

“There is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the government.”
- Benjamin Franklin

A Guide to the False Claims Act and State False Claims Acts



The Georgia Taxpayer Protection False Claims Act was signed on April 16, 2012. Participating in the signing ceremony with Governor Nathan Deal are (from left) Rep. Matt Ramsey, Rep. Edward Lindsey, and Michael A. Sullivan of Finch McCranie, LLP.

Michael A. Sullivan

www.finchmccranie.com
www.who-tam-litigation.com

Finch McCranie, LLP
225 Peachtree Street, Suite 1700
Atlanta, Georgia 30303
(404) 658-9070
msullivan@finchmccranie.com



FINCH MCCRANIE LLP
LAW FIRM FOR WHISTLEBLOWERS: DOJ • IRS • SEC

A Guide to the False Claims Act and State False Claims Acts

Michael A. Sullivan¹

The successes of the federal False Claims Act (“FCA”)² have inspired states to enact their own versions of this important “whistleblower” law, including the “Georgia Taxpayer Protection False Claims Act.”³ Both the federal and state FCA laws are *civil* statutes designed to combat

1 Michael A. Sullivan is a partner with Finch McCranie, LLP in Atlanta. He represents whistleblowers in *qui tam* litigation under the False Claims Act, in the SEC and CFTC Whistleblower Programs, and in the IRS Whistleblower Program. Mr. Sullivan was co-counsel to Relators in two of the largest health care fraud *qui tam* recoveries in recent years: (1) the \$465 million settlement by Mylan, Inc. in 2017 for erroneously classifying its patented, brand name drug EpiPen as a generic drug to avoid its obligation to pay higher Medicaid rebates; and (2) the groundbreaking case that authorized use of statistical sampling to prove elements of FCA liability and damages, *United States ex rel. Glenda Martin v. Life Care Centers of America, Inc.* (E.D. TN), which in 2016 produced the largest health care fraud settlement in history against a skilled nursing facility chain.

Mr. Sullivan has worked with the False Claims Act since the late 1980s and has both defended and prosecuted cases under the False Claims Act. Mr. Sullivan helped draft Georgia’s two *qui tam* statutes, the 2007 “State False Medicaid Claims Act,” and the 2012 “Georgia Taxpayer Protection False Claims Act.” Since the December 2006 beginning of the new IRS Whistleblower Program, Mr. Sullivan has also represented IRS whistleblowers in submissions totaling billions of dollars. He has also worked with the IRS Whistleblower Office staff in presenting programs on best practices in pursuing IRS Whistleblower claims.

In 2009 and again in 2010, Mr. Sullivan was consulted by staff members of the U.S. Senate Banking Committee to discuss how the new SEC and CFTC Whistleblower Programs should operate. In 2011, he met with the SEC and CFTC Chairmen and senior staff to recommend changes to the proposed rules for SEC and CFTC Whistleblower claims. Mr. Sullivan is a graduate of the University of North Carolina and Vanderbilt Law School. He clerked for U.S. District Judge Marvin H. Shoob in Atlanta from 1984-86. He chairs the bi-annual “Whistleblower Law Symposium” for ICLE-GA. He also recently served as counsel to Larry D. Thompson in Mr. Thompson’s role as the Independent Compliance Monitor and Auditor of Volkswagen AG, with responsibilities that include coordinating with counsel across the globe to advise on legal requirements of countries in Europe, Asia, North America, and South America.

2 31 U.S.C. §§ 3729-33.

3 O.C.G.A. §§ 23-3-120 to 23-3-127.

fraud directed at taxpayer dollars.

Since its 1986 amendments created the modern Act, the federal FCA has been dramatically successful in recovering many billions of dollars in taxpayer funds from defendants who engaged in fraud or false claims. Especially in this time of tight state budgets, Sen. Charles Grassley (R-Iowa) and others have championed the FCA as a model for states – both to deter fraud in government contracts and programs, and to recover meaningful damages and penalties designed to make the states “whole” when they are defrauded. As Sen. Grassley argues, these laws work by providing incentives to private citizen “whistleblowers” (known as “relators”) to expose fraud against taxpayer funds by filing “*qui tam*”⁴ lawsuits on behalf of a government body.

In 2007, like many other states that sought to qualify for financial incentives established by Congress, Georgia took the first step by passing a state FCA that applies only to Medicaid spending, the “State False Medicaid Claims Act.”⁵

The 2012 Georgia Taxpayer Protection False Claims Act now extends Georgia’s protection of taxpayer dollars beyond Medicaid, to include protection of *all other spending by the state, and all spending by local governments*.

Moreover, the 2012 Act can be used by a wide array of “local government” entities. The

4 The term “*qui tam*” is derived from the Latin phrase, “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,” which means “who pursues this action on our Lord the King's behalf as well as his own.” *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 769 n.1 (2000).

5 O.C.G.A. §§ 49-4-168 to 49-4-168.6.

Act defines “local government” broadly to include “any Georgia county, municipal corporation, consolidated government, authority, board of education or other local public board, body, or commission, town, school district, board of cooperative educational services, local public benefit corporation, hospital authority, taxing authority, or other political subdivision of the state or of such local government, including MARTA.”

For attorneys who encounter this powerful anti-fraud law, this article should be useful in explaining the unique procedures of the FCA, as well as how it has been used by the federal and state governments.

I. Introduction to the False Claims Acts, Federal and State

All lawyers will benefit from understanding potential claims and liabilities under the federal and state False Claims Acts, especially those attorneys whose practices involve health care, procurement, financial services, and other industries that involve government spending. Health care increasingly has become the major focus of the federal government’s enforcement efforts, although fraud by financial institutions has produced significant recoveries as well.

Adding to the lawyer’s challenges, since 2009 Congress has amended the False Claims Act *three times*, primarily to overturn judicial decisions that once created obstacles to FCA actions.⁶ Those amendments also have created an important new basis of FCA liability – retention of overpayments – which has great significance especially to health care providers. These 2009-2010 amendments make the FCA a far more effective enforcement tool for the

⁶ Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (“FERA”); Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (“PPACA”); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376.

government, and thus a much greater problem for defendants accused of health care fraud.

