False Claims Act Update

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The authors review recent developments relating to the False Claims Act, including amendments to the federal law.

The frenetic pace of False Claims Act ("FCA") activity in 2008 has continued into 2009. In addition to record-breaking FCA settlements in several industries, we have witnessed substantial amendments to the federal statute itself.

Most significantly, on May 20, 2009, President Obama signed into law the Fraud Enforcement and Recovery Act of 2009 ("FERA"), which amends the FCA in a manner that will increase the exposure of every company that does business with the federal government and of every person or entity that supplies goods or services that are reimbursed by federal government dollars. FERA overturns important judicial precedent, including the Supreme Court's unanimous ruling last term in *Allison Engine Co. v. United States ex rel. Sanders*,[1] and could reverse many judicial trends that curtailed private whistleblowers' ability to prosecute FCA actions. And other legislation remains pending in Congress that would further expand the scope of the Act and possibly eliminate key FCA claim defenses.

Regarding the trend of increasing settlements, in fiscal year 2008, the federal government recovered approximately $1.34 billion in FCA settle-

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ments and judgments. During the first six months of 2009, the federal government already has recovered far more than that amount. Indeed, three FCA settlements alone exceed the total recoveries for FY 2008 ($800 million from Eli Lilly in January 2009, $262 million from Quest Diagnostics in April 2009, and $325 million from Northrop Grumman Corp. in April 2009).

This article provides first a summary of important amendments to the FCA (including amendments recently signed into law and others still pending before Congress), next a brief overview of FCA enforcement activities and judicial decisions during the first half of 2009, and finally some practical guidance to help companies avoid or limit liability under the current version of the FCA.

LEGISLATIVE ACTION IN 2009

FERA Significantly Amends the False Claims Act

FERA, among other things:

- Overturns, legislatively, the Supreme Court's unanimous decision last term in *Allison Engine* and imposes FCA liability even if the company that submitted a false claim to a non-government entity did not specifically intend to defraud the federal government.
- Expands liability to indirect recipients of federal funds by eliminating what had been called the "presentment" requirement and effectively overruling a D.C. Circuit decision (authored by then Judge John Roberts) in *United States ex rel. Totten v. Bombardier Corp.*[2] The *Totten* court held that the FCA did not apply to a suit alleging fraud against a federal grantee (Amtrak), because the underlying false statements were submitted to a recipient of federal dollars and not to the federal government itself. After FERA, the FCA appears to apply to any fraud committed against any federal grantee.
- Amends the definition of "claim," thus extending FCA liability to any false claim made to any recipient of federal money so long as that money is used to "advance a Government program or interest," a

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phrase the amendments fail to define.

- Penalizes the knowing "retention of any overpayment" as a reverse false claim, thus expanding exposure against federal contractors or grantees for retaining "overpayments" that may not have been obtained through any false statement or record in the first instance.
- Resolves a Circuit split and defines "materiality" as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property," which was the more liberal standard applied by some courts.

Pending Legislation (S. 458 And H.R. 1788)

On February 24, 2009, Senator Charles Grassley (R-IA) introduced S. 458, the "False Claims Act Clarification Act of 2009." The bill was read twice on that date and referred to the Judiciary Committee. On March 30, 2009, Representative Howard Berman (D-CA) introduced H.R. 1788, entitled the "False Claims Act Correction Act of 2009." The bill was reported out of the House Judiciary Committee on April 28, 2009. Both bills seek to expand the definition of a claim under the FCA, eliminate the "presentment" requirement, and overrule *Allison Engine* in a manner that (arguably) has already been accomplished by FERA. In addition, these bills look to expand the class of individuals permitted to bring private *qui tam* actions and effectively eliminate potent FCA defenses. Indeed, the pending legislation would reverse many of the judicial trends discussed below.

Bidding Farewell to the Public Disclosure Bar?

Presently, under the FCA, a *defendant* may move to dismiss a *qui tam* action for lack of subject matter jurisdiction at any stage of the litigation — even post-verdict — if the allegations are based upon public disclosures and the relator is not an "original source."[3] The pending legislation in both the Senate and the House, however, would amend the FCA to allow *only the government* to seek dismissal of a *qui tam* action based upon public disclosures.[4] Further, the bills would redefine what constitutes a

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"public disclosure" and more narrowly define the "based upon" standard, thereby breathing new life into lawsuits that otherwise would die under the FCA's current interpretation.

For example, H.R. 1788 includes as a "public disclosure" only disclosures "that are made on the public record or have otherwise been disseminated broadly to the general public."[5] Further, the bill provides that an action or claim is "'based on' a public disclosure only if the person bringing the action derived the person's knowledge of *all essential elements of liability* of the action or claim alleged in the complaint from the public disclosure."[6] Finally, the bill permits a court to dismiss a *qui tam* action or claim only if the "allegations relating to *all essential elements* of liability of the action or claim are *based exclusively* on the public disclosure of allegations or transactions…."[7] All of these definitions significantly narrow the standards most courts presently apply.

