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CURRENT ISSUES IN FALSE CLAIMS LITIGATION

By Sarah M. Brackney and Matthew H. Solomson

In recent years, litigation under the civil False Claims Act (FCA)[1] has multiplied at a rapid pace. This surge is due in part to an increase in potential recovery: $5,500 to $11,000 per false claim for claims arising after September 29, 1999, plus treble damages.[2] As FCA litigation has expanded, courts have been faced with the difficult job of interpreting and applying statutory provisions whose meanings are not always clear. It should come as no surprise that the courts are often not in agreement, which ultimately leads to confusion among litigants, including Government contractors, who often find themselves the target of a false claims action.

Previous BRIEFING PAPERS have addressed the basic statutory scheme of the FCA and its *qui tam* provisions.[3] This BRIEFING PAPER thus examines several emerging and unsettled issues relating to the FCA, focusing on areas in which the federal courts of appeal are split. The first two sections discuss FCA provisions related to settling *qui tam* actions when the Government has declined to intervene. First, the PAPER addresses the question of when the Government's consent is required before a *qui tam* relator and defendant may voluntarily dismiss, as part of a settlement, an action brought under the FCA when the Government has not intervened. Second, the PAPER looks at how the courts have analyzed the effects of the Government's use of an "alternate remedy" to seek recovery for false claims, rather than intervening in the *qui tam* action.

The last three sections of this BRIEFING PAPER address a variety of arguments that have been raised by defendants to avoid liability under the FCA. In that regard, this PAPER discusses whether a reasonable interpretation of a statute or regulation can preclude a finding of falsity and therefore support a motion to dismiss, provides guidance on whether timely disclosures to the Government of a contractor's reasonable interpretation of an ambiguous pro-

IN BRIEF

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vision can bar a suit under the FCA, and addresses the different views taken by the courts concerning whether a document received through a Freedom of Information Act request is a "public disclosure" that would bar a *qui tam* action.

Government Consent For Qui Tam Settlements

The FCA permits individuals, called *qui tam* relators, to bring suit for false claims on behalf of themselves and the U.S. Government in the name of the Government.[4] Once the relator files suit, the relator must furnish the Government with a copy of the complaint and disclose the information on which the FCA claims are based.[5] The Government then has 60 days to decide whether to intervene and thereby take control over the FCA action; during this time, the complaint remains under seal.[6] The Government may receive an extension of time to decide whether to intervene "for good cause shown."[7]

At the end of the statutory period (whether extended or not), the Government has two options. First, it may "proceed with the action, in which case the action shall be conducted by the Government."[8] Second, the Government can "notify the court that it declines to take over the action."[9] There is no question that the Government is permitted to dismiss or settle the action over the objections of the relator.[10] If, however, the Government chooses the second option of declining to take over the action, the *qui tam* relator "shall have the right to conduct the action."[11] When the Government declines to intervene, "the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages."[12] Even if the Government declines to intervene at this early stage, a court may permit intervention at a later date for good cause.[13]

A fair amount of litigation has arisen concerning the ability of a *qui tam* relator and a defendant to settle the FCA action and voluntarily dismiss it without the consent of the Government when the Government has chosen not to intervene. On the one hand, the FCA permits the relator "to conduct the action" and to "settl[e] the claim."[14] On the other hand, the Act declares that "[t]he action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."[15] Several federal courts of appeal have interpreted these arguably conflicting provisions to determine when the Attorney General's approval is required before an FCA action, in which the Government did not intervene, is dismissed.

First, courts of appeal have consistently held that the Government's consent is *not* required before an action is *involuntarily* dismissed by a trial court. The U.S. Court of Appeals for the Second Circuit, interpreting the consent provision as a matter of first impression, concluded that "it applies only in cases where a plaintiff seeks voluntary dismissal of a claim or action brought under the False Claims Act, and not where the court orders dismissal."[16] Although the Second Circuit looked primarily to legislative history to reach this conclusion, other

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courts have noted that separation of powers issues are implicated if the consent provision were applied to involuntary dismissals.[17] It is interesting to note that courts have excluded involuntary dismissals from the consent requirement, despite the fact that the FCA, by its terms, makes no such distinction.

Second, the federal courts of appeal have split on the question whether the Government has a unilateral right to veto a settlement between a *qui tam* relator and a defendant where the Government has chosen not to intervene. The first to address this question directly was the Ninth Circuit in *United States ex rel. Killingsworth v. Northrop Corp.*[18] There the court rejected the Government's argument that it had an "absolute right to block a settlement."[19] In that case, the Government sought to veto the settlement agreement because it believed that the relator and the defendant had conspired to divert monies from the FCA claim to the relator's personal claim.[20] Despite its objection to the settlement, however, the Government still declined to intervene in the suit; the defendant, Northrop, argued that the Government, having failed to intervene, should not be able to force the parties to continue to litigate against their will.[21]

The court looked to the legislative history and to the framework of the FCA, reviewing each of the relevant provisions but reading the statute "as a whole."[22] The Ninth Circuit concluded that "the consent provision…applies only during the initial sixty-day (or extended) period."[23] Reading each of the applicable provisions together, the court determined that the Government's asserted veto power was inconsistent with the *qui tam* relator's right to conduct and to settle the action.[24] Additionally, the court approached this question with an eye towards the realities of litigation:[25]

> Finally, the government's assertion of an absolute right to block a settlement and dismissal by withholding its consent may represent a meaningless privilege in terms of present-day *qui tam* litigation. Here, neither the government nor the relator desires to engage in further litigation. If the parties settle the action without a dismissal and thereby effectively stop litigating the case, the trial court would undoubtedly dismiss the suit for failure to prosecute. Conversely, the government may not force [the relator] and [the defendant] to continue litigation by refusing to consent to a settlement.

