

CONSTRUCTION BILLS

By Asha A. Echeverria and Brian R. Zimmerman



Asha A. Echeverria



Brian R. Zimmerman

Resurgence of False Claims Acts at Federal and State Levels

The federal False Claims Act (FCA) dates back to the Civil War, when it was enacted to combat fraud in contracting by the Union Army for goods and services.¹ Changes to the FCA in 1986 brought new relevance to the Act, and continued amendments over recent decades have allowed the federal government to recover billions of dollars from those making false or fraudulent claims on government contracts.²

The FCA prohibits anyone from “knowingly” presenting, making, or conspiring to make a false claim to the government.³ Violations are subject to civil penalty and treble damages.⁴ In addition to the federal government’s right to pursue and collect from violators, in certain situations, the FCA allows individuals to act as private attorneys general to prosecute claims on behalf of the government and recover funds on behalf of the government.⁵ This private citizen action is often referred to as qui tam.⁶ The FCA incentivizes private attorneys general by rewarding the citizen with a percentage of the recovery.⁷

In 2006, the Deficit Reduction Act of 2005 (DRA) was enacted in an effort to further recover funds that were fraudulently paid by the government by incentivizing the states to not only create their own false claims law, but one “that is at least as effective in rewarding and facilitating qui tam or whistleblower actions for false claims as those described in federal law.”⁸ Since 2006, the FCA has been further strengthened through the Fraud Enforcement Recovery Act of 2009 (FERA), the Affordable Care Act (ACA), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank).⁹

In the fiscal year ending September 30, 2014, the U.S. Department of Justice reported a record \$5.69 billion

in settlements and judgments from civil cases brought under the FCA.¹⁰ With the 2014 success, the Department of Justice appears to be attempting to keep pace in 2015. The federal government’s recovery in the past six years of over \$22 billion amounts to more than half the total recovery under the FCA since Congress amended the FCA in 1986 to strengthen the law and increase whistleblower incentives.¹¹

As a result of the FCA’s amendments, the government has seen a surge in qui tam claims, with 700 such actions filed in 2014, netting the federal government \$3 billion.¹² While it currently appears that the financial industry and the health-care industry are in the government’s spotlight,¹³ construction accounts for a significant portion of all government contracting, and, therefore, the construction industry should be especially sensitive to the expansion and scrutiny of the FCA.¹⁴

States Strengthening Their False Claims Acts

The following states/jurisdictions have some form of false claims act: California, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Vermont, Virginia, and Washington.¹⁵ This number will most likely continue to grow as states seek to replicate, even at a smaller scale, the substantial recoveries the federal government is producing. Through the DRA, the federal government provided states with financial incentives to develop their own false claims laws based on federal guidelines.¹⁶ In the past two years, many states have moved forward legislation to meet DRA guidelines and deadlines, and thereby be eligible for federal incentives.

Florida

In 2013, Florida made substantial changes to the Florida False Claims Act (FFCA)¹⁷ to update and strengthen its law, which was already modeled after the FCA. First, the Florida legislature removed the “direct presentment” requirement. As a result, it is no longer required that a party submit a claim directly to a government entity in order to be liable under the FFCA. Under the amended law, and similar to the FCA, a subcontractor can be found liable under the FFCA if it submits a false claim to a general contractor operating under a state contract.¹⁸

Second, following the federal response to *Allison Engine Co., Inc. v. United States ex rel. Sanders*,¹⁹ Florida clarified the FFCA’s imposition of liability on anyone who knowingly makes, uses, or causes any false statement or record to get a false or fraudulent claim paid.²⁰

Asha A. Echeverria is a shareholder at Bernstein Shur in Portland, Maine. Brian R. Zimmerman is a shareholder of Hurtado Zimmerman S.C. in Milwaukee, Wisconsin.

Therefore, a subcontractor's false claim to the general contractor is enough if it is material to the general contractor's receipt of payment from the state.

