



**Congressional
Research Service**

Informing the legislative debate since 1914

Contractor Fraud Against the Federal Government: Selected Federal Civil Remedies

-name redacted-

Legislative Attorney

April 1, 2014

Congressional Research Service

7-....

www.crs.gov

R43460

Summary

Because the federal government relies heavily on contractors to supply it with goods and services, fraud by these contractors potentially costs the government billions of dollars annually. Detecting, prosecuting, and deterring contractor fraud poses a challenge to federal agencies, which often possess limited resources. To combat contractor fraud, Congress has enacted several statutes that allow the federal government—and in some instances, private parties—to recover damages, civil penalties, or forfeitures against parties that make false or fraudulent claims for payment or engage in other misconduct. These statutes may impose civil liability for conduct that does not amount to fraud under traditional common law definitions and potentially allow for significant recoveries.

Generally, the False Claims Act (FCA) authorizes the Attorney General, as well as certain private parties, to bring a civil action against “any person” who makes a false claim for payment from the government. Recently, some courts have held that claims for payment that are not explicitly false may become false by implication because of a party’s actions or omissions prior to contract formation or during contract performance. However, some of these same courts have expressed concerns that such theories could lead to liability for ordinary breaches of contract or insignificant regulatory violations, and have thus imposed limitations on their use by the government or private parties that sue on behalf of the government. Other recent regulatory and judicial developments may also affect contractors’ potential exposure to civil liability and damages under the FCA.

The Contract Disputes Act (CDA) sets forth procedures for the resolution of claims and disputes involving certain contracts awarded by executive agencies. The CDA contains an anti-fraud remedy because of concerns that contractors would submit inflated claims during contract disputes as a “negotiating tactic,” leading the government to settle these claims instead of using its limited resources to evaluate them on the merits. The Federal Circuit’s notable decision in *Daewoo Engineering Co., Ltd. v. United States* demonstrates that the CDA’s anti-fraud provision may result in a significant civil penalty for a contractor that submits a fraudulent claim to the government in an effort to extract a settlement offer.

Under the Forfeiture of Fraudulent Claims Act (FFCA), a contractor that brings a fraudulent contract claim against the government in the Court of Federal Claims (COFC) may have to forfeit all of its claims under the contract. Courts disagree over whether fraud sufficient for forfeiture may relate to the execution or performance of the contract in addition to submission of a claim.

The Program Fraud Civil Remedies Act (PFCRA) provides an administrative process under which certain federal agencies may impose civil remedies or assessments on “persons” who knowingly make false, fraudulent, or fictitious claims or statements to the agencies in “small-dollar cases” of fraud that the Department of Justice (DOJ) declines to pursue in court. Few federal agencies use the PFCRA, leading some to recommend that, among other things, Congress raise the act’s jurisdictional cap and civil penalty limit; allow agencies to retain recovered funds; and simplify the act’s procedural requirements.

Congress is perennially interested in the scope of federal civil fraud remedy statutes. In order to be effective, these statutes must be broad enough to punish and deter fraud that often evades detection, wastes taxpayer funds, and negatively impacts government programs. On the other hand, if courts interpret a fraud statute so broadly that it imposes civil liability on contractors for minor regulatory violations or ordinary breaches of contract, contractors may decline to compete for government contracts, potentially leading to higher prices for the government.

Contents

| | |
|---|----|
| Introduction..... | 1 |
| Civil False Claims Act | 3 |
| Overview | 4 |
| Recent Amendments | 7 |
| Implied False Certification Theory..... | 8 |
| Examples | 10 |
| Limitations on the Theory | 11 |
| Fraud in the Inducement Theory | 13 |
| Allegations of Fraud in the Inducement by Underbidding..... | 14 |
| Other Examples..... | 15 |
| Limitations on the Theory | 17 |
| Calculating Treble Damages..... | 18 |
| Contract Disputes Act Anti-Fraud Provision | 20 |
| Overview of the CDA..... | 20 |
| Anti-Fraud Provision..... | 21 |
| <i>Daewoo Engineering and Construction Co., Ltd. v. United States</i> | 23 |
| Other Examples..... | 24 |
| Forfeiture of Fraudulent Claims Act..... | 25 |
| Program Fraud Civil Remedies Act..... | 27 |
| Recent Regulatory Developments | 28 |
| Mandatory Disclosure Rule..... | 28 |
| Presumed Loss Rule | 30 |
| Conclusion | 31 |

Tables

| | |
|--|----|
| Table 1. Judicial Approaches to Calculating Treble Damages Under the Civil FCA | 19 |
|--|----|

Contacts

| | |
|---------------------------------|----|
| Author Contact Information..... | 32 |
|---------------------------------|----|

Introduction

The federal government relies heavily on contractors to supply it with goods and services.¹ Each year, fraud by these contractors potentially costs the government billions of dollars.² Detecting, prosecuting, and deterring contractor fraud poses a challenge to federal agencies, which often possess limited resources.³ Contractor fraud comes in many forms, including false or fraudulent claims for payment made under a contract or as part of the contract disputes process;⁴ false statements;⁵ bid rigging; defective pricing; cost mischarging; product substitution; and false certification of small business size or status.⁶

Congressional efforts to deter contractor fraud extend at least as far back as the passage of the False Claims Act (FCA) during the Civil War.⁷ Since that time, Congress has enacted several statutes that allow the federal government—and in some instances, private parties—to recover damages, civil penalties, or forfeitures for false or fraudulent claims for payment and other misconduct.⁸ Since the passage of the FCA, Members of Congress, courts, and others have continued to debate the proper scope of liability under these civil fraud statutes.⁹

Recoveries of large damage awards and penalties by the government or private parties under these statutes have brought new attention to this debate. For example, in FY2013, the Department of Justice (DOJ) recovered about \$3.8 billion in settlements and judgments under the FCA, which represents the federal government's primary civil fraud remedy.¹⁰ Of this amount, recoveries from procurement fraud cases accounted for a record \$890 million.¹¹ The government has also

¹ National Procurement Fraud Task Force, Legislation Committee, Procurement Fraud: Legislative and Regulatory Reform Proposals ii (2008), <http://www.gsaig.gov/?LinkServID=A8DD55A6-A6BB-D9F8-0788C31C39FC3CD0&>.

² General Services Administration, Office of Inspector General, Procurement Fraud Handbook 2 (2012), <http://www.gsaig.gov/?LinkServID=6486B647-A5DF-C154-010A408470CAE0B8>.

³ National Procurement Fraud Task Force, Legislation Committee, Procurement Fraud: Legislative and Regulatory Reform Proposals ii (2008), <http://www.gsaig.gov/?LinkServID=A8DD55A6-A6BB-D9F8-0788C31C39FC3CD0&>.

⁴ Contractors could submit false or fraudulent claims to contracting officers or bring them before the Court of Federal Claims as part of the contract disputes process. *See* Daewoo Engineering and Construction Co., Ltd. v. United States, 557 F.3d 1332, 1334-35 (Fed. Cir. 2009).

⁵ *See, e.g.*, 31 U.S.C. §3729(a)(1)(B).

⁶ General Services Administration, Office of Inspector General, Procurement Fraud Handbook 14-29 (2012), <http://www.gsaig.gov/?LinkServID=6486B647-A5DF-C154-010A408470CAE0B8>.

⁷ *See* Cong. Globe, 37th Cong., 3d Sess. 952 (1863) (remarks of Sen. Jacob M. Howard) (“The country, as we know, has been full of complaints respecting the frauds and corruptions practiced in obtaining pay from the Government during the present war; and it is said ... that further legislation is pressingly necessary to prevent this great evil ...”).

⁸ *E.g.*, Forfeiture of Fraudulent Claims Act, 28 U.S.C. §2514; False Claims Act, 31 U.S.C. §§3729-3733; Program Fraud Civil Remedies Act, *id.* at §§3801-3812; Contract Disputes Act, 41 U.S.C. §7103(c)(2).

⁹ *See, for example*, “False Claims Act: Recent Amendments” below. *See also* Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348, 1366 & n.18 (Fed. Cir. 2013) (discussing different judicial interpretations of the scope of the Forfeiture of Fraudulent Claims Act).

¹⁰ Press Release, Department of Justice Recovers \$3.8 Billion from False Claims Act Cases in Fiscal Year 2013 (Dec. 20, 2013) (“The False Claims Act is the government’s primary civil remedy to redress false claims for government funds and property under government contracts, including national security and defense contracts, as well as under government programs as varied as Medicare, veterans benefits, federally insured loans and mortgages, transportation and research grants, agricultural supports, school lunches and disaster assistance.”), <http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html>; *see also* 31 U.S.C. §§3729-3733.

¹¹ Press Release, Department of Justice Recovers \$3.8 Billion from False Claims Act Cases in Fiscal Year 2013 (Dec. 20, 2013), <http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html>. A large portion of this recovery resulted (continued...)

recovered large civil penalties and forfeitures from contractors who submit fraudulent claims for payment as part of the contract disputes process, including in a recent case in which the Federal Circuit affirmed the Court of Federal Claims' (COFC's) assessment of a \$50.6 million civil penalty against a contractor under the Contract Disputes Act's (CDA's) anti-fraud provision¹² and rendered judgment of forfeiture of a \$13.3 million contractor claim under the Forfeiture of Fraudulent Claims Act (FFCA).¹³ Some federal statutory civil fraud remedies may be cumulative,¹⁴ raising the possibility that the government could potentially recover significant sums, particularly if it suffers damages.¹⁵

In addition to the significant damage awards that plaintiffs may recover under some of these statutes, courts may find a contractor civilly liable under these laws for conduct that may not amount to fraud under traditional common law definitions.¹⁶ Although many provisions in federal civil fraud statutes require the existence of a "claim" for payment from the government,¹⁷ the statutes may impose civil penalties and forfeitures even when the government has not relied on, or suffered damages from, the claim.¹⁸ Moreover, recent statutory and judicial developments under the FCA have reduced the level of "knowledge" that a defendant must possess in order to be liable and extended the scope of the act to cover a wider range of conduct than the common law typically encompasses.¹⁹

Congress has an interest in the scope of federal civil fraud remedy statutes. In order to be effective, these statutes must be broad enough to punish and deter fraud that often evades

(...continued)

from a single case. *Id.* Health care fraud cases accounted for \$2.6 billion of the total recovery. *Id.*

¹² *Daewoo Engineering and Construction Co., Ltd. v. United States*, 557 F.3d 1332, 1341 (Fed. Cir. 2009); *see also* 41 U.S.C. §7103(c)(2).

¹³ *Daewoo*, 557 F.3d at 1341; *see also* 28 U.S.C. §2514.

¹⁴ *Daewoo*, 557 F.3d at 1340-41 ("A certified claim may be a source of liability under both the Contract Disputes Act and the False Claims Act.") (citations omitted); *Daewoo Engineering and Construction Co., Ltd. v. United States*, 73 Fed. Cl. 547, 597 (2006) ("The fraud statutes are cumulative and not in the alternative.").

¹⁵ *See, e.g.*, 31 U.S.C. §3729(a)(1) (allowing for the recovery of treble damages in addition to a civil penalty).

¹⁶ The elements of common law fraud vary by jurisdiction, but generally they require the plaintiff to allege that (1) the defendant made a material false representation, (2) the defendant knew that the representation was false, (3) the defendant acted with intent to defraud, (4) the plaintiff reasonably relied on the false representation, and (5) the plaintiff suffered damages. *See, e.g.*, *Marcus v. AT&T Corp.*, 138 F.3d 46, 63 (2d. Cir. 1998) (citations omitted) (stating the requirements under federal or New York state common law); *see also* H.Rept. 99-660, at 18 (1986) (comparing common law remedies to the FCA).

¹⁷ *E.g.*, 28 U.S.C. §2514 (requiring that there be a claim against the United States); 31 U.S.C. §3729(a)(1)(A)-(B) (requiring that there be a false or fraudulent claim); *id.* at §3802(a)(1) (requiring that there be a false, fictitious, or fraudulent claim); 41 U.S.C. §7103(c)(2) (requiring that there be a claim against the United States).

¹⁸ *E.g.*, 28 U.S.C. §2514 ("A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.") (emphasis added); 31 U.S.C. §3729 (making "any person" who, for example, knowingly presents a false claim for payment or knowingly makes a false statement material to a false claim for payment, liable for a civil penalty without requiring the government to rely on this conduct or suffer damages as a result of it); *id.* at §3802(a)(1) (making "any person" who submits false claims liable for a civil penalty without requiring reliance by, or damage to, the government); 41 U.S.C. §7103(c)(2) (stating that "the contractor is liable to the Federal Government for an amount equal to the unsupported part of the claim" without requiring that the government rely on the claim or suffer damages); *see also* S.Rept. 95-1118, at 20 (1978).

¹⁹ *See* 31 U.S.C. §3729(b)(1) (codifying the 1986 amendments that relaxed the "knowledge" requirement). *See also* "Implied False Certification Theory" below.

detection, wastes taxpayer funds, and negatively impacts government programs.²⁰ On the other hand, if courts interpret a fraud statute so broadly that it imposes civil liability on contractors for minor regulatory violations or ordinary breaches of contract—possibly resulting in a contractor having insufficient notice as to which actions will result in liability²¹—contractors may decline to compete for government contracts. This could lead to higher prices for the government.

This report provides an overview of federal statutes that provide civil remedies for contractor fraud, as well as issues stemming from judicial interpretation of these statutes.²² These statutes include the civil FCA, anti-fraud provision of the CDA, FFCA,²³ and the Program Fraud Civil Remedies Act. The report also briefly examines regulatory and judicial developments that have implications for enforcement of the FCA, including the circuit split regarding the calculation of treble damages under the FCA; the Mandatory Disclosure Rule; and the Presumed Loss Rule.

Civil False Claims Act

Congress originally enacted the FCA in 1863 to combat fraud by Civil War defense contractors.²⁴ Since that time, Congress has occasionally adjusted the scope of the FCA's civil liability provisions in response to judicial developments and shifting perceptions of the prevalence of fraud against the federal government.²⁵ In its current form, the FCA imposes civil liability on “any person” who engages in at least one of seven forms of misconduct.²⁶ The FCA authorizes the Attorney General, as well as certain private parties that sue on behalf of the United States under the act's *qui tam* provisions, to bring a civil action against an alleged violator of the act.²⁷ Liability under the FCA requires no specific proof of intent to defraud.²⁸

Liability under two provisions of the FCA frequently used against contractors requires, among other things, the existence of a “false or fraudulent” claim for payment from the government.²⁹ Some federal courts have developed theories that expand the definition of a “false or fraudulent”

²⁰ *E.g.*, Department of Defense, Inspector General, Semiannual Report to the Congress 31 (2013) (“The potential damage resulting from procurement fraud extends well beyond financial losses. This crime poses a serious threat to the ability of the Department to achieve its operational objectives and can have a negative effect on the implementation of programs.”), http://www.dodig.mil/pubs/sar/SAR_APR_SEPT_2013_web_compliant.pdf.

²¹ See Christopher L. Martin, Jr., *Reining in Lincoln's Law: A Call to Limit the Implied Certification Theory of Liability Under the False Claims Act*, 101 Cal. L. Rev. 227, 258 (2013).

²² This report does not examine criminal statutes that may impose penalties on a contractor that defrauds the government. This report also does not examine federal common law or contractual remedies; state or local remedies; or the provisions in the Federal Acquisition Regulation (FAR) stating that agency heads may void and rescind contracts in certain cases of contractor misconduct. See 48 C.F.R. Subpart 3.7.

²³ At least one court has characterized forfeiture of a claim under the FFCA as a punishment rather than a remedy because the amount of the forfeiture is unrelated to the amount of damages sustained by the government. *Gulf Group Gen. Enters. Co. W.L.L. v. United States*, 114 Fed. Cl. 258, 340 (2013) (quoting *Barren Island Marina, Inc. v. United States*, 44 Fed. Cl. 252, 257 (1999)).