Further, a wave of *new* “whistleblower” statutes has followed, inspired by the successes of the False Claims Act. These new laws include (1) an increasing number of state versions of the federal False Claims Act;⁷ (2) the 2006 enactment of new IRS Whistleblower Rewards Program;⁸ and (3) new “SEC Whistleblower” and “CFTC Whistleblower” programs, authorized in July 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”).⁹ By encouraging employees, contractors, and others to report allegations of fraud, these new whistleblower provisions create substantial concerns for health care organizations and other defendants alleged to be liable.

This article provides an overview of what lawyers should know about the federal False Claims Act and the newer state False Claims Acts. These state False Claims Acts, like the federal Act, have unique procedural requirements that are foreign to most lawyers.

This article explains how both the federal and state False Claims Acts work. It

⁷ See *infra* section IV.

⁸ The False Claims Act expressly “does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.” 31 U.S.C. § 3729(e). In December 2006, however, Congress used the False Claims Act as a model in establishing the new IRS Whistleblower Rewards Program, which provides incentives to “whistleblowers” to report violations of the Internal Revenue laws in excess of \$2 million. IRS Whistleblowers may receive 15-30% of the recovery. See 26 U.S.C. § 7623(b)(1) (providing for “an award at least 15 percent but not more than 30 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts)).” Regularly updated information about the IRS Whistleblower program may be found at http://www.whistleblowerlawyerblog.com/irs_rewards_program_tax/.

⁹ Section 922 of the Dodd-Frank Financial Reform Act provides for the first potentially meaningful rewards to whistleblowers by the Securities and Exchange Commission. (http://www.whistleblowerlawyerblog.com/2010/07/new_sec_whistleblower_program_1.html). Section 748 provides for similar rewards to whistleblowers by the Commodity Futures Trading Commission. (http://www.whistleblowerlawyerblog.com/2010/07/whistleblowers_reporting_deriv.html#more).

summarizes the background of the federal False Claims Act, outlines how it operates, and discusses the Act’s increasing use to combat fraud directed at public funds. This article also highlights some important differences between state False Claims Acts and the federal False Claims Act.

II. Why A “False Claims Act”?

Fraud is perhaps so pervasive and, therefore, costly to the Government due to a lack of deterrence. GAO concluded in its 1981 study that most fraud goes undetected due to the failure of Governmental agencies to effectively ensure accountability on the part of program recipients and Government contractors. The study states:

For those who are caught committing fraud, the chances of being prosecuted and eventually going to jail are slim. . . . The sad truth is that crime against the Government often does pay.¹⁰

Fraud – and allegations of fraud – plague government spending at every level. Today, as the federal government struggles to fund the hundreds of billions of dollars spent annually on health care through Medicare, Medicaid, and other programs; the Iraq and Afghanistan wars; the financial “bailout” measures enacted after the 2008 financial collapse; disaster relief efforts; and government grants and programs of every description, there is no shortage of opportunities for fraud against the public fisc.

The False Claims Act has been the federal government’s “primary” weapon to recover losses from those who defraud it.¹¹ The Act not only authorizes the government to pursue

10 S. REP. No. 99-345, at 3 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5268 [hereinafter “Legislative History”] (quoting 1981 GAO Report to Congress, “Fraud in Government Programs: How Extensive Is It? How Can It Be Controlled?”).

11 *Id.* at 2.

actions for treble damages and penalties, but also empowers and provides incentives to *private citizens* to file suit on the government’s behalf as “*qui tam* relators.” Over the past three decades, recoveries for the federal government have grown steadily since Congress amended the Act in 1986 to encourage greater use of the *qui tam* provisions, as part of a “coordinated effort of both the [g]overnment and the citizenry [to] decrease this wave of defrauding public funds.”¹²

The federal False Claims Act since 1986 has been successful in recovering more than \$56 billion,¹³ increasingly through *qui tam* lawsuits brought by private citizens. In light of the federal Act’s successes, Congress in the Deficit Reduction Act of 2005¹⁴ created a large financial “carrot” for states that adopt state versions of the False Claims Act. Any state that passes its own “False Claims” statute with *qui tam* or whistleblower provisions that are at least as effective as those of the federal Act becomes eligible for a 10% increase in its share of Medicaid fraud recoveries.¹⁵

Thus, the impetus for states to enact a False Claims Act is this incentive of more dollars. Since 2006, the number of states with a state version of the False Claims Act covering at least

12 *Id.*

13 See <https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017>.

14 *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4.

15 *Id.* § 6031. In the legislative hearings that led to passage of the Georgia State False Medicaid Claims Act (at which this writer also testified), former Inspector General Doug Colburn of the Georgia Department of Community Health testified that Georgia currently pays approximately 38 cents of every dollar spent in the Georgia Medicaid program, and thus Georgia currently receives 38% of Medicaid fraud recoveries. This ten point increase to 48% in Georgia’s share of Medicaid fraud recoveries would thus effectively increase Georgia’s share of these recoveries by more than 26% in actual dollars (i.e., by the fraction 10/38).

Medicaid has grown to at least twenty-nine.¹⁶ Other states¹⁷ have considered enacting similar statutes of their own.

III. Background of the Federal False Claims Act

Although the False Claims Act may be the best known *qui tam* statute, it is far from being the first. *Qui tam* actions date back to English law in the 13th and 14th Centuries. This tradition took root in the American colonies and, by 1789, states and the new federal government had authorized *qui tam* actions in various contexts.¹⁸