Although the Ninth Circuit rejected the Government's assertion of unlimited veto power, it did conclude that the Government was not without rights. First, the court found that the Government could intervene solely for the purpose of appealing the district court's approval of the settlement.[26] Second, even though the Government opted not to formally intervene in the action, it could still object to the settlement upon a showing of good cause.[27] The Ninth Circuit's decision sought to balance the interests of the parties and the Government, while establishing procedures to ensure that the settlement was properly structured so as not to deny the Government its fair share of the proceeds for the relator's FCA claims.

The Fifth and Sixth Circuits reached the opposite conclusion of the Ninth Circuit, finding that the Government has an absolute right to bar a voluntary dismissal of an FCA action (e.g., as a product of settlement), even when it has declined to intervene.[28] In *Searcy v. Philips Electronics North America Corp.*, the Fifth Circuit adopted the Government's position and "sanction[ed] an absolute veto power over voluntary settlements in *qui tam* False Claims Act suits."[29] The court rejected the Ninth Circuit's analysis in *Killingsworth* as "unpersuasive" and found that the consent provision is "unambiguous in its declaration that courts may not grant a voluntary dismissal in a False Claims Act suit unless the U.S. Attorney General consents to the dismissal."[30] In *United States v. Health Possibilities, P.S.C.*, the Sixth Circuit likewise held that "a *qui tam* plaintiff may not seek a voluntary dismissal of any action under the False Claims Act with the Attorney General's consent."[31]

These courts believed that there was no conflict between the consent provision and other sections of the FCA that grant rights to a relator. They concluded that the plaintiff could "conduct" the action, even if the Government retained the ultimate decisionmaking power regarding settlement and dismissal.[32] Moreover, the provision permitting the relator to settle

the claim did not create an "iron-clad 'right to settle.'"[33]

The Fifth and Sixth Circuits did not address the problem of whether the Government could force the parties to continue to litigate against their will, an issue which had concerned the Ninth Circuit. Instead, these courts focused on another policy concern—preventing the parties from conspiring to bilk the Government out of its rightful recovery. In *Searcy*, the Fifth Circuit expressed its concern as follows:[34]

> The *Killingsworth* litigation demonstrates that relators can manipulate settlements in ways that unfairly enrich them and reduce benefits to the government….In *qui tam* litigation,…there is a danger that the relator can boost the value of settlement by bargaining away claims on behalf of the United States….If the government decides the settlement isn't worth the cost, [the consent provision] allows the government to resist these tactics and protect its ability to prosecute matters in the future.

Moreover, in *Health Possibilities*, the Ninth Circuit stated:[35]

> The potential for such profiteering is exacerbated when, as here, a relator couples FCA claims with personal claims. In these circumstances, a relator can avoid the FCA's recovery division requirements by allocating settlement monies to the personal claims. Relators can thereby use the bait of broad claim preclusion to secure large settlements, while steering any monetary recovery to the personal action.

Although the Fifth and Sixth Circuits clearly were concerned in these decisions with protecting the Government's interest,[36] neither addressed any of the options proposed by the Ninth Circuit in *Killingsworth* (e.g., intervention for good cause, intervention for appeal purposes, and objection for good cause), which also likely would serve to protect the Government adequately.

Interpreting The "Alternate Remedy" Provision

As discussed above, the FCA permits *qui tam* relators to bring suit on behalf of themselves and the Government, but this right is not without limits. Even when a relator is pursuing a *qui tam* action and the Government has opted not to intervene, the Government is entitled to pursue an "alternate remedy":[37]

> [T]he Government may elect to pursue its claims through any alternate remedy available to the Government, including any administrative proceeding to determine a civil monetary penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section.

Although few courts have addressed the effect of this provision, their constructions have not been wholly consistent. Courts have consistently found that the "alternate remedy" provision applies once the Government has declined to intervene in the action.[38] Such alternate proceedings may include settlement,[39] criminal forfeiture proceedings,[40] and suspension and debarment proceedings.[41] If the Government intervenes and continues with the FCA action, however, the alternate remedy provision may not be applicable, even if the Government proceeds with a separate parallel proceeding.[42] Similarly, if the relator cannot show that the Government's recovery resulted from the FCA claims, the relator cannot invoke the alternate remedy section.[43]

Courts have disagreed, however, concerning the effect on the relator's *qui tam* action of the Government's successful pursuit of an alternate remedy. The majority of courts have concluded that the *qui tam* relator is entitled to share in the proceeds received by the Government through the alternate remedy.[44] As the Ninth Circuit explained, "[i]f the government chooses not to intervene in the relator's action, but, instead, chooses to pursue 'any alternate remedy,' the relator has a right to recover a share of the proceeds of the 'alternate remedy' to the same degree that he or she would have been entitled to a share of the proceeds of an FCA action."[45]

This interpretation protects the interests of the relator and of the defendant. First, if the relator was not entitled to a share of the proceeds from the alternate remedy, the Government would have an incentive to decline to intervene and then settle the claim sepa-

rately, while using the information provided by the relator in the *qui tam* action.[46] The relator also will not be forced to continue to litigate with a defendant who claims that the FCA claims are barred by the settlement with the Government.[47] Second, the defendant is protected from the possibility of having to pay multiple times for the same wrongdoing.[48]

On the other hand, the Third Circuit has held that when the Government pursues an alternate remedy, the *qui tam* relator's "right to proceed with his *qui tam* action remains unimpaired."[49] Even though the defendant has settled with the Government, it must continue to litigate with the *qui tam* relator and face the possibility of paying multiple times on the same false claims. That court reasoned that:[50]

> [The "alternate remedy" provision] preserves a relator's right to a percentage of the recovery even when the government chooses to pursue its claims administratively. Because the government never exercised its rights to intervene, the settlement between [the government] and [the defendant] does not negate [the relator's] ability, as the relator, to proceed independently with his *qui tam* claim.

