federal financial claims. Furthermore, the digest provides a useful resource for legislators and other individuals responsible for developing new methodology to protect against fraudulent activity in government transportation contracting.
THE EFFECTIVENESS OF STATE FALSE CLAIMS ACTS IN PROTECTING STATE TRANSPORTATION FUNDING

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I. INTRODUCTION

A. Purpose of Report

For more than 150 years, the Federal False Claims Act1 (herein, the Federal FCA) has served to prevent false claims for federal government funds. In recent years, a number of state legislatures have enacted state false claims acts (herein, State FCAs) modeled after the Federal FCA, to prevent false claims for state government funds. The purpose of this digest is to provide practical legal guidance for state transportation officials as well as state attorneys general regarding the use of false claims acts to protect public funds for transportation and highway contracting, and to recover funds paid to false claimants by transportation agencies.

Because state transportation agencies often contract for work using federal grant funds from the United States Department of Transportation (herein, USDOT), it is not always a straightforward matter to determine whether a false claim on a state transportation agency project is a violation of the Federal FCA, a State FCA, or both. As discussed in detail in Section I.C.3 herein, a series of appellate decisions in the mid-2000s, called into question whether the Federal FCA was applicable to federal transportation funds in the hands of state transportation agencies. If the Federal FCA did not apply to federally funded state transportation agency projects, then there could have been substantially less protection against false claims made to state transportation agencies in states without a State FCA. Although some State FCAs existed dating back to 1987,2 the number of State FCAs increased significantly after Congress acted in 2006 to encourage state legislatures to enact State FCAs.3 A compilation of State FCAs is provided as Appendix A to this digest.

In 2009, Congress amended the Federal FCA to clarify that the Federal FCA is applicable to federal transportation funds in the hands of state transportation agencies or other federal grant recipients.4 As a result, there are now often at least two statutes (the Federal FCA and a State FCA or local government false claims ordinance) that can be used to protect or recover transportation funds that are the object of a false claim. This digest will discuss the considerations involved in using one or more FCAs to protect or recover state transportation agency funds.

B. Features of False Claims Acts

For purposes of this digest, State FCAs are statutes passed by the state legislature, modeled after the Federal FCA. There is a wide variety of legislation prohibiting false statements or false claims made to the government; however, not all such legislation qualifies as a State FCA.5 State FCAs are those statutes that adopt one or more of the following features of the Federal FCA, as a means of mitigating false claims made to the state or its political subdivisions.

1. Financial Recovery for the Government

The primary focus of an FCA is a statutory cause of action for the government to recover monetary damages due to "false claims," or claims for government funds based on misrepresentations by the claimant. Where the government has paid a meritless claim, the FCA provides a mechanism to recover amounts that should not have been paid. This is in addition to other causes of action that may be available (e.g., breach of contract).

However, a distinguishing feature of an FCA (as opposed to other causes of action such as breach of contract) is that typically it provides for additional recovery to the government, over and above actual damages. As discussed in detail in Section II.B.2 herein, most FCAs now provide for treble damages, allowing the government to recover up to three times the amount that was paid based on false claims. In addition, as discussed in Section II.B.1 herein, most FCAs also provide for monetary penalties for each violation (or each false claim). Thus, the government may be able to recover financially even when the government has not suffered monetary damages, since penalties are available when a claim is made, regardless of whether the claim was actually paid.

2. Qui tam Provisions

The Federal FCA authorizes private persons to initiate civil actions against defendants alleged to have submitted false

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5 See, e.g., Ariz. Rev. Stat. § 35-212 (authorizing state attorney general to bring action to enjoin or recover the illegal payment of public funds, but not authorizing treble damages, monetary penalties, qui tam actions, or whistleblower retaliation actions).
claims, to pursue monetary recovery in the name of the United States.\textsuperscript{9} Allowing private persons to enforce the Federal FCA provides additional protection for federal funds, because private persons, such as employees or subcontractors of false claimants, may be more likely than the government to have direct knowledge and evidence of false claims. This type of civil action is commonly known as a \textit{qui tam} action, in reference to the Latin phrase “\textit{qui tam pro domino rege quam pro se ipso in hae parte sequitur},” which means “one who sues on behalf of the King as well as for oneself.”\textsuperscript{10,11} A \textit{qui tam} action is one in which a private person is authorized by statute to sue for a monetary recovery, “part of which the government or some specified public institution will receive.”\textsuperscript{12} As discussed in greater detail in Section II.B.3 herein, the \textit{qui tam} plaintiff (or “relator”) under the Federal FCA is typically entitled to a portion of any proceeds of the civil action or settlement—currently between 15 percent and 30 percent of the proceeds under the Federal FCA, depending on the extent to which the \textit{qui tam} relator contributes to the prosecution of the case\textsuperscript{13,14}—and the United States is entitled to the remainder. The prospect of monetary recovery for the \textit{qui tam} relator is intended to encourage private persons with knowledge of false claims to come forward.

The Federal FCA has included the \textit{qui tam} provision ever since its enactment in 1863.\textsuperscript{15} However, the \textit{qui tam} provision has been controversial, particularly in cases where seemingly undeserving \textit{qui tam} relators have received monetary awards. As discussed in greater detail in Section I.C herein, Congress has amended the \textit{qui tam} provision over the years to try to strike a balance between incentivizing private parties to help protect federal funds and not rewarding “parasitic” \textit{qui tam} actions.\textsuperscript{16}

State FCAs enacted over the years, although modeled after the Federal FCA, often did not originally include \textit{qui tam} provisions.\textsuperscript{17} However, in 2006, Congress enacted a financial incentive for states to enact State FCAs that “are at least as effective in rewarding and facilitating \textit{qui tam} actions” as the Federal FCA.\textsuperscript{18} As a result, most State FCAs now include a \textit{qui tam} provision,\textsuperscript{19} allowing a relator to bring suit on behalf of the state, or in some cases, its political subdivisions. The State FCA \textit{qui tam} provisions typically mirror the percentage recovery that is available to \textit{qui tam} relators under the Federal FCA, with the state or local government entitled to the remainder. However, there are exceptions—for example, the Kansas FCA\textsuperscript{20} and Oregon FCA\textsuperscript{21} do not contain \textit{qui tam} provisions, and the \textit{qui tam} provisions in some other State FCAs have not been updated to keep pace with revisions to the Federal FCA. The Office of Inspector General (“OIG”) of the U.S. Department of Health and Human Services (HHS) reviews State FCAs and issues determinations regarding whether the \textit{qui tam} provision of a State FCA is “at least as effective” as that in the Federal FCA.\textsuperscript{22} Although the focus of the HHS OIG review is the protection of Medicaid funds, variations in the effectiveness of \textit{qui tam} provisions from state to state can also significantly impact the protection of transportation funds.

3. Government Civil Investigations

The Federal FCA requires the U.S. Attorney General to “diligently” investigate false claims.\textsuperscript{23} Such an investigation may take place after a \textit{qui tam} complaint has been filed under seal, to assist the government in determining whether to intervene.\textsuperscript{24} The investigation might also take place when no action has been filed, to assist the government in deciding whether to initiate a Federal FCA action.\textsuperscript{25} Most State FCAs likewise require state

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\item \textsuperscript{9} 31 U.S.C. § 3730(b)(1).
\item \textsuperscript{11} Esserman v. Indiana Dep't of Envtl. Mgmt., 66 N.E.3d 993, 997 n.3 (Ind. Ct. App. 2016) (quoting Black’s Law Dictionary 1444 (10th ed.2014)).
\item \textsuperscript{12} 31 U.S.C. § 3730(d).
\item \textsuperscript{13} Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 698; see also U.S. ex rel. Lamens v. City of Green Bay, 168 F.3d 1013, 1016 (7th Cir. 1999) (“Since the Civil War, \textit{qui tam} suits have been part of the FCA scheme for preventing fraud against the federal government.”).
\item \textsuperscript{14} Cause of Action v. Chicago Transit Authority, 815 F.3d 267, 273 (7th Cir. 2016) (stating that with its 1986 amendments, Congress “sought to resolve a tension between . . . encouraging people to come forward with information and . . . preventing ‘parasitic’ lawsuits”); Chen v. EMSL Analytical, Inc., 966 F. Supp. 2d 282, 296 (S.D.N.Y. 2013) (“Congress has since amended the FCA more than once to attempt to strike a balance between encouraging private citizens to expose fraud and avoiding parasitic actions by opportunists who attempt to capitalize on public information without seriously contributing to the disclosure of the fraud.” (quoting U.S. ex rel. Doc v. John Doe Corp., 960 F.2d 318, 321 (2d Cir. 1992))).
\item \textsuperscript{15} Barger, et al., supra note 2, at 478 (“Only thirteen of the nineteen statutes contain \textit{qui tam} provisions.”).
\item \textsuperscript{16} 31 U.S.C. § 3730(b).
\item \textsuperscript{18} See, e.g., Pamela Bucy, Jonathan Diesenhaus, Marc S. Raspanti, Holly Chestnut, Katherine Merrell & Chad Vacarella, States, Statutes, and Fraud: A Study of Emerging State Efforts to Combat White Collar Crime, 31 Cardozo L. Rev. 1523, 1535 (2010) (“By January 1, 2009, twenty-three states and the District of Columbia had civil or criminal False Claims Acts and all twenty-four jurisdictions had statutes with \textit{qui tam} provisions.”).
\item \textsuperscript{19} Kan. Stat. § 75-7504(b) (“[N]othing in this act shall be construed to create a private cause of action.”); see also Kan. Stat. § 75-7506 (“This section shall not be construed to create any private cause of action for violations of this act . . .”).
\item \textsuperscript{20} Or. Rev. Stat. § 180.760(1) (providing only for the Oregon attorney general to bring an action).
\item \textsuperscript{21} 42 U.S.C. § 1396h(b)(2); see also HHS OIG, State False Claims Act Reviews, https://oig.hhs.gov/fraud/state-false-claims-act-reviews/index.asp.
\item \textsuperscript{22} 31 U.S.C. § 3730(a).
\item \textsuperscript{23} 31 U.S.C. § 3730(b).
\item \textsuperscript{24} 31 U.S.C. § 3730(a) (“If the Attorney General finds that a person has violated or is violating [the Federal FCA], the Attorney General may bring a civil action under this section against the person.”).
attorneys general (or other state officials) to investigate violations of State FCAs.

The Federal FCA includes special statutory authorization for the U.S. Attorney General, or its designee, to issue a “civil investigative demand” to any person believed to have information relevant to the government’s investigation. The civil investigative demand may require the recipient to produce documents, to answer written interrogatories, and/or to give oral testimony (e.g., by sworn deposition). This is similar to the types of discovery that would be available to a party in a civil lawsuit; however, the civil investigative demand authorizes the government to obtain discovery without first initiating an FCA action, or before unsealing and serving a qui tam lawsuit. The civil investigative demand authority in the Federal FCA can be a powerful tool to police fraud involving federal funds, as the government can undertake discovery without initiating a lawsuit.

Roughly half of the State FCAs authorize civil investigative demands or similar subpoena authority for state officials to obtain the type of pre-litigation discovery that is available under the Federal FCAs’ civil investigative demand. State FCAs that do authorize civil investigative demands do not always provide for discovery as extensive as the discovery available under the Federal FCA. There can be significant differences from state to state regarding the state’s ability to investigate false claims prior to initiating or intervening in a State FCA civil action.


Because of the central role of private individuals in FCA litigation, FCAs often provide additional protection for employees who experience retaliation for their efforts to prevent false claims by their employers. The Federal FCA was amended in 1986 to provide a separate “whistleblower retaliation” cause of action to protect individuals who suffer retaliatory employment actions as a result of protected activity such as reporting or assisting in the investigation or prosecution of false claims. Whereas the qui tam provision is designed to financially incentivize insiders (e.g., employees or independent contractors of false claimants) to report fraudulent activities, the whistleblower retaliation provision is designed to eliminate the inherent disincentives such as wrongful termination. The Federal FCA qui tam provision provides that the whistleblower is entitled to all relief necessary to make that employee, contractor, or agent whole, including job reinstatement and double the wages improperly withheld, if the whistleblower suffers discrimination due to lawful efforts to prevent false claims. Most State FCAs now also contain a whistleblower retaliation provision modeled after the Federal FCA. These provisions are discussed in detail in Section V herein.

C. History

1. Federal False Claims Act

The Federal FCA was enacted by Congress in 1863 to combat fraud committed against the Union Army by defense contractors during the U.S. Civil War. As originally enacted, the Federal FCA imposed liability, in the form of double damages and also a $2,000 “forfeiture” penalty, on any person who presented any false or fraudulent claim (or any false or fraudulent statement in support of a claim) for payment by the U.S. government. The Federal FCA also authorized private individuals, or qui tam relators, to bring suit against false claimants on behalf of the U.S. government, in exchange for half of the recovery. However, the Federal FCA qui tam provision “was largely dormant . . . until the 1930’s and 1940’s when increased federal government spending led to increased opportunities for unscrupulous government contractors to defraud the government.”

It was long understood that the Federal FCA applied to false claims made to federal grant recipients by their contractors. In 1943, in U.S. ex rel. Marcus v. Hess, a qui tam relator brought suit (on behalf of the United States) against public works contractors, alleging that the contractors were engaged in a bid-rigging scheme to overcharge local governments (municipalities...
and school districts), where the public works projects in question were funded in part by the federal government, and the contractors were paid "from a joint construction bank account containing both federal and local funds." The U.S. Supreme Court held that the contractors were liable under the Federal FCA even though they contracted with local governments rather than the federal government, and even though the federal government reimbursed funds to the local governments, in the form of "grants in aid," rather than directly to the contractors.

More controversial in the Marcus case was the federal government's assertion that the qui tam relator did not actually disclose the bid-rigging scheme to the government, and in fact "contributed nothing to the discovery of this crime." The qui tam lawsuit was filed only after the defendants had been indicted for bid-rigging and assessed criminal fines. However, the Court held that the Federal FCA did not require the qui tam relator to be the government's informant or an original source of the information on which the qui tam lawsuit was based. The purpose of the Federal FCA was served by allowing the qui tam relator to recover half of the judgment against the contractors, because the federal government was also able to recover half of the judgment although the qui tam relator bore the full risk of funding the FCA action.

However, Congress viewed the Marcus decision as allowing parasitic qui tam actions, and immediately amended the Federal FCA in order to jurisdictionally bar qui tam actions "based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." This 1943 amendment significantly weakened the qui tam provision of the Federal FCA, as even individuals who were the original source of the false claims allegations were prohibited from being qui tam relators if they provided evidence or information to the government prior to bringing suit.

The 1943 amendments further discouraged qui tam actions by reducing the relator's share of recovery from 50 percent to no more than 25 percent (and no more than 10 percent in cases where the United States intervened). "Congress had effectively eliminated any incentive to bring fraud to the attention of the government."

2. Amendments in the 1980s

The ability of the Federal FCA to protect federal highway funding was called into question in the early 1980s. In United States v. Azzarelli Construction Co., the U.S. Court of Appeals for the Seventh Circuit held that the Federal FCA did not apply to claims for payment made to state transportation agencies by their construction contractors, even where the construction projects were funded (and the contractors were paid) using federal highway grant funds. The United States brought suit under the Federal FCA against contractors for the Illinois Department of Transportation (herein, "IDOT"), alleging a bid-rigging conspiracy that resulted in overcharges on federally funded highway construction projects in Illinois.

The Court observed that Congress had authorized USDOT to apportion highway grant funds to state transportation agencies according to "statutory formulae." Although these funds were administered by FHWA, and could not be spent by state transportation agencies without federal approvals at various project stages, the sum available to each state transportation agency was fixed annually. Therefore, although overcharging by state transportation agency contractors would result in fewer federal funds available to the state transportation agency for use on other projects, such overcharging would not result in additional highway funds paid out by the federal government. Therefore, there was no false claim "capable of causing an injury to the funds or property of the United States if the claim is in fact paid," and thus no liability under the Federal FCA.

In 1986, in response to Azzarelli, Congress amended the Federal FCA, defining the word "claim" to include "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the U.S. Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." This amendment potentially expanded liability under the Federal FCA to false claims made to federal grant recipients (e.g., state transportation agencies) by their contractors, and also to false claims made to government contractors by their subcontractors.

With the 1986 amendments, Congress also sought to reinvigorate the qui tam provision that had been rendered impotent.

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41 Id. at 539 n.1, 63 S. Ct. at 382 n.1, 87 L. Ed. at 446 n.1.
42 Id. at 543, 63 S. Ct. at 384, 87 L. Ed. at 449.
43 Id. at 544-45, 63 S. Ct. at 384, 87 L. Ed. at 449.
44 Id. at 545, 63 S. Ct. at 385, 87 L. Ed. at 450.
45 Id. at 546, 63 S. Ct. at 385, 87 L. Ed. at 450.
46 Id. at 545-46, 63 S. Ct. at 385, 87 L. Ed. at 450.
47 An Act to limit private suits for penalties and damages arising out of frauds against the United States, Pub. L. 78-213, 57 Stat. 608 (1943); see also U.S. ex rel. Doe v. John Doe Corp., 960 F.2d 318, 321 (2d Cir. 1992) ("Reacting to Marcus, Congress immediately amended the qui tam provisions of the FCA to bar all qui tam actions based on information that the government already possessed."); Safir v. Blackwell, 579 F.2d 742, 746 (2d Cir. 1978) (observing that Marcus "inspired the 1943 amendments" to the Federal FCA).
48 Barger, et al., supra note 2, at 471 n.40.
49 U.S. ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1016 (7th Cir. 1999)
with the 1943 amendment barring *qui tam* actions based on evidence or information in the possession of the government. As amended in 1986, the Federal FCA barred *qui tam* actions based on “public disclosure of allegations or transactions,” unless the *qui tam* relator was an “original source of the information.” The amendment allowed relators to bring suit under the Federal FCA even if they previously provided information or evidence to the government regarding the alleged false claims. The 1986 amendments also incentivized *qui tam* actions by increasing the remedies available under the Federal FCA. Allowable recovery was increased from double damages to treble damages, and penalties were increased from $2,000 per false claim to “not less than $5,000 and not more than $10,000” per false claim. The *qui tam* relator’s share was also increased to a range of 15 percent to 25 percent of the total recovery in cases where the federal government intervened, and increased to a range of 25 percent to 30 percent of the total recovery in cases where the federal government did not intervene.

3. Case Law Development

The 1986 amendments enabled the State of Illinois, as *qui tam* relator, to maintain an FCA action in the early 1990s against contractors for IDOT and other state transportation agencies on federally funded highway contracts, where the federal government declined to pursue legal action. In *State ex rel. Hartigan v. Palumbo Bros., Inc.*, the defendant contractors were alleged to have made false statements to the state transportation agencies, overstating the amounts paid to a purported minority business enterprise (“MBE”) subcontractor. As a recipient of USDOT highway grant funds, the State of Illinois was required to (and did) report the suspected fraud to the federal government. Under the pre-1986 Federal FCA, providing evidence of fraud to the federal government would have prevented the State of Illinois from later bringing a *qui tam* action, even though it was the original source of the information provided to the federal government. In fact, the U.S. District Court for the Northern District of Illinois dismissed counts against the defendant contractors regarding claims that were “completed” (presented to the state transportation agencies and paid by the state transportation agencies using federal funds) prior to the October 1986 effective date of the amendments. However, the court applied the amended Federal FCA to the remaining counts that “revolve around contracts entered into or obligations that arose after October, 1986.” Under the amended FCA, a *qui tam* action by the State of Illinois was not jurisdictionally barred, despite the state’s disclosure of the fraud to the federal government, as long as the state was the “original source.” The court determined that the State qualified as the original source, where it had “conducted an extensive investigation into the alleged fraudulent practices of the major construction companies receiving both state and federal funding for state construction projects,” and voluntarily provided its findings to the federal government. Accordingly, under the amended Federal FCA, the State of Illinois could maintain a *qui tam* action against state transportation agency contractors for claims made on federally funded projects after October 1986.

However, in 2004, the U.S. Court of Appeals for the D.C. Circuit held that, the 1986 amendments notwithstanding, false claims presented to USDOT grant recipients were not actionable under the Federal FCA unless the false claims were actually presented to the federal government. In *U.S. ex rel. Totten v. Bombardier Corp.*, a former employee of the National Railroad Passenger Corporation (“Amtrak”) brought a *qui tam* action under the Federal FCA against Amtrak contractors alleged to have invoiced Amtrak for work that failed to meet contract specifications. As in *Azzarelli*, the contractors were alleged to have been paid from an account that included USDOT grant funds; however, the *Totten* relator did not allege that either the contractors or Amtrak had presented a false claim to the federal government.

The *Totten* Court recognized that the 1986 amendments to the Federal FCA were intended to overrule *Azzarelli*, by defining “claim” to include requests for payment made to a grant recipient if the federal government would reimburse the grant recipient. However, the Court concluded that there was no liability under the Federal FCA until a false claim was presented to the federal government (e.g., if the grant recipient paid its contractor and then presented the contractor’s false claim to the federal government for reimbursement). The Court stated that the 1986 amendments to the Federal FCA could have resulted in FCA liability under the facts of *Azzarelli*, where it had been alleged that IDOT sought reimbursement from FHWA after paying its contractor’s false claims. However, the *Totten* relator alleged only that Amtrak paid the contractor’s claims using funds it had previously received from the federal government, not that Amtrak subsequently presented the contractor’s claims to the federal government, and the Court held that there was no liability under the Federal FCA for the alleged conduct.

Some courts in other appellate circuits rejected the *Totten* decision, and concluded that false claims made to state trans-

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51 Id. § 3.
52 Id. § 2.
54 Id. at 630.
55 Id. at 629.
56 Id.
57 Id. at 630.
portation agencies for federal highway funds could give rise to liability under the Federal FCA, even if the false claims were never presented directly to the federal government. The U.S. Supreme Court had the opportunity to resolve the circuit split in 2008 in Allison Engine Co., Inc. v. U.S. ex rel. Sanders. In Allison Engine, the Court noted that the language of the Federal FCA expressly provided remedies for certain false claims that are never presented directly to the federal government, but rather are "made to a contractor, grantee, or other recipient of Government funding." However, the Court approvingly cited Totten for the principle that the Federal FCA did not apply to all false claims made to federal grant recipients. Rather, the false claimant "must have the purpose of getting a false or fraudulent claim 'paid or approved by the Government' in order to be liable" under the Federal FCA; the false claimant must intend that the federal government itself pay the claim.

Although there remained considerable uncertainty about the application of the Federal FCA to federal grant funds after Allison Engine, the decision also clarified that false claims made to federal grant recipients such as state transportation agencies were not categorically excluded from coverage under the Federal FCA. For example, in U.S. Department of Transportation ex rel. Arnold v. CMC Engineering, the U.S. Court of Appeals for the Third Circuit reversed the dismissal of a Federal FCA action against consultants for the Pennsylvania Department of Transportation (herein, "PennDOT"): "If the Federal Highway Administration was involved in the disbursement of funds from PennDOT to the consultants upon submission of the fraudulent claims in any way," the alleged false claims may be actionable under the Federal FCA. Therefore, the Arnold Court remanded to the trial court to "reconsider its view that a relator can never bring a qui tam action based in part on prior public disclosures to proceed, whereas prior to the amendment the action could have been jurisdictionally barred," as discussed in detail in Section IV.C. herein. Further, the 2010 amendment allowed a qui tam action based in part on

4. Amendments in the 2000s

After the Allison Engine decision, Congress "expressed frustration with the widely varying and errant nature of many of the judicial interpretations of the various provisions of the False Claims Act by the federal courts, including some decisions by the United States Supreme Court." Congress amended the Federal FCA in 2009, to clarify "that the FCA covers false claims for government money or property: (1) whether or not the claim was presented to a government employee or official; (2) whether or not the government has custody of the money or property; and (3) whether or not the person or entity specifically intended to defraud the government." Specifically, the definition of "claim" was amended to expressly include both "direct requests to the Government for payment as well as reimbursement requests made to the recipients of federal funds under federal benefits programs." As a result of the 2009 amendment, the Federal FCA now unambiguously applies to false claims made to federal grant recipients such as state transportation agencies.

However, by the time of the 2009 amendment, litigation under the Federal FCA was less focused on traditional government contracting and had become dominated by healthcare-related cases, typically alleging Medicaid fraud. In 2006, Congress enacted a financial incentive for states to enact State FCAs that are "at least as effective in rewarding and facilitating qui tam actions" as the Federal FCA, by crediting states 10 percent of any amount recovered in a case brought under the State FCA for Medicaid fraud. This has encouraged the enactment of more State FCAs, and also has resulted in more uniformity between the State FCAs and Federal FCA.

In 2010, Congress further amended the Federal FCA as part of the Patient Protection and Affordable Care Act, giving the government the authority to allow a qui tam action based in part on prior public disclosures to proceed, whereas prior to the amendment the action could have been jurisdictionally barred, as discussed in detail in Section IV.C. herein. Further, the 2010 amendment allowed a qui tam action based in part on

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70 See, e.g., U.S. ex rel. Maxfield v. Wasatch Constructors, No. 99-CV-00040, 2005 U.S. Dist. LEXIS 10162, at *22 (D. Utah May 27, 2005) citing the dissent in Totten in concluding that false claims made to Utah DOT by its prime contractor on the FHWA-funded I-15 construction project were actionable under the Federal FCA.


72 Id. at 670 n.1, 128 S. Ct. at 2129 n.1, 170 L. Ed.2d at 1039 n.1.

73 Id. at 669, 128 S. Ct. at 2129, 170 L. Ed.2d at 1038.

74 Id. at 668-69, 128 S. Ct. at 2128, 170 L. Ed.2d at 1038.

75 564 F.3d 673 (3d Cir. 2009).

76 Id. at 679.

77 Knox Cnty. ex rel. Env'tl Termite & Pest Control, Inc. v. Arrow Exterminators, Inc., 350 S.W.3d 511, 521 (Tenn. 2011).


82 U.S. ex rel. Int'l Bhd. of Elec. Workers, Local Union No. 98 v. Farfield Co., No. 09-CV-04230, 2013 U.S. Dist. LEXIS 92590, at *26 (E.D. Pa. July 2, 2013) (rejecting defendant's contention based on Allison Engine that Federal FCA does not apply where "the contracts were not between the Defendant and the United States government, but rather between the Defendant and state transportation agencies for projects that were partially funded by federal grants to the state transportation agencies").
prior public disclosures to be brought by someone who “has knowledge that is independent of and materially adds to the publicly disclosed allegations,” removing the requirement that the relator have “direct” knowledge. These actions by Congress were designed to encourage use of the *qui tam* power, primarily with regard to combating Medicaid fraud. However, the result of more State FCAs, with stronger *qui tam* provisions, has also increased the likelihood that a State FCA could be used to combat fraud in highway and transportation contracting.

5. State False Claims Acts

A majority of state legislatures have now enacted their own State FCAs modeled after the Federal FCA. In 1987, California became the first state to pass a State FCA modeled after the Federal FCA, with a *qui tam* provision and treble damages. The California FCA has long been used to combat false claims made on highway, transportation, and other public works funds of the state or its political subdivisions. However, most State FCAs were enacted in 2000 or later, in response to the rise in Medicaid fraud litigation, with a significant increase in State FCAs after Congress enacted the Medicaid financial incentive in 2006. Consequently, the vast majority of lawsuits brought under State FCAs involve healthcare or Medicaid fraud. State FCAs are generally invoked in nationwide lawsuits against healthcare providers or drug manufacturers, to recover Medicaid funds improperly disbursed due to overcharging. Some State FCAs are specifically limited to healthcare or Medicaid fraud.

However, as most State FCAs are modeled very closely after the Federal FCA, most State FCAs technically apply to any false claim for funds originating in part from the state or its political subdivision, which would include false claims by highway contractors to state transportation agencies. The Massachusetts FCA was enacted in 2000, during construction of the Central Artery/Tunnel Project, better known as the "Big Dig," amid various claims of fraud and waste. In passing the statute, the Massachusetts legislature specifically stated that one purpose of the Massachusetts FCA was "to prevent the Big Dig from further cannibalizing transportation funding." In enacting the Delaware FCA in 2000, the Delaware legislature expressly provided that it applies to false claims made to the Delaware DOT.

The Virginia FCA was enacted in 2002, and the first lawsuit brought under the statute, brought by a *qui tam* relator in April 2003, alleged that a contractor had overcharged the Virginia DOT for equipment and services. However, for the most part, the potential of State FCAs to protect highway and transportation funding has not been realized.

With the notable exception of the California FCA, “[t]here is little case law interpreting most of these” State FCAs, particularly in the context of highway and transportation funding. Many if not most court opinions involving State FCAs in the context of highway and transportation funding are not officially reported, and thus are not precedential. As most State FCAs now mirror the language of the Federal FCA, courts tend to rely on Federal FCA opinions and precedent in construing the State FCAs.

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85 Cause of Action v. Chicago Transit Authority, 815 F.3d 267, 283 (7th Cir. 2016); see also City of Chicago ex rel. Rosenberg v. Redflex Traffic Sys., Inc., No. 15-CV-08271, 2016 U.S. Dist. LEXIS 103760, at *24 at n.7 (N.D. Ill. Aug. 8, 2016), aff'd, 884 F.3d 798 (7th Cir. 2018).


87 See, e.g., S. Cal. Rapid Transit District v. Superior Court, 30 Cal. App. 4th 713, 724 n.9, 36 Cal. Rptr. 2d 665, 671 n.9 (1994) (citations omitted) (concluding that transit district "clearly qualifies as a political subdivision" under the California FCA).

88 See, e.g., Barger, *et al.*, *supra* note 2, at 479 (noting that, of the 13 State FCAs in existence in 2005, "six of the thirteen were passed or amended to include *qui tam* authority in the last five years"); Bucy, *supra* note 82, at 1599 (stating in 2007 that state legislatures "started passing" State FCAs "about five years ago").

89 Hunt v. Cent. Consol. Sch. Dist., 951 F. Supp. 2d 1136, 1244 (D.N.M. 2013) (citations omitted) ("[M]ost states’ *false-claims statutes passed in recent years [were] spurred by Congress’ *financial incentive for states to pass FCAs that mirror the federal FCA *…*"); see also Bucy, *supra* note 82, at 1604 (noting that there were 19 State FCAs in existence by 2007, and the "remaining states are likely to follow suit soon" due to the financial incentive passed by Congress in 2006); Bucy, *et al.*, *supra* note 14, at 1535 ("[B]y January 1, 2009, twenty-three states and the District of Columbia had civil or criminal False Claims Acts and all twenty-four jurisdictions had statutes with *qui tam* provisions.").

90 See, e.g., Barger, *et al.*, *supra* note 2, at 483 (In 2005, "the majority of *qui tam* cases filed under the thirteen statutes are healthcare related."); Bucy, *et al.*, *supra* note 14, at 1536 (In 2010, "most states reported in our survey that they use their statute primarily to pursue health care cases.").
In summary, State FCAs tend to be of relatively recent vintage and do not have an extensive track record with respect to protecting highway and transportation funds. However, considering the track record of the Federal FCA, State FCAs have tremendous potential for combating fraud on public works funds in the hands of states or their political subdivisions, including state transportation agencies. Also, now that Congress has made clear that the Federal FCA applies to federal transportation grant funds in the hands of state transportation agencies, state transportation agencies or state attorneys general may have multiple tools to address false claims on any given transportation project. State FCAs may offer protection in some situations that the Federal FCA cannot, such as when only state or local funds are at stake.99 This digest will examine how FCAs can be used to protect state transportation agency funds.

D. Overview of this Report

The following Section II addresses the application of FCAs to typical factual situations involving state transportation agencies, identifying activities that may constitute false claims involving highway or transportation funds, the potential parties to an FCA action, and remedies available under an FCA.

Section III provides an overview of the statutory procedure for FCA litigation, differentiating between FCA cases initiated by the government prosecuting authority (e.g., state attorney general) and cases initiated by qui tam relators, including the process for the government prosecuting authority to intervene in a qui tam action. Procedural considerations such as identifying the causes of action (e.g., which FCA is available) and selecting the forum (e.g., jurisdiction and venue) are also addressed.

Section IV addresses a number of additional issues that must be considered in any FCA case, which may give rise to a successful defense by the false claimant if not properly addressed. These issues include satisfying the specific pleading requirements for fraud, complying with the applicable statutes of limitation, overcoming the public disclosure bar and the government knowledge defense, and the role of preclusive doctrines such as res judicata and collateral estoppel.

Finally, Section V addresses the whistleblower retaliation provisions of FCAs, an entirely separate cause of action from the standard FCA litigation to recover government funds, which provides employment protection for individuals who attempt to prevent false claims by their employers.

A state-by-state summary of State FCAs is contained in Appendix A. Appendix B contains a survey questionnaire that was delivered to all 50 state transportation agencies and their prosecuting authorities (typically the transportation section of a state attorney general’s office) as part of this research project in order to identify State FCAs and also to identify State FCA litigation involving highway and transportation funds. Twenty-three of 50 states (46%) responded to the survey. However, six of those states provided only a general response containing publicly available information about the applicable State FCA and declining to respond to the specific questions in the survey, typically citing such concerns as the need to avoid disclosing the state’s FCA litigation strategy or to avoid disclosing information under seal. Accordingly, 17 of 50 states (34%) provided direct responses to the questions in the survey.

II. APPLICABILITY OF FALSE CLAIMS ACTS TO TRANSPORTATION PROJECTS

A. What Constitutes a False Claim

Liability under the Federal FCA, and most State FCAs, arises for anyone who “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval,”100 or who “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim,”101 or who conspires to commit such a violation.102

99 Bucy, supra note 82, at 1604.
though FCAs also provide for liability in other specialized situations (most notably, reverse false claims, which are addressed in Section II.A.2.d), almost all FCA actions are cast in terms of a claimant submitting information that the claimant knows to be false in order to induce payment of government funds. The elements of an FCA cause of action are thus often enumerated as: (1) a false statement or fraudulent course of conduct; (2) made or carried out with the requisite knowledge or scienter; (3) that the defendant presented, or caused to be presented, to the government (or a recipient of government funds) for payment or approval (i.e., a claim); (4) that was material to the claim recipient’s decision-making process. These elements are addressed herein.

1. Elements of a False Claim

a. Falsity

For there to be liability under the Federal FCA, there must be a “false or fraudulent” claim. Most State FCAs also specifically apply to “false or fraudulent” claims. The terms “false or fraudulent” are typically not defined in the FCA statutes. Courts interpret the terms broadly in FCA actions, to encompass almost any statement that is literally untrue. When combined with the other elements discussed herein—knowledge and materiality—a false or untrue statement rises to the level of a fraudulent misrepresentation, potentially actionable under an FCA.

Some cases distinguish between claims that are “factually false” or “legally false.” A claim is “factually false” when the claimant misrepresents the goods or services for which it is seeking payment. This is the traditional form of false claim, where a contractor overstates the quantity or quality of goods or services it has provided in an attempt to be paid more than it is entitled to be paid. If the claimant is contractually entitled to the payment it is requesting, the claim is not false. Some courts even conclude that a claim is not false even if the contractor is not entitled to payment, as long as the claim recipient (i.e., the government funding source) knows what goods or services have been provided and knows what it is being asked to pay for.

A claim is “legally false” where the claimant falsely certifies that it has complied with a statute, regulation, or contractual provision for which compliance is a condition precedent for payment. This type of “false certification” claim is discussed in greater detail in Section II.A.2.c. Again, for purposes of determining whether the certification is false, the inquiry is whether the certification is literally untrue. Some cases hold that a certification is not false where “there is any reasonable interpretation of the statute or regulation under which the claim would be true.” However, “where technical and complex administrative regulations are not discretionary,” it is typically up to the court to determine whether the claimant complied with the regulations (and thus, whether its compliance certifications are false).

b. Claim

Under the Federal FCA, a “claim” is defined to include “any request or demand, whether under a contract or otherwise, for money or property” that “is presented to an officer, employee, or agent of the United States.” Invoices or pay applications to federal agencies from their contractors clearly fall within this definition.