16 As of February 27, 2019, state “False Claims” statutes are in effect in at least the following other states: California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, and the District of Columbia. See CAL. GOV’T CODE §§ 12650-12656; COL. REV. STAT. §§ 25.5-4-303.5 to 25.5-4-310; CONN. GEN. STAT. ANN. §§ 17B-301 to 17A-301P; DEL. CODE ANN. tit. 6, §§ 1201-1209; FLA. STAT. §§ 68.081-68.09; HAW. REV. STAT. §§ 661-21 to 661-29; 740 ILL. COMP. STAT. §§ 175/1 to 175/8; IND. CODE §§ 5-11-5.5-1 to 5-11-5.5-18; IOWA CODE ANN. §§ 685.1 to 685.7; LA. REV. STAT. ANN. §§ 46:437.1-440.3; MD. HEALTH GEN. §§ 2-601 to 2-611; MASS. GEN. LAWS 12 §§ 5A; MICH. COMP. LAWS §§ 400.601-400.613; M.S.A. §§ 15C.01 to 15C.16; MONT. CODE ANN. §§ 17-8-401 to 17-8-412; NEV. REV. STAT. §§ 357.010 to 357.250; N.H. REV. STAT. ANN. §§ 167:61 to 167:61-e; N.J. STAT. ANN §§ 2A:32C-1 to 2A:32C-17; N.M. STAT. §§ 27-14-1 to 27-14-15; N.Y. STATE FIN. LAW §§ 187-194 (McKinney); N.C.G.S.A. §§ 1-605 to 1-618; OKLA. STAT. tit. 63, §§ 5053-5053.7; R.I. GEN. LAWS §§ 9-1.1-1 to 9-1.1-8; TENN. CODE ANN. §§ 71-5-181 to 71-5-185; TEX. HUM. RES. CODE ANN. §§ 36.001 to 36.132; VT. STAT. ANN., tit. 32, §§ 630 to 642; VA. CODE ANN. §§ 8.01-216.1 to 8.01-216.19; WASH. REV. CODE ANN. §§ 74.66.10 to 74.66.130 (WEST); and D.C. CODE §§ 2-308.13-2.308.21.

A regularly updated list of state False Claims Acts appears at www.taf.org/statefca.htm. For an excellent 2005 article on state False Claims Acts, see James F. Barger, Jr., Pamela H. Bucy, Melinda M. Eubanks, and Marc S. Raspanti, *States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts*, 80 TUL. L. REV. 465 (2005) [hereinafter *State False Claims Act Study*].

17 State False Claims Acts also have been proposed in at least Arkansas, Kansas, Mississippi, Missouri, North Dakota, Pennsylvania, and South Carolina. See John T. Boese, *FraudMail Alert*, <http://www.friedfrank.com/wcc/pdf/fm070314.pdf>.

18 See, e.g., *Marvin v. Trout*, 199 U.S. 212, 225 (1905) (“Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence for hundreds of years in England, and in this country ever since the foundation of our

According to one writer:

*In the early years of the Nation, the qui tam mechanism served a need at a time when federal and state governments were fairly small and unable to devote significant resources to law enforcement. As the role of the Government expanded, the utility of private assistance in law enforcement did not diminish. If anything, changes in the role and size of Government created a greater role for this method of law enforcement.*¹⁹

A. Birth of the False Claims Act: The Civil War prompted Congress to enact the original False Claims Act in 1863. As government spending on war materials increased, dishonest government contractors took advantage of opportunities to defraud the United States government. “Through haste, carelessness, or criminal collusion, the state and federal officers accepted almost every offer and paid almost any price for the commodities, regardless of character, quality, or quantity.”²⁰

One senator explained how the *qui tam* provisions of the Act were intended to work:

*The effect of the [qui tam provisions] is simply to hold out to a confederate a strong temptation to betray his co-conspirator, and bring him to justice. The bill offers, in short, a reward to the informer who comes into court and betrays his co-conspirator, if he be such; but it is not confined to that class. . . . In short, sir, I have based the [qui tam provision] upon the old fashioned idea of holding out a temptation and setting a rogue to catch a rogue, which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.*²¹

government.”) See generally CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 2.3, at 34-36 (West 2004).

19 SYLVIA, *supra* note 18 § 2:6, at 41.

20 *Id.* § 2:6, at 42 (quoting 1 FRED ALBERT SHANNON, THE ORIGINATION AND ADMINISTRATION OF THE UNION ARMY, 1861-65, at 55-56, 58 (1965) (other sources quoted omitted)).

21 *Id.* § 2:6, at 43 (quoting Cong. Globe, 37th Cong., 3d Sess., 955-56 (1863)).

The original Act provided for double damages, plus a \$2,000 forfeiture for each claim submitted.²² If a private citizen or “relator” used the *qui tam* provision to file suit, the government had no right to intervene or control the litigation. A successful “relator” was entitled to one-half of the government’s recovery.²³

The Act survived in substantially its original form until World War II.²⁴ In a classic and oft-quoted 1885 passage, one court rejected the argument that courts should limit the statute’s reach on the grounds that *qui tam* actions were poor public policy:

The statute is a remedial one. It is intended to protect the treasury against the hungry and unscrupulous host that encompasses it on every side, and should be construed accordingly. It was passed upon the theory, based on experience as old as modern civilization that one of the least expensive and most effective means of preventing frauds on the treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.²⁵

B. “Over-Correction” of the False Claims Act: Until World War II, perhaps because of the relatively small amount of government spending compared to the modern era, the Act did not

22 Legislative History, *supra* note 10.

23 Act of March 2, 1863, ch. 67, § 6, 12 Stat. 698 (discussed in SYLVIA, *supra* note 18, § 2:6, at 44 & n.18).

24 Certain amendments to the Act did occur in the early 1900s. SYLVIA, *supra* note 18, § 2.6, at 44 & n.18. In addition, the United States Supreme Court declined to limit the Act’s application in 1937 in *United States v. Kapp*, 302 U.S. 214 (1937). In *Kapp*, the Supreme Court rejected the defendant’s argument that the government must show a monetary loss and that the representations in question were not material. *Id.* at 217-18.

25 *United States v. Griswold*, 24 F. 361, 365-66 (D. Or. 1885).

attract much attention.²⁶ World War II then spawned various *qui tam* actions over defense procurement fraud. Some relators sought to exploit what was effectively an unintended “loophole” in the Act that permitted them to file “parasitic” lawsuits. These relators simply copied the information contained in criminal indictments, when the relator had no information to bring to the government’s attention independently.²⁷

In 1943 the Supreme Court in *United States ex rel. Marcus v. Hess*²⁸ held that it was up to Congress to make any desired changes in the Act to eliminate “parasitic” lawsuits.²⁹ Congress amended the Act that same year to do so. The 1943 Amendments eliminated jurisdiction over *qui tam* actions that were based on evidence or information in the government’s possession, even if the relator had provided the information to the government.³⁰

In addition, Congress in 1943 also gave the government the right to intervene and litigate cases filed by *qui tam* relators. The 1943 amendments also dramatically reduced incentives for *qui tam* suits to be filed, by reducing to 10% the maximum amount of the recovery that a relator could receive if the government intervened, with a 25% maximum award if the government did not intervene and the private citizen alone obtained a judgment or settlement.³¹

26 See generally JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS §§ 1-9, 1-10 (1993).

27 Legislative History, *supra* note 10, at 11.

28 317 U.S. 537 (1943).