Third, Florida clarified liability for "reverse false claims," closing a loophole and assuring that liability attaches whenever someone "knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the state."²¹ Fourth, public disclosure is no longer a jurisdictional bar to a qui tam lawsuit, although it still remains a basis for dismissal if the state does not oppose dismissal.²²

And finally, Florida broadened the scope of the state law to apply to all "instrumentalities of the state,"²³ which has been interpreted in other contexts to mean state school districts, counties, and municipalities.

Vermont

In 2015, Vermont enacted the Vermont False Claims Act, which mirrors the FCA and imposes stiff penalties for submitting false or fraudulent claims to the state for payment.²⁴ The statute, effective May 18, 2015, permits treble damages and penalties up to \$11,000 for each fraudulent act.²⁵ Controversially, the Vermont law contains a retroactivity clause allowing suit to be brought based on fraud that occurred up to ten years prior to the law's passage.²⁶ The Vermont legislature delayed the effectiveness of the retroactivity provision until May 15, 2016, which opens the possibility of the legislature repealing this controversial clause in the 2016 session, before any constitutional challenge is brought.

Maryland

Effective June 1, 2015, Maryland adopted the Maryland False Claims Act.²⁷ Maryland previously had limited false claim protections under its False Health Claims Act,²⁸ which only applied to cases of Medicaid and health-care-related fraud. Under the new law, which passed with bipartisan support, individuals with knowledge of fraud can bring cases to the attention of the Office of the Attorney General, or a local State Attorney's Office, which will review and then pursue cases that are seen to have merit. Successful cases relating to fraud at the state or local level permit the state to recover treble damages for losses and allow for payments to be made to whistleblowers, who are also protected under the law from on-the-job retaliation.²⁹

Several States Have Aligned Legislation with the DRA

Over the past two years, several states have sought to enact legislation to bring their false claims acts in line with the DRA federal guidelines and therefore qualify for federal incentives.

New Jersey

After being notified in 2011 by the Office of the Inspector General that the New Jersey False Claims Act was not in compliance with the DRA,³⁰ the New Jersey General

Assembly passed a bill allowing for retroactive claims under the New Jersey False Claims Act on May 14, 2015, which then passed to the New Jersey Senate Judiciary Committee for review on May 18, 2015.³¹

Georgia

Two rounds of amendments in 2013 and 2014, adopting additional penalties for civil violations and more effective qui tam provisions, brought the Georgia State False Medicaid Claims Act³² in line with DRA incentive guidelines in 2014.³³

Nevada

Though Nevada passed legislation in 2013 to revise the Nevada False Claims Act with the goal of complying with the DRA, those changes fell short of compliance.³⁴ According to the Office of Inspector General, Nevada had failed to provide an effective reward and facilitation of qui tam actions, providing protections against retaliation in fewer situations than the FCA and less reward to whistleblowers in qui tam actions.

Other States

Some states, like Colorado,³⁵ Massachusetts,³⁶ and Minnesota,³⁷ amended their false claims acts in 2013 to comply with the DRA requirements and obtain financial incentives associated with compliance. Colorado's False Claims Act is specific to Medicaid fraud, whereas those of Massachusetts and Minnesota are general laws affecting government contracting. Other states that have false claims laws that were amended in recent years to comply with the DRA include Montana, Rhode Island, Tennessee, and Texas. Montana and Rhode Island have statutes with broad application, whereas Tennessee's and Texas's statutes are narrowly tailored for Medicaid fraud.³⁸

States Moving Away from False Claims Acts

Wisconsin Repeals Its False Claims Law

While most other states have made attempts to adopt, amend, and strengthen false claims laws by increasing incentives to private citizens to act as whistleblowers or codifying qui tam actions and to comply with the DRA and other provisions providing financial incentives, Wisconsin swung the other direction, repealing Wisconsin's 2007 False Claims for Medical Assistance Act on July 12, 2015.³⁹ While the repeal legislation was embedded in the state's biennial budget law, and passed with little attention in the state or explanation from lawmakers, the state's Attorney General noted that it "will not have much impact—if any—given that there are numerous laws that allow the state to prosecute Medicaid fraud."⁴⁰ Wisconsin had previously received notice from the OIG in March 2011 that Wisconsin's legislation did not comply with DRA.⁴¹ Wisconsin chose to let the two-year grace period to become compliant lapse, therefore passing on federal incentives.