105 See, e.g., Hooper v. Lockheed Martin Corp., 688 F.3d 1037, 1047 (9th Cir. 2012).
107 Notably, the California FCA was amended effective 2010 to extend liability to a “false or fraudulent” claim, rather than just a “false claim.” Cal. Gov’t Code § 12651(a). However, this change in terminology has not been construed as substantive. San Francisco Unified Sch. Dist. ex rel. Contreras v. Laidlaw Transit, Inc., 182 Cal. App. 4th 438, 454 n.14, 106 Cal. Rptr. 3d 84, 97 n.14 (2010); see also Tutor-Saliba-Perini J.V. v. Los Angeles Cty. Metro. Transportation Authority, Nos. B232372, B237037, 2014 Cal. App. Unpub. LEXIS 4261, at *27 n.8 (Jun. 16, 2014).
amended in 1986, and further amended in 2009, to include such requests or demands "made to a contractor, grantee, or other recipient" if the federal government had provided (or would reimburse) any portion of the funds requested. Thus, a claim under the Federal FCA includes invoices or pay applications sent to federal contractors by their subcontractors. A claim also includes invoices or pay applications sent to federal grant recipients, such as state transportation agencies, by their contractors if the state transportation agency project is funded in part by the federal government.\textsuperscript{119}

Most State FCAs mimic the Federal FCA language and define "claim" to include any request for payment made to an agency of the state government. Most State FCAs have also adopted the language that extends a claim to requests for payment made to contractors, grant recipients, etc., where the state has provided (or will reimburse) any portion of the funds requested. State FCAs also typically extend to requests for payment made to political subdivisions of the state (e.g., local governments or transportation agencies)\textsuperscript{120} or their contractors.

A claim, therefore, involves some assertion by the claimant that it is entitled to receive government funds (or property). Merely making false statements to a government agency does not give rise to FCA liability unless tied to a request for payment.\textsuperscript{121} Further, the request for payment must involve money (or property) that originates, at least in part, from a government entity—i.e., the claim must involve federal funds under the Federal FCA, or state or local funds under a State FCA. For example, in McCrary v. Knox County, Indiana,\textsuperscript{122} a former county highway department employee brought a whistleblower retaliation action under both the Federal FCA and the Indiana FCA, alleging that his superiors in the highway department were improperly diverting the department's resources to grading work on private property.\textsuperscript{123} Although the employee alleged that the county highway department received some federal funds, he did not allege "that the federal government will be responsible for paying or reimbursing any portion of the costs associated with the allegedly fraudulent grading job."\textsuperscript{124} He did not allege that anyone would request federal funds for the grading work, or that anyone was preparing "false financial or other records that would be submitted to the federal government."\textsuperscript{125} Although the improper use of county resources might be actionable under the Indiana FCA, there was simply an insufficient nexus with federal funds to constitute a "claim" under the Federal FCA.\textsuperscript{126}

c. Knowledge

The knowledge or scienter element of an FCA cause of action provides that, in order to be liable under the FCA, the defendant must "knowingly" make a false claim, or "knowingly" cause false information to be used in support of such a claim.\textsuperscript{127} The Federal FCA defines "knowingly" to mean that the claimant "(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information."\textsuperscript{128} Most State FCAs include an identical definition of "knowingly."\textsuperscript{129} Courts construing the definition of "knowingly" conclude that it applies to the truth or falsity of the information,\textsuperscript{130} and to a lesser extent the submission of a claim—\textsuperscript{131}—that is, a defendant acts "knowingly" if it submits a claim or information in support of a claim, with actual knowledge (or deliberate ignorance or reckless disregard) that the information submitted in support of the claim is false.

However, one need not act with the motive or purpose of defrauding the government in order to act "knowingly."\textsuperscript{132} The Federal FCA expressly provides that the defendant need not have the "specific intent to defraud."\textsuperscript{133} Most State FCAs include this qualifier,\textsuperscript{134} although some State FCAs expressly provide

\textsuperscript{120} See, e.g., S. Cal. Rapid Transit District v. Superior Court, 30 Cal. App. 4th 713, 724 n.9, 36 Cal. Rptr. 2d 665, 671 n.9 (Cal. App. 1994) (concluding that a regional transit district "clearly qualifies as a political subdivision" under the California FCA).
\textsuperscript{121} See, e.g., U.S. ex rel. Fryberger v. Kiewit Pacific Co., 41 F. Supp. 2d 1142, 1151 (C.D. Cal. 2006) (holding that alleged false statements made to transportation authority by its contractor were not "claims" actionable under Federal FCA or State FCA); U.S. ex rel. Hedley v. ABHE & Svoboda, Inc., No. 14-CV-02935, 2015 U.S. Dist. LEXIS 10070 (D. Md. Jul 31, 2015) (holding that false DBE certifications were not actionable under FCA where the certification was not connected "to any claims for payment"). But see S. Cal. Rapid Transit District v. Superior Court, 30 Cal. App. 4th 713, 36 Cal. Rptr. 2d 665 (1994) (concluding that false DBE certification could constitute false claim, even if not tied to a claim for payment, if it would entitle the claimant to receive a DBE set-aside contract under which it could receive payments in the future).
\textsuperscript{122} 200 F. Supp. 3d 782 (S.D. Ind. 2016).
\textsuperscript{123} Id. at 788.
\textsuperscript{124} Id. at 792.
\textsuperscript{125} Id. at 793.
\textsuperscript{126} Id. at 798.
\textsuperscript{127} 31 U.S.C. § 3729(a)(1).
\textsuperscript{129} See, e.g., Cal. Gov’t Code § 12650(b)(3).
\textsuperscript{130} Allison Engine Co., Inc. v. U.S. ex rel. Sanders, 553 U.S. 662, 671 n.2, 128 S. Ct. 2123, 2130 n.2, 170 L. Ed.2d 1030, 1039 n.2 (2008) (concluding that "knowingly" refers to "specific intent with regard to the truth or falsity of the information" and not to the "defendant’s purpose in making or using a false record or statement"); see also M.A. DeAtley Const., Inc. v. U.S., 75 Fed. Cl. 812, 818 (2007) (stating that Federal FCA action against USDOT contractor "requires some degree of knowledge of the claim's falsity on the part of the contractor").
\textsuperscript{131} U.S. v. Sequel Contractors, Inc., 402 F. Supp. 2d 1142, 1151 (C.D. Cal. 2005) ("Thus, the knowledge requirement of the FCA applies to the presentation of the claim and the falsity of the information in the claim.").
\textsuperscript{132} See, e.g., U.S. v. TDC Mgmt. Corp., Inc., 24 F.3d 292, 295-98 (D.C. Cir. 1994) (reversing summary judgment in favor of USDOT contractor in Federal FCA action, where trial court had incorrectly required government to prove that contractor "knowingly or recklessly" made false or fraudulent statements, "with the intent to deceive the government"); Town of Smyrna, Tenn. v. Mun. Gas Auth. of Georgia, 129 F. Supp. 3d 589, 601 (M.D. Tenn. 2015) ("[M]otive is not an essential element of a false claims case.").
\textsuperscript{133} 31 U.S.C. § 3729(b)(1)(B).
\textsuperscript{134} See, e.g., Cal. Gov’t Code § 12650(b)(3).
that the defendant will not be deemed to have acted "knowingly" if the defendant was merely negligent or mistaken regarding the truth. Some courts interpreting State FCAs have held that allegations that the defendant "knew or should have known" that it submitted false information is insufficient to support an FCA action, as this suggests the lower standard for negligence. Likewise, a mere technical breach of contract (e.g., failure to perform in strict compliance with contract specifications) does not give rise to FCA liability unless the claimant "knowingly" performed in strict compliance with contract specifications or with a regulatory requirement that is a condition for payment.

While mere negligence or breach of contract may not constitute "knowledge" for purposes of an FCA cause of action, the fact that one can incur FCA liability by acting "in deliberate ignorance of the truth or falsity of the information" suggests a lower scierent standard for FCA liability than is typically required for fraud. By defining "knowingly" to include "deliberate ignorance," Congress adopted "the concept that individuals and contractors receiving public funds have some duty to make a limited inquiry so as to be reasonably certain they are entitled to the money they seek." In the government contracting context, one could act "knowingly" by certifying compliance with the contract specifications or with a regulatory requirement that is a condition for payment, without taking steps to confirm whether the claimant is actually in compliance (i.e., remaining deliberately ignorant of the true state of compliance). Problems can arise when contract requirements or regulatory requirements are ambiguous—if the claimant certifies compliance based on the claimant's interpretation of the requirement, but is not actually in compliance under the government's interpretation, it can be difficult to prove that the claimant "knowingly" submitted a false claim by remaining deliberately ignorant of the conditions for compliance. Courts have held that contractors to USDOT grant recipients did not "knowingly" make false compliance certifications where there was evidence that the contractors and grant recipients were coordinating their compliance efforts with the applicable USDOT agency. "If the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim.";

**d. Materiality**

Liability under the Federal FCA arises when the defendant has provided false information (or caused false information to be used) in support of a claim, where the information is "material" to the claim. Likewise, liability arises for a "reverse" false claim where the defendant has provided false information (or caused false information to be used) to avoid transmitting to exclude evidence of contractor's overall DBE compliance, as probative of contractor's scierent, where contractor contended that its false DBE reports were an "honest mistake"; City of San Diego v. Means, No. D051840, 2009 Cal. App. Unpub. LEXIS 53, at *31 (Jan. 7, 2009) (concluding that airport manager could have "knowingly" violated competitive bidding requirements for airport contracts for purposes of liability under the California FCA, despite the fact that "no one ever told her she was doing anything wrong" and "she received no formal training on the City's rules and regulations").

See, e.g., U.S. Dep't of Transportation ex rel. Arnold v. CMC Engg., 567 Fed. Appx' 166, 170-71 (3d Cir. 2014) (affirming summary judgment in favor of PennDOT contractor on Federal FCA cause of action, where due to contract ambiguity, contractor did not "knowingly" make a false claim or false certification); Tutor-Saliba-Perini J.V. v. Los Angeles Cty. Metro. Transportation Authority, No. B232372, B237037, 2014 Cal. App. Unpub. LEXIS 4261, at *62 (June 16, 2014) (affirming dismissal of California FCA count against LACMTA contractor, where contractor's incorrect contract interpretation was "not so frivolous as to meet the scierent requirement of the False Claims Act").

See, e.g., U.S. ex rel. Totten v. Bombardier Corp., 380 F3d 488, 496 (D.C. Cir. 2004) ("[I]f the claimant has told the grantee pertinent facts that would, in the absence of such disclosure, make a claim fraudulent, it seems that the claimant has not 'knowingly' presented a false claim to the grantee"); U.S. ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1019 (7th Cir. 1999) (holding that City did not "knowingly" misrepresent compliance with FTA requirements, when there was "overwhelming evidence that the City was cooperating with the FTA to bring [transit operation] into full regulatory compliance"); U.S. ex rel. Nguyen v. City of Cleveland, Ohio, No. 09-CV-00208, 2005 U.S. Dist. LEXIS 22103 (N.D. Ohio Sept. 30, 2005) (holding that airports did not "knowingly" misrepresent environmental compliance, where incorrect compliance certifications were based on Federal Aviation Administration guidance).

money or property to the government, where the information is "material" to the defendant's obligation to do so. The Federal FCA defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property." Most State FCAs include a nearly verbatim definition of "material." Notably, the California FCA expands the definition to include influencing the receipt of "services," not just money or property.

The materiality requirement was a "judicially-imposed" doctrine, not originally included in the text of the Federal FCA. Courts imposed the materiality requirement to create a heightened standard for FCA liability. To impose liability where a false statement was made "to get" a claim paid, concluding that the false claimant must have the specific purpose of defrauding the government. In reaction to Allison Engine, Congress amended the Federal FCA in 2009, eliminating the words "to get" and providing liability for providing false information "material" to a false claim. This somewhat lowered the standard of proof for FCA liability, as one need only show that the false statement objectively had a natural tendency to induce payment, not that the false claimant subjectively intended to induce payment. Most State FCAs have likewise been amended to conform with the revised Federal FCA language, but a few still provide that a false claim is punishable if it was made "to get" a claim paid.

Although materiality only implies a "tendency" to induce payment, the materiality standard is "demanding," as it ensures that liability does not automatically arise from submitting false information in conjunction with a claim. False statements alone are not actionable under the FCA unless they potentially could have influenced payment. On the other hand, there is no requirement to show that the false statements actually did influence payment of government funds, or otherwise result in damages to the government. Stated another way, it is not necessary to show that the recipient of the false information actually relied on the false information when deciding whether to pay a claim. However, where the payor actually does rely on the false information in deciding to pay the claim, it is likely that the false information was material. On the other hand, where the payor is aware of the true state of facts and pays the claim, notwithstanding the false information, it is likely that the false information was not material.

A number of courts analogize the "materiality" requirement of an FCA cause of action with the "materiality" requirement of a breach of contract action, in that mere noncompliance does not give rise to liability unless the noncompliance was "material."

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147 See, e.g., Del. Code tit. 6, § 1202(4).
148 Cal. Gov't Code § 12650(b)(4) (expanding the definition of "material" to mean "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money, property, or services") (emphasis supplied).
149 Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1999).
150 Id.
155 Id. at *52 (denying summary judgment to contractor for San Francisco Bay Area Rapid Transit District ("BART") as to California FCA count, where BART had raised a genuine issue of fact as to reliance, and a "showing of materiality requires even less than a showing of reliance").
However, keep in mind that seeking payment for materially noncompliant contract work, in and of itself, does not constitute a false claim.162 Accordingly, a number of courts articulate a “heightened standard” for proving materiality in false certification cases—where the claimant is alleged to have falsely certified compliance with a contract specification or regulatory requirement. Under this “heightened standard,” the false certification must have more than a “tendency” to induce payment—the government payor must have expressly “conditioned payment of the claim upon certification of compliance with the provision of the statute, regulation, or contract at issue.”163

For example, in U.S. ex rel. Laymon v. Bombardier Transportation (Holdings) USA, Inc.,164 a contractor for the San Francisco Bay Area Rapid Transit District (herein, “BART”) sought to exclude evidence of its noncompliance with USDOT’s Disadvantaged Business Enterprise (“DBE”) requirements, contending that its DBE compliance was not material to whether its invoices were false. However, the U.S. District Court for the Western District of Pennsylvania denied the motion, concluding that the contractor’s actual DBE participation figures were material, where “the right to receive payment by Defendant was conditioned upon its DBE compliance.”165

However, the government’s decision “to expressly identify a provision as a condition of payment is relevant, but not automatically dispositive” as to materiality.166 In U.S. ex rel. Harman v. Trinity Industries, Inc.,167 a guardrail manufacturer was sued under the Federal FCA for allegedly falsely certifying that its end terminals had been approved for reimbursement by FHWA, in order to induce state transportation agencies to purchase the terminals. The guardrail manufacturer moved to dismiss on the grounds that the alleged false certifications were not material, but the U.S. District Court for the Eastern District of Texas denied the motion because the relator “specifically alleged that these certifications were necessary both in order for state authorities to purchase the [terminal] and to receive reimbursement from the federal government. Such certifications are adequately presented to be material.”168 A jury subsequently issued a verdict against the guardrail manufacturer, finding that its false certifications “were material to a demand for payment by the U.S. government.”169 However, the U.S. Court of Appeals for the Fifth Circuit reversed, because FHWA continued to approve reimbursement for the guardrail end terminals long after the relator’s allegations were known, indicating that the manufacturer’s “alleged misstatements were not material to its payment decision.”170

Finally, it is worth noting that in addition to a claim, falsity, knowledge, and materiality, a number of FCA court opinions recite that there is an additional element to an FCA cause of action—that the claimant must have actually received payment in response to the false claim.171 However, with the materiality standard, especially as rearticulated by Congress in its 2009 amendment to the Federal FCA, it is clear that the government need not incur actual damages in order for an FCA cause of action to arise172—the false claim need only have the “natural tendency” to induce payment.

2. Types of False Claims

a. Overbilling

A false claim is essentially a request or demand for payment to which the claimant knows it is not entitled. A contractor overbilling a state transportation agency—submitting a pay application that the contractor knows exceeds the amount due—will practically always give rise to liability where there is an applicable FCA, because such a submission inherently covers all elements of an FCA cause of action. Overbilling a state transportation agency can take many forms.

The form of overbilling that is most obviously a false claim is when a contractor requests payment for goods or services that were not actually furnished.173 Although it is rarely alleged that a contractor was so brazen as to submit an invoice where it furnished no goods or services,174 FCA actions often allege that a

162 San Francisco Unified Sch. Dist. ex rel. Contreras v. Laidlaw Transit, Inc., 182 Cal. App. 4th 438, 456, 106 Cal. Rptr. 3d 84, 98 (2010) ("[A] false implied certification relating to a ‘material’ contract term may not always be ‘material’ to the government’s decision to pay a contractor.").
163 Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 793 (4th Cir. 1999); see also City & County of San Francisco v. Tutor-Saliba Corp., No. 02-CV-05286, 2005 U.S. Dist. LEXIS 46590 (N.D. Cal. Mar. 17, 2005); U.S. ex rel. Fryberger v. Kiewit Pac. Co., No. 12-CV-02698, 2013 U.S. Dist. LEXIS 153135, *32 (N.D. Cal. Oct. 24, 2013) (“For a relator to establish a false certification false claim, the certification must be material to the payment made by the government..., and must be a prerequisite to obtaining the government benefit...”).
165 Id. at 549.
167 872 F.3d 645 (5th Cir. 2017).
171 See, e.g., U.S. ex rel. Patton v. Shaw Servs., LLC., 418 Fed. App’x 366, 369 (5th Cir. 2011) (“[T]o prove a violation of the FCA, a plaintiff must establish [a material, knowing misrepresentation] that caused the government to pay out money or to forfeit moneys due (i.e., that involved a claim.”); U.S. ex rel. Hedley v. Abhe & Svoboda, Inc., 199 F. Supp. 3d 945, 953 (D. Md. 2016) (“[T]he statement or conduct caused the government to pay out money or to forfeit money due.”).
172 See, e.g., Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 n.7 (4th Cir. 1999) (“In fact, there is no requirement that the government have suffered damages as a result of the fraud.”).
173 U.S. v. Science Applications Int’l Corp., 626 F.3d 1257, 1266 (D.C. Cir. 2010) (“In the paradigmatic case, a claim is false because it involves an incorrect description of goods or services provided or a request for reimbursement for goods or services never provided.”) (quoting Mikes v. Strauss, 274 F.3d 687, 697 (2d Cir. 2001)); see also S. Razo No. 99-345, at 9 (1986) (“[A] false claim may take many forms, the most common being a claim for goods or services not provided . . ..”).
174 But see Press Release, Attorney General Frosh Joins Regional and Federal Partners in Settling Fraud Case against WMATA Contractor,
portion of the invoiced goods or services were not furnished. For example, government agencies or qui tam relators may allege that there was improper “backup” or supporting documentation (e.g., subcontractor or supplier invoices), the implication being that the contractor had not actually incurred the expense of furnishing the work at the time of invoicing for it. On the other hand, without sufficient backup for the contractor’s actual expenses, it can be difficult for an FCA plaintiff to prove that the contractor overbilled. For example, in Reno Metal Products, Inc. v. Steiny and Co., Inc., a subcontractor on a Los Angeles County Metropolitan Transportation Authority (herein, “LACMTA”) project was alleged to be liable under the California FCA for failing to provide backup “to support material costs, labor costs and construction equipment costs for the Bills of Sale.” The California Court of Appeal overturned a judgment against the subcontractor under the California FCA, because, without documentation of the subcontractor’s actual costs, there was not “substantial evidence” of damages incurred by LACMTA.

On the other hand, where invoices are supported with backup showing that the contractor actually did incur the claimed expense, FCA plaintiffs may allege that the defendant furnished the goods or services to someone other than the government, or on a project other than that funded by the government, and improperly tried to get reimbursed using government funds. For example, in McCrery v. Knox County, Indiana, a case brought under both the Federal FCA and the Indiana FCA, the relator alleged that county resources were improperly diverted to perform grading work not on a county road, but rather on a private road owned by a county official. Similarly, in U.S. ex rel. Anthony v. Burke Engineering Co., a case brought under the Federal, California, and Nevada FCAs, the relator alleged that a mechanical contractor invoiced various government agencies for HVAC equipment sold to employees of those agencies for their personal use.

A common variation on the overbilling theme is where it is not disputed that the contractor did provide some portion of the goods and services for which it seeks payment, but it is alleged that the contractor is overstating the quantity of work it actually furnished in order to be paid more than it is entitled. State transportation agency contracts often include unit prices for certain work items, or allowances that provide for an adjustment in the contract sum if certain work items exceed estimated quantities, so that overstating the quantities provided can result in net overpayment to the contractor. For example, in United States v. Sequel Contractors, Inc. a case brought under both the Federal FCA and the California FCA, the defendant contractor was alleged to have requested payment for 350 cubic yards of concrete when it actually furnished only 73 cubic yards. Another allegation frequently made in FCA actions is that, even if the quantities claimed by the contractor are accurate, the contractor invoiced at higher rates than the contract allowed. For example, in U.S. Department of Transportation ex rel. Arnold v. CMC Engineering, the qui tam relator alleged that a consultant for PennDOT invoiced inflated hourly rates for its inspectors. The contract between PennDOT and the consultant established hourly pay rates for inspectors based on certifications, training, and experience. Although the inspectors did not have the certifications, training, and experience specifically identified in the contract for the rates billed, the court declined to hold the consultant liable under the FCA where the contract also included “catchall” phrases that arguably allowed the consultant to substitute “equivalent” certifications, training, and experience for the criteria identified in the contract.

Another type of FCA action for overbilling that arises on state transportation agency projects and other construction projects is where the contractor is alleged to have overstated its progress. On construction projects, contractors typically invoice at regular intervals for progress payments, for a portion of the overall contract sum based on the estimated percentage completion of the project. It can be difficult to hold the contractor liable in these situations, since the contractor is typically not representing that its progress estimate is anything other than an estimate, and the contract often provides that the state transportation agency’s representative or design professional must concur with the progress estimate before the contractor receives payment. Further, although an inflated progress estimate may result in the contractor receiving some funds early, it typically would not result in an increase in the overall contract sum—i.e., it would not increase the total amount that the contractor is ultimately expected to receive for the entire contract. Even in situations where the contract price is not fixed, so that overstated progress could potentially result in a net overpayment to

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176 Id. at *10-11.

177 Id. at *42.

178 Id. at 782 (S.D. Ind. 2016).

179 Id. at 787.


181 Id. at 1120.


183 U.S. v. GroundDown Constructors, LLC, No. 13-CV-00338 (E.D. Va., May 28, 2013) (seeking to hold utilities contractor for Virginia DOT liable under both Federal FCA and Virginia FCA for repeatedly invoicing for more linear feet of water/sewer pipe than the quantities observed by the Virginia DOT inspector).

184 Id. at 167.

185 Id. at 1152-53.

186 Id. at 1152-53.


188 Id. at 787.

189 Id. at 787.

190 Id. at 116.

191 Id. at 1120.
the contractor, it is probably not a false claim where the government allows its contractor to submit progress billings based on estimates with the understanding that any overpayment will be reconciled at the end of the project.\textsuperscript{190} However, where the contractor seeks to request additional sums from the government due to alleged delays or acceleration costs, overstated progress estimates early in the project could be considered false claims because they would result in inflated calculations of the impact of the delays or acceleration later in the project.\textsuperscript{191}

Disputes over what is included in the contract scope of work can result in another type of overbilling allegation—that the contractor is requesting extra payment, or an increase in the contract sum, for goods or services that were part of the original contract scope of work and should have been included in the original contract sum. For example, where the government rejects part of a contractor’s work and the work must be corrected, the government may allege that the contractor is submitting a false claim by invoicing for correcting its own work, which the government is not obligated to pay even though the contractor can likely demonstrate that it did incur extra costs of correction.\textsuperscript{192} Likewise, where the contractor has simply-underbid a project, requesting change orders to recover its actual cost of performance over and above the contract sum may subject the contractor to FCA liability, even though the contractor may only be requesting compensation for costs the contractor has actually incurred.\textsuperscript{193}

All of the above “overbilling” FCA scenarios involve relatively familiar and straightforward assessments of entitlement that are routine in construction contract dispute litigation—actual determinations by the court of what the contract requires, what work was furnished by the contractor, and what payment (if any) was the contractor entitled to receive for the work. The most unique distinguishing factor about an FCA action for overbilling, as opposed to a routine contract case, is that the court will have to also assess the claimant’s knowledge—whether the contractor knew that its claim was false, as opposed to a good-faith contract dispute.

\textbf{b. Defective Performance}

At the heart of many FCA actions is an allegation that the contractor failed to perform its work in accordance with the contract requirements. On state transportation agency contracts, these types of “defective performance” allegations often involve materials or products that allegedly fail to conform to contract specifications.\textsuperscript{194} The problem inherent with this type of FCA action is that nonconforming work, in and of itself, does not involve a false claim.\textsuperscript{195} Defective performance, in and of itself, does not necessarily involve a false statement or false information being submitted to induce payment.\textsuperscript{196} Failure to comply with contract requirements would be a proper basis for a breach of contract action, not necessarily an FCA cause of action.\textsuperscript{197} On the other hand, if the defendant can show that its work complied with the contract specifications, so that there was no breach of

\textsuperscript{190} See, e.g., Lee v. North Bay Construction, Inc., No. A123862, 2010 Cal. App. Unpub. LEXIS 3714 (May 20, 2010) (affirming summary judgment in favor of paving contractor as to California FCA count, where contracting agency changed from a fixed-price to a time-and-materials contract, but still allowed contractor to submit interim invoices based on estimated quantities); Dillingham-Ray Wilson v. City of Los Angeles, 182 Cal. App. 4\textsuperscript{th} 1396, 1403, 106 Cal. Rptr. 3d 691, 697 (2010) (affirming judgment in favor of public works contractor as to California FCA count, where city authorized contractor to perform extra work based on estimates or on a time-and-materials basis, with a lump sum price to be negotiated at a later date).

\textsuperscript{191} See, e.g., City and Cty. of San Francisco v. Tutor-Saliba Corp., No. 02-CV-05286, 2005 U.S. Dist. LEXIS 46590 (N.D. Cal. Mar. 17, 2005) (allowing local governments to proceed with action under California FCA and San Francisco FCA where airport construction contractor’s alleged misrepresentations about progress and schedule were alleged to result in inflated delay and acceleration claims by the contractor).

\textsuperscript{192} See, e.g., M.A. DeAtley Const., Inc. v. U.S., 75 Fed. Cl. 812, 818-19 (2007) (denying summary judgment to FHWA contractor with respect to Federal FCA cause of action where contractor was alleged to have requested payment by FHWA both for supplying defective roadbed aggregate and also for replacing the defective aggregate rejected by FHWA); U.S. ex rel. Bhatnagar v. Kiewit Pacific Co., 24 Fed. Appx 837 (9th Cir. 2002) (overturning summary judgment for Caltrans contractor on Federal FCA cause of action where contractor was alleged to have requested payment both for stormwater pollution prevention plan (SWPPP) required by its contract and also for preparing amended SWPPP after original SWPPP was rejected).

\textsuperscript{193} See, e.g., Tutor-Saliba-Perini J.V. v. Los Angeles Cty. Metro. Transportation Authority, No. B232372, 2014 Cal. Unpub. LEXIS 4261 (June 16, 2014) (affirming judgment against LACMTA contractor on California FCA cause of action, where contractor requested additional payment for work that was included in original contract scope); Kaijima Engg & Const., Inc. v. City of Los Angeles, 96 Cal. App. 4\textsuperscript{th} 921, 116 Cal. Rptr. 2d 187 (2002) (allowing California FCA cause of action to proceed


\textsuperscript{195} See, e.g., Pfingston v. Ronan Engg Co., 284 F.3d 999, 1004 (9th Cir. 2002) (holding that allegation of nonconforming underground fuel tanks supplied by LACMTA contractor “fall far short of setting forth a prima facie case” under Federal FCA and California FCA).

\textsuperscript{196} See, e.g., U.S. ex rel. Patton v. Shaw Servs., L.L.C., 418 Fed. Appx 366, 370 (5th Cir. 2011) (affirming summary judgment in favor of Louisiana DOT contractor in defective construction FCA case, where qui tam relator failed to show that contractor “falsely certified compliance with the contract provisions or construction methods” alleged to have been violated, “nor has he shown that compliance with those provisions or methods was a condition to payment under the contract”).

\textsuperscript{197} Town of Smyrna v. Mun. Gas. Auth. of Georgia, 129 F. Supp. 3d 589, 601 (M.D. Tenn. 2015) (“After all, a mere breach of contract generally does not a false claim make.”)
contract, there will also be no FCA cause of action arising out of
defective performance.\footnote{See, e.g., U.S. ex rel. Patton v. Shaw Servs., L.L.C., 418 Fed. App'x 366, 370 (5th Cir. 2011) (affirming summary judgment in Federal FCA action in favor of contractor on Louisiana State Transportation Center project, where “a third-party architectural firm retained by the state inspected Shaw's work weekly and drafted field reports, none of which indicated that Shaw's work was not in compliance with the contract or otherwise improper”).}

FCA plaintiffs will seek to connect the allegedly defective contract performance with a claim for payment, such as an invoice for the nonconforming goods and services, in order to establish the existence of a false claim. However, the mere existence of an invoice still typically does not establish that there was a false statement or false information, unless the goods or services stated on the invoice were not actually furnished, or the goods and services that were furnished were “worthless.”\footnote{Id. at 719.}

In that case, the invoice (requesting payment for work not performed) may be a false statement in and of itself.\footnote{Id. at 721-22.} But it is extremely rare for a contractor to be so audacious as to request payment where no work has been performed, and accordingly FCA actions based on “worthless” contract performance are rarely sustained. Rather, in most FCA actions involving claims of defective performance, the FCA plaintiff acknowledges that work was performed, but alleges that the government was asked to pay for lower quality work than it is entitled to receive under the contract.

In order to elevate defective performance allegations from a breach-of-contract action to an FCA action, FCA plaintiffs typically attempt to tie the defective performance to a false certification by the contractor that its work was performed in accordance with contract requirements.\footnote{565 Fed. App'x 669 (9th Cir. 2014).} For example, in *Klausmeier v. Bell Constructors, Inc.*,\footnote{469 Fed. App'x 718 (11th Cir. 2012).} a case brought under the Federal FCA and the Florida FCA, the *qui tam* relator alleged that the contractor failed to satisfy the contract’s earthwork specifications, by furnishing nonconforming soil and stone materials and performing inadequate compaction. The relator alleged that the contract incorporated Federal Acquisition Regulation (“FAR”) provisions requiring the contractor “to certify, in each monthly invoice, that the payment requested was for work performed according to the contract’s specifications.”\footnote{Id. at 721-22.} Because the contractor had performed nonconforming work, and submitted invoices, the relator argued that the invoices necessarily included false certifications that the work conformed to the contract requirements. The U.S. Court of Appeals for the Eleventh Circuit disagreed. Affirming dismissal of the FCA action, the Court noted that the relator did not have firsthand knowledge of the contents of the invoices, so it was unclear whether the invoices actually included false certifications or if the contractor even invoiced for the allegedly nonconforming work.\footnote{565 Fed. App'x 669 (9th Cir. 2014).}

Similarly, in *U.S. ex rel. Perry v. Hooker Creek Asphalt & Paving, Inc.*,\footnote{469 Fed. App'x 718 (11th Cir. 2012).} the *qui tam* relator alleged that paving contractors for the Oregon Department of Transportation (ODOT) furnished pavement materials that failed to satisfy the contract specifications, and submitted false claims by invoicing for the nonconforming materials. The U.S. District Court for the District of Oregon dismissed the case with prejudice, noting that nonconforming work does not equate to an FCA cause of action merely because the defendant also submitted invoices, where the relator had no firsthand knowledge of the actual content of the invoices or any false statements therein: “It is simply not plausible that all defendants submitted falsified billings for all projects for all work for the Oregon Department of Transportation over a 10 year period.”\footnote{565 Fed. App'x 669 (9th Cir. 2014).}

In the absence of an express certification of contract compliance, some courts have allowed FCA actions to proceed under an “implied certification” theory. In *San Francisco Unified School District ex rel. Contreras v. Laidlaw Transit, Inc.*,\footnote{182 Cal. App. 4th 438, 106 Cal. Rptr. 3d 84 (2010).} a case brought under the California FCA, the *qui tam* relators alleged that a transit contractor supplied transit vehicles that failed to conform to contract specifications including emissions standards. The contractor argued that there was no false claim, where its invoices did not include an express certification of compliance with contract requirements, and where its contract did not expressly require it to certify compliance with contract requirements as a prerequisite to payment.\footnote{Id. at 447, 106 Cal. Rptr. 3d 84 (2010).} However, the California
Courts of Appeal allowed the case to proceed, concluding that the relator’s allegation that the contractor sought payment for work that it knew was nonconforming constituted an “implied certification” that could trigger liability under the California FCA. “It is reasonable for governmental entities to assume that contractors seeking payment are in compliance with the material terms of their contracts.”

Whether the alleged false certification of compliance is express or implied, such FCA actions based on defective performance can be viewed as a subset of FCA actions based on false certifications, which are addressed in the next section.

c. False Certifications of Regulatory Compliance

The types of FCA cases described above (overbilling or defective performance) are sometimes considered to involve “factually false” claims, where the false claim involves misrepresentation of the quantity or quality of goods or services provided. A growing number of FCA cases involve what have come to be known as “legally false” claims—misrepresentation of compliance with rules or regulations.

On state transportation agency projects, and particularly projects that receive federal funding, contractors are typically required to comply with numerous laws and regulations—such as DBE requirements, Buy America provisions, environmental regulations, and labor laws such as the Davis–Bacon Act. Likewise, federal grant recipients such as state transportation agencies often must submit grant assurances certifying compliance with various federal laws and regulations in order for their projects to be eligible for federal funds.

In a “false certification” FCA action, unlike an action based on overbilling or defective performance, the allegation is not necessarily that the government did not receive the benefit of its bargain as far as the tangible work product is concerned. The contractor’s work may conform to the technical specifications of the contract, but the contractor may still be exposed to FCA liability for falsely certifying that it has complied with regulatory requirements in order to get paid. For example, in San Francisco Bay Area Rapid Transit District v. Spencer, a case brought under the California FCA, the U.S. District Court for the Northern District of California did not dispute that a BART contractor’s pay application represented a legitimate estimate of the work performed and the cost to complete the work. However, because its subcontractor falsely certified its DBE status in order to be eligible for the work, summary judgment was denied to the subcontractor as to the California FCA count.

However, just as defective work alone will not give rise to liability under the FCA, regulatory noncompliance alone will not give rise to liability under the FCA. As many courts have stated, “the FCA is not an appropriate vehicle for policing technical compliance with administrative regulations.” Failure to comply with regulations does not necessarily mean that there was a false claim, or even a false certification. For example, in Gerhard v. D Construction, Inc., a whistleblower retaliation case brought under both the Federal FCA and the Illinois FCA, a former employee of an IDOT contractor alleged that the contractor’s violations of workplace safety regulations constituted FCA violations, because the IDOT contract required the contractor to “comply with all applicable laws and regulations.” The U.S. District Court for the Northern District of Illinois dismissed the Federal FCA cause of action, noting that the whistleblower’s “expansive interpretation” of the FCA would improperly subject a contractor to FCA liability for “any violation of any law or regulation on the job site of a construction company” receiving federal funds.

In order for a false certification to give rise to FCA liability, the defendant’s alleged false certification typically must be tied to a claim for payment. As discussed in Section II.A.1.d, some courts recognize a heightened materiality requirement in false certification cases, such that “the government must have conditioned payment of the claim upon certification of compliance with the provision of the statute, regulation, or contract at issue.” In order for FCA liability to arise. Despite the heightened standard for false certification cases, there can be larger damages awards than in cases involving “factually false” claims, as some courts will calculate the government’s damages as the...

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211 Id. at 453, 106 Cal. Rptr. 3d at 96.
213 Id.
215 See, e.g., U.S. ex rel. Fields v. Bi-State Dev. Agency of the Missouri–Illinois Metro. Dist., 829 F.3d 598, 599 (8th Cir. 2016) (alleging that FTA grant recipient falsely certified compliance with multiple federal statutes in order to receive FTA funding); U.S. ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1014 (7th Cir. 1999) (observing that FTA grant recipient “must submit assurances of its compliance with all applicable federal statutes and regulations”).
220 10 Id. at *11.
221 Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 793 (4th Cir. 1999).
entire amount of the payment that was contingent on the false certification.220

The following sections examine some of the more common “false certification” FCA violations alleged on state transportation agency projects.221

(1) Disadvantaged business enterprise compliance. In recent years, false certifications of compliance with the USDOT DBE regulations has become a primary source of Federal FCA litigation involving federally funded highway projects for state transportation agencies. As state transportation agencies often have their own DBE programs (often called minority business enterprise (“MBE”) or woman-owned business enterprise (“WBE”) programs), false statements of compliance with those state programs can also be a source of State FCA liability.