²⁴ See “Overview” below.

²⁵ See “Recent Amendments” below.

²⁶ See “Overview” below.

²⁷ See “Overview” below.

²⁸ See “Overview” below.

²⁹ 31 U.S.C. §3729(a)(1)(A)-(B).

claim.³⁰ Under the implied false certification and fraud in the inducement theories, claims for payment that are not explicitly false may become false by implication because of a party's actions or omissions prior to contract formation or during contract performance.³¹ Some courts have expressed concerns that, under these theories, a defendant could become liable for ordinary breaches of contract or minor regulatory violations.³² Thus, some courts have limited the use of the theories by strictly enforcing the FCA's mental state requirement; the heightened pleading requirements for fraud allegations under Federal Rule of Civil Procedure 9(b); or some form of materiality requirement.³³

In addition to discussing the scope of liability under the FCA, this section also examines a circuit split involving the method by which courts calculate treble damages under the act when the contractor has provided at least some value to the government.³⁴

Overview

Congress enacted the FCA in 1863 to detect, punish, and deter fraud against the federal government by defense contractors during the Civil War.³⁵ In its current form, the FCA imposes civil liability³⁶ on "any person" who engages in at least one of seven forms of misconduct.³⁷

³⁰ See "Implied False Certification Theory" and "Fraud in the Inducement Theory" below.

³¹ See "Implied False Certification Theory" and "Fraud in the Inducement Theory" below. Two scholars have characterized these theories as the "implied certification of no pre-formation fraud in the inducement" and "implied certification of post-formation performance" theories. Gregory Klass & Michael Holt, *Implied Certification under the False Claims Act*, 41 Pub. Contract. L.J. 1, 5 (2011).

³² See "Implied False Certification Theory: Limitations on the Theory" and "Fraud in the inducement Theory: Limitations on the Theory" below.

³³ See "Implied False Certification Theory: Limitations on the Theory" and "Fraud in the inducement Theory: Limitations on the Theory" below.

³⁴ See "Calculating Treble Damages" below.

³⁵ False Claims Act, ch. 67, 12 Stat. 696 (1863); Cong. Globe, 37th Cong., 3d Sess. 952 (1863) (remarks of Sen. Jacob M. Howard) ("The country, as we know, has been full of complaints respecting the frauds and corruptions practiced in obtaining pay from the Government during the present war; and it is said ... that further legislation is pressingly necessary to prevent this great evil ..."). For a more detailed overview of the FCA and its history, see CRS Report R40785, *Qui Tam: The False Claims Act and Related Federal Statutes*, by (name redacted).

³⁶ Originally, the FCA contained both civil and criminal liability provisions. See False Claims Act, ch. 67, 12 Stat. 696-99. This report examines judicial interpretations of some of the act's civil liability provisions, which Congress has since amended and separately codified at 31 U.S.C. §§3729-3733.

³⁷ 31 U.S.C. §3729(a)(1). The FCA imposes civil liability on "any person" who

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

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

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

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

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

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

(continued...)

Parties bringing claims against contractors under the FCA frequently invoke two of the act's provisions. These provisions impose liability for treble damages³⁸ and a civil penalty³⁹ on "any person" who "knowingly⁴⁰ presents, or causes to be presented, a false or fraudulent claim⁴¹ for payment or approval" or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim."⁴² Many federal courts of appeals require parties bringing an FCA cause of action to show that the falsity of the claim or statement is material to the government's (or its intermediary's) decision to pay the claim.⁴³ The party bringing an FCA cause of action against a contractor must prove its elements, including damages, "by a

(...continued)

sell or pledge property; or

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

³⁸ *Id.* at §3729(a)(1). In some circumstances, the FCA allows courts to assess double damages. *Id.* at §3729(a)(2). These circumstances include when the person in violation of the act discloses all information known to that person about the violation of the act to certain government officials within 30 days of obtaining the information; fully cooperates in the government's investigation; and meets certain other requirements. *Id.*

³⁹ The Department of Justice has currently set the civil penalty at between \$5,500 and \$11,000 per violation. *Id.* at §3729(a)(1); 28 C.F.R. §85.3(a)(9) (adjusting the civil penalty in accordance with the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990).

⁴⁰ In this context, to prove that a person acted "knowingly" with respect to information, the government or a relator must show that the person possessed "actual knowledge" of the information or deliberately ignored or acted in reckless disregard of the information's truth or falsity. 31 U.S.C. §3729(b)(1). The FCA does not require proof of specific intent to defraud. *Id.*

⁴¹ The act defines "claim" as

any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—(i) is presented to an officer, employee, or agent of the United States; or (ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—(I) provides or has provided any portion of the money or property requested or demanded; or (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

Id. at §3729(b)(2). Claims do not include "requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property." *Id.*

⁴² *Id.* at §3729(a)(1)(A)-(B). "This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986." *Id.* at §3729(d). Commentators have noted that it is unclear where in these provisions a court might find support for the implied false certification and fraud in the inducement theories of falsity. *See, e.g.,* Gregory Klass & Michael Holt, *Implied Certification under the False Claims Act*, 41 Pub. Contract. L.J. 1, 27-28 (2011). Because some courts have nevertheless applied these theories in their decisions, this report does not speculate on the theories' statutory bases.

⁴³ *See, e.g.,* United States v. Bourseau, 531 F.3d 1159, 1170-71 (9th Cir. 2008) (listing several circuit courts of appeals that have held that the FCA includes a materiality requirement and adopting such a requirement). Courts have applied various tests to determine whether a false claim or statement is material to a payment decision. *See* United States ex rel. Longhi v. Lithium Power Techs., Inc., 575 F.3d 458, 470 (5th Cir. 2009). In 2009, Congress passed the Fraud Enforcement and Recovery Act (FERA), which added a specific materiality element to Section 3729(a)(1)(B) defined to encompass those false statements having natural tendency to influence payment. P.L. 111-21 §4, 123 Stat. 1617, 1621, 31 U.S.C. §3729(a)(1)(B).

preponderance of the evidence.”⁴⁴ Unlike some of the other federal civil fraud remedy statutes discussed in this report, liability under the FCA requires no specific proof of intent to defraud.⁴⁵

The FCA authorizes the Attorney General, as well as certain private parties that sue on behalf of the United States under the act’s *qui tam*⁴⁶ provisions (known as “relators”), to bring a civil action⁴⁷ against an alleged violator of the act.⁴⁸ Generally, the Department of Justice (DOJ) may intervene in a relator’s suit within a certain time period after receiving the complaint and other material information.⁴⁹ If the DOJ intervenes, then it conducts the action.⁵⁰ If the DOJ declines to intervene, the relator may proceed with the action.⁵¹ When the DOJ conducts an action initially brought by a relator, the court may award the relator between 15 to 25 percent of the proceeds of the action or settlement of the claim “depending upon the extent to which the person substantially contributed to the prosecution of the action.”⁵² If the government declines to intervene, the relator may receive between 25 and 30 percent of the proceeds of the action or settlement.⁵³

⁴⁴ *Id.* at §3731(d).

⁴⁵ *Id.* at §3729(b)(1).

⁴⁶ “*Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means ‘who pursues this action on our Lord the King’s behalf as well as his own.’” Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 769 n.1 (2000).

⁴⁷ The government or relators may bring FCA actions in district court. *E.g.*, United States ex rel. Mikes v. Straus, 274 F.3d 687, 692 (2d Cir. 2001) (discussing the procedural history of the *Mikes* case); *see also* 28 U.S.C. §1331. In addition, the government may bring FCA actions as counterclaims in the Court of Federal Claims when a contractor seeks relief related to a government contract dispute. *E.g.*, Ab-Tech Construction, Inc. v. United States, 31 Fed. Cl. 429, 431 (1994), *aff’d*, 57 F.3d 1084 (Fed. Cir. 1995) (unpublished table decision); *see also* 28 U.S.C. §§1503, 2508.

⁴⁸ 31 U.S.C. §3730(a)-(b). A relator initially files its action under seal until the court orders the relator to serve it on the defendant. *Id.* at §3730(b). The act also seeks to protect relators that take lawful action in furtherance of an FCA lawsuit from retaliation by their employers. *Id.* at §3730(h). Further, the act imposes certain limitations on FCA lawsuits, including limits intended to prevent relators from receiving a share of the proceeds of an FCA lawsuit when information about the fraud has been publicly disclosed and the relator was not an original source of the information. *See id.* at §3730(e). In addition, the act contains a statute of limitations that generally bars FCA lawsuits brought after a certain amount of time has passed. *See id.* at §3731(b). The Fourth Circuit recently held that the Wartime Suspension of Limitations Act (WSLA) tolled the FCA’s statute of limitations in a *qui tam* suit brought against a defense contractor that provided services to the U.S. military in Iraq. United States ex rel. Carter v. Halliburton Co., 710 F.3d 171, 174, 178 (4th Cir. 2013). The court held that the WSLA may apply even in the absence of a “formal declaration of war.” *Id.* at 178; *see also* 18 U.S.C. §3287.

⁴⁹ 31 U.S.C. §3730(b).

⁵⁰ *Id.* at §3730(c)(1).

⁵¹ *Id.* at §3730(c)(3). “The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.” *Id.* §3730(b)(1). “When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.” *Id.* at §3730(c)(3).

⁵² *Id.* at §3730(d)(1). The court may not award more than 10 percent of the proceeds in cases in which “the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or [Government Accountability Office] report, hearing, audit, or investigation, or from the news media.” *Id.*

⁵³ *Id.* at §3730(d)(2). Regardless of whether the government intervenes, a prevailing relator shall receive “reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys’ fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.” *Id.* at §3730(d)(1)-(2). However, if the relator planned and initiated the violation that served as the basis for the FCA suit, the court may reduce the award. *Id.* at §3730(d)(3). If the relator was convicted of criminal conduct related to the violation of the FCA upon which suit is brought, the relator must be dismissed from the action and is ineligible to receive any proceeds. *Id.*

Recent Amendments

Since enacting the FCA, Congress has periodically amended the act to, among other things, change the extent to which the act exposes contractors and other parties to potential civil liability. For example, in 1943, the Supreme Court expanded the reach of the act's *qui tam* provisions, holding that a relator's action under the FCA could be based solely on knowledge already possessed by the government and made public in a criminal indictment.⁵⁴ Congress reversed this decision by enacting a law that stripped federal courts of jurisdiction over suits brought by relators when the government already had knowledge of the alleged fraud underlying the relator's complaint.⁵⁵ In the same law, Congress also limited whistleblower lawsuits by reducing the share of the recovery a relator could obtain in a successful suit.⁵⁶

By contrast, decades later, Congress sought to strengthen the FCA in the wake of evidence of extensive fraud against the federal government by defense contractors and others.⁵⁷ In 1986, Congress restored courts' jurisdiction over some *qui tam* suits based on publicly disclosed information, including suits in which relators were an "original source" of information about the alleged fraud.⁵⁸ The amendments also relaxed the knowledge standard for liability, making clear that liability required no specific intent to defraud.⁵⁹

More recently, Congress amended the FCA in response to various judicial developments that some perceived as having weakened the act.⁶⁰ In 2009, Congress passed the Fraud Enforcement and Recovery Act (FERA).⁶¹ Among other things, FERA eliminated language suggesting that a false claim must be submitted directly to a federal officer or employee and added a specific materiality element to the act's "false statements" provision.⁶² Congress made additional

⁵⁴ United States ex rel. Marcus v. Hess, 317 U.S. 537, 545 (1943) ("Even if, as the government suggests, the petitioner has contributed nothing to the discovery of this crime, he has contributed much to accomplishing one of the purposes for which the Act was passed.").

⁵⁵ P.L. 78-213, 57 Stat. 608, 609 (1943) ("The court shall have no jurisdiction to proceed with any such [*qui tam*] suit ... whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States ...").

⁵⁶ *Id.*

⁵⁷ S.Rept. 99-345, at 2-3 (1986) ("In 1985 ... 45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses. Additionally, the Justice Department has reported that in the last year, four of the largest defense contractors ... have been convicted of criminal offenses while another ... has been indicted and awaits trial.... The Department of Justice has estimated fraud as draining 1 to 10 percent of the entire Federal budget. Taking into account the spending level in 1985 of nearly \$1 trillion, fraud against the Government could be costing taxpayers anywhere from \$10 to \$100 billion annually.") (citations omitted); *see also* H.Rept. 99-660, at 18 (1986).

⁵⁸ False Claims Amendments Act of 1986, P.L. 99-562 §3, 100 Stat. 3153, 3157 (1986).

⁵⁹ *Id.* at §2, 100 Stat. at 3154; S.Rept. 99-345, at 7 (1986) ("The Committee believes [the knowledge standard prior to the 1986 amendments] is inappropriate in a civil remedy and presently prohibits the filing of many civil actions to recover taxpayer funds lost to fraud.").

⁶⁰ S.Rept. 111-10, at 4 (2009) ("The effectiveness of the False Claims Act has recently been undermined by court decisions which limit the scope of the law and, in some cases, allow subcontractors paid with Government money to escape responsibility for proven frauds. The False Claims Act must be corrected and clarified in order to protect from fraud the Federal assistance and relief funds expended in response to our current economic crisis.").

⁶¹ P.L. 111-21, 123 Stat. 1617 (2009).

⁶² *Id.* at §4, 123 Stat. at 1621-25, codified at 31 U.S.C. §3729(a)(1)(A)-(B), (b)(4). Other than adding a statutory materiality requirement to the "false statements" provision, it does not appear that these changes will significantly affect the viability of the implied false certification and fraud in the inducement theories of falsity. Courts disagree about retroactive application of FERA's amendment to the FCA's "false statements" provision. *See* P.L. 111-21 §4, (continued...)

amendments to the FCA in the Patient Protection and Affordable Care Act (PPACA) of 2010 that, among other things, reduced some of the jurisdictional obstacles to *qui tam* suits.⁶³

Implied False Certification Theory

As described above, one element that the United States or a relator must prove in order to establish a defendant's liability for fraudulent misconduct under sections 3729(a)(1)(A)-(B) of the FCA is that the claim is "false or fraudulent."⁶⁴ Congress did not define this phrase in the FCA, and thus courts have developed a body of case law interpreting it.⁶⁵ One formulation of the judicially created implied false certification theory allows the United States or a relator to establish the falsity of a claim for payment even when the claim is not explicitly false⁶⁶ because "the act of submitting a claim for reimbursement [or payment]⁶⁷ itself implies compliance with governing federal rules that are a precondition to payment."⁶⁸

However, courts have not adopted this definition uniformly. Thus, for example, some courts do not mandate that compliance with a law or contractual provision be an express precondition of payment, requiring only that it be material to the government's decision to pay the claim.⁶⁹ Some

(...continued)

123 Stat. 1617, 1625 ("[S]ubparagraph (B) of section 3729(a)(1) of title 31, United States Code ... shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act ... that are pending on or after that date."); *United States ex rel. SNAPP, Inc. v. Ford Motor Co.*, 618 F.3d 505, 509 n.2 (6th Cir. 2010) ("It is unsettled, however, whether the retroactive effect mandated by Congress applies to 'claims' in the sense of demands made via litigation or 'claims' as defined by the FCA.") (citation omitted); *U.S. ex rel. Sanders v. Allison Engine Co.*, 667 F. Supp. 2d 747, 758 (S.D. Ohio 2009) ("[R]etroactive application of the new FCA language to these Defendants violates the Ex Post Facto Clause [of the Constitution].").

⁶³ *E.g.*, P.L. 111-148 §10104(j)(2), 124 Stat. 119, 901-902. The amendments do not appear to apply retroactively to FCA cases filed before PPACA's enactment on March 23, 2010. *See Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 283 n.1 (2010).

⁶⁴ 31 U.S.C. §3729(a)(1)(A)-(B).

⁶⁵ *See United States ex rel. Mikes v. Straus*, 274 F.3d 687, 696 (2d Cir. 2001).