Mississippi

Over the past two years, Mississippi has attempted and failed three times to pass a Mississippi False Claims Act, styled after the FCA.⁴² The most recent attempt in January 2015 with House Bill 491 died in the state judiciary committee.⁴³

West Virginia

West Virginia has a Fraud and Abuse in the Medicaid Program,⁴⁴ but efforts in 2014, through House Bill 4001, to enact a broader false claims act similar to the FCA and in line with the DRA requirements was rejected on February 25, 2014.⁴⁵

Industry Effects

By allowing private individuals to bring *qui tam* claims and share in the successful recovery of government funds, as well as incentivizing states to follow suit with similar legislation, the FCA and state equivalents have seen a resurgence, producing a record-setting \$5.7 billion in recoveries for the federal government in 2014.⁴⁶ Though not notable yet, this boom in FCA litigation will impact the construction industry at the state and federal levels.

One area that should be of particular interest to subcontractors is the elimination of the “presentment” requirement. Now a contractor can be liable under the FCA, and similar state statutes, for a false claim even if a request for payment is presented to a third party, like a general contractor, if the payment funds come from a government source.⁴⁷ Also, it is no longer a requirement for the contractor to have intentionally defrauded the government; liability exists if the contractor’s request was “material” to the government’s decisions to pay a claim, another means by which a subcontractor’s claim could give rise to FCA liability.⁴⁸

Additional attention should be paid to the expansion of the concept of “implied certification.” Under this theory, a contractor can be liable for making a claim for payment before every term of the contract is satisfied.⁴⁹ In theory, this gives rise to liability if every term of a contract is not complied with or if final payment is requested when some item of work remains incomplete. A circuit split exists on implied certification after the theory was adopted by the Fourth Circuit and rejected by the Fifth and Seventh Circuits.⁵⁰

With states and the federal government amending this Civil War statute in an effort to exploit what has become a multibillion-dollar source for recovery of false claims, the FCA and its state counterparts will continue to be significant aspects of public contracting for the foreseeable future.

Endnotes

1. U.S. DEP’T OF JUSTICE, *THE FALSE CLAIMS ACT: A PRIMER* (Apr. 22, 2011), available at http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf.

2. Dave Nadler & Ryan P. McGovern, *Top Ten Things Every Government Contractor Should Know about the False Claims Act*, ASS’N OF CORP. COUNSEL (Apr. 24, 2013), <http://www.acc.com/legalresources/publications/topten/ttgetgskatfca.cfm>.

3. 31 U.S.C.A. § 3729.

4. *Id.*

5. *Id.*

6. *Qui tam* is a Latin abbreviation of the phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means “who as well for the king as for himself sues in this matter.”

7. 31 U.S.C.A. § 3730.

8. *Incentivi[z]ing State False Claims Act*, NAT’L CONFERENCE OF STATE LEGISLATURES (Mar. 7, 2013), <http://www.ncsl.org/research/health/clarifying-requirements-for-a-state-false-claims-a.aspx>.

9. *Id.*

10. *Justice Department Recovers Nearly \$6 Billion False Claims Act Cases in Fiscal Year 2014*, U.S. DEP’T OF JUSTICE (Nov. 20, 2014), <http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014> [hereinafter *Justice Department Recovers Nearly \$6 Billion*].

11. *Id.*

12. *Id.*

13. *Id.*

14. Nadler & McGovern, *supra* note 2.

15. David H. Chen, *States Continue to Develop False Claims Act Analogs* (Mar. 5, 2015), <http://www.fcaupdate.com/2015/03/states-continue-to-develop-their-own-false-claims-act-analogs/>.

16. *Incentivi[z]ing State False Claims Act*, *supra* note 8; *Justice Department Recovers Nearly \$6 Billion*, *supra* note 10.

