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THE CIVIL FALSE CLAIMS ACT AND ITS UNREASONABLY BROAD SCOPE OF LIABILITY: THE NEED FOR REAL "CLARIFICATIONS" FOLLOWING THE FRAUD ENFORCEMENT AND RECOVERY ACT OF 2009

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I. INTRODUCTION

Two companies face serious legal action that could put them out of business.

Metal-Maven, Inc., a metal fabrication company, is under contract with the United States Air Force to fabricate specialty screws that the federal government will use to construct a new military aircraft, the Blackbird. Pursuant to the contract, Metal-Maven is to produce 500 sets of screws, one for each new aircraft. The government will pay Metal-Maven $10,000 for each set. The specifications of the contract call for Metal-Maven to use titanium, which is lighter and stronger than steel, to fabricate the screws to be used on the aircraft. Titanium, however, is more expensive than steel. In an attempt to maximize profit, Metal-Maven orders from a subcontractor enough steel to produce the 500 sets of screws, instead of the agreed upon titanium.

The steel screws prove no match for the abuse the new Blackbirds must endure, and cause several performance issues for the Air Force. The weight of the steel screws hinders the Blackbirds' ability to reach desired speeds; the steel screws, very early on, begin to rust; and, eventually, many of the screws begin to buckle under the wind pressure caused by the high rates of speed of the Blackbirds. The United States Attorney General, based on information brought forth by a whistle-blowing[1] Metal-Maven employee, files suit against Metal-Maven for defrauding the government under the False Claims Act ("FCA").

Reliable Rubber Manufacturers ("Reliable") processes and produces rubber pieces for a variety of purposes. Reliable's most recent contract calls for it to

[1] "Whistleblower" is a term often used to describe an employee, present or former, who brings information regarding his employer's wrongful conduct to the attention of the government, acting as a third-party plaintiff. Similarly, "relator" is another legal term of art describing the third-party informant involved in False Claims litigation. The term "relator," however, is applied to all third-party plaintiffs, not just past or present employees of the offender. For purposes of this Note, both whistleblower and relator describe third-party plaintiffs in False Claims Act litigation who bring information regarding the "false claims" to the government's attention.

produce rubber tubing to be used on lifeboats. Lasting Lifeboats, LLC is manufacturing 5,000 lifeboats for the United States Navy, and has subcontracted with Reliable to produce the customized tubing; Reliable is to be compensated $1,000 for each unique piece. The specifications for the boats, expressed in the contracts between all three entities, call for three-quarter inch tubes.

While prudently performing its duties, Reliable noticed that its rubber-processing machine was malfunctioning. Reliable called a licensed and highly credible machine servicing company to repair the equipment. The machine was recalibrated and the repairs were complete. According to the repair company, the machine was now processing three-quarter inch rubber tubing. As far as Reliable knew, it completed the order for the tubing according to specification and sent it off to Lasting Lifeboats. Lasting Lifeboats affixed the rubber piece to its boats and sent them off to the Navy. The Navy, however, quickly receives information from a third party that the tubing measures only seven-tenths of an inch in diameter and will not be sufficient for its purposes. As a result, the United States Attorney General files a False Claims action against Reliable for "knowingly" defrauding the government.

At first glance, both companies appear to be on the hook for roughly $5,000,000 in damages.[2] The FCA, however, imposes treble damages,[3] bringing each company's total liability to $15,000,000. On top of that, each party may be liable for between $5,000 and $10,000 per claim.[4] If Metal-Maven submitted 500 claims for reimbursement—one per set of screws—it could be held liable for an additional $5,000,000. Reliable, on the other hand, presuming it filed separate claims for each of the 5,000 lifeboats – may be held liable for an additional $50,000,000.

The False Claims Act was intended to hold parties liable, like Metal-Maven, who purposefully defraud the government. That is, only those with the requisite scienter[5] should be held liable. Attaching liability to such action has recovered billions of the federal government's misappropriated dollars. The FCA was not intended to attach liability to mere negligent activity.[6] Presumably, companies like Reliable will learn their lesson through a simple negligence or breach of contract claim.

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[2] In Metal-Maven's case, 500 sets of screws multiplied by its compensation, $10,000 per set, results in $5,000,000. Reliable produced 5,000 rubber pieces at a rate of $1,000 per unit, resulting in $5,000,000. Presumably, if sued under breach of contract, both companies would be liable for $5,000,000 in restitution.

[3] False Claims Act, 31 U.S.C.A. § 3729(a)(1) (West 2010) (stating that defendants are liable for three times the amount of damages the government sustains because of the defendant).

[4] *See* 31 U.S.C.A. § 3729(a)(1) (West 2010); *see also* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT, § 7:2 (2004) (The text of the False Claims Act sets forth "a mandatory civil penalty of 'not less than $5,000 and not more than $10,000' for each violation of the Act." In addition, "[u]nder the Debt Collection Improvement Act of 1996, these penalties must be adjusted for inflation every four years and are currently set at $5,500-$11,000.").

[5] For purposes of this Note, "scienter" is a legal term of art referring to the requisite state of mind for an offender to be found liable under the FCA.

[6] *See* United States *ex rel.* Hagood v. Sonoma Cnty. Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991).

Attaching FCA liability in such circumstances, like Reliable Rubber's, can cripple entities that never intended to defraud the government. Attaching liability to mere negligence under the FCA, although Congress denies the Act's intention to do so,[7] carries with it a number of devastating implications for the government, contractors, and the public as a whole. Additionally, it hardly provides for a deterrent to mere negligence. This Note discusses this unresolved issue and focuses on the confusion surrounding the necessary state of mind for effectuating liability under the FCA.[8]

This Note analyzes Congress's most recent attempts to recover fraudulently secured government funds through its modifications of the False Claims Act ("FCA"), and concludes that an amendment to the Act is necessary. To begin, Part II.A. presents a brief historical tracking of the FCA, including the original FCA of 1863,[9] and the critical amendments through 1986. Part II.B. explores relevant interpretations by the courts that established the landscape of false claims litigation prior to the Fraud Enforcement and Recovery Act of 2009 ("FERA"), including *Allison Engine v. United States ex. rel. Sanders*, in which the United States Supreme Court reversed a presentment requirement and articulated an intent requirement for defendant liability.[10] Part II.C. details the recent, though significant, alterations to the FCA, including FERA's effective overruling of *Allison Engine* and removal of any intent requirement. This Note will briefly explain the Patient Protection and Affordable Care Act of 2010, its erosion of the "Public Disclosure Bar," and its narrow definition of "publicly disclosed" information.

Part III.A. highlights current examples that demonstrate the FCA's inevitable shift toward a negligence standard if the Act is not further clarified. Part III.B. will show the serious repercussions that necessarily follow such a broadened scope of liability, such as an increased cost of doing business with the government and contractors, and several policy implications. Finally, Part III.C. will explain that Congress must adopt the approach of several state versions of the False Claims Act, and expressly eliminate negligence and mistake as bases for liability under the federal False Claims Act.

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7 *See* 132 CONG. REC. S11244 (daily ed. Aug. 11, 1986).

8 The expanded liability under the False Claims Act that is discussed in this Note is most threatening to the health care industry. In fact, the real-world examples used in this Note's analysis deal with the risks posed to the health care industry. For purposes of clarity, the hypothetical examples in the introduction of this Note involve military contracting, as the extreme complexities involved with the health care system, including its coding procedures, become befuddling. The general principles, however, apply equally in all government-contracting settings.

9 *See* Act of March 2, 1863, ch. 67, § 1, 12 Stat. 696, 696-99 (1863) (current version at 31 U.S.C. §§ 3729-3733 (2009)).

10 *See* Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662 (2008).