Deputizing Government Employees

Although the current statute does not expressly forbid it, many courts have held that government employees, particularly those who are charged with investigating fraud, are precluded from bringing *qui tam* actions.[8] Proposed legislation would expressly *authorize* federal employees to bring a *qui tam* action based upon information discovered during his or her employment under certain circumstances. The bills would permit the government to seek dismissal when a government employee fails to satisfy the statutory prerequisites, but strikingly, the bills are unclear whether a private defendant could similarly move to dismiss.

Relaxing Substantially Rule 9(b) Pleading Requirements

Currently, courts demand that relators plead FCA allegations with heightened particularity as set forth in Federal Rule of Civil Procedure 9(b). H.R. 1788, however, would effectively eliminate the Rule 9(b) pleading requirements, providing instead: "In pleading an action, a person shall not be required to identify specific claims that result from an alleged course of misconduct if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more viola-

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tions of section 3729 are likely to have occurred, and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the Government effectively to investigate and defendants fairly to defend the allegations made."[9] Although supporters of the amendments argue that courts dismiss meritorious lawsuits based on an overly-strict interpretation of Rule 9(b), relaxation of Rule 9(b)'s pleading requirements — as the proposed legislation suggests — will likely encourage general allegations of wrongdoing that could only be evaluated after participation in the costly civil discovery process.

State Legislative Action

In April and May 2009, respectively, Kansas and Minnesota enacted their own civil False Claims Acts modeled after the federal statute. Those doing business with the government should be aware that many programs are jointly funded by the federal and state governments (such as Medicaid), and many government contracts are similarly funded by the federal and state governments (such as infrastructure improvement). Accordingly, companies may face concurrent allegations of liability under federal and state versions of the FCA.

FCA TRENDS AND ENFORCEMENT ACTIVITIES DURING THE FIRST HALF OF 2009

The FCA as an All-Purpose Anti-Fraud Statute

In *Allison Engine* the Supreme Court narrowed the application of the FCA and warned against "transform[ing] the FCA into an all-purpose antifraud statute."[10] Federal appellate and district courts almost universally agreed. For example, in *United States ex rel. Bledsoe v. Community Health Sys., Inc.*, the Sixth Circuit stated that the FCA "imposes liability not for defrauding the government generally; it instead only prohibits a narrow species of fraudulent activity: present[ing] or caus[ing] to be presented,… a false or fraudulent claim for payment or approval."[11]

Yet, in practice, the DOJ and *qui tam* relators have pursued, and will

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no doubt continue to pursue, FCA actions based on alleged regulatory noncompliance and generalized fraud. For example, relators consistently bring claims under implied or express "false certification" theories of liability, arguing that a defendant violates the FCA by falsely certifying compliance with a broad range of federal statutes, regulations, or guidelines at the time claims were filed, whether or not the regulations directly relate to the actual claim for government funds. Thus, private individuals who would not otherwise have standing to enforce the myriad of federal laws that lack private enforcement mechanisms (*e.g*., healthcare or environmental regulations), use the FCA to enforce compliance with those laws and to severely penalize noncompliance, even if the end result of a defendant's conduct yielded little or no monetary loss.

In pursuit of this principle, the DOJ recently intervened in an FCA action filed by the Humane Society against two meat distribution companies stemming from their purportedly inhumane treatment and slaughter of cattle.[12] The complaint alleged that the companies falsely represented to the U.S. Department of Agriculture that ground beef ultimately supplied to the National School Lunch Program came from cattle that was humanely handled in accordance with federal regulations and that no meat from disabled, non-ambulatory cattle was included in the supply.[13] The DOJ intervened in part over "concern for the health of our nations' schoolchildren."[14]

Similarly, the federal government pursued a case against an aircraft company that installed an untested component part of military helicopters.[15] In announcing the settlement, the DOJ did not allege that the untested parts were substandard or defective, or that any injuries resulted. Yet, DOJ warned, "[t]his settlement sends a message that fraud, especially when it concerns the safety of our men and women in uniform, cannot and will not be tolerated in Government contracts."[16] Although everyone applauded the government's effort to protect the health and safety of our military, many questioned whether the FCA was the proper enforcement mechanism for doing so, especially when specific regulatory and/or statutory schemes existed to punish the same wrongdoing.

The FCA has extended to the sales and marketing of medical devices and drugs. For example, because Medicaid, Medicare, and other programs

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generally do not pay for off-label uses of drugs and devises, DOJ and relators have alleged that all claims for off-label uses are ineligible for reimbursement, such that the entire amount of the claim should be awarded as damages (and then trebled), regardless of the actual administration of the drug/device for medical purposes and any benefit actually conferred on the patient. Relators typically proceed under the FCA using an express or implied certification theory, contending that compliance with restrictions on off-label marketing is a condition precedent to reimbursement.[17] The $302 million recent Quest settlement (discussed below) further suggests that healthcare companies may be liable under the FCA for knowingly misrepresenting product information in labeling, marketing, or selling devices known to be inaccurate, unreliable, or defective. Again, the expansion of FCA liability in these situations parallels similar enforcement under other statutes and/or regulations written specifically to cover the practices at issue.