⁶⁶ A claim would be explicitly false if, for example, it contained an "incorrect description of goods or services provided or a request for reimbursement for goods or services never provided." *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 697 (2d Cir. 2001); *United States ex rel. Wilkins v. United Health Group, Inc.*, 659 F.3d 295, 305 (3rd Cir. 2011).

⁶⁷ *Mikes* was decided in the context of a healthcare provider submitting Medicare claims to the government for reimbursement, but the Second Circuit later extended its holding to the procurement context. *See United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 115 (2d Cir. 2010), *rev'd on other grounds*, *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885 (2011).

⁶⁸ *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 699 (2d Cir. 2001); *United States ex rel. Wilkins v. United Health Group, Inc.*, 659 F.3d 295, 313 (3rd Cir. 2011) ("To plead a claim for relief under an implied certification theory, appellants were required to allege, as they did, that appellees submitted claims for payment to the Government at a time that they knowingly violated a law, rule, or regulation which was a condition for receiving payment from the Government."). At least one federal court of appeals has held that a claim may be false even if the claimant violates a regulation *after* submitting its claim for payment. *See United States ex rel. Augustine v. Century Health Servs.*, 289 F.3d 409, 415 (6th Cir. 2002) (stating that "liability can attach if the claimant violates its continuing duty to comply with the regulations on which payment is conditioned.").

⁶⁹ *E.g.*, *United States v. Sci. Applications Int'l Corp.*, 626 F.3d 1257, 1269 (D.C. Cir. 2010); *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429, 433-34 (1994) ("The withholding of such information—information critical to the decision to pay—is the essence of a false claim."), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995) (unpublished table decision). The First Circuit, which does not recognize the implied false certification theory by name, does not require that a claim "fail to comply with a precondition of payment expressly stated in a statute or regulation" in order for it to be false or fraudulent because the text of the FCA does not contain such a requirement. *United States ex rel. Hutcheson v. Blackstone Med., Inc.*, 647 F.3d 377, 379 (1st Cir. 2011).

courts hold that a violation of a *contractual provision* may make a claim for payment false under the implied certification theory.⁷⁰ In addition, a couple of courts that have recognized the theory have done so in cases in which the claimant has previously expressly certified that it would comply with a law.⁷¹

Although the government and relators have often used the implied false certification theory in an effort to establish the falsity of claims for payment by contractors, the text of the FCA does not explicitly appear to recognize the theory.⁷² Moreover, it does not appear that the Supreme Court has addressed the theory's viability. Nevertheless, federal courts of appeals in the First,⁷³ Second, Third, Sixth, Ninth, Tenth, Eleventh, and District of Columbia circuits have adopted this theory of falsity in some form.⁷⁴ Courts that have adopted the theory have found support for it in the FCA's structure⁷⁵ and legislative history,⁷⁶ as well as language in Supreme Court opinions about Congress' intent that the FCA encompass a wide range of fraudulent conduct.⁷⁷

⁷⁰ See, e.g., *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1170 (10th Cir. 2010) (“Even if Plaintiffs failed to state a claim arising directly from Envirocare’s regulatory obligations, Plaintiffs’ allegations provided more than enough factual detail to support their contract-based claims.”); *Sci. Applications Int’l Corp.*, 626 F.3d at 1269 (“Instead, we hold that to establish the existence of a ‘false or fraudulent’ claim on the basis of implied certification of a contractual condition, the FCA plaintiff—here the government—must show that the contractor withheld information about its noncompliance with material contractual requirements.”). At least one district court has held that FCA liability may attach under the implied certification theory only when the contractual term the defendant allegedly failed to comply with is “clear and unambiguous.” *United States v. DRC, Inc.*, 856 F. Supp. 2d 159, 170 (D.D.C. 2012).

⁷¹ E.g., *United States ex rel. Ebeid v. Lungwitz*, 616 F.3d 993, 998 (9th Cir. 2010) (“Implied false certification occurs when an entity has previously undertaken to expressly comply with a law, rule, or regulation, and that obligation is implicated by submitting a claim for payment even though a *certification* of compliance is not required in the process of submitting the claim.”); *Ab-Tech*, 31 Fed. Cl. at 432. But see *Lemmon*, 614 F.3d at 1170 (stating that implied false certification claims “do not involve—let alone require—an explicit certification of regulatory compliance.”).

⁷² See 31 U.S.C. §3729(a)(1)(A)-(G).

⁷³ The First Circuit appears to recognize some form of the theory but rejects the categories of “express” and “implied” certifications. *United States ex rel. Hutchesson v. Blackstone Med., Inc.*, 647 F.3d 377, 385-88 (1st Cir. 2011).

⁷⁴ *United States ex rel. Mikes v. Straus*, 274 F.3d 687, 699-700 (2d Cir. 2001); *United States ex rel. Wilkins v. United Health Group, Inc.*, 659 F.3d 295, 306 (3rd Cir. 2011); *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 415 (6th Cir. 2002); *Ebeid*, 616 F.3d at 998; *Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 519, 533 (10th Cir. 2000); *United States ex rel. McNutt v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005); *Sci. Applications Int’l Corp.*, 626 F.3d at 1266-67 (discussing the D.C. Circuit’s earlier acceptance of the theory by implication). In an unpublished table decision, the Federal Circuit affirmed a Court of Federal Claims decision recognizing the theory. See *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429 (1994), *aff’d.*, 57 F.3d 1084 (Fed. Cir. 1995).

⁷⁵ *Wilkins*, 659 F.3d 295 at 307 (“[S]ection 3729(a)(1), when compared with section 3729(a)(2), indicates that a plaintiff can bring a claim under the FCA even without evidence that a claimant for Government funds made an express false statement in order to obtain those funds.”); see also *Shaw*, 213 F.3d at 531-32. In these decisions, the courts referred to the provisions of the FCA before Congress renumbered them in FERA. See 31 U.S.C. §3729(a) (2006).

⁷⁶ To justify recognition of the implied false certification theory, courts often point to language in a Senate committee report accompanying the 1986 amendments to the FCA. See, e.g., *Wilkins*, 659 F.3d at 306; *Mikes*, 274 F.3d at 699. The committee report states that the act is “intended to reach all fraudulent attempts to cause the Government to pay out sums of money or to deliver property or services,” and that a false claim “may take many forms, the most common being a claim for goods or services not provided, or provided in violation of contract terms, specification, statute, or regulation.” S.Rept. 99-345, at 9 (1986) (emphasis added).

⁷⁷ E.g., *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968) (“This remedial statute reaches beyond ‘claims’ which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money.”). But see *United States v. McNinch*, 356 U.S. 595, 599 (1958) (stating that the FCA “was not designed to reach every kind of fraud practiced on the Government.”).

Examples

Decisions by federal courts in FCA cases illustrate attempts to use the implied false certification theory in civil lawsuits against contractors. It appears that the earliest use of the term “implied certification” in an FCA decision occurs in the Court of Federal Claims’ 1994 opinion in *Ab-Tech Construction, Inc. v. United States*.⁷⁸ In this case, a subcontractor agreed to comply with the eligibility requirements of the Small Business Administration’s (SBA’s) “8(a) Program” in order to receive a contract from the agency.⁷⁹ Federal regulations required Ab-Tech to obtain the SBA’s approval prior to entering into “any management agreement, joint venture agreement or other agreement relative to the performance of a section 8(a) subcontract.”⁸⁰ The court held that by submitting payment vouchers to the government without disclosing that it had entered into a prohibited contractual arrangement with a non-minority owned business, Ab-Tech falsely and by implication certified compliance with the eligibility regulations that were critical to the government’s payment decision.⁸¹ This, the court held, resulted in a false claim under the FCA.⁸² The court reasoned that these claims were false in part because they “caused the Government to pay out funds in the mistaken belief that it was furthering the aims of the 8(a) program.”⁸³

Examples of recent implied false certification cases in the procurement context include cases in which parties have alleged that a contractor submitted a claim for payment while failing to comply with contractual provisions (express or implied),⁸⁴ laws,⁸⁵ or, most commonly, requirements established by law and contract.⁸⁶

⁷⁸ *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429 (1994), *aff’d.*, 57 F.3d 1084 (Fed. Cir. 1995) (unpublished table decision).

⁷⁹ *Id.* at 432. The 8(a) Program seeks to assist small businesses “unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States” that demonstrate “potential for success.” 13 C.F.R. §124.101. For more on the program, see CRS Report R40744, *The “8(a) Program” for Small Businesses Owned and Controlled by the Socially and Economically Disadvantaged: Legal Requirements and Issues*, by (name redacted).

⁸⁰ *Ab-Tech*, 31 Fed. Cl. at 432.

⁸¹ *Id.* at 433-34.

⁸² *Id.*

⁸³ *Id.* at 434.

⁸⁴ *United States ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202, 206 (5th Cir. 2013) (implied warranty of merchantability); *United States v. Sci. Applications Int’l Corp.*, 626 F.3d 1257, 1261 (D.C. Cir. 2010) (prohibition on conflicts of interest); *United States v. DRC, Inc.*, 856 F. Supp. 2d 159, 169-70 (D.D.C. 2012) (provision requiring approval from government agency prior to subcontracting work); *United States v. First Choice Armor & Equipment, Inc.*, 808 F. Supp. 2d 68, 76 (D.D.C. 2011) (implied warranty requirements for body armor); *United States v. Kellogg Brown & Root Servs., Inc.*, 800 F. Supp. 2d 143, 156 (D.D.C. 2011) (contract provision allegedly prohibiting the charging of expenses for private security); *United States v. Honeywell Int’l Inc.*, 798 F. Supp. 2d 12, 20 (D.D.C. 2011) (implied five-year warranty against defects for bulletproof vests).

⁸⁵ *United States ex rel. Kirk v. Schindler Elevator Corp.*, 601 F.3d 94, 98, 115 (2d Cir. 2010) (Vietnam Era Veterans Readjustment Assistance Act, which “requires contractors doing business with federal government entities to submit annual reports to the Secretary of Labor providing information about the number of veterans employed by the contractor”); *United States ex rel. Siewick v. Jamieson Sci. and Engineering*, 214 F.3d 1372, 1374 (D.C. Cir. 2000) (criminal statute “aimed at ‘revolving door’ abuses by former government employees”); *United States ex rel. Dyer v. Raytheon Co.*, 2013 U.S. Dist. LEXIS 135691, *1 (D. Ma. Sept. 23, 2013) (provisions of the Federal Acquisition Regulation (FAR) governing reimbursement for incentive compensation).

⁸⁶ *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1166 (10th Cir. 2010) (contractual provisions requiring adherence to regulatory requirements regarding waste disposal); *Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 519, 527 & n.7 (10th Cir. 2000) (contractual and legal requirements regarding silver recovery and disposal of fixer); *United States ex rel. McLain v. Fluor Enters., Inc.*, 2013 U.S. Dist. LEXIS 161142, *5, 14 (E.D. (continued...))

Limitations on the Theory

Some courts that recognize the implied false certification theory have limited its reach. For example, several federal courts of appeals require that the defendant's compliance with the law or contractual provision it has allegedly violated be a precondition of payment by the government.⁸⁷ Some of these courts have stated that the FCA is not an "enforcement device" for "minor" violations of law or breaches of contract.⁸⁸ In addition, at least one commentator has noted that such a requirement makes the contractor aware of which violations of law or contract may result in FCA liability, allowing contractors to focus their resources on monitoring for compliance with these requirements.⁸⁹ Other courts that recognize the implied certification theory do not mandate that compliance be an express precondition of payment, requiring only that the law or contractual provision be material to the government's decision to pay the claim.⁹⁰ One commentator has

(...continued)

La. Nov. 12, 2013) (contract requiring compliance with state and local regulations "governing handling and installation of liquefied petroleum tanks"); United States ex rel. Thomas v. Black & Veatch Special Projects Corp., 2013 U.S. Dist. LEXIS 104826, *2-3 (D. Kan. July 26, 2013) (contractual provision requiring compliance with Afghan law when obtaining work permits for employees); United States ex rel. Winkler v. BAE Systems, Inc., 957 F. Supp. 2d 856, 868 (E.D. Mich. 2013) (minimum performance standards for brakes for military vehicles); United State ex rel. Head v. The Kane Company, 798 F. Supp. 2d 186, 199 (D.D.C. 2011) (contract terms that required compliance with the Service Contract Act's minimum wage requirements); United States ex rel. Chabot v. MLU Servs., Inc., 2010 U.S. Dist. LEXIS 38045, *5-6 (M.D. Fla. April 18, 2010) (contractual provision requiring compliance with state and local licensing requirements for construction activity); United States ex rel. Compton v. Circle B Enters., Inc., 2010 U.S. Dist. LEXIS 22749, *20 (M.D. Ga. March 11, 2010) (contractual provision and the Anti-Kickback Act); United States ex rel. Smith v. Boeing, 505 F. Supp. 2d 974, 979-80 (D. Kan. 2007) (contract specifications, statutes, rules, and other requirements for aircraft parts); United States ex rel. Holder v. Special Devices, Inc., 296 F. Supp. 2d 1167, 1169 (C.D. Ca. 2003) (contractual requirements mandating compliance with environmental and health and safety regulations).

⁸⁷ E.g., United States ex rel. Wilkins v. United Health Group, 659 F.3d 295, 309 (3d Cir. 2011) ("[T]o plead a claim upon which relief could be granted under a false certification theory, either express or implied, a plaintiff must show that compliance with the regulation which the defendant allegedly violated was a condition of payment from the Government."); Chesbrough v. VPA, P.C., 655 F.3d 461, 468 (6th Cir. 2011) ("[I]t is not the violation of a regulation itself that creates a cause of action under the FCA. Rather, noncompliance constitutes actionable fraud only when compliance is a prerequisite to obtaining payment."); Kirk, 601 F.3d at 114 (stating that "[a]n implied false certification takes place where a statute expressly conditions payment on compliance with a given statute or regulation, and the contractor, while failing to comply with the statute or regulation (and while knowing that compliance is required), submits a claim for payment."); United States ex rel. Steury v. Cardinal Health, Inc., 625 F.3d 262, 269 (5th Cir. 2010) (holding, without adopting the implied certification theory, that "a false certification of compliance, without more, does not give rise to a false claim for payment unless payment is conditioned on compliance" in statutes, regulations, or contracts); United States ex rel. Conner v. Salina Reg'l Health Ctr., 543 F.3d 1211, 1218 (10th Cir. 2008) (stating that courts examine whether "the underlying contracts, statutes, or regulations themselves ... make compliance a prerequisite to the government's payment."); United States ex rel. Mikes v. Straus, 274 F.3d 687, 700 (2d Cir. 2001) ("[I]mplied false certification is appropriately applied only when the underlying statute or regulation upon which the plaintiff relies expressly states the provider must comply in order to be paid.") (citation omitted) (emphasis retained).

⁸⁸ E.g., United States ex rel. Steury v. Cardinal Health, Inc., 735 F.3d 202, 205-06 (5th Cir. 2013) (quoting United States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1997)); Mikes, 274 F.3d at 697 (stating that the FCA "does not encompass those instances of regulatory noncompliance that are irrelevant to the government's disbursement decisions."). A district court found support for the express-condition-of-payment requirement in the general tort principle that "a plaintiff making a tort claim based on a statutory violation must have suffered an injury of the type the statute was designed to prevent." KBR, 800 F. Supp. 2d at 156 (citation omitted) (emphasis retained).

⁸⁹ Christopher L. Martin, Jr., *Reining in Lincoln's Law: A Call to Limit the Implied Certification Theory of Liability Under the False Claims Act*, 101 Cal. L. Rev. 227, 263, 266 (2013) ("The express condition-of-payment requirement provides fair notice by giving contractors ex ante warning of the contract breaches and statutory and regulatory violations that could give rise to False Claims Act liability.").

