The Government Contractor®

WEST®

Information and Analysis on Legal Aspects of Procurement

Vol. 56, No. 8 **February 26, 2014**

Focus

¶ 53

FEATURE COMMENT: Ten FCA Decisions From 2013 That Government Contractors Need To Know

While the U.S. Supreme Court did not issue a single decision addressing the False Claims Act, 2013 saw a flurry of activity in the lower courts, especially the Court of Appeals for the Fourth Circuit. Some of these decisions reined in attempts to broaden the FCA. The Fourth Circuit, for example, refused to relax the pleading requirements for a qui tam relator who could not identify even one allegedly false claim. And the Seventh Circuit rejected an approach to calculating damages favored by the Government that would have led to outsized jury awards and settlements. These were welcome cases for contractors.

But many of the decisions—in no small part because of the recent amendments to the statute—effectively broaden the FCA's reach, creating increased risk for Government contractors. In a decision that may soon be addressed by the Supreme Court, the Fourth Circuit held that the Wartime Suspension of Limitations Act (WSLA) extends to the FCA, effectively tolling its statute of limitations indefinitely. In another decision, the Fourth Circuit concluded that statutory penalties of $24 million on a contract worth slightly more than $3 million does not constitute an unconstitutional "excessive fine," even though there was no finding that the Government had suffered any harm. And the Second Circuit left open the possibility that in-house counsel may be whistleblowers against their own clients using confidential information gained during their employment.

Without further ado, the following are 10 FCA decisions from 2013 that Government contractors need to know.

10. In-House Counsel May Be Qui Tam Relators: *U.S. ex rel. Fair Lab. Practices Assocs. v. Quest Diagnostics, Inc.*, 734 F.3d 154 (2d Cir. 2013); 55 GC ¶ 399—In their day-to-day activities, in-house counsel oftentimes review information concerning a company's legal and compliance affairs. When can in-house counsel use this information against his or her employer (and client) as the basis of a qui tam suit?

In *U.S. ex rel. Fair Laboratory Practices Associates v. Quest Diagnostics, Inc.*, the Second Circuit addressed the tension underlying this question, i.e. the "tension between an attorney's ethical duty of confidentiality and the federal interest in encouraging 'whistleblowers' to disclose unlawful conduct harmful to the government." The Second Circuit did not foreclose the possibility that in-house counsel could file a qui tam suit against his or her employer, but the ability to bring such a suit is bounded by a lawyer's ethical obligations.

In this case, the "whistleblower" was a partnership formed by three former employees of Unilab, now a subsidiary of Quest Diagnostics, for the purpose of bringing the qui tam suit at issue. One of the three former employees, Mark Bibi, served as general counsel to Unilab, and for a period of years was responsible for all of Unilab's legal and compliance affairs. After taking limited discovery on the issue, the defendants moved to dismiss the suit, contending that Bibi had violated two provisions of the New York Rules of Professional Conduct. The lower court granted the dismissal, finding that the former general counsel had violated New York Rule 1.9(c) by disclosing the confidential information of a former client in excess of what was required to "prevent the client from committing a crime," as allowed by Rule 1.6(b)(2). As an alternate basis for dismissal, the lower court found that Bibi had "switched sides" against his former client in violation of Rule 1.9(a). The district court disqualified the plaintiff partnership, the individual members of the partnership, and their outside counsel from bringing this suit or any subsequent suit based on the same facts, in order to protect defendants from the use of their confidential information against them.

On appeal, the Second Circuit affirmed dismissal. First, the Court found that the FCA did not preempt state ethical rules. Merely because the FCA permits any person to bring a qui tam action does not authorize a person to violate state laws in the process. Second, although Bibi could reasonably have believed in 2005 that defendants had the intention to commit a crime, it was nonetheless "unnecessary for Bibi to participate in this *qui tam* action at all, much less to broadly disclose [the defendants'] confidential information." The court of appeals did not address the lower court's alternate reason for dismissal.

While the Second Circuit did not create a bright-line rule barring all in-house lawyers from using client information in FCA cases, it struck a balance between a lawyer's ethical obligations to the client and the Government's competing interest in encouraging whistleblowers to report fraud. It found that the disclosure exceeded what was necessary to prevent the client from committing a crime in violation of state ethical rules. Ultimately, *Fair Laboratory* leaves open the possibility that in-house lawyers may in some circumstances file a qui tam case against their employer based on the very same confidential information they reviewed to serve their client. Let the conflicts begin.

9. Compliance System Weaknesses May Lead to Constructive Knowledge: *U.S. v. Sci. Applications Int'l Corp.*, 2013 WL 3791423 (D.D.C. July 22, 2013)—The FCA is an anti-fraud statute; it was not created to punish innocent mistakes. A contractor may be held liable only if it acts with the requisite intent—which is to have acted "knowingly." 31 USCA § 3729(a)(1). While this standard does not require actual knowledge or specific intent to defraud, acting with reckless disregard or deliberate ignorance will do, 31 USCA § 3729(b)(1); negligence is never enough. But when does a corporation—which is composed of and can only act through its employees—actually *know* something?

We initially addressed this question three years ago, see Liu and Cone, Feature Comment, "Two Steps Forward, One Step Back—The D.C. Circuit Expands The False Claims Act's Reach, But Not For Mere Mistakes," 53 GC ¶ 25, after the D.C. Circuit's noteworthy decision in *U.S. v. Sci. Applications Int'l Corp.*, 626 F.3d 1257 (D.C. Cir. 2010). In *SAIC*, the D.C. Circuit rejected the "collective knowledge" theory of scienter advanced by the Government in which a corporation is deemed to know the sum of what each of its employees know. It concluded that it was inappropriate to "piec[e] together scraps of innocent knowledge" held by corporate employees, even when those individuals may never have had contact with one another or have known what the others knew or were doing, to establish knowledge. 626