In the procurement context, the FCA has similarly expanded. For example, DOJ and relators argue that by misrepresenting facts to obtain a contract at the outset, defendants subject *all* claims submitted under that contract to FCA liability because those claims are "tainted" by the alleged fraudulent inducement.[18] To make matter worse, relators then seek to treble all monies paid under the contract (and add penalties), regardless of any benefit conferred or the value of goods or services provided under the contract.[19]

Despite the judiciary's efforts to prevent the FCA from morphing into an "all-purpose antifraud statute," the DOJ and relators continue to push expansive theories of liability that often drive large settlements, and, if accepted by the courts, would transform the FCA into an "all-purpose antifraud statute."

FCA Settlements During the First Half of 2009

Virtually every area of industry supported, even in part, by federal spending has witnessed FCA activity over these past few months. By way of example only, the federal government recently settled civil FCA claims with:

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- A Chicago advertising firm that allegedly over-billed the government while developing the "Army of One" recruiting campaign;
- A GSA contractor who allegedly sold furniture in violation of the Trade Agreement Act (the action was initiated by a competitor);
- Texas school districts who allegedly provided false information in connection with the Federal Communications Commission's E-Rate program (which provides funding for school districts to access the internet and other critical technology);
- Colleges that allegedly submitted false claims for student aid funds by purportedly deceiving a state licensing agency to obtain a state license that served as a prerequisite to federal funding;
- A State Department of Education that allegedly falsely certified its eligibility to receive funds under the Migrant Education Program; and,
- Companies that allegedly made false statements to Federal Emergency Management Agency in connection with Hurricane Katrina Relief Funds.

With federal spending on the rise and increased enforcement budgets and resources, we expect settlements to increase in every sector of our economy. Three areas of industry merit separate attention, below.

Healthcare

As with all years for which statistics are available, most recoveries in the first half of 2009 stemmed from the healthcare industry. To assure this trend continues, on May 29, 2009, the DOJ and the Department of Health and Human Services ("HHS") announced a joint task force comprised of law-enforcement agents and prosecutors aimed at preventing fraud and enforcing anti-fraud laws known as the Health Care Fraud Prevention & Enforcement Action Team ("HEAT"). HHS Secretary Kathleen Sebelius announced that the taskforce is "turning up the heat on perpetrators who steal from the taxpayers and threaten the future of Medicare and Medicaid."[20]

The following are three significant recoveries in the first half of this year:

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- On January 15, 2009, the DOJ announced that Eli Lilly and Company had agreed to pay $1.415 billion to resolve criminal and civil allegations that it promoted its antipsychotic drug Zyprexa for uses not approved by the FDA.[21] The reported $515 million criminal fine was "the largest ever in a health care case, and the largest criminal fine for an individual corporation ever imposed in a United States criminal prosecution of any kind."[22]

  The civil settlement between Eli Lilly, the United States and various States of up to $800 million also resolved FCA claims and related state claims raised in four related *qui tam* lawsuits (all filed by former Eli Lilly sales representatives), alleging that Eli Lilly marketed and promoted Zyprexa for off-label uses, causing providers to submit false claims for payment to federal insurance programs. *The qui tam relators will receive more than $78 million from the federal share of the settlement amount.*

- On April 15, 2009, the DOJ announced a $302 million global settlement with Quest Diagnostics and its subsidiary, Nichols Institute Diagnostics ("NID"), resolving criminal and civil claims concerning various types of diagnostic test kits that NID manufactured, marketed, and sold to laboratories throughout the country.[23] The payment "represents one of the largest recoveries ever in a case involving a medical device."[24]

  The civil settlement resolved allegations that NID manufactured, marketed, and sold test kits knowing that some of these kits produced results that were materially inaccurate and unreliable, thereby causing laboratories and providers that used the test kits to submit false claims for reimbursement to federal health programs. Quest and NID paid the United States $262 million plus interest to resolve the civil FCA allegations, and paid various state Medicaid programs approximately $6.2 million to resolve similar civil claims. *The qui tam relator will receive approximately $45 million from the federal share of the settlement amount*.

- In May 2009, Sanofi-Aventis reportedly agreed to pay $95.5 million to settle allegations that it violated Medicaid's "best prices" require-

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ment. Of the total settlement amount, $49 million will go to the federal government and more than $40 million will go to the various state Medicaid programs. According to the DOJ, "Aventis entered into 'private label' agreements with the HMO Kaiser Permanente that simply repackaged Aventis's drugs under a new label," leading them to allegedly underpay drug rebates to Medicaid and overcharge public health services for the products.[25] The Civil Division, the U.S. Attorney's Office for the District of Massachusetts, HHS's Office of Inspector General and Office of Counsel to the Inspector General, and the National Association of Medicaid Fraud Control Units handled the investigation.