DBE or M/WBE programs typically allow the contracting authority to establish goals for participation of disadvantaged businesses. For example, the prime contractor may be expected to subcontract a certain percentage of its overall contract work to disadvantaged subcontractors. There is typically an exception, where the prime contractor need not actually achieve the subcontracting goal if the contractor made “good faith efforts” to achieve the goal. There is a wide variety of behavior that may be alleged to violate these program requirements.

FCA actions may be brought against contractors for overstating the amount paid to disadvantaged subcontractors, in an attempt to make it appear that the DBE goals were satisfied when they were not.222 For example, in U.S. ex rel. Haydel v. Abbe & Svoboda, Inc.,223 a case brought under the Federal FCA, the prime contractor on a federally funded Maryland State Highway Administration project was alleged to have certified that it satisfied the project’s 15 percent DBE goal, when in reality it paid a certified DBE subcontractor 8 percent of its contract price with the understanding that the DBE would not actually perform work on the project.224

Other variations of this include contractors inflating the value of DBE subcontracts by improperly including costs of equipment and materials purchased by the prime contractor, rather than just the cost of labor and materials furnished by the DBE subcontractor.225 Conversely, contractors may accurately state the amounts paid to DBE subcontractors, but fail to disclose that the DBE was acting as a “pass-through” or broker who subsequently subcontracted the work to a nonqualifying subcontractor.226 For example, in CSX Transp. v. Schuykill Products, Inc.,227 the U.S. District Court for the Middle District of Pennsylvania granted summary judgment in favor of the qui tam relator alleging DBE fraud under the Federal FCA, finding that “PennDOT’s largest recipient of DBE-designated funds”228 was actually a pass-through entity that “did not perform a commercially useful function.”229

Contractors and subcontractors can incur FCA liability for falsely certifying that they (or their subcontractors) qualify as disadvantaged businesses when they do not.230 For example, FCA actions may be brought against subcontractors who hold themselves out as DBEs, using a minority partner who does not actually control the enterprise and does not actually perform the subcontract work.230

Contractors can also incur FCA liability when they acknowledge that they did not meet the DBE goals, but falsely certify their “good faith” efforts to achieve the goals.231 For example, FCA actions may be brought against contractors who decline

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223 Id. at 949.


227 Id. at *4.

228 Id. at *16.

229 See, e.g., S. Cal. Rapid Transit District v. Superior Court, 30 Cal. App. 4th 713, 719, 36 Cal. Rptr. 2d 663, 668 (1994) (alleging that transit district DBE contractor might be a “front” for non-minority license qualifier, whose income may exceed DBE threshold, in whistleblower retaliation case brought under California FCA).

230 San Francisco Bay Area Rapid Transit District v. Spencer, 358 Fed. Appx 793, 795 (9th Cir. 2009) (upholding award of penalties under California FCA regarding pay applications to BART that incorporated subcontractor claims from “sham joint venture”).

231 See, e.g., City & County of San Francisco v. Tutor-Saliba Corp., No. 02-CV-05286, 2005 U.S. Dist. LEXIS 46590 (N.D. Cal. Mar. 17, 2005) (alleging that airport contractor misstated its compliance with good faith requirements of San Francisco minority outreach program).
to hire DBE subcontractors and later certify that they did not receive bids from DBE subcontractors.232

Keep in mind that the false certification alone does not give rise to liability under the FCA—all elements of an FCA cause of action must be met, meaning that the false certification must be tied to a false claim for payment. For example, in Green v. City of St. Louis, Missouri,233 a whistleblower retaliation case brought under the Federal FCA, the U.S. Court of Appeals for the Eighth Circuit affirmed dismissal where the whistleblower alleged improper M/WBE certifications of airport contractors, but could not identify any claims for federal grant funds based on the false certifications.234 However, in Southern California Rapid Transit District v. Superior Court,235 a similar whistleblower retaliation case brought under the California FCA, the California Court of Appeal allowed the action to proceed, suggesting that false DBE certification alone could constitute a false claim, since false DBE certification would make the contractor appear eligible to receive public funds to which it was not actually entitled.

(2) Environmental compliance. A subset of "false certification" FCA cases involves alleged false certifications of environmental compliance. Federally funded transportation projects typically must comply with the environmental review requirements of the National Environmental Policy Act ("NEPA").236 There are also typically state statutes modeled after NEPA, which apply to state transportation agency projects even without significant federal funding. Individuals opposing transportation projects on environmental grounds may initiate litigation under an appropriate FCA, alleging that the contracting agency falsely certified compliance with environmental review requirements, which were a condition of government funding.237

One difficulty in maintaining this type of FCA action is that it is typically the obligation of the public contracting agency, rather than its contractor, to certify compliance with environmental review requirements. As discussed in detail in Section II.C herein, there are obstacles to litigating FCA actions against government defendants. For example, in West v. U.S. Army Corps of Engineers,238 a qui tam relator sued several state and federal entities, including the Washington State Department of Transportation ("WSDOT"), the U.S. Secretary of Transportation, and the Federal Aviation Administration, alleging violations of NEPA and the Washington State Environmental Policy Act on multiple transportation construction projects, including a rail project and an air terminal expansion project. However, the U.S. District Court for the Western District of Washington dismissed the Federal FCA action as to the government entities, because the United States has not waived sovereign immunity for federal agencies under the Federal FCA,239 and because a state agency such as WSDOT cannot be sued in federal court under the Eleventh Amendment240 (discussed in Section II.C.4).

Likewise, because it is the public contracting agency's obligation to conduct environmental review, most of the environmental review documents are public records, and there are often requirements for the agency to conduct public hearings as part of the environmental review process. Therefore, a qui tam FCA action alleging false certification of environmental compliance will often be barred by public disclosure, as discussed in detail in Section IV.C. In U.S. ex rel. O'Keefe v. Sverdrup Corp.,241 a qui tam relator sued the Massachusetts Bay Transportation Authority ("MBTA") and its environmental review consultants, alleging false statements in its NEPA environmental impact statement ("EIS"), which resulted in FTA approval and funding for a commuter rail project.242 The U.S. District Court for the District of Massachusetts granted summary judgment for the defendants, finding that the allegations were either based on "comments made in the public EIS proceedings" or statements in the EIS itself, which "was co-authored by the United States Department of Transportation,"243 so the Federal FCA complaint was barred due to prior public disclosures.

Nevertheless, there are instances in which government contracting agencies have incurred FCA liability due to false NEPA certifications. In U.S. ex rel. Shepard v. Tippetts,244 a qui tam relator alleged that an airport falsely certified that the impact of a proposed federally funded construction project was so minor as to qualify for a categorical exclusion from the NEPA environmental review process. The United States agreed that the airport violated the Federal FCA by making the false certification to obtain FAA grant funding for the project but settled with the airport for only $16,500 in penalties (a tiny fraction of the $16,500,000 in treble damages sought by the qui tam relator).245

[233] 507 F.3d 662 (8th Cir. 2007).
[234] Id. at 668.
[237] See, e.g., U.S. ex rel. Heath v. Dallas-Fort Worth Int'l Airport Bd., 260 Fed. Appx' 708, 709 (5th Cir. 2007) (alleging that airport "submitted false statements relating to environmental issues to obtain grant funds in violation of the" Federal FCA); U.S. ex rel. Nguyen v. City of Cleveland, Ohio, No. 00-CV-00208, 2005 U.S. Dist. LEXIS 22103, at *12 (N.D. Ohio Sep. 30, 2005) ("[T]he basis of Plaintiff's False Claims Act claims is that the Airports knowingly violated the aforementioned environmental laws, and, thereafter, knowingly and falsely certified to the Government that they were in compliance with those, and other, laws so as to receive federal funds.").
[239] Id. at *3.
[242] Id. at 89.
[243] Id. at 91-92.
[245] Id. at *14.
d. Bidding Improperities

A number of FCA actions involve alleged bidding improperities. Typical allegations of bidding improperities in the highway contracting context include:

- that the successful bidder submitted false pricing information; typically, that the successful bidder intentionally underbids the project in order to fraudulently induce a contract award, with the intention of requesting additional compensation later;\(^\text{246}\)

- that the successful bidder included false information other than price in its bid, such as false certification of size status or DBE status;\(^\text{247}\)

- that potential contractors engaged in “bid-rigging,” colluding with one another to keep bid prices higher than they would be in a competitive bidding environment;\(^\text{248}\) and

- that the contracting authority avoided procurement requirements designed to ensure competition, and instead routed a contract to a favored or incumbent contractor.\(^\text{249}\)

Over the years, there have been conflicting court opinions regarding whether bidding improperities constitute “false claims” or are otherwise actionable under FCAs. Some courts have concluded that bidding improperities alone do not give rise to an FCA action, as bids or proposals typically do not include a request or demand for payment, but instead are submitted to obtain a contract as a vehicle through which to be paid by the government at a later date.\(^\text{250}\) However, the more prevalent view is that underbidding does create FCA liability, as it constitutes a false statement if the defendant actually intends to charge more than its bid.\(^\text{251}\)

Bidders are often asked to certify that their bids comply with applicable public procurement law.\(^\text{252}\) Where improper bidding

\(^{254}\) See also Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 788 (4th Cir. 1999) (observing that there can be Federal FCA liability where contracts are induced by bidding improperities, even though “the claims that were submitted were not in and of themselves false”); City of Pomona v. Superior Court, 89 Cal. App. 4th 793, 802, 107 Cal. Rptr. 2d 710, 717 (2001) (concluding that under California FCA, “the claim itself need not be false but only need be underpinned by fraud” as in the case of bidding improperities).

\(^{257}\) Veridyne Corp. v. U.S., 758 F.3d 1371, 1380 (Fed. Cir. 2014) (affirming award against USDOT contractor of $1,397,000, or maximum penalty under Federal FCA for each of 127 invoices, where contract was obtained under false pretenses).

\(^{258}\) See, e.g., Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 788 (4th Cir. 1999); Hooper v. Lockheed Martin Corp., 688 F.3d 1037, 1049 (9th Cir. 2012).
activities such as collusion can be demonstrated, this bidder certification often stands as tangible evidence of false information submitted to the procuring agency and forms the basis of an FCA action. In this way, allegations of bidding improprieties may be seen as a variation of a “false certification” FCA action. By the same token, “false certification” FCA allegations are often presented as bidding improprieties, especially when the certifications play a part in determining whether a bid is responsive. For example, where some part of the work is set aside for DBEs, false certifications of DBE status can fraudulently induce a contract award.259 Portraying a false certification as a bidding impropriety can result in a larger recovery, under the theory that each invoice or pay application under an improperly bid contract constitutes a separate false claim.

Because of the procuring agency’s active role in the procurement process, FCA actions involving bidding improprieties will often be challenged on the basis of the “government knowledge” defense discussed in Section IV.D. For example, in U.S. ex rel. Sterili v. Shasta Services, Inc.,260 an action against a contractor for the California Department of Transportation (Caltrans) under both the Federal FCA and the California FCA was dismissed, where Caltrans had knowledge of the allegations of DBE fraud at the time it awarded the contract and before it received any pay requests. Similarly, where it is alleged that the procuring agency has failed to follow competitive procurement practices, some courts have concluded that the procuring agency’s knowledge and assent to any deviation from procurement requirements bars recovery under an FCA.261 However, transportation contracts often have multiple funding sources (e.g., state transportation agencies contract for work using FHWA funds), and the procuring agency’s knowledge of bidding improprieties does not always absolve the contractor from FCA liability, especially where another funding agency is not aware of the bidding improprieties.262


260 440 F. Supp. 2d 1108, 1114 (E.D. Cal. 2006) (“The court concludes that failure to follow proper contracting practices, as Sterili claims occurred here, is not a ‘proper vehicle’ for invoking the False Claims Act.”).

261 See, e.g., Debro v. Turner Const. Co., No. A117338, 2008 Cal. App. Unpub. LEXIS 2470 (Mar. 25, 2008) (concluding that California FCA action was time-barred, where allegation was that Port of Oakland bypassed competitive bidding requirements in selecting airport contractor, so government had knowledge of bidding improprieties as of the date contract was executed).

262 See, e.g., Veridyne Corp. v. U.S., 758 F.3d 1371, 1379 (Fed. Cir. 2014) (concluding that USDOT’s knowledge of bidding impropriety did not absolve contractor from Federal FCA liability, where Small Business Administration was a party to the contract and did not have knowledge of bidding impropriety).


264 See, e.g., Cal. Gov’t Code § 12651(a)(7).


266 279 F.3d 219 (3d Cir. 2002), judgment vacated, 538 U.S. 918, 123 S. Ct. 1619, 155 L. Ed. 2d 308 (2003).

267 Id. at 221.

268 Id. at 226.


statement of the traditional false claims allegation.\footnote{271} For example, where a false claimant has received government funds to which it is not entitled based on a false claim, that could be portrayed as both as a false statement in connection with receipt of funds and also a failure to return funds improperly paid.\footnote{272} Likewise, where an FCA action is premised on false certifications of regulatory compliance, the FCA action might also include a reverse false claims count for failure to pay fines due to non-compliance.\footnote{273} However, liability is more likely to be assessed on the basis of the traditional false claim that resulted in improper payment, which preceded the obligation to refund.

Not all withholding of government funds is punishable under FCAs. The Federal FCA “does not apply to claims, records, or statements made under the Internal Revenue Code.”\footnote{274} In U.S. ex rel. Lissack v. Sakura Global Capital Markets,\footnote{275} this “tax bar” was found to preclude an FCA action alleging that bonds issued for highway and bridge construction did not qualify for tax-exempt status. State FCAs often include a similar provision making them inapplicable to allegations of tax evasion.\footnote{276} Actions taken under State FCAs to recover fees owed to the government by private parties are often found to be barred by these provisions. For example, State FCA actions taken against telecommunications companies to recover 911 fees have been found to be precluded by “tax bars” in the State FCA.\footnote{277} Likewise, State FCA actions against mortgage lenders for failure to pay recording fees excluded by “tax bars” in the State FCA.

\footnote{271}{See, e.g., San Francisco Unified Sch. Dist. ex rel. Contreras v. Laidlaw Transit, Inc., 182 Cal. App. 4th 438, 443–44, 106 Cal. Rptr. 3d 84, 88 (2010) (alleging that transit contractor (i) presented false claims for payment, (ii) submitted false information in support of its claims, and (iii) used false information to conceal, avoid, or decrease an obligation to return payment).}

\footnote{272}{See, e.g., Los Angeles Cty. Metro. Transportation Authority v. Parsons-Dillingham Metro Rail Constr. Manager J.V., No. B265863, 2018 Cal. Unpub. LEXIS 1315 (Feb. 26, 2018) (alleging that LACMTA contractor (i) improperly invoiced (and was overpaid) for ineligible overhead and G&A costs, and (ii) concealed its obligation to refund the overpayments, in violation of Federal FCA and California FCA).}

\footnote{273}{See, e.g., U.S. ex rel. Nguyen v. City of Cleveland, Ohio, No. 00-CV-00208, 2005 U.S. Dist. LEXIS 22103, at *12 at n.10 (N.D. Ohio Sept. 30, 2005) (alleging that airports (i) received federal funds on the basis of false environmental compliance certifications, and (ii) failed to pay fines for their environmental violations).}

\footnote{274}{31 U.S.C. § 3729(d).}


\footnote{276}{See, e.g., CAL. GOV’T CODE § 12651(f) (“This section does not apply to claims, records, or statements made under the Revenue and Taxation Code”); MINN. STAT. § 15C.05 (“This chapter does not apply to claims, records, or statements made under portions of Minnesota Statutes relating to taxation”); TENN. CODE § 4-18-103(f) (“This section does not apply to claims, records, or statements made under any statute applicable to any tax administered by the department of revenue.”).}

\footnote{277}{See, e.g., State ex rel. Phone Recovery Servs., LLC v. Qwest Corp., 901 N.W.2d 185, 199 (2017), aff’d, 919 N.W.2d 315 (Minn. 2018) (Minn. Ct. App. 2017) (holding that Minnesota FCA action for withholding 911 fees was precluded by tax bar). But see Hamilton Cnty. Emergency Comm’n Dist. 16-5149 v. BellSouth Telecommunications, LLC, 852 F.3d 521, 534 (6th Cir. 2017) (reversing trial court’s dismissal of or transfer taxes have generally been unsuccessful.\footnote{278} By analogy, where the government seeks to collect fees (e.g., highway tolls, gasoline taxes, vehicle registration fees) to be used in part to fund state transportation agency activities, the failure to pay such fees is likely not actionable as a “reverse false claim” under a State FCA that contains a tax bar.

\section{Available Remedies for False Claims}

\subsection{Fines or Penalties}

FCAs typically provide a civil fine or penalty for each instance of a false claim. For more than 100 years after its enactment, the Federal FCA provided for a fixed $2,000 penalty or “forfeiture” for each false claim.\footnote{279} However, Congress amended the Federal FCA in 1986 to provide that a false claimant “is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990.”\footnote{280} This created a monetary range within which courts could impose penalties. It also significantly increased the penalty for each false claim, and provided that the penalties would continue to increase in the future to account for inflation without requiring further amendment.

However, no inflationary adjustment was actually applied until 1999, when the U.S. Department of Justice (“USDOD”) modestly increased the minimum FCA penalty from $5,000 to $5,500, and the maximum FCA penalty from $10,000 to $11,000.\footnote{281} On November 2, 2015, Congress amended the Federal Civil Penalties Inflation Adjustment Act,\footnote{282} substantially revising the formula used to calculate inflationary adjustments.\footnote{283} This resulted in substantial increases in penalties for FCA violations committed after November 2, 2015, as the revised formula is designed to better capture the inflation that has occurred since the 1986 amendment of the Federal FCA.\footnote{284} As of this writing, the inflation-adjusted penalties for Federal FCA violations committed after November 2, 2015, are a minimum of $11,181 and a maximum of $22,363.\footnote{285} This range applies to FCA penalties


\footnote{279}{See, e.g., U.S. v. Azzarelli Construction Co., 647 F.2d 757, 759 (7th Cir. 1981).}

\footnote{280}{31 U.S.C. § 3729(a)(1)(G).}

\footnote{281}{Civil Monetary Penalties Inflation Adjustment, 46 Fed. Reg. 47,099, 47,104 (Aug. 30, 1999).}


\footnote{283}{Id. § 701, 129 Stat. 584, 599 (codified at 28 U.S.C. § 2461).}


\footnote{285}{See, 28 C.F.R. § 85.5; see also Civil Monetary Penalties Inflation Adjustment, 83 Fed. Reg. 3,944, 3,945 (Jan. 29, 2018).}
assessed after January 29, 2018. The size of the civil penalties will continue to increase annually to account for inflation. This is noteworthy because prejudgment interest typically does not apply to an award of penalties, but penalties under the Federal FCA will nevertheless increase over the course of lengthy FCA litigation to reflect the time value of money.

Most State FCAs also provide for a civil penalty for each violation. State FCAs frequently provide a minimum penalty of $5,500 and a maximum penalty of $11,000 for each violation, mirroring the Federal FCA penalties as amended in 1999. However, some State FCAs contain lower or higher monetary penalties. A few State FCAs are expressly linked to the Federal FCA penalty, as adjusted for inflation, so the potential civil penalties will be substantially higher under those State FCAs. Many State FCAs will likely be amended to adopt this approach, in order to take advantage of the 2015 changes to the Federal FCA inflation adjustment formula.

FCA liability arises from submitting false claims or submitting false information in support of a claim; there is typically no requirement for the false claim to have actually been paid in order for penalties to apply. Where the government has not actually made a payment in response to a false claim, statutory penalties may be the primary or only remedy sought. Even where other remedies (e.g., treble damages) are sought, civil penalties may be awarded in addition to the other FCA remedies, or may be awarded where the plaintiff proves there was a false claim but fails to prove its actual damages. Along these lines, civil penalties may be awarded where the claimant submitted material false information (i.e., false certifications of regulatory compliance) in support of its claim, but the invoice price actually paid by the government was fair.

One issue that arises in imposing penalties is how to calculate the number of violations for which penalties will be assessed. It is typical for courts to determine that each invoice or pay application based on false representations constitutes a single violation, and to award penalties for each violation. However, because it constitutes an FCA violation to submit false information in support of a claim, some courts have entertained the argument that there could be multiple violations (e.g., multiple false statements or supporting documents) in a single invoice or pay application. Where the contract is procured as a result of a misrepresentation made at the time of bidding or at the time of contracting, courts may consider each invoice or pay application submitted under the contract to be a violation, even if there is no false information contained within each invoice or pay application.

Aside from providing a range of possible penalties, with a minimum and a maximum amount per violation, FCAs typically do not include statutory criteria for setting the penalty amount in a given case. It is typically left to the court's discretion to set the FCA penalty amount somewhere between the minimum and the maximum value.

286 Id.


288 See, e.g., Cal. Gov’t Code § 12651(a); Del. Code tit. 6, § 1201(a); Fla. Stat. § 68.082(2); Ga. Code § 23-3-121(a); Mass. Gen. Laws ch. 12, § 5B(a); Minn. Stat. § 15C.02(a); Mont. Code Ann. § 17-8-403(1); Nev. Rev. Stat. § 357.040.2(c); N.C. Gen. Stat. § 1-607(a); R.I. Gen. Laws § 9-1.1-3(a); Vt. Stat. Ann. tit. 32, § 631(b); Va. Code § 8.01-216.3.A.

289 See, e.g., Ind. Code § 5-11.5-5-2(b) (at least five thousand dollars); Kan. Stat. § 75-7503(a) (not less than $1,000 and not more than $11,000 for each violation); N.M. Stat. §§ 44-9-3.C(2) ($5,000 to $10,000); N.Y. State Fin. Law § 189.1(b) ($6,000 to $12,000); Ore. Rev. Stat. § 180.760(4) (a penalty equal to the greater of $10,000 for each violation or an amount equal to twice the amount of damages incurred for each violation); Tenn. Code §§ 4-18-103(a) ($2,500 to $10,000).

290 See, e.g., 740 ILL. COMP. STAT. § 175/3(a)(1)(G); Iowa Code § 685.2-1.1; N.J. Stat. § 2A:32C-3; Okla. Stat. tit. 63, § 5053.1.B.

291 See, e.g., San Francisco Bay Area Rapid Transit Dist. v. Spencer, No. 04-CV-04632, 2007 U.S. Dist. LEXIS 25318, at *3 (N.D. Cal. Mar. 23, 2007) (affirming award of $2,500 for each violation, where the jury failed to prove any actual damages. However, despite an inability to establish injury, plaintiff may still receive the statutory penalty for each violation of the California FCA.); San Francisco Unified Sch. Dist. ex rel. Contractors v. Laidlaw Transit, Inc., 182 Cal. App. 4th 438, 457, 106 Cal. Rptr. 3d 84, 99 (2010) (Under California FCA, “the penalty provision does not require a showing that the violation caused damages to the public entity.”).

292 See, e.g., U.S. ex rel. Laymon v. Bombardier Transportation (Holdings) USA, Inc., No. 05-CV-00169, 2009 U.S. Dist. LEXIS 24403, at *47 (W.D. Pa. Mar. 23, 2009) (“The Court further finds that even if a jury were to conclude that the government did not suffer actual harm, statutory damages may still be appropriate, calculated on a per false claim basis as provided by 31 U.S.C. § 3729.”).

293 See, e.g., U.S. v. TDC Mgmt. Corp., Inc., 288 F.3d 421, 427 (D.C. Cir. 2002) (affirming award of $36,000 in penalties against USDOT contractor for 18 false payment vouchers, at $2,000 per violation under pre-1986 version of Federal FCA); U.S. v. Ehrlich, 643 F.3d 634, 638 (9th Cir. 1981) (affirming award of 76 penalties, one for each monthly payment voucher).


295 See, e.g., Veridyne Corp. v. U.S., 758 F.3d 1371, 1379 (Fed. Cir. 2014) (“The Supreme Court has held that claims submitted pursuant to a fraudulently obtained contract are FCA violations even if the claims themselves do not contain false statements.”). But see San Francisco Bay Area Rapid Transit Dist. v. Spencer, No. 04-CV-04632, 2007 U.S. Dist. LEXIS 40075 (N.D. Cal. May 14, 2007), aff’d, 358 Fed. App’x 793 (9th Cir. 2009) (declining to impose penalties for all pay applications submitted by BART prime contractor, where prime contract was procured by DBE fraud by subcontractor, but affirming $2,500 penalty for each prime contract pay application that incorporated request for payment to fraudulent DBE subcontractor).

296 See, e.g., San Francisco Bay Area Rapid Transit District v. Spencer, 358 Fed. App’x 793, 795 (9th Cir. 2009) (affirming penalty award of $2,500 per claim against BART contractor, where trial court “considered relevant factors when determining where within the available range (50 to $10,000 per claim) to set the penalty” under California FCA.); U.S. ex rel. Laymon v. Bombardier Transportation (Holdings) USA, Inc., 656 F. Supp. 2d 540, 547 (W.D. Pa. 2009) (holding that the court would determine the amount of the penalty imposed on BART contractor after the jury determined the number of violations, under Federal FCA).
The application of civil penalties is illustrated by Veridyne v. United States, a 2014 decision from the U.S. Court of Appeals for the Federal Circuit involving the Federal FCA. Veridyne was an incumbent logistics contractor to USDOT, who submitted a proposal for a sole-source contract extension. The proposal price was less than $3 million, in order to satisfy requirements to be eligible for a sole-source contract and avoid open competition. However, after the contract extension was awarded, USDOT ultimately paid Veridyne more than $31 million for work performed under the contract extension. After an investigation by the USDOT Inspector General determined that the contract extension had been procured by fraud, USDOT issued a stop work order to Veridyne and made no further payments. Veridyne filed suit in the U.S. Court of Federal Claims, and the government counterclaimed under the Federal FCA seeking penalties, but not seeking recovery of amounts paid and not seeking treble damages under the FCA. The Court found that Veridyne's proposal misrepresented the cost of services that Veridyne expected to provide under the contract extension, and treated all 127 invoices submitted under the contract extension as false claims. In its discretion, the Claims Court imposed the maximum FCA penalty (at the time, $11,000) for each invoice, resulting in an award to the government of $1.397 million, and the Federal Circuit affirmed.

2. Treble Damages

One of the most significant distinctions between an FCA action and other causes of action for government contracting misconduct (e.g., breach of contract) is the treble damages remedy. If the FCA plaintiff is able to prove actual damages arising from false claims, trebling of the actual damages tends to be mandatory, with limited statutory exceptions.

For more than 100 years after its enactment, the Federal FCA provided that, in addition to the civil penalty for each violation, the defendant was liable for "double the amount of damages which the United States may have sustained" as a result of the defendant's false claims. With the 1986 amendments, the double damages remedy under the Federal FCA was increased to treble damages—"3 times the amount of damages which the Government sustains because of the act of that person." Most State FCAs mirror that language, providing for recovery of three times the amount of damages that the state sustains because of the defendant's acts in violation of the State FCA, in addition to the civil penalty for each violation. In some cases, the State FCA will expressly provide that damages sustained by a local government or political subdivision of the state are also subject to trebling. The Oregon FCA is unique in that it provides that the state can recover its actual damages, plus "a penalty equal to the greater of $10,000 for each violation or an amount equal to twice the amount of damages incurred for each violation"—effectively limiting recovery to either treble damages or actual damages plus civil penalties per violation.

Unlike the civil penalties available under the Federal FCA, where the court has discretion to set the per-violation penalty within a range, treble damages are mandatory in most cases—under the express language of the Federal FCA, treble damages is the prescribed remedy and not an upper bound on the court's award. The same is true under most State FCAs, although a few provide that the court may award "up to three (3) times the amount of damages sustained by the state," suggesting somewhat more discretion under the State FCA.

Under the Federal FCA, the court has discretion to reduce the treble damages award to "not less than 2 times the amount of damages which the Government sustains only in the case where the defendant self-reported his or her violation without delay, prior to any formal action being taken against the person, or prior to the person's knowledge that his or her violation was already being investigated, and with the person's full cooperation with any investigation. State FCAs typically (but not always) also give the court discretion to make an award somewhere between double damages and treble damages in the limited situation where the defendant provided such a significant degree of cooperation. As is the case with civil penalties, the statutes typically provide no guidance to the court as to how to

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297 758 F.3d 1371 (2014).
298 Id. at 1374.
299 Id. at 1375.
300 Id. at 1376.
301 Id. at 1378.
302 Id. at 1380.
303 U.S. ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 500 (D.C. Cir. 2004); see also U.S. v. Azzarelli Construction Co., 647 F.2d 757, 759 (7th Cir. 1981) ("As codified at the present time, the civil remedies provide for double damages . . .").
304 31 U.S.C. § 3729(a)(1)(G); see also Barger, et al., supra note 2, at 472 n. 43 (describing change to available remedies under 1986 amendments).
306 See, e.g., Cal. Govt’r Code § 12651(a); Ga. Code § 23-3-121(a); Kan. Stat. § 75-7503(a); Mass. Gen. Laws ch. 12, § 5B(a); Minn. Stat. § 15C.02(a); Nev. Rev. Stat. § 357.040.2(a); N.M. Stat. § 44-9-3.C(1); N.Y. State Fin. Law § 189.1(b).
309 See, e.g., Ind. Code § 5-11-5.5-2(b)(8).
311 See, e.g., 740 Ill. Comp. Stat. § 175/3(a) (not providing for a reduction of treble damages).
312 See, e.g., Cal. Govt’r Code § 12651(b); Del. Code tit. 6, § 1201(b); Ga. Code § 23-3-121(b); Haw. Rev. Stat. § 661-21(b); Ind. Code § 5115.52(c); Iowa Code § 685.2.2; Kan. Stat. § 75-7503(b); Mass. Gen. Laws ch. 12, § 5B(b); Minn. Stat. § 15C.02(b); Mont. Code Ann. § 17-8-403(2); Nev. Rev. Stat. § 357.050; N.J. Stat. § 2A:32C-4; N.M. Stat. § 44-9-3.D; N.Y. State Fin. Law § 189.2; N.C. Gen. Stat. § 1-607(b); Okla. Stat. tit. 63, § 5053.1(C); Tenn. Code § 4-18-103(b); Va. Stat. Ann. tit. 32, § 631(b)(2); Va. Code § 8.01-216.3.B. Under Oregon FCA, the court may award actual damages, but not a penalty, double damages, or treble damages, against such a cooperative defendant. Or. Rev. Stat. § 180.760(6).
to determine the award within the broad range between double and treble damages, although some State FCAs require the court to "set forth in a written order its findings and basis for reducing the treble damages award." 313

In the typical case, where treble damages are mandatory, determining the award is simply a matter of multiplying the actual damages times three. The more difficult issue for the fact-finder will be calculating the actual damages that are to be trebled. Because an FCA action is always brought in the name of the government, it is the actual damages sustained by the government that must be determined. As a general rule, "the measure of the government’s damages would be the amount that it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful." 314 In "overbilling" FCA cases, the actual damages may simply be the portion of the claim that constitutes overbilling—that is, the legitimate value of goods and services received by the government may be subtracted from amounts paid in order to arrive at the government’s actual damages. Likewise, in "defective performance" FCA cases, the actual damages may be difference between what the government paid and the value of the work the government received, or the actual damages may be the cost to correct the work. 315

In “false certification” FCA cases, the calculation of actual damages subject to trebling is less certain. Where the government appears to have received the tangible benefit of its bargain—where the value of the work performed is commensurate with amounts paid—a traditional contract damages analysis might conclude that there are no actual damages to be trebled. 316 However, where the contractor has made material misrepresentations about regulatory compliance, some courts will consider the actual damages to include all amounts paid in response to those false claims, notwithstanding the value of the work the government received. 317 The treble damages award against the false claimant would thus be three times the total amount the claimant actually received.

As discussed earlier, where no payment was made in response to a false claim, there may be no actual damages incurred by the government, in which case there cannot be an award of treble damages (although civil penalties likely still apply). However, there may be other actual damages suffered by the government as a result of discovering that its contractor is perpetrating a fraud, including the additional expense of hiring a replacement contractor and the cost of related delays in completing the project. For example, if a claim was not paid because a government investigation determined the claim was fraudulent, some courts will treat the investigation costs as actual damages subject to trebling. 318

3. Qui tam Relator’s Share

FCA actions are always brought in the name of the government, and the remedies discussed above (civil penalties and treble damages) are intended to compensate the government and also discourage fraud committed against the government. This remains true even when a qui tam FCA action is brought by a private party in the name of the government; however, the qui tam relator is typically entitled to receive a share of the civil penalties or treble damages awarded to the government. Whether or not the government intervenes, the qui tam relator’s share is paid out of the proceeds recovered from the defendant, under either the Federal FCA or State FCAs. The government is not otherwise responsible for reimbursing the relator for the relator’s efforts on behalf of the government.

When enacted in 1863, the Federal FCA provided that the qui tam relator received 50 percent of any successful judgment. 319 However, the 1943 amendment discussed in Section I.C.1 reduced this to a maximum of 25 percent if the government did not intervene, and no more than 10 percent if the government did intervene, with no guaranteed minimum award to the qui tam relator. 320 The 1986 amendment discussed in Section I.C.2, which increased the available penalties and damages awards, also increased the qui tam relator’s share of any penalties or damages award and guaranteed a minimum recovery in most cases. 321 Most State FCAs (but not all) contain a qui tam provi-

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313 Fla. Stat. § 68.082(3)(c).
314 U.S. v. United Technologies Corp., 782 F.3d 718, 730 (6th Cir. 2015).
315 U.S. v. Sci. Applications Int’l Corp., 626 F.3d 1257, 1279 (D.C. Cir. 2010) (“To establish damages, the government must show not only that the defendant’s false claims caused the government to make payments that it would have otherwise withheld, but also that the performance the government received was worth less than what it believed it had purchased.”).
316 See, e.g., Ab-Tech Const., Inc. v. U.S., 31 Fed. Cl. 429, 434 (1994) (“[T]he Government got essentially what it paid for—[a] facility built in accordance with the contract drawings and specifications. Thus, the court can discern no basis upon which to uphold the Government’s demand for treble damages.”).
sion that similarly allows the relator to receive a share of any penalties or damages award.\textsuperscript{322}

Under the Federal FCA, where a relator has initiated a \textit{qui tam} action and the government does not intervene (requiring the relator to prosecute the litigation on behalf of the United States), the relator is entitled to receive “not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement.”\textsuperscript{323} The actual percentage awarded to the relator depends on what the “court decides is reasonable for collecting the civil penalty and damages.”\textsuperscript{324} Most State FCAs with a \textit{qui tam} provision provide an identical 25-30 percent range for \textit{qui tam} relators where the state does not intervene,\textsuperscript{325} although some State FCAs provide for a greater share to the relator. For example, the California FCA provides that the \textit{qui tam} relator’s share “shall be not less than 25 percent and not more than 50 percent of the proceeds of the action or settlement,”\textsuperscript{326} and the Tennessee FCA provides that the \textit{qui tam} relator’s share “shall be not less than thirty-five percent (35%) and not more than fifty percent (50%) of the proceeds of the action or settlement.”\textsuperscript{327}

Where the government does intervene, the \textit{qui tam} relator’s share is reduced, but still significant, particularly considering the fact that the relator gets the benefit of having the action prosecuted by the government. Under the Federal FCA, where the United States intervenes in a \textit{qui tam} action, the relator shall, in most cases, “receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim.”\textsuperscript{328} The actual percentage of the relator’s share is set by the court, and depends “upon the extent to which the person substantially contributed to the prosecution of the action.”\textsuperscript{329} Most State FCAs with a \textit{qui tam} provision provide an identical 15-25 percent range for \textit{qui tam} relators where the state intervenes,\textsuperscript{330} although there are exceptions.\textsuperscript{331} For example, the California FCA provides that the \textit{qui tam} relator shall “receive at least 15 percent but not more than 33 percent of the proceeds of the action or settlement.”\textsuperscript{332} and the Tennessee FCA provides that the \textit{qui tam} relator shall “receive at least twenty-five percent (25%) but not more than thirty-three percent (33%) of the proceeds of the action or settlement.”\textsuperscript{333}

Determining the actual percentage of the \textit{qui tam} relator’s share is addressed in \textit{U.S. ex rel. Peterson v. Sanborn Map Company, Inc.}\textsuperscript{334} In that case, the relator was a former officer and manager of a federal contractor who provided mapping and aerial photography services for federal, state, and local agencies. The relator had been terminated from the company shortly after reporting the company’s alleged FCA violations to IDOT in 2009. The relator filed suit against his former employer under the Federal FCA in 2011, and the United States intervened in 2013. The United States reached a $2.1 million settlement with the company, and the U.S. District Court for the Eastern District of Missouri had to determine the relator’s share of the settlement proceeds. The Court noted that the relator was entitled at least to the minimum 15 percent “finder’s fee” even if the relator did not “substantially contribute to the prosecution of the action.”\textsuperscript{335} In this case, the Court concluded that the relator was entitled to more than the minimum, because the relator “identified a fraud of which the Government was unaware which led to a settlement of $2.1 million; provided the Government with thousands of pages of documents and a 60-page summary of the fraudulent scheme; met with the Government to explain his findings; and provided some further assistance as the investigation went on.”\textsuperscript{336} On the other hand, the Court observed that the relator “did not play a productive role in those negotiations”\textsuperscript{337} that led to the $2.1 million settlement. After weighing these facts regarding the relator’s participation, as well as USDOJ guidelines for consideration in setting the percentage, the Court set the relator’s share at 19 percent, or $399,000. In cases where the relator is more cooperative in settlement discussions, the government and relator may negotiate the relator’s share, rather than leave it up to the court’s determination.\textsuperscript{338}

The \textit{qui tam} relator’s share may be substantially reduced where it is determined that the information underlying the FCA action had been publicly disclosed before filing suit. Where the court finds that a Federal FCA action is primarily based on disclosures other than information provided by the relator, such as information disclosed in another formal proceeding, government investigation, or news media report, the court may award the relator “such sums as it considers appropriate, but in no case...”\textsuperscript{339}

\textsuperscript{322} See, e.g., Bucy, \textit{et al.}, supra note 14, at 1535 (“[B]y January 1, 2009, twenty-three states and the District of Columbia had civil or criminal False Claims Acts and all twenty-four jurisdictions had statutes with \textit{qui tam} provisions.”).
\textsuperscript{323} 31 U.S.C. § 3730(d)(2).
\textsuperscript{324} Id.
\textsuperscript{325} See, e.g., N.C. GEN. STAT. § 1-610(e).
\textsuperscript{326} Cal. Gov’t Code § 12652(g)(3); see also Bucy, \textit{et al.}, supra note 14, at 1536 (“Two jurisdictions provide that relators may obtain up to 50%.”).
\textsuperscript{327} Tenn. Code § 4-18-104(g)(3).
\textsuperscript{328} 31 U.S.C. § 3730(d)(1).
\textsuperscript{329} Id.
\textsuperscript{330} See, e.g., N.C. GEN. STAT. § 1-610(a).
\textsuperscript{331} Tenn. Code § 4-18-104(g)(2).
\textsuperscript{332} Cal. Gov’t Code § 12652(g)(2).