⁹⁰ E.g., United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1269 (D.C. Cir. 2010) ("[T]o establish the existence of a 'false or fraudulent' claim on the basis of implied certification of a contractual condition, the FCA (continued...)

criticized this rule as failing to provide contractors with notice of which requirements they must comply with in order to avoid liability.⁹¹

Courts have also imposed limits on defendants' liability for implied false certifications of compliance—at least with contractual provisions—by reference to the FCA's knowledge (or "scienter") requirement.⁹² For example, in the D.C. Circuit, the United States or relators must show that a defendant knows "(1) that it violated a contractual obligation, and (2) that its compliance with that obligation was material to the government's decision to pay."⁹³ However, when the government pays a claim while possessing knowledge that a contractor has violated a law, regulation, or contractual provision, this may negate the contractor's intent to make a false claim or statement, at least when the government has directed the contractor's participation in, or consented to, the violation.⁹⁴ In addition, some courts have found that a contractor may lack the requisite knowledge when it has made a plausible but erroneous interpretation of the contract "absent some specific evidence of knowledge that the claim is false or of intent to deceive," at least when the interpretation is not unreasonable.⁹⁵

(...continued)

plaintiff ... must show that the contractor withheld information about its noncompliance with material contractual requirements. The existence of express contractual language specifically linking compliance to eligibility for payment may well constitute dispositive evidence of materiality, but it is not ... a necessary condition. The plaintiff may establish materiality in other ways, such as through testimony demonstrating that both parties to the contract understood that payment was conditional on compliance with the requirement at issue." The D.C. Circuit acknowledged that this could potentially allow minor contractual violations to become the basis of an FCA claim but wrote that courts should use the act's materiality and scienter requirements to avoid this result. *Id.* at 1270; *see also* *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429, 433-34 (1994) ("The withholding of such information—information critical to the decision to pay—is the essence of a false claim."), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995) (unpublished table decision).

The First Circuit, which does not recognize the implied false certification theory by name, does not require that a claim "fail to comply with a precondition of payment expressly stated in a statute or regulation" in order for it to be false or fraudulent because the text of the FCA does not contain such a requirement. *United States ex rel. Hutcherson v. Blackstone Med., Inc.*, 647 F.3d 377, 379 (1st Cir. 2011).

⁹¹ Christopher L. Martin, Jr., *Reining in Lincoln's Law: A Call to Limit the Implied Certification Theory of Liability Under the False Claims Act*, 101 Cal. L. Rev. 227, 258 (2013) (stating that this rule "draws the obligation to disclose broadly, because contractors bear the risk that a court might later deem undisclosed violations material.").

⁹² *United States ex rel. Jones v. Brigham and Women's Hosp.*, 678 F.3d 72, 85 (1st Cir. 2012); *Sci. Applications Int'l Corp.*, 626 F.3d at 1270-73.

⁹³ *Id.* at 1271. Similarly, the Sixth Circuit has held that "when FCA liability is premised on an implied certification of compliance with a contract, the FCA nonetheless requires that the contractor knew, or recklessly disregarded a risk, that its implied certification of compliance was false." *United States ex rel. Augustine v. Century Health Servs., Inc.*, 289 F.3d 409, 416 (6th Cir. 2002) (quoting *Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 519, 533 (10th Cir. 2000)).

⁹⁴ *See, e.g., United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 327 (9th Cir. 1995) ("[I]f the district court correctly found that the only reasonable conclusion a jury could draw from the evidence was that MDHC and the Army had so completely cooperated and shared all information during the testing that MDHC did not 'knowingly' submit false claims, then we must affirm the directed verdict. We examine the individual statements below to determine whether, if they are arguably false, the government's knowledge of their deficiencies negates MDHC's intent."); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) ("[T]he knowledge possessed by officials of the United States may be highly relevant. Such knowledge may show that the defendant did not submit its claim in deliberate ignorance or reckless disregard of the truth."); *Ulysses, Inc. v. United States*, 110 Fed. Cl. 618, 647 (2013). *But see Shaw*, 213 F.3d at 535 (holding that the "government's alleged knowledge of Defendants' actions therefore does not, as a matter of law, negate the evidence of Defendants' intent to submit a false record in support of a claim.").

⁹⁵ *E.g., Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998); *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 684 (5th Cir. 2003) ("Where there are legitimate grounds for disagreement over the scope of a contractual or regulatory provision, and the claimant's actions are in good faith, the claimant cannot be (continued...)

Because a cause of action under the FCA alleges fraud, some courts have held that Federal Rule of Civil Procedure 9(b) requires the government or relator to plead the elements of such actions with sufficient particularity in order to avoid having the actions dismissed by a court for failure to state a claim for relief.⁹⁶ This requirement is intended to give the defendant fair notice of the fraud it allegedly committed so that the defendant may prepare a response to the claims; narrow the scope of discovery; and protect defendants from harm to their reputations from fraud allegations.⁹⁷

Fraud in the Inducement Theory

In contrast to the implied false certification theory, which holds that a claim for payment under a government contract becomes false because of a contractor's conduct during contract performance, the fraud in the inducement or "promissory fraud"⁹⁸ theory holds that a claim for payment becomes false because of fraudulent conduct by the contractor (or other party) prior to contract formation that induced the government to enter into the contract.⁹⁹ These cases often involve conduct by contractors during the bidding or negotiation process such as collusive bidding; bid-rigging; contracts obtained based on false information, fraudulent pricing, or inflated cost estimates;¹⁰⁰ or false representations about the ability to perform.¹⁰¹ Federal courts of appeals

(...continued)

said to have knowingly presented a false claim." (citation omitted).

⁹⁶ *Chesbrough v. VPA, P.C.*, 655 F.3d 461, 472 (6th Cir. 2011) ("The Chesbroughs have no personal knowledge that claims for nondiagnostic tests were presented to the government, nor do they allege facts that strongly support an inference that such billings were submitted. We therefore conclude that the Chesbroughs' complaint fails to satisfy Rule 9(b)"). The Fifth Circuit has stated that Rule 9(b) requires a plaintiff to provide the "who, what, when, where, and how of the alleged fraud." *United States ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 202, 204 (5th Cir. 2013) (citation omitted). For implied false certification claims, the Fifth Circuit has stated that a plaintiff must specifically establish that the government has conditioned payment on a certification of compliance. *Id.* at 207. According to the Tenth Circuit, "claims under the FCA need only show the specifics of a fraudulent scheme and provide an adequate basis for a reasonable inference that false claims were submitted as part of that scheme." *United States ex rel. Lemmon v. Envirocare of Utah, Inc.*, 614 F.3d 1163, 1172 (10th Cir. 2010) (citations omitted). *See generally* Fed. R. Civ. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.").

⁹⁷ *Chesbrough*, 655 F.3d at 466.

⁹⁸ *See, e.g.*, *United States ex rel. Hendow v. Univ. of Phoenix*, 461 F.3d 1166, 1173 (9th Cir. 2006).

⁹⁹ *E.g.*, *In re Baycol Products Litig.*, 732 F.3d 869, 871, 876 (8th Cir. 2013) ("Thus, when a relator alleges liability under a theory of fraud-in-the inducement, claims for payment subsequently submitted under a contract initially induced by fraud do not have to be false or fraudulent in and of themselves in order to state a cause of action under the FCA."); *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999) ("Contrary to the district court's decision, in many of the [fraud in the inducement] cases cited above the claims that were submitted were not in and of themselves false.... False Claims Act liability attached, however, because of the fraud surrounding the efforts to obtain the contract or benefit status, or the payments thereunder."); *see also* *United States v. Veneziale*, 268 F.2d 504, 505-06 (3rd Cir. 1959).

¹⁰⁰ The Truth in Negotiations Act (TINA) generally requires offerors and contractors to submit certified "cost or pricing data" to the government prior to award or modification of negotiated government contracts or subcontracts that exceed \$700,000 in value, with exceptions for contracts awarded with "adequate price competition," among other things. 10 U.S.C. §2306a; 41 U.S.C. §§3501-3509; 48 C.F.R. §§15.403-1(a)-(b), 15.403-4; *see also id.* §2.101 (defining "cost or pricing data"). TINA provides for a potential reduction in the price of the contract to the extent that inaccurate, incomplete, or noncurrent cost or pricing data submitted to the government increased the price. 10 U.S.C. §2306a(e); 41 U.S.C. §3506. Non-compliance with TINA may serve as a basis for an FCA suit against a contractor. *See* Department of Justice, Press Release, *CyTerra Corporation Agrees to Pay \$1.9 Million to Resolve False Claims Act Allegations* (July 2, 2013), <http://www.justice.gov/opa/pr/2013/July/13-civ-751.html>.

¹⁰¹ *Harrison*, 176 F.3d at 787-88.

that recognize the fraud in the inducement theory of falsity include the Fourth, Fifth, Seventh, Eighth, and Ninth circuits.¹⁰²

Courts' recognition of the theory may stem in part from concerns that the government will ultimately pay higher prices for goods and services under fraudulently induced contracts.¹⁰³ For example, many courts adopting the theory have invoked the Supreme Court's decision in *United States ex rel. Marcus v. Hess*.¹⁰⁴ In that case, electrical contractors colluded to remove competition from the bidding process while certifying that their bids were genuine and not collusive.¹⁰⁵ The Court wrote that

By their conduct, the respondents thus caused the government to pay claims of the local sponsors in order that they might in turn pay respondents under contracts found to have been executed as the result of the fraudulent bidding. This fraud did not spend itself with the execution of the contract. Its taint entered into every swollen estimate which was the basic cause for payment of every dollar paid by the [government].... The initial fraudulent action and every step thereafter taken pressed ever to the ultimate goal—payment of government money to persons who had caused it to be defrauded.¹⁰⁶

Courts also find support for the theory in a Senate committee report accompanying the 1986 amendments to the FCA.¹⁰⁷ In this report, the committee wrote that “each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim.”¹⁰⁸

Allegations of Fraud in the Inducement by Underbidding

A special case of potential fraud in the inducement occurs when a contractor underbids the contract while intending to later seek an increase in the contract price. The Ninth Circuit has held that FCA liability may attach to a contractor's false initial cost estimates under a fraud in the inducement theory.¹⁰⁹ In *United States ex rel. Hooper v. Lockheed Martin Corp.*, the relator alleged that Lockheed Martin knowingly underestimated its costs in order to win a cost-reimbursement contract¹¹⁰ for services related to modernizing hardware and software used for

¹⁰² *Id.* at 788; *United States ex rel. Laird v. Lockheed Martin Engineering & Sci. Servs. Co.*, 491 F.3d 254, 259 (5th Cir. 2007); *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 916-17 (7th Cir. 2005); *Baycol*, 732 F.3d at 871, 876; *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1048-49 (9th Cir. 2012).

¹⁰³ *See, e.g., United States ex rel. Marcus v. Hess*, 317 U.S. 537, 542-44 (1943), *superseded by statute on other grounds*, P.L. 78-213, 57 Stat. 608, 609 (1943).

¹⁰⁴ *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), *superseded by statute on other grounds*, P.L. 78-213, 57 Stat. 608, 609 (1943).

¹⁰⁵ *Id.* at 539, 543; *see also Murray & Sorenson, Inc., v. United States*, 207 F.2d 119, 124 (1st Cir. 1953) (“[I]n this case there was an implied false representation that the bids were at a figure which the corporate defendant would have submitted in competition instead of at a somewhat higher figure suggested by the contractor's purchasing agent.”).

¹⁰⁶ *Marcus*, 317 U.S. at 543-44.

¹⁰⁷ S.Rept. 99-345, at 9 (1986).

¹⁰⁸ *Id.*

¹⁰⁹ *United States ex rel. Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1049 (9th Cir. 2012).

¹¹⁰ “Cost-reimbursement types of contracts provide for payment of allowable incurred costs, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer.” 48 C.F.R. §16.301-1.

space launch operations.¹¹¹ At the time the Air Force awarded the contract to Lockheed, it knew of the risk that costs would grow.¹¹² Indeed, although Lockheed bid \$432 million on the contract, the Air Force ultimately paid the company more than \$900 million.¹¹³ Lockheed argued that it could not be held liable for making false initial cost estimates, even though Lockheed's management had allegedly told employees to lower their cost estimates without a sound basis, because these estimates amounted to statements of opinion rather than fact.¹¹⁴ The Ninth Circuit disagreed, holding that FCA liability may attach to false estimates, including "fraudulent underbidding in which the bid is not what the defendant actually intends to charge" when the other elements for FCA liability are satisfied.¹¹⁵

A few court decisions provide further insight into this theory of fraud in the inducement. Although submission of *inflated* bids by contractors may cause the government to spend more money than it would have in a fair and open marketplace,¹¹⁶ some courts have recognized that underbidding may result in higher costs for the government only if the contractor seeks price adjustments above the bid price.¹¹⁷ Thus, one district court has held that an intentionally undervalued bid may not render claims for payment under a fixed-price contract false under an inducement theory unless the contractor subsequently seeks adjustments beyond the bid price to which it is not entitled.¹¹⁸ This holding acknowledges that contractors may "buy-in," or deliberately offer below-cost prices to get an award, hoping that it will lead to future work with a government agency.¹¹⁹ In addition, a contractor might request a price adjustment under a contract for various reasons other than to defraud the government, including that the government has added work to the contract during performance because of changed needs or unforeseen circumstances.¹²⁰

Other Examples

Decisions by federal courts in FCA cases illustrate the use of the fraud in the inducement theory in civil lawsuits against contractors. These cases involve allegations that a contractor has submitted a claim for payment after inducing the government to enter into the contract by underbidding the contract,¹²¹ engaging in bid rigging,¹²² or participating in collusive bidding.¹²³ In

¹¹¹ *Hooper*, 688 F.3d at 1041-42, 1047.

¹¹² *Id.* at 1042.

¹¹³ *Id.*

¹¹⁴ *Id.* at 1042, 1047.

¹¹⁵ *Id.* at 1049. However, the court held that a genuine issue of material fact existed regarding whether Lockheed acted with the requisite mental state when it bid on the contract. *Id.* at 1049-50.

¹¹⁶ *Shupe v. Cisco Systems, Inc.*, 2013 U.S. Dist. LEXIS 162513, *30-31 (S.D. Tex. May 13, 2013) (emphasis added).

¹¹⁷ *United States ex rel. Bettis v. Odebrecht Contractors of California, Inc.*, 297 F. Supp. 2d 272, 279-83 (D.D.C. 2004).

¹¹⁸ *Id.* Similarly, the Fifth Circuit has stated that underbidding may not result in a false claim under the fraud in the inducement theory unless the underbid is linked to "a request for payment that the contractor would not have been entitled to absent the contract." *United States ex rel. Laird v. Lockheed Martin Engineering & Sci. Servs. Co.*, 491 F.3d 254, 260 (5th Cir. 2007).

¹¹⁹ *See, e.g., Norden Sys., Inc.*, B-227106.9 (Aug. 11, 1988).

¹²⁰ *Laird*, 491 F.3d at 260-61; *Bettis*, 297 F. Supp. 2d at 281-83.

¹²¹ *E.g., Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1041, 1047 (9th Cir. 2012) (contracts for software and hardware used to support space launch operations allegedly induced by false cost estimates that underbid the contract); *Laird*, 491 F.3d at 259 (research contract allegedly induced by underbidding); *United States ex rel. Bettis v. Odebrecht Contractors of California, Inc.*, 393 F.3d 1321, 1323 (D.C. Cir. 2005) (public works construction contract allegedly induced by submission of an undervalued bid and other false representations); *United States ex rel. Long v. GSD&M* (continued...)

addition, parties have alleged that inducement occurred as a result of false representations made by the contractor about the characteristics of a product, such as its effectiveness and safety;¹²⁴ performance of the contract;¹²⁵ record of business ethics or lack of conflicts of interest;¹²⁶ compliance with the preconditions of contract award;¹²⁷ compliance with labor laws and regulations;¹²⁸ financial health;¹²⁹ and discounts offered to commercial customers.¹³⁰

(...continued)

Idea City LLC, 2013 U.S. Dist. LEXIS 8002, *20 (N.D. Tex. Jan. 18, 2013) (contract allegedly induced by false overhead costs and profit numbers).