Department of Defense

The federal government is infusing unprecedented amounts of money into every sector of the economy, while simultaneously outsourcing more and more government functions to the private sector. Perhaps nowhere is this more prevalent than the defense industry. The Comptroller General of the United States recently testified before Congress regarding Department of Defense spending as follows:

> The government is relying on contractors to perform many tasks that closely support inherently governmental functions, such as contracting support, intelligence analysis, security services, program management, and engineering and technical support for program offices.[26]

The following are significant recoveries in the defense industry the first half of this year:

- In April 2009, the DOJ announced that Northrop Grumman Corp., one of its subsidiaries, and a predecessor company agreed to settle FCA claims in connection with the sale of allegedly defective satellite parts. The DOJ valued the settlement at $325 million, which was used to offset claims Northrop had asserted against the government in an earlier, unrelated contract dispute action.[27] *A former employee whistleblower*

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will receive more than $48 million as his share of the recovery under the qui tam provisions of the FCA.

- In February 2009, APL Limited agreed to settle FCA claims for more than $26 million stemming from allegations that it submitted inflated invoices for shipping containers to troops in Iraq and Afghanistan.[28]

Government Contracting and Financial Fraud

In the wake of the economic crisis and the American Recovery and Reinvestment Act of 2009 (signed into law February 17, 2009), the federal government has shown a marked interest in contract and procurement cases and financial fraud. In April 2009, the DOJ reported "the largest contract fraud settlement the General Services Administration (GSA) has obtained to date."[29] And, when announcing a recently filed FCA action against a mortgage lender in connection with federally-insured loans, DOJ warned, "Mortgage fraud is a top priority for this Administration."[30] Indeed, the main goal of FERA was to extend the reach of the FCA to financial frauds and provide the federal government with sufficient law enforcement staff and budget to prosecute those frauds.

On May 12, 2009, the DOJ's Antitrust Division announced a new initiative to help protect stimulus funds from fraud, waste, and abuse. The Antitrust Division will train officials to recognize and report possible collusion, fraud, or waste in procurement, grant, and funding programs and will assist in investigations and prosecutions. Moreover, the DOJ's budget request for fiscal year 2010 includes $62.6 million to combat financial fraud and protect the federal fisc.[31]

The following are significant recoveries in the first half of this year in this area:

- In April 2009, GSA Contractor NetApp Inc. and NetApp U.S. Public Sector Inc. agreed to pay $128 million to resolve claims that they violated the FCA during contract negotiations and administration by knowingly failing to provide GSA with current, accurate, and complete information about its commercial sales practices and discounts for hardware, software, and storage management services for comput-

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er networks sold to government entities through the GSA program.[32] *A former NetApp employee whistleblower will receive more than $19 million as his share of the recovery.* Notably, on March 2, 2009, the federal government intervened in an FCA action against EMC Corp. similarly questioning its commercial pricing practices during negotiation of GSA contracts to provide information technology hardware and services to federal agencies.

- In February 2009, the federal government recovered $19 million from AMEC Construction Management, settling FCA litigation involving allegations of fraud, false claims, and kickbacks on four GSA construction contracts and litigation over claims for excess re-procurement costs incurred by GSA after it terminated the company's contract to build a courthouse in St. Louis, Missouri.[33]

IMPORTANT JUDICIAL DECISIONS AND CONTINUING LEGAL TRENDS DURING THE FIRST HALF OF 2009

The Supreme Court has addressed the timeliness of an appeal under the FCA, and several lower courts (and the Supreme Court in a rare grant of *certiorari*), addressed the public disclosure bar, the original source requirements, and the FCA pleading requirements under Rule 9(b). In a significant development, the Fourth Circuit recently held that fraudulent claims submitted to the Coalition Authority in Iraq and paid for with Coalition Authority funds, are subject to the FCA even if the actual source of the funds is someone other than the United States government.

The Supreme Court Limits the Time Relators Have to File an Appeal

On June 8, 2009, the Supreme Court issued its unanimous decision in *United States ex rel. Eisenstein v. City of New York*.[34] The Court considered "whether the 30-day time limit to file a notice of appeal in Federal Rule of Appellate Procedure 4(a)(1)(A) or the 60-day time limit in rule 4(a)(1)(B) applies when the United States declines to formally intervene in a *qui tam* action brought under the False Claims Act."[35] The Court held

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that because the United States declined intervention it could not be considered a "party" despite its status as a "real party in interest."[36] Because relators filed their notice of appeal 54 days after the district court dismissed their complaint and entered final judgment, the Court held that the appeal was not timely filed. The decision resolved a previous split in the circuits regarding the amount of time for a relator to appeal in cases where the federal government had not intervened.