\textsuperscript{333} Tenn. Code § 4-18-104(g)(2); see also Knox Cnty. ex rel. Envtl. Termite & Pest Control, Inc. v. Arrow Exterminators, Inc., 350 S.W.3d 511, 513 (Tenn. 2011) (affirming \textit{qui tam} relator’s 28 percent share of settlement proceeds in case brought under Tennessee FCA).
\textsuperscript{334} No. 11-CV-00902, 2014 U.S. Dist. LEXIS 49444 (E.D. Mo. Apr. 10, 2014).
\textsuperscript{335} Id. at *8 (citing Roberts v. Accenture, LLP, 707 F.3d 1011 (8th Cir.2013)).
\textsuperscript{336} Id. at *13.
\textsuperscript{337} Id.
more than 10 percent of the proceeds of such action or settlement in which the United States has intervened. The actual percentage of the relator’s share to no more than 10 percent when the government intervenes in such cases involving prior public disclosures, but others contain no such limitation. However, where the government elects not to intervene, the qui tam relator may be barred from any recovery at all in actions brought under either the Federal FCA or State FCAs based on publicly disclosed information where the relator is not the original source, as discussed in greater detail in Section IV.C.

Under the Federal FCA, the court may also reduce the qui tam relator’s share “to the extent that the court considers appropriate,” where the court finds that the relator “planned and initiated the violation” of the Federal FCA on which the action is based. If the qui tam relator “is convicted of criminal conduct arising from” the Federal FCA violation on which the action is based, then the relator “shall not receive any share of the proceeds of the action.”

State FCAs may provide for additional reductions on shares paid to qui tam relators. For example, under the California FCA, there is no minimum recovery for qui tam relators who are current or former state employees—giving the court the discretion to reduce the employee-relator’s share below the typical statutory ranges, or to deny the employee-relator any recovery at all. 4. Costs and Attorneys’ Fees

In addition to civil penalties and treble damages for violations of the Federal FCA, the Federal FCA provides for liability “to the United States Government for the costs of a civil action brought to recover any such penalty or damages,” regardless of whether the action is initiated by the United States or by a qui tam relator. In addition, where the Federal FCA action is initiated by a qui tam relator and results in an award to the United States, the relator “shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys’ fees and costs,” regardless of whether the United States intervenes. Such an award of costs and attorneys’ fees is to be made against the defendant; the United States is not responsible for the relator’s costs and attorneys’ fees even though the relator is nominally acting on behalf of the United States. Because FCA litigation can be lengthy, an award of attorneys’ fees can often exceed the award of penalties or damages, so allowing recovery of attorneys’ fees can be critical to the effectiveness of the qui tam provision.

Most State FCAs also provide that the government prosecuting authority is entitled to recover its costs of a civil action where a violation of the State FCA is proven. Some State FCAs expressly provide that recoverable costs include the state’s cost of investigation. State FCAs also typically provide that qui tam relators are entitled to recover costs and attorneys’ fees where the qui tam action results in an award of penalties or damages to the government. A number of State FCAs, unlike the Federal FCA, expressly provide that the government prosecuting authority is also entitled to recover its attorneys’ fees in that situation. A few State FCAs provide that either the state or qui tam relator is also entitled to recover reasonable fees of expert consultants or expert witnesses.

On the other hand, in qui tam actions where the United States does not intervene and the defendant subsequently prevails, the Federal FCA provides that “the court may award to the defendant its reasonable attorneys’ fees and expenses” if “the court

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340 1 Id.
344 Id.
345 Cal. Gov’t Code § 12652(g)(4).
348 Id.
350 See, e.g., County of Solano v. Lionsgate Corp., 126 Cal. App. 4th 741, 746, 24 Cal. Rptr. 3d 362, 365 (2005) (affirming arbitration award against bridge contractor of $500,000 in attorneys’ fees and $210,000 in civil penalties under California FCA).
351 See, e.g., Ind. Code § 5-11-5.5-2(b) (“A person who violates this section is liable to the state for the costs of a civil action brought to recover a penalty or damages.”); Nev. Rev. Stat. § 357.040.2 (“The person is liable for . . . [t]he costs of a civil action brought to recover the damages . . . .”); N.C. Gen. Stat. § 1-607(a) (“A person who commits any of the following acts also shall be liable to the State for the costs of a civil action brought to recover any of those penalties or damages . . . .”); N.Y. State Fin. Law § 189.3 (“A person who violates this section shall also be liable for the costs, including attorneys’ fees, of a civil action brought to recover any such penalty or damages.”); R.I. Gen. Laws § 9-1-1.3(a) (“A person violating this subsection (a) shall also be liable to the state for the costs of a civil action brought to recover any such penalty or damages.”).
finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.”356 Most State FCAs have a substantially similar provision.357 A few State FCAs provide that the prevailing defendant may also receive its attorneys’ fees in a State FCA action prosecuted by the government,358 although other State FCAs expressly provide that the prevailing defendant cannot recover his or her attorneys’ fees from the government.359 A prevailing defendant in a Federal FCA action prosecuted by the United States may recover his or her attorneys’ fees, “unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.”360

However, the award of attorneys’ fees to FCA defendants “is reserved for rare and special circumstances.”361 FCA actions are often settled as discussed in Section III.B.4, or dismissed based on the variety of available defenses as discussed in Section IV, resulting in no adverse ruling against the defendant, but this does not mean that the defendant is entitled to attorneys’ fees.362 For example, in U.S. ex rel. Sterl i v. Shasta Services, Inc.,363 a qui tam action brought against a Caltrans contractor under the Federal FCA and California FCA was dismissed upon motion by the United States and the State of California, and the defendant moved for attorneys’ fees. The U.S. District Court for the Eastern District of California denied the motion, noting that notwithstanding its dismissal of the qui tam action, the qui tam relator’s allegations of DBE fraud seemed to be supported by USDOT’s withdrawal of federal funding for the project.364

358 See, e.g., Cal. Gov’t Code § 12652(g)(9)(B) (“[T]he court may award the defendant its reasonable attorney’s fees and expenses against the state or political subdivision that proceeded with the action if the defendant prevails in the action and the court finds that the claim was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.”); Or. Rev. Stat. § 180.760(8) (allowing attorneys’ fees to the prevailing defendant in an Oregon FCA action “if the court determines that the Attorney General had no objectively reasonable basis for bringing the action”).
359 See, e.g., Fla. Stat. § 68.086(3); Ind. Code § 5-11-5.5-6(c); Mass. Gen. Laws ch. 12, § 5I(3).
361 Pfingston v. Ronan Engg Co., 284 F.3d 999, 1007 (9th Cir. 2002) (vacating award of attorneys’ fees in Federal FCA and California FCA action brought against LACMTA).
364 Id.
typically include hundreds of pages, and disputes arise over the precise scope of work that the contractor is to perform. The government project owner may allege that the contractor’s request for additional compensation is a false claim because it should have been included in the agreed contract price.

Government units engaged in highway construction also often contract directly with engineering and architectural firms to provide professional services such as design and construction management. Although these professional services contracts typically involve smaller invoices in comparison with construction contracts, FCA actions are regularly initiated against professional services providers for alleged false claims made directly to their government customers.\(^{701}\)

Certainly, prime contractors to USDOT agencies are subject to suit under the Federal FCA.\(^{702}\) However, most federally funded highway construction is performed under contract to federal grant recipients, such as state transportation agencies. As discussed in Section I.C.4, Congress clarified in 2009 that prime contractors to federal grant recipients are also subject to suit under the Federal FCA.\(^{703}\) and Federal FCA actions are regularly brought against prime contractors to state transportation agencies where the contract is funded in part by the federal government.\(^{704}\) Where there is also an applicable State FCA, prime contractors to state transportation agencies on federally funded construction projects may find themselves being sued under both the Federal FCA and the State FCA for false claims made to the state transportation agency.\(^{705}\) Even when federal funds are not involved, prime contractors to state transportation agencies are subject to suit under the applicable State FCA, if any.

Prime contractors will typically be limited-liability business organizations, such as corporations or LLCs. Interestingly, while the Federal FCA creates liability for “any person” who presents false information in support of a claim,\(^{706}\) it does not define “person” for purposes of establishing whether business organizations may be liable for violations of the Federal FCA. Some State FCAs expressly provide that a “person” under the State FCA includes a “corporation, firm, association, organization, partnership, limited liability company, business, or trust.”\(^{707}\) Regardless, courts allow both Federal FCA and State FCA actions against corporate defendants for false claims made by or on behalf of the business organization. Under general agency principles, the contractor may be held liable under FCAs for the conduct of its agents on the contractor’s behalf.\(^{708}\) Conversely, FCA plaintiffs sometimes seek to hold the individual employees, managers, officers, and shareholders who actively submitted false information on behalf of the corporate defendant individually liable for FCA violations.\(^{709}\) This is generally allowed, as fraud is typically an exception to the limited liability or “corporate veil” of a business organization.

2. Subcontractors and Suppliers


\(^{707}\) See, e.g., CAL. GOV’T CODE § 12650(b)(9); IND. CODE § 5-11-5.5-1(5).


to provide that "claims" include requests "made to a contractor . . . if the Government will reimburse such contractor" or if otherwise provide any portion of the funds requested. Thus, subcontractors who contracted directly with prime contractors on government-funded projects could become liable under the FCA for submitting false claims for payment to the prime contractors. As discussed in Section I.C.3, some courts interpreted the 1986 Federal FCA language to mean that a subcontractor would only become liable if the federal government actually made a payment based on the subcontractor's false claim. However, in 2008, the U.S. Supreme Court concluded that a subcontractor violates the Federal FCA "if the subcontractor submits a false statement to the prime contractor intending for the statement to be used by the prime contractor to get the Government to pay its claim." Shortly thereafter, Congress amended the Federal FCA to clarify that the subcontractor need not specifically intend that the claim be paid by the federal government in order to incur FCA liability when the subcontractor submits false claims to the prime contractor on a federally funded project. "Under the new provisions, liability exists under a much lower standard: if the subcontractor's statement had a natural tendency to influence, or was capable of influencing, payment or receipt of money." State FCAs typically mirror the amended Federal FCA language, ensuring that subcontractors on state-funded projects can incur liability under the State FCA for submitting false claims to prime contractors to state transportation agencies.

The 2009 amendment is important because subcontractor invoices to prime contractors are not always submitted to the government project owner. For example, where the government has entered into a fixed-price contract with its prime contractor, the prime contractor's actual cost of performing the work (including amounts the prime contractor has paid its subcontractors) may not be pertinent to the amount the government owes the prime contractor. Nevertheless, where the prime contractor may use government funds to pay the subcontractor's invoice, the subcontractor's false claim to the prime contractor constitutes an FCA violation. The subcontractor can also incur FCA liability where it has not actually submitted a claim or invoice to the prime contractor, if the subcontractor causes the prime contractor to submit a false claim for payment to the government.

Although the subcontractor need not make a claim for payment from the government in order to incur FCA liability, FCA cases often involve subcontractor claims that are "passed through" to the government by the prime contractor. For example, on construction projects, the subcontractor may contend that the actual conditions in the field differed from the government's specifications that were used to bid the project, warranting additional compensation over and above the subcontractor's bid price to the prime contractor. In that situation, the prime contractor may submit a change order request to the government for the subcontractor's claimed extra costs. If the subcontractor's claim for additional compensation is false (e.g., if the actual field conditions do not justify an increase over the subcontractor's original bid price), the subcontractor could be liable under an applicable FCA for requesting additional compensation from the prime contractor. Likewise, by passing the subcontractor's claim on to the government, the prime contractor could incur FCA liability, if it knows that the subcontractor's claim is false. However, if the prime contractor legitimately believes that its subcontractor could be entitled to additional compensation, the prime contractor has probably not "knowledgeably" submitted a false claim. To avoid FCA liability, a prime contractor will often require its subcontractor to certify that its invoice is true and not intended to cause the prime contractor to submit a false claim for payment to the government.

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References:

380 Id.; see also U.S. ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 502 (D.C. Cir. 2004) ("[I]t remains unclear whether 'federal monies' . . . are still 'federal monies' when passed along to subgrantees or subcontractors, employees and suppliers of subgrantees and subcontractors, and so on.").
381 Allison Engine Co., Inc. v. U.S. ex rel. Sanders, 553 U.S. 662, 671, 128 S. Ct. 2123, 2130, 170 L. Ed. 2d 1030, 1039 (2008); see also U.S. Dep't of Transportation ex rel. Arnold v. CMC Engg., 564 F.3d 673, 678 (3d Cir. 2009) (interpreting Allison Engine to impose FCA liability on a subcontractor where "the subcontractor intentionally used a false claim to induce payment by the federal government").
382 See, e.g., 31 U.S.C. § 3729(b)(2)(A) (defining "claim" to include a request "for money or property and whether or not the United States has title to the money or property").
384 See, e.g., CAL. GOV'T CODE § 12650(b)(1)(B) (defining a "claim" to include a payment request that is "made to a contractor" for the state or political subdivision, if the state or political subdivision "[r]eimburse[s] the contractor" or "[i]ncludes or has provided any portion of the money"); OW. REV. STAT. § 180.750(3) (defining "public agency" to include a "person who contracts with a public body," so that liability for false claims "made to a public agency" will include false invoices submitted by subcontractor to prime contractor).
387 See, e.g., San Francisco Bay Area Rapid Transit Dist. v. Spencer, No. 04-CV-04632, 2006 U.S. LEXIS 88022, at *51 (N.D. Cal. Dec. 5, 2006), aff'd, 358 Fed. App'x 793 (9th Cir. 2009) (observing that prime contractor's "legitimate estimate of anticipated completion costs is not a false claim, although subcontractor may be liable for subcontractor's false information incorporated into estimate by prime contractor acting in good faith").
request for additional compensation is not a false claim, as a condition of passing the claim on to the government.390

Subcontractors and suppliers not in privity with the government are somewhat less likely than prime contractors to be required to certify compliance with statutes and regulations. However, there are a number of situations involving transportation funds where subcontractors and suppliers can incur FCA liability by making false certifications. For example, because of the DBE or M/WBE subcontracting requirements applicable to most government highway construction projects, subcontractors are often asked to indicate whether they qualify for one of those designations. As discussed in Section II.A.2.c, FCA actions are frequently initiated against subcontractors for allegedly misrepresenting their disadvantaged status in order to obtain work on government-funded projects.391

With regard to construction materials, it is generally the prime contractor’s responsibility to ensure that it procures materials that satisfy the prime contract specifications. However, where the prime contractor accurately communicates the specifications to its supplier, and the supplier knowingly supplies materials that do not satisfy the specifications, its invoice to the prime contractor could constitute a false claim. Suppliers and manufacturers of certain specialty equipment may be required to provide certifications that their supplies conform to applicable standards for use on highway construction projects, and false certifications of conformance likewise can constitute false claims.

For example, in U.S. ex rel. Harman v. Trinity Industries, Inc.390 a manufacturer of guardrail end terminals certified that its products complied with NCHRP protocols for testing highway products, which protocols had been formally adopted by FHWA.391 The manufacturer’s certification made the guardrail end terminals eligible for purchase and use by prime contractors to state transportation agencies on federally funded highway projects.392 However, the qui tam relator alleged that the manufacturer had made changes to its product after undergoing the NCHRP testing protocol and obtaining FHWA approval, without disclosing the changes to FHWA.393 After learning of the qui tam relator’s allegations, and reviewing the alleged changes, FHWA reaffirmed its approval of the guardrail end terminals for use on federally funded highway projects.394 Accordingly, the U.S. Court of Appeals for the Fifth Circuit concluded that the manufacturer’s certificate of conformance was not a false claim, as any changes to the guardrail end terminal were not material to FHWA’s approval or agreement to reimburse state transportation agencies and their prime contractors for the product.395

3. Other Private Parties

Outside of the traditional government contractor–subcontractor–supplier chain of claimants seeking payment of government funds, there are a variety of other private parties who may commit FCA violations. FCA liability attaches to parties other than false claimants, such as one who “causes” a false claim to be presented by another,396 or one who “causes” false information to be used in support of a false claim.397 Strictly construed, the party who “causes” a false claim to be presented has violated the FCA even if the party is not a beneficiary of the claim; however, FCA defendants are typically parties who stand to benefit in some way from the false claim, even where the misrepresentation is made by another. For example, Federal FCA actions have been initiated against issuers of highway construction bonds where the bond purchasers misrepresented the bonds as qualifying for tax-exempt status;398 against a residential contractor where the prospective homeowner submitted false vouchers for federal mortgage interest subsidies;399 and against the seller of real property acquired by transportation agencies, where the transportation agency misrepresented compliance with USDOT appraisal requirements.400

Although mere “passive acquiescence” in the false claim made by another is insufficient to warrant liability, FCA defendants who are not the actual false claimant or primary beneficiary of a false claim may be deemed to have “caused” a false claim simply by having knowledge of the false claim and accepting the benefits.401 Even an innocent beneficiary of a false claim may become liable under the Federal FCA after it discovers the falsity, and then “knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.”402 Likewise, State FCAs often provide that even innocent beneficiaries of a false claim may be-

388 See, e.g., Certified Coatings of California, Inc. v. Shimmick Const. Co., Inc./Obayashi Corp., No. A120531, 2009 Cal. App. Unpub. LEXIS 1135 at *9-10 (Feb. 9, 2009) (asking subcontractor “to provide a certification” that its claim for extra compensation on Golden Gate Bridge project does not violate the California FCA).


390 872 F.3d 645, 654 (5th Cir. 2017).

391 Id. at 654.

392 Id. at 648.

393 Id.

394 Id. at 667-68.

395 Id.


399 U.S. v. Ehrlrich, 643 F.2d 634, 639 (9th Cir. 1981).


401 Id. at *13.

come liable if they discover the submission of a false claim and do not report it to the proper authorities.\textsuperscript{403}

4. Government Defendants

FCA complaints occasionally allege that government agencies or their employees were complicit in the fraud underlying the FCA action. However, it can be difficult to maintain an FCA action against a government defendant for a number of reasons, discussed herein.

A number of courts have concluded that federal government agencies (e.g., USDOT agencies) are not proper defendants for \textit{qui tam} actions under the Federal FCA, finding that the United States has not waived sovereign immunity as to FCA actions.\textsuperscript{404} Other courts have concluded that Federal FCA \textit{qui tam} actions against federal agencies cannot be sustained, because they are "the equivalent of the United States suing the United States."\textsuperscript{405} For example, in Fleming v. Giles,\textsuperscript{406} a Federal FCA action brought against USDOT and FAA was dismissed because those federal agencies "never made a 'claim' against the United States government within the meaning of the False Claims Act."\textsuperscript{407}

With respect to individual representatives of the federal government, the Federal FCA provides that "[n]o court shall have jurisdiction" over a Federal FCA \textit{qui tam} action brought "against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought."\textsuperscript{408} By omission, this suggests there is no such limitation against bringing a Federal FCA \textit{qui tam} action against other federal employees who are alleged to be complicit in a fraud committed against a federal agency. However, federal employees are rarely named defendants in FCA actions, even when they are alleged to be complicit with the named defendants in the alleged misconduct.\textsuperscript{409}

\textsuperscript{403} Barger, \textit{et al.}, supra note 2, at 491-93 (stating that under Hawai'i FCA, Massachusetts FCA, and Nevada FCA, false claimants include "beneficiary of inadvertent submission of false claim who discovers and does not report").


\textsuperscript{406} 132 Fed. Appx 168, 170 (9th Cir. 2005).

\textsuperscript{407} Id. at 170.

\textsuperscript{408} 31 U.S.C. § 3730(e)(2)(A).


\textsuperscript{410} See, \textit{e.g.}, Mass. Gen. Laws ch. 12, § 5G(a); N.Y. State Fin. Law § 190.9(a)(ii)(i); N.C. Gen. Stat. § 1-611(a); Va. Stat. tit. 32, § 636(a).

\textsuperscript{411} See, \textit{e.g.}, Cal. Gov't Code § 12652(d)(1); Nev. Rev. Stat. § 357.080.3(a); Tenn. Code § 4-18-104(d)(1).

\textsuperscript{412} See, \textit{e.g.}, R.I. Gen. Laws § 9-1.1-4(e)(2).

\textsuperscript{413} See, \textit{e.g.}, Mont. Code Ann. § 17-8-403(7).

\textsuperscript{414} See, \textit{e.g.}, Ind. Code § 5-11-5.7-4(d).

\textsuperscript{415} See, \textit{e.g.}, Iowa Code § 695.3.5; R.I. Gen. Laws § 9-1.1-4(e)(1).

\textsuperscript{416} See, \textit{e.g.}, Va. Code § 8.01-216.8.

\textsuperscript{417} See, \textit{e.g.}, Minn. Stat. § 15C.05(c)(1).

\textsuperscript{418} See, \textit{e.g.}, N.J. Stat. § 2A:32C-15.

\textsuperscript{419} See, \textit{e.g.}, Mont. Code Ann. § 17-8-403(7).

\textsuperscript{420} See, \textit{e.g.}, Fla. Stat. § 68.087(6); N.Y. State Fin. Law § 190.1


cannot even violate the California FCA, because “[t]he State cannot make a false claim against itself.” In O’Shell v. Cline, the U.S. Court of Appeals for the Seventh Circuit concluded that an Indiana FCA action could not be maintained against the commissioner of the Indiana Department of Transportation in his personal capacity, finding that there was no waiver of sovereign immunity in the Indiana FCA.

Regardless of whether a state transportation agency may be a defendant under a given State FCA, the U.S. Supreme Court held in 2000 that a Federal FCA qui tam action may not be brought against a state agency such as a state transportation agency. In Vermont Agency of Natural Resources v. U.S. ex rel. Stevens, a former Vermont state employee alleged that his agency employer overstated the amount of time spent by its employees on federally funded projects, in order to induce the federal government to disburse excessive federal grant funds to the state, in violation of the Federal FCA. The Court declined to rule on whether such an action against a state agency is barred by the Eleventh Amendment to the U.S. Constitution. Rather, the Court concluded that, in providing liability for a “person” who submitted a false claim, Congress did not appear to provide liability for states under the Federal FCA. A number of courts have subsequently relied on the Stevens decision in dismissing Federal FCA actions initiated against state transportation agencies.

However, local governments that receive federal transportation grant funds may be sued under the Federal FCA, notwithstanding the fact that they may be political subdivisions of the state. Shortly after the Stevens decision, the U.S. Court of Appeals for the First Circuit relied on Stevens to conclude that a Federal FCA qui tam action could not be brought against a county, where the county was alleged to have purchased real property using federal grant funds intended for park purposes, then sold the land to PennDOT for highway purposes, and failed to refund the federal park funds. However, in 2003, the U.S. Supreme Court held in Cook County, Illinois v. U.S. ex rel. Chandler that local governments may be sued for violations of the Federal FCA. Consequently, Federal FCA actions are regularly brought against federal transportation grant recipients including county highway departments, municipal transit authorities, and airports. In U.S. ex rel. Fields v. Bi-State Development Agency of the Missouri–Illinois Metropolitan District, a qui tam relator brought a Federal FCA action against a regional public transit district that was created by a compact between the states of Illinois and Missouri, alleging that the district made false claims to receive federal public transit funds from USDOT. The U.S. District Court for the Eastern District of Missouri denied the transit district’s motion for summary judgment based on Stevens, reasoning that the district was more like the local governments that may be sued under the Federal FCA under Chandler, than the state agencies that cannot be sued under the Federal FCA under Stevens. The U.S. Court of Appeals for the Eighth Circuit subsequently dismissed the transit district’s appeal based on Eleventh Amendment sovereign immunity, because the issue was not raised at the trial court, and Eleventh Amendment sovereign immunity is a distinct issue from whether an agency is a proper defendant under the Federal FCA.

D. Who May Bring or Maintain the False Claims Action

There are two types of plaintiffs in FCA actions. The real plaintiff in interest is always the government, and all FCAs authorize a government prosecuting authority (e.g., the U.S.

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431 571 Fed. App’x 487 (7th Cir. 2014).
432 Id. at 491.
433 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000).
434 Id. at 770, 120 S. Ct. at 1861, 146 L. Ed. 2d at 843-44.
435 Id. at 787, 120 S. Ct. at 1870, 146 L. Ed. 2d at 854.
436 Id. at 782, 120 S. Ct. at 1868, 146 L. Ed. 2d at 851.
437 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000).
442 Id. at *26.
Attorney General under the Federal FCA to initiate an action on behalf of the government. On the other hand, a private party or relator may initiate a qui tam FCA action in the name of the government under the Federal FCA and under most State FCAs. When the action is initiated by a qui tam relator, the government prosecuting authority may intervene and prosecute the case as if the government had initiated the case. On the other hand, the government may decline to intervene but allow the relator to proceed on the government’s behalf. These very different approaches are discussed in detail in the following section.

III. FALSE CLAIMS ACT PROCEDURE

A. Cases Brought by Government

1. Suit Initiated by Attorney General

The Federal FCA authorizes the U.S. Attorney General to “bring a civil action” against any person alleged to have violated the Federal FCA. Once the Attorney General initiates a civil action under the Federal FCA, no other person may do so based on “substantially the same allegations or transactions” as alleged in the Attorney General’s lawsuit. When a Federal FCA action is filed by the Attorney General, a summons is issued and the defendant may be served forthwith. Therefore, a Federal FCA action would typically be filed by the Attorney General only after initiating an investigation as discussed in Section I.B.3, and concluding that the defendant probably “has violated or is violating” the Federal FCA.

State FCAs invariably likewise authorize state attorneys general to “bring a civil action” to prosecute violations of the State FCA. State FCAs may specify other officials, such as an inspector general, who may be authorized or designated by the state attorney general to bring the State FCA action. State FCAs often allow the state attorney general to designate a local attorney, such as a district attorney, county attorney, or city attorney, to bring the State FCA action, particularly where the violation involves the funds of a political subdivision of the state.

Some State FCAs authorize the political subdivisions, acting through their county attorney or city attorney, to bring a State FCA action for violations involving the funds of the political subdivision, without prior coordination with the state attorney general. For example, in County of Solano v. Lionsgate Corp., a county was able to arbitrate a California FCA action against its bridge contractor without involving the state attorney general, where there was no allegation that state funds were involved.

Because transportation projects often involve a combination of federal, state, and local funds, a fraud perpetrated by a project participant could give rise to liability under multiple FCAs, involving multiple prosecuting authorities. Determining which prosecuting authority should (or can) bring the FCA action can be complex, depending on the involvement of various governmental entities and the text of the applicable State FCA. When possible, it is often ideal for the FCA action to be initiated by the governmental unit that actually contracted for the project, as that entity is likely to have additional causes of action to assert against the defendant (as discussed in Section III.C.1.b). Alternatively, a State FCA action initiated by the state attorney general may be consolidated with a civil action brought by or on behalf of the contracting agency for breach of contract and related counts. The Federal FCA specifically provides that a state or local government may be named a co-plaintiff along with the United States in a Federal FCA action, for purposes of adding any state law cause of action (e.g., a State FCA count) “for the recovery of funds paid by a state or local government if the action arises from the same transaction or occurrence as” the Federal FCA count. Accordingly, an FCA action involving a jointly funded project could have multiple government plaintiffs representing the respective interests of the federal, state, and local governments in the project.

441 See, e.g., Bucy, et al., supra note 14, at 1538 (“[B]y January 1, 2009, twenty-three states and the District of Columbia had civil or criminal False Claims Acts and all twenty-four jurisdictions had statutes with qui tam provisions.”).
446 See, e.g., CAL. GOV’T CODE § 12652(a)(1); Fla. Stat. § 68.083(1); GA. CODE § 23-3-122(a); 740 ILL. COMP. STAT. § 175/4(a); N.M. GEN. STAT. § 44-9-4A; N.C. GEN. STAT. § 1-608(a); OKLA. STAT. tit. 63, § 5053.2(a); OR. REV. STAT. § 180.760(1); VA. CODE § 8.01-216.4.
447 See, e.g., IND. CODE § 5-11-5.5-3(a) (granting concurrent jurisdiction to the attorney general and inspector general under the Indiana FCA).
448 See, e.g., KAN. STAT. § 75-7504 (allowing the attorney general to use the “assistance of city and county attorneys in cases involving their respective political subdivisions”); NEV. REV. STAT. § 357.070.2 (allowing attorney general to designate “district attorney or city attorney” to bring suit under Nevada FCA).
449 See, e.g., HAW. REV. STAT. § 46-172 (authorizing “county corporation counsel or county attorney” to bring suit under Hawaii FCA); MASS. GEN. LAWS ch. 12, § 5 (authorizing district attorneys to bring suit under Massachusetts FCA); MINN. STAT. § 15C.01, subdiv. 7(2) (authorizing “county attorney, city attorney, or other attorney representing a political subdivision” to bring Minnesota FCA action regarding the funds of the political subdivision); N.Y. STATE FIN. LAW § 190.1 (authorizing “local government” to “bring a civil action on its own behalf, or on behalf of any subdivision of such local government, to recover damages sustained by such local government” under the New York FCA); R.I. GEN. LAWS §§ 9-1.1-2(7), 9-1.1-4(a) (authorizing a “municipality, acting through its city or town solicitor or other duly appointed legal counsel” to bring a Rhode Island FCA action); TENN. CODE § 4-18-102(5) (authorizing “county counsel, city attorney, or other local government official” to bring a Tennessee FCA action).
451 Bucy, supra note 82, at 1609-10 (2007) (“[T]he presence of state FCA statutes and the virtual certainty that more state FCAs soon will be enacted presents challenges in what is already a complex prosecutorial environment. Multiple prosecuting entities make it more difficult for everyone.”).
452 31 U.S.C. § 3732(b).
Responses to the survey questionnaire issued as part of this research project (reproduced in Appendix B) suggest that FCA actions involving claims made to state transportation agencies are rare. In Question C.1, respondents were asked whether Federal FCA litigation had been initiated in the past 5 years to protect or recover state transportation agency funds. As shown in Figure 1, of the 17 states that directly responded to the question, only two (12%) answered in the affirmative. A few other states commented that they use the threat of Federal FCA action to resolve contractor claims.

In Question B.2, respondents were asked whether they had used a State FCA in the past 5 years to protect or recover state transportation agency funds. As shown in Figure 2, of the 17 states that directly responded to the question, eight (47%) answered in the negative. Three of those states did not have a State FCA, two had a State FCA that only applied to Medicaid funds, and three indicated that they simply have not applied the State FCA to claims for state transportation agency funds. Eight states (47%) responded that they “rarely” use the State FCA in the context of state transportation agency funds, and only one state indicated that it “regularly” uses the State FCA in the context of state transportation agency funds.

**Figure 2. Use of State FCAs by state transportation agencies and their prosecuting authorities to protect state transportation agency funds.**

2. **Counterclaim or Defense to Suit Initiated by Contractor**

FCA causes of action may be asserted as counterclaims to lawsuits filed against the government, such as suits by government contractors seeking to recover amounts claimed to be due under a contract. For example, both *Veridyne v. United States*[^453] and *M.A. DeAtley Construction, Inc. v. United States*[^454] originated as lawsuits by USDOT contractors seeking to recover amounts claimed to be owed by the United States, in which the United States denied entitlement and asserted counterclaims under the Federal FCA. An FCA counterclaim in those circumstances is likely compulsory (i.e., likely could not be asserted in a later proceeding), where it involves the same parties and the same transactions or occurrences as the contractor’s affirmative claim.[^455]

Similarly, State FCA causes of action are occasionally asserted as counterclaims by state and local governments in lawsuits initiated by their contractors.[^456] In *Kajima Engineering and Construction, Inc. v. City of Los Angeles*,[^457] the California Court of Appeal allowed the City of Los Angeles to assert California FCA counterclaims in a lawsuit initiated by its contractor seeking payment on a bridge construction project, as “arising out of the same transaction”[^458] as the contractor’s lawsuit. A State FCA counterclaim may be compulsory in that situation, where it involves the same parties and the same transactions or occurrences.

Whether the government agency can (or must) assert a State FCA counterclaim in response to a contractor lawsuit will depend, in part, on whether the defendant governmental unit is

[^453]: 758 F.3d 1371 (Fed. Cir. 2014).
[^458]: Id. at 933, 116 Cal. Rptr. 2d at 196.
specifically authorized to prosecute violations of the State FCA. If not, the state attorney general or other authorized prosecuting authority might initiate a separate State FCA action against the claimant contractor. Of course, maintaining joint proceedings could lead to significant litigation inefficiencies if the proceedings cannot be consolidated.463 Alternatively, the defendant governmental unit might consider asserting the State FCA counterclaim as a *qui tam* relator,460 giving the authorized prosecuting authority the opportunity to intervene.

The decision whether to assert an FCA counterclaim can become more complex when state transportation agencies or other governmental units are brought into litigation between their prime contractors and subcontractors. For example, when subcontractors sue the prime contractor, claiming entitlement to additional compensation on a public project, the defendant prime contractor may assert a third-party complaint against the government, alleging that to the extent the subcontractor is entitled to additional compensation, it should be paid by the government owner. As discussed in Section II.C.2, a subcontractor's meritless claim for additional compensation could be a violation of most State FCAs, even if the subcontractor only sought payment from the prime contractor. Where a state or local transportation agency is made a third party to litigation involving a payment dispute, it should consider whether it should (or can) assert a State FCA cause of action against one or more of the other parties to the dispute.464

**B. *Qui tam* Cases**

The FCA *qui tam* procedure (discussed in Section I.B.2) has been described as "unique in American jurisprudence."462 An FCA lawsuit filed by a *qui tam* relator is filed under seal and not immediately served on the defendant, but rather is served on the applicable prosecuting authority along with "written disclosure of substantially all material evidence and information the person possesses."465 The prosecuting authority investigates and decides whether or not to intervene in the lawsuit, while the lawsuit is effectively stayed. Ultimately, the *qui tam* relator may proceed as a party to the lawsuit, regardless of whether the government intervenes, and the relator's relative contributions to the prosecution of the case determine the relator's share of any recovery (as discussed in Section II.B.3). The process is discussed in detail herein.

Responses to the survey questionnaire issued as part of this research project (reproduced in Appendix B) suggest that *qui tam* actions under State FCAs are even more rare than state-initiated actions, with respect to state transportation agency funds. In Question B.3, respondents were asked whether *qui tam* litigation under their State FCA had been initiated in the past 5 years to protect or recover state transportation agency funds. As shown in Figure 3, of the 17 states that directly responded to the question, only five (29%) answered in the affirmative. Of the remaining states that reported no *qui tam* litigation, three did not have a State FCA, two had a State FCA that only applied to Medicaid funds, two had a State FCA without a *qui tam* provision, and five states had a *qui tam* provision that simply had not been used in the context of state transportation agency funds.