II. BACKGROUND

A. Lincoln's Law: The Inception of the False Claims Act

In 1863, Congress enacted Lincoln's Law, the original False Claims Act, in response to increasing fraud among Union contractors during the Civil War.[11] In one such example, according to the legislative history, a contractor sold and delivered boxes of sawdust to Union cavalry, who were expecting muskets.[12] The FCA incorporated *qui tam* provisions—Latin for "who as well for the king as for himself sues in this matter"[13]—permitting private plaintiffs, or "relators," to bring civil action against an FCA offender on the government's behalf. The *qui tam* provisions were introduced to greatly increase the government's capacity to combat fraud,[14] effectively offering rewards for information to which it would not otherwise have access.[15] *Qui tam* provisions were especially useful at the time given that "federal and state governments were fairly small and unable to devote significant resources to law enforcement."[16] As the role of Government swelled, though, the use of *qui tam* provisions did not subside.[17] A respected scholar noted that "[t]he war called for a dramatic escalation in the role of national government and this too was reflected in many ways in every part of the law."[18] Specifically, the Civil War

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[11] ABA, Section of Public Contract Law, Procurement Fraud Committee, QUI TAM LITIGATION UNDER THE FALSE CLAIMS ACT, 1 (2d ed. 1999); *see also* An Act to Prevent and Punish Frauds upon the Government of the United States, ch. 67, 12 Stat. 696 (1863) [hereinafter "Original False Claims Act"] (As it was written in 1863, the False Claims Act held liable any person "who shall make or cause to be made, or present or cause to be presented for payment or approval to or by any person or officer in the civil or military service of the United States, any claim upon or against the Government of the United States . . . knowing such claim to be false, fictitious, or fraudulent.").

[12] *See* 132 CONG. REC. H6479, H6482 (daily ed. Sept. 9, 1986).

[13] *Qui tam pro domino rege quam pro se ipso in hac parte sequitur*. BLACK'S LAW DICTIONARY 1368 (9th ed. 2009).

[14] *See* Note, *Qui Tam Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions*, 67 NW. U. L. REV. 446, 453 (1972).

[15] For example:

> The effect of [the qui tam provision] is simply to hold out to a confederate a strong temptation to betray his coconspirator, and bring him to justice. The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator, if he be such; but it is not confined to that class. . . . In short, sir, I have based the [qui tam provisions] upon the old-fashioned idea of holding out a temptation and "setting a rogue to catch a rogue," which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.

CONG. GLOBE, 37TH CONG., 3D SESS. 955-56 (1863).

[16] SYLVIA, *supra* note 4, at § 2:6.

[17] *Id*. ("As the role of the Government expanded, the utility of private assistance in law enforcement did not diminish. If anything, changes in the role and size of the Government created a greater role for this method of law enforcement.").

[18] *Id*. (quoting LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 295 (1973)).

created an intense demand for war supplies, which in turn created more opportunity for fraud.[19]

B. 1943 Amendments: Extinguishing the Parasites

The FCA was significantly altered only once between its inception and 1986. In 1943, several changes were made to the FCA. Among other things, the 1943 amendments bestowed upon the Department of Justice the ability to take over cases initiated by *qui tam* relators.[20] Furthermore, the 1943 amendments impeded *qui tam* relators' ability to bring action and reduced potential damages they may be awarded.[21] Perhaps the most momentous of the 1943 amendments required a *qui tam* relator to base his suit on information that the government did not already possess.[22] In passing this amendment, Congress nullified the Supreme Court's decision in *United States ex rel. Marcus v. Hess*, which allowed for *qui tam* relators to bring "parasitical" actions based on information already made public by the government.[23] After 1943, a relator could no longer replicate the government's indictment by acting as a parasite to recover a portion of the damages. Here, Congress's intent was to prevent relators from piggy-backing on information the government already possessed, thereby taking advantage of the *qui tam* provision for personal financial gain without contributing anything to the government's enforcement efforts.

C. 1986 Amendments: Removing Barriers for Qui Tam Plaintiffs and the Government

By 1986, Congress and legal scholars[24] had expressed an escalating concern that the FCA was doing too little to prevent fraud in government contracting.[25] For instance, the Department of Defense noted that, as of 1985, forty-five of the one hundred largest defense contractors were being investigated for "multiple fraud offenses."[26] Congress responded by demolishing many of the barriers that the 1943 revisions placed on *qui tam* relators.[27] Consequently, relators—aptly nicknamed "whistleblowers"—had increased incentive to bring action,[28] were afforded greater

[19] *Id*.

[20] *Id*. at § 2:8.

[21] *See* MICHAEL A. BRANCA, AARON P. SILBERMAN & JOHN S. VENTO, FEDERAL GOVERNMENT CONSTRUCTION CONTRACTS 728 (2d ed. 2010) (citing S. REP. NO. 99-345, at 8 (1986), reprinted in 1986 U.S.C.C.A.N. 5266).

[22] *See* False Claims Act, Pub. L. No. 78-213, 57 Stat. 608, 608-09 (1943).

[23] *See* Francis E. Purcell, Jr., *Qui Tam Suits Under the False Claims Amendments Act of 1986: The Need for Clear Legislative Expression*, 42 CATH. U. L. Rev. 935, 936 (1992-93) (citing United States *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943)).

[24] SYLVIA, *supra* note 4, at § 2:9.

[25] *See* S. REP. NO. 99-345, at 2 (1986).

[26] *Id.*

[27] *See* ABA, Section of Public Contract Law, Procurement Fraud Committee, QUI TAM LITIGATION UNDER THE FALSE CLAIMS ACT, 2-3 (2d ed. 1999).

[28] *Id.*

employment discrimination protection,[29] were awarded higher bounties,[30] and now faced a lower burden of proof to show violation of the FCA.[31] In contrast to the 1943 Amendments, whistleblowers could now bring suit even if the government already possessed the information, provided the whistleblower was the "original source."[32] Finally, *qui tam* plaintiffs were now entitled to between fifteen and thirty percent of the government's recovery.[33] In addition, defendants were liable for treble damages[34] and a $5,000 to $10,000 fine per false claim.[35]

It is clear that Congress intended to revitalize the FCA through its 1986 amendments. Describing the intent behind the amendments, a representative of a supporting business association stated that the 1986 amendments were:

> supportive of improved integrity in [government] contracting. The bill adds no new layers of bureaucracy, new regulations, or new Federal police powers. Instead, the bill takes the sensible approach of increasing penalties for *wrongdoing*, and rewarding those private individuals who *take significant personal risk to bring such wrongdoing to light*.[36] (emphasis added).

Furthermore, during the Senate hearings, Congressman Berman explained, "the Act was not intended to apply to mere negligence."[37] Berman did, however, posit that

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[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] 31 U.S.C.A. § 3730(e)(4)(B) (West 2010); *see also* Purcell, *supra* note 23, at 936. "A person is an original source if he had some of the information related to the claim which he made available to the government or the news media in advance of the false claim being publicly disclosed." 132 CONG. REC. 29322 (1986).

[33] *See id.*

[34] To reiterate, the treble damages provision requires a court to award the plaintiff three times the amount of actual or compensatory damages.

[35] 31 U.S.C.A. § 3729(a)(1) (West 2010).

[36] S. REP. NO. 99-345, at 14 (1986).

[37] Explaining the new FCA standard for liability, Congressman Berman stated:

> It expressly acknowledges that no proof of specific intent to defraud the government is required. There have been some erroneous court decisions that have misapplied the law in the past to require an intent to defraud. The language defined in this section of the law is entered to clarify what has been the law which has been properly interpreted in the case of United States v. Cooperative Grain and Supply. Subsection 3 of Section 3729(c) uses the term "reckless disregard of the truth or falsity of the information" which is no different than and has the same meaning as a gross negligence standard that has been applied in other cases. While the Act was not intended to apply to mere negligence, it is intended to apply in situations that could be considered gross negligence where the submitted claims to the Government are prepared in such a sloppy or unsupervised fashion that resulted [*sic*] in overcharges to the Government. The Act is also intended not to permit artful defense counsel to require some form of intent as an essential ingredient of proof. This section is intended to reach the "ostrich-with-his-head-in-the-sand" problem where government contractors hide

the amendments were "intended to apply in situations that could be considered gross negligence where . . . claims to the Government are . . . sloppy or unsupervised."[38]

D. The False Claims Act and Relevant Decisions Prior to the 2009 Amendments

Confusion has historically surrounded the False Claims Act. In its pre-2009 form, the FCA made liable any person[39] that knowingly presented a false or fraudulent claim[40] or knowingly made "a false record or statement *to get* a false or fraudulent claim paid or approved by the Government."[41] A person, or corporation, acted "knowingly" if that person had "actual knowledge,"[42] acted in "deliberate ignorance" of the information[43], or acted in "reckless disregard of the truth or falsity of the information."[44]

1. The "Presentment Requirement": *Totten v. Bombardier Corporation*

In *United States ex rel. Totten v. Bombardier Corp.*, liability hinged on Bombardier's presentation of invoices seeking payment from an account that contained government funds.[45] Relator Totten sued Bombardier Corporation and Envirovac, Inc., alleging violation of the FCA[46] for delivering defective rail cars to Amtrak, and submitting invoices to Amtrak for payment from a federally funded

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> behind the fact they were not personally aware that such overcharges may have occurred.