Under this interpretation, the Government cannot settle the relator's claim, even if it reaches an agreement with the defendant as to its own claims.[51] In contrast, the Ninth Circuit has held that the relator's claims are the same as the Government's claims; therefore, if the Government chooses to release its claims, the relator has no more claims to pursue:[52]

> [The relator] could not have a claim separate from the government's. A qui tam relator has Article III standing to sue only as a relator, on behalf of the government. His standing is in the nature of an assignee of the government's claim. Thus there is one claim, the government's, pursuable either by the qui tam relator on behalf of the government, or by the government on its own behalf. Once the government recovers the money it paid on the false invoice, plus penalties, or releases its claim, there is no more to be recovered by anyone, because only the government can have a claim for a false claim made upon the government.

In some cases, the Government and the defendant have crafted their settlement—resulting from an alternate remedy—to exclude the claims of the *qui tam* relator, presumably in an effort to avoid paying the relator his share of the recovery.[53] The Third Circuit would likely find this permissible, but most courts have refused to accept this practice.[54]

Reasonable Interpretations Of Ambiguous Provisions

Under the FCA, a defendant is liable for knowingly presenting a false claim for payment to the Federal Government.[55] "Knowingly" is defined as having "actual knowledge of the information" or acting in "deliberate ignorance [or] reckless disregard of the truth or falsity of the information."[56] The question whether a reasonable or plausible interpretation of a statute or regulation can be "knowingly false" has been fiercely litigated, and the courts of appeal are in disagreement on this issue. Some circuits have held that a reasonable interpretation of an ambiguous provision cannot be "false" as a matter of law. Others, however, view reasonableness as an aspect of whether a defendant "knowingly" submitted a false claim; in those circuits, this scienter issue is considered a question of fact for the jury and not a subject for the court's concern on a motion to dismiss or for summary judgment.

In most circuits, a reasonable interpretation of an ambiguous provision of a statute, regulation, or contract *cannot* be the basis of a false claim.[57] These courts have concluded that the Act was not intended to punish disputes concerning interpretation.[58] This determination is consistent with the application of the criminal FCA statute,[59] which requires the Government to demonstrate that the defendant's interpretation was not reasonable.[60] Therefore, if a defendant could show that a regulation was ambiguous and its interpretation was reasonable, the claims are not false as a matter of law and the suit should be dismissed.

The Ninth Circuit, however, has created some confusion on this issue. Early Ninth Circuit cases were consistent with other circuits and seemingly held that issues of contract interpretation and disputed questions of law did not raise false claims.[61] In *United States ex rel. Oliver v. Parsons Co.*, the Ninth Circuit changed

direction, holding that "the district court erred in applying a 'reasonable interpretation' approach to determining falsity under the Act and that genuine issues of material fact exist regarding whether [the defendant] 'knowingly' submitted false claims."[62] The court held that the ultimate meaning of the regulations in question would be interpreted by the court.[63] Under this case, reasonableness is relevant as to whether a false claim was "knowingly" submitted, but "falsity" is based on whether the defendant's interpretation was correct.[64]

The Ninth Circuit concluded, however, that a good faith interpretation would preclude a finding that the scienter requirement had been met: "A contractor relying on a good faith interpretation of a regulation is not subject to liability, not because his or her interpretation was correct or 'reasonable' but because the good faith nature of his or her action forecloses the possibility that the scienter requirement is met."[65] The court denied summary judgment because it believed that there were issues of fact remaining concerning whether the defendant knowingly submitted false claims.[66]

The Ninth Circuit again discussed the issues of falsity and scienter in a recent case, *United States ex rel. Hendow v. University of Phoenix*.[67] While the court in that case reiterated that "'[i]nnocent mistakes, mere negligent misrepresentations and differences in interpretations' are not sufficient for False Claims Act liability to attach,"[68] the court concluded that the relator indeed had asserted sufficient allegations of falsity to survive a motion to dismiss.[69] Notably, the Ninth Circuit failed to cite to the *Oliver* decision in its discussion of falsity and scienter, perhaps signaling that that court is moving away from its reasoning in *Oliver*.

Recently, the Eleventh Circuit addressed the question whether a reasonable interpretation of an ambiguous regulation can support a claim under the FCA. In *United States ex rel. Walker v. R&F Properties of Lake County, Inc.*, the court permitted the action to go forward, despite agreeing that the regulation at issue was ambiguous and that the defendant's interpretation was reasonable.[70] In doing so, it reversed the district court, which had held that falsity was foreclosed as a matter of law because the defendant had reasonably interpreted an ambiguous regulation.[71]

The Eleventh Circuit focused on the evidence presented by the plaintiff that was meant to demonstrate the meaning of the regulation and the reasonableness of the defendant's interpretation.[72] In essence, the court determined that the plaintiff had raised an issue of scienter, rather than falsity, noting that "evidence presented by the relator…was relevant to a determination of the…regulation's meaning and that there was a question of fact as to the defendants' understanding of the meaning of the regulatory language."[73] Because the court found that questions of fact remained, it reversed the grant of summary judgment.[74]

The defendant in *Walker* has filed a petition for certiorari asking the Supreme Court to review the Eleventh Circuit's decision.[75] If the Court accepts the case, it will hopefully resolve this split among the circuits.