**Figure 3. Use of State FCAs by *qui tam* relators to protect or recover state transportation agency funds.**

1. **File Under Seal**

A *qui tam* lawsuit under the Federal FCA "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders."464 All State FCAs with *qui tam* provisions mirror this requirement that the *qui tam* action be filed under seal, and be served on the state attorney general rather than the defendant. At one time, there was significant variation from state to state regarding the nominal duration of the seal, as State FCAs variously contained 60-day, 90-day, 120-day, and even 180-day seal requirements. However, over the years State FCAs have been amended to make the *qui tam* provisions "at least as effective" as the Federal FCA, and as a result almost all State FCAs with a *qui tam* re-

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461 See, e.g., id. (in which LACMTA asserted a California FCA cross-complaint against the defendant prime contractor, who brought LACMTA into a lawsuit initiated by its subcontractor); Oved & Associates Const. Servs., Inc. v. Los Angeles Cty. Metro. Transportation Authority, No. B177595, 2006 Cal. App. Unpub. LEXIS 5358 (June 22, 2006) (in which LACMTA asserted a California FCA cross-complaint against the plaintiff subcontractor, after LACMTA was brought into the case by the defendant prime contractor).

462 Barger, *et al.*, supra note 2, at 473.

463 *Id.* at 473-74 (quoting 31 U.S.C. § 3730(b)(2)).
quirement now contain a standard 60-day seal requirement (although a few State FCAs still provide for 120 days under seal).466

Notwithstanding that, FCA actions regularly remain under seal much longer than 60 days. Under the Federal FCA, the “Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal. . . . Any such motions may be supported by affidavits or other submissions in camera.”467 State FCAs have similar provisions.468 As a result, it is not unusual for FCA actions to remain under seal for 1 or 2 years while the prosecuting authority investigates and considers whether to intervene.469 If the government intervenes, the seal is typically lifted automatically as there is no statutory requirement for the government’s intervention pleading to be filed under seal.470 If the government does not intervene, the qui tam relator may need to move for a court order lifting the seal,471 resulting in additional delay before the lawsuit is served on the defendants.472

Failure to comply with the seal requirement can jeopardize the qui tam relator’s lawsuit. Failure to file the initial FCA action under seal can result in its dismissal.473 Other violations of the seal requirement, such as disclosing the existence of the lawsuit while it is under seal, could also result in dismissal or other sanctions from the court. In determining whether to dismiss the qui tam action, courts will consider whether the seal violation frustrates the purpose of the seal.474 For example, if the defendant has already been made aware of the existence of the FCA action (perhaps as a result of the government’s investigation), then a seal violation by the qui tam relator might be readily forgiven. In addition, a qui tam relator could publicly disclose the fraudulent activity alleged in the qui tam lawsuit without disclosing the existence of the lawsuit itself, and thus not warrant sanctions for violating the seal requirement.475 FCA complaints are frequently amended (sometimes due to additional information learned while under seal during the lengthy investigation process, and sometimes in response to defenses raised as discussed in Section IV). Once a seal has been lifted, an amended FCA complaint probably does not need to be filed under seal, as the defendant is already on notice and the seal thus no longer serves any purpose.476

2. Investigation

The Federal FCA provides that the U.S. Attorney General “diligently shall investigate” alleged violations of the Federal FCA, which certainly applies when the Attorney General is served with a qui tam Federal FCA complaint.477 Likewise, State FCAs with a qui tam provision typically provide that the prosecuting authority shall conduct an investigation of the allegations made in a qui tam State FCA complaint.478

466 See, e.g., Ind. Code § 5-11-5.5-4(c)(2); Mass. Gen. Laws ch. 12, § 5C(3); N.C. Gen. Stat. § 1-608(b)(2); Va. Code § 8.01-216.5.B.
468 See, e.g., Cal. Gov’t Code § 12652(c)(2).
469 See, e.g., Chen v. EMSL Analytical, Inc., 966 F. Supp. 2d 282, 293 (S.D.N.Y. 2013) (unsealing qui tam complaint under Federal FCA and New York FCA against transportation agency air monitoring consultant, twenty months after filing); U.S. ex rel. Int’l Bhd. of Elec. Workers, Local Union No. 98 v. Fairfield Co., No. 09-04-02430, 2017 U.S. Dist. LEXIS 157270 (E.D. Pa. Sept. 26, 2017) (unsealing Federal FCA qui tam complaint against contractor to FTA grant recipients more than 2 years after filing); J-M Mfg. Co., Inc. v. Phillips & Cohen, LLP, 443 N.J. Super 447, 451, 129 A.3d 342, 345 (N.J. App. 2015) (“Pursuant to the FCA process, the United States government completed a years-long investigation after the qui tam complaint was filed and placed under seal.”); see also Bucy, supra note 82, at 1600 (“The lawsuit remains sealed, often for two years or more, to allow DOJ to fully investigate the charges made by the relator.”).
470 See, e.g., U.S. ex rel. Petersen v. Sanborn Map Co., Inc., No. 11-CV-009002, 2014 U.S. Dist. LEXIS 49444 at *3 (E.D. Mo. Apr. 10, 2014) (“The Government intervened in this action on July 31, 2013, and the seal was lifted on the same day,” more than 2 years after Federal FCA qui tam action was initiated against IDOT contractor).
471 See, e.g., U.S. ex rel. Klusmeier v. Bell Constructors, Inc., No. 08-CV-08442, Docket No. 87 (S.D. Fla. Nov. 17, 2009), aff’d, 469 Fed. App’x 718 (11th Cir. 2012) (granting motion to unseal qui tam complaint filed under Federal FCA and Florida FCA against prime contractor on federally funded state construction project, after United States declined to intervene and Florida failed to make an intervention decision within the statutory timeframe).
473 Fleming v. Giles, 132 Fed. App’x 168, 170 (9th Cir. 2005) (affirming on other grounds the trial court’s dismissal of Federal FCA action brought against USDOT and FAA for failing to comply with the seal requirements).
474 See, e.g., Smith v. Clark/Smooth/Russell, 796 F.3d 424, 430 (4th Cir. 2015) (reversing the dismissal of a Federal FCA qui tam action against construction contractors for the relator’s violation of the seal requirement, where the existence of the action was only disclosed to the defendant and not to the public, and where the disclosure actually facilitated the government’s investigation).
475 See, e.g., U.S. ex rel. Betteroads Asphalt, LLC v. R & F Asphalt Unlimited, Inc., 167 F. Supp. 3d 275, 278 (D.P.R. 2016) (concluding that qui tam relator did not violate Federal FCA seal requirement, where relator was quoted in newspaper articles about alleged fraud by paving contractor while lawsuit was under seal, but did not disclose existence of lawsuit).
476 See, e.g., E. Bay Mun. Util. Dist. v. Balfour Beatty Infrastructure, Inc., No. 13-CV-02032, 2014 U.S. Dist. LEXIS 81004 (N.D. Cal. June 11, 2014) (concluding that amended California FCA complaint against public construction contractor was not required to be filed under seal, when the complaint was amended in response to the defendant’s contention that the original complaint did not plead fraud in sufficient detail).
477 31 U.S.C. § 3730(a); see also J-M Mfg. Co., Inc. v. Phillips & Cohen, LLP, 443 N.J. Super. 447, 129 A.3d 342, 345 (N.J. App. 2015) (“Pursuant to the FCA process, the United States government completed a years-long investigation after the qui tam complaint was filed and placed under seal.”).
478 See, e.g., Del. Code tit. 6, § 1203(b)(2) (“Within 60 days after receiving a copy of the complaint, the Department of Justice shall con-
The investigation typically begins with informal meetings between the prosecuting authority and the relator to discuss the allegations and determine what additional evidence is likely to exist. The relator is required to have served substantially all of its evidence on the prosecuting authority along with the qui tam complaint. Informal meetings between the prosecuting authority and the contracting agency usually follow the initial meetings with the relator.

Investigating agencies other than the prosecuting authority may become involved. In qui tam actions where a state or local government is named a co-plaintiff along with the United States (e.g., in FCA actions involving federally funded transportation agency projects), the Federal FCA specifically authorizes the federal government to share evidence with "the law enforcement authorities that are authorized under the law of that state or local government to investigate and prosecute such actions on behalf of such governments." In Federal FCA actions involving USDOT funds, the USDOT Office of Inspector General (OIG) is likely to investigate substantive allegations. Likewise, some state transportation agencies will have inspectors general to investigate allegations under State FCAs involving state transportation agency funds. Some State FCAs specifically authorize investigative agencies other than the state attorney general to investigate complaints filed under State FCAs under certain circumstances. In qui tam actions involving a political subdivision of the state, such as a local government or a state agency, the State FCA may authorize the political subdivision to be involved in the investigation.

At some point before a determination is made whether to intervene, the investigation will likely involve interviews with the named defendant. The Federal FCA and some State FCAs authorize civil investigative demands or administrative subpoenas to obtain documents, sworn statements, or oral testimony from uncooperative parties, such as the named defendant. Even where the State FCA does not include this authority, the investigating agency may have similar subpoena authority under another statute.

Where the government determines as a result of its investigation that the FCA allegations have merit, the government may seek to recover from the defendant the costs of its investigation, either as part of a settlement agreement, or as damages in the underlying FCA action. If the government intervenes in the FCA action, its investigation costs may be sought as damages subject to trebling. Under some State FCAs, a portion of any recovery may be used by the state attorney general to reimburse its investigative costs, or to cover the costs of future false claims investigations.

3. Intervention

Upon conclusion of its investigation, the government decides whether to intervene in the qui tam action. The Federal designation from the Attorney General to investigate any alleged liability pursuant to the Nevada FCA; N.M. Stat. § 44-9.4(B) ("The attorney general may in appropriate cases delegate the authority to investigate or to bring a civil action to the state agency or political subdivision to which a false claim was made.").


484 31 U.S.C. § 3732(c).


486 Barger, et al., supra note 2, at 480 ("Depending on the type of case, other state and local enforcement authorities often play a role in investigating the qui tam cases, such as investigators with state Departments of Transportation . . ."). Bucy, et al., supra note 14, at Appx. B, p. 1562 (2010) ("For example, the Virginia Department of Transportation has an inspector general with their own investigators and if we have a case that involves them, then we can use their investigators, but they are not dedicated to qui tam cases.")

487 See, e.g., Fla. Stat. § 68.083(4) (authorizing investigation by Florida Department of Financial Services); Iowa. Code § 5-11.5-3(a) (authorizing investigation by Indiana inspector general).

488 See, e.g., Cal. Gov’t Code § 12652(c)(8)(A) (requiring attorney general to "coordinate its review and investigation with" the political subdivision, where the qui tam complaint alleges "violations that involve both state and political subdivision funds"); Nev. Rev. Stat. § 357.070.2 ("A district attorney or city attorney may accept a projection of the costs for the defense.")

489 See, e.g., Mass. Gen. Laws ch. 12, § 5B(a) (providing that costs recoverable in a Massachusetts FCA action "include the costs of any review or investigation undertaken by the attorney general, or by the state auditor or the inspector general in cooperation with the attorney general").


491 See, e.g., N.C. Gen. Stat. § 1-608(c); Or. Rev. Stat. § 180.780(1) ("[T]he Attorney General shall first apply amounts collected under the judgment to reimburse the state for the costs, attorney fees and expenses, including investigative costs") under the Oregon FCA.

492 See, e.g., N.J. Stat. §§ 2A:32C-7.c, 2A:32C-13.a (providing that the state attorney general receives 10 percent of the proceeds or settlement of any New Jersey FCA action that it brings, which “shall only be used to support its ongoing investigation and prosecution of false claims”); Tenn. Code § 4-18-104(g)(2) (providing that the state attorney general receives 33 percent of the proceeds or settlement of any Tennessee FCA action that it brings, “which shall be used to support its ongoing investigation and prosecution of false claims”).
FCA provides, “The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.” 492 However, as discussed above, the 60-day period is often significantly extended while the allegations are investigated, during which time additional details or grounds for the lawsuit may come to light. When it chooses to intervene, “the Government may file its own complaint or amend the [qui tam] complaint . . . to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief.” 493

State transportation agency projects often involve a mix of federal and state funds, and qui tam actions involving state transportation agency projects could conceivably be brought under both the Federal FCA and a State FCA, in the name of both the United States and the state government. In that situation, the federal government and state government could each have the right to intervene. 494

Under the Federal FCA, the U.S. Attorney General is the only government official authorized to intervene. In a Federal FCA qui tam action involving USDOT funds, the Attorney General ultimately can decide to intervene (or not), notwithstanding USDOT’s preferred course of action. 495 State FCAs may or may not follow the Federal FCA model in this regard. Under some State FCAs, only the state attorney general is authorized to intervene. 496 Some State FCAs give the state attorney general the discretion to delegate a qui tam case to a political subdivision of the state (e.g., a local government, or in some cases a transportation agency), if the case involves the funds of that political subdivision. 497 Where a case involves the funds of a political subdivision, some State FCAs require the relator to serve its qui tam complaint on the political subdivision, giving the political subdivision the right to decide whether to intervene. 498 Under other State FCAs, the state attorney general is required to notify the political subdivision of a qui tam action involving that political subdivision’s funds, giving the political subdivision the right to decide whether to intervene. 499 For example, under the California FCA, where a qui tam complaint involves the funds of a political subdivision, the state attorney general is required to forward copies to the political subdivision, 500 and the political subdivision may decide to intervene on its own behalf, 501 even if the state attorney general does not intervene. 502 Under this provision, the state attorney general has transferred California FCA qui tam complaints to local transportation agencies, who have intervened and prosecuted the cases themselves. 503

Typically, if the government intervenes, it will take over and conduct the action. 504 In such a case, while the government intervenor has “primary responsibility for prosecuting the action,” 505 the qui tam relator remains a party and has certain rights in the litigation, 506 albeit subject to limitation and supervision by the government intervenor. For example, the Federal FCA “allows the government to limit the relator’s witnesses and the length of

495 U.S. ex rel. Heath v. Dallas-Fort Worth Int’l Airport Bd., 260 Fed. App’x 708, 710 (5th Cir. 2007) (observing that only the Attorney General, and not the FAA, was authorized to make decisions and take action regarding a Federal FCA qui tam complaint against an FAA grant recipient).
497 See, e.g., Ga. Code § 23-3-122(b)(2) (“The state or, if delegated the authority by the Attorney General, local government may elect to intervene and proceed with the action . . . .”); Nev. Rev. Stat. § 357.110.1 (“[T]he Attorney General or a designee of the Attorney General . . . may intervene and proceed with the action . . . .”); N.Y. State Fin. Law § 190.2(b) (“The state may elect to supersede or intervene and proceed with the action, or to authorize a local government that may have sustained damages to supersede or intervene . . . .”).

497 See, e.g., Ga. Code § 23-3-122(b)(2) (“The state or, if delegated the authority by the Attorney General, local government may elect to intervene and proceed with the action . . . .”); Nev. Rev. Stat. § 357.110.1 (“[T]he Attorney General or a designee of the Attorney General . . . may intervene and proceed with the action . . . .”); N.Y. State Fin. Law § 190.2(b) (“The state may elect to supersede or intervene and proceed with the action, or to authorize a local government that may have sustained damages to supersede or intervene . . . .”).
their testimony; stay the relator’s discovery requests; and out-right dismiss an action as long as the relators are afforded notice and a hearing.507

If the government declines to intervene, typically the qui tam relator must prosecute the FCA case.508 The Federal FCA provides, “If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action.”509 As originally enacted, some State FCAs provided that the qui tam relator could not proceed with the case if the state declined to intervene,510 and other State FCAs provided that the state had “exclusive responsibility” to prosecute the case if the state intervened.511 However, in 2006, Congress enacted a financial incentive for states to enact State FCAs that “are at least as effective in rewarding and facilitating qui tam actions”512 as the Federal FCA. As a result, State FCAs with a qui tam provision now typically allow the relator to continue as plaintiff regardless of whether the state intervenes.513

Where the qui tam relator is allowed to conduct the case alone, the relator does so in the name of the government. Under the Federal FCA, and all State FCAs with a qui tam provision, the government may allow the qui tam relator to proceed with the case while reserving the government’s right to monitor the case and intervene at a later time,514 for good cause such as the relator’s failure to adequately represent the government’s interest.515 Likewise, the government may initially intervene in a case, and later “withdraw” its intervention, leaving the qui tam relator to prosecute the case alone.516

4. Settlement

Under the Federal FCA, and all State FCAs with a qui tam provision, the government may settle with the defendant and dismiss the FCA action notwithstanding the objections of the qui tam relator.517 However, the relator is entitled to a hearing, and the court must find that the settlement is fair, adequate, and reasonable under the circumstances.518 Because the court has the statutory authority to approve the settlement agreement, the court is often asked to enter a judgment in the amount of the settlement.519

Certainly, parties to the settlement agreement should include the defendant, the government agency alleged to have been defrauded, and the prosecuting authority who is authorized to represent the government’s interests in court.520 The settlement agreement may specify what portion of the proceeds will go to reimburse the government agency, and what portion will go to cover the costs of the prosecuting authority.521

Ideally, the qui tam relator will also be a party to the settlement agreement,522 or otherwise provide written consent, in


510 Barger, et al., supra note 2, at 487 (noting that under Texas FCA, “relator's complaint should be dismissed if the government decides not to join the lawsuit as a plaintiff”); see also U.S. ex rel. Ping Chen v. EMSI Analytical, Inc., 966 F. Supp. 2d 282, 305-06 (S.D.N.Y. 2013) (stating that under New York City FCA, qui tam relator could not proceed with case without authorization from New York City corporation counsel).

511 Barger, et al., supra note 2, at 484 (noting that under Delaware FCA, the state assumed “exclusive control” over qui tam actions in which it intervened).


513 See, e.g., CAL. GOV’T CODE § 12652(e)(1) (“The qui tam plaintiff shall have the right to continue as a full party to the action.”); DEL. CODE tit. 6, § 1204(a); FLA. STAT. § 68.084(1); GA. CODE § 23-3-122(c)(1); HAW. REV. STAT. § 661-26(a); 740 ILL. COMP. STAT. § 175/4(c)(1); IND. CODE § 5-11-5.5-5(a); IOWA CODE § 685.3.3.a; MASS. GEN. LAWS ch. 12, § 5D(1); MINN. STAT. § 15C.08(c); MONT. CODE ANN. § 17-8-406(5); NEV. REV. STAT. § 357.120.1; N.J. STAT. § 2A:32C-6.a; N.M. STAT. § 44-9-6.A; N.Y. STATE FINE LAW § 190.5(a); N.C. GEN. STAT. § 1-609(a); OKLA. STAT. tit. 63, § 5053.3.a; R.I. GEN. LAWS § 9-1-1.4(c)(1); TENN. CODE § 41-10-14(e)(1); VA. CODE § 8.01-216.6.A.

514 See, e.g., CAL. GOV’T CODE § 12652(f)(2)(A); DEL. CODE tit. 6, 1204(d); FLA. STAT. § 68.084(3); GA. CODE § 23-3-122(c); HAW. REV. STAT. § 661-26(c); 740 ILL. COMP. STAT. § 175/4(c)(3); IND. CODE § 5-11-5.5-5(a); IOWA CODE § 685.3.3.c; MASS. GEN. LAWS ch. 12, § 5D(6); MINN. STAT. § 15C.08(b); MONT. CODE ANN. § 17-8-406(6)(b); NEV. REV. STAT. § 357.130.2; N.J. STAT. § 2A:32C-6.f; N.M. STAT. § 44-9-6.b; N.Y. STATE FINE LAW § 190.5(a); N.C. GEN. STAT. § 1-609(f); OKLA. STAT. tit. 63, § 5053.3.b; R.I. GEN. LAWS § 9-1-1.4(c)(3); VA. CODE § 8.01-216.6.F.
order to avoid a court challenge to the settlement amount agreed upon between the government and the defendant. Where the government does not have the relator's consent to a settlement, the settlement agreement should be made contingent on obtaining the relator's consent or the court's approval.⁵²³ If the relator consents to the settlement agreement with the defendant, the government and the relator might use the settlement agreement to document their agreement concerning the share of the settlement proceeds that the relator will receive.⁵²⁴ Where the *qui tam* relator also has an FCA whistleblower retaliation claim against the defendant (as discussed in Section V), the settlement agreement would ideally resolve the retaliation claim as well.⁵²⁵ Sometimes the relator may agree with the reasonableness of the overall settlement amount, but will still object to settlement with the defendant because the relator and the government have not reached agreement on the share of the settlement amount that the relator will receive.⁵²⁶ In that case, the court may approve the settlement with the defendant and determine the relator's share of the proceeds,⁵²⁷ within the allowable range for the relator's share in the applicable FCA, as discussed in Section II.B.3.

It is not uncommon for FCA cases to settle shortly after the government intervenes, sometimes after years of keeping the case under seal.⁵²⁸ This typically suggests that the government has negotiated a resolution with the defendant while the case was under seal, and only elected to intervene after reaching a resolution in principle.

A more questionable, but still not uncommon, practice is when the government elects not to intervene in an FCA action, but still attempts to settle it. Nothing in the language of the Federal FCA (nor most State FCAs) requires the government to intervene in order to settle a case. In fact, some courts have concluded that because the *qui tam* action is prosecuted in the name of the government, the government has the right to settle the case, even where it has not intervened.⁵²⁹ However, other courts have viewed with suspicion the government's settlement of a case in which it declined to intervene.⁵³⁰ For example, where the government declines to intervene, or actually moves to dismiss, an FCA case on the grounds that there are no false claims, but the government also settles with the defendant on the underlying contract dispute resulting in recovery from the defendant, it can create the appearance of attempting to withhold from the *qui tam* relator its statutory share of the FCA settlement proceeds.⁵³¹

Where the government does not intervene or settle the matter, the *qui tam* relator may reach a settlement agreement with the defendant.⁵³² However, under the Federal FCA and most State FCAs, the relator cannot unilaterally dismiss the lawsuit without the consent of the government (who is the real party in interest).⁵³³ Therefore, any settlement agreement between the relator and the defendant should be made contingent on obtaining the government's consent and the court's approval.

State transportation agency projects often involve a mix of federal and state funds, and *qui tam* actions involving state transportation agency projects could conceivably be brought under both the Federal FCA and a State FCA, in the name of both the United States and the state government. In that situ-

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⁵²⁶ See, e.g., *Knox Cnty. ex rel. Envtl. Termite & Pest Control, Inc. v. Arrow Exterminators, Inc.*, 350 S.W.3d 511, 517 (Tenn. 2011) (invoking objection of *qui tam* relator under Tennessee FCA in order “to preserve its right to recover a portion of the settlement and its attorney’s fees,” despite the fact that relator does “not disagree with the reasonableness of the settlement”).

⁵²⁷ See, e.g., *U.S. ex rel. Peterson v. Sanborn Map Co.*, Inc., No. 11-CV-00902, 2014 U.S. Dist. LEXIS 49444, at *3 (E.D. Mo. Apr. 10, 2014) (“Relator did not object to the settlement amount, but he did object to the overall settlement” and petitioned the court for a larger share in Federal FCA action against IDOT contractor.).

⁵²⁸ See, e.g., *U.S. ex rel. Betteroads Asphalt, LLC v. R & F Asphalt Unlimited, Inc.*, 167 F. Supp. 3d 275, 277 (D.P.R. 2016) (intervening in a Federal FCA case against airport contractor while contemporaneously filing settlement agreements for the court's approval, which approval is granted on the same day the court unseals the lawsuit).

⁵²⁹ See, e.g., *U.S. ex rel. Stierli v. Shasta Servs., Inc.*, 440 F. Supp. 2d 1108, 1112 (E.D. Cal. 2006) (holding that government entities could move to dismiss action brought against Caltrans contractor under Federal FCA and California FCA, although neither federal nor state government had intervened); *U.S. ex rel. Shepard v. Grand Junction Reg’l Airport Auth.*, No. 13-CV-00736, 2017 U.S. Dist. LEXIS 27083, at *7 (D. Colo. Feb. 27, 2017) (“This Court sees no reason why the government should be given such broad discretion to dismiss a case but not to settle it under circumstances that it deems fair, adequate, and reasonable.”).


⁵³¹ See, e.g., id. at 737 (denying *qui tam* relator a share of settlement proceeds, where government settled with defendant alleged to have improperly retained land sale proceeds received from PennDOT, after government declined to intervene and obtained dismissal of relator's *qui tam* case).

⁵³² See, e.g., 31 U.S.C. § 3730(d)(2) (“If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the public penalty and damages” (emphasis supplied)).

⁵³³ See, e.g., 31 U.S.C. § 3730(b)(1) (“The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.”).
ation, the federal government and state government both have the independent statutory authority to settle counts under their respective FCAs. It is not uncommon for the federal government to settle the Federal FCA count with the defendant, who remains exposed to liability for the State FCA count. While the defendant would typically prefer to settle all counts instead of leaving its ultimate liability uncertain, the defendant may be incentivized to settle the Federal FCA count without resolving the State FCA counts in order to avoid federal debarment or criminal prosecution.

C. Procedural Considerations

1. Claim Identification

a. Federal or State False Claims Act

In deciding whether to bring suit under a Federal FCA or a State FCA, or both, for false claims on a state transportation agency project, one must first consider whether there is an applicable State FCA. A current list of State FCAs is included as Appendix A. If there is a State FCA, then one must confirm that it is applicable to state transportation agency claims and is not limited to Medicaid claims.

If there is a potentially applicable State FCA, then the next step is to analyze the statutory language of both the State FCA and the Federal FCA in the context of the allegedly fraudulent conduct, to determine whether the conduct constitutes a violation of either statute, or both. Typically, this requires one to articulate, or pinpoint, the activity that constitutes the “false claim.” Refer to Section II.A.1 for definitions of “false” and “claim” for purposes of FCAs.

Once it is determined that the alleged activity constitutes a false claim, there are two additional considerations in determining which FCAs are potentially applicable: To whom was the false claim presented, and whose funds were involved? The Federal FCA and most State FCAs provide liability for two avenues or types of false claims: those presented to the government, and those submitted to someone else for payment with government funds.

Under the Federal FCA, a false claim includes one that “is presented to an officer, employee, or agent of the United States.” Similarly, under all State FCAs, a false claim includes one that is directly “presented to an officer, employee, or agent of the state.” Under some (but not all) State FCAs, a false claim also includes one that is presented to an officer, employee, or agent of a state’s “political subdivision.” If the false claim is presented to an officer, employee, or agent of the government unit identified in the FCA, then there is likely liability under the applicable FCA regardless of whether the government unit to whom the false claim was presented actually has title to the money or property for which the claim was made. When asserting an FCA action under this first avenue of liability, for claims presented directly to a government “officer, employee, or agent,” the complaint should specifically allege the governmental unit and its agent to whom the claim was made.

As discussed in detail in Section I.C.4, the Federal FCA was amended in 2009 to clarify that false claims need not be presented directly to the federal government for liability to arise. Under this second avenue of liability, a false claim is punishable if it “is made to a contractor, grantee, or other recipient” of the U.S. government, and the U.S. government has provided, or will provide or reimburse, “any portion of the money or property requested or demanded.” Likewise, most State FCAs now provide for liability for false claims made to recipients of state funds, such as local governments or state contractors. When asserting an FCA action under this second avenue of liability, for indirect claims made to recipients of government funds, the complaint should specifically allege the facts showing that a unit of government provided or would provide funds in response to the claim.

State transportation agency projects often involve a mix of federal and state funds, so false claims involving state transportation agency projects could conceivably give rise to liability under both the Federal FCA and a State FCA. Where the false claimant is the state transportation agency contractor, the contractor can incur liability under a State FCA for presenting its


536 See, e.g., 31 U.S.C. § 3729(b)(2)(A) (defining “claim” to include a “request or demand . . . for money or property and whether or not the United States has title to the money or property.”).

537 U.S. ex rel. Piscitelli v. Kaba Ilco Corp., No. 11-CV-00396, 2011 U.S. Dist. LEXIS 177360 (N.D. Ohio Dec. 14, 2012) (dismissing qui tam action brought under Federal FCA and several State FCAs against supplier of locks to airports and Transportation Security Administration, where “the complaint fails to allege who heard or received the statements”).


541 Boyd v. Keystone Const., No. 14-CV-00119, 2014 U.S. Dist. LEXIS 146142 at *5-6 (S.D. Ind. Oct. 14, 2014) (dismissing a Federal FCA retaliation lawsuit where, although the plaintiff alleged that the project was publicly funded, she has not alleged that it was funded by the federal government; nor has she alleged that she reasonably believed that any of the ‘entitlement, cost and scope discrepancies’ she complained about had resulted in or would result in a false claim for payment by the federal government”).
invoice or pay application “to an officer, employee, or agent of the state.” Likewise, the same invoice or pay application could constitute a false claim under the Federal FCA, as a claim submitted to a “grantee” of the federal government, where the federal government will provide a “portion of the money” claimed. If there are no federal funds involved, then the Federal FCA is likely not an option. Although “state FCAs can reach fraudulent activity not covered by the Federal FCA,” including “false claims submitted to state governments in programs funded with exclusively state or mixed state and federal funds.” Where the activity is punishable under both the Federal FCA and a State FCA, it is typically advisable to assert both causes of action in the pleading. As long as the plaintiff is statutorily authorized to assert both, because failure to assert a State FCA count in the Federal FCA pleading, or vice versa, could bar it from being asserted later. Accordingly, Federal FCA actions involving transportation funds often include State FCA counts as independent or alternative causes of action.

Of course, in a *qui tam* action, a State FCA count typically cannot be alleged in the Federal FCA complaint unless there is an applicable State FCA with a *qui tam* provision. In an action brought by a state government plaintiff, such as a state transportation agency, while the state may be authorized to bring suit in its own name under the State FCA, it can only do so under the Federal FCA as a *qui tam* plaintiff in the name of the U.S. government.

### b. Related Causes of Action

Because of the relative difficulty of prevailing on an FCA cause of action, a prosecuting authority considering initiating or intervening in an FCA action should consider the state’s other available causes of action and alternative means of recovering state highway and transportation funds.

#### (1) Contract-related causes of action

Where there is an FCA action against a contracting party on a transportation project, alleging that the defendant requested payment to which it was not entitled, there will usually be the opportunity to assert a contract-related claim in addition or in the alternative. Although a *qui tam* relator would not have standing to assert a contract-related civil claim on behalf of the government, such a claim may typically be asserted by the prosecuting authority when it intervenes. In an FCA action initiated by the government, the prosecuting authority may assert contract-related claims in the alternative, or seek to consolidate the FCA action with a separate civil action initiated by the contracting agency. Certainly, FCA actions against a prime contractor in direct privity with the government (e.g., for overbilling or for false certifications of contract compliance) can typically be asserted in the alternative to a breach of contract action. The actual damages under both counts are often identical (i.e., the amount overpaid to the prime contractor), or at least there will be significant overlap between the asserted damages and the evidence required to prove both counts.

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543 Bucy, supra note 82, at 1604 (“If there are no federal dollars at issue, the federal FCA has no applicability no matter how egregious the fraud.”).

544 Id.

545 See, e.g., Fed. R. Civ. P. 18 (“A party asserting a claim . . . may join, as independent or alternative claims, as many claims as it has against an opposing party”).


547 See, e.g., O’Shell v. Cline, 571 Fed. App’x 487, 489 (7th Cir. 2014) (involving retaliation action under both Federal FCA and Indiana FCA by former Indiana DOT employee, who alleged violations of both Federal FCA and Indiana FCA); Pfingston v. Ronan Engineering Co., 284 F.3d 999 (9th Cir. 2002) (involving *qui tam* action against LACMTA contractor “unquestionably violated the first-to-file rule” in 31 U.S.C. § 3730(b)(5)).

548 See, e.g., O’Shell v. Cline, 571 Fed. App’x 487, 489 (7th Cir. 2014) (involving retaliation action under both Federal FCA and Indiana FCA by former Indiana DOT employee, who alleged violations of both Federal FCA and Indiana FCA); Pfingston v. Ronan Engineering Co., 284 F.3d 999 (9th Cir. 2002) (involving *qui tam* action against LACMTA contractor “unquestionably violated the first-to-file rule” in 31 U.S.C. § 3730(b)(5)).

549 See, e.g., Bucy, supra note 82, at 1604 (“If the Government elects to intervene . . . the Government may file its own complaint or amend the complaint . . . to add any additional claims with respect to which the Government contends it is entitled to relief”).

able because, although significantly higher remedies (i.e., treble damages plus penalties) are available under the FCA, it is generally more difficult to prevail on an FCA count than a breach of contract count, as “a mere breach of contract does not give rise to liability under the False Claims Act.”

An FCA action against a party who is not in privity with the government, such as a subcontractor, might similarly be coupled with a count for unjust enrichment or quantum meruit. Where the allegedly false claim involves defective performance of the contract work, it will also often support a count for breach of warranty, or a performance bond claim against the prime contractor’s performance bond surety.

(2) Fraud-related causes of action. The allegations supporting an FCA cause of action will typically also support a cause of action under state common law for fraud or misrepresentation. Most states also include statutory causes of action for unfair and/or deceptive trade practices, which may offer similar remedies as a State FCA (e.g., treble damages). These causes of action can typically be asserted alongside an FCA cause of action, and serve as a suitable surrogate where there is not an applicable State FCA.

trial court decision not to bifurcate California FCA action from breach of contract action against public construction contractor, where the evidence to prove causes of action “overlapped extensively”).


But see San Francisco Bay Area Rapid Transit Dist. v. Spencer, No. 04-CV-04632, 2007 U.S. Dist. LEXIS 4466, at *4 (N.D. Cal. Jan. 9, 2007) (not allowing unjust enrichment count against transit district subcontractor, where transit district has no actual damages and California FCA count “is far more closely tailored to the facts of this case”).


(3) Criminal prosecution. The fraudulent activity alleged in an FCA action can often be prosecuted as a crime. For example, federal law provides for criminal fines and imprisonment for making “any materially false, fictitious, or fraudulent statement or representation” to the U.S. government. There are typically similar “false statement” statutes under state law providing for criminal prosecution of false statements made to state agencies such as state transportation agencies. Where there is not an applicable State FCA, the state’s preferred course of action may be criminal prosecution of false claims by state contractors under the applicable false statement statute.

Where there is an applicable FCA, the government will often pursue criminal prosecution concurrently with an FCA civil action. A final judgment against the defendant in a criminal proceeding involving fraud or false statements will estop the defendant from denying the fraud or false statements in the FCA civil action.

When an FCA action is initiated by a qui tam relator, the government may pursue criminal prosecution instead of intervening in the civil case. Where a criminal action has been initiated by the government, a qui tam relator is barred from later initiating an FCA action involving the same allegations of fraud contained in the criminal complaint, unless the relator was the “original source” of the criminal charges, as discussed in Section IV.C.

e. Alternatives to Litigation

A government unit considering whether to initiate or intervene in an FCA action will also consider the administrative remedies at its disposal, as an alternative to or in addition to the FCA action. For example, an administrative action before a state transportation agency claims board may be an effective means of establishing whether the contractor is entitled to the payment it is claiming. The FCA cause of action might be asserted in a subsequent judicial appeal of the administrative action. If the administrative action is not appealed, a party could be collaterally estopped from denying the findings in the administrative action. For example, a state transportation agency claims
board could find that a contractor is not entitled to the payment it claimed, estopping it from litigating entitlement, while re-

serving a decision on whether the claim was fraudulent, requir-

ing the government to prove that the claim was submitted with

the requisite scienter in a subsequent FCA action.