132 CONG. REC. H9382 (daily ed. Sept. 9, 1986) (citation omitted). But the court's holding in *United States v. Coop. Grain & Supply Co.* seems contradictory:

> Since the False Claims Act is civil in nature, the definition of "knowingly" should be the definition as applied in the civil action of misrepresentation. Prosser classifies misrepresentation into "the three familiar tort classifications of intent, negligence and strict responsibility." Since we have decided that a false claim, not only a fraudulent claim, is actionable under the Act, a negligent misrepresentation can constitute the necessary "knowledge." Prosser says that "[A] representation made with a honest belief in its truth may still be negligent because a lack of reasonable care in ascertaining the facts."

United States v. Coop. Grain & Supply Co., 476 F.2d 47, 60 (8th Cir. 1973) (citations omitted).

[38] 132 CONG. REC. H9382 (daily ed. Sept. 9, 1986).

[39] For purposes of this Note, a corporation is considered a "person." *See* SYLVIA, *supra* note 4, at § 4:70 ("Corporations are presumptively persons under the False Claims Act.").

[40] 31 U.S.C.A. § 3729(a)(1) (West 1994) (amended 2009).

[41] 31 U.S.C.A. § 3729(a)(2) (West 1994) (amended 2009) (emphasis added).

[42] 31 U.S.C.A. § 3729(b)(1) (West 1994) (amended 2009).

[43] 31 U.S.C.A. § 3729(b)(2) (West 1994) (amended 2009).

[44] 31 U.S.C.A. § 3729(b)(3) (West 1994) (amended 2009).

[45] United States *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 490 (D.C. Cir. 2004) (holding that submission of false claims to Amtrak did not constitute a violation because the claim was not presented to the Government).

[46] *See id.* Relator Totten brought his claim under 31 U.S.C. § 3729(a)(1).

account.[47] The D.C. Circuit held that Bombardier's claim must be "presented to an officer or employee of the government before liability can attach."[48] According to the court, because Amtrak was not a government entity, Bombardier and Envirovac had not "presented" a false claim "to the Government."[49] Consequently, liability could not attach and Bombardier's activity was not actionable under the FCA.[50] *Totten* established what many have been termed the "presentment" requirement.[51]

2. To Get, or Not To Get: The "Intent" Requirement of *Allison Engine Co. v. United States ex rel. Sanders*

Four years later, the United States Supreme Court revisited the "presentment" requirement,[52] and addressed whether an FCA defendant must intend for the fraudulent claims to be paid by the Government.[53] In *Allison Engine Co. v. United States ex rel. Sanders*, the United States Navy contracted with two shipbuilders to assemble a fleet of missile destroyers.[54] The shipbuilders subcontracted with petitioner Allison Engine to build ninety generator sets for the destroyers.[55] Allison Engine then subcontracted with petitioner General Tool to assemble the generator sets, who, in turn, subcontracted with petitioner Southern Ohio Fabricators Company ("SOFCO") to make enclosures for the sets.[56] The Navy specified in its contract with the shipyards that every part produced for the destroyers was to be in strict compliance with military standards.[57] All of the Navy's standards were expressed in each subcontract.[58]

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[47] *See id.*

[48] *Id.*

[49] *See id.* at 491-92.

[50] *Id.* at 493.

[51] Before 1986, questions arose as to whether false claims submitted to quasi-governmental entities constituted submission of a claim to the "United States Government," pursuant to the False Claims Act. *See, e.g.*, Rainwater v. United States, 356 U.S. 590, 592 (1958) (holding that the Commodity Credit Corporation was a part of the United States Government for purposes of the False Claims Act); United States v. McNinch, 356 U.S. 595, 598 (1958) (holding that the Federal Housing Authority was part of the Government for purposes of the False Claims Act); United States *ex rel.* Salzman v. Salant & Salant, 41 F. Supp. 196, 197 (S.D.N.Y. 1938) (holding that the Red Cross was not part of the Government for purposes of the False Claims Act).

[52] *See* Allison Engine Co. v. United States *ex rel.* Sanders, 553 U.S. 662, 668-69 (2008). Note that the United States Supreme Court's decision in implementing the intent requirement was unanimous.

[53] *Id.* at 665.

[54] *Id.*

[55] *Id.* at 666.

[56] *Id.*

[57] *Id.*

[58] *Id.*

Ten years after the contracts were formed, two former employees of General Tool brought suit under § 3729 of the FCA in the District Court for the Southern District of Ohio.[59] The two whistleblowers alleged that Allison Engine, General Tool, and SOFCO submitted invoices to the shipyards that "fraudulently sought payment for work that had not been done in accordance with contract specifications."[60] The District Court granted the companies judgment as a matter of law because the whistleblowers failed to show that the false or fraudulent claim was ever presented to the Navy.[61] While the Sixth Circuit agreed that "liability under § 3279(a)(1) requires proof that a false claim was presented to the Government," it reversed the District Court in relevant part.[62] The Sixth Circuit held that claims under § 3729(a)(2) and (3) "do not require proof of an intent to cause a false claim to be paid by the Government," and that "proof of intent to cause a false claim to be paid by a private entity using Government funds was sufficient."[63]

The United States Supreme Court reversed.[64] First, the Court implicitly overturned *Totten* and found that the claim need not be presented directly to the government.[65] The Court held, however, that the false statement must be made with the intention that it will be relied upon by the government in paying, or approving payment of, a claim.[66] A subcontractor is not liable for submitting false claims to a prime contractor, unless the subcontractor does so with the intent that the claim is to be paid by the federal government.[67]

In its analysis, the Court marshaled the specific language of § 3729(a)(2), holding that "to get" a false claim paid "by the Government" indicated an intent requirement.[68] In other words, the mere fact that government funds were used was insufficient to attach liability. Rather, the false claim must intend to defraud the government. The Court reasoned that, without such a requirement, the FCA would become "an all-purpose anti-fraud statute."[69] Moreover, "[e]liminating this element

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59 *Id.*

60 *Id.* at 667.

61 *Id.*

62 *Id.* at 667-68. The Sixth Circuit agreed with the district court that liability under § 3729(a)(1) requires proof that the claim was presented to the government. The appellate court, however, held that § 3729(a)(2) and (3) did not require intent to defraud to attach liability.

63 *Id.* at 668.

64 *Id.* at 673.

65 *Id.* at 672.

66 *Id.* at 672-73.

67 *Id.*

68 *Id.* at 668 (quoting 31 U.S.C. § 3729(a)(2) (1986), *amended by* Pub. L. No. 111-21, § 4(a)(1), 123 Stat. 1617, 1622 (2009)).

69 *Id.* at 672.

of intent . . . would expand the FCA well beyond its intended role of combating 'fraud against the *Government*.'"[70]

E. The Fraud Enforcement & Recovery Act of 2009: "Clarifications to the False Claims Act"

In May of 2009, President Obama signed into effect the Fraud Enforcement and Recovery Act of 2009 ("FERA"),[71] its primary purpose being to address the current crises of financial institution fraud and fraud against federal relief programs. In the process, FERA slipped several crucial amendments to the FCA into the bill.[72] For instance, FERA overruled *Allison Engine*'s intent requirement. In relevant part,[73] FERA set out to "clarify" portions of the False Claims Act ("FCA"), the act originally enacted as the government's response to abuses by private supply contractors during the Civil War.[74] While FERA made numerous adjustments to the FCA, this Note primarily focuses on FERA's removal of the so-called "intent" requirement,[75] FERA's expansion of liability under the "reverse false claims" provision, and the FCA's inevitable trend toward a negligence standard.

1. Congress' Removal of *Allison Engine*'s "Intent" Requirement

As mentioned above, the Court in *Allison Engine* held that "to get" a claim paid by the Government denotes purpose and intent.[76] In response to the Supreme Court's holding in *Allison Engine*, Congress amended the language in § 3729(a)(2) of the FCA.[77] Congress removed the "to get" language, and now requires only that

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[70] *Id.* at 669 (quoting Rainwater v. United States, 356 U.S. 590, 592 (1958)) (emphasis in *Allison Engine*).

[71] Pub. L. No. 111-21, 123 Stat. 1617 (2009).

[72] *See id.*

[73] *See generally*, S. REP. NO. 111-10, at 10-12 (2009). The Fraud Enforcement and Recovery Act of 2009 amended, *inter alia*, a fraud statute to protect funds under the Troubled Asset Relief Program and economic stimulus package, the federal securities statute, and the federal money laundering statutes. For purposes of this Note, however, only the amendments to the False Claims Act are relevant.