Disclosure Of Interpretation To Government

As discussed above, the FCA imposes civil liability for the knowing submission of a false claim to the Federal Government.[76] When faced with an ambiguous statute, regulation, or contract, you must make an attempt to interpret it reasonably. But also as discussed above, merely demonstrating that your interpretation was reasonable may be insufficient to succeed on a motion to dismiss. That is, a reasonable interpretation of a statute or regulation is not an absolute bar to a *qui tam* relator's claims. One way to attempt to mitigate the possibility of any future FCA claims is to disclose your interpretation to the Government in advance. Making such disclosures may lessen the likelihood of a finding against the defendant on both "knowledge" and "falsity."

Some cases have held that disclosures to the Government of reasonable assumptions will negate a finding of knowledge or falsity, leading to a dismissal of FCA claims. In *United States ex*

rel. Costner v. United States, the Eighth Circuit addressed the effect of the defendants' disclosures to the Government, stating: "The [Government's] knowledge of operational difficulties also bears on whether the defendants had the requisite intent under the Act….A contractor that is open with the Government…to find a solution lacks the intent required by the Act."[77] The scienter requirement was therefore negated, and the defendants could not be found liable under the FCA.[78] The Fourth Circuit, citing to cases from the Second, Seventh, Ninth, and Tenth Circuits, similarly concluded that "the government's knowledge of the facts underlying an allegedly false record or statement can negate the scienter requirement required for an FCA violation."[79] The Seventh Circuit has held that the "government's prior knowledge of an allegedly false claim can vitiate a FCA action."[80] The court explained that:[81]

> If the government knows and approves of the particulars of a claim for payment before that claim is presented, the presenter cannot be said to have knowingly presented a fraudulent or false claim. In such a case, the government's knowledge effectively negates the fraud or falsity required by the FCA.

Both the Fourth and Seventh Circuits held that defendants were not liable under the FCA because the Government had prior knowledge of, and had either approved or not objected to, defendants' activities that resulted in the allegedly false claims.[82]

Other cases have held that disclosure to the Government is relevant to, but not dispositive of, the issue of knowledge. For example, the Ninth Circuit concluded that while the Government's knowledge was highly relevant, the effect of that knowledge was a question for summary judgment or trial.[83] The Second Circuit concurred, holding that defendants were not automatically exonerated simply because information was presented to the Government.[84]

Overall, the success of the "Government knowledge" defense will likely depend on the facts of the case, especially in courts that apply the relevancy rule.[85] Because all courts seem to consider prior disclosure to the Government to be at least relevant to the question whether there was a "knowing" submission of a false claim, it is in the your interest to work closely with the Federal Government and fully disclose any interpretations or assumptions that are being made in your attempt to comply with statutory, regulatory, or contractual obligations.[86] Indeed, the failure to raise an interpretation issue with the Government can give rise to a negative inference that the claim is, in fact, false.[87]

FOIA Responses As "Public Disclosures"

Although the FCA is designed to encourage relators to pursue *qui tam* actions, the Act also seeks to preclude the filing of opportunistic suits that are based on publicly available information:[88]

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

An "original source" is "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on that information."[89]

The federal courts of appeal have disagreed as to whether documents received through a Freedom of Information Act (FOIA)[90] request should be considered public disclosures under this provision. Most courts have concluded that the disclosure of information pursuant to a FOIA request is a "public disclosure" barring them from exercising jurisdiction over a *qui tam* action.[91] These courts have determined that FOIA responses fall within the enumerated circumstances in the public disclosure provision, which includes administrative reports and administrative investigations.[92] They reasoned that answering a FOIA request requires official Government action (administrative) and

provides information concerning the search for the requested documents (report).[93] Even though these courts have concluded that responses to FOIA requests are "public disclosures," a *qui tam* suit might not be barred if the materials were not received until after the action was filed.[94]

In a recent opinion, the Ninth Circuit has departed from this line of cases.[95] The court held that a document obtained through a FOIA request is not a "public disclosure" barring a *qui tam* suit unless that document is one of the enumerated sources in the FCA's public disclosure provision.[96] The Ninth Circuit reasoned that designating any document received after a FOIA request as a "report" or "investigation" would "stretch the meaning of those terms too broadly."[97] The court believed that reports and investigations involved "independent work product" on behalf of a Government agency.[98] On the other hand, according to the Ninth Circuit, "responding to a FOIA request requires little more than duplication;" therefore, "labeling any response to a FOIA request a 'report' or 'investigation' would ignore the way in which each of the enumerated sources involves governmental work product."[99]

Moreover, the Ninth Circuit viewed its interpretation as more consistent with the purposes of the FCA, finding that "[i]nterpreting the jurisdictional provision to bar *qui tam* suits where the allegations are based on otherwise private information obtained via a FOIA request would be out of step with Congress's intentions in amending the jurisdictional provision of the FCA" in 1986 to add the relevant language regarding the public disclosure bar.[100] By narrowly tailoring the jurisdictional bar, Congress sought to prevent suits where it should be on notice of the fraud, while seeking "to capitalize on the independent efforts of prospective *qui tam* relators who call information to the attention of the government."[101] Because the document—a grant application—that the relator received through the FOIA request was not itself one of the enumerated sources, the Ninth Circuit permitted the relator's claim to go forward.[102]

GUIDELINES

These *Guidelines* are designed to assist Government contractors in navigating the morass of legal issues that arise in FCA litigation. They are not, however, a substitute for professional representation in any specific situation.