Where there is a qui tam action, the government may elect
not to intervene, but instead initiate "an administrative proceed-

ing to determine a civil monetary penalty,"563 if such an alternate remedy is available. If it takes that course of action, the qui tam relator "shall have the same rights in such proceeding as such person would have had"564 in the FCA action. For example, the relator may be able to present evidence in the administrative ac-

tion, and receive a share of the administrative award, just as if

the government had intervened in the FCA action. However, if

the government has already initiated an administrative action
to recover a "civil monetary penalty," no FCA qui tam action
may be subsequently initiated based on the same allegations or
transactions.565

Transportation agencies will often have access to adminis-

trative proceedings tailored to false claims allegations, involv-

ing punitive measures other than civil monetary penalties, such

as suspension or debarment.566 The transportation agency may

pursue these "exclusion actions" instead of, or in conjunction

with, recovery under an applicable FCA.567 The threat of suspen-

sion or debarment can give the transportation agency consid-

erable leverage in negotiating settlement of an FCA action, as

the defendant would often prefer to pay a monetary settlement

in order to remain eligible for future government contracts.568

In addition, the settling defendant will often agree to institute

administrative oversight, training, and quality control reforms

subject to monitoring by the government for a defined period,
in order to remain eligible for government contracts.

\[ \text{\textsuperscript{563}} \text{See, e.g., 31 U.S.C. § 3730(c)(5).} \]

\[ \text{\textsuperscript{564}} \text{See, e.g., 31 U.S.C. § 3730(c)(5).} \]

\[ \text{\textsuperscript{565}} \text{See, e.g., 31 U.S.C. § 3730(e)(3).} \]

\[ \text{\textsuperscript{566}} \text{See, e.g., 31 U.S.C. § 3730(c)(5).} \]

\[ \text{\textsuperscript{567}} \text{See, e.g., 31 U.S.C. § 3730(c)(5).} \]

\[ \text{\textsuperscript{568}} \text{See, e.g., U.S. ex rel. Heath v. Dallas-Fort Worth Int'l Airport Bd., 260 Fed. App'x 708, 70910 (5th Cir. 2007) (in which qui tam relator argued that FAA "could not have pursued administrative remedies" while Federal FCA qui tam action was pending).} \]

\[ \text{\textsuperscript{569}} \text{28 U.S.C. § 1331.} \]

\[ \text{\textsuperscript{570}} \text{31 U.S.C. § 3732(a).} \]

\[ \text{\textsuperscript{571}} \text{See, e.g., U.S. ex rel. Heath v. Dallas-Fort Worth Int'l Airport Bd., 260 Fed. App'x 708, 70910 (5th Cir. 2007) (in which qui tam relator argued that FAA "could not have pursued administrative remedies" while Federal FCA qui tam action was pending).} \]

\[ \text{\textsuperscript{572}} \text{Claire Sylvia, The False Claims Act: Fraud Against the Government § 10.17 (3d ed. 2017).} \]

\[ \text{\textsuperscript{573}} \text{See, e.g., 31 U.S.C. § 3732(a).} \]

\[ \text{\textsuperscript{574}} \text{See, e.g., U.S. ex rel. Hartigan v. Palumbo Bros., Inc., 797 F. Supp. 624, 631 (N.D. Ill. 1992) ("Clearly, federal jurisdiction is not mandatory under the FCA because the statute does not expressly suggest that jurisdiction shall be exclusive. It provides that suits of the kind described ‘may’ be brought in the federal district courts, not that they must be.").} \]

\[ \text{\textsuperscript{575}} \text{See, e.g., U.S. ex rel. Anthony v. Burke Engineering Co., 356 F. Supp. 2d 1119 (C.D. Cal. 2005) (exercising jurisdiction over counts brought against airport construction contractors under California FCA and San Francisco FCA).} \]

\[ \text{\textsuperscript{576}} \text{See, e.g., U.S. ex rel. Heath v. Dallas-Fort Worth Int'l Airport Bd., 260 Fed. App'x 708, 70910 (5th Cir. 2007) (in which qui tam relator argued that FAA "could not have pursued administrative remedies" while Federal FCA qui tam action was pending).} \]

\[ \text{\textsuperscript{577}} \text{See, e.g., U.S. ex rel. Hartigan v. Palumbo Bros., Inc., 797 F. Supp. 624, 631 (N.D. Ill. 1992) ("Clearly, federal jurisdiction is not mandatory under the FCA because the statute does not expressly suggest that jurisdiction shall be exclusive. It provides that suits of the kind described ‘may’ be brought in the federal district courts, not that they must be.").} \]

\[ \text{\textsuperscript{578}} \text{See, e.g., City & County of San Francisco v. Tutor-Saliba Corp., No. 02-CV-05286, 2005 U.S. Dist. LEXIS 46590 (N.D. Cal. Mar. 17, 2005) (exercising diversity jurisdiction over counts brought against airport construction contractors under California FCA and San Francisco FCA).} \]

\[ \text{\textsuperscript{579}} \text{See, e.g., U.S. ex rel. Hartigan v. Palumbo Bros., Inc., 797 F. Supp. 624, 631 (N.D. Ill. 1992) ("Clearly, federal jurisdiction is not mandatory under the FCA because the statute does not expressly suggest that jurisdiction shall be exclusive. It provides that suits of the kind described ‘may’ be brought in the federal district courts, not that they must be.").} \]

\[ \text{\textsuperscript{580}} \text{See, e.g., U.S. ex rel. Anthony v. Burke Engineering Co., 356 F. Supp. 2d 1119 (C.D. Cal. 2005) (exercising jurisdiction over counts brought against airport construction contractors under California FCA and San Francisco FCA).} \]

2. Jurisdiction—Federal or State Court

After identifying its claims, the FCA plaintiff must decide
where to bring the action. In addition to typical questions of
personal jurisdiction over the defendant, the plaintiff must con-

sider what court has subject matter jurisdiction over the FCA

claims.

a. Subject Matter Jurisdiction

As a law of the United States, the U.S. District Courts have
original jurisdiction over all civil actions brought under the
Federal FCA.569 The Federal FCA expressly provides that a law-
suit "may be brought" in U.S. District Court.570 However, courts
interpreting the Federal FCA have concluded that the U.S. Dis-

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action and a State FCA cause of action, the U.S. District Courts have “supplemental jurisdiction” over the State FCA count if it forms “part of the same case or controversy” as the Federal FCA count.578 The Federal FCA expressly provides that the U.S. District Courts “shall have jurisdiction over any action brought under the laws of any state for the recovery of funds paid by a state or local government if the action arises from the same transaction or occurrence as an action brought under” the Federal FCA.579 Some State FCAs expressly provide that the U.S. District Courts have jurisdiction over State FCA actions if the Court has pendent jurisdiction.580

The ability to bring a Federal FCA action in state court, or a State FCA action in federal court, is important because a false claim made to a USDOT grant recipient (e.g., a state transportation agency) will frequently implicate both the Federal FCA and the relevant State FCA. For example, in United States v. Sequel Contractors, Inc.,581 airport construction contractors were alleged to have presented false claims to the county, which was reimbursed by FAA. The alleged false claims to the county constituted the “same transaction or occurrence” giving rise to liability under both the Federal FCA and California FCA, so the U.S. District Court for the Central District of California exercised jurisdiction over both causes of action.582

b. Federal Abstention

Although the U.S. District Courts may exercise supplemental jurisdiction over State FCA causes of action brought with Federal FCA causes of action, the decision whether to exercise supplemental jurisdiction over the State FCA count is within the discretion of the U.S. District Court.583 Declining to exercise supplemental jurisdiction over the State FCA count creates the potential for parallel proceedings—for example, a Federal FCA action in U.S. District Court and a State FCA action in state court involving the same false claim allegations. In the case of parallel proceedings, the U.S. District Court may abstain from hearing the Federal FCA action pending the resolution of the state court case, in the interest of judicial economy and to avoid contradictory outcomes.584

For example, in U.S. ex rel. Hartigan v. Palumbo Bros., Inc.,585 the State of Illinois filed a lawsuit in Illinois state court against an IDOT contractor for breach of contract and fraud, alleging M/WBE misrepresentation, and then a few years later filed a qui tam action against the contractor under the Federal FCA in the U.S. District Court for the Northern District of Illinois. Noting that there had been “substantial progress in the state court action,”586 and that “Illinois must prove fraud and breach of contract”587 in order to prevail on its Federal FCA action, the U.S. District Court dismissed the Federal FCA action “without prejudice and with leave to reinstate within forty-five days of the completion of the state court proceedings.”588

In U.S. ex rel. Fryberger v. Kiewit Pacific Co.,589 a subcontractor on a federally funded LACMTA project brought a qui tam action against the prime contractor in the U.S. District Court for the Northern District of California, asserting violations of both the Federal FCA and the California FCA related to the failure of a retaining wall on the project. The prime contractor sued the subcontractor in California state court for breach of contract. The U.S. District Court retained jurisdiction over both the Federal FCA and the California FCA counts, but stayed proceedings pending “litigation and resolution of the state case,” in order to “simplify” the FCA case, because the prime contractor’s “alleged misrepresentations to the federal government in connection with that project will be common to both actions.”590

Where the U.S. District Court has exercised supplemental jurisdiction over the State FCA cause of action, it may still remand the State FCA cause of action to state court after disposing of the counts in which the U.S. District Court had original jurisdiction591 (e.g., a Federal FCA count). Any time prior to final judgment, if it appears that the U.S. District Court lacks subject matter jurisdiction over a State FCA count that was removed from state court, the U.S. District Court shall remand it back to the state court.592 As a general rule, after disposing of the Federal FCA count that was the basis of original jurisdiction, the U.S. District Court should decline to continue exercising supplemental jurisdiction over the State FCA count.593

For example, in McCrary v. Knox County, Indiana,594 a former county highway department brought a whistleblower lawsuit against his former employer in the U.S. District Court for the Southern District of Indiana under both the Federal FCA and the Indiana FCA, alleging misuse of department resources for the grading of private roads. Although the plaintiff alleged that the department received federal highway funds, he did not allege “that the federal government will be responsible for paying or reimbursing any portion of the costs associated with the

582 Id. at 1148-49.
586 Id. at 636.
587 Id. at 635.
588 Id. at 636.
589 Id. at 636.
590 Id. at 796 (N.D. Cal. 2014).
591 Id. at 815.
allegedly fraudulent grading job. Accordingly, the U.S. District Court dismissed the Federal FCA count on the merits. Not having original jurisdiction over the remaining Indiana FCA count, the Court declined to exercise supplemental jurisdiction, dismissing it without prejudice so that the plaintiff could bring suit in Indiana state court.

3. Venue

The Federal FCA provides that an action may be brought in the federal judicial district where at least one of the named defendants “can be found, resides, transacts business,” or in the district where a violation of the Federal FCA occurred. The Federal FCA action may also be brought in a state court located in that federal judicial district.

Likewise, most (but not all) State FCAs provide that an action may be brought in the county in which at least one of the defendants “can be found, resides, or transacts business.” In the case of a foreign defendant, this could involve filing a State FCA action in another state’s court, or in federal court in the defendant’s home state. As discussed in Section III.C.2, the State FCA action may be brought in federal court in the federal judicial district containing the county in which venue is proper, as long as the federal court can exercise jurisdiction over the action. The federal court likely has diversity jurisdiction in the case of a foreign defendant, or federal question jurisdiction if the State FCA action is combined with a Federal FCA cause of action.

However, where the alleged fraud involves transportation funds for a state transportation agency project, the State FCA defendant will typically have transacted business in the state, at least with respect to the project at issue, and venue will thus be proper in the county where the project is located. Likewise, most State FCAs provide that an action may be brought in the county where the act or conduct allegedly constituting a violation of the State FCA took place. In cases involving state transportation agency projects, at least some of the allegedly fraudulent conduct typically takes place in the county where the project is located.

Some State FCAs provide that an action may be brought in a specific county; typically, the county in which the state attorney general is located. A few State FCAs with a qui tam provision provide that an action may be brought in the county in which the relator resides. In the case of a qui tam action in which the state attorney general intervenes, the state attorney general may be able to move for a change of venue to the county in which the state attorney general is located.

After an FCA action has been initiated in a statutorily authorized venue, and the defendants have been served, giving the court jurisdiction over the matter and the parties, a party may move for a change of venue. In FCA actions involving state transportation agency projects, venue will typically be most appropriate in the county or judicial district where the project is located. Sometimes, the parties will have contractually agreed in advance to the venue for resolving any disputes. After a State FCA action has been initiated in a statutorily authorized venue, state courts have transferred the State FCA action to the contractually agreed venue, including arbitration in some cases, upon motion of one of the contracting parties.
4. Statutes of Limitation

The Federal FCA provides that an action must be brought within the later of either (a) 6 years from the date of the alleged violation, or (b) 3 years from when “the official of the United States charged with responsibility to act in the circumstances” first knew or should have known the material facts, but no more than 10 years after the date of alleged violation.608 As discussed in Section II.B.1, each invoice or pay application based on false information or a fraudulently induced contract may constitute a new violation. Therefore, it is possible that where the defendant's course of conduct includes misrepresentations made outside of the statutory limitation period, there still may be individual violations (e.g., subsequent invoices or pay applications) for which the FCA action is timely.609

As originally enacted, State FCAs had a wide variety of statutes of limitation, often more strict than that in the Federal FCA.610 However, in 2006, Congress enacted a financial incentive for states to enact State FCAs that “are at least as effective in rewarding and facilitating qui tam actions”611 as the Federal FCA. As a result, State FCAs typically now contain a statute of limitation modeled after the Federal FCA, providing that a State FCA action may be brought within the later of either (a) 6 years from the date of the alleged violation, or (b) 3 years from when the material facts were known or should have been known by the state official charged with responsibility to take action under the State FCA, but no later than 10 years after the date of the alleged violation.612 The few remaining variations now tend to be less stringent than the Federal FCA. For example, the Hawai’i FCA extends the “discovery rule” to 6 years from the date the violation should have been discovered, with an outside limit of 10 years from the date of violation,613 and the New York FCA simply provides 10 years after the date of the violation in which to bring an action.614 The New Mexico FCA provides that an action “may be brought at any time,” including “for conduct that occurred prior to the effective date of that act”615 as far back as July 1, 1987.

The 3-year discovery rule in the Federal FCA and most State FCAs could potentially bar an FCA action more than 3 years after the government official “charged with responsibility to act in the circumstances”616 knew or should have known of the FCA violation. Under the Federal FCA, the U.S. Attorney General is the only government official authorized to initiate litigation. Therefore, the 3-year statute of limitation does not start running when the federal contracting agency becomes aware of the fraud, but rather it is triggered when an official of USDOT becomes aware.617 However, under many State FCAs, political subdivisions including transportation agencies may be authorized to initiate litigation, as discussed in Section III.A.1. In that case, the 3-year statute of limitation to bring suit under the State FCA could begin running when the contracting agency becomes aware of the fraud.618

For example, in San Francisco Bay Area Rapid Transit District v. Spencer,619 BART initiated a California FCA action on its own behalf against a subcontractor on several BART projects for misrepresenting its DBE status. The subcontractor moved for summary judgment on the basis of the statute of limitations, but BART had become aware that the subcontractor was not actually a DBE more than 3 years before asserting Federal FCA counterclaim, despite the fact that USDOT contracting agency appeared be aware of fraud much earlier; U.S. v. R.J. Zavoral & Sons, Inc., No. 12-CV-00668, 2014 U.S. Dist. LEXIS 150343 (D. Minn. Oct. 21, 2014) (concluding that Federal FCA action against bridge painting subcontractor was not time-barred based on date of USDOJ's knowledge, despite the fact that SBA official suspected fraud more than 6 years before action was filed).

608 See, e.g., U.S. ex rel. Harman v. Trinity Indus., Inc., No. 12-CV-00089, 2014 U.S. Dist. LEXIS 973 (E.D. Tex. Jan. 6, 2014) (dismissing qui tam Federal FCA action as to alleged violations that occurred more than 6 years before filing, but ruling that action is timely as to alleged violations that occurred within 6 years prior to filing).
609 391 Barger, et al., supra note 2, at 49293 (summarizing State FCAs in 2005 and noting that Louisiana FCA at the time required a qui tam action to be brought within 1 year from the date the facts were known or should have been known, and that Nevada FCA at the time required an action to be brought within the lesser of 5 years from the date of violation or 3 years from when the attorney general knew or should have known).
611 See, e.g., CAL. GOV’T CODE § 12654(a). But see OR. REV. STAT. § 180.765 (providing that an action under the Oregon FCA must be brought within 3 years after the date of actual discovery of the violation, but no more than 10 years after the violation); TENN. CODE § 4-18-106(a) (providing that an action under the Tennessee FCA must be brought within 3 years after the date of actual discovery of the violation, but no more than 10 years after the violation).
612 50 HAW. REV. STAT. § 661-24.
613 N.Y. STATE FIN. LAW § 192.1.
614 N.M. STAT. § 44-9-12.A.
616 See, e.g., Veridyne Corp. v. U.S., 86 Fed. Cl. 668, 678 (2009) (accepting USDOJ representation for purposes of statute of limitations that it was not aware of fraud more than 3 years before asserting Federal FCA counterclaim, despite the fact that USDOT contracting agency appeared be aware of fraud much earlier).
617 See, e.g., Dep't of Transp. v. BART, 56 Fed. Cl. Unpub. LEXIS 2470 (Mar. 25, 2008) (affirming dismissal of California FCA qui tam action against Oakland airport prime construction contractor, where the Port Attorney was aware of the facts alleged to constitute California FCA violations more than 3 years before the action was filed).
618 358 Fed. App'x 793 (9th Cir. 2009).
its DBE status. However, a jury later concluded that BART knew or should have known that the subcontractor’s DBE representations were fraudulent more than 3 years before filing suit, resulting in more than two-thirds of the violations alleged in BART’s lawsuit being time-barred under the California FCA statute of limitation. The remaining violations corresponded to pay applications submitted by the subcontractor within the limitations period prior to BART’s filing of the California FCA action. Although these later violations were not time-barred, the Court concluded (and the U.S. Court of Appeals for the Ninth Circuit affirmed) that “BART slept on its rights” by failing to take action to prevent the DBE fraud earlier, and only awarded BART one-fourth of the maximum statutory penalty under the California FCA for each of those violations.

Where the government is intervening in an FCA action initiated by a qui tam relator, the government may amend or add detail to the relator’s FCA counts, or it may bring additional counts against the defendant, as discussed in Section III.B.3. Under the Federal FCA, as long as the amended or additional counts asserted by the government intervenor arise out of the same conduct, transactions, or occurrences alleged in the relator’s complaint, the government’s intervention pleading “shall relate back to the filing date of the complaint” of the qui tam relator, for purposes of the statute of limitation. Likewise, under State FCAs with a qui tam provision, the government’s intervention pleading will typically relate back to the date of filing of the qui tam complaint, for purposes of the State FCA statute of limitation, to the extent the government’s pleading “arises out of the conduct, transactions, or occurrences asserted by the relator’s complaint. As discussed in Section III.B.2, the government prosecuting authority may investigate the qui tam allegations for years before deciding whether to intervene. This potentially allows the government to assert new FCA counts long after the statute of limitation would have otherwise expired, as long as the qui tam complaint was timely filed.

IV. ADDITIONAL CONSIDERATIONS AND DEFENSES

A. Specific Pleading Requirement for Fraud

“A false claim allegation is an averment of fraud.” Accordingly, a complaint in federal court alleging violations of the Federal FCA must comply with Federal Rule of Civil Procedure 9(b), which requires the complaint to “state with particularity the circumstances constituting fraud or mistake.” Courts often say that this requires the FCA complaint to allege the “time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby.” Other courts will state that Rule 9(b) requires the FCA complaint to “(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.” Some courts simplify this into a requirement that FCA complaints allege the “who, what, when, where, and how” of the misconduct charged. Older court cases often also required the complaint to allege “to whom” the false statements or representations were made. However, as the Federal FCA no longer requires a false claim to be presented directly to the federal government (as discussed in Section I.C.4), Federal FCA complaints are no longer required to allege “that any claim was presented directly to the

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620 Id. at *51.
624 See, e.g., CAL. GOV’T CODE § 12654.5.
629 See, e.g., U.S. ex rel. Erickson v. Uintah Special Services Dist., 395 F. Supp. 2d 1088, 1101 (D. Utah 2005) (dismissing qui tam Federal FCA complaint filed by former county highway department employees, alleging improper diversion of federal highway funds “because they do not allege when any of the false representations were made, who made them, or to whom they were made”); U.S. ex rel. Piscitelli v. Kaba Ilco Corp., No. 11-CV-00396, 2012 U.S. Dist. LEXIS 177360 at *11 (N.D. Ohio Dec. 14, 2012) (dismissing qui tam action brought under Federal FCA and several State FCAs against supplier of locks to airports and Transportation Security Administration, where “the complaint fails to allege who heard or received the statements”).
federal government,” but still must "sufficiently allege a nexus to federal funds."631

The rationale for the specific pleading requirement is that allegations of fraud should be "specific enough to give a defendant notice of the particular misconduct alleged to constitute the fraud"632 so that he or she can formulate a defense. In the context of FCA qui tam actions, the specific pleading requirement also helps avoid “fishing expeditions” and predatory qui tam actions, to ensure that the qui tam relator actually has significant information involving the alleged fraud at the time of bringing suit and "to eliminate fraud actions in which all the facts are learned after discovery,"633 However, courts will occasionally relax this requirement, allowing qui tam plaintiffs to plead generally with respect to matters deemed to be within the defendant’s knowledge, where the courts decide that the plaintiff cannot be expected to have personal knowledge of specific facts without discovery.634 Courts will accept general pleadings or conclusory allegations that the defendant had knowledge (or other "conditions of a person’s mind" such as intent or malice).635

State rules of civil procedure also require specific pleading for fraud, which typically applies to actions brought in state courts and/or actions brought under most State FCAs.636 However, there are state-specific exceptions. For example, the Georgia FCA provides:


632 U.S. ex rel. Fryberger v. Kiewit Pac. Co., 41 F. Supp. 3d 796, 802 (N.D. Cal. 2014) (dismissing action as to individual officers, managers, and employees of LACMTA contractor under Federal FCA and California FCA pursuant to Rule 9(b)); see also City & County of San Francisco v. Tutor-Saliba Corp., No. 02-CV-05286, 2005 U.S. Dist. LEXIS 46590 (N.D. Cal. Mar. 17, 2005) (denying airport prime construction contractor’s motion to dismiss action under California FCA and San Francisco FCA pursuant to Rule 9(b)).


634 See, e.g., Chen v. EMSL Analytical, Inc., 966 F. Supp. 2d 282, 302 n.14 (S.D.N.Y. 2013) (“[R]equirements of Rule 9(b) may be relaxed in a case where the plaintiff is not in a position to know specific facts until after discovery and where the opposing party has particular knowledge of the facts . . .”). U.S. ex rel. Anthony v. Burke Eng’g Co., No. 00-CV-01216, 2004 U.S. Dist. LEXIS 18916, at *12 (C.D. Cal. Sept. 13, 2004) (relaxing the specific pleading requirement where plaintiff says there were “tens of thousands” of fraudulent transactions in violation of Federal FCA, California FCA and Nevada FCA, and the “transactions would be information within Defendant’s knowledge”).

635 Fed. R. Civ. Pro. 9(b); see also San Francisco Unified Sch. Dist. ex rel. Contreras v. Laidlaw Transit, Inc., 182 Cal. App. 4th 418, 453 n.12, 106 Cal. Rptr. 3d 84, 95 n.12 (2010) (“Allegations of the defendant’s knowledge and intent to deceive may use conclusive language, however”). As discussed in Section II.A.1.c, while “knowledge” is an essential element of an FCA cause of action, “intent” is not.

636 City of Los Angeles ex rel. Dep’t of Water & Power v. Asplundh Constr. Corp., No. 12-CV-06057, Docket No. 26, (C.D. Cal. Nov. 15, 2012) (California FCA claims must meet the heightened pleading requirements of Rule 9(b)).

In pleading a civil action brought under this article, the qui tam plaintiff shall not be required to identify specific claims that result from an alleged course of misconduct or any specific records or statements used if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations of [the Georgia FCA] are likely to have occurred and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the state or a local government to investigate effectively and defendants to defend fairly the allegations made.637

As some courts and some state legislatures have seen fit to relax the specific pleading requirements when defendants are deemed to have sufficient knowledge to mount a defense, courts reach “varying results as to the sufficiency of allegations of fraud to meet the particularity requirement of Rule 9(b)” in FCA actions.638 What one court deems sufficient to put the defendant on notice of the specific misconduct alleged to be fraud may not suffice in another court.

For example, in United States v. Sequel Contractors, Inc.,639 a qui tam plaintiff filed a Federal FCA and California FCA action against both a construction manager and paving contractor at the county-owned John Wayne Airport, alleging that the defendants colluded to cause the county to overpay the paving contractor, using FAA funds. Specifically, the qui tam relator alleged that in May 2002, the paving contractor invoiced $146,145.00 for furnishing 350 cubic yards of concrete on a specific airport project, when the contractor actually furnished only 73 cubic yards of concrete and the invoice should have totaled only $42,137.20.640 The construction manager allegedly approved the false claim, causing the county to pay the paving contractor and seek reimbursement from FAA.641 The county intervened, and filed its own complaint including much broader allegations, alleging that the May 2002 incident was one instance of a long-running scheme by which the construction manager approved false claim, causing the county to pay the paving contractor and seek reimbursement from FAA.641 The county intervened, and filed its own complaint including much broader allegations, alleging that the May 2002 incident was one instance of a long-running scheme by which the construction manager approved

637 Ga. Code § 23-3-123(c).


641 Id. at 1152-53.

642 Id. at 1150.

643 Id. at 1153.

644 Id. at 1150.

645 Id. at 1153.
sives magazine) at the airport where the work was performed and the specific timeframe (May 2002) when the false claim was presented. The complaint identified the parties (the construction manager and the paving contractor) who participated in the false claim.

The Court also accepted the much more general allegations in the county's intervention pleading against the construction manager and paving contractor as sufficient under Rule 9(b). Although the county did not identify specific projects or a specific time for each alleged false claim, the Court accepted as sufficient the allegations that “[t]he time is 1996 through 2004” and “[t]he location is the Payment Requests.” Further, although the county did not specifically identify the fraud in each pay request, the Court determined that Rule 9(b) did not require the county to “describe in detail a single specific transaction,” and accepted as sufficient the allegation that “[t]he content of the misrepresentations is overstated unit prices, overstated and accepted as sufficient the allegation that “[t]he content of the misrepresentations is overstated unit prices, overstated and accepted as sufficient the allegation that “[t]he content of the misrepresentations is overstated unit prices, overstated

The Court thus concluded that the county's general allegations also satisfied Rule 9(b) and did not dismiss the intervention pleading, although the Court did require the county “to attach copies of the 30 Job Orders, the 42 Payment Requests, and the contracts that form the basis of their claims,” to help defendants “locate the 72 misrepresentations that Plaintiffs allege they made.”

In other cases, general allegations such as those made by the county in Sequel are deemed insufficient under Rule 9(b). For example, in U.S. ex rel. Perry v. Hooker Creek Asphalt & Paving, LLC, the qui tam relator (a former ODOT employee) brought a Federal FCA action alleging that the defendant paving contractors submitted pay applications containing false certifications of quality assurance for numerous FHWA-funded ODOT projects over a 10-year period. The relator's complaint included “several specific examples of incidents that, standing alone, are sufficiently detailed to satisfy the requirements” of Rule 9(b), and (as in Sequel) alleged that the specific incidents were examples of a scheme that covered the course of more than 200 contracts.

However, the U.S. District Court for the District of Oregon determined that this failed to satisfy Rule 9(b). The Court observed that the allegations “merely provide general time frames of the contracts themselves, the general work to be performed, that billing occurred in violation of generalized specifications at some location within the areas referenced in the contract and occasionally names individual representatives of the paving contractors and ODOT who participated in the transactions. The allegations fail to "state when and where the conduct occurred (other than the general area of the contract and the contract timeframe)." Also, despite the fact that Congress had expressly removed the direct presentment requirement from the Federal FCA, the Court complained that the complaint failed to specifically allege “what information was presented to the federal government (or even ODOT for that matter), or what role the information provided in the federal government's decision to pay (or even what if anything the government paid).” Although the Sequel Court had deemed sufficient a very similar pleading strategy, the Hooker Creek Court stated that such “conclusory allegations that the elements of the [Federal FCA] are met are inadequate to meet the pleading requirements in this case.”

The Ninth Circuit's approach in Hooker Creek is typical: Although an FCA complaint is subject to dismissal for failing to allege fraud with particularity, courts typically allow the plaintiff one or more opportunities to amend in order to satisfy Rule 9(b).

B. Standing

Defendants in FCA actions will often move to dismiss based on lack of standing—that is, that the plaintiff is not a proper party to bring the action, typically because the plaintiff did not sustain damages as a result of the defendant’s alleged misconduct. However, in the case of qui tam actions, the relator “need not be damaged or personally harmed to file such a suit.” The relator has standing on an “assignment” theory—that is, the government has assigned its right to bring suit on its behalf. The Federal FCA and most State FCAs with qui tam provisions expressly provide that any “person” is authorized to bring suit.
and that the person is entitled to remain a party even after the government intervenes. Therefore, *qui tam* relators are rarely dismissed for lack of standing.

Likewise, the government is not required to actually sustain damages in order to have standing to maintain an FCA action. As long as the prosecuting agency appearing on behalf of the government is authorized to do so in the relevant FCA, the agency has standing. Even in cases where FCA actions are brought by government agencies (e.g., state or local transportation agencies) not specifically authorized to prosecute an FCA action, courts have granted the agencies standing as *qui tam* plaintiffs.

However, the broad statutory grant of standing to maintain an FCA action is balanced by legislative concerns about parasitic *qui tam* actions by opportunistic individuals who do not offer significant firsthand knowledge of the fraud against the government. Just because the statutes say that an action may be brought by “any person” does not mean that every person is able to bring an FCA action. For example, the specific pleading requirement discussed in the previous section requires a *qui tam* plaintiff to demonstrate significant knowledge about the alleged fraud at the time of bringing suit. Likewise, the original source requirement discussed in the following section requires a *qui tam* plaintiff to have independent (if not direct) knowledge of the alleged fraud if the allegations in the *qui tam* complaint are substantially similar to information that was publicly disclosed prior to bringing suit. These requirements effectively displace “standing” as the means of ensuring that the *qui tam* plaintiff is a proper party.

For example, in *Klausmeier v. Bell Constructors*, *qui tam* relators filed suit under the Federal FCA and the Florida FCA against a construction contractor for alleged false certifications.

C. Public Disclosure Bar

As originally enacted in 1863, the Federal FCA permitted relators to bring *qui tam* actions (and thus share in recovery) against false claimants even when the United States was already aware of the fraud. As discussed in Section I.C.1, Congress amended the Federal FCA in 1943 to bar parasitic *qui tam* actions, where private relators brought suit based on fraud uncovered by the government's investigation. As amended in 1943, the Federal FCA provided, “The court shall have no jurisdiction to proceed with” a *qui tam* action under the Federal FCA, “whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.” This effectively barred *qui tam* actions where the potential relator reported the false claims to the government prior to filing suit, eliminating any incentive to notify the government of potential fraud.

The 1986 amendments attempted to correct this problem to encourage more reporting of fraud and more *qui tam* actions.
As amended in 1986, the Federal FCA provided, “No court shall have jurisdiction over” a Federal FCA action “based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.”676 Most courts interpreted the 1986 language to deprive a court of jurisdiction over a qui tam action if the allegations were “substantially similar” to information that was publicly disclosed prior to filing the complaint.677

The public disclosure bar was further amended in 2010. The Federal FCA now provides:

The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—

(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

(ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or

(iii) from the news media,

unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.678

The 2010 amendments thus adopted the judicial interpretation that a relator should be prevented from sharing in recovery where the allegations in the qui tam complaint are “substantially similar” to information that had been publicly disclosed prior to filing the complaint. The 2010 amendments also clarified that the United States could block the dismissal of such an action, so that the courts are not deprived of jurisdiction over a qui tam based on prior public disclosures if the United States wants the Federal FCA action to proceed.

State FCAs with a qui tam provision typically contain some version of the public disclosure bar.679 Most have been amended since 2010 to mirror the Federal FCAs language, such that a court “shall dismiss” a State FCA action grounded in allegations “substantially the same” as prior public disclosures, unless opposed by the state.680 However, some State FCAs still provide that the court does not have jurisdiction over a State FCA action “based upon” prior public disclosures.681

As discussed in Section I.C.1, the public disclosure bar was originally included in the Federal FCA to prevent parasitic qui tam actions based on criminal indictments. The FCA allegations need not be identical to the allegations in the criminal prosecution for the public disclosure bar to apply—courts will typically bar an FCA action if disclosures made in the criminal action are sufficient to put the government on notice of the fraud that is the basis of the FCA action.

For example, in Chen v. EMSL Analytical, Inc.682 U.S. Attorneys for the Southern District of New York and Northern District of New York had initiated criminal prosecutions against air monitoring contractors, alleging false asbestos air testing services that were ultimately paid using federal funds or New York City funds. An asbestos air testing professional subsequently initiated a qui tam action against a number of other air monitoring contractors (including his former employers) under the Federal FCA, New York FCA, and New York City FCA, alleging that the defendants performed false asbestos air testing services for the New York City Department of Transportation (NYC-DOT), New York City MTA, New Jersey Transit Authority, and other federal, state, and local agencies.683 Although the FCA action involved different defendants than the criminal prosecutions, the U.S. District Court for the Southern District of New York determined that the FCA allegations were “substantially the same” as the allegations in the criminal prosecutions. “It is simply not plausible that the government officials conducting an investigation into the frauds carried out by” the criminal defendants “were not alerted by the information uncovered during those investigations to the prospect of wrongdoing by” the FCA defendants.684 Therefore, the Court held the FCA action was barred by the prior public disclosures.

The public disclosure bar also applies where the qui tam action is initiated based on information disclosed in prior civil litigation. In State of California ex rel. Standard Elevator Co., Inc. v. West Bay Builders, Inc., a prime contractor on a public construction project discovered that its structural steel subcontractor was not properly licensed and had inadequate bonding capacity. The prime contractor hired a qualified replacement, and then sued the subcontractor for the difference between the subcontractor’s bid price.685 During discovery in that lawsuit, the subcontractor learned that the prime contractor had replaced other subcontractors on the project. The subcontractor counterclaimed for damages due to its improper termination, alleging that its substitution on the project violated California public procurement law, which prohibited subcontractor substitution unless approved by the public owner. However, the trial court found in favor of the prime contractor and ordered the subcontractor to pay damages for breach of contract.686 The subcontractor subsequently brought a qui tam action against the prime contractor under the California FCA, alleging that prime contractor’s implied certifications of compliance with California public procurement law were false, due to the multiple subcon-
tractor substitutions on the project. The California Court of Appeal determined that the subcontractor’s allegations in the California FCA action that the prime contractor made multiple illegal subcontractor substitutions were “substantially similar” to the subcontractor’s allegation in the original contract action that it had been improperly terminated. In the California FCA action, the subcontractor had “simply expanded the number of subcontractors” that the prime contractor was “alleged to have improperly substituted.” Because the allegations in the original contract action were sufficient to put the government “on notice” of possible improper substitution by the prime contractor, the Court held that the California FCA action was barred due to those public disclosures.

There need not have been actual litigation or criminal prosecutions in order for the public disclosure bar to apply. In Cause of Action v. Chicago Transit Authority, a public transit agency was alleged to have falsely reported its “revenue miles,” possibly resulting in FTAs overpayment of transit grant funds to the agency. The questionable reporting had been disclosed in a 2007 report by the Illinois Auditor General, covering the years 1999 to 2004, which was provided to USDOT in 2009. In 2012, a nonprofit organization asked USDOT to investigate. Shortly thereafter, FTA formally directed the transit agency to correct its reporting for the years 2011 forward, but apparently did not require the transit agency to disgorge excess funds. The nonprofit organization brought a qui tam action against the transit agency under the Federal FCA. The U.S. Court of Appeals for the Seventh Circuit concluded that the nonprofit organization’s allegations in the 2012 lawsuit were “substantially the same as the information disclosed in the [2007] Audit Report,” despite the fact that the alleged false reporting in the FCA action “spans a broader timeframe.” The public disclosures in the audit report were sufficient to put the “responsible authority” on notice of the conduct alleged in the FCA complaint. The qui tam action was thus barred due to the public disclosures in the audit report.

As noted above, prior public disclosures do not prevent the government from bringing an FCA action, and do not prevent a qui tam action as long as the relator “is an original source of the information.” Under the Federal FCA, an original source includes an individual who “voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based” prior to the public disclosure. Since 2010, an original source also includes an individual “who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions,” and who has voluntarily disclosed this independent, additional information to the government prior to filing suit.

Prior to 2010, a qui tam relator was required to have direct and independent knowledge of the information on which the allegations are based in order to be considered an original source. The 2010 amendments allow a qui tam relator to bring a Federal FCA action, even if prior public disclosures should have put the government on notice of the potential fraud, and even if the relator was not the source of the initial disclosures, and even if the relator indirectly learned about the potential fraud. However, in order to maintain the FCA action, the qui tam relator must have voluntarily cooperated with the government, and the information provided by the relator must “materially augment” information previously possessed by the government regarding the alleged fraud. Furthermore, even when the qui tam relator is allowed to proceed with a Federal FCA action based primarily on prior public disclosures, the relator is not guaranteed a share of the proceeds, and may receive no more than 10 percent.