The Supreme Court Grants Certiorari to Resolve a Circuit Split Regarding the Scope of the Public Disclosure Bar

To determine, in the first instance, whether a court has jurisdiction over an FCA claim, the court must answer three questions — (1) Was there a public disclosure? If so, (2) Is the *qui tam* action based upon the public disclosure? If so, (3) Is each relator an original source of the information underlying each of the allegations of the complaint? With respect to the first question, the FCA enumerates several sources of public disclosure, including disclosure in a "Congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation."[37] The circuit courts are currently divided on whether a state administrative report constitutes a public disclosure. On June 9, 2008, the Fourth Circuit held "the public disclosure bar applies to *federal* administrative audits, reports, hearings or investigations, *but not to those conducted or issued by a state or local governmental entity*."[38] Thus, disclosures in a county audit report and a State (North Carolina) Department of Environment, Health and Natural Resources report did not constitute "public disclosures" within the meaning of the FCA.[39]

The defendant in that case petitioned the U.S. Supreme Court for review, and, after briefing from the United States Solicitor General, several states' Attorneys General, and representatives of the pharmaceutical and biotechnology industries, the Supreme Court granted *certiorari* in June. Should the Supreme Court resolve the circuit split and hold that state and local government reports constitute public disclosures, then the public disclosure bar would strengthen and serve to eliminate *qui tam* complaints "based upon" state administrative reports. As discussed above, however,

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pending legislation — S. 458 and H.R. 1788 — would redefine "public disclosures."

Courts Continue to Dismiss Claims Under the Public Disclosure Bar

Circuit courts have continued to construe the public disclosure bar more broadly, thus leading to the dismissal of FCA claims for lack of jurisdiction. For example, the Tenth Circuit recently held that "allegations of industry wide gas mismeasurement" disclosed in a previous lawsuit and in Senate Committee documents constituted a "public disclosure" of all types of mismeasurement techniques (even those not disclosed previously) by all gas companies that produced gas on Indian lands (even companies that were not identified in the public disclosures).[40]

The Sixth Circuit recently held that prior litigation constituted a public disclosure even though the previous lawsuit contained no allegation of fraud because the prior lawsuit "'presented enough facts to create an inference of wrongdoing.'"[41]

Similarly, the Ninth Circuit recently rejected a relator's claim that the public disclosure bar should not apply because the public disclosure came three months after the relator had presented evidence of the fraudulent activity to the federal government, but had not yet filed suit.[42] The court reasoned that the relator's disclosure to the government was a private disclosure that could not serve as a shield against a public disclosure that occurred three months later when the unrelated litigation commenced.[43]

District courts have followed suit. First the Southern District of New York recently followed the majority of circuits and held that information obtained through a FOIA request constitutes a public disclosure even though a FOIA request is not a specifically enumerated public disclosure in Section 3730(e)(4)(A).[44] And recently the Northern District of Illinois held that an OIG report identifying common practices of fraud by chiropractors generally was sufficient to constitute a public disclosure as to allegations against specific chiropractors who allegedly participated in similar practices.[45]

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Courts Continue to Strictly Interpret "Original Source" Requirements

Courts have continued to strictly interpret the "original source" requirement of jurisdiction.

To qualify as an original source, a relator must demonstrate that (1) he or she has direct and independent knowledge of the information upon which the allegations are based and (2) voluntarily provided that information to the government prior to filing a qui tam action. The Ninth Circuit recently confirmed that simply knowing about an alleged fraud is not equivalent to possessing "direct and independent knowledge of the alleged fraud."[46] The circuit courts continue to deny original source status as to claims that occurred after a relator has left the defendant's employ.[47] And the Sixth Circuit recently held that even relators who possess "direct and independent knowledge" do not qualify as original sources if they fail "to provide this information to the government before filing [their] complaint."[48]

In addition, courts continue to reject relators' efforts to secure discovery in an attempt to demonstrate independent source status. As the Fourth Circuit succinctly observed "[o]ne also wonders why [the relator] would have even needed discovery regarding, for example, how he gained direct and independent knowledge of the alleged false billings submitted by Defendants, because such information should be within his own custody and control."[49]

Courts Continue to Dismiss Cases Based on Relators' Failures to Plead FCA Claims With the Heightened Particularity that Rule 9(b) Requires

FCA actions are subject to the special pleading requirements applicable to fraud actions under Rule 9(b). When facing motions to dismiss, court often struggle to determine the appropriate level of specificity required in a complaint, particularly where the plaintiff alleges a fraudulent scheme occurring over many years and/or in multiple programs or locations. Courts continue to demand an increasing level of specificity in complaints to withstand dismissal.