¹²² *E.g.*, Shupe v. Cisco Systems, Inc., 2013 U.S. Dist. LEXIS 162513, *3, *29-30 (S.D. Tex. May 13, 2013) (contract for equipment and services for communications networks allegedly induced by bid rigging that thwarted free competition); United States v. CFW Construction Co., Inc., 649 F. Supp. 616, 618 (D.S.C. 1986) (alleged bid rigging “on two federally funded wastewater treatment projects”).

¹²³ *E.g.*, United States ex rel. Becker v. Tools & Metals, Inc., 2009 U.S. Dist. LEXIS 27507, *20-21 (N.D. Tex. March 31, 2009) (alleged collusive bidding scheme involving submission of inflated prices to the government by the contractor, who had received the inflated prices from a subcontractor).

¹²⁴ *E.g.*, *In re* Baycol Products Litig., 732 F.3d 869, 871, 873 (8th Cir. 2013) (contracts for the purchase of a cholesterol-lowering drug allegedly induced by false statements about the effectiveness and safety of the drug); United States v. Bollinger Shipyards, Inc., 2013 U.S. Dist. LEXIS 150822, *3-4, 19-20 (E.D. La. Oct. 21, 2013) (acceptance of delivery and payment allegedly induced by false measurements of boats); United States ex rel. McArtor v. Rolls-Royce Corp., 2012 U.S. Dist. LEXIS 189752, *3-5 (S.D. Ind. June 4, 2012) (contract for purchase of aircraft engines and parts allegedly induced by misrepresentation that contractor would comply with quality assurance procedures); United States v. Toyobo Co. Ltd., 811 F. Supp. 2d 37, 42 (D.D.C. 2011) (contract with body armor manufacturers allegedly induced by fiber manufacturer’s misrepresentations about deterioration of fiber used in body armor); United States v. Honeywell Int’l Inc., 798 F. Supp. 2d 12, 22 (D.D.C. 2011) (contract with body armor manufacturer allegedly induced by manufacturer of component of body armor’s misrepresentations about component’s tensile strength).

¹²⁵ *E.g.*, United States ex rel. DRC, Inc. v. Custer Battles, LLC, 562 F.3d 295, 308-09 (4th Cir. 2009) (contract for airport security allegedly induced by false promises of certain staffing levels); United States ex rel. Wilson v. Kellogg Brown & Root Servs., Inc., 525 F.3d 370, 375 (4th Cir. 2008) (Army task order allegedly induced by contractor’s misrepresentation that it would comply with vehicle maintenance requirements); United States ex rel. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 780 (4th Cir. 1999) (approval of subcontract allegedly induced by misrepresentations concerning cost, duration, and lack of conflicts of interest); United States ex rel. Berg v. Honeywell Int’l, Inc., 2013 U.S. Dist. LEXIS 89197, *8-9 (D. Alaska June 24, 2013) (energy savings performance contract allegedly induced by knowingly false calculation and guarantee of energy cost savings, among other things).

¹²⁶ *E.g.*, *Harrison*, 176 F.3d at 780 (subcontract allegedly induced by misrepresenting cost, duration, and lack of conflicts of interest); United States ex rel. Alexander v. Dyncorp, Inc., 924 F. Supp. 292, 298 (D.D.C. 1996) (contract allegedly induced by misrepresentations about the contractor’s record of business ethics and availability of “key personnel” to perform the work).

¹²⁷ *E.g.*, United States ex rel. SNAPP, Inc. v. Ford Motor Co., 532 F.3d 496, 499 (6th Cir. 2008) (contract allegedly induced by misrepresentations that contractor complied with requirements governing subcontracting with small and minority-owned businesses).

¹²⁸ *E.g.*, United States ex rel. Green v. Serv. Contract Educ. and Training Trust Fund, 843 F. Supp. 2d 20, 25, 26-27 (D.D.C. 2012) (contract allegedly induced by misrepresentations that fringe benefits provided to the contractor’s employees complied with the Service Contract Act and related Department of Labor regulations); United States ex rel. Head v. The Kane Company, 798 F. Supp. 2d 186, 190-91, 197 (D.D.C. 2011) (contract for moving and other services allegedly induced by misrepresentations that, among other things, contractor would pay wages in accordance with the Service Contract Act); Herndon v. Sci. Applications Int’l Corp., 2007 U.S. Dist. LEXIS 50194, *1 (S.D. Cal. July 10, 2007) (contracts allegedly induced by contractor’s misrepresentation in contract negotiations that it would comply with age discrimination laws).

¹²⁹ *E.g.*, United States ex rel. Sanchez v. Abuabara, 2012 U.S. Dist. LEXIS 10079, *2, 21 (S.D. Fla. Jan. 27, 2012) (contract for “communication infrastructure solutions” allegedly induced by “false financial statements making an insolvent company appear financially viable”).

¹³⁰ *E.g.*, United States ex rel. Frascella v. Oracle Corp., 751 F. Supp. 2d 842, 844-46 (E.D. Va. 2010) (contract to provide software products allegedly induced by contractor’s false representations about the discounts it provided to commercial customers, among other things).

Limitations on the Theory

As with the implied certification theory, some courts have limited plaintiffs' use of the fraud in the inducement theory. A couple of courts in the Fourth Circuit have imposed limitations that appear to be intended to prevent ordinary breaches of contract from becoming FCA violations.¹³¹ For example, at least one court has held that a plaintiff must allege that the contractor made a false statement in an invoice or claim for payment (rather than merely during the course of bidding or negotiations) for allegations to rise above breach of contract.¹³² In the Fourth Circuit, a statement may not be false under the FCA if the plaintiff simply alleges neglect of contractual duties or if contract terms are ambiguous and admit of various interpretations.¹³³

Courts have also required that a false record or statement that allegedly induced the contract be material to the government's decision to pay the claim.¹³⁴ This may require a causal connection between the alleged false records or statements and the submission or payment of a claim.¹³⁵ Allegations that payment of a kickback has tainted a contract in the absence of a showing that this conduct increased the contract price may be insufficient to state a claim under the FCA.¹³⁶

Courts have also required that the defendant knowingly took the action that allegedly induced the contract.¹³⁷ At least one court has inferred the requisite intent when "substantial nonperformance" of contractual duties occurs promptly after contract formation.¹³⁸ For liability to attach to a

¹³¹ *E.g.*, United States ex rel. McLain v. KBR, Inc., 2013 U.S. Dist. LEXIS 27061, *15-17 (E.D. Va. Feb. 27, 2013).

¹³² *Id.* ("[A]ny fraudulent inducement action under the FCA must allege a submitted claim or invoice that contains a false statement. Without any reference to claims or payments, the allegations here comprise merely a breach of contract claim.") (citation omitted).

¹³³ United States ex rel. Wilson v. Kellogg Brown & Root Servs., Inc., 525 F.3d 370, 376-78 (4th Cir. 2008) ("To hold otherwise would render meaningless the fundamental distinction between actions for fraud and breach of contract.") (citations omitted).

¹³⁴ United States ex rel. Longhi v. Lithium Power Techs., Inc., 575 F.3d 458, 467-69 (5th Cir. 2009); United States ex rel. Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1174 (9th Cir. 2006) ("[A]s with the false certification theory, the promissory fraud theory requires that the underlying fraud be material to the government's decision to pay out moneys to the claimant."); United States ex rel. Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 785 (4th Cir. 1999) ("Liability under each of the provisions of the False Claims Act is subject to the further, judicially-imposed, requirement that the false statement or claim be material.>").

¹³⁵ *McLain*, 2013 U.S. Dist. at *22 ("Relator fails to allege any causal connection or link between the compliance logs and either submission or payment of a claim. If these logs are not seen by anyone who makes or processes a claim for payment, then the logs cannot influence any action.>").

¹³⁶ *See Kellogg Brown & Root Servs., Inc. v. United States*, 99 Fed. Cl. 488, 513 (2011) ("Defendant must allege facts showing that the costs actually inflated the contract price. The facts alleged are too attenuated to show that a false claim was submitted ..."); *see also Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1367 n.20 (Fed. Cir. 2013). The Anti-Kickback Act of 1946, as amended, generally imposes civil and criminal penalties on contractors who offer, solicit, accept, or include in the price they charge the government, payments made to "improperly obtain or reward favorable treatment in connection with a prime contract or a subcontract relating to a prime contract." 41 U.S.C. §§8701(2), 8702, 8705, 8706, 8707; 48 C.F.R. §3.502-1 to -3.

¹³⁷ *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1041, 1050 (9th Cir. 2012) ("Because there is a genuine issue as to whether Lockheed had actual knowledge, deliberately ignored the truth, or acted in reckless disregard of the truth when it submitted its allegedly false bid for the [contract], we reverse and remand to the district court."); *Hendow*, 461 F.3d at 1174 ("In short, therefore, under a promissory fraud theory, relator must allege a false or fraudulent course of conduct, made with scienter.>").

¹³⁸ United States ex rel. Willard v. Humana Health Plan of Texas, Inc., 336 F.3d 375, 386 (5th Cir. 2003) ("It would be illogical to find fraud where a party secretly did not intend to perform the contract when it was signed, but in actuality did perform, as the civil law generally regulates actions, not thoughts alone.>").

promise that allegedly induced a contract, the “promise must be false when made.”¹³⁹ In limited circumstances, government knowledge of a contractor’s inaccurate statements prior to the government’s payment of a contractor’s claim may lead a court to find that the contractor did not knowingly induce a contract by fraud under the FCA.¹⁴⁰ In addition, some courts have found that a contractor may lack the requisite knowledge when it has made a plausible but erroneous interpretation of the contract “absent some specific evidence of knowledge that the claim is false or of intent to deceive,” at least when the interpretation is not unreasonable.¹⁴¹

Finally, several courts have required plaintiffs pleading falsity under the fraud in the inducement theory to comply with Federal Rule of Civil Procedure 9(b).¹⁴² Generally, this means that the plaintiff must set forth the circumstances surrounding the *alleged inducement* with particularity.¹⁴³ At least one court has held that a plaintiff may not plead fraud in the inducement based on a contractor’s failure to disclose information unless the plaintiff alleges that a law or other source explicitly requires disclosure.¹⁴⁴

Calculating Treble Damages

In addition to disagreeing about the proper scope of liability under the FCA, courts of appeals have different views about the proper method for calculating treble damages under the act when the defendant (e.g., a contractor) has provided some value to the government.¹⁴⁵ The FCA states that, in addition to a civil penalty, a “person” violating the FCA is liable for “[three] times the amount of damages which the Government sustains because of the act of that person.”¹⁴⁶ The act does not specify how courts should calculate this amount.¹⁴⁷ Federal courts of appeals have

¹³⁹ See, e.g., *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 917 (7th Cir. 2005) (“[F]ailure to honor one’s promise is (just) breach of contract, but making a promise that one *intends* not to keep is fraud.”) (citations omitted); *Willard*, 336 F.3d at 384 (“Entering into a contract with no intention of performing may constitute fraud in the inducement.”); *Hendow*, 461 F.3d at 1174 (quoting *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1267 (9th Cir. 1996)).

¹⁴⁰ E.g., *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) (“[T]he knowledge possessed by officials of the United States may be highly relevant. Such knowledge may show that the defendant did not submit its claim in deliberate ignorance or reckless disregard of the truth.”); *United States v. Bollinger Shipyards, Inc.*, 2013 U.S. Dist. LEXIS 150822, *30 (E.D. La. Oct. 21, 2013) (“These circumstances suggest that the government knew that the reported section modulus might be incorrect and was willing to pay anyway. There can be no FCA liability in such circumstances”); *United States ex rel. Berg v. Honeywell Int’l, Inc.*, 2013 U.S. Dist. LEXIS 89197, *15 (D. Alaska June 24, 2013).

¹⁴¹ E.g., *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998); *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 684 (5th Cir. 2003) (“Where there are legitimate grounds for disagreement over the scope of a contractual or regulatory provision, and the claimant’s actions are in good faith, the claimant cannot be said to have knowingly presented a false claim.”) (citation omitted).

¹⁴² E.g., *In re Baycol Products Litig.*, 732 F.3d 869, 876-77 (8th Cir. 2013); *Willard*, 336 F.3d at 384-85; *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 789 (4th Cir. 1999); *United States ex rel. Sanchez v. Abuabara*, 2012 U.S. Dist. LEXIS 10079, *22-32 (S.D. Fla. Jan. 27, 2012).

¹⁴³ *Baycol*, 732 F.3d at 871, 876-77; *Willard*, 336 F.3d at 384-85; *Harrison*, 176 F.3d at 790-91; *Abuabara*, 2012 U.S. Dist. LEXIS at *23-24.

¹⁴⁴ *United States ex rel. Wilkins v. N. Am. Constr. Corp.*, 173 F. Supp. 2d 601, 632 (S.D. Tex. 2001).

¹⁴⁵ E.g., *United States v. Anchor Mortg. Corp.*, 711 F.3d 745, 748-50 (7th Cir. 2013) (adopting the “net trebling” approach); *United States v. Eghbal*, 548 F.3d 1281, 1285 (9th Cir. 2008) (expressing support for the “gross trebling” approach).

¹⁴⁶ 31 U.S.C. §3729(a)(1).

¹⁴⁷ See *id.*

developed two methods of calculating treble damages in this situation that may result in significant differences in damages.¹⁴⁸ The Seventh Circuit Court of Appeals has referred to these methods as the “net trebling” and “gross trebling” approaches.¹⁴⁹

A decision by the Seventh Circuit illustrates the differences in these two approaches. In *United States v. Anchor Mortgage Corp.*, the district court found that a company and its chief executive officer had knowingly provided false information when applying for federal guarantees of home mortgage loans.¹⁵⁰ In calculating damages, the district court applied the “gross trebling” approach.¹⁵¹ It trebled the damages that the government had suffered from paying lenders under the guarantees on the defaulted loans and then deducted the amounts the government recovered from selling the properties that secured the loans.¹⁵² On appeal, the Seventh Circuit reversed the district court’s damages award and held that the district court should have employed the “net trebling” approach.¹⁵³ Under this method, the district court should have subtracted the amount that the government realized from sale of the collateral properties from the amount the government paid to lenders under the loan guarantees *before* trebling the damages.¹⁵⁴

Table I. Judicial Approaches to Calculating Treble Damages Under the Civil FCA

Gross Trebling

(Government’s damages x 3) - (Value retained by government) = Treble damages

Example: (\$131,643.05 x 3) - \$68,200.00 = \$326,729.15

Net Trebling

(Government’s damages - Value retained by government) x 3 = Treble damages

Example: (\$131,643.05 - \$68,200.00) x 3 = \$190,329.15

Difference in treble damages under the net trebling approach: In this example, the net trebling approach resulted in damages that were about 42% lower than under the gross trebling approach.

Source: *United States v. Anchor Mortgage Corp.*, 711 F.3d 745 (7th Cir. 2013).

The Seventh Circuit sought to justify use of the “net trebling” approach by arguing that calculating damages using net loss is the “norm” in common law contract cases.¹⁵⁵ Courts in these cases have often measured damages using the difference between the market price and contract price.¹⁵⁶ Thus far, most courts of appeals that have considered the issue favor the “net trebling” approach.¹⁵⁷

¹⁴⁸ See *Anchor Mortgage Corp.*, 711 F.3d at 748-750.

¹⁴⁹ *Id.*

¹⁵⁰ *United States v. Anchor Mortgage Corp.*, 2010 U.S. Dist. LEXIS 81298, *14-33 (N.D. Ill. Aug. 11, 2010).

¹⁵¹ *Id.* at *34-35.

¹⁵² *Id.*; see also *Anchor Mortgage Corp.*, 711 F.3d at 748.

¹⁵³ *Id.* at 749-751.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 749.