Most, but not all, State FCAs contain the original source exception to the public disclosure bar. A notable exception is the New Mexico FCA, which gives the court the discretion to dismiss a qui tam action based on public disclosures, upon motion by the government, regardless of whether the relator was the original source of the public disclosures. Of the State FCAs that contain an original source exception, most have been updated to reflect the 2010 amendments to the Federal FCA, but some still require the qui tam relator to have “direct and independent knowledge” of the FCA allegations in order to be an original source.

In U.S. Department of Transportation ex rel. Arnold v. CMC Engineering, the qui tam relator was a former PennDOT em-

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688 Id. at 975, 130 Cal. Rptr. 3d at 109.
689 Id. at 977, 130 Cal. Rptr. 3d at 110.
690 815 F.3d 267 (7th Cir. 2016).
691 Id. at 270, 281.
692 Id. at 270-71, 275-76.
693 Id. at 281.
694 Id. at 276.
697 Id.
698 See, e.g., U.S. ex rel. Lamers v. City of GreenBay, 168 F.3d 1013 (7th Cir. 1999) (concluding that relator was “original source” for Federal FCA action against FTA grant recipient, where relator had conducted independent investigation of transit operations that had resulted in prior FTA administrative decision against grant recipient); U.S. ex rel. Hartigan v. Palumbo Bros., Inc., 797 F. Supp. 624, 630-31 (N.D. Ill. 1992) (concluding that State of Illinois was “original source” of Federal FCA allegations against contractors and subcontractors involving numerous federally funded State transportation agency projects, where disclosures and allegations were based on State’s “extensive investigation into the alleged fraudulent practices of the major construction companies receiving both state and federal funding for state construction projects”).
699 See, e.g., U.S. ex rel. Fryberger v. Kiewit Pacific Co., 41 F. Supp. 3d 796, 809 (N.D. Cal. 2014) (allowing qui tam action under Federal FCA and California FCA to proceed against LACMTA contractor, despite prior news reports about defective construction and despite prior litigation disclosing alleged false certification of compliance, where relators conducted an independent investigation and disclosed additional details about contractor’s noncompliance).
700 See, e.g., CAL. GOV’T CODE § 12652(d)(3)(B).
702 See, e.g., IND. CODE § 5-11-5.5-7(f); N.J. STAT. § 2A:32C-9.c; TENN. CODE § 4-18-104(d)(3)(B).
ployee who determined, based on his own investigation and audit, that several consultants hired by PennDOT to provide engineering services on federally funded highway projects did not have the proper credentials. The relator reported his findings to USDOT after PennDOT failed to act on his audit. After USDOT became involved, PennDOT conducted its own investigation which identified numerous additional consultants without the proper credentials, and the news media reported the results of PennDOT’s investigation. The relator initiated a Federal FCA action against several of the improperly creden
tialed consultants identified in PennDOT’s investigation. The U.S. District Court for the Western District of Pennsylvania concluded that the relator was not the original source as to consultants who were identified in PennDOT’s investigation and who were not named in the relator’s audit. However, the Court concluded that the relator was the original source as to the defendants who were first identified in the relator’s audit, and thus the relator could maintain a qui tam action against those defendants despite the public disclosures by PennDOT and the news media. The U.S. Court of Appeals for the Third Circuit agreed that the relator qualified as the original source as to those defendants identified in his audit, because he independently reviewed the credentials of those consultants and disclosed those findings to USDOT prior to the public disclosures.

The relator must have voluntarily provided information to the government in order to qualify as the original source. In City of Chicago ex rel. Rosenberg v. Redflex Traffic Systems, Inc., a former executive of a Chicago Department of Transportation (CDOT) contractor brought a qui tam action against the contractor under the Chicago FCA, alleging that the contractor made illegal payments to a CDOT employee in order to receive contracts. The alleged bribery scheme was disclosed in a series of Chicago Tribune articles, which resulted in investigations by the Chicago OIG as well as federal law enforcement agents.

The executive had been interviewed by the investigators, and thus argued that he was an original source qualified to bring a qui tam action against the defendants despite the public disclosures by PennDOT and the news media. The U.S. Court of Appeals for the Third Circuit agreed that the relator qualified as the original source as to those defendants identified in his audit, because he independently reviewed the credentials of those consultants and disclosed those findings to USDOT prior to the public disclosures.

The relator must have voluntarily provided information to the government in order to qualify as the original source. In City of Chicago ex rel. Rosenberg v. Redflex Traffic Systems, Inc., a former executive of a Chicago Department of Transportation (CDOT) contractor brought a qui tam action against the contractor under the Chicago FCA, alleging that the contractor made illegal payments to a CDOT employee in order to receive contracts. The alleged bribery scheme was disclosed in a series of Chicago Tribune articles, which resulted in investigations by the Chicago OIG as well as federal law enforcement agents.

For example, in public construction projects, it is typical for the government to make interim or progress payments on a regular basis while the work is ongoing, long before the government receives a completed project. There will often be an agreement between the government and its contractor that these progress payments will be based on rough estimates of work performed, with the understanding that any discrepancies will be resolved in the final billing at the completion of the project. For example, progress payments on “lump sum” or fixed-price projects will often be based on interim estimates of percentage completion, with the understanding that any discrepancies will be resolved in the final billing when all line items are agreed to be 100 percent complete. Likewise, where work is to be performed according to agreed unit prices, progress payments may be based on rough estimates of quantities of work furnished, again with the understanding that the final payment may include adjustments to reflect the actual quantities furnished on the project. Where there is no agreement on the price, such as change directive work or work performed on a “time and materials” basis, contractors will often request payment based on estimated costs, with the understanding that the final approved price will be determined later.

D. Government Knowledge Defense

Defendants to FCA actions will often assert the government’s knowledge as a defense—that is, that even if they made a misrepresentation in support of a claim for government funds, it is not punishable if the government had knowledge of the true state of facts. One problem for defendants making this argu-
ment is that FCAs, in the enumeration of activities that conсти-
tute FCA violations, focus on the activity of the false claimant and are silent as to the knowledge of the government. There is no express exception from liability for making misrepresentations that the government knows to be false.

However, courts often say that the government’s knowledge can “vitiates” a false claim. It is sometimes said that government knowledge is not a true defense, but rather creates an “inference” that all of the required elements of an FCA action are not satisfied when the government has knowledge that a claim is false at the time it is made. Specifically, the government’s knowledge can make it difficult to establish falsity, knowledge, and materiality.

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In all of these cases, the estimates (of cost, quantities,

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704 Id. at 640.
705 Id. at 643.
706 Id. at 644.
707 Id. at 645-46.
709 884 F.3d 798 (7th Cir. 2018).
710 Id. at 800-01.
or percentage completion) submitted by the contractor with a progress payment application are probably not entirely accurate, but neither are they “false,” because the government knows and expects the contractor to submit estimates.

In other cases, where the government and claimant have an agreement or understanding about the meaning of the claimant’s representations, courts will conclude that the government’s understanding negates the knowledge element.\textsuperscript{717} This often applies to allegations of false certifications of regulatory compliance. Where it is unclear how a regulation should be interpreted or applied, a contractor may rely on the interpretation of its government customer, which could result in a compliance certification that is technically false if the government’s interpretation of the regulation is incorrect. However, where the government understands the true state of facts, and the contractor relies on the government’s understanding in certifying compliance, courts will often say that the contractor did not “knowingly” present a false claim.\textsuperscript{718}

The examples discussed above involve statements that, while technically false, are relatively innocent. FCA actions typically allege more sinister, or intentional, misrepresentations, such as invoicing for amounts to which the claimant is not entitled. In these cases, where the government payor is aware of the misrepresentation, but still pays the claim, then some courts will conclude that the false statement was not material.\textsuperscript{719} The logic is to recover on California FCA count against its public works contractor, where “the City directed DRW to perform changes on a time and materials basis;” the City requested an estimate of the cost of work, told DRW to commence work and agreed the parties would negotiate a lump sum payment at a later date); Lee v. N. Bay Const., Inc., No. A123862, 1010 Cal. App. Unpub. LEXIS 3714 at *12 (May 20, 2010) (affirming dismissal of City’s California FCA count against its public works contractor, where city and contractor agreed that contractor “would submit estimated payment requests and the parties would conduct a detailed audit later to determine whether the payments had been too high or too low”).

\textsuperscript{717} See, e.g., U.S. ex rel. Totten v. Bombardier Corp., 380 F.3d 488, 496 (D.C. Cir. 2004) (“If the claimant has told the grantee pertinent facts that would, in the absence of such disclosure, make a claim fraudulent, it seems that the claimant has not ‘knowingly’ presented a false claim to the grantee.”); U.S. v. Shasta Services, Inc., 440 F. Supp. 2d 1108, 1113 (E.D. Cal. 2006) (“If the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim.”) (citations omitted).

\textsuperscript{718} See, e.g., U.S. v. Shasta Services, Inc., 440 F. Supp. 2d 1108, 1113-14 (E.D. Cal. 2006) (dismissing Federal FCA and California FCA action against Caltrans contractor, because defendants did not “knowingly” falsify DBE compliance certification, where Caltrans was aware of FHWA investigation into DBE noncompliance at the time it paid contractor’s claims); U.S. ex rel. Nguyen v. City of Cleveland, Ohio, No. 00-CV-00208, 2005 U.S. Dist. LEXIS 22103, at *17 (N.D. Ohio Sept. 30, 2005) (granting summary judgment to defendant airport owners in Federal FCA action, because defendants did not “knowingly” falsify environmental compliance certifications made to FAA, where the certifications were “based on facially reliable published emission factors promulgated by credible sources, not the least of which is the FAA”).

\textsuperscript{719} See, e.g., San Francisco Bay Area Rapid Transit Dist. v. Spencer, No. 04-CV-04632, 2006 U.S. Dist. LEXIS 88022 (N.D. Cal. Dec. 5, 2006), aff’d, 358 Fed. App’x 793 (9th Cir. 2009) (granting summary judgment to defendant in California FCA action brought by BART alleging false DBE certifications, because DBE certification could not have been material to BART if it did not consider subcontractor to be a valid DBE at the time it awarded the contracts).

This government knowledge defense or inference is not absolute. Where a false claimant conspires with a government representative to get a false claim paid, the government representative’s knowledge that the claim is false does not immunize the false claimant. In that situation, courts usually find exceptions or distinctions that overcome the inference and hold the false claimant liable.\textsuperscript{720} Where there is a government representative who has actual knowledge of the fraud or scheme, courts will often conclude that a different government official, or a different government agency, was required to have knowledge of the fraud in order to invoke the government knowledge defense or inference. For example, in the grantor–grantee context, courts may say that the government knowledge defense or inference is not applicable where the grantee agency was aware of the fraud, but the grantor agency (against whose funds the false claim was made) was not aware of the fraud. For example, in U.S. Department of Transportation ex rel. Arnold v. CMC Engineering,\textsuperscript{721} the U.S. Court of Appeals for the Third Circuit concluded that the “government knowledge” defense or inference was inapplicable, where it was alleged that PennDOT knew that its contractor misrepresented its employees’ credentials on federally funded highway projects, but there was no evidence that the federal government knew. Likewise, in Veridyne Corp. v. United States,\textsuperscript{722} the U.S. Court of Appeals for the Federal Circuit concluded that the government knowledge defense did not absolve a USDOT contractor for its false statement of Small Business Administration (SBA) eligibility, even though USDOT knew that its contractor was ineligible for an SBA award, because SBA was not aware that the contractor’s statements were fraudulent.

Defendants often try to invoke the government knowledge defense or inference even when they did not disclose their fraud to the government, on the theory that the government should have known the truth, negating one or more required elements of an FCA action. For example, the defendant may argue that the government contracting agency would have known the truth if it had exercised reasonable diligence in monitoring its contrac-
tor. Conversely, where the government did diligently monitor its contractor, the defendant may argue that the government likely did know the truth, and the action should be barred due to the government’s likely knowledge. These types of arguments typically do not result in dismissal of the FCA action unless the defendant can show that the government had actual knowledge that the claim was false at the time it was made.

Even when an FCA action is not barred by the government knowledge defense or inference, the government’s actual knowledge that a claim was false can limit the FCA action in other ways. For example, under the public disclosure bar discussed in the previous section, a qui tam action must be dismissed if publicly disclosed information was sufficient to put the government on notice of the alleged fraud before the qui tam action was filed. Where the government had knowledge of the false statements at the time they were made, there will often be contemporaneous public records (e.g., communications, reports, etc.) generated by the government officials who had knowledge of the false statements that can be used to dismiss the qui tam action pursuant to the public disclosure bar. Also, as discussed in Section III.C.4, the contracting agency’s knowledge of the conduct constituting the alleged fraud can implicate the running of the statute of limitation under some State FCAs.

E. Res Judicata and Collateral Estoppel

FCA actions may be barred due to the preclusive effect of prior rulings on the merits, under legal concepts such as res judicata or collateral estoppel. These concepts are examined in Missud v. City and County of San Francisco, a California FCA action alleging fraudulent conduct by the San Francisco Municipal Transit Authority. The Missud Court noted that there is

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“significant overlap” between res judicata and collateral estoppel. Res judicata, or “claim preclusion,” prevents relitigation of the same cause of action between the same parties (or parties in privity with them) after a final judgment on the merits. Collateral estoppel, or “issue preclusion,” prohibits the relitigation of issues decided in a previous action between the same parties (or parties in privity with them), even if the second action involves different causes of action. In Missud, the California FCA count was barred by res judicata because the qui tam plaintiff had asserted substantially the same California FCA count against the San Francisco Municipal Transit Authority in a previous suit that was dismissed with prejudice.

FCAs often have similar preclusion concepts codified in the FCA statutes themselves. As discussed in Section III.C.1.c, the Federal FCA provides that “the Government may elect to pursue its claim through any available alternate remedy available to the Government, including any administrative proceeding to determine a civil monetary penalty,” and State FCAs typically contain a similar provision. “Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an FCA action. The alternative civil or administrative proceeding has become “final” if it is not subject to appeal, or if the time to appeal has expired, or if all appeals have been exhausted. When the government is a party to any “civil suit or administrative civil monetary penalty proceeding,” all other persons are barred from instituting an FCA action based on the same allegations or transactions.

The FCA expressly gives preclusive effect only to final decisions in proceedings in which the government is a party. Likewise, the common law claim preclusion concepts discussed above bar relitigation between the same parties (or parties in privity with them). Because the government is always the real party in interest in an FCA action, the outcome of a civil or administrative proceeding between private parties, in which the government is not a party, will likely not bar a later FCA action involving the same issues. For example, the outcome of a retaliation action brought against a government contractor by a whistleblower employee probably will not bar a qui tam FCA action brought later by the employee against the contractor on behalf of the government.

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723 See, e.g., City & County of San Francisco v. Tutor-Saliba Corp., No. 02-CV-05286, 2005 U.S. Dist. LEXIS 46590, at *38 (N.D. Cal. Mar. 17, 2005) (denying summary judgment to airport construction contractor as to California FCA count, where the defendant argued that its alleged schedule misrepresentations submitted with progress pay applications were not material, “because Plaintiffs were capable of observing the progress of the construction work and deciding for themselves, at the time, whether the . . . Defendants’ schedule statements were accurate”).
724 See, e.g., Lee v. N. Bay Const., Inc., No. A123862, 2010 Cal. App. Unpub. LEXIS 3714 (Cal. Ct. App. May 20, 2010) (dismissing qui tam complaint pursuant to public disclosure bar, where city audit showed that city was aware of alleged overbillings by its roadwork contractor at the time the claims were made).
725 See, e.g., Debro v. Turner Const. Co., No. A117338, 2008 Cal. App. Unpub. LEXIS 2470 (Cal. Ct. App. Mar. 25, 2008) (affirming dismissal of California FCA qui tam action against Oakland airport prime construction contractor, where the Port Attorney was aware of the facts alleged to constitute California FCA violations more than 3 years before the action was filed).
727 See, e.g., Lee v. N. Bay Const., Inc., No. A123862, 2010 Cal. App. Unpub. LEXIS 3714 (Cal. Ct. App. May 20, 2010) (dismissing qui tam complaint pursuant to public disclosure bar, where city audit showed that city was aware of alleged overbillings by its roadwork contractor at the time the claims were made).
728 See, e.g., Fla. Stat. § 86845 (5); 740 Ill. Comp. Stat. § 1754(4c)(5); Ind. Code § 5-11.5-5-5(h); Iowa Code § 683.3.3.e; Mass. Gen. Laws ch. 12, § 5E; Minn. Stat. § 15C.06(c); N.J. Stat. § 2A:32C-6.h; N.M. Stat. § 449-6.8; N.C. Gen. Stat. § 1-609(h); Ohio. Stat. tit. 63, § 5053.3.D.
729 Id.
The application of collateral estoppel in the FCA context was examined in *United States v. TDC Management Corp.*736, a Federal FCA action against a USDOT contractor hired to develop a bonding program for minority business enterprises. A dispute arose over progress, and USDOT terminated the contractor and withheld payments requested by the contractor, contending that the contractor had been overpaid. The contractor initiated an action with the USDOT Board of Contract Appeals (DOTBCA) seeking full payment, and USDOT asserted a counterclaim in the DOTBCA action seeking recovery of the alleged overpayments.737 While the DOTBCA action was pending, the United States initiated a Federal FCA action against the contractor, alleging that the contractor submitted false progress reports to USDOT with its pay requests, and also that the contractor failed to disclose its unauthorized financial interest in the bonding program.738

The DOTBCA action proceeded, with DOTBCA finding that the contractor intentionally failed to disclose its financial interest in the bonding program to USDOT.739 However, DOTBCA recognized that its jurisdiction did not extend to claims involving fraud, and expressly reserved ruling whether the contractor's failure to disclose its financial interest in the bonding program constituted fraud.740 DOTBCA ruled that the contractor did not overstate its progress and was entitled to the amounts it had requested, a decision that was ultimately affirmed by the U.S. Court of Appeals for the Federal Circuit.741

With the favorable DOTBCA ruling affirmed by the Federal Circuit, the contractor sought summary judgment in the Federal FCA action based on collateral estoppel.742 The U.S. Court of Appeals for the D.C. Circuit agreed that the government was collaterally estopped from relitigating the accuracy of the contractor's progress reports, which DOTBCA concluded (and the Federal Circuit affirmed) were accurate.743 However, the D.C. Circuit reversed, holding that the government was not collaterally estopped from bringing its Federal FCA action based on information that the contractor omitted from its progress reports, such as the contractor's failure to disclose its financial interest in the bonding program, because DOTBCA had expressly reserved ruling on that issue.744

After years of litigation in the Federal FCA action, the government later moved for summary judgment against the contractor on the basis of collateral estoppel.745 The U.S. District Court for the District of Columbia granted the motion, concluding that the contractor was collaterally estopped from relitigating the DOTBCA finding that the contractor had intentionally failed to disclose its interest in the bonding program, so the contractor was liable under the Federal FCA.746 The contractor appealed this application of collateral estoppel, arguing that DOTBCAs finding that it had intentionally omitted information was not a final disposition on the merits, where DOTBCA had expressly reserved ruling whether that nondisclosure constituted fraud.747 On appeal, the D.C. Circuit agreed with the contractor that the trial court's application of collateral estoppel was "clear error,"748 but nevertheless affirmed the decision, ruling that the contractor waived the argument by failing to raise the argument either in opposing the government's motion for summary judgment or later in the contractor's motion for clarification.749 Thus, despite previously affirming an award of $778,613 to the contractor on its contract claim based on collateral estoppel of the DOTBCA ruling, the D.C. Circuit now affirmed a $1,285,198 judgment against the contractor on the Federal FCA count based on collateral estoppel of the same DOTBCA ruling.750

There was a similar outcome in *Tutor-Saliba-Perini J.V. v. Los Angeles County Metropolitan Transportation Authority,*751 in which LACMTA asserted a California FCA count against its prime construction contractor, related to additional compensation requested by the contractor to supply tunnel sub-grade handrails. LACMTA and the contractor disputed whether the handrails were required by the plans and specifications, so the contractor's claim was submitted to a dispute review board ("DRB"), which determined that the contractor was entitled to additional compensation. The contractor argued that by failing to challenge the DRB ruling within 21 days, and instead issuing a change order to the contractor for the handrails, "the DRB ruling became final and binding" and LACMTA "was thereafter precluded from challenging it."752 However, evidence and testimony at trial suggested that the contractor knew at the time of the DRB proceedings that handrails were a requirement of its contract, but used "false and deceptive documents" in order "to deceive the DRB."753 Although the DRB ruled in favor of the contractor as to its contract claim, the issue of fraud was not before the DRB—the DRB's decision "was a product of [the contractor]’s unlawful scheme, not a validation of it."754 The California Court of Appeal thus declined to give the DRB ruling preclusive effect, and affirmed a California FCA award in favor of LACMTA.

FCAs typically contain separate statutory provisions that preclude relitigation of issues decided in criminal proceedings. The Federal FCA provides that "a final judgment rendered in favor of the United States in any criminal proceeding charg-
ing fraud or false statements . . . shall estop the defendant from denying the essential elements of the offense” in a Federal FCA action “which involves the same transaction as in the criminal proceeding.”755 State FCAs typically contain a similar provision.756 This is a more limited version of collateral estoppel or issue preclusion, as it only arises from criminal charges of “fraud or false statements” and only runs in favor of the government.

In U.S. ex rel. Green v. Schuykill Products, Inc.,757 the officer of a highway concrete products manufacturing company had been prosecuted for DBE fraud on federally funded PennDOT projects. The officer pled guilty to engaging in a conspiracy “to defraud the United States by impeding, impairing, obstructing, and defeating the lawful governmental functions of the United States Department of Transportation in the implementation, execution, and administration of its Disadvantaged Business Enterprises program.”758 His former employee, who had been the original source of information that led to the investigation and criminal prosecution, initiated a Federal FCA qui tam lawsuit against both the company and the officer individually. Although the company did not answer the lawsuit, the officer answered and denied presenting false claims. However, the U.S. District Court for the Middle District of Pennsylvania concluded that the officer’s guilty plea in the criminal case conclusively established the elements of the Federal FCA cause of action, and entered judgment against him as a matter of law.759

F. Federal Preemption

In some cases, states or local governments will be barred from using State FCAs to recover transportation funds involving issues that have been pre-empted by federal transportation legislation. In State FCA litigation brought against the courier service DHL Express, qui tam relators alleged that DHL over-billed state governments by, among other things, including fuel surcharges for aviation fuel when the packages were not transported by air. Both the Florida Court of Appeal760 and New York Court of Appeals761 held that the actions under the Florida FCA and the New York FCA, respectively, were preempted by the Federal Aviation Administration Authorization Act762 and Airline Deregulation Act of 1975,763 both of which prohibit states and their political subdivisions from enforcing laws “related to a price, route, or service” of a carrier that transports property. This preemption defense may be available to State FCA defendants accused of defrauding state or local transportation agencies, where the federal government “occupies a legislative field”764 of the subject matter underlying the fraud. This could frequently come into play with allegations of false claims made to state aviation departments or local airport authorities, as several aspects of airport operations, including aviation safety and noise regulation, have been federally preempted.765

V. WHISTLEBLOWER RETALIATION ACTIONS

The Federal FCA provides a separate cause of action to protect individuals who suffer retaliatory employment actions (e.g., wrongful termination) as a result of protected activity such as reporting or assisting in the investigation or prosecution of false claims.766 Congress added this “whistleblower retaliation” provision to the Federal FCA in 1986 “in order to ensure that individuals who investigate and report their employers’ violations of the FCA will not face adverse consequences.”767 It was believed that this additional protection was required because the qui tam relator’s potential financial recovery was not a sufficient incentive to expose false claims made by one’s employer where the whistleblower is putting his or her job or career at risk. “[W]e all put our faith in the integrity of the construction companies that build our roads and highways. Although financial incentives can certainly encourage whistleblowers to come forward—especially employees who will likely lose their jobs and possibly become unemployable in their fields for exposing fraud—whistleblowing is about much more than money. Whistleblowing is about people.”768

Most State FCAs also include whistleblower retaliation provisions modeled after the Federal FCA provision. This section addresses the “whistleblower retaliation” aspect of FCAs with a focus on how the provision applies to false claims made to state transportation agencies.

758 Id. at *7.
759 Id.
760 DHL Exp. (USA), Inc. v. State, ex rel. Grupp, 60 So. 3d 426, 428 (Fla. Ct. App. 2011).
763 Pub. L. 95-504, Sec. 4(a), 92 Stat. 1705,1707 (codified at 49 U.S.C. § 41713(b)(1)).
768 Cleveland Lawrence III’s introductory statement, Taxpayers Against Fraud, EDUCATION FUND QUARTERLY REVIEW (Apr. 2015).
A. Retaliatory Acts Covered

As a threshold matter, in order to state a claim under the whistleblower retaliation provision, the whistleblower must have faced some sort of adverse employment action. Under the Federal FCA, the whistleblower plaintiff must have been “discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment”\(^\text{769}\) as a result of the plaintiff’s protected activity. State FCAs typically recite the same list of retaliatory actions that may give rise to a whistleblower retaliation action under the State FCA,\(^\text{770}\) although a few contain subtle differences. For example, in addition to the standard list of retaliatory actions, the New Jersey FCA, New Mexico FCA, and Tennessee FCA all also expressly provide that an employer cannot “deny promotion” to an employee due to the employee’s protected activity.\(^\text{771}\)

It is easiest to show that there has been adverse employment action where the person has involuntarily lost his or her job. Accordingly, almost all whistleblower retaliation claims allege wrongful termination.\(^\text{772}\) It is more difficult to show that there was an adverse employment action where the employer has not fired the employee, such as where the employee is allowed to voluntarily resign in lieu of being terminated.\(^\text{773}\) For example, in VanLandingham v. Grand Junction Regional Airport Authority,\(^\text{774}\) a former airport employee alleged that she was wrongfully terminated for expressing her concerns that the airport’s federally funded fencing project was ineligible for federal funds. However, the U.S. District Court for the District of Colorado granted the airport’s motion to dismiss the former employee’s Federal FCA whistleblower retaliation action, finding that she had voluntarily executed a separation agreement and general release of all causes of action arising from the employment relationship.\(^\text{775}\)

The U.S. Court of Appeals for the Tenth Circuit affirmed the dismissal, holding that an individual can waive a whistleblower retaliation action (as opposed to a qui tam action)\(^\text{776}\) because the individual, and not the government, is the true party in interest.

It can be even more difficult to maintain a whistleblower retaliation action where the employee has not been terminated, but has been merely assigned different responsibilities. It is not always clear that a reassignment is an adverse employment action such as a demotion that would warrant a whistleblower retaliation action under an FCA.\(^\text{777}\) In deciding whether the employment action is adverse, courts will consider whether the reassignment results in lower pay and worse working conditions for the reassigned employee.\(^\text{778}\)

One thing that is clear is that whistleblower retaliation actions only provide relief for adverse actions against individuals in the employment context, not for adverse actions against corporate entities in the contracting context. As discussed in the following section, although the Federal FCA historically provided a whistleblower retaliation cause of action only for an “employee,” it was amended in 2009 to allow a whistleblower cause of action to be brought by an “employee, contractor, or agent.”\(^\text{779}\)

The purpose of this amendment was to extend whistleblower retaliation protection to individuals who provide labor or services and are functionally employees but are classified as independent contractors,\(^\text{780}\) not to extend whistleblower retaliation protection to corporate entities who enter into public contracts. Termination of a contract or subcontract with a corporate entity (e.g., to perform work on a state transportation agency project) does not form the basis of an FCA whistleblower retaliation action, even if the contract or subcontract was terminated because of the corporate entity’s efforts to prevent fraud on government funds.\(^\text{781}\)

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\(^\text{770}\) See, e.g., Cal. Gov’t Code § 12653(a).


\(^\text{773}\) See, e.g., O’Shell v. Cline, 571 Fed. App’x 487, 489 (7th Cir. 2014) (affirming dismissal of whistleblower retaliation action by former Indiana DOT employee under Federal FCA and Indiana FCA, where plaintiff had been “allowed to resign” rather than fired “in order to preserve her accrued vacation and sick leave”).

\(^\text{774}\) 46 F. Supp. 3d 1119 (D. Colo. 2014), aff’d, 603 Fed. App’x 657 (10th Cir. 2015).

\(^\text{775}\) Id. at 1125.

\(^\text{776}\) VanLandingham v. Grand Junction Regional Airport Auth., 603 Fed. App’x 651, 661 (10th Cir. 2015).

\(^\text{777}\) See, e.g., Hunt v. Cent. Consol. Sch. Dist., 951 F. Supp. 2d 1136, 1148, 1246 (D.N.M. 2013) (dismissing New Mexico FCA whistleblower retaliation count where alleged retaliation was employee’s reassignment from “Transportation Director” to “Transportation Coordinator”).

\(^\text{778}\) See, e.g., Smith v. Clark/Smoot/Russell, 796 F.3d 424, 434 (4th Cir. 2015) (reversing dismissal of Federal FCA retaliation count by reassigned employee of construction contractor, where plaintiff alleged that “he was transferred to a lower-paying job site that substantially increased his commute time and transportation costs”).


\(^\text{780}\) See, e.g., Lytle v. Capital Area Intermediate Unit, No. 05-CV-00133, 2009 U.S. Dist. LEXIS 48985 (M.D. Pa. June 11, 2009), aff’d, 393 Fed. App’x 953 (3d Cir. 2010) (granting summary judgment to defendant as to Federal FCA whistleblower cause of action that accrued prior to effective date of 2009 amendments, where individual plaintiffs were not technically employees but rather independent transportation contractors).

\(^\text{781}\) See, e.g., U.S. ex rel. Fryberger v. Kiewit Pac. Co., 41 F. Supp. 3d 796, 813 (N.D. Cal. 2014) (concluding that Federal FCA “entitles only individual employees, contractors, or agents to sue for retaliation,” and dismissing whistleblower retaliation count, where alleged “retaliation” was prime contractor’s termination of subcontractor limited liability company due to subcontractor’s allegations of fraud by prime contractor on Caltrans project).
B. Protected Activities and Individuals

In addition to suffering an adverse employment action, the plaintiff in an FCA whistleblower retaliation lawsuit must show that the adverse employment action was retaliation for engaging in activity protected under the FCA whistleblower retaliation provision. The original 1986 version of the Federal FCA whistleblower retaliation provision allowed an “employee” to bring suit due to retaliation “by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under” the Federal FCA. The 2009 amendment to the Federal FCA provides that the individual need not have acted “in furtherance of an action” under the Federal FCA—the individual may also bring suit for retaliation for “other efforts to stop 1 or more violations of” the Federal FCA. This clarifies that the individual need not have initiated a qui tam lawsuit, nor assisted the government in an FCA lawsuit, in order to seek relief under the whistleblower retaliation provision—the individual need only allege retaliation due to efforts to prevent false claims. Most State FCAs containing whistleblower retaliation provisions have likewise been amended to extend protection to “other efforts” to prevent false claims. However, some State FCAs still only provide retaliation protection for employee acts in furtherance of an “action” under the State FCA.

Where the whistleblower plaintiff has not initiated a qui tam action, the courts must decide whether the plaintiff has engaged in protected activity—that is, “other efforts” to prevent false claims. In the absence of FCA litigation to prosecute false claims, “courts have struggled to place tangible limits on what sort of activity qualifies for protection under the FCAs anti-retaliation provision.” In McCrory v. Knox County, Indiana, a former county highway department employee brought suit under the whistleblower retaliation provisions of both the Federal FCA and the Indiana FCA when he was terminated after objecting to the allegedly improper use of county resources to grade a private road. Although the plaintiff alleged that the county highway department received “Federal and Indiana funds for road repair, road construction, bridge repair, bridge construction and purchase of equipment and materials,” he did not allege “that the federal government will be responsible for paying or reimbursing any portion of the costs associated with the allegedly fraudulent grading job.” Therefore, his objection to the grading job did not implicate protected activity under the Federal FCA—his allegations did not “suggest he was terminated as a result of investigating or reporting false claims to the federal government or to a program operated by a grantee of the federal government”—so his Federal FCA whistleblower retaliation action was dismissed. Likewise, in Green v. City of St. Louis, Missouri, the former director of the city M/WBE program brought a whistleblower action under the Federal FCA, alleging he was terminated for objecting to improper M/WBE certifications of contractors for the Lambert St. Louis Airport. However, because “he could not identify any grant applications that made false assertions about inclusion of women and minorities and he could not identify any reports submitted to the federal government that were based on false certifications,” his objections did not constitute protected activity, and the U.S. Court of Appeals for the Eighth Circuit affirmed dismissal of his whistleblower action.

In addition to engaging in protected activity, the individual must show that he or she is a proper plaintiff entitled to bring suit under the whistleblower retaliation provision. The 2009 amendment to the Federal FCA whistleblower retaliation provision provide that the action may be brought by any “employee, contractor, or agent,” although none of those terms are defined. The “additional terms” were intended to protect persons who were “not technically employees within the typical employer–employee relationship, but nonetheless have a contractual or agent relationship with an employer.” Interestingly, however, the term “employer” no longer appears in the Federal FCA after the 2009 amendments, although the retaliation action would typically be brought against an employer. Most State FCAs containing a whistleblower retaliation provision have been amended to adopt the language of the Federal FCA, extending

784 See, e.g., CAL. GOV’T CODE § 12653(a).
785 See, e.g., FLA. STAT. § 68.088, KAN. STAT. § 75-7506, N.J. STAT. § 2A:32C-10, TENN. CODE § 4-18-105.
788 200 F. Supp. 3d 782 (S.D. Ind. 2016)
789 Id. at 788.
protection to an “employee, contractor, or agent.” However, some State FCAs still only provide protection for employees.

1. Contractor Employees

The classic FCA whistleblower retaliation lawsuit is brought by an employee of a government contractor, alleging that he or she was terminated for trying to prevent the contractor from making false claims for public funds. Disgruntled former employees of government contractors frequently are able to allege activities by their former employer that could constitute false claims. However, such plaintiffs often have difficulty maintaining actions under an FCA whistleblower retaliation provision, because it can be difficult to show that they were terminated because of their efforts to prevent such false claims. Specifically, if the plaintiff cannot show that his or her former employer was aware of the plaintiff’s efforts to prevent false claims, then the plaintiff cannot show that those efforts were the reason for his or her termination.

On government-funded construction projects, whistleblower retaliation actions frequently involve allegations of defective or nonconforming work, which the plaintiff alleges resulted in claims for payment to which the contractor was not entitled. The plaintiff is often able to show that he or she expressed concerns to the contractor about the quality of the construction work, and possibly even that disagreements over the quality of the construction work led to the plaintiff’s termination. However, unless the plaintiff can show that he or she notified the contractor that it was making false claims for payment, a mere disagreement about work quality is typically too attenuated from efforts to prevent false claims to support a whistleblower retaliation action. For example, in U.S. ex rel. Patton v. Shaw Services, L.L.C., the plaintiff alleged that his former employer performed “construction to less than contract specifications and/or applicable building codes at the Louisiana State Transportation Center.” The plaintiff alleged that his employment as a carpenter was terminated after he raised concerns internally about his employer’s “unsafe or improper construction methods.” Affirming summary judgment in favor of the employer, the U.S. Court of Appeals for the Fifth Circuit determined the employee’s whistleblowing related to construction methods, not to his employer’s claims for payment as required to support a Federal FCA whistleblower retaliation action: “Mere criticism of [the employer’s] construction methods, without any suggestion that [the plaintiff] was attempting to expose illegality or fraud within the meaning of the FCA, does not rise to the level of protected activity.” Likewise, in U.S. ex rel. Fryberger v. Kiewit Pacific Co., the plaintiff’s whistleblower retaliation count was dismissed where the complaint alleged that a construction superintendent on a highway-widening project was terminated for complaining that retaining wall construction did not comply with specifications, not because he believed his employer was “possibly committing fraud against the government.” Merely disagreeing about construction methods was not a “protected activity.”

Similarly, courts often consider whether the employee’s alleged efforts to prevent false claims amount to anything more than the employee simply performing his or her job. In U.S. ex rel. Ivanov v. Exelis, Inc., a former test engineer for an FAA contractor alleged that he was terminated after informing his employer that it was not correctly performing all contractually required testing required for an air traffic control system. The plaintiff’s Federal FCA whistleblower retaliation count was dismissed because his alleged investigation of product testing was not a protected activity “beyond his normal job responsibilities as a test engineer.” In Boyd v. Keystone Construction, a former project manager for a construction contractor alleged that her job duties required her to evaluate cost proposals and change order requests as to entitlement, cost, and scope, and that these job responsibilities put her in an adversarial position with the contractors making the proposals. After complaining in writing to her employer about the manner in which she was treated by the contractors whose cost proposals she was assigned to evaluate, the project manager was terminated for not processing the change orders “fast enough.” Her subsequent Indiana FCA whistleblower retaliation action was dismissed because the written complaint that preceded her termination dealt with “the ‘professional and personal impact’ this unfair treatment is having on her, not concern about the misuse of public funds.”