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Both the First and the Eighth Circuits recently affirmed dismissal of relators' complaints for failure to plead with sufficient particularity as required by Rule 9(b).[50] A number of district courts have also rejected FCA claims on 9(b) grounds within the past several months.[51] As discussed above, pending legislation, H.R. 1788, would effectively eliminate the Rule 9(b) pleading requirements applied by these courts.

On the other hand, the Fifth Circuit recently relaxed Rule 9(b)'s requirements where the relators could not allege the details of an actually submitted false claim.[52] In *United States ex rel. Grubbs v. Kanneganti*, the relator alleged that other doctors with whom he worked "instructed him that during weekend on-call shifts doctors meet with the nursing staff to get updates on current patients. The doctors then saw the patients only 'as needed' or when 'something acute's going on,' but billed every day as a regular 'face-to-face' hospital visit."[53] Relator further alleged that nurses "indeed attempted to assist him in recording face-to-face physician visits that had not occurred and that were based solely on information obtained through nursing contacts with the patients."[54] Relator's compliant laid out the allegations of wrongdoing with specificity, and averred at least one overt act of billing for each defendant doctor, which contained identifying information regarding a specific, individual claim.[55]

Defendants moved to dismiss arguing that Rule 9(b) demanded that the "contents of the presented bill itself…must be pled with particular detail and not inferred from the circumstances."[56] The Fifth Circuit rejected this argument and held:

> [T]he 'time, place, contents, and identity' standard is not a straitjacket for Rule 9(b). Rather the rule is context specific and flexible and must remain so to achieve the remedial purpose of the False Claim[s] Act…. We hold that to plead with particularity the circumstances constituting fraud for a False Claims Act § 3729(a)(1) claim, a Relator's complaint, if it cannot allege the details of an actually submitted false claim, may nevertheless survive by alleging particular details of a scheme to submit false claims *paired with reliable indicia that lead to a strong inference that claims were actually submitted*.[57]

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Although *Grubbs* appears to be a measured retreat from a requirement that actual false claims be particularly identified in the pleadings to survive a Rule 9(b) motion to dismiss, the court cautioned that in addition to alleging a scheme to submit false claims, relators must raise a "strong inference that…claims were submitted" by providing some specific allegations that the false claims were likely submitted "such as dates and descriptions of recorded, but unprovided, services and a description of the billing system that the records were likely entered into."[58] Moreover, the Fifth Circuit rejected relator's conspiracy claim against the hospital on Rule 9(b) grounds because allegations that "various doctors over a period of years each submitted certain false claims" only pointed "to a possibility of an agreement among" the doctors and the hospital.[59] Thus, the Fifth Circuit determined that general allegations of potential wrongdoing alone remain insufficient.

Fraudulent Claims Submitted to the Coalition Authority in Iraq Can Create FCA Liability

The Fourth Circuit recently held, in *United States ex rel. DRC, Inc. v. Custer Battles, LLC*,[60] that the FCA covered fraudulent claims submitted to the Coalition Authority in Iraq. Custer Battles contracted with the Coalition Authority of Iraq to replace currency that bore Saddam Hussein's portrait with new currency.[61] "Although the Coalition Authority was funded from multiple sources," including sources other that the United States Government, the Coalition Authority issued an advance of three million dollars to Custer Battles paid by a U.S. Treasury check that was funded by assets seized from the Iraqi government as part of the war effort.[62] Subsequent invoices were submitted "to U.S. personnel who were detailed to work with the Coalition Authority," and were paid from the Coalition's Development Fund for Iraq, which included funds from various non-U.S. sources as well as "$210 million confiscated by the United States from Iraqi bank accounts and transferred to the Development Fund, as well as funds appropriated by Congress."[63] The district court limited Custer Battles' damages under the Dinar Exchange Contract to a maximum of $3 million after "conducting a thorough source-of-funds analysis,

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concluding that of the approximately $15 million paid on the Dinar Exchange Contract, only the $3-million advance came from U.S. government funds."[64] After the jury returned a verdict for the maximum damages of $3 million, the district court considered Custer Battles' Rule 50(a) motion for judgment as a matter of law. Because the "Relators did not prove that the invoices were presented to U.S. government employees or officers," rather than to the Coalition Authority, the district court entered judgment for Custer Battles on relators' 3729(a)(1) and 3729(a)(2) claims.[65]

The Fourth Circuit reversed. First the Fourth Circuit held that "[s]o long as '*any portion*' of the claim is or will be funded by U.S. money *given to the grantee*, the full claim satisfies the definition of [a false claim] as used in § 3729(a)(1) or (a)(2)."[66] Thus, the district court erred when it conducted a source of funds analysis. Second, the Fourth Circuit rejected the district court's requirement that the United States control the funds from which payment comes, finding a control of funds requirement inconsistent with the FCA's inclusion of claims "*made to…a grantee, or other recipient,*" of U.S. funds, so long as the United States "provides any portion" of the funds that the grantees or recipients would use to pay the claim."[67] Finally, the Fourth Circuit rejected the district court's assumption that U.S. government personnel detailed to the Coalition Authority "could not be working in their official capacities as U.S. government employees," as Section 3729(a)(1) requires.[68]

Notably, the Fourth Circuit's ruling in *Custer Battles*, if accepted by other circuits, together with FERA's recent amendments to the FCA, will most significantly broaden the types of FCA claims that relators may bring in the next few years.