17. FLA. STAT. § 68.081 et seq. (2013).

18. *See id.* § 68.082.

19. 553 U.S. 662 (2008) (holding that the subcontractor’s alleged improper demand for payment from the general contractor did not meet the federal Act’s prohibition of making a false record or statement in order to induce the federal government to pay or approve a claim).

20. FLA. STAT. § 68.082.

21. *Id.* § 68.082(2)(g).

22. *Id.* § 68.087.

23. *Id.* § 68.082(1)(f).

24. VT. STAT. ANN. tit. 32, § 630 et seq. (2015).

25. *Id.* § 631(b)(1).

26. *Id.* § 632(b).

27. MD. CODE ANN., GEN. PROVIS. § 8-101 et seq. (2015).

28. MD. CODE ANN., HEALTH-GEN., § 2-602.

29. MD. CODE, GEN. PROVIS. § 8-101 et seq.

30. Letter from Daniel R. Levinson, Inspector Gen., to Paula T. Dow, N.J. Att’y Gen. (Mar. 21, 2011), available at <http://oig.hhs.gov/fraud/docs/falseclaimsact/NewJersey.pdf>.

31. N.J. Act No. A4041, 216th Leg. (2014).

32. *See generally* GA. CODE ANN. § 49-4-168 (2014).

33. Letter from Daniel R. Levinson, Inspector Gen., to Samuel S. Olens, Ga. Att’y Gen. (May 22, 2014), available at <http://oig.hhs.gov/fraud/docs/falseclaimsact/Georgia.pdf>.

34. Letter from Daniel R. Levinson, Inspector Gen., to Catherine Cortez Masto, Nev. Dep’t Justice (Mar. 12, 2014), available at <http://oig.hhs.gov/fraud/docs/falseclaimsact/Nevada.pdf>.

35. Colo. S.B. 13-205, 69th Gen. Assembly (2013): “In order for Colorado to retain a greater percentage of monetary recoveries for fraudulent medicaid claims, the ‘Colorado Medicaid False Claims Act’ (act) must be at least as effective as federal law in rewarding and facilitating *qui tam* actions for false and fraudulent claims. The bill amends the act to bring the act into compliance with federal law[.]”

36. *See generally* MASS. GEN. LAWS ch. 12, § 5B (2013).

37. *See generally* MINN. STAT. §§ 15C.01–15C.16 (2013).

38. *See generally* MONT. CODE ANN. § 17-8-403 (2015); R.I.

GEN. LAWS § 9-1.1-4 (2015) Tenn. H.B. 184, Pub. Acts no. 99 tit. 71, ch. 5; TEX. HUM. RES. CODE ANN. §§ 36.001–36.132 (West 2015).

39. 2015 Wis. Act 55 (July 13, 2015); *Wisconsin Repeals State False Claims Act*, NAT'L L. REV. (July 15, 2015), available at <http://www.natlawreview.com/article/wisconsin-repeals-state-false-claims-act>.

40. *Id.*

41. Letter from Daniel R. Levinson, Inspector Gen., to Thomas Storm, Wis. Dir. of Medicaid Fraud Control (Mar. 21, 2015), available at <http://oig.hhs.gov/fraud/docs/falseclaimsact/Wisconsin.pdf>.

42. Miss. H.B. 58 and 196 (2014).

43. Miss. H.B. 491 (2015).

44. See generally W. VA. CODE ANN. § 9-7-1 (2011).

45. W. VA. H.B. 4001 (2014).

46. *Justice Department Recovers Nearly \$6 Billion*, *supra* note 10.

47. See 31 U.S.C. § 3729(b):

(2) the term “claim”—

(A) means 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

48. *Id.*

49. Nadler & McGovern, *supra* note 2.

50. *United States v. Triple Canopy, Inc.*, 775 F.3d 628, 633 (4th Cir. 2015); *Steury v. Cardinal Health, Inc.*, 625 F.3d 262, 268 (5th Cir. 2010); *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 701 (7th Cir. 2015).