29 *Id.* at 546-47.

30 Act of December 23, 1943, ch. 377, 57 Stat. 608.

31 SYLVIA, *supra* note 18, § 2:8, at 51.

C. The 1986 Amendments Establish the Modern False Claims Act: By the 1980s, both the Justice Department and congressional leaders realized that the 1943 amendments and “several restrictive court interpretations”³² had made the False Claims Act ineffective. Congress acted decisively in 1986 with major amendments that breathed life into the False Claims Act.³³

A representative of a business association testified that the 1986 Amendments were:

supportive of improved integrity in military contracting. The bill adds no new layers of bureaucracy, new regulations, or new Federal police powers. Instead, the bill takes the sensible approach of increasing penalties for wrongdoing, and rewarding those private individuals who take significant personal risks to bring such wrongdoing to light.³⁴

The 1986 Amendments increased financial and other incentives for *qui tam* relators to bring suits on behalf of the government. Congress increased the damages recoverable by the government from double damages to treble damages, and increased the monetary penalties to a minimum of \$5,000 and a maximum of \$10,000 per false claim. The 1986 Amendments also increased the *qui tam* relator’s share of recovery to a range of 15% to 25% in cases in which the government intervenes, and 25% to 30% in cases in which the government does not intervene, plus attorney’s fees and costs.

The 1986 Amendments also clarified the standard of proof required and made defendants

32 Legislative History, *supra* note 10.

33 S. 1562, 99th Cong., 2d Sess. (1986) (False Claims Reform Act) (discussed in Legislative History, *supra* note 10).

34 Legislative History, *supra* note 10, at 14.

liable for acting with “deliberate ignorance” or “reckless disregard” of the truth. Congress also lengthened the statute of limitations to as much as ten years, modernized jurisdiction and venue provisions, and made other changes as well.³⁵

D. The 2009 and 2010 Amendments Remove Judicially Created Obstacles to the False Claims Act: Responding to a variety of court decisions since 1986 that had limited the FCA’s effectiveness, Congress again acted decisively in 2009 and 2010 with amendments, in three stages:

First, the 2009 Fraud Enforcement and Recovery Act (“FERA”) legislatively overruled judicial decisions that had limited the FCA’s reach, including *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008); *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005); and *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 376 F. Supp. 2d 617 (E.D. Va. 2005), *rev’d*, 562 F.3d 295 (4th Cir. 2009).

The major effects of the 2009 FERA amendments included the following:

1. The amendments expanded the definition of “claim,” and fraud directed against government *contractors, grantees* and *other recipients* is now plainly covered by the FCA.
2. Funds *administered by* the United States government (such as in Iraq) are now included within the FCA’s protections.
3. *Retaining overpayments* of money is now an explicit basis of liability, which is an important broadening of the Act from the perspective of health care providers, among others.
4. Liability for “*conspiracy*” to violate the FCA is far broader, and now includes conspiring to commit a violation of any substantive FCA theory of liability.

³⁵ See section IV, *infra*.

5. Protection of whistleblowers and others against "*retaliation*" now extends not only to "employees," but also to "contractors" and "agents"; and persons other than "employers" potentially may be held liable for retaliation.
6. In investigating, the government now has authority to use "civil investigative *demands*" more broadly to gather evidence and take testimony, and to *share information* more with state and local authorities and with whistleblowers/relators.
7. A standard definition of what is "material" now applies in False Claims Act cases.³⁶
8. The *statute of limitations* has been clarified in *qui tam* cases to facilitate the government's asserting its own claims.

Second, in 2010, Congress made other important changes to the FCA. From a relator's perspective, perhaps most significant was eliminating language in the "public disclosure" provision (section 3730(e)(4)(a)) that sometimes deprived the court of subject matter jurisdiction. Congress rewrote that provision so that the court no longer loses subject matter jurisdiction even if a "public disclosure" has occurred. Another change to this section was to empower the government to prevent dismissals based on "public disclosure" through the following language: "the court shall dismiss an action or claim under this section, unless opposed by the Government" ³⁷

From a health care entity's perspective, the most important FCA changes may be that it (1) clarified and extended liability for overpayments identified but retained by providers in

³⁶ See also *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2002, 195 L. Ed. 2d 348 (2016)(addressing materiality under FCA).

³⁷ 31 U.S.C. § 3730 (e)(4)(A).

Medicare and Medicaid claims;³⁸ and (2) made explicit that claims which include items or services resulting from an Anti-Kickback Act violation constitute false claims under the FCA.³⁹

Third, also in 2010, Congress created a uniform three year statute of limitations for claims of “retaliation” pursuant to section 3730(h). It also corrected an apparent drafting error in FERA’s 2009 changes to the same section by restoring its intended breadth. The anti-retaliation provision now encompasses (a) not only the pre-FERA definition of “protected conduct” as “lawful acts done . . . in furtherance of [an FCA action]” (which FERA had mistakenly dropped from the statute), but also (b) FERA’s expansion of the definition of “protected conduct” to include “other efforts to stop 1 or more violations [of the FCA]”⁴⁰

IV. Overview of How the Modern False Claims Act Works (with Comparisons to Some State False Claims Acts)

A. Conduct Prohibited

The federal False Claims Act imposes civil liability under several different theories, only four of which were generally used before FERA. FERA has added an additional theory of liability for retention of overpayments, which now will likely be used quite often, especially in health care cases:

First, the Act makes liable any person who knowingly presents, or causes to be presented, a “false or fraudulent claim for payment or approval.”⁴¹

38 Pub. L. No. 111-148, § 6402.

39 Pub. L. No. 111-148, § 6402(f).

40 31 U.S.C. § 3730(h).

41 31 U.S.C. § 3729(a)(1)(A).