PRACTICAL GUIDANCE AND CONCLUDING THOUGHTS

In a recent Deloitte poll of more than 1,500 business professionals from multiple industries, a staggering 79.8 percent responded that they were unfamiliar with the FCA.[69] It is imperative, therefore, that all companies who do business with the federal government and/or receive federal funds directly or indirectly, educate their employees about the FCA's provisions and the ramifications of violations.

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In that same Deloitte poll, more than half (58.2 percent) of the respondents stated that the level of transparency demanded by the Obama administration in connection with bailout spending is not possible.[70] Nevertheless, all recipients of federal funds should strive for transparency, carefully document claims, and actively monitor compliance with federal regulations and contract specifications. From the outset, companies that receive directly or indirectly stimulus funds under the American Recovery and Reinvestment Act must understand the FCA and implement controls to avoid fraudulent procurement or inducement claims that might taint every future claim for payment. Companies should then closely monitor their activities to prevent fraud, waste, or abuse. Not only will false certifications of compliance with contract specifications or federal regulations expose companies to sweeping FCA liability, but a failure to promptly detect and disclose overpayments may lead to FCA liability and disbarment under FAR Rules.

In sum, the sweeping changes to the FCA brought by FERA is sure to spur increased activity in the FCA arena. The scope of FCA claims is likely to expand, while the courts grapple with interpreting the FCA's most recent amendments. And as the federal government continues to increase its spending in all areas of the economy, more companies will find themselves subject to the FCA's provisions. The remainder of this year is sure to present a robust level of enforcement activity.

NOTES

[1] 128 S. Ct. 2123 (2008).

[2] 380 F.3d 488 (D.C. Cir. 2004).

[3] 31 U.S.C. § 3730(e)(4)(A); *see also Rockwell Int'l. Corp. v. United States*, 549 U.S. 457 (2007).

[4] *See* S. 458, § 4(b); H.R. 1788, § 3(d).

[5] *Id*. at § 3(d) (proposing amendments to 31 U.S.C. § 3730(e)(4)).

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

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

[8] *See*, *e.g*., *United States ex rel. Fine v. Chevron U.S.A., Inc.*, 72 F.3d 740 (9th Cir. 1996).

[9] H.R. 1788, § 4(c) (proposing a new subsection (e) to 31 U.S.C. § 3731).

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[10] 128 S. Ct. at 2130.
[11] *Id*. at 501 F.3d 493, 504 (6th Cir. 2007) (internal quotations omitted).
[12] *See* http://www.usdoj.gov/opa/pr/2009/May/09-civ-426.html.
[13] *Id*.
[14] *Id*.
[15] *See* http://www.usdoj.gov/opa/pr/2009/March/09-civ-273.html.
[16] *Id*.
[17] *See*, *e.g*., *United States ex rel. Kennedy v. Aventis Pharms., Inc., 2009 U.S. Dist. LEXIS 34107 (N.D. Ill. Apr. 20, 2009)* (relators alleged that the defendant marketed a certain prescription drug for off-label uses and thereby induced providers to submit fraudulent Medicare reimbursement claims).
[18] *See*, *e.g*., *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370 (4th Cir. 2008) (relators alleged that the defendant fraudulently induced the contract with the United States to provide military transport by knowingly misrepresenting that it would comply with certain maintenance requirements).
[19] *Id.*
[20] *See* http://www.hhs.gov/news/press/2009pres/05/20090520a.html.
[21] *See* http://www.usdoj.gov/opa/pr/2009/January/09-civ-038.html.
[22] *Id*.
[23] *See* http://www.usdoj.gov/opa/pr/2009/April/09-civ-350.html.
[24] *Id*.
[25] *See* http://www.usdoj.gov/opa/pr/2009/May/09-civ-520.html.
[26] *See* GAO Report, "DOD's Increased Reliance on Service Contractors Exacerbates Long-standing Challenges," GAO-08-621T, available at http://www.gao.gov/new.items/d08621t.pdf. Notably, in recommending the fiscal year 2010 defense budget, requesting "a nearly $11 billion increase" above the prior year's budget level, Secretary of Defense Robert M. Gates stated, "we must reform how and what we buy, meaning a fundamental overhaul of our approach to procurement, acquisition, and contracting." *See* April 6, 2009, "Defense Budget Recommendation Statement (Arlington, VA)," available at http://www.defenselink.mil/speeches/speech.aspx?speechid=1341.
[27] *See* http://www.usdoj.gov/opa/pr/2009/April/09-ag-305.html.
[28] *See* http://www.usdoj.gov/opa/pr/2009/February/09-civ-120.html.
[29] *See* http://www.usdoj.gov/opa/pr/2009/April/09-civ-353.html.
[30] *See* http://www.usdoj.gov/opa/pr/2009/June/09-civ-570.html.
[31] *See* http://www.usdoj.gov/opa/pr/2009/May/09-ag-451.html.