1. Although an essential thing to keep in mind in any litigation, be keenly aware of which circuit court governs the FCA matter or suit in which you are involved, particularly given the number of circuit splits on issues related to the FCA.

2. When fashioning a settlement with a relator in an action where the Government did not intervene, keep in mind that the Government will have at least some role, regardless of the circuit. This influence ranges from the ability to object for good cause to an absolute veto over any voluntary settlement.

3. Be careful to craft a settlement that fairly addresses all claims brought by the relator and adequately apportions recovery to the FCA claims. If the proportion of the settlement proceeds dedicated to the non-FCA claims is too high, the Government will likely veto the settlement (or object for good cause) to ensure that it is receiving fair compensation.

4. If you seek to reach an "alternate remedy" with the Government, you must consider the effect on the relator's *qui tam* action. In most courts, the relator will receive a share of the Government's recovery, and the relator's claims will be barred. In others, however, the relator may still be able to pursue his claims against you, despite the settlement with the Government.

5. In most courts, if you can show that you reasonably interpreted an ambiguous statute, regulation, or contract, there is no falsity as a matter of law. Other courts have refused to dismiss FCA claims under these circumstances. Even in these courts, it is important to argue that your interpretation was reasonable, as it will be powerful evidence to demonstrate

that the scienter requirement has not been met.

6. If you are unsure about the meaning of a statute, regulation, or contract provision, it is in your benefit to disclose your interpretation to the Government. Although cooperation with the Government is not necessarily a bar to an FCA action, disclosure to the Government is at least relevant to demonstrate that there was no knowing submission of a false claim. Moreover, failure to disclose your interpretation to the Government can be seen as evidence that you intended to deceive the Government. It is therefore in your best interest to work closely with the Government to reach an acceptable interpretation.

7. Be aware of the source of any document the relator is using to support his claims. If the relator received the document through a FOIA request, you may be able to get the suit dismissed for lack of jurisdiction under the "public disclosure" bar.

★ REFERENCES ★

1/ 31 U.S.C.A. § 3729 et seq.

2/ 31 U.S.C.A. § 3729(a); 28 C.F.R. § 85.3 (although the FCA provides for penalties in the range of $5,000 to $10,000, the Department of Justice has adjusted the penalties to $5,500 and $11,000 pursuant to other statutory authority).

3/ See generally Silberman, "False Claims Issues in Subcontracting," Briefing Papers No. 06-8 (July 2006); Huffman, Madsen & Hamrick, "The Civil False Claims Act," Briefing Papers No. 01-10 (Sept. 2001); Goddard, "Business Ethics in Government Contracting—Part II," Briefing Papers No. 03-7 (June 2003).

4/ 31 U.S.C.A. § 3730(b) ("A person may bring a civil action for a violation of [31 U.S.C.A. §] 3729 for the person and for the United States Government. The action shall be brought in the name of the Government.").

5/ 31 U.S.C.A. § 3730(b)(2) ("A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government….").

6/ 31 U.S.C.A. § 3730(b)(2) ("The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.").

7/ 31 U.S.C.A. § 3730(b)(3) ("The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under [31 U.S.C.A. § 3730(b)(2)].").

8/ 31 U.S.C.A. § 3730(b)(4)(A); see also 31 U.S.C.A. § 3730(c)(1) ("If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action.").

9/ 31 U.S.C.A. § 3730(b)(4)(B).

10/ 31 U.S.C.A. § 3730(c)(2)(A) ("The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion."); 31 U.S.C.A. § 3730(c)(2)(B) ("The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances.").

11/ 31 U.S.C.A. § 3730(b)(4)(B); see also 31 U.S.C.A. § 3730(c)(3) ("If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action.").

12/ 31 U.S.C.A. § 3730(d)(2).

13/ 31 U.S.C.A. § 3730(c)(3) ("When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.").

14/ 31 U.S.C.A. § 3730(b)(4)(B), (c)(3), (d)(2).

15/ 31 U.S.C.A. § 3730(b)(1).

16/ Minotti v. Lensink, 895 F.2d 100, 103 (2d Cir. 1990); see also United States ex rel. Shaver v. Lucas W. Corp., 237 F.3d 932, 934 (8th Cir. 2001) ("[W]e interpret this provision to mean the Attorney General's consent is required only where the relator seeks a voluntary dismissal, not where, as here, the district court grants a motion by the defendant to dismiss for failure to state a claim.").

17/ See, e.g., Searcy v. Philips Elec. N. Am. Corp., 117 F.3d 154, 158 (5th Cir. 1997), 39 GC ¶ 389 (noting the Government acknowledged potential separation of powers issues if consent provision was applied to involuntary dismissals).

18/ United States ex rel. Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994), 36 GC ¶ 20.

19/ Id. at 720.

20/ Id.; see also id. at 718 ("The government thought that the parties might have specifically structured the settlement so as to reduce the amount the government realized; normally entitled to roughly seventy percent of any False Claims Act settlement under 31 U.S.C.A. § 3730(d)(2), the government would not receive any compensation from the wrongful termination claim.").

21/ See id. at 721.

22/ Id. at 721–22 ("To place the contested provision in an appropriate context, we first examine the legislative history of the Act."); see also id. at 722 ("Congress' intent to place full responsibility for False Claims Act litigation on private parties, absent early intervention by the government or later for good cause, is fundamentally inconsistent with the asserted 'absolute' right of the government to block a settlement and force a private party to continue litigation.").