Second, the Act creates liability for using a “false record or statement.” It imposes liability on any person who “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.”⁴²

“Claim” is broadly defined, and is not limited to submissions made directly to the federal government:

(2) the term "claim"--

(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that--

(i) is presented to an officer, employee, or agent of the United States; or

(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government--

(I) provides or has provided any portion of the money or property requested or demanded; or

(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property.⁴³

Third, since the government also can be defrauded when a private entity *underpays* or

42 *Id.* § 3729(a)(1)(B).

43 *Id.* § 3729(b)(2).

avoids paying an obligation to the government, the Act contains what is known as a “reverse false claim” provision. FERA has added language to this provision to establish liability for *retention of overpayments*. This provision of the FCA creates liability for any person who “knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, *or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.*”⁴⁴ For example, a company that is obligated to pay royalties to the government under an oil lease can be held liable if it uses false records or statements to pay less than what it owes. Health care providers can now also be liable for retaining identified overpayments from federal health care programs such as Medicare and Medicaid.

FERA has introduced the following definition of “obligation”:

(3) the term "obligation" means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment;

Fifth, the False Claims Act imposes liability under a “conspiracy” provision, which FERA has broadened to cover conspiracy to violate any substantive provision of the FCA. Any person who “conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G)” is liable under this provision.⁴⁵

State False Claims Acts compared: *Before FERA included retention of overpayments*

44 *Id.* § 3729(a)(1)(G). The Act also lists three little-used bases of liability in subsections (a)(1)(D), (E), and (F), which are omitted from this discussion.

45 *Id.* § 3729(a)(1)(C).

as a basis of FCA liability, several states—including Hawaii, Massachusetts, Nevada, Tennessee, and Wisconsin—had expanded the federal Act’s other four commonly-used theories of liability listed above. These state laws recognized a legal theory for holding liable a person or entity who is the “beneficiary” of the “inadvertent submission” of a false or fraudulent claim, if that person or entity fails to disclose (and presumably correct) the false claim after discovering it.⁴⁶ Now, since the 2012 Act took effect, Georgia’s two FCAs both provide for liability for “retention of overpayments.”

Moreover, Tennessee’s False Claims Act reaches beyond false or fraudulent “claims” and imposes liability for false or fraudulent “conduct” that apparently does not necessarily involve “claims” submitted to the state. This state law adds a new category of liability for “any false or fraudulent conduct, representation, or practice in order to procure anything of value directly or indirectly from the state or any political subdivision.”⁴⁷

B. Retaliation Protection for Employees, Contractors, and Agents

As noted, the federal False Claims Act also creates a cause of action for damages for retaliation against employees, contractors, and agents who assist in the investigation and prosecution of False Claims Act cases.⁴⁸ This cause of action belongs to the employee alone, and

⁴⁶ *See, e.g.*, TENN. CODE ANN. § 4-18-103 (imposing liability on a “beneficiary of an inadvertent submission of a false claim to the state or a political subdivision, [who] subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim”). *See also* HAW. REV. STAT. § 661-21 (similar provision for failing to disclose inadvertent submission of false claim after discovery of submission); MASS. GEN. LAWS 12 § 5B (similar provision); NEV. REV. STAT. § 357.040 (similar provision); WIS. STAT. ANN. § 20.931(2)(h) (similar provision).

⁴⁷ TENN. CODE ANN. § 4-18-103.

⁴⁸ 31 U.S.C. § 3730(h).

the government does not share in any recovery for retaliation.

As summarized above, FERA and Dodd-Frank have modified the federal FCA retaliation provision in section 3730(h) so that it now provides as follows:

(h) Relief from retaliatory actions.

(1) In general. Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

(2) Relief. Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.

(3) Limitation on Bringing Civil Action. A civil action under this subsection may not be brought more than 3 years after the date when the retaliation occurred.

31 U.S.C. § 3730(h).

*State False Claims Acts compared: The New Jersey False Claims Act goes further than the federal Act's retaliation provision. It authorizes, "where appropriate, punitive damages," and affirmatively prohibits employers from attempting to restrict employees' abilities to report evidence of fraud to the government.*⁴⁹

49 The "employee protections" of the New Jersey False Claims Act are set forth below:

§ 2A:32C-10. Employer policies restricting employees from disclosing information or reporting violations prohibited; employee protections; remedies for violations

a. No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a State or law enforcement agency or from

C. Broad Definition of “Knowing” and “Knowingly”

The federal Act’s “scienter” requirement of “knowingly” presenting false claims, or “knowingly” using false records or statements, is broadly defined as well. A person is liable not only when acting with “actual knowledge,” but also when acting in “deliberate ignorance” or

acting to further a false claims action, including investigating, initiating, testifying, or assisting in an action filed or to be filed under this act.

b. No employer shall discharge, demote, suspend, threaten, harass, deny promotion to, or in any other manner discriminate against an employee in the terms and conditions of employment because of lawful acts done by the employee on behalf of the employee or others in disclosing information to a State or law enforcement agency or in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this act.

c. An employer who violates subsection b. of this section shall be liable for all relief necessary to make the employee whole, including reinstatement with the same seniority status such employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, compensation for any special damage sustained as a result of the discrimination, and, where appropriate, punitive damages. In addition, the defendant shall be required to pay litigation costs and reasonable attorneys' fees associated with an action brought under this section. An employee may bring an action in the Superior Court for the relief provided in this subsection.

d. An employee who is discharged, demoted, suspended, harassed, denied promotion, or in any other manner discriminated against in the terms and conditions of employment by his employer because of participation in conduct which directly or indirectly resulted in a false claim being submitted to the State shall be entitled to the remedies under subsection c. of this section if, and only if, both of the following occurred:

(1) The employee voluntarily disclosed information to a State or law enforcement agency or acts in furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed.

(2) The employee had been harassed, threatened with termination or demotion, or otherwise coerced by the employer or its management into engaging in the fraudulent activity in the first place.

N.J. STAT. ANN. § 2A:32C-10.

“reckless disregard” of the truth or falsity of the information in question.⁵⁰ The Act also makes explicit that no “specific intent to defraud” need be shown to impose liability, and thus rejects this traditional “fraud” standard.