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[32] *See* http://www.usdoj.gov/opa/pr/2009/April/09-civ-353.html.
[33] *See* http://www.usdoj.gov/opa/pr/2009/February/09-civ-085.html.
[34] 129 S. Ct. 2230 (2009).
[35] *Slip Op.* at 1.
[36] *Slip Op.* at 9.
[37] 31 U.S.C. 3730(e)(4)(A).
[38] *United States ex rel. Wilson v. Graham County Soil & Water Conservation Dist.*, 528 F.3d 292, 296 (4th Cir. 2008) (emphasis added).
[39] *Id*.
[40] *In re Natural Gas Royalties Qui Tam Litig.*, 562 F.3d 1032, 1040-43 (10th Cir. 2009).
[41] *United States ex rel. Poteet v. Medtronic*, *Inc.,* 552 F.3d 503, 513 (6th Cir. 2009).
[42] *United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1199-1200 (N.D. Cal. 2009).
[43] *Id.*
[44] *United States ex rel. Kirk v. Schindler Elevator Corp.*, 606 F. Supp. 2d 448, 461-62 (S.D.N.Y. 2009) (following Third, Sixth, and Tenth Circuits).
[45] *United States ex rel. Baltazar v. Warden*, 2009 U.S. Dist LEXIS 28639, *20-21 (N.D. Ill. Apr. 2, 2009).
[46] *United States ex rel. Meyer v. Horizon Health Corp.*, 565 F.3d 1195, 1201 (9th Cir. May 14, 2009).
[47] *See*, *e.g.*, *United States ex rel. Vuyyuru*, 555 F.3d 337, 355 (4th Cir. 2009).
[48] *United States ex rel. Poteet v. Medtronic, Inc.*, 552 F.3d 503, 515 (6th Cir. 2009); *see also In re Natural Gas Royalties Qui Tam Litig.*, 562 F.3d 1032, 1044 (10th Cir. 2009).
[49] *Vuyyuru*, 555 F.3d at 355.
[50] *See United States ex rel. Gagne v. City of Worcester*, 565 F.3d 40, 48 (1st Cir. 2009); *United States ex rel. Roop v. Hypoguard USA, Inc.*, 559 F.3d 818, 824-25 (8th Cir. 2009).
[51] *See*, *e.g.*, *United States ex rel. Carter v. Halliburton Co.*, 2009 U.S. Dist. LEXIS 1936, *11-16 (E.D. Va. Jan. 13, 2009); *United States ex rel. Smart v. Christus Health*, 2009 U.S. Dist. LEXIS 4143, *22 (S.D. Tex. Jan. 22, 2009); *United States ex rel. Sharp v. Eastern Oklahoma Orthopedic Ctr.*, 2009 U.S. Dist. LEXIS 15988, *29-78 (N.D. Okla. Feb 27, 2009); *United States ex rel. Snapp, Inc. v. Ford Motor Co.*, 2009 U.S. Dist. LEXIS 30393, *20-21 (E.D. Mich. Apr. 7, 2009); *United States ex rel. Poteet v. Lenke*, 604 F. Supp. 2d

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313, 324 (D. Mass. 2009); *United States ex rel. Westfall v. Axiom Worldwide, Inc.*, 2009 U.S. Dist. LEXIS 45809, *12-17 (M.D. Fla. May 20, 2009); *United States ex. rel. Polansky v. Pfizer, Inc.*, 2009 U.S. Dist. LEXIS 43438, *11-14 (E.D.N.Y. May 22, 2009); *Mason v. Medline Indus., Inc.*, 2009 U.S. Dist. LEXIS 43500, *9 (N.D. Ill. May 22, 2009).

[52] *United States ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 189-190 (5th Cir. 2009).

[53] *Id.* at 184.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 190.

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

[58] *Id.* at 191.

[59] *Id.* at 194.

[60] 562 F.3d 295, 303-08 (4th Cir. 2009).

[61] *Id.* at 298.

[62] *Id.* at 298-99.

[63] *Id.* at 299.

[64] *Id.* at 301.

[65] *Id.* at 301.

[66] *Id.* at 303 (emphasis in original).

[67] *Id.* at 304 (citing 31 U.S.C. § 3729(c)) (emphasis in original).

[68] *Id.* at 306.

[69] *See* http://www.deloitte.com/dtt/press_release/0,1014,sid%253D2007%2526cid%253D258357,00.html.

[70] *Id*.

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