[74] J. Randy Beck, *The False Claims Act and the English Eradication of Qui Tam Legislation*, 78 N.C. L. REV. 539, 555 (2000).

[75] 31 U.S.C.A. § 3729(a)(1)(B) (West 2010). As originally enacted in 1863, this section imposed liability on a person "who shall, for the purpose of obtaining, or aiding in obtaining, the approval or payment of such claim, make, use, or cause to be made or used, any false bill, receipt, voucher, entry, roll, account, claim, statement, certificate, affidavit, or deposition, knowing the same to contain any false or fraudulent statement or entry." Act of Mar. 2, 1863, § 1, 12 Stat. 696, 697. Congress later eliminated a number of the references to the various types of records or statements for consistency with other sections of the Code. *See* Pub. L. No. 97-258, 96 Stat. 978 (1982); H.R. REP. NO. 97-651 (1982), reprinted in 1982 U.S.C.C.A.N. 1895, 2037. In 2009, Congress eliminated the references to getting a claim paid, or the purpose of the record. Pub. L. No. 111-21, 123 Stat. 1617 (2009).

[76] *See supra* Part II.D.2.

[77] Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009).

the false record or statement be "material to" the false or fraudulent claim.[78] Similarly, Congress further "clarified" the FCA by officially ridding the statute of any language that might indicate a "presentment" requirement.[79] Congress defined the term "material" to mean "having a natural tendency to influence, or being capable of influencing, the payment or receipt of money or property."[80]

To cap things off, FERA modified the FCA's definition of "claim," which now reads, "any request or demand . . . for money or property . . . whether or not the United States has title to the money or property . . . if the money or property is to be spent or used on the government's behalf or to advance a government program or interest."[81] In sum, liability may now attach even when FCA defendants neither present a false claim directly to the government, nor present a false claim with the intent of defrauding the government.[82]

2. FERA's Expansion of the "Reverse False Claims" Provision of the FCA

A whistleblower also has the so-called "reverse false claims" provision of the False Claims Act at its disposal.[83] A reverse false claim, post-FERA, transpires when an entity "knowingly" makes a false statement to avoid or decrease an "obligation" to pay the Government, as opposed to making false statements to increase the amount of money it receives from the Government.[84] An "obligation," a term previously interpreted by the courts, now means "an established duty, whether or not fixed, arising from an express or implied contractual . . . relationship . . . or from the retention of any overpayment."[85] Thus, the "reverse false claims" provision

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[78] S. REP. NO. 111-10, at 12 (2009) ("To correct the *Allison Engine* decision . . . [i]n section 3729(a)(2) the words 'to get' were removed striking the language the Supreme Court found created an intent requirement for false claims liability under that section.").

[79] *Id.* ("[T]he language 'paid or approved by the Government' was removed to address both the decision in *Allison Engine*, and to prevent a new 'presentment' requirement from being read into the section.").

[80] *Id.* (quoting 31 U.S.C. § 3729(b)(4) (2009)). *Contra* United States *ex rel.* Conner v. Salina Reg'l Health Ctr., 543 F.3d 1211 (10th Cir. 2008) (applying a much narrower definition of "materiality" than the definition provided by FERA).

[81] Pub. L. No. 111-21, § 4(a)(2), 123 Stat. 1617, 1621 (2009).

[82] *See* 31 U.S.C.A. § 3729(a)(1)(B) (West 2010).

[83] *See* 31 U.S.C.A. § 3729(a)(1)(G) (West 2010) (formerly codified as 31 U.S.C. § 3729(a)(7)).

[84] *Id.* Prior to the Fraud Enforcement and Recovery Act of 2009, the "reverse false claims" provision held liable any person that "knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." Upon enactment of FERA, the provision holds liable any person who "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.*" (emphasis added).

[85] 31 U.S.C.A. § 3729(b)(3) (West 2010).

now attaches liability to potential or contingent duties to repay,[86] not just those previously fixed or determined.[87]

In addition, an affirmative statement[88] is no longer necessary to invoke liability under the "reverse false claims" provision because it now makes liable any person who "knowingly conceals or . . . avoids or decreases an obligation to pay."[89] As a result, merely retaining an overpayment, without more, could presumably lead not only to the obligation to restore the Government to its original position, but could also trigger treble damages and penalties. At the very least, FERA's ambiguous definition of "obligation" prompts the question: When can an "established duty" arise from "retention of an overpayment," other than from "a contractual, grantor-grantee, licensor-licensee, fee-based or similar relationship, or a statute or a regulation"?[90] Because whistleblowers no longer need to prove an affirmative act for a defendant to be subject to FCA liability, FERA will necessarily open the door to more fruitless, wasteful litigation. In addition, these changes further exemplify the FCA's shift toward a negligence standard of liability.

F. The Patient Protection and Affordable Care Act of 2010

In another effort to reverse the judicial trend of limiting *qui tam* actions under the FCA, President Obama signed into law the Patient Protection and Affordable Care Act ("PPACA") in March of 2010.[91] Of chief importance is the PPACA's erosion of the "Public Disclosure Bar."[92] The FCA now reads that "the Court shall dismiss an action or claim under this section, unless opposed by the Government, if

[86] S. REP. NO. 111-10, at 14 (2009) ("The term 'obligation' is now defined under new Section 3729(b)(3) and includes fixed and *contingent duties* owed to the Government–including fixed liquidated obligations such as judgments, and fixed, unliquidated obligations such as tariffs on imported goods.") (emphasis added).

[87] *See*, *e.g.*, United States *ex rel.* Marcy v. Rowan Co., 520 F.3d 384, 391 (5th Cir. 2008); U.S. *ex rel.* Bain v. Ga. Gulf Corp., 386 F.3d 648, 657 (5th Cir. 2004); United States v. Bourseau, 531 F.3d 1159, 1169-70 (9th Cir. 2008) (declining to interpret "obligation" to include potential or contingent obligations, requiring instead that the obligation be fixed at the time of the allegedly false claim).

[88] *See* Robert T. Rhoad & Matthew T. Fornataro, *A Gathering Storm: The New False Claims Act Amendments and Their Impact on Healthcare Fraud Enforcement*, 21 HEALTH LAW. 14, 18 (2009) (noting that the Senate Judiciary Committee on FERA states that the revised provision is aimed at imposing liability "without notice [by the provider] to the Government about the overpayment" (quoting S. REP. NO. 111-10, at 15 (2009)).

[89] 31 U.S.C.A. § 3729(a)(1)(G) (West 2010).

[90] *See* 31 U.S.C.A. § 3729(b)(3) (West 2010).

[91] *See* Brian G. Santo, *The False Claims Act: Analysis of the Recently Expanded Legislation on Qui Tam Actions and Related Impact on Whistleblowers*, ABA HEALTH ESOURCE (July 2010), http://www.americanbar.org/newsletter/publications/aba_health_esource_home/Volume6_SE2_Santo.html (citing the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010)).

[92] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

substantially the same allegations or transactions alleged in the action or claim were publicly disclosed."[93]

In tandem with the Court's new standard of discretion, the amended FCA employs a narrower definition of "publicly disclosed" information.[94] The FCA now only bars actions brought in response to disclosures by federal sources or the media, leaving open the possibility of parasitic actions based on state or local publications.[95] The "original source" exception to the public disclosure bar, as previously mentioned,[96] has even been expanded.[97] Instead of requiring a whistleblower to provide "direct and independent knowledge" of allegedly fraudulent activity,[98] the FCA now merely requires a whistleblower to contain "knowledge that is independent of and materially adds to the publicly disclosed allegations."[99] By narrowing the FCA's definition of "publicly disclosed" information and relaxing its definition of "original source," the PPACA corrodes the "public disclosure bar." As a result, more *qui tam* relators are able to bring suits under the FCA, which contributes to the FCA's widened scope of liability.

Currently, the FCA establishes liability when any person or entity improperly receives funds from, or avoids payment to, the Federal government.[100] In short, the FCA prohibits a contractor from: (1) knowingly presenting, or causing the presentation of a false claim for payment or approval; (2) knowingly making, or causing to be made or used, a false record or statement material to a false or fraudulent claim; (3) conspiring to commit any violation of the FCA; (4) falsely certifying the type or amount of property to be used by the Government; (5) certifying receipt of property on a document without complete knowledge of the information's truth; (6) knowingly buying Government property from an officer not under Government authorization, and; (7) knowingly making, using, or causing to be made or used a false record to avoid, or decrease an obligation to pay or relinquish property to the Government.[101]

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[93] 31 U.S.C.A. § 3730(e)(4)(A) (West 2010).