¹⁵⁶ *Id.* The Seventh Circuit also found support for the “net trebling” approach in a footnote to a 1976 Supreme Court opinion. *Id.* at 750 (citing *United States v. Bornstein*, 423 U.S. 303 n.13 (1976) (“The Government’s actual damages are equal to the difference between the market value of the tubes it received and retained and the market value that the tubes would have had if they had been of the specified quality.”)).

¹⁵⁷ *E.g.*, *United States ex rel. Feldman v. Van Gorp*, 697 F.3d 78, 87-88 (2d Cir. 2012) (implying that the court would (continued...))

Contract Disputes Act Anti-Fraud Provision

The Contract Disputes Act of 1978 (CDA) provides administrative and judicial procedures for the resolution of disputes between the government and contractors involving certain contracts awarded by executive agencies.¹⁵⁸ In part because of concerns that contractors would submit inflated claims during contract disputes as a “negotiating tactic,” Congress added a provision to the CDA imposing a penalty for unsupported claims.¹⁵⁹

The Federal Circuit’s recent decision in *Daewoo Engineering Co., Ltd. v. United States* demonstrates that the CDA’s anti-fraud provision may result in a significant civil penalty for a contractor when it submits a fraudulent claim to the government during a contract dispute in order to extract a settlement.¹⁶⁰

Overview of the CDA

Congress passed the CDA in 1978 in order to provide a fair and efficient system for the resolution of claims and disputes involving contracts awarded by executive agencies.¹⁶¹ The CDA’s dispute provisions apply to most express or implied-in-fact contracts made by executive agencies¹⁶² for the procurement of property (other than real property in being)¹⁶³ or services; construction, alteration, repair, or maintenance of real property; or the disposal of personal property.¹⁶⁴ Generally, if parties cannot settle a dispute arising under, or relating to, a contract, the prime contractor¹⁶⁵ or the government submits a claim¹⁶⁶ to the contracting officer for decision.¹⁶⁷ When

(...continued)

follow the net trebling approach); *United States v. Sci. Applications Int’l Corp.*, 626 F.3d 1257, 1278-79 (D.C. Cir. 2010) (endorsing the “benefit-of-the-bargain framework” in calculating damages under the FCA); *United States v. United Techs. Corp.*, 626 F.3d 313, 322 (6th Cir. 2010) (“On remand, the district court should calculate what the government eventually paid each year[,] ... what it should have paid each year based on what the government received, then take the difference between the two.”); *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1372 (Fed. Cir. 1998) (“We agree ... that the normal measure of damages is the difference in value between what the government was supposed to get and what it actually got from the contractor.”) (citations omitted). *But see United States v. Eghbal*, 548 F.3d 1281, 1285 (9th Cir. 2008) (expressing support for the gross trebling approach).

¹⁵⁸ 41 U.S.C. §§7101-7109; S.Rept. 95-1118, at 1 (1978); H.Rept. 95-1556, at 6 (1978).

¹⁵⁹ 41 U.S.C. §7103(c)(2); S.Rept. 95-1118, at 7, 8, 20 (1978).

¹⁶⁰ See “*Daewoo Engineering and Construction Co., Ltd. v. United States*” below.

¹⁶¹ 41 U.S.C. §§7101-7109; S.Rept. 95-1118, at 1 (1978); H.Rept. 95-1556, at 6 (1978).

¹⁶² The term “executive agency” refers to “(A) an executive department as defined in section 101 of title 5; (B) a military department as defined in section 102 of title 5; (C) an independent establishment as defined in section 104 of title 5, except that the term does not include the Government Accountability Office; and (D) a wholly owned Government corporation as defined in section 9101(3) of title 31.” 41 U.S.C. §7101(8).

¹⁶³ However, *leases* of real property are subject to the CDA. *E.g.*, *Forman v. United States*, 767 F.2d 875, 879 n.4 (Fed. Cir. 1985).

¹⁶⁴ 41 U.S.C. §7102(a).

The CDA may not apply to certain contracts of the Tennessee Valley Authority and certain contracts with foreign governments or international organizations. *Id.* at §7102(b)-(c).

¹⁶⁵ The CDA waives the government’s sovereign immunity concerning claims arising under or relating to its contracts, but generally not for claims arising under or relating to subcontracts under its contracts. *See id.* at §§7101-7109. In general, subcontractors may not submit claims under the CDA because they are not in privity of contract with the government. *See id.* at §7101(7) (“The term ‘contractor’ means a party to a Federal Government contract other than the Federal Government.”); S.Rept. 95-1118, at 16-17 (1978) (listing the reasons for allowing a subcontractor to submit a (continued...))

a contractor's claim exceeds \$100,000, the contractor or other authorized individual must certify that, among other things, the claim is made in good faith and that "the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable."¹⁶⁸

The contracting officer's decision on the claim (or a deemed denial because of the officer's failure to decide) becomes final unless the contractor lodges an appeal of an adverse decision within 90 days of the decision to the proper agency board of contract appeals, or files suit within 12 months in the COFC.¹⁶⁹ Generally, the contractor—or the agency head with Attorney General approval—may appeal decisions of an agency board of contract appeals or the COFC to the U.S. Court of Appeals for the Federal Circuit.¹⁷⁰ Ultimately, the Supreme Court could grant certiorari.¹⁷¹

Anti-Fraud Provision

The CDA contains an anti-fraud remedy primarily because of concerns that contractors would submit inflated claims during contract disputes as a "negotiating tactic," leading the government to settle these claims instead of using its limited resources to evaluate them on the merits.¹⁷² During hearings on the CDA, Admiral Hyman G. Rickover testified that some Navy contractors had circumvented competitive bidding procedures by underbidding in order to win contracts and later submitting equitable adjustment claims to recover the amounts by which their costs exceeded their bid prices.¹⁷³ Congress added the anti-fraud provision to the CDA in an effort to address these concerns and to supplement the government's remedies under the FCA and Forfeiture of Fraudulent Claims Act (FFCA) by making it so that "the larger the fraud attempted, the greater is the liability to the Government."¹⁷⁴ The CDA's anti-fraud provision states that

If a contractor is unable to support any part of the contractor's claim and it is determined that the inability is attributable to a misrepresentation of fact or fraud by the contractor, then the contractor is liable to the Federal Government for an amount equal to the unsupported part of the claim plus all of the Federal Government's costs attributable to reviewing the

(...continued)

CDA claim only with the sponsorship of the prime contractor).

¹⁶⁶ Although the CDA does not define "claim," a provision in the Federal Acquisition Regulation (FAR) states that a "claim" is generally "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." 48 C.F.R. §2.101.

¹⁶⁷ 41 U.S.C. §7103(a)(1)-(3).

¹⁶⁸ *Id.* at §7103(b)(1)-(2); 48 C.F.R. §33.207.

¹⁶⁹ 41 U.S.C. §§7103(g), 7104. The contractor and the contracting officer may agree to use alternative dispute resolution procedures. *Id.* at §7103(h).

"In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a district court of the United States pursuant to section 1337 of title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary." *Id.* at §7104(b)(2).

¹⁷⁰ *Id.* at §7107(a)(1).

¹⁷¹ U.S. Const. art. III, §2, cl. 2.

¹⁷² S.Rept. 95-1118, at 7, 8, 20 (1978).

¹⁷³ *Contract Disputes Act of 1978: Joint Hearings Before the Subcomm. on Federal Spending Practices and Open Government of the S. Comm. on Governmental Affairs and the Subcomm. on Citizens and Shareholders Rights and Remedies of the S. Comm. on the Judiciary*, 95th Cong. 44 (1978) (statement of Admiral. H. G. Rickover).

¹⁷⁴ S.Rept. 95-1118, at 7-8, 20 (1978).

unsupported part of the claim.¹⁷⁵ Liability under this paragraph shall be determined within 6 years of the commission of the misrepresentation of fact or fraud.¹⁷⁶

Agency boards of contract appeals and contracting officers generally lack jurisdiction over fraud claims brought under the CDA's anti-fraud provision.¹⁷⁷ However, the COFC has jurisdiction over government counterclaims brought under the CDA's anti-fraud provision regardless of whether the contracting officer has issued a final decision on the CDA claim.¹⁷⁸

The CDA defines "misrepresentation of fact" as "a false statement of substantive fact, or conduct that leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead."¹⁷⁹ The government must prove falsity and intent by a preponderance of the evidence.¹⁸⁰ The statute of limitations for government claims against a contractor under the CDA's anti-fraud provision is six years after the claim accrues.¹⁸¹

Although courts have interpreted the CDA's anti-fraud provision in only a few cases, the Federal Circuit and Court of Federal Claims have suggested ways in which a contractor may avoid liability under the provision. For example, a contractor could potentially avoid liability by taking "reasonable steps to verify the claim."¹⁸² In addition, a contractor that submits a claim based on a plausible legal interpretation of a contractual provision may avoid liability even if a court finds that the interpretation is incorrect "absent some specific evidence of knowledge that the claim is false or of intent to deceive."¹⁸³ If a contractor remains unsure about the proper interpretation of a contract, the Federal Circuit has indicated that the contractor should ask the government for clarification.¹⁸⁴

¹⁷⁵ The phrase "all of the Federal Government's costs" refers to costs incurred in reviewing the allegedly fraudulent claim by the contracting officer, the Department of Justice, and Defense Contract Audit Agency, if applicable. *UMC Electronics Co. v. United States*, 45 Fed. Cl. 507, 510 (1999). The COFC recently held that the government may recover from the contractor costs of review that are documented sufficiently, reasonable, and not attributable to litigation. *Veridyne Corp. v. United States*, 107 Fed. Cl. 762, 767 (2012).

¹⁷⁶ 41 U.S.C. §7103(c)(2). In 2011, Congress moved the anti-fraud provision of the CDA from 41 U.S.C. §604 to 41 U.S.C. §7103(c)(2) but did not change the substantive meaning of the provision. Act of Jan. 4, 2011, P.L. 111-350, 124 Stat. 3677, 3860; *Hernandez, Kroone, and Assocs., Inc. v. United States*, 110 Fed. Cl. 496, 524 n.6 (2013) ("Comparing 41 U.S.C. § 7103(c)(2) with its source, 41 U.S.C. § 604[,] ... confirms the absence of any substantive change.").

¹⁷⁷ *Martin J. Simko Construction, Inc. v. United States*, 852 F.2d 540, 545 (Fed. Cir. 1988) ("We have determined that ... Congress never intended to include claims brought under [the CDA's anti-fraud provision] to be within the agency dispute resolution process."). *But see* *AAA Engineering & Drafting, Inc., ASBCA 47940, 2001-1 B.C.A. ¶31,256 (2001)* (finding contract board jurisdiction under the CDA "to decide the dispute concerning [the contractor's] entitlement to termination costs" despite the possibility that the termination claim was fraudulent and that the board had jurisdiction to consider "for purposes of contractual analysis, determinations of fraud made by other tribunals."). In addition, an agency head may not "settle, compromise, pay, or otherwise adjust any claim involving fraud." 41 U.S.C. §7103(c)(1). Under the FAR, a contracting officer that discovers a violation of the CDA's anti-fraud provision must refer the matter to the agency official responsible for investigating fraud. 48 C.F.R. §33.209.

¹⁷⁸ *See* 28 U.S.C. §§1491(a)(2), 1503, 2508; *Martin J. Simko Construction*, 852 F.2d at 545.

¹⁷⁹ 41 U.S.C. §7101(9); 48 C.F.R. §33.201. S.Rept. 95-1118, at 17 (1978) ("It is not the intent of the committees to punish contractors who may through ignorance or lack of understanding misrepresent some portion of the facts on a claim.").

¹⁸⁰ *Daewoo Engineering and Construction Co., Ltd. v. United States*, 557 F.3d 1332, 1335 (Fed. Cir. 2009).

¹⁸¹ 41 U.S.C. §7103(a)(4)(A).

¹⁸² *Tri-Ad Constructors v. United States*, 45 Fed. Appx. 907, 913 (Fed. Cir. 2002).

¹⁸³ *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1366 (Fed. Cir. 1998); *Ulysses, Inc. v. United States*, 110 Fed. Cl. 618, 648 (2013).

¹⁸⁴ *Commercial Contractors*, 154 F.3d at 1366.

Daewoo Engineering and Construction Co., Ltd. v. United States

The Federal Circuit Court of Appeals' decision in *Daewoo Engineering Co., Ltd. v. United States* demonstrates that the CDA's anti-fraud provision may result in a significant civil penalty for a contractor that submits a fraudulent claim to the government without taking steps to verify and justify its certified claim.¹⁸⁵ In this case, the United States Army Corps of Engineers (USACE) awarded Daewoo a contract to build a road in the Republic of Palau.¹⁸⁶ In order to build the road, Daewoo had to compact moist soil in rainy weather, which posed a significant challenge within the agreed upon time constraints.¹⁸⁷ Daewoo experienced several problems with compacting the soil, leading it to fall behind schedule in its performance of the contract.¹⁸⁸

As its contract performance problems continued, Daewoo filed a certified CDA claim with the contracting officer seeking a \$64 million increase in the contract price.¹⁸⁹ Daewoo alleged that the contract contained a "misleading weather-delay clause;" that the government had withheld "superior knowledge" about its "weather-delay calculation methods;" and that the contract was impossible to perform, among other things.¹⁹⁰ Daewoo's claim included incurred costs of about \$13 million and projected costs of about \$50 million.¹⁹¹ When the contracting officer denied Daewoo's claim, the company brought suit against the government in the COFC for almost \$64 million in damages, arguing that the USACE had misrepresented the extent of poor weather conditions at the construction site.¹⁹² The United States asserted that the contractor's claim was fraudulent and sought penalties and forfeitures in counterclaims under the FCA, the CDA's anti-fraud provision, and the Forfeiture of Fraudulent Claims Act (FFCA).¹⁹³

Court of Federal Claims' Decision

The COFC first considered Daewoo's CDA claims and rejected them.¹⁹⁴ Next, the COFC considered the government's fraud counterclaims.¹⁹⁵ It found Daewoo liable under the CDA's anti-fraud provision because Daewoo had acted in bad faith by using its claim as a "negotiating ploy" to extract a settlement offer from the government without believing that the government actually owed it \$50 million in projected costs.¹⁹⁶ The COFC entered judgment for the government for \$50 million for the CDA violation, and held that Daewoo's claims under the contract were forfeited pursuant to the FFCA (although it had not found them to be supported anyway).¹⁹⁷ However, the COFC entered judgment for the government for only \$10,000 for the

¹⁸⁵ *Daewoo*, 557 F.3d at 1338-41.

¹⁸⁶ *Id.* at 1334; *Daewoo Engineering and Construction Co., Ltd. v. United States*, 73 Fed. Cl. 547, 551, 553-54 (2006).

¹⁸⁷ *Id.* at 554.

¹⁸⁸ *Id.* at 551, 555-59.

¹⁸⁹ *Daewoo*, 557 F.3d at 1334.

¹⁹⁰ *Id.* at 1334-35; *Daewoo*, 73 Fed. Cl. at 551, 560.

¹⁹¹ *Daewoo*, 557 F.3d at 1335; *Daewoo*, 73 Fed. Cl. at 551, 560.

¹⁹² *Id.* at 560.

¹⁹³ *Daewoo*, 557 F.3d at 1334.

¹⁹⁴ *Daewoo*, 73 Fed. Cl. at 582.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 585, 596.