23/ Id.

24/ Id.

25/ Id. at 723; see also United States ex rel. Pratt v. Alliant Techsystems, Inc., 50 F. Supp. 2d 942, 950 (C.D. Cal. 1999) (describing the problem as forcing the relator into "involuntary servitude"); United States ex rel. Hullinger v. Hercules, Inc., 80 F. Supp. 2d 1234, 1241 (D. Utah 1999) ("The court believes that, were the government to have such a right, it would have the power to hold the relator and the defendant hostage indefinitely, forcing the litigation to continue, regardless of the fact that a settlement had been reached.…Such a result cannot be tolerated."); United States ex rel. Summit v. Michael Baker Corp., 40 F. Supp. 2d 772, 775 (E.D. Va. 1999) ("The Government has tied the relator's hands behind his back, not allowing him to settle the claims or to dismiss the claims, yet refusing to proceed with the claims on its own.").

26/ See Killingsworth, 25 F.3d at 719 (citing United States ex rel. McGough v. Covington Tech. Co., 967 F.2d 1391, 1393–94 (9th Cir. 1992), 32 GC ¶ 609).

27/ See id. at 723; see also id. at 724 ("Thus, while the government may not obstruct the settlement and force a qui tam plaintiff to continue litigation, the government nonetheless may question the settlement for good cause, as it sought to do in this case, with or without formal intervention and without proceeding with the litigation under [31 U.S.C.A.] § 3730(b)(2) or (c)(3)."). See generally Cibinic, "Qui Tam Settlements and 'Proceedings' Costs," 13 Nash & Cibinic Rep. ¶ 22 (Apr. 1999).

28/ See also Ridenour v. Kaiser-Hill Co., 397 F.3d 925, 931 n.8 (10th Cir. 2005) (stating in dicta that "[e]ven where the Government has declined to intervene, relators are required to obtain government approval prior to entering a settlement or voluntarily dismissing the action"); United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr., 961 F.2d 46, 49 (4th Cir. 1992), 34 GC ¶ 351 (stating without discussion that "[e]ven where the government allows the qui tam relator to pursue the action, the case may not be settled or voluntarily dismissed without the government's consent").

29/ Searcy v. Philips Elec. N. Am. Corp., 117 F.3d 154, 158 (5th Cir. 1997), 39 GC ¶ 389.

30/ Id. at 159, 155.

31/ United States v. Health Possibilities, P.S.C., 207 F.3d 335, 336 (6th Cir. 2000), 42 GC ¶ 128.

32/ See Searcy, 117 F.3d at 160.

33/ Id.; see also Health Possibilities, 207 F.3d at 341 ("Nothing in the statute suggests that the right to 'conduct' an action provides the relator with unilateral and ultimate settling authority.").

34/ Searcy, 117 F.3d at 160.

35/ Health Possibilities, 207 F.3d at 342.

36/ Id. at 340 ("In our view, the power to veto a privately negotiated settlement of public claims is a critical aspect of the government's ability to protect the public interest in a qui tam litigation.").

37/ 31 U.S.C.A. § 3730(c)(5).

38/ See United States ex rel. Bledsoe v. Community Health Sys., Inc., 342 F.3d 634, 647 (6th Cir. 2003) ("We hold that 'alternate remedy' refers to the government's pursuit of any alternative to intervening in a relator's qui tam action."); United States ex rel. Dunleavy v. County of Delaware, 123 F.3d 734, 739 (3d Cir. 1997).

39/ Bledsoe, 342 F.3d at 649 ("We therefore hold that a settlement pursued by the government in lieu of intervening in a qui tam action asserting the same FCA claims constitutes an 'alternate remedy' for purposes of 31 U.S.C. § 3730(c)(5).").

40/ United States v. Bisig, No. 100CV335JDTWTL, 2005 WL 3532554, at *3 (S.D. Ind. Dec. 21, 2005) ("The court hold that when the United States declines to intervene in the qui tam action, but seeks recovery of defendant's assets through criminal forfeiture, the United States has engaged in an 'alternate remedy' for the purposes of [31 U.S.C.A.] § 3730(c)(5).").

41/ United States ex rel. Barajas v. United States, 258 F.3d 1004, 1011–12 (9th Cir. 2001) ("Barajas II"). See generally West, Hatch, Brennan & VanDyke, "Suspension & Debarment," Briefing Papers No. 06-9 (Aug. 2006).

42/ United States v. Lustman, No. 05-40082-GPM, 2006 WL 1207145, at *2 (S.D. Ill. May 4, 2006) (holding that criminal prosecution was not an "alternate remedy" when qui tam action continued after criminal judgment entered).

43/ United States ex rel. Ubl v. United States, No. 1:97 MC 117, 2006 WL 1050650, at * 3 (E.D. Va. Apr. 18, 2006), 48 GC ¶ 192 ("The funds in which Relator seeks to share simply are not proceeds of his qui tam claims.").

44/ See, e.g., Bledsoe, 342 F.3d at 649–50; Bisig, 2006 WL 3532554, at *2.

45/ Barajas II, 258 F.3d at 1010.

46/ Bledsoe, 342 F.3d at 648–49 ("It is readily apparent that, under the government's interpretation of [31 U.S.C.A.] § 3730(c)(5), the government could decline to intervene in a qui tam suit, then settle that suit's claims separately and deny the relator his or her share of the settlement proceeds simply because the government had not formally intervened in the qui tam action.").

47/ See id. at 649.