[94] 31 U.S.C.A. § 3730(e)(4)(A)(ii) (West 2010).

[95] 31 U.S.C.A. § 3730(e)(4)(A)(iii) (West 2010).

[96] *See supra* Part II.B.

[97] *See* Santo, *supra* note 91 (citing False Claims Act, 31 U.S.C.A. § 3730(e)(4)(B) (West 2010)).

[98] 31 U.S.C.A. § 3730(e)(4)(B) (West 2009) *amended by* 31 U.S.C.A. § 3730(e)(4)(B) (West 2010).

[99] 31 U.S.C.A. § 3730(e)(4)(B) (West 2010).

[100] *See generally* 31 U.S.C.A. § 3729 (West 2010).

[101] 31 U.S.C.A. § 3729(a)(1)(A)-(G) (West 2010).

III. The False Claims Act's Shift Toward a Negligence Standard: The Inevitable Escalation of Transactional Costs and Necessary Changes

A. The False Claims Act and its Shift Toward a Negligence Standard

With FERA's removal of *Allison Engine*'s intent requirement,[102] the standard for liability under the False Claims Act resembles one of negligence. Negligence employs a standard of care based upon the conduct of a "reasonable man of ordinary prudence."[103] Under a standard of negligence, an actor is expected to do the reasonable thing under the circumstances.[104] The standard of conduct applied is an objective one, contrary to the subjective standard applied to intentional conduct.[105] In short, an actor or entity is negligent if: (1) the actor or entity owes a legal duty; (2) breaches that duty by falling below a reasonable standard of care; (3) there exists a causal connection between the conduct and the injury; and (4) the conduct results in actual loss or damage to another.[106]

To reiterate, the FCA only requires that a false claim be "material to" the government's decision to approve payment,[107] and "require[s] no proof of specific intent to defraud."[108] Congress developed the FERA "clarifications" of the FCA to halt the "types of fraud the FCA was intended to reach when it was amended in 1986."[109] These "clarifications" are not without benefits; many false or fraudulent statements deserve recourse "without regard to whether the wrongdoer deals directly with the Federal Government . . . or with a third party contractor."[110] Congress's motives, while well-intentioned, are shortsighted. Under the FERA "clarifications," liability may attach without regard to whether the defendant is an intentional "wrongdoer"[111] in the first place. Moreover, it appears that merely negligent defendants are now subject to liability under the amended FCA.

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[102] *See supra* Part II.E.1.

[103] PROSSER & KEETON ON THE LAW OF TORTS, 174 (W. Page Keeton et al. eds., 5th ed. 1984). Authored and often reedited by the late Dean Prosser and the late Professor Keeton, PROSSER & KEETON ON THE LAW OF TORTS has widely been recognized as the leading work on the subject of tort law.

[104] *Id.* at 173-74.

[105] *Id.*

[106] *Id.* at 164-65.

[107] 31 U.S.C.A. § 3729(a)(1)(A) (West 2010); *see also* 31 U.S.C.A. § 3729(a)(1)(G) (West 2010) (attaching liability when statement is "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* . . .") (emphasis added).

[108] 31 U.S.C.A. § 3729(b)(1)(B) (West 2010).

[109] S. REP. NO. 111-10, at 11 (2009).

[110] *Id.*

[111] Black's Law Dictionary defines "wrongful" as "[c]haracterized by unfairness or injustice . . . [c]ontrary to law; unlawful . . . ." BLACK'S LAW DICTIONARY 1751 (9th ed. 2009).

1. Negligent Compliance and Voluntary Disclosure

The Mayo Foundation ("Mayo") is a current example of a negligent FCA defendant.[112] Although negligent, Mayo is not necessarily a wrongdoer, and has not acted with any intent to defraud. In September 2010, the Department of Justice ("DOJ") intervened in a false claims action against Mayo pertaining to billing for services that were allegedly never performed.[113] The whistleblowers that initiated the complaint are comprised of patients and family members.[114] The government has intervened despite the fact that "Mayo says it refunded the government's money three years ago before the organization even knew the lawsuit was in the works."[115]

In particular, the complaint alleges that, over the duration of 10 years, Mayo billed Medicare when it "prepared and examined water-based, blue-stained frozen slides"[116] for pathology purposes. Mayo also billed Medicare for the preparation, examination, and reports of "unfrozen slides," which, according to the whistleblowers, Mayo never performed.[117] For instance, the deceased wife of one of the whistleblowers underwent gallbladder surgery at Mayo Clinic in 1999. "Mayo billed Medicare for both a *frozen* section pathology exam under surgical pathology code 88331-26 and for the preparation of an unfrozen permanent section slide . . . the examination of the unfrozen permanent section slide and the preparation of a report for such examination under surgical pathology code 88304-26."[118] Mayo's records indicate the billing of both, even though "Code 88304-26 specifically excludes a *frozen* section exam from its definition. . . ."[119]

Similar to the Reliable Rubber example,[120] it appears as if Mayo's unnecessary billing was merely a result of negligent compliance. Although Mayo volunteered the information, it may have simply fallen below the reasonable standard of care in its coding efforts. At most, Mayo is in breach of a contractual obligation. In Mayo's defense, complex coding and billing procedures often result in billing errors. The practice of medicine, for example, "more than ever before, places greater demands on physicians to see more patients, provide more complex medical services and

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[112] *See* Complaint, United States *ex rel.* Ketroser v. Mayo Found., Case No. 07-SC-4676 RHK (AJB) (D. Minn. Feb. 20, 2008) [hereinafter Mayo Found.] (on file with author). Relators Ketroser, Latz, Smith, and Kennedy filed this complaint in 2008. In September of 2010, the Department of Justice decided to intervene in this *qui tam* action. *See* Youngstrom, *infra* note 113.

[113] *See* Nina Youngstrom, *Feds Join Lawsuit Against Mayo Foundation Despite its Voluntary Medicare Refund Years Ago*, AIS'S HEALTH BUSINESS DAILY (Oct. 26, 2010, 11:06 AM) (on file with author).

[114] *See* Mayo Found., *supra* note 112, at 2.

[115] Youngstrom, *supra* note 113, at 1.

[116] *Id.* at 2 (Presumably, the slides were used, among other things, to diagnose and treat the patient.); *see also* Mayo Found., *supra* note 112, at 16-17.

[117] Youngstrom, *supra* note 113, at 2.

[118] Mayo Found., *supra* note 112, at 17 (emphasis added).

[119] *Id.* (emphasis added).

[120] *See supra* Part I.

adhere to stricter regulatory rules, leaving little time for coding and billing."[121] Among the most common errors are "[b]illing for items or services not provided . . . . [d]ouble billing for the same service or item . . . ." and "[u]pcoding the level of service provided."[122] In addition, not all of these billing errors result in the over-compensation of physicians. Both health care and business analysts alike reveal "that physicians may not be receiving their fair share of health care dollars."[123] The American Medical Association states that declining reimbursements are "the dilemma facing many doctors today who have overhead costs that are going up faster than their revenue."[124]

A Mayo spokesperson responded to the allegations by stating "that Mayo officials discovered a billing error in 2007, corrected it and *voluntarily* refunded $242,711 to the government."[125] In addition, "[t]he error was identified and corrected long before Mayo was aware that a sealed complaint[126] had been filed and before Mayo was notified that the Department of Justice was evaluating whether to become involved in the complaint[.]"[127] Since Mayo discovered the misstep internally and voluntarily returned the money to the government, it would appear that the government did not suffer injury. Even so, according to Ed Gaines, attorney and compliance specialist,[128] "if you don't go through the protocol, you don't trump the 'whistleblower effect[.]'"[129] What is more, by failing to comply with voluntary self-disclosure protocol, Mayo will not be considered the original source of the blunder.[130]

Mayo independently discovered and voluntarily disclosed the false information. Thus, it necessarily follows that Mayo did not act with the requisite "scienter" that the FCA set out to prohibit.[131] In this case, it appears that mere negligence – a

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[121] Diane L. Adams, Helen Norman & Valentine J. Burroughs, *Addressing Medical Coding and Billing, Part II: A Strategy for Achieving Compliance, a Risk Management Approach for Reducing Coding and Billing Errors*, 94, J. NAT'L MED. ASSOC. 430, 430. (June 2002).