¹⁹⁷ *Daewoo*, 557 F.3d at 1334.

contractor's FCA violation because the court could not establish that the government had suffered losses.¹⁹⁸ Daewoo appealed to the Federal Circuit.¹⁹⁹

Federal Circuit Court of Appeals' Decision

On appeal before the Federal Circuit, Daewoo raised two main arguments. First, the contractor maintained that it had not made a "claim" under the CDA for the \$64 million in total costs because it did not seek the funds as a "matter of right" but rather presented the number as an estimate "to encourage the government to adjust the contract specifications."²⁰⁰ The Federal Circuit rejected this argument, declining to find the lower court's factual determination that Daewoo had made a "claim" for these costs to be clearly erroneous, in significant part because of testimony by Daewoo's project manager confirming that Daewoo had made a \$64 million claim.²⁰¹

Next, Daewoo argued that even if it had made a "claim" for the \$50 million in projected costs, the claim was not fraudulent.²⁰² The Federal Circuit rejected this argument as well, and, like the COFC, held that Daewoo had committed fraud.²⁰³ However, the appeals court reached this result for slightly different reasons than the lower court.²⁰⁴ The Federal Circuit held that Daewoo had committed fraud because the contractor's calculation of its claim for \$50 million in projected costs "assumed the government was responsible for each day of additional performance beyond the original 1080-day contract period, without even considering whether there was any contractor-caused delay or delay for which the government was not responsible."²⁰⁵ In addition, the appeals court noted that Daewoo did not use outside experts to calculate the amount of its claim and neglected to explain how it arrived at the claimed amount during trial.²⁰⁶ Finally, Daewoo had certified that the claim was accurate and made in good faith.²⁰⁷ In upholding the \$50 million penalty under the CDA's anti-fraud provision, the Federal Circuit rejected Daewoo's arguments that the penalty violated the Eighth and Fifth amendments of the U.S. Constitution.²⁰⁸

Other Examples

Other examples of cases in which the government has alleged that a contractor violated the CDA's anti-fraud provision have involved a contractor's purported submission of false, inflated, or duplicative claims,²⁰⁹ including when the contractor allegedly misrepresented costs under a

¹⁹⁸ *Daewoo*, 73 Fed. Cl. at 585.

¹⁹⁹ *Daewoo*, 557 F.3d at 1334.

²⁰⁰ *Id.* at 1336.

²⁰¹ *Id.* at 1337.

²⁰² *Id.* at 1338.

²⁰³ *Id.* at 1334.

²⁰⁴ *Id.* at 1338.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 1339.

²⁰⁸ *Id.* at 1340.

²⁰⁹ *E.g.*, *Gulf Group Gen. Enters. Co. W.L.L. v. United States*, 114 Fed. Cl. 258, 307 (2013) (contractor allegedly submitted claims for more than it was owed); *Munford Construction Co. v. United States*, 34 Fed. Cl. 62, 64 (1995) (contractor allegedly submitted "fictitious, inflated, and duplicative" claims).

contract,²¹⁰ sought payment for products that did not conform with specifications,²¹¹ misrepresented that it was an approved source,²¹² or misrepresented its eligibility to perform the contract.²¹³

Forfeiture of Fraudulent Claims Act

The Forfeiture of Fraudulent Claims Act (FFCA), or “special plea in fraud” statute, generally allows the government to assert a counterclaim²¹⁴ seeking forfeiture of fraudulent claims brought against it in the COFC.²¹⁵ This penalty exists as a condition of the government’s waiver of its sovereign immunity from suit.²¹⁶ Congress enacted the FFCA as part of an 1863 law that granted new powers to the Court of Claims.²¹⁷ The FFCA states that “A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.”

In such cases the United States Court of Federal Claims shall specifically find such fraud or attempt and render judgment of forfeiture.²¹⁸

Judicial interpretations have clarified the elements of the special plea in fraud, as well as its mental state requirement, burden of proof, and application. The Federal Circuit has held that the government must prove that the contractor knowingly²¹⁹ submitted a false claim with an intent to defraud it, and thus the government does not have to show that it relied on the claim or suffered

²¹⁰ *E.g.*, *Tri-Ad Constructors v. United States*, 45 Fed. Appx. 907, 913 (Fed. Cir. 2002) (contractor allegedly misrepresented “added costs” and claimed lost profit on deleted work); *UMC Electronics Co. v. United States*, 249 F.3d 1337, 1340 (Fed. Cir. 2001) (contractor allegedly used amounts in purchase orders as actual costs when related invoices showed lower costs); *Veridyne Corp. v. United States*, 105 Fed. Cl. 769, 816 (2012) (contractor allegedly included duplicate expenses and expenses not yet incurred in its claim); *Ry. Logistics v. United States*, 103 Fed. Cl. 252, 256, 259 (2012) (contractor allegedly overstated costs in a spreadsheet that the contractor characterized as a “rough estimate”).

²¹¹ *SGW, Inc. v. United States*, 20 Ct. Cl. 174, 176 (1990) (contractor sought lost costs and profits for rifle barrels that allegedly failed to conform with specifications).

²¹² *Ulysses, Inc. v. United States*, 110 Fed. Cl. 618, 647 (2013) (contractor allegedly misrepresented that it was an approved source to obtain two purchase orders).

²¹³ *Crane Helicopter Servs., Inc. v. United States*, 45 Fed. Cl. 410, 411 (1999) (contractor allegedly misrepresented that an aircraft was a civilian aircraft to gain Federal Aviation Administration certification and obtain the contract).

²¹⁴ *Daewoo Engineering and Construction Co., Ltd. v. United States*, 557 F.3d 1332, 1334 (Fed. Cir. 2009). At least one court has held that judgment of forfeiture may be rendered on the court’s own initiative without the existence of a government counterclaim. *DeRochemont v. United States*, 23 Ct. Cl. 87, 90 (1991).

²¹⁵ 28 U.S.C. §2514. In addition to applying to claims brought against the government in the COFC, the forfeiture provision may also apply to claims brought against the government before a contracting officer. *Tyger Construction Co. Inc. v. United States*, 28 Fed. Cl. 35, 60-61 (1993).

²¹⁶ *DeRochemont*, 23 Ct. Cl. at 89.

²¹⁷ Court of Claims Act, ch. 92, 12 Stat. 765, 767 (1863); *O’Brien Gear & Mach. Co. v. United States*, 219 Ct. Cl. 187, 209-12 (1979) (discussing the history of the FFCA); *see also* *Supermex, Inc. v. United States*, 35 Fed. Cl. 29, 41 (1996) (quoting Cong. Globe, 37th Cong., 2d Sess. app. 124 (1862)) (“This is meant to visit with merited punishment that corrupted moral sense which regards the Government as always a proper prey for fraudulent rapacity.”).

²¹⁸ 28 U.S.C. §2514.

²¹⁹ The scienter requirement is “knowingly presenting the government with a false claim for the purpose of getting paid for the claim.” *Tri-Ad Constructors v. United States*, 45 Fed. Appx. 907, 912 (Fed. Cir. 2002).

injury from it.²²⁰ The burden of proof for the government is “clear and convincing evidence,” a higher standard than preponderance of the evidence.²²¹ Under the FFCA, if the court finds part of a claim under a contract to be fraudulent and submitted with the requisite mental state, the court must render judgment of forfeiture on all claims under that contract.²²² At least one court has sought to justify such a holding on the grounds that separating the claims tainted by fraud from those untainted by fraud is impossible.²²³

A few significant disagreements over the proper interpretation of the FFCA have arisen over the years. For example, courts disagree about whether fraud sufficient for forfeiture may involve fraud in connection with the execution or performance of the contract in addition to fraud related to submission of a claim.²²⁴ The Federal Circuit appears to have recently held that the government may establish a violation of the FFCA only when the alleged fraud relates to the submission of a claim, stating that the “neighboring provisions illustrate that the forfeiture statute is best understood as a companion requirement of claims procedure rather than a catch-all anti-fraud provision.”²²⁵ Courts also disagree over whether the FFCA is subject to the general statute of limitations for claims over which the COFC has jurisdiction.²²⁶

A few recent examples of cases in which the government has sought forfeiture of a contractor’s claims because of purported fraudulent conduct include allegations that the contractor submitted “several inconsistent explanations for its added costs” and knowingly claimed unrecoverable lost profits;²²⁷ used amounts in purchase orders as actual costs in its claim when related invoices showed lower costs;²²⁸ and asserted that it was an approved source to obtain two purchase orders.²²⁹

²²⁰ *UMC Electronics Co. v. United States*, 249 F.3d 1337, 1340 (Fed. Cir. 2001); *Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1362 (Fed. Cir. 1998).

²²¹ *UMC Electronics Co.*, 249 F.3d at 1339; *Commercial Contractors, Inc.*, 154 F.3d at 1362.

²²² *Daewoo Engineering and Construction Co., Ltd. v. United States*, 557 F.3d 1332, 1341 (Fed. Cir. 2009); *UMC Electronics Co. v. United States*, 43 Fed. Cl. 776, 790-91 (1999).

²²³ *Id.* at 790-91.

²²⁴ *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1366 (Fed. Cir. 2013) (submission of a claim); *Ulysses, Inc. v. United States*, 110 Fed. Cl. 618, 649 (2013) (citation omitted) (submission of a claim); *Crane Helicopter Servs., Inc. v. United States*, 45 Fed. Cl. 410, 431 (1999) (contract performance or submission of a claim); *Supermex, Inc. v. United States*, 35 Fed. Cl. 29, 39-41 (1996) (contract performance); *Little v. United States*, 138 Ct. Cl. 773, 778 (1957) (“[W]here, as in the present case, fraud was committed in regard to the very contract upon which the suit is brought, this court does not have the right to divide the contract and allow recovery on part of it.”).

²²⁵ *KBR*, 728 F.3d at 1366.

²²⁶ 28 U.S.C. §2501; *Am. Heritage Bancorp v. United States*, 56 Fed. Cl. 596, 606 (2003) (not subject to the statute of limitations); *First Fed. Savings Bank of Hegewisch v. United States*, 52 Fed. Cl. 774, 787-88 (2002) (not subject to statute of limitations because “[s]uch a limitation would allow plaintiffs to wait until the six-year time period expired before filing their fraudulent claims.”); *TS Infosystems, Inc. v. United States*, 36 Fed. Cl. 570, 574 (1996) (subject to the statute of limitations); *Jana, Inc. v. United States*, 34 Fed. Cl. 447, 452 (1995) (not subject to the statute of limitations); *see also* 28 U.S.C. §2415(f).

²²⁷ *Tri-Ad Constructors v. United States*, 45 Fed. App’x. 907, 912-13 (Fed. Cir. 2002).

²²⁸ *UMC Electronics Co. v. United States*, 249 F.3d 1337, 1340 (Fed. Cir. 2001).

²²⁹ *Ulysses, Inc. v. United States*, 110 Fed. Cl. 618, 636 (2013).

Program Fraud Civil Remedies Act

The Program Fraud Civil Remedies Act (PFCRA) provides an administrative process under which certain federal agencies may obtain civil remedies and assessments from “persons” who knowingly make false, fraudulent, or fictitious claims or statements to the agencies.²³⁰ The act’s legislative history suggests that Congress intended the PFCRA to remedy the “small-dollar cases” of fraud that the Department of Justice (DOJ) had declined to pursue in court because of litigation costs.²³¹ Thus, an agency may not use the administrative process contained in the PFCRA when the amount of money, property, or services demanded in a claim (or group of related claims) exceeds \$150,000.²³²

The PFCRA shares some structural similarities with the FCA.²³³ Like the FCA, it allows for the imposition of civil penalties on violators for false claims or statements, as well as an assessment on violators when the government has paid the claim.²³⁴ As with the FCA, liability under the PFCRA requires no specific intent to defraud, and thus a party may violate the FCA when it acts with reckless disregard of a claim or statement’s truth or falsity.²³⁵

However, unlike the FCA, the PFCRA establishes a mostly administrative process for recovery of civil remedies rather than a judicial one. The PFCRA provides for agency officials to investigate and review allegations of false claims or statements and ultimately requires the approval of a certain official from DOJ for the case to be referred to an Administrative Law Judge or other hearing officer.²³⁶ The act provides the person alleged to be liable with notice and the opportunity for a hearing on the record.²³⁷ The agency must prove its allegations by a preponderance of the evidence.²³⁸ A decision on liability or damages by the hearing officer may be appealed to the agency head within 30 days after the hearing officer issues a written decision, and, ultimately, to federal district court within 60 days of the agency head’s decision.²³⁹

Few federal agencies use the PFCRA, according to a recent study by the Government Accountability Office (GAO).²⁴⁰ The study found that from FY2006 through FY2010, five

²³⁰ Omnibus Budget Reconciliation Act of 1986, P.L. 99-509, §6103, 100 Stat. 1934 (1986) (codified as amended at 31 U.S.C. §§3801-3812). The definitions of “claim” and “statement” under the PFCRA are located at 31 U.S.C. §3801. The act requires agency heads to promulgate regulations implementing the act. 31 U.S.C. §3809; e.g., 34 C.F.R. Part 33 (implementing the provisions of the PFCRA for the U.S. Department of Education).

²³¹ H.Rept. 99-1012, at 258 (1986).

²³² 31 U.S.C. §3803(c)(1).

²³³ See *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 786 (2000) (characterizing the PFCRA as a “sister scheme” to the FCA).

²³⁴ 31 U.S.C. §3802. The current inflation-adjusted civil monetary penalty amount is \$5,500. 28 C.F.R. §85.3(a)(10)-(11). However, some agencies have raised the penalty even higher. GAO-12-275R, Program Fraud Civil Remedies Act: Observations on Implementation 1 n.2 (2012), <http://gao.gov/assets/590/587978.pdf>.

²³⁵ 31 U.S.C. §3801(a)(5).

²³⁶ *Id.* at §3803(a)-(b).

²³⁷ *Id.* at §3803(d), (f).

²³⁸ *Id.* at §3803(f).

²³⁹ *Id.* at §§3803(i), 3805(b). Before appealing a decision to district court, the petitioner must first exhaust all administrative remedies under the PFCRA. *Id.* at §3805(b)(1)(B)(i).

²⁴⁰ GAO-12-275R, Program Fraud Civil Remedies Act: Observations on Implementation 2 (2012), <http://gao.gov/assets/590/587978.pdf>.

civilian agencies referred 141 cases to DOJ for approval.²⁴¹ Of these cases, the U.S. Department of Housing and Urban Development referred 135, or 96 percent.²⁴² A 2008 report by the National Procurement Fraud Task Force recommended several reforms to the PFCRA designed to increase its use by federal agencies and its effectiveness at deterring fraud.²⁴³ These reforms include incentivizing agencies to use the PFCRA by increasing the act's jurisdictional cap to \$500,000 and the civil penalty limit to \$15,000; allowing agencies to retain recovered funds instead of depositing them into the Treasury Miscellaneous Receipts account; and simplifying the act's procedural requirements.²⁴⁴

Recent Regulatory Developments

This section briefly considers two recent regulatory developments that may affect contractors' potential exposure to civil liability and/or damages under the FCA. Among other things, the Mandatory Disclosure Rule allows an agency to suspend or debar a contractor for failing to timely disclose to the government certain violations of federal law related to a contract or subcontract, including violations of the FCA.²⁴⁵ Generally, the Presumed Loss Rule states that when a business willfully misrepresents its size or status in order to obtain certain small business contracting preferences, there is a presumption that the United States has suffered losses equal to the amount that the government has spent on the contract.²⁴⁶

Mandatory Disclosure Rule

In part to implement a statutory mandate contained in the Supplemental Appropriations Act of 2008,²⁴⁷ the Civilian Agency Acquisition Council and the Defense Acquisition Regulations

²⁴¹ *Id.*

²⁴² *Id.* According to the GAO report, some regulatory agencies "have few issues with false claims." *Id.* at 3.

²⁴³ National Procurement Fraud Task Force, Legislation Committee, Procurement Fraud: Legislative and Regulatory Reform Proposals 8, 10, 11-13 (2008), <http://www.gsaig.gov/?LinkServID=A8DD55A6-A6BB-D9F8-0788C31C39FC3CD0&>. The Task Force consisted of several federal agencies involved in the investigation and prosecution of procurement and grant fraud. *Id.* at i. In 2009, it became part of the Financial Fraud Task Force. See Financial Fraud Enforcement Task Force, <http://www.stopfraud.gov/about.html>.