48/ Id. at 649–50 ("Defendants would be forced to pay the civil penalties and double or treble damages associated with the very same claims for which they had already paid penalties and damages by way of the settlement.").

49/ United States ex rel. Dunleavy v. County of Delaware, 123 F.3d 734, 739 (3d Cir. 1997); see also United States ex rel. Haskins v. Omega Inst., Inc., 11 F. Supp. 2d 555, 560 (D.N.J. 1998) (A district court in the Third Circuit held that "[w]hen the government declines to intervene in the qui tam action, case law provides that a relator's claim should not be stayed or dismissed without prejudice even though the government may pursue an alternate remedy.").

50/ Dunleavy, 123 F.3d at 739 (citations omitted).

51/ Id. ("Since [the relator], if a proper relator, has an interest in pursuing his claim independently of the government, the government, which has elected not to intervene, cannot compromise [the relator's] claim even if the government has settled its own claim.").

52/ United States ex rel. Barajas v. Northrop Corp., 147 F.3d 905, 910 (9th Cir. 1998) (citation omitted); see also id. at 911–12 ("Had the government wanted to do more discovery before settling the…claims, it could have refused to release them. It did release them.…The government having settled the case, there is no claim left for [the relator] to pursue.").

53/ United States ex rel. Barmak v. Sutter Corp., No. 95 CIV. 7637 KTD RLE, 2002 WL 987109, at *3 (S.D.N.Y. May 14, 2002) (holding that "a qui tam relator does not have standing to assert claims the government could not assert on its own behalf.…Thus, regardless of the parties' intent [in a settlement agreement], if the government's claims are barred, so are the relator's." (citations omitted)).

54/ United States ex rel. Bledsoe v. Community Health Sys., Inc., 342 F.3d 634, 650 (6th Cir. 2003) ("We therefore hold that the government may not settle a relator's claims and seek to avoid paying a relator his or her statutory share to the settlement proceeds by excluding the relator's claims from the terms of the settlement agreement."); United States v. Bisig, No. 100CV335JDTWTL, 2005 WL 3532554, at *4 (S.D. Ind. Dec. 21, 2005) ("Simply stated, the United States cannot sidestep the requirement to share recovery with the relator, who contends that it first discovered the fraud and informed the United States regarding the fraud, by merely electing to recover through criminal forfeiture proceedings.").

55/ 31 U.S.C.A. § 3729(a)(1).

56/ 31 U.S.C.A. § 3729(b).

57/ See, e.g., United States v. Southland Mgmt. Corp., 326 F.3d 669, 682 (5th Cir. 2003), 45 GC ¶ 158 (Jones, J., concurring) ("Further, where disputed legal issues arise from vague provisions or regulations, a contractor's decision to take advantage of a position can not result in his filing a 'knowingly' false claim."); United States ex rel. Norbeck v. Basin Elec. Power Coop., 248 F.3d 781, 795 (8th Cir. 2001), 43 GC ¶ 208 ("'The improper interpretation…of a contract,' however, 'does not constitute a false claim for payment.'") (quoting United States ex rel. Butler v. Hughes Helicopters, Inc., 71 F.3d 321, 329 (9th Cir.1995), 37 GC ¶ 628); United States ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1018 (7th Cir. 1999) ("[I]mprecise statements or differences in interpretation growing out of a disputed legal question are similarly not false under the FCA."). See generally Nash, "False Claims: The Effect of a Contract Remedy," 17 Nash & Cibinic Rep. ¶ 35 (June 2003) (discussing Southland).

58/ See, e.g., United States ex rel. Swafford v. Borgess Med. Ctr., 24 Fed. Appx. 491 (6th Cir. 2001) ("Disputes as to interpretation of regulations do not implicate FCA liability."); Commercial Contractors, Inc. v. United States, 154 F.3d 1357, 1366 (Fed. Cir. 1998), 40 GC ¶ 471 ("If a contractor submits a claim based on a plausible but erroneous contract interpretation, the contractor will not be liable, absent some specific evidence of knowledge that the claim is false or of intent to deceive."); Hagood v. Sonoma County Water Auth., 81 F.3d 1465, 1479 (9th Cir. 1996) (holding that it is "not enough" to "t[ake] advantage of a disputed legal issue").

59/ 18 U.S.C. §§ 286, 287, 1001, 1002.

60/ See, e.g., United States v. Whiteside, 285 F.3d 1345, 1351 (11th Cir. 2002) (holding that "the government bears the burden of proving beyond a reasonable doubt that the defendant's statement is not true under a reasonable interpretation of the law"); United States v. Race, 632 F.2d 1114, 1120 (4th Cir. 1980) (concluding that "one cannot be found guilty of a false statement under a contract beyond a reasonable doubt when his statement is within a reasonable construction of the contract"); United States v. Anderson, 579 F.2d 455, 460 (8th Cir. 1978) ("[G]overnment must negative any reasonable interpretation that would make the defendant's statement factually correct.").

61/ Butler, 71 F.3d at 326 (rejecting FCA allegations as "rais[ing] questions of contract interpretation, rather than false claims"); United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991), 34 GC ¶ 58 ("To take advantage of a disputed legal question, as may have happened here, is to be neither deliberately ignorant nor recklessly disregardful.").

62/ United States ex rel. Oliver v. Parsons Co., 195 F.3d 457, 460 (9th Cir. 1999), 41 GC ¶ 484.

63/ See id. at 463.

64/ See id.

65/ Id. at 464.

66/ See id. at 465. See generally Nash, "Can a Reasonable Interpretation of a Contract Be Fraud?," 14 Nash & Cibinic Rep. ¶ 11 (Mar. 2000).