[122] *Id.* at 434.

[123] *Id.* at 430.

[124] Julie A. Jacob, *Losing Proposition: When Doctors Take In Less Than What Goes Out*, AM. MED. NEWS, Jan. 7, 2002, *available at* http://www.ama-assn.org/amednews/2002/01/07/bisa0107.htm.

[125] Youngstrom, *supra* note 113, at 2 (emphasis added) (The Mayo spokesperson further stated that, "[t]he error was identified and corrected long before Mayo was aware that a sealed complaint had been filed and before Mayo was notified that the Department of Justice was evaluating whether to become involved in the Complaint.").

[126] *See* 31 U.S.C.A. § 3730(b)(2) (West 2010) ("A copy of the complaint and written disclosure . . . shall be served on the Government . . . [.] The complaint shall . . . remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders.").

[127] Youngstrom, *supra* note 113, at 2-3.

[128] *See id.* at 2 (According to the article, Ed Gaines is the "chief compliance officer for Medical Management Professionals in North Carolina.").

[129] *Id.* at 3.

[130] *See id.* at 3-4.

[131] *See supra* Part I.

breach of Mayo's duty to comply with disclosure protocol – may result in liability under the unfastened provisions of the FCA.

2. Reasonable Belief of Compliance

Without an intent requirement, courts may attach liability in situations where defendants reasonably believed they were compliant.[132] In *United States v. Chen*, the court held defendant Dr. Chen liable under § 3729 of the False Claims Act.[133] The government alleged that the anesthesiologist and critical care expert *knowingly* fabricated "consultations" and submitted claims to Medicare for reimbursement.[134] At first glance, Dr. Chen's situation appears to be the most typical form of a false claim allegation: one where the "defendant charged the government for more than was provided."[135] Unfortunately for Dr. Chen, what constitutes a "consultation" is confusing[136] because there is no statutory or regulatory definition of the term.[137] Consequently, physicians often have trouble determining how to bill a consultation.

For nearly five years, Dr. Chen billed Medicare for his consultations in the same manner.[138] Medicare reimbursed him each time, thereby affirming that he was in compliance with Medicare billing practices.[139] Specifically, Dr. Chen billed for catheterization, the area in which he specializes, and a consult on the same patient performed on the same day.[140] The Unites States contended that the referring physicians did not request consultations or that Chen did not perform "separately identifiable services."[141] Each of the thirty-seven referring physicians, however, stated that he or she "requested a 'consult' from Dr. Chen."[142] But in most instances, the referring physicians requested Dr. Chen to perform catheter procedures, and did

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132 *See generally* United States v. Chen, 402 F. App'x 185 (9th Cir. 2010).

133 *See generally id.*

134 *Id.* at 187.

135 SYLVIA, *supra* note 4, at § 4:16 (noting that "[c]ongressional committees investigating fraud against the government prior to the adoption of the False Claims Act in 1863 reviewed countless examples of this type of conduct").

136 United States v. Chen, 2:04-cv-00859-PMP-PAL, 2006 U.S. Dist. LEXIS 35845, at *5-6, *aff'd* (D. Nev. May 30, 2006). The district court admitted that "this case involves regulations that . . . [are] unquestionably technical . . . [and] [t]heir meaning is ultimately the subject of judicial interpretation." *Id.* at *23 (quoting United States *ex rel*. Oliver v. Parsons Co., 195 F.3d 457, 463 (9th Cir. 1999)). *See also* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

137 Medicare's best attempt to explain what might constitute a consultation is "a type of service provided by a physician whose opinion or advice regarding evaluation and/or management of a specific problem is requested by another physician." *Chen*, 2006 U.S. Dist. LEXIS 35845, at *5-6.

138 *See id.* at *8-9. (Dr. Chen was sued for 3,544 claims made between January 1, 1999 and June 21, 2004.).

139 *Id.* at *9-11.

140 *Id.* at *8.

141 *Id.* at *24.

142 *Id.* at *16.

not expressly ask for Dr. Chen's opinion or advice.[143] Therefore, the court found that, "[a]lthough every referring doctor has testified that he requested a 'consultation,' none has testified that he requested a consultation *as defined by Medicare* supporting Dr. Den's billing of CPT Code 99255."[144]

Dr. Chen's belief that he was in compliance with Medicare, and the FCA, seemed reasonable. The term "consultation" is not precisely defined, and each referring physician stated that they both requested, and Dr. Chen performed, a consultation.[145] Even if Dr. Chen's belief was unreasonable, and he knowingly submitted false claims, Medicare compensated him for years without issue.[146] If Medicare affirmed Dr. Chen's practices by continued reimbursement, he was submitting subsequent claims in good faith. Thus, the Ninth Circuit's statement that an FCA defendant can escape liability "not because [his] interpretation was correct or 'reasonable' but because the good faith nature of [his] action forecloses the possibility that the scienter requirement is met"[147] seems like lip service. In no way did Dr. Chen act with the intention to injure the government. Even more so, Dr. Chen's actions were neither deceptive nor wrongful. Even if Dr. Chen acted unreasonably by Medicare standards, he lacked the requisite scienter intended under the FCA. Because there are other methods of recourse, the FCA should only sink its teeth into intentional, wrongful, or deceptive claims.

3. Negligent Returns of Government Overpayments

After the enactment of FERA and PPACA, health care organizations risk severe sanctions under the reverse false claims provision.[148] Where government programs – most notably federal healthcare programs like Medicare and Medicaid – make erroneous overpayments to a contractor, the burden soon shifts to the contractor to recognize and reconcile the government's blunder. In the health care field, "overpayments" include "any funds that a person receives or retains . . . to which the person, after applicable reconciliation, is not entitled."[149] After the overpayment is "identified," contractors have a mere sixty days to report and return the erroneously rationed funds.[150] Should a negligent oversight on the part of the contractor result in retention of these funds for longer than sixty days, the contractor faces treble damages.[151] Furthermore, § 6402 of the PPACA legislation asserts that an

[143] *Id.* at *24.

[144] *Id.* at *24-25 (emphasis added).

[145] *Id.* at *5-6.

[146] *Id.* at *9-11.

[147] United States v. Chen, 402 F. App'x 185, 188 (9th Cir. 2010). (citing United States *ex. rel*. Oliver v. Parsons Co., 195 F.3d 457, 464 (9th Cir. 1999)).

[148] *See supra* notes 83-90 and accompanying text.

[149] Patient Protection and Affordable Care Act, H.R. 3590, 111th Cong. (2009), Pub. L. No. 111-148, 124 Stat. 119 (2010).

[150] *Id.* The provider must report and return a Medicare or Medicaid overpayment within sixty days of identification of the overpayment or the date the corresponding cost report is due, whichever is later. *See* Pub. L. No. 111-148, § 6402(a).

[151] *See supra* note 3 and accompanying text.

overpayment retained after sixty days establishes an "obligation" under the FCA, thus exposing a provider to penalties of up to $10,000 per claim.[152] Thus, even "retaining reimbursement received in good faith but later determined to be improper, such as the reimbursement for services provided pursuant to a referral prohibited by [federal law], could give rise to FCA liability."[153]

Compounding the confusion, the PPACA neglects to define the term "identified."[154] Must the contractor have actual knowledge of the overpayment? Will a reckless disregard for the identification of the overpayment suffice? As such, "what constitutes an 'identified' overpayment is, at this point, unknown and likely to be the subject of significant litigation, unless sufficiently clarified by an agency rulemaking."[155] Navigating the murky waters of the FCA, along with other regulatory provisions, in order to determine when repayment obligations might exist is a daunting task. In the healthcare context, the Fourth Circuit noted:

> There can be no doubt but that the statutes and provisions in question, involving the financing of Medicare and Medicaid, are among the most completely impenetrable texts within human experience. Indeed, one approaches them at the level of specificity herein demanded with dread, for not only are they dense reading of the most tortuous kind, but Congress also revisits the area frequently, generously cutting and pruning in the process and making any solid grasp of the matters addressed merely a passing phase.[156]

What has become increasingly clear, however, is that contractors face potentially crippling consequences under the modernized FCA without any intent to defraud the government.

a. What Constitutes an "Obligation"?

After FERA's enactment, the FCA attaches liability if there is an "obligation" to repay overpayments that are possessed "knowingly" and "improperly."[157] FERA "defines an 'obligation' as 'an established duty, whether or not fixed' arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment."[158] Further complicating the matter is the fact that an affirmative statement or claim is no longer necessary to trigger liability.[159] The new

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[152] Pub. L. No. 111-148, § 6402, 31 U.S.C.A. § 3729(a) (West 2010).