On the other hand, in U.S. ex rel. Besancon v. UChicago Argonne, LLC, the former CFO of a government contractor alleged that, in his capacity as CFO, he discovered false or fraudulent certifications, disclosures, “cost statements and overhead rate sheets” for work performed for federal agencies including USDOT. Although his investigation of the contractor’s billing practices was performed in his capacity as CFO of the contractor, this was deemed to be protected activity sufficient to withstand dismissal and state a cause of action under the whistleblower provisions of both the Federal FCA and the Indiana FCA, where “he claims to have been terminated

See, e.g., Cal. Gov’t Code § 12653(a).


418 Fed. Appx 366, 369 (5th Cir. 2011).

Id. at 369.

Id. at 372.

Id.
for failing to participate in the alleged scheme to overcharge the government.814

2. Government Employees

Generally speaking, FCA whistleblower retaliation provisions offer more protection for contractor employees than for employees of government agencies, such as state transportation agencies, who suffer adverse employment actions for their efforts to prevent fraud. The U.S. Supreme Court ruled in 2000 that state agencies were not subject to liability under the *qui tam* provision of the Federal FCA in *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens.*815 Courts have applied the *Stevens* holding to also bar Federal FCA whistleblower lawsuits against state transportation agencies by disgruntled employees or former employees.816

However, local government employees are protected by the Federal FCA whistleblower retaliation provision, as the U.S. Supreme Court has held that local governments are subject to suit in federal court under the Federal FCA.817 In *U.S. ex rel. Erickson v. Uintah Special Services District,*818 a former county road superintendent brought a *qui tam* Federal FCA action against the county, alleging various diversions of funds allegedly intended for county highway projects. The plaintiff also included a Federal FCA whistleblower retaliation count, alleging that he was terminated after reporting the alleged improper diversions of funds "to representatives of the state and federal government."819 The U.S. District Court for the District of Utah dismissed the Federal FCA *qui tam* count, as the funds in question were state funds, not federal funds, and the complaint alleged that the state government, not the federal government, required the funds to be used for highway work.820 However, the Court allowed the plaintiff to maintain his Federal FCA whistleblower retaliation count, alleging that he was terminated after reporting the allegedly illegal diversions of highway funds, and he "need not have a successful FCA claim to have an FCA retaliation claim."821

State transportation agency employees may or may not have whistleblower retaliation protection under State FCAs. Some State FCAs expressly preserve concepts of sovereign immunity, so that State FCA whistleblower retaliation actions cannot be brought against state transportation agencies. For example, in *O'Shell v. Cline,*822 a former Indiana DOT employee asserted whistleblower retaliation counts under both the Federal FCA and the Indiana FCA, alleging she was forced out of her job after discovering that Indiana DOT used FHWA funds for ineligible purposes.823 After dismissing the Federal FCA whistleblower retaliation count in light of *Stevens,* the U.S. District Court for the Southern District of Indiana also dismissed her Indiana FCA whistleblower retaliation count, because the Indiana FCA did not expressly include state agencies such as Indiana DOT in its enumeration of entities subject to suit under its whistleblower retaliation provision.824 The U.S. Court of Appeals for the Seventh Circuit affirmed, stating that "Indiana state law expressly preserves sovereign immunity in false-claims suits."825

Some State FCAs expressly provide that government employees (e.g., state transportation agency employees) may bring suit against their employer under the State FCA whistleblower retaliation provision.826 For example, the Virginia FCA, which includes a whistleblower retaliation provision to bar retaliation by "employers," defines "employer" to include "the Commonwealth," and also defines "employee" to include "an employee or officer of the Commonwealth."827 In addition, the whistleblower retaliation provision of the Virginia FCA expressly provides that it constitutes "a waiver of sovereign immunity and creates a cause of action by an employee against the Commonwealth if the Commonwealth is the employer responsible for the adverse employment action."828

Like the Virginia FCA, the New Mexico FCA defines "employer" to include "the state and any of its agencies, institutions, or political subdivisions."829 In *Hunt v. Central Consolidated School District,*830 a former local government employee brought suit under the New Mexico FCA, alleging that his reassignment from "Transportation Director" to "Transportation Coordinator" was a demotion constituting retaliation under the New Mexico FCA whistleblower retaliation provision.831

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814 Id. at *13.
815 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000).
818 *Id.* at 1102.
819 *Id.* at 1102-03.
820 *Id.* at 1098.
821 *Id.* at 1102-03.
823 *Id.* at 489.
824 *O'Shell v. Cline,* No. 11-CV-01660, 2013 U.S. Dist. LEXIS 192776, at *14 (S.D. Ind. Nov. 20, 2013), *aff'd,* 571 Fed. Appx 487 (7th Cir. 2014) (citing the definition of "person" subject to suit under Ind. Code § 5-11-5.5-1(5)).
825 *O'Shell v. Cline,* 571 Fed. Appx. 487, 491 (7th Cir. 2014) (citing Ind. Code § 5-11-5.5-7(d), which bars an Indiana FCA *qui tam* action against the state "based on information known to the state at the time the action was brought"); see also *Esserman v. Indiana Dep’t of Envtl. Mgmt.,* 84 N.Y.E.3d 1185, 1192 (Ind. 2017) (holding that the Indiana legislature did not waive sovereign immunity for state agencies for purposes of whistleblower retaliation actions under Indiana FCA).
826 See, e.g., *N.Y. Fin. State Law § 191* (extensively extending protection to employee, contractor, or agent of any public employer).
827 Va. Code § 8.01-216.2.
828 Va. Code § 8.01-216.8; see also *Lewis v. City of Alexandria,* 756 S.E.2d 465, 472 (Va. 2014) (affirming relief under Virginia FCA whistleblower retaliation to city employee terminated from position as construction manager).
829 N.M. Stat. § 44-9-2.B.
The defendants claimed immunity, arguing that the New Mexico FCA “should be interpreted parallel to the Federal False Claims Act.” The U.S. District Court for the District of New Mexico concluded that the express inclusion of “state” in the definition of “employer” constituted a waiver of the state’s sovereign immunity with regard to retaliation lawsuits. However, the Court dismissed the New Mexico FCA whistleblower retaliation action because the former employee did not allege that the demotion was a result of any effort by the employee to prevent false claims against the state.

Where the State FCA does not expressly say whether its whistleblower retaliation provision applies to public employees, some courts have allowed employees of government agencies such as state transportation agencies to maintain suit. For example, in Southern California Rapid Transit District v. Superior Court, former employees of a mass transit agency created by the California state legislature were allowed to bring a whistleblower claim against the agency under the California FCA. The plaintiffs had been employees of the Office of Inspector General of the Southern California Rapid Transit District, the predecessor of LACMTA.

In that capacity, they allegedly discovered that one of the agency’s contractors on federally funded projects had been improperly certified by the agency as a DBE. The plaintiffs notified their supervisor, the Inspector General, and advised it to bring the improper certification to the attention of USDOT. However, the Inspector General refused to act on the information, “expressing fear that he would lose his job if the matter were made known to the federal agencies,” and he ultimately fired the plaintiffs. The plaintiffs brought a California FCA whistleblower retaliation action against both the agency and the Inspector General. The California Court of Appeal rejected the defendants’ argument that the action was barred by principles of immunity. Treating the termination of plaintiffs as “simply a discretionary act to which qualified immunity applied, even though such discharge was a retaliatory act expressly prohibited by [the California FCA], wouldemasculate the entire effect and purpose of the statute.”

However, in Ling La v. San Mateo County Transit District, a California FCA whistleblower retaliation action brought by a terminated former employee of a mass transit agency, the U.S. District Court for the Northern District of California concluded that the defendant’s termination was retaliatory. The U.S. District Court for the Northern District of California concluded that in order to bring such an action against a public body, the action must fit within the waiver of sovereign immunity embodied by the California Tort Claims Act (CTCA). Where the plaintiff did not allege that she had complied with the CTCA by presenting a written claim to the transit agency in order to invoke the CTCA waiver of sovereign immunity, her California FCA whistleblower retaliation action was dismissed.

Where a public employee has been terminated, the whistleblower retaliation cause of action may be one facet of a larger employment dispute between the plaintiff and the government agency regarding the plaintiff’s compensation. However, most State FCAs, like the Federal FCA, provide that a “false claim” does not include requests or demands for income or compensation paid to an individual as compensation for government employment. Therefore, a dispute over employment compensation typically cannot constitute the underlying “false claim” supporting an FCA whistleblower retaliation action. For example, in Turner v. City and County of San Francisco, a California FCA whistleblower retaliation action, the plaintiff alleged that he was terminated after complaining that he and others were improperly classified as temporary rather than permanent employees. The U.S. District Court for the Northern District of California dismissed the action, concluding that the plaintiff’s actions did not constitute protected activity as he did not allege that he acted to prevent false claims. Claims under the California FCA do not include “requests or demands for money, property, or services that the state or a political subdivision has paid to an individual as compensation for employment with the state or political subdivision.” Further, even if the plaintiff’s allegations were true, the government treating its employees as temporary rather than permanent would have resulted in an underpayment of public funds, not an overpayment of public funds which is what the California FCA was designed to prevent.

Conversely, in Delaney v. Massachusetts Bay Transit Authority, the U.S. District Court for the District of Massachusetts declined to dismiss a whistleblower retaliation count asserted by an employee of a transit authority, who alleged that she and other employees were paid for training that they did not attend. “[T]aking the facts alleged in the light most favorable to” the plaintiff, the Court concluded that she engaged in protected activity to prevent false claims under the Massachusetts FCA, since the “falsified records” of training resulted in overpayment to public employees “for work they did not perform.” The Delaney Court did not address the fact that, under the Massachusetts FCA, a claim does “not include requests or demands for money or property that the commonwealth or a political subdivision thereof has paid to an individual.

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831 Id. at 1148.
832 Id. at 1162.
833 Id. at 1244.
834 Id. at 1245.
836 Id. at 667-68.
837 Id. at 668.
838 Id. at 669.
839 Id.
840 Id. at 673.
842 Id. at *23-24.
844 No. 11-CV-01427, 2012 U.S. Dist. LEXIS 179585 (N.D. Cal. Dec. 19, 2012), aff’d, 788 F.3d 1206 (9th Cir. 2015), and aff’d, 617 Fed. App’x 674 (9th Cir. 2015).
845 Id. at *36 (citing Cal. Gov’t Code § 12650(b)(2)).
846 Id. at *36-37.
848 Id. at *7.
as compensation for employment with the commonwealth or a political subdivision.\textsuperscript{849}

\textbf{C. Remedies}

The Federal FCA provides that a whistleblower plaintiff who has suffered retaliation is entitled to “all relief necessary to make that employee, contractor, or agent whole.”\textsuperscript{850} Available relief specifically includes reinstatement (if terminated or demoted), two times the amount of “back pay” or compensation improperly withheld in retaliation, plus interest on the back pay, and “special damages” including “litigation costs and reasonable attorneys’ fees.”\textsuperscript{851} “These examples of relief all have one thing in common—they are directed to individual plaintiffs, not entities.”\textsuperscript{852}

State FCAs that contain whistleblower retaliation provisions typically mirror the relief available under the Federal FCA.\textsuperscript{853} Some State FCAs provide additional remedies over and above the relief available under the Federal FCA. For example, a number of State FCAs specifically provide that the plaintiff may recover punitive damages against the employer.\textsuperscript{854} The New York FCA provides that the plaintiff may obtain “an injunction to restrain continued discrimination.”\textsuperscript{855}

In order to make the plaintiff “whole,” courts may award relief other than the remedies enumerated in the statutes. In \textit{Lewis v. City of Alexandria},\textsuperscript{856} a former employee of the City of Alexandria brought suit under the Virginia FCA whistleblower retaliation provision when he was terminated from his position as an architect, after allegedly complaining about the City’s payment of amounts improperly invoiced by the City’s construction management contractor.\textsuperscript{857} After a jury trial, the plaintiff was awarded more than $100,000 in back pay, which was doubled according to the Virginia FCA, plus more than $8,000 in earned vacation time and more than $200,000 in attorneys’ fees.\textsuperscript{858} However, the court declined to reinstate the plaintiff to his former job, or to award him “front pay” and pension compensation in the alternative. It appeared that both parties agreed that reinstatement was not realistic, due to “animosity” between the parties and the fact that the plaintiff “had secured new employment.”\textsuperscript{859} The Supreme Court of Virginia noted that, although “front pay” is not mentioned in the Virginia FCA, “front pay is commonly given consideration as an equitable remedy in the alternative to reinstatement”\textsuperscript{860} in FCA whistleblower retaliation cases. However, the Court declined to award that relief here, where the lower court determined that the plaintiff had been “made whole.” With regard to his request for pension compensation, the Court noted that the plaintiff’s City pension had not vested, and he had no guarantee of employment long enough to attain a vested pension, so any pension compensation was “subject to too much speculation”\textsuperscript{861} to warrant an award.

\textbf{D. Civil Procedure}

The Federal FCA provides that a whistleblower retaliation action “may be brought in the appropriate district court of the United States.”\textsuperscript{862} Most State FCAs similarly identify a specific state court in which a whistleblower retaliation action “may be brought.”\textsuperscript{863} Because jurisdiction conferred by the statutes is permissive, and not exclusive, it is presumed that State FCA whistleblower retaliation actions may also be brought in federal court, and that Federal FCA whistleblower retaliation actions may also be brought in state court. This allows plaintiffs to assert whistleblower retaliation counts under both the Federal FCA and a State FCA in the same court, in the same action.\textsuperscript{864} A few State FCAs specifically provide that a State FCA whistleblower retaliation action be brought in any court of competent jurisdiction.\textsuperscript{865}

Whistleblower retaliation counts are sometimes asserted in conjunction with a \textit{qui tam} lawsuit, as the plaintiff seeks to hold the defendant liable for the same false claims that the plaintiff alleges he or she was terminated for attempting to prevent.\textsuperscript{866} There are a number of procedural considerations in filing such a two-pronged FCA complaint, including the statutes of limitation. The Federal FCA requires a whistleblower retaliation action to be brought within 3 years of “the date when the retaliation occurred.”\textsuperscript{867} Almost all State FCAs with whistleblower retaliation provisions now contain the same 3-year statute of limitations.
limitation. As discussed in Section III.C.4, there is typically a significantly longer statute of limitation for a qui tam action. The whistleblower retaliation count in a two-pronged FCA complaint could be time-barred even though the qui tam count is timely. Furthermore, even when the complaint is timely filed under the whistleblower retaliation statute of limitation, if it contains a qui tam count, the complaint must remain under seal while the prosecuting authority investigates, as discussed in Section III.B.2, which could delay relief under the whistleblower retaliation provision.

For the above reasons, it is often advantageous for whistleblower plaintiffs to bring a standalone employment retaliation action. An action asserting only employment retaliation counts, and not a qui tam count, does not have to be transmitted to the government for investigation before the case can go forward. Further, a whistleblower retaliation action does not have to meet the heightened pleading standards of a qui tam action, which were addressed in Section IV.A.

VI. CONCLUSIONS

The Federal FCA is a powerful tool for protecting federal transportation funds, including federal grant funds allocated to state transportation agency projects. Although the Federal FCA has been in existence since 1863, Congress reinvigorated the Federal FCA in 1986 to offer substantial financial recovery (including both treble damages and significant civil penalties) and increased incentives for private parties (including employees of the false claimant) to disclose and prosecute false claims. Congress further amended the Federal FCA in 2009 to unambiguously provide that the Federal FCA is available to prosecute false claims made on federal grant funds, even when the false claims are made to a grant recipient, such as a state transportation agency, rather than to the federal government.

However, the Federal FCA does not always protect the interest of a state transportation agency that has been defrauded. A Federal FCA action is brought in the name of the United States, and any financial recovery under the Federal FCA goes to the United States (with a share for the qui tam relator), not to the state transportation agency. Further, on state transportation agency projects where there are no federal funds involved, the Federal FCA does not apply.

In recent years, a number of state legislatures have adopted State FCAs modeled after the Federal FCA, typically in response to encouragement from Congress to enact State FCAs to help protect Medicaid funds. Although some of the State FCAs are only applicable to Medicaid fraud, those that are modeled most closely after the Federal FCA are generally applicable to all false claims made to state agencies such as state transportation agencies. Most (but not all) of these generally applicable State FCAs also apply to false claims made to political subdivisions of the state, such as county highway departments, municipal transit authorities, and airports.

State FCAs typically provide for financial recovery for the state, in the form of treble damages plus civil penalties for each false claim. Where a state transportation agency contractor has engaged in a pattern of overbilling, or where the contractor procured a state transportation agency contract based on false M/WBE certification, every invoice or pay application could constitute a false claim, subject to the civil penalty. With civil penalties plus treble damages, the financial recovery to the state could be many times more than the amount actually paid to the false claimant. Thus, a State FCA is a potentially powerful tool to combat fraud on state transportation agency projects.

However, for the most part, the potential for State FCAs to protect transportation funds in the hands of state and local transportation agencies has not been realized. State FCAs remain relatively new, and litigation involving State FCAs tends to be focused on Medicaid or similar healthcare-related fraud. Although Congress has encouraged efforts to standardize State FCAs, to make them at least as effective as the Federal FCA, there remains significant variation from state to state. Some states do not even have a State FCA, and some State FCAs are restricted to Medicaid fraud. Where there is a generally applicable State FCA, some do not apply to false claims made to political subdivisions. Most (but not all) contain a qui tam provision, allowing private parties to bring suit on behalf of the state. Most (but not all) contain a whistleblower retaliation provision, encouraging individual employees to disclose fraud to the authorities or to bring a qui tam action.

Clearly, in order for State FCAs to be effective in combating fraud on highway and transportation funds, state legislatures must first enact State FCAs that are generally applicable to false claims made to the state or its political subdivisions, including claims for highway and transportation funds, and not just healthcare fraud. The State FCAs should include both whistleblower retaliation provisions and qui tam provisions to encourage individuals with knowledge of false claims to come forward, and perhaps to litigate State FCA actions on behalf of the state government. The qui tam provision should be submitted to the HHS OIG for review to ensure that it is at least as effective as the Federal FCA, including ensuring that the available civil penalties conform to the Federal Civil Penalties Inflation Adjustment Act, and the State FCA should be amended as recommended by the HHS OIG in order to encourage qui tam actions.

In order for State FCAs to achieve their potential to protect highway and transportation funds, state transportation agencies and their prosecuting authorities need to become familiar with the applicable State FCAs and consider their application in the context of false claims made by the state transportation agency’s contractors or subcontractors. State FCAs may need to be amended to provide that state attorneys general receive a

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870 See, e.g., McCrary v. Knox Cnty., 200 F. Supp. 3d 782, 791 n.3 (S.D. Ind. 2016)
871 Id. at 786 n.1.
portion of the recovery, to incentivize them to litigate State FCA actions on behalf of state transportation agencies. Ultimately, however, it may be *qui tam* relators and other whistleblowers who are most likely to recognize the potential of State FCAs in the state transportation agency context, and who take advantage of the incentives to individuals contained within State FCAs by pursuing recovery of highway and transportation funds on behalf of the state.
APPENDIX A. STATE AND LOCAL FALSE CLAIMS STATUTES

A. State-by-State Summary of State False Claims Acts

The following is a comprehensive list of all current State FCAs, identifying whether each State FCA is generally applicable to state transportation agency, highway, and transportation funds, and whether each State FCA contains a qui tam provision as effective as the Federal FCA.

1. Arkansas

The Arkansas Medicaid Fraud False Claims Act, Ark. Code §§ 20-77-901 to 20-77-911, presently applies only to Medicaid fraud, and is not applicable to highway and transportation funds. It does not contain a qui tam provision, and therefore has not been approved by the HHS OIG.

2. California

The California False Claims Act, Cal. Gov’t Code §§ 12650 to 12656, applies generally to false claims made to the state or its political subdivisions, including claims for highway and transportation funds. The civil penalties provision was amended in 2018 to conform to the Federal Civil Penalties Inflation Adjustment Act, in order to make the California FCA qui tam provision as effective as the Federal FCA qui tam provision. As evidenced by the many court cases cited in this report, the California FCA is widely used by the state, its political subdivisions, and qui tam relators to combat false claims on the funds of transportation agencies including Caltrans, LACMTA, and the state’s airports.

3. Colorado

The Colorado Medicaid False Claims Act, Colo. Rev. Stat. §§ 25.5-4-303.5 to 25.5-4-310, presently applies only to Medicaid fraud, and is not applicable to highway and transportation funds. Its qui tam provision has been approved by the HHS OIG as at least as effective as the Federal FCA qui tam provision.

4. Connecticut

The Connecticut False Claims Act, Conn. Gen. Stat. §§ 4-274 to 4-289, presently applies only to state-administered health and human services programs, and is not applicable to highway and transportation funds. Its qui tam provision has been approved by the HHS OIG as at least as effective as the Federal FCA qui tam provision.

5. Delaware

The Delaware False Claims and Reporting Act, Del. Code tit. 6, §§ 1201 to 1211, applies generally to false claims made to the state or its political subdivisions, expressly including the Delaware DOT. The civil penalties provision was amended in 2018 to conform to the Federal Civil Penalties Inflation Adjustment Act, in order to make the Delaware FCA qui tam provision as effective as the Federal FCA qui tam provision.

6. Florida

The Florida False Claims Act, Fla. Stat. §§ 68.081 to 68.092, applies generally to false claims made to the state or its political subdivisions, including claims for highway and transportation funds. When enacting the statute in 1994, the Florida legislature specifically identified “Fraud Against the Department of Transportation” as the type of fraud intended to be addressed by the Florida FCA. It contains a qui tam provision, but the HHS OIG has determined that it is not as effective as the Federal FCA qui tam provision for reasons including lower available civil penalties.

7. Georgia

The Georgia Taxpayer Protection and False Claims Act, Ga. Code §§ 23-3-120 to 23-3-127, applies generally to false claims made to the state or its political subdivisions, including claims for highway and transportation funds. It contains a qui tam provision, although it has not been reviewed and approved by the HHS OIG.

8. Hawaii

The Hawai‘i False Claims Act, Haw. Rev. Stat. §§ 661-21 to 661-31, applies generally to false claims made to the state, including claims for highway and transportation funds. A separate statute, Haw. Rev. Stat. §§ 46-171 to 46-181, applies to false claims made to counties. The Hawai‘i FCA contains a qui tam provision, but the HHS OIG has determined that it is not as effective as the Federal FCA qui tam provision for reasons including lower available civil penalties.

9. Illinois

The Illinois False Claims Act, 740 Ill. Comp. Stat. §§ 175/1 to 175/8, applies generally to false claims made to the state or its political subdivisions, including claims for highway and transportation funds. Its qui tam provision has been approved to the state or its political subdivisions.

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876 Dean A. Calloway & Dan M. Silverboard, The Georgia Taxpayer Protection and False Claims Act, 65 Mercer L. Rev. 1, 15 (2013) (stating that public works projects involving “construction and repair of roads and bridges” are “particularly vulnerable to billing improprieties and thus likely targets” of litigation under the Georgia FCA).
by the HHS OIG as at least as effective as the Federal FCA qui tam provision.878

10. Indiana

The Indiana False Claims and Whistleblower Protection Act, IND. CODE §§ 5-11-5.5-1 to 5-11-5.5-18, applies generally to false claims made to the state, including claims for highway and transportation funds. It contains a qui tam provision, that was reviewed and approved by the HHS OIG.

11. Iowa

The Iowa False Claims Act, IOWA CODE §§ 685.1 to 685.7, applies generally to false claims made to the state or its political subdivisions, including claims for highway and transportation funds. Its qui tam provision has been approved by the HHS OIG as at least as effective as the Federal FCA qui tam provision.879

12. Kansas

The Kansas False Claims Act, KAN. STAT. §§ 75-7501 to 75-7511, applies generally to false claims made to the state, including claims for highway and transportation funds. It does not contain a qui tam provision, and therefore has not been approved by the HHS OIG.

13. Louisiana

The Louisiana Medical Assistance Programs Integrity Law, LA. STAT. §§ 46:437 to 46:440, presently applies only to Medicaid fraud, and is not applicable to highway and transportation funds. It contains a qui tam provision, but the HHS OIG has determined that it is not as effective as the Federal FCA qui tam provision.880

14. Maine

The Maine False Claims Act, ME. REV. STAT. tit. 22, § 15, presently applies only to Medicaid fraud, and is not applicable to highway and transportation funds. It does not contain a qui tam provision, and therefore has not been approved by the HHS OIG.

15. Maryland

The Maryland False Claims Act, MD. CODE, GENERAL PROVISIONS, §§ 8-101 to 8-111 applies generally to false claims made to the state or its political subdivisions, including claims for highway and transportation funds. Unlike the Federal FCA, the case is dismissed if the Maryland Attorney General does not intervene or withdraws the government’s intervention.881

16. Massachusetts

The Massachusetts False Claims Act, MASS. GEN. LAWS ch. 12, §§ 5A to 5O, applies generally to false claims made to the state or its political subdivisions, including claims for highway and transportation funds. When enacting the statute in 2000, the Massachusetts legislature was particularly concerned about protecting transportation and infrastructure funding.882 Its qui tam provision has been approved by the HHS OIG as at least as effective as the Federal FCA qui tam provision.883

17. Michigan

The Michigan Medicaid False Claims Act, MICH. COMP. LAWS §§ 400.601 to 400.615, presently applies only to Medicaid fraud, and is not applicable to highway and transportation funds. It contains a qui tam provision, but the HHS OIG has determined that it is not as effective as the Federal FCA qui tam provision for reasons including lower available civil penalties.884

18. Minnesota

The Minnesota False Claims Act, MINN. STAT. §§ 15C.01 to 15C.16, applies generally to false claims made to the state or its political subdivisions, including claims for highway and transportation funds. Minnesota DOT employees are required to report suspected violations involving false claims made to the Minnesota DOT.885 The Minnesota FCA contains a qui tam provision, but the HHS OIG has determined that it is not as effective as the Federal FCA qui tam provision for reasons including lower available civil penalties.886

19. Mississippi

MISS. CODE. §§ 43-13-201 to 43-13-233 applies only to Medicaid fraud.

20. Missouri

MO. STAT. §§ 191.900 to 191.914 applies only to Medicaid fraud.

881 MD. CODE. GEN. PROV. §§ 8-104(a) (7), (b) (3) (ii) (2).
882 Joseph M. Makalusky, Blowing the Whistle on the Need to Clarify and Correct the Massachusetts False Claims Act, 94 MASS. L. REV. 41, 55 (2012).
21. Montana

The Montana False Claims Act, MONT. CODE ANN. §§ 17-8-401 to 17-8-416, applies generally to false claims made to the state or political subdivision, including claims for highway and transportation funds. Its qui tam provision has been approved by the HHS OIG as at least as effective as the Federal FCA qui tam provision.\(^887\) A separate statute, MONT. CODE § 7-6-4311, applies to false claims made to cities and towns.

22. Nebraska


23. Nevada

The Nevada False Claims Act, Nev. Rev. Stat. §§ 357.010 to 357.250, applies generally to false claims made to the state or political subdivision, including claims for highway and transportation funds. Its qui tam provision has been approved by the HHS OIG as at least as effective as the Federal FCA qui tam provision.\(^888\)

24. New Hampshire


25. New Jersey

The New Jersey False Claims Act, N.J. Stat. §§ 2A:32C-1 to 2A:32C-18, applies generally to false claims made to the state, including claims for highway and transportation funds. It contains a qui tam provision, but the HHS OIG has determined that it is not as effective as the Federal FCA qui tam provision.\(^889\)

26. New Mexico

The New Mexico Fraud Against Taxpayers Act, N.M. Stat. Ann. §§ 44-9-1 to 44-9-14, applies generally to false claims made to the state or political subdivision, including claims for highway and transportation funds. It contains a qui tam provision, but the HHS OIG has determined that it is not as effective as the Federal FCA qui tam provision because it does not contain an “original source” exception to the public disclosure bar.\(^890\)

27. New York

The New York False Claims Act, N.Y. State Fin. Law §§ 187 to 194, applies generally to false claims made to the state or political subdivision, including claims for highway and transportation funds. The civil penalties provision was amended in 2018 to conform to the Federal Civil Penalties Inflation Adjustment Act, in order to make the New York FCA qui tam provision as effective as the Federal FCA qui tam provision.\(^891\)

28. North Carolina

The North Carolina False Claims Act, N.C. Gen. Stat. §§ 1-605 to 1-629, applies generally to false claims made to the state or political subdivision, including claims for highway and transportation funds. Its qui tam provision has been approved by the HHS OIG as at least as effective as the Federal FCA qui tam provision.\(^892\)

29. Oklahoma

Despite its name, the Oklahoma Medicaid False Claim Act, Okla. Stat. tit. 63, §§ 5053 to 5054, is not limited to Medicaid fraud, and applies generally to false claims made to the state, including claims for highway and transportation funds. Its qui tam provision has been approved by the HHS OIG as at least as effective as the Federal FCA qui tam provision.\(^893\)

30. Oregon

The Oregon False Claims Act, Or. Rev. Stat. §§ 180.750 to 180.785, applies generally to false claims made to the state or political subdivision, including claims for highway and transportation funds. It does not contain a qui tam provision, and therefore has not been approved by the HHS OIG.

31. Rhode Island

The Rhode Island False Claims Act, R.I. Gen. Laws §§ 9-1.1-1 to 9-1.1-9, applies generally to false claims made to the state or political subdivision, including claims for highway and transportation funds. The civil penalties provision was amended in 2018 to conform to the Federal Civil Penalties Inflation Adjustment Act, in order to make the Rhode Island FCA qui tam provision as effective as the Federal FCA qui tam provision.

32. South Carolina

S.C. Code §§ 43-7-60 to 43-7-90 applies only to Medicaid fraud.

33. Tennessee

The Tennessee False Claims Act, Tenn. Code §§ 4-18-101 to 4-18-108, applies generally to false claims made to the state or political subdivision, including claims for highway and transportation funds. Its qui tam provision has been approved by the

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Local False Claims Ordinances

In addition to State FCAs, a number of municipalities have adopted similar false claims ordinances covering false claims presented to the municipality, including false claims presented to the municipal department of transportation or transit authority. Some of the more prominent municipal false claims ordinances are listed below.

1. District of Columbia

The District of Columbia false claims ordinance, D.C. Code §§ 2-381.01 to 2-381.10, applies generally to false claims made to the District. It includes a *qui tam* provision.

2. Chicago

The Chicago false claims ordinance, Chicago Mun. Code §§ 1-22-010 to 1-22-060, applies generally to false claims made to the city, including the Chicago DOT and Chicago Transit Authority. It includes a *qui tam* provision.

3. New York City

The New York City False Claims Act, N.Y.C. Admin. Code §§ 7-801 to 7-810, applies generally to false claims made to the city, including any city agency, department, division, or bureau. It contains a *qui tam* provision.

4. Philadelphia

The Philadelphia false claims ordinance, Phila. Code §§ 19-3601 to 19-3603, applies generally to false claims made to the city. It contains a *qui tam* provision.

5. San Francisco

The San Francisco False Claims Act, S.F. Admin. Code §§ 6.80 to 6.83, applies generally to false claims made to the city. It contains a *qui tam* provision.

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895 K. Brett Marston & J. Barrett Lucy, *Construction Law*, 40 U. Rich. L. Rev. 143, 156 (2005) (stating that the Virginia FCA “does not directly implicate the construction industry, but which has significant ramifications for those working on projects where the Commonwealth of Virginia is the distributor of funds”).


APPENDIX B. SURVEY QUESTIONNAIRE

The following survey questionnaire was delivered to all 50 state transportation agencies and their prosecuting authorities (typically the transportation section of a state attorney general's office) as part of this research project in order to identify State FCAs and also to identify State FCA litigation involving highway and transportation funds.

Figure 4. Cover letter used to transmit survey to state transportation agencies and their prosecuting authorities.
A. Background
1. Please provide the name and address of your organization:

2. Please provide the name, telephone number, and email address of the individual completing the survey:

B. State False Claims Acts
1. Please cite the state statute (if any) constituting your State's FCA:

2. In the past five (5) years, has your office used your State FCA to protect or recover State DOT/highway funds?
   - Our office has regularly used the State FCA to protect highway/transportation funds.
   - Our office has only rarely used the State FCA to protect highway/transportation funds.
   - Although the option is available to us, our office does not use the State FCA to protect or recover state highway/transportation funds.
   - Our State FCA is only available for recovery of Medicaid funds.
   - We do not have a State FCA.

3. In the past five (5) years, have qui tam relators filed suit using your State FCA regarding State DOT/highway funds?
   - Our office regularly sees qui tam lawsuits under the State FCA regarding state highway/transportation funds.
   - Our office only rarely sees qui tam lawsuits under the State FCA regarding state highway/transportation funds.
   - Although the option is available, our office has not seen qui tam lawsuits under the State FCA regarding state highway/transportation funds.
   - Although we do have a State FCA applicable to state highway/transportation funds, it does not contain a qui tam provision.
   - Our State FCA is only available for recovery of Medicaid funds.
   - We do not have a State FCA.

4. Please identify any advantages of your State FCA over the Federal False Claims Act, or any reasons that your office would prefer to use the State FCA to protect or recover state highway/transportation funds:

5. Please identify any weaknesses in your State FCA, or any areas where improvement is needed, in order to better protect state transportation funds:

6. Please identify (by case citation or docket number, if possible) any litigation in the past five (5) years involving your State FCA to protect or recover your state's highway/transportation funds:

C. Federal False Claims Act (31 U.S.C. §§ 3729 et seq.)
1. In the past five (5) years, has Federal FCA litigation been initiated to protect or recover your State DOT highway/transportation funds?
   - The Federal FCA has been regularly used to protect our highway/transportation funds.
   - The Federal FCA has only rarely been used to protect our highway/transportation funds.
   - The Federal FCA has not been used to protect our state's highway/transportation funds.

2. Please identify (by case citation or docket number, if possible) any litigation in the past five (5) years involving the Federal FCA to protect or recover your state's highway/transportation funds:

3. Please identify any advantages of using the Federal False Claims Act, rather than your State FCA, to protect state highway/transportation funds:
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The Effectiveness of State False Claims Acts in Protecting State Transportation Funding

This digest was prepared under NCHRP Project 20-06, “Legal Problems Arising Out of Highway Programs,” for which the Transportation Research Board (TRB) is the agency coordinating the research. Under Topic 23-04, Timothy R. Wyatt, Conner Gwyn Schenck PLLC, Greensboro, NC, prepared this digest. The opinions and conclusions expressed or implied in this digest are those of the researchers who performed the research and are not necessarily those of the Transportation Research Board; the National Academies of Sciences, Engineering, and Medicine; or the program sponsors. The responsible program officer is Gwen Chisholm Smith.

Background

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. The NCHRP Legal Research Digest and the Selected Studies in Transportation Law (SSTL) series are intended to keep departments up-to-date on laws that will affect their operations.

Foreword

The purpose of this digest is to provide an in-depth assessment of state and federal statutes and case law relating to false claims in the area of highway and transportation contracting. The comprehensive federal False Claims Act has served to protect federal highway and transportation funds since its inception. For the past decade, the federal False Claims Act has unquestionably applied to fraud involving federal funds granted to state transportation agencies. Furthermore, most U.S. state legislatures have enacted false claims statutory provisions, regularly patterned after the federal False Claims Act, that may also serve to protect transportation funds of states and political subdivisions. With few exceptions, most state false claims procedures, including those that relate to qui tam actions, mirror federal procedure, although there are subtle differences from state to state. State false claims acts are commonly used to combat Medicaid and healthcare fraud, and have not been broadly applied to claims made to state transportation agencies and political subdivisions involving highway and transportation funds. This digest focuses on how state false claims acts could be used to better protect funds of state and local transportation agencies. This digest also addresses legislative developments associated with the rights of “whistleblowers” and legal prohibitions against employer retaliation.

With increasing emphasis on transparency of public institutional activities, this digest should prove valuable to federal and state employers and employees, transportation contractors and subcontractors, attorneys, and others whose work involves personnel management and processing payment invoices and other types of state and federal financial claims. Furthermore, the digest provides a useful resource for legislators and other individuals responsible for developing new methodology to protect against fraudulent activity in government transportation contracting.

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