67/ United States ex rel. Hendow v. University of Phoenix, 2006 WL 2530394 (9th Cir. Sept. 5, 2006).

68/ See id. at *7 (quoting United States ex rel. Hopper v. Anton, 91 F.3d 1261, 1267 (9th Cir. 1996)).

69/ See id. at *8.

70/ United States ex rel. Walker v. R&F Props. of Lake County, Inc., 433 F.3d 1349, 1356 (11th Cir. 2005).

71/ See id.

72/ See id.

73/ Id. at 1358.

74/ Id.

75/ Id., petition for certiorari filed, 75 U.S.L.W. 3065 (July 31, 2006)(No. 06-152).

76/ 31 U.S.C.A. § 3729(a)(1).

77/ United States ex rel. Costner v. United States, 317 F.3d 883, 887–88 (8th Cir. 2003).

78/ Id. at 888.

79/ United States ex rel. Becker v. Westinghouse Savannah River Co., 305 F.3d 284, 289 (4th Cir. 2002), 44 GC ¶ 414.

80/ United States ex rel. Durcholz v. FKW Inc., 189 F.3d 542, 544–45 (7th Cir. 1999).

81/ Id. at 545; see also Wang v. FMC Corp., 975 F.2d 1412, 1421 (9th Cir. 1992), 34 GC ¶ 732 ("The fact that the government knew of [the defendant's] mistakes and limitations, and that [the defendant] was open with the government about them, suggests that while [the defendant] might have been groping for solutions, it was not cheating the government in that effort."); United States v. Southland Mgmt. Corp., 326 F.3d 669, 682 (5th Cir. 2003), 45 GC ¶ 158 (Jones, J., concurring) ("Most of our sister circuits have held that under some circumstances, the government's knowledge of the falsity of a statement or claim can defeat FCA liability on the ground that the claimant did not act 'knowingly', because the claimant knew that the government knew of the falsity of the statement and was willing to pay anyway….Where the government and a contractor have been working together, albeit outside the written provisions of the contract, to reach a common solution to a problem, no claim arises.").

82/ Becker, 305 F.3d at 289; Durcholz, 189 F.3d at 544–45.

83/ United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991), 34 GC ¶ 58.

84/ United States ex rel. Kreindler & Kreindler v. United Tech. Corp., 985 F.2d 1148, 1156 (2d Cir. 1993), 35 GC ¶ 258.

85/ See, e.g., United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc., 400 F.3d 428, 454 n.21 (6th Cir. 2005); United States ex rel. Butler v. Hughes Helicopter, Inc., 71 F.3d 321, 326 (9th Cir. 1995), 37 GC ¶ 628 ("As government knowledge is no longer an automatic bar to suit, courts have had to decide case by case whether a FCA claim based on information in the government's possession can succeed.").

86/ Compare United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc., 297 F. Supp. 2d 272, 296 (D.D.C. 2004), 46 GC ¶ 91 ("Rather, what the evidence

shows is that defendant cooperate with [the Government] to come up with an approach to ensure that progress payment requests were fair and reasonable estimates of the work performed….As a matter of law, this cannot constitute fraud."), with Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 534 (10th Cir. 2000), 42 GC ¶ 238 (finding that although some level of Government knowledge would negate the FCA claim as a matter of law, it was not present where Government information came from relator and defendant was not forthcoming about the issue).

87/ Commercial Contractors, Inc. v. United States, 154 F.3d 1357, 1366 (Fed. Cir. 1998), 40 GC ¶ 471 ("[W]hen the contractor's purported interpretation of the contract borders on the frivolous, the contractor must either raise the interpretation issue with the government contracting officials or risk liability under the FCA…."); United States v. Aerodex, Inc., 469 F.2d 1003, 1008 (5th Cir. 1972) (contractor's failure to disclose interpretation of contract "indicates nothing less than an intent to deceive").

88/ 31 U.S.C.A. § 3730(e)(4)(A); see also United States v. A.D. Roe Co., 186 F.3d 717, 722 (6th Cir. 1999) ("This provision attempts to strike a balance between encouraging citizens to expose fraud and discouraging parasitic actions by opportunists.").

89/ 31 U.S.C.A. § 3730(e)(4)(B).

90/ 5 U.S.C.A. § 552 et seq.

91/ See United States ex rel. Mistick PBT v. Housing Auth. of Pittsburgh, 186 F.3d 376, 383 (3d Cir. 1999), 41 GC ¶ 378; A.D. Roe, 186 F.3d at 723–24; United States ex rel. Reagan v. East Tex. Med. Ctr. Reg'l Healthcare Sys., 384 F.3d 168, 176 (5th Cir. 2004).

92/ Mistick, 186 F.3d at 383–84.

93/ Reagan, 384 F.3d at 176; A.D. Roe, 186 F.3d at 723 (noting that once a FOIA request has been made, Department of Defense regulations require an examination of the documents to ensure that none of the material requires protection).

94/ A.D. Roe, 186 F.3d at 726.

95/ United States ex rel. Haight v. Catholic Healthcare West, 445 F.3d 1147 (9th Cir. 2006), 48 GC ¶ 174.

96/ Id. at 1153 ("We disagree: a response to a FOIA request is not necessarily a report or investigation, although it can be, if it is from one of the sources enumerated in the statute.").

97/ Id.

98/ Id.

99/ Id.

100/ Id. at 1154; see Pub. L. No. 99-562, § 3, 100 Stat. 3153 (1986).

101/ Haight, 445 F.3d at 1155.

102/ Id. at 1156.