[153] Robert G. Homchick, Lisa R. Hayward & David V. Marshall, *FERA and the New World of False Claims Act Risks: Hypotheticals Help Illustrate What Constitutes "Knowing and Proper,"* 12 J. HEALTH CARE COMPLIANCE 5, 8 (2010).

[154] Pub. L. No. 111-148, § 6402(a) (2010).

[155] Neely S. Griffith & Mollye M. Demosthenidy, *Provider Uncertainties in the Refund of Overpayments*, ABA HEALTH ESOURCE (June 2010) (on file with author).

[156] Rehab. Ass'n of Va. v. Kozlowski, 42 F.3d 1444, 1450 (4th Cir. 1994).

[157] 31 U.S.C.A. § 3729(a)(1)(G) (West 2010).

[158] Homchick et al., *supra* note 153, at 8 (quoting 31 U.S.C.A. § 3729(b)(3) (West 2010)).

[159] *See* 31 U.S.C.A. § 3729(a)(1)(G) (West 2010).

definition of "obligation" can cause considerable confusion in the health care industry because "identifying and confirming a potential legal duty to repay an overpayment in the health care regulatory scheme is no simple task."[160]

FERA does not elaborate on what constitutes an "established duty."[161] FERA's legislative history does indicate, however, that Congress did not intend for a "contingent" obligation to fall within the purview of the FCA.[162] Unfortunately, FERA's definition of "obligation" has yet to be interpreted by the courts in many contexts. Instead, contractors linger at the sufferance of the courts' interpretation of exceedingly vague language, and correspondingly perplexing regulatory law. As a result, contractors remain subject to arbitrary, paralyzing penalties for seemingly negligent activity.

b. When are Funds "Improperly" Retained?

Another question that government contractors are forced to grapple with is whether or not funds have been "improperly" retained. An example of this confusion can be illustrated through a hypothetical situation.[163] Athlete Rehabilitation Center ("the Center") contracts with Orthopedic Professional Physicians ("the Physicians") to staff the Center's orthopedic surgery department ("OSD"). The Center bills for both the OSD facility fees and the physicians' specialized services. The physicians are revered among their orthopedic surgeon colleagues, and widely considered to be the most skilled coalition in their profession. The quality of the physicians' work performed in the OSD is among the highest in the nation, and the Center has received widespread praise.

The physicians, however, have not reached the same level of mastery in meticulously maintaining accurate documentation of services provided. The Center recently conducted an internal audit, revealing that documentation for thirty-five percent of the claims submitted for orthopedic services (whether facility or professional components) contained deficiencies. While the severity of the respective documentation deficiencies varied from claim to claim, the audit results confirmed that all services were, in fact, performed. To ensure that these problems do not occur again in the future, the Center provides documentation and coding training to the physicians. Given the unclear language implemented by the FERA amendments to the FCA, it is not clear whether the Center has "knowingly and improperly" retained overpayments.

A whistleblower privy to the deficient documentation may bring an action by arguing that the documentation errors make the claims "improper." If the whistleblower succeeds in its argument, it may show that the reimbursement the Center received for the properly rendered services constitutes an "overpayment," thereby exposing the Center to FCA liability. In this situation, the physicians performed superlatively, simply falling below a reasonable standard of care in documenting such services. It is not even clear that the documentation oversights resulted in the Center or the physicians being overpaid. More importantly, neither the physicians nor the Center acted with intent to defraud the government.

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160 Homchick et al., *supra* note 153, at 8.

161 *Id.*

162 *Id.*

163 The following hypothetical is based on one presented in Homchick et al., *Id.* at 9.

Additionally, after an internal audit, the Center took steps to correct the problem by implementing a training program for the physicians. Consequently, imposing heavy damages and excessive penalties for a negligent compliance with overly vague provisions is illogical and will yield counterintuitive results.

c. What Does it Mean to Have "Identified" an Overpayment?

Confusion also surrounds the issue of what it means to have "identified" an overpayment. Recall that, under the PPACA, a health care contractor is required to report and return any overpayment of Medicare or Medicaid funds no later than sixty days after the overpayment has been "identified."[164] The PPACA fails to elaborate as to when an overpayment has been "identified." Of chief concern is what state of mind is required to "identify" an overpayment. For example, must the contractor have actual knowledge of the overpayment, or is "information that reasonably suggests there has been an overpayment" sufficient?[165] Because it is unclear what constitutes *identification* of an overpayment, it is necessarily unclear when the sixty day limitation provided by the PPACA begins to run. Consequently, it becomes increasingly difficult for health care organizations to avoid FCA liability through timely reports and returns of uncertain "overpayments."

B. Raising the Cost of Doing Business with Both Contractors and the Government

Exposing companies to increased liability necessarily raises the price of doing business with those companies and the federal government. To combat the risk of liability, companies are forced to allocate additional resources in several areas; namely, compliance, arbitration, litigation, settlement negotiations, and the time necessary to research these situations.[166] In disputes involving complex presumptions of liability, expenditures for legal counsel can range between one and ten million dollars, sometimes more.[167] Smaller firms, similar to the hypothetical Reliable Rubber,[168] may not have the means to guard against FCA allegations or to "implement expansive compliance systems."[169]

Cases where the government declines to intervene have proven particularly burdensome on companies and contractors, resulting in company expenditures disproportionate to the relators' recovery.[170] A study of thirty-eight cases shows that when whistleblowers chose to go at it alone, the average recovery was a mere

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[164] Pub. L. No. 111-148, 124 Stat. 119, § 6402(a) (2010).

[165] James J. Belanger & Scott M. Bennett, *The Continued Expansion of the False Claims Act*, 4 J. HEALTH & SCI. LAW, 26, 33-34 (2010).

[166] William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201, 225 (1998).

[167] *Id.* at 225.

[168] *See supra* Part I.

[169] Kovacic, *supra* note 166, at 226.

[170] *See* Kovacic, *supra* note 166, at 233. *See generally* Kovacic for an in-depth discussion on the government's failure to seek dismissal on an admittedly meritless *qui tam* action. Failure by the Justice Department to seek dismissal in similar cases strongly suggests no support from the government to "oppose even the weakest qui tam suits."

$97,223, compared to an average cost to defend the action of $1,431,660.[171] Even more striking is the fact that, as of 2009, the government declined to intervene in more than two-thirds of the cases.[172] Of those two-thirds, a majority of the cases were dismissed, "incurring costs for the parties without benefitting the public."[173]

Even more striking is the fact that courts may award penalties even absent any financial loss to the government. In *United States ex rel. Harrison v. Westinghouse Savannah River Company*, the district court awarded civil penalties of $195,000 and attorney's fees totaling more than $144,000 even though the relator failed to prove the government incurred an actual loss.[174] The defendant neglected to divulge a conflict of interest when seeking a contract with the Department of Energy, but the misrepresentation resulted in no loss to the government.[175] Instead, the Fourth Circuit attached liability on the ground that misrepresentation had "negatively affected the integrity of the bidding process."[176] Logically, these companies and contractors are forced to raise prices in order to subsidize the increased costs of fruitless litigation.[177]

Similarly, the increase in FCA litigation also heightens the cost of doing business with the government.[178] Proponents of expanded FCA liability validly point out that "the costs of defending against unsuccessful *qui tam* suits are recoverable against the government."[179] In other words, in the case of dismissal or a victory for the defense, the defendant can recover the cost of the litigation. In many instances, however, the government has reimbursed the defendant in excess of what the whistleblower stood to gain on his own.[180] As a result, a survey suggests that the Department of Defense

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[171] *See* Daniel C. Lumm, *The 2009 "Clarifications" to the False Claims Act of 1863: The All-Purpose Antifraud Statute with the Fun Qui Tam Twist*, 45 WAKE FOREST L. REV. 527, 537 (2010).

[172] U.S. DEP'T JUSTICE CIVIL DIV., FRAUD STATISTICS, *QUI TAM* INTERVENTION DECISIONS & CASES STATUS (2009). As of 2009, the United States has declined to intervene in 4,366 of 6,628 cases, with nearly 1,000 still under investigation. *Id.*

[173] Lumm, *supra* note 171, at 537.

[174] United States *ex rel.* Harrison v. Westinghouse Savannah River Company, 352 F.3d 908, 913 (4th Cir. 2003).