²⁴⁴ National Procurement Fraud Task Force, Legislation Committee, Procurement Fraud: Legislative and Regulatory Reform Proposals 8, 10, 11-13 (2008), <http://www.gsaig.gov/?LinkServID=A8DD55A6-A6BB-D9F8-0788C31C39FC3CD0&>. Generally, penalties and assessments collected under the PFCRA must be deposited "as miscellaneous receipts in the Treasury of the United States." 31 U.S.C. §3806(g)(1). However, the statute contains exceptions for certain funds recovered by the U.S. Postal Service and Department of Health and Human Services. *Id.* at §3806(g)(2).

²⁴⁵ DOD, GSA, and NASA, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67064, 67090-91 (November 12, 2008) (codified at 48 C.F.R. §§9.406-2(b)(1)(vi), 9.407-2(a)(8)). The rule applies to contracts whose value exceeds \$5 million and whose duration is more than 120 days. Supplemental Appropriations Act of 2008, P.L. 110-252 §6103, 122 Stat. 2387 (2008), codified at 41 U.S.C. §3509(a).

²⁴⁶ Small Business Administration, Final Rule, Small Business Size and Status Integrity, 78 Fed. Reg. 38811, 38816-21 (June 28, 2013) (codified in several sections of Title 13 of the *Code of Federal Regulations*), <http://www.gpo.gov/fdsys/pkg/FR-2013-06-28/pdf/2013-15418.pdf>.

²⁴⁷ In the Supplemental Appropriations Act of 2008, Congress required that the FAR be amended to "require timely notification by Federal contractors of violations of Federal criminal law or overpayments in connection with the award or performance of covered contracts or subcontracts, including those performed outside the United States and those for commercial items." Supplemental Appropriations Act of 2008, P.L. 110-252 §6102, 122 Stat. 2386 (2008), codified at 41 U.S.C. §3509(b).

Council (the Councils) amended the FAR to, among other things, require contractors to disclose certain violations of federal law related to a contract or subcontract.²⁴⁸ This “Mandatory Disclosure Rule” allows an agency to suspend or debar a contractor for

Knowing failure by a principal, until 3 years after final payment on any Government contract awarded to the contractor, to timely disclose to the Government, in connection with the award, performance, or closeout of the contract or a subcontract thereunder, credible evidence of—

(A) Violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code;

(B) Violation of the civil False Claims Act (31 U.S.C. 3729-3733); or

(C) Significant overpayment(s) on the contract, other than overpayments resulting from contract financing payments as defined in [48 C.F.R. §32.001].²⁴⁹

Many government contracts must now include language requiring contractors to, among other things, timely disclose civil FCA violations related to the contract (or a subcontract under the contract) when the contractor has “credible evidence” that a principal of the contractor or one of certain other parties has committed such a violation.²⁵⁰ The provision states that disclosure must be made in writing to the relevant agency Office of the Inspector General and contracting officer.²⁵¹

During the rulemaking for the Mandatory Disclosure Rule, commenters expressed concerns that contractors would have difficulty in disclosing violations of the civil FCA because courts have reached different conclusions about what kind of conduct constitutes a violation.²⁵² The Councils responded that “[g]enuine disputes over the proper application of the civil FCA may be considered in evaluating whether the contractor knowingly failed to disclose a violation of the civil FCA.”²⁵³ Commenters also argued that mandatory disclosure of violations would facilitate lawsuits against contractors by *qui tam* relators.²⁵⁴ The Councils responded that “[t]imely disclosure of a knowing violation offers the contractor an opportunity to demonstrate its present responsibility to avoid suspension or debarment, and to obtain a reduction in damages under the civil FCA.”²⁵⁵

²⁴⁸ See 73 Fed. Reg. at 67090-91.

²⁴⁹ *Id.* The rule applies to contracts whose value exceeds \$5 million and whose duration is more than 120 days. Supplemental Appropriations Act of 2008, P.L. 110-252 §6103, 122 Stat. 2387 (2008), codified at 41 U.S.C. §3509(a). For more on debarment and suspension of government contractors, see CRS Report RL34753, *Debarment and Suspension of Government Contractors: A Legal Overview*, by (name redacted).

²⁵⁰ 73 Fed. Reg. at 67091 (codified at 48 C.F.R. §52.203-13); see also *id.* at §52.301.

²⁵¹ 73 Fed. Reg. at 67091 (codified at 48 C.F.R. §52.203-13).

²⁵² *Id.* at 67081. As described above, courts have reached various conclusions on whether, and if so, under what circumstances, a breach of contract or regulatory violation may make a claim for payment “false or fraudulent” by implication under the FCA. See “Implied False Certification Theory” and “Fraud in the Inducement Theory” above.

²⁵³ 73 Fed. Reg. at 67081.

²⁵⁴ *Id.* at 67082.

²⁵⁵ *Id.*

Presumed Loss Rule

Businesses that fraudulently obtain sole-source or set-aside contracts²⁵⁶ by misrepresenting their size or status prevent legitimate small businesses from receiving these contracts.²⁵⁷ In 2010, Congress amended the Small Business Act in an effort to address this issue.²⁵⁸ The SBA implemented these amendments in a 2013 rule.²⁵⁹

The “Presumed Loss Rule,” which is codified throughout Title 13 of the *Code of Federal Regulations*, states in part that when a business willfully misrepresents its size or status in order to establish its eligibility for award of a contract or subcontract²⁶⁰ “set aside, reserved, or otherwise classified as intended for award to” business concerns with a particular size or status,²⁶¹ there is a presumption that the United States has suffered losses equal to the amount that the government has spent on the contract.²⁶² A business is deemed to have made a willful certification of business size or status when it (1) submits a bid, proposal, or offer for a federal contract or subcontract set-aside or reserved for businesses of a particular size or status; (2) submits a bid, proposal, or offer for a federal contract or subcontract that “in any way encourages a Federal agency to classify the bid or proposal, if awarded, as an award to” a business of a particular size or status; or (3) registers on a federal electronic database as a business of a particular size or status in order to be considered for award of a federal contract or subcontract.²⁶³ The rule allows a trier of fact to determine that the presumption of loss does not apply in certain situations, such as when the contractor’s misrepresentations stem from unintentional errors.²⁶⁴

²⁵⁶ In support of its “declared policy” that a “fair proportion” of federal contracts be awarded to small businesses, 15 U.S.C. §631(a), Congress has enacted various statutes authorizing procuring agencies to conduct competitions in which only small businesses may compete, or to make noncompetitive (“sole-source”) awards to such firms in circumstances when similar awards could not be made to other firms. *See, e.g., id.* at §644(a) (set-asides for small businesses); *id.* at §637(a) (set-asides for 8(a) participants); *id.* at §637(m) (set-asides for women-owned small businesses); *id.* at §657a (set-asides for HUBZone small businesses); *id.* at §657f (set-asides for service-disabled veteran-owned small businesses). Congress has also sought to assist small businesses by requiring the establishment of government-wide and agency-specific goals for the percentage of federal contract and/or subcontract dollars awarded to small businesses each year. *See, e.g., id.* at §644(g)(1)-(2). For more information on these statutes and other issues associated with set-asides for small businesses, see CRS Report R42981, *Set-Asides for Small Businesses: Legal Requirements and Issues*, by (name redacted) and (name redacted).

²⁵⁷ *See, e.g.,* Department of Veterans Affairs, Audit of Veteran-Owned and Service-Disabled Veteran-Owned Small Business Programs 3 (2011), <http://www.va.gov/oig/52/reports/2011/VAOIG-10-02436-234.pdf>; GAO-10-425, 8(a) Program: Fourteen Ineligible Firms Received \$325 Million in Sole-Source and Set-Aside Contracts 7 (2010), <http://www.gao.gov/new.items/d10425.pdf>.

²⁵⁸ Small Business Jobs Act of 2010, P.L. 111-240 §§1341, 1342, 124 Stat. 2543-44 (2010), codified at 15 U.S.C. §632(w)-(x).

²⁵⁹ Small Business Administration, Final Rule, Small Business Size and Status Integrity, 78 Fed. Reg. 38811, 38816-21 (June 28, 2013) (codified in several sections of Title 13 of the *Code of Federal Regulations*), <http://www.gpo.gov/fdsys/pkg/FR-2013-06-28/pdf/2013-15418.pdf>.

²⁶⁰ The rule may also apply to cooperative agreements, cooperative research and development agreements, or grants. *Id.*

²⁶¹ This rule may apply when a business makes a willful misrepresentation that it is a small business or a specific type of small business (i.e., a small disadvantaged business, including participants in the “8(a) Program”; Historically Underutilized Business Zone small business; women-owned small business; or service-disabled veteran-owned small business). *Id.*

²⁶² *Id.*

²⁶³ *Id.* The rule also requires an authorized official to certify small business size or status and requires annual certification for the business to be identified as having a particular size or status in federal procurement databases. *Id.*

²⁶⁴ *Id.*

The Presumed Loss Rule may have significant implications in FCA suits in which the government or a relator alleges that a contractor fraudulently induced the government to award the contractor a set-aside or sole-source contract by misrepresenting its size or status, or that a contractor made an implied false certification by submitting a claim for payment after having failed to comply with federal regulations governing size or status representations.²⁶⁵ In the past, the COFC has declined to impose damages when the contractor failed to comply with the eligibility requirements of the SBA's 8(a) Program.²⁶⁶ The court stated that "damages represent compensation for a loss or injury sustained" and that, because the government "got essentially what it paid for," the government had not suffered damages as a result of the contractor's failure to comply with the eligibility requirements.²⁶⁷ Under the Presumed Loss Rule, however, a court facing the same set of facts would probably hold the contractor liable for three times the amount that the government paid on the contract.

Conclusion

Preventing contractor fraud without deterring contractors' willingness to compete for government contracts poses a challenge for the federal government because fraud takes a variety of forms and can be difficult to detect and prosecute with limited resources.²⁶⁸ Several federal statutes allow the federal government—and in some instances, private parties—to recover damages, civil penalties, or forfeitures for false or fraudulent claims for payment and other misconduct.²⁶⁹ Some Members of Congress, courts, and others have continued to debate the proper scope of liability under these civil fraud statutes.²⁷⁰ Congress may enact laws that alter the scope of these statutes and, at least with respect to the FCA, has done so many times.²⁷¹

Much of the debate about the scope of fraud statutes has focused on the FCA, the federal government's primary civil fraud remedy.²⁷² Two recent court-created theories have further expanded the scope of defendants' liability under the FCA²⁷³—a statute which the Supreme Court has characterized as imposing "damages that are essentially punitive in nature."²⁷⁴ Some

²⁶⁵ See 31 U.S.C. §3729(a)(1) (potentially imposing liability for treble damages for violations of the FCA); see also "Fraud in the Inducement Theory" and "Implied False Certification Theory" above.

²⁶⁶ *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429, 434 (1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995) (unpublished table decision).

²⁶⁷ *Id.*

²⁶⁸ General Services Administration, Office of Inspector General, *Procurement Fraud Handbook* 14-29 (2012), <http://www.gsaig.gov/?LinkServID=6486B647-A5DF-C154-010A408470CAE0B8>; National Procurement Fraud Task Force, *Legislation Committee, Procurement Fraud: Legislative and Regulatory Reform Proposals ii* (2008), <http://www.gsaig.gov/?LinkServID=A8DD55A6-A6BB-D9F8-0788C31C39FC3CD0&>.

²⁶⁹ *E.g.*, Forfeiture of Fraudulent Claims Act, 28 U.S.C. §2514; False Claims Act, 31 U.S.C. §§3729-3733; Program Fraud Civil Remedies Act, 31 U.S.C. §§3801-3812; Contract Disputes Act, 41 U.S.C. §7103(c)(2).

²⁷⁰ See, for example, "False Claims Act: Recent Amendments" above. See also *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1366 & n.18 (Fed. Cir. 2013) (discussing different judicial interpretations of the scope of the Forfeiture of Fraudulent Claims Act).

²⁷¹ See "False Claims Act: Recent Amendments" above.

²⁷² *Id.*

²⁷³ See "Implied False Certification Theory" and "Fraud in the Inducement Theory" above.

²⁷⁴ *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784-85 (2000) ("[T]he current version of the FCA imposes damages that are essentially punitive in nature ..."); *cf.* *United States ex. rel. Marcus v. Hess*, 317 U.S. 537, 551-52 (1943) ("We think the chief purpose of the statutes here was to provide for restitution to the (continued...)")

commentators have expressed concerns that judicial recognition of these theories could allow the government or relators to recover tort-like damages for defendants' minor breaches of contract.²⁷⁵ However, some of the courts that recognize these theories have limited their use by strictly enforcing the FCA's mental state requirement; the heightened pleading requirements for fraud allegations under Federal Rule of Civil Procedure 9(b); or some form of materiality requirement.²⁷⁶ Other recent regulatory and judicial developments may also affect contractors' potential exposure to civil liability and damages under the FCA.²⁷⁷

Contractors' submission of fraudulent claims during the contract disputes process poses additional challenges for the government. Federal statutory civil remedies for this type of contractor fraud exist as a condition of the government's waiver of its sovereign immunity from suit,²⁷⁸ and as a means of deterring fraud against federal agencies that lack the resources to thoroughly evaluate contractor claims that may have been submitted in an effort to extract a settlement offer from the government.²⁷⁹ Fair resolution of contract disputes by courts, including resolution of government counterclaims alleging fraud, helps ensure that contractors will continue to compete for the government's business.²⁸⁰

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

(...continued)

government of money taken from it by fraud, and that the device of double [currently, treble] damages plus a specific sum was chosen to make sure that the government would be made completely whole."'). At the time of the Supreme Court's decision in *Hess*, the FCA allowed the government to recover double damages. *See id.* at 546. In the 1986 amendments to the FCA, Congress changed this amount to treble damages. False Claims Amendments Act of 1986, P.L. 99-562 §2, 100 Stat. 3153 (1986).

²⁷⁵ *E.g.*, Restatement (Second) of Contracts §355 (1981) ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."); Gregory Klass & Michael Holt, *Implied Certification under the False Claims Act*, 41 *Pub. Contract. L.J.* 1, 1-2 (2011).

²⁷⁶ See "Implied False Certification Theory: Limitations on the Theory" and "Fraud in the Inducement Theory: Limitations on the Theory" above.

²⁷⁷ See "False Claims Act: Calculating Treble Damages," "Mandatory Disclosure Rule," and "Presumed Loss Rule" above.

²⁷⁸ *DeRochemont v. United States*, 23 Ct. Cl. 87, 89 (1991) (FFCA).

²⁷⁹ S.Rept. 95-1118, at 7, 8, 20 (1978) (CDA); *see also* "Daewoo Engineering and Construction Co., Ltd. v. United States" above.

²⁸⁰ *See* S.Rept. 95-1118, at 4 ("How procurement functions has a far-reaching impact on the economy of our society and on the success of many major Government programs. Both can be affected by the existence of competition and quality contractors—or by the lack thereof. The way potential contractors view the disputes-resolving system influences how, whether, and at what prices they compete for Government contract business.").

EveryCRSReport.com

The Congressional Research Service (CRS) is a federal legislative branch agency, housed inside the Library of Congress, charged with providing the United States Congress non-partisan advice on issues that may come before Congress.

EveryCRSReport.com republishes CRS reports that are available to all Congressional staff. The reports are not classified, and Members of Congress routinely make individual reports available to the public.

Prior to our republication, we redacted names, phone numbers and email addresses of analysts who produced the reports. We also added this page to the report. We have not intentionally made any other changes to any report published on EveryCRSReport.com.

CRS reports, as a work of the United States government, are not subject to copyright protection in the United States. Any CRS report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS report may include copyrighted images or material from a third party, you may need to obtain permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

Information in a CRS report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to members of Congress in connection with CRS' institutional role.

EveryCRSReport.com is not a government website and is not affiliated with CRS. We do not claim copyright on any CRS report we have republished.