***State False Claims Acts compared:** The state False Claims Acts typically incorporate the same broad definitions of “knowing” and “knowingly,” and likewise makes clear that “[n]o proof of specific intent to defraud is required.” States have no leeway in this regard if they wish to qualify for the additional funds under the Deficit Reduction Act. In fact, when the Georgia bill was under consideration in 2007, Indiana’s statute had already been determined not to qualify that state for additional funds under the Deficit Reduction Act, precisely because the Indiana statute did not define “knowing” and “knowingly” as broadly as does the federal Act.⁵¹*

D. Damages and Penalties Under the False Claims Act

Exposure of defendants in False Claims Act cases can be enormous. First, the Act provides for *treble* damages—“3 times the amount of damages which the Government sustains because of the act of that person.”⁵²

Second, the Act provides for a civil penalty of \$5,000 to \$10,000 for each false claim submitted, an amount that has been adjusted upward for inflation periodically.⁵³ For civil

⁵⁰ *Id.* § 3729(b).

⁵¹ See <http://www.oig.hhs.gov/fraud/docs/falseclaimsact/Indiana.pdf>.

⁵² 31 U.S.C. § 3729(a)(1). In specified circumstances in which the defendant reports the fraud to the government promptly and cooperates fully, the Act provides for double damages. 31 U.S.C. § 3729(a)(2).

⁵³ 31 U.S.C. § 3729(a)(1). See 28 U.S.C. § 2461; 28 C.F.R. § 85.3(9) (2006).

penalties assessed after August 1, 2016, for violations that occurred after November 2, 2015, the minimum penalty increased from \$5,500 to \$10,781, and the maximum penalty increased from \$11,000 to \$21,563.⁵⁴ Thereafter, penalties have been adjusted for inflation to a range of \$10,957-\$21,916 per violation starting February 3, 2017, and then to \$11,181-\$22,363 per violation for penalties assessed after January 29, 2018.⁵⁵

***State False Claims Acts:** The state Acts likewise provide for treble damages and penalties that are typically \$5,500 to \$11,000 for each false claim submitted, although states are free to impose larger penalties. For instance, under the New York FCA enacted in 2007 and substantially amended in 2010 in light of FERA, penalties range from \$6,000 to \$12,000 for each false or fraudulent claim.⁵⁶*

E. Some of the Peculiar Jurisdictional and Procedural Requirements In *Qui Tam* Cases

The False Claims Act establishes a wholly different process for *qui tam* actions from the usual one encountered in civil litigation. The Act has unique jurisdictional and procedural requirements.

The *qui tam* relator brings the lawsuit for the relator and for the United States, in the name of the United States.⁵⁷ The action can also be brought in the name of one or more states, if

⁵⁴ 28 C.F.R. § 85.5.

⁵⁵ See <https://www.gpo.gov/fdsys/pkg/FR-2018-01-29/pdf/2018-01464.pdf>.

⁵⁶ N.Y. STATE FIN. LAW § 189 (McKinney).

⁵⁷ 31 U.S.C. § 3730(b)(1).

applicable. The Complaint must be filed “in camera” and “under seal,” and must remain under seal for at least 60 days.⁵⁸ The relator must serve the government under Rule 4 of the Federal Rules of Civil Procedure with a “copy of the complaint and written disclosure of substantially all material evidence and information the person possesses.”⁵⁹

In reality, courts regularly have extended the seal for many months (or even years) at the government’s request, although some courts are becoming more restrictive. The purpose of the seal extensions is to permit the government to evaluate and investigate the case and make its decision as to whether to intervene. Thus, it is not uncommon for the defendant to receive no notice for more than a year that it has been sued in a *qui tam* action, even as the government meets with the relator and relator’s counsel to develop the case against the defendant. Nonetheless, defense counsel may infer the existence of a *qui tam* action when the client or its employees are contacted by government agents.

If the government elects to intervene, it assumes primary responsibility for prosecuting the case, although the relator remains a party with certain rights to participate.⁶⁰ The defendant is served once the complaint is unsealed, and has 20 days after service to respond.⁶¹

If the government intervenes, it is not “bound by an act of the person bringing the

58 31 U.S.C. § 3730(b)(2).

59 *Id.*

60 *Id.* § 3730(c)(1).

61 *Id.* § 3730(b)(3).

action.”⁶² The government can file its own complaint and can expand or amend the allegations made.⁶³ Once it has intervened, the government also has the right to dismiss the case notwithstanding the relator’s objections, but the relator has a right to be heard on the issue.⁶⁴

The government may petition the court before intervention for a partial lifting of the seal in order to disclose the complaint to the defendant and discuss resolution of the case, even before it decides whether to intervene.

If the government elects not to intervene, the relator has the right to “conduct the action.”⁶⁵ Although the relator must prosecute the case without the government, as stated the relator is entitled to a larger share of any recovery, 25-30%, in non-intervened cases.⁶⁶

After intervention, the government is authorized to settle the case even if the relator objects, but the relator has a right to a “fairness” hearing on any such settlement. In actuality, a relator’s objections are highly unlikely to stop a settlement that the government, after intervention, seeks to make.

Before 2010, the Act stated that, when there is an action “based upon the public

62 *Id.* § 3730(c)(1).

63 *See id.*

64 *Id.* § 3730(c)(2)(A).

65 *Id.* § 3730(c)(3).

66 Even “non-intervened” cases sometimes result in substantial liabilities to defendants. For example, in *United States ex rel. Franklin v. Parke Davis*, No. 96-11651-PBS (D. Mass.), a relator pursued an action over the off-label marketing of Neurontin, and the government elected not to intervene. Ultimately, the defendant entered into a global settlement of \$430 million, of which \$152 million was to settle False Claims Act liability, and \$38 million was to settle civil liabilities to the fifty states. *See* <http://www.usdoj.gov/civil/foia/elecread/2004/Warner-Lambert%202004.pdf>.

disclosure of allegations or transactions” in one of three specified categories of places where disclosures can occur, the court shall lack jurisdiction over the action, unless “the person bringing the action is an original source of the information.” The three specified places of “public disclosure” were “[1] in a criminal, civil, or administrative hearing, [2] in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or [3] from the news media.”⁶⁷

67 The “public disclosure” provision before PPACA provided as follows:

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.