[175] *Id.*

[176] *Id.*

[177] *See* Amy Kolz, *The Professional, Serial Whistle-blower Joseph Piacentile Makes Millions Helping the Government Uncover Fraud. That's how the False Claims Act is Supposed to Work. Or is it?*, THE AM. LAWYER (June 1, 2010, 3:19 PM), http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202457711736&slreturn=20120716133432. Joseph Piacentile is a "professional" whistleblower. After being convicted of fraud and tax charges in 1991, Piacentile has made a career as a *qui tam* plaintiff. As a "professional" plaintiff, Piacentile has racked up some $17 million in whistle-blower awards, with no sign of stopping any time soon. Many of Piacentile's actions arguably lack the requisite particularity required of a relator's claims. Even when claims made by those like Piacentile are meritless, companies are forced to spend thousands in legal fees.

[178] Kovacic, *supra* note 166, at 226.

[179] *Id*.

[180] *See id*.

spends significantly more in reimbursing contractor defendants than the government recovers under the FCA in like situations.[181] It is undisputed that the FCA, in many instances, is an effective and necessary weapon in combating fraud against the government.[182] The FCA, however, can be a more efficient tool if its focus is narrowed to exclude negligence as a basis for liability.

C. Implicit Negligence Standard Causes Other Policy Implications and Unwarranted Burdens

The wrath of the vast FCA does not limit itself to smaller organizations. Boeing, for example, is the largest United States exporter in terms of value, and is the third largest defense contractor in the world.[183] Boeing's Defense, Space & Security division was responsible for fifty-one percent of the company's income in 2008.[184] Attaching liability to Boeing for conduct merely resembling a breach of contract or negligence would have disastrous implications.

Potentially, the government may lose one of its most important contractors. In addition, putting Boeing's defense division under could result in massive job loss. Furthermore, the loss of its defense division, because of its value to the company, would have a substantial impact on Boeing's other divisions. Given FERA's economic-driven purpose,[185] job loss of this magnitude is manifestly undesirable. Thus, narrowing the FCA's focus to exclude negligence or mistake will better serve FERA's economic agenda.

Further compounding the issue is the burden the increase in liability will necessarily place on federal court dockets. Even before FERA, "[t]he sheer number of potential parties to FCA liability has already increased with the passage of the economic stimulus bills."[186] After the FERA amendments widened the scale of

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[181] *See id*. *But see, e.g.,* JACK A. MEYER & STEPHANIE E. ANTHONY, REDUCING HEALTH CARE FRAUD: AN ASSESSMENT OF THE IMPACT OF THE FALSE CLAIMS ACT 50–51 (2001) (suggesting that the Government recovers $8 for every $1 it spends on enforcement of the Act); SYLVIA, *supra* note 4, at § 1:14 ("[I]t is not clear that additional enforcement costs out-pace the Governments gain. One study suggests that in health-related False Claims Act cases, the Government recovers roughly $8 in direct benefits for every dollar it spends on enforcement.").

[182] *See* Melissa A. M. Hudzik & David S. Greenberg, *The False Claims Act Amendments: The Curious Conundrum of Retroactivity*, The ABA Health Law Section, 22 THE HEALTH LAWYER, no. 5, at 3 (June 2010) (The False Claims Act "has recovered in excess of $24 billion for the federal government since 1986.") (citing http://www.justice.gov/opa/pr/2009/November/09-civ-1253.html.).

[183] *Defense News Top 100 for 2008*, DEFENSE NEWS (Apr. 3, 2012, 11:45 AM), http://special.defensenews.com/top-100/charts/rank_2008.php.

[184] *Id.*

[185] S. REP. NO. 111-10, at 3 (2009) (Congress explained that the purpose of the legislation was to "reinvigorate our Nation's capacity to investigate and prosecute the kinds of financial frauds that have so severely undermined our financial markets *and hurt so many hard working people in these difficult economic times*.") (emphasis added).

[186] Gerard E. Wimberly, Daniel T. Plunkett & Laura C. Settlemyer, The Presentment Requirement Under the False Claims Act: The Impact of Allison Engine & the Fraud Enforcement & Recovery Act of 2009, 09-9 Briefing Papers 1, 11.

liability, "the potential exists for almost any business or company to be liable under the FCA."[187] In combining these amendments with "the other FERA amendments that provide for expanded protection available to whistleblowers and qui tam relators, the potential is great for a flood of FCA litigation."[188]

IV. Congress Should Amend the False Claims Act: A Potent, Yet More Efficient Weapon to Combat Fraud Against the Government

Instead of providing for clarification, the FERA's amendments to the FCA – specifically its removal of the "intent" requirement and expansion of the reverse false claims provision – ensure a broadened scope of liability for private entities that conduct business with the government, whether directly or indirectly. In an attempt to remedy the loopholes recent Supreme Court decisions have created for contractors, Congress has instead created loopholes for relators and whistleblowers. Moreover, a law that was initially designed to punish those who intentionally defraud the Government now appears to employ a quasi-negligence standard. Consequently, the FERA amendments to the FCA will expose organizations that use government funds to unwarranted liability.

Congress should again amend the False Claims Act. This time, however, the legislation should expressly exclude mere negligence as a basis for liability. Several state legislatures have included such language into their state versions of the False Claims Act.[189] Minnesota, for example, does not attach liability to "a person who acts merely negligently, inadvertently, or mistakenly."[190] Florida excludes "innocent mistake[s]" from the Act's ambit of reprimand.[191] Amending the FCA to exclude negligence and mistake as bases for liability is consistent with Congress's goal "to protect from *fraud* the Federal assistance and relief funds expended in response to our current economic crisis."[192] Moreover, this amendment would prevent the FCA from attaching liability to parties lacking the requisite scienter, such as Reliable Rubber, Mayo Foundation, Dr. Chen, and even Boeing. For these innocent, although negligent parties, recourse lies in a simple claim of negligence or breach of contract. In turn, the government's effort will be more focused on those who need deterring.

Similarly, Congress could effectuate its purpose by amending the language of the FCA to attach liability to conduct done in "bad faith." Black's Law Dictionary defines "bad faith" as "dishonesty of belief or purpose."[193] Pursuant to this

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[187] Wimberly et al., *supra* note 186, at 11.

[188] *Id*.

[189] *See*, *e.g*., FLA. STAT. ANN. § 68.082(1)(c) (West 2010) (excluding "innocent mistake" from liability); MICH. COMP. LAWS ANN. § 400.602(2)(f) (West 2010) ("knowingly does not include conduct which is an error or mistake"); MINN. STAT. ANN. § 15C.01(3) (West 2010) ("in no case is a person who acts merely negligently, inadvertently, or mistakenly with respect to information deemed to have acted knowingly"); N.J. STAT. ANN. § 2A:32C-2 (West 2010); N.Y. STATE FIN. LAW § 188(3)(b) (McKinney 2010) ("acts occurring by mistake or as a result of mere negligence are not covered").

[190] MINN. STAT. ANN. § 15C.01(3) (West 2010).

[191] FLA. STAT. ANN. § 68.082(1)(c) (West 2010).

[192] S. REP. NO. 111-10, at 5 (2009).

[193] BLACK'S LAW DICTIONARY 159 (9th ed. 2009).

definition, courts may find entities liable when the entity has presented a false claim or obtained government funds with a dishonest belief or purpose. Here, too, Congress would ensure that courts attach liability to deserving corporate entities, without unfairly penalizing parties who merely act unreasonably in their compliance procedures or in filing claims. After all, these are not the parties that need deterring.

V. CONCLUSION

The Civil False Claims Act was not intended to remedy every wrong that a government contractor may commit.[194] The FCA and its extreme penalties were designed to deter a specific category of offenders: those who knowingly, deceptively, and wrongfully defraud the government. If left unchanged, the FCA's imprecise language will result in courts applying a negligence standard. If the FCA's threshold for liability were to erode to a negligence standard, the cost of doing business with the government and contractors would necessarily rise. Furthermore, the number of people willing to do business with the government would dwindle. Congress must take heed of the states, and expressly exclude negligence and mere mistake as bases for liability under the federal False Claims Act.

[194] 132 CONG. REC. S11244 (daily ed. Aug. 11, 1986) (statement of Sen. Grassley) (Senator Grassley stated that Congress's "intent in returning to the reckless disregard standard is only to assure that mere negligence, mistake, and inadvertence are not actionable under the False Claims Act. In doing so, we reconfirm our belief that reckless disregard and gross negligence define essentially the same conduct and that under this act, reckless disregard does not require any proof of an intentional, deliberate, or willful act.").