[Former] 31 U.S.C. § 3730(e)(4)(A). Since 2010, this section of the Act provides as follows:

(4) (A) The court shall dismiss an action or claim under this section, *unless opposed by the Government*, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed-

- (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;
- (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or
- (iii) 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.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions,

Amendments in 2010 have removed this jurisdictional bar, have authorized the government to prevent dismissal on this basis if it chooses, and have relaxed the standard for relators to establish that they are an “original source” as a means of avoiding dismissal on that basis as well. In addition, the amendments limited the type of public disclosures in question to federal sources, and thus pre-empted for future violations the Supreme Court’s ruling shortly thereafter in 2010 in *Graham County Soil & Water Conservation District v. United States ex rel. Wilson*, 130 S. Ct. 1396 (2010)(state report created public disclosure under prior version of FCA).

State False Claims Acts compared: *The state False Claims Acts establish essentially the same procedures, although most have not yet been amended to conform to the 2009-2010 FCA amendments discussed above. For example, the Georgia Act directs that the complaint and “written disclosure of substantially all material evidence and information shall be served on the Attorney General.” The complaint must be filed in camera and shall remain under seal for at least 60 days, and it is not served on the defendant while it remains under seal. The Attorney General may move to extend the time under seal in order to investigate the allegations of the complaint, all pursuant to section 49-4-168.1(c).*

V. The Trend of Recent Recoveries Under the False Claims Act

Over the past twenty-five years since the modern False Claims Act was established

and who has voluntarily provided the information to the Government before filing an action under this section.” (31 U.S.C. 53730 (e)(4)(A) (Emphasis supplied).

through the 1986 Amendments, the federal government's recoveries of dollars have grown astronomically, especially in health care cases. The Department of Justice ("DOJ") statistics⁶⁸ tell the story:

In 1987, the government's recoveries in *qui tam* cases totaled *zero*, presumably because the 1986 Amendments had just taken effect; and total recoveries under the False Claims Act were just \$86 million. The following year, *qui tam* and other False Claims Act settlements and judgments began a steady climb upward, exceeding \$200 million by 1989, and \$300 million by 1991. By 1994, the government's recoveries broke the \$1 billion mark for the first time, with \$380 million of that amount attributable to *qui tam* case recoveries alone.

In 2000, the government recovered more than \$1.5 billion, of which \$1.2 billion was derived from *qui tam* actions. In 2001, the government recovered more than \$1.7 billion, with almost \$1.2 billion of that amount from *qui tam* cases. With the exception of 2004, in each year since 2000 the government has recovered more than *a billion dollars per year* under the False Claims Act, and *qui tam* actions were responsible for the lion's share of those recoveries. For example, in 2003, government recoveries exceeded \$2.2 billion, of which \$1.4 billion came from *qui tam* cases. Similarly, in 2005, of the government's total recovery of \$1.4 billion, \$1.1 billion of that amount came from *qui tam* cases.

In 2014, DOJ set a record with \$5.69 billion recovered from cases involving fraud and false claims, with \$3.1 billion in recoveries from financial institutions, and \$2.3 billion in health

68 See Department of Justice statistics reprinted at <http://www.taf.org/statistics.htm>.

care fraud recoveries.⁶⁹ In 2015, DOJ recovered \$3.5 billion, of which \$1.9 billion came from companies and individuals in the health care industry. The next largest category of recoveries was government contracts, which produced \$1.1 billion in recoveries.⁷⁰ In 2016, DOJ recovered \$4.7 billion recovered, of which \$2.5 billion came from the health care industry.⁷¹

In 2017, DOJ recovered \$3.7 billion, of which \$2.4 billion involved the health care industry, including drug companies, hospitals, pharmacies, laboratories, and physicians.⁷² In 2018, DOJ recovered \$2.8 billion in settlements and judgments from civil cases involving fraud and false claims against the government. \$2.5 billion of that amount involved the health care industry, including drug and medical device manufacturers, managed care providers, hospitals, pharmacies, hospice organizations, laboratories, and physicians. *Qui tam* cases produced more than \$2.1 billion of the \$2.8 billion recovered in 2018.⁷³

69 <http://www.justice.gov/opa/pr/justice-department-recovers-nearly-6-billion-false-claims-act-cases-fiscal-year-2014>.

70 <https://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015>.

71 <https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016>.

72 <https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017>.

73 <https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018>.

2019 recoveries by DOJ were \$3 billion in settlements and judgments from civil cases involving fraud and false claims against the government.⁷⁴ \$2.6 billion of that amount was from the health care industry, including drug and medical device manufacturers, managed care providers, hospitals, pharmacies, hospice organizations, laboratories, and physicians.⁷⁵ 2019 is the tenth consecutive year that civil health care fraud settlements and judgments have exceeded \$2 billion.⁷⁶ Recoveries since 1986, when Congress substantially amended the False Claims Act, now total more than \$62 billion.⁷⁷

It is interesting that, while defense procurement fraud both inspired the Act and was the largest source of recoveries at the time of the 1986 Amendments, health care cases usually now lead in recoveries, as health care costs have grown as a percentage of the federal budget. By industry, in 1987 the defense industry was the largest source of cases under the False Claims Act.⁷⁸ The health care industry accounted for only 12% of cases under the False Claims Act in

74 <https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019>.

75 *Id.*

76 *Id.*

77 *Id.*

78 SYLVIA, *supra* note 18, § 2:13, at 63.

1987; that percentage grew to 54% by 1997.⁷⁹ In 2008, health care produced more than 80% of the government's recoveries,⁸⁰ and that figure grew to 83% in 2010.⁸¹ As noted, financial industry fraud has now produced several billion in recoveries in recent years, although that trend may be attributable to cases resulting from the 2008 economic collapse and thus may or may not continue.

In short, the health care industry now typically accounts for the vast majority of settlements and judgments obtained by the federal government for fraud and false claims.

VI. Other States' Experiences With Their Own False Claims Acts

As noted, at least twenty-nine states now have a False Claims statute, and many other states are considering similar laws.⁸² The financial incentives of the Deficit Reduction Act of 2005 have not only prompted states that lacked False Claims statutes to enact them, but also have caused many states wishing to qualify for the additional funds to amend their existing False Claims statutes.

In essence, while states may enact "tougher" or more comprehensive laws than the

⁷⁹ *Id.* § 2:14, at 64.

⁸⁰ See <http://www.usdoj.gov/opa/pr/2008/November/08-civ-992.html>.

⁸¹ <http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html>.

⁸² See *supra* notes 16 and 17 for lists of states.

federal False Claims Act, states with “weaker” or less effective laws—as judged by the standards of the Deficit Reduction Act—will not qualify for the additional funds.⁸³

Seven of the first ten states whose statutes were scrutinized by the Office of Inspector General (OIG) quickly learned this lesson when OIG disapproved their state statutes.⁸⁴ These included California (which lacked a minimum penalty), Florida (which omitted “fraudulent” from its definition of claims), Indiana (which did not make defendants liable for “deliberate ignorance” and “reckless disregard”), Louisiana (which did not permit the state to intervene in

83 Under the Deficit Reduction Act, the Office of Inspector General of HHS, in consultation with the Justice Department, must determine that the state law meets the following criteria in order to qualify for the increased share of Medicaid funds recovered:

- (1) The law establishes liability to the State for false or fraudulent claims described in section 3729 of title 31, United States Code, with respect to any expenditure described in [31 U.S.C. § 1396b(d)].
- (2) The law contains provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in sections 3730 through 3732 of Title 31, United States Code.
- (3) The law contains a requirement for filing an action under seal for 60 days with review by the State Attorney General.
- (4) The law contains a civil penalty that is not less than the amount of the civil penalty authorized under section 3729 of Title 31, United States Code.

42 U.S.C. § 1396h(b).

84 The Office of Inspector General’s reviews of these state laws may be found at <http://oig.hhs.gov/fraud/falseclaimsact.asp>.

cases, set too low a percentage for whistleblowers to recover, and set no minimum penalty), Michigan (which omitted penalties and liability for decreasing or avoiding an obligation to pay the government, i.e., a “reverse false claim”), Nevada (which had a statute of limitations too short and a minimum penalty too low), and Texas (which did not permit the whistleblower to litigate the case if the state did not, and which provided for lower percentage shares to whistleblowers and lower penalties). Most of these states have gone back to the drawing board to correct these deficiencies.

In sum, the Deficit Reduction Act has set minimum standards for state False Claims Acts for states wishing to receive these additional funds. In plain English, the state laws must protect at least Medicaid funds, and they must be at least as effective as the federal False Claims Act, especially in rewarding and facilitating *qui tam* actions for false or fraudulent claims, with damages and penalties no less than those under the federal Act.⁸⁵

In addition, because of the 2009 and 2010 federal False Claims Act amendments, OIG gave all states until 2013 to amend their state Acts to be consistent with the current federal Act, or else lose the DRA benefit.⁸⁶ Many state False Claims laws were already in transition after 2006. States whose laws have been “disapproved” by OIG began to amend their statutes to meet the

⁸⁵ 42 U.S.C. § 1396h(b)(4).

⁸⁶ <http://oig.hhs.gov/fraud/state-false-claims-act-reviews/index.asp>.

requirements for obtaining the additional funds under the Deficit Reduction Act, as Florida and Texas accomplished in 2007. While these laws are in flux, some significant differences from the “Medicaid-only” laws such as Georgia’s new State False Medicaid Claims Act are likely to remain.

First, the majority of state False Claims statutes protect the state’s funds generally, rather than protecting only state Medicaid funds, as Georgia’s 2007 State False Medicaid Claims Act was limited. Just as the federal False Claims Act is not limited to health care fraud, but encompasses fraud against the government generally (except for Internal Revenue violations, which are now covered by the new IRS Whistleblower program), many states have used these statutes to protect public funds in general from fraud. Those states include California, Delaware, Florida, Georgia (under the 2012 Act), Hawaii, Illinois, Indiana, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Virginia, and Tennessee.⁸⁷ New York’s False Claims Act—perhaps the most comprehensive state FCA in the country--also includes non-payment and underpayment of taxes owed to the state.

Because states have this leeway under the Deficit Reduction Act to pass laws that may be “tougher” or more “effective” than the federal Act, some states have set the statutory penalties

⁸⁷ See *supra* note 16.

higher than the federal level of \$5,500 to \$11,000 per claim. For instance, under the New York FCA enacted in 2007 and amended in 2010, penalties range from \$6,000 to \$12,000 for each false or fraudulent claim.⁸⁸

Some other states authorize a higher percentage of the state's recovery that a relator (whistleblower) may receive, instead of the percentages that the federal False Claims Act authorizes: 15-25% of the recovery in cases in which the government intervenes, and 25-30% in cases in which the government does not intervene. For example, Nevada's percentages are 15-33% in intervened cases, and 25-50% in non-intervened cases; Tennessee's are 25-33% in intervened cases and 35-50% in non-intervened cases; and Montana's range from 15-50%.⁸⁹

Most *qui tam* cases filed under the state False Claims statutes have related to health care. Many are "global" Medicaid cases that were first developed in federal courts as Medicare and Medicaid fraud cases and that concerned a nationwide fraud which had been investigated by multiple federal and state jurisdictions.⁹⁰

Most of the state settlements have come from "piggy backing" on federal law enforcement efforts and from joining in global settlements.⁹¹ Experience with some of the newer

88 N.Y. STATE FIN. LAW § 189 (McKinney).

89 See MONT. CODE ANN. § 17-8-410; NEV. REV. STAT. § 357.210; TENN. CODE. ANN. § 4-18-104.

90 *State False Claims Act Study*, *supra* 16, at 483.

91 See testimony of Patrick J. O'Connell, then of Texas Attorney General's Office, at

state statutes is too recent to evaluate, but many states have reported the desire for more resources to develop such cases.⁹²

VII. Conclusion

The False Claims Act and the state False Claims Acts are increasingly important tools in the effort to protect taxpayer funds.

In Georgia, in an era in which fraud too often drains already scarce public funds, Georgia's Taxpayer Protection False Claims Act can be an asset not only for the state, but also for city and county governments and citizens. It allows not only the state, but also cities, counties, and other "local government" bodies, to deter and combat fraud and to recover treble damages and penalties from those who steal from the public fisc. The new Georgia law positions the state to take its place among states that are replicating the FCA's successes in protecting taxpayer dollars.

<http://oversight.house.gov/documents/20070209123455-21529.pdf>.

92 *State False Claims Act Study*, *supra* note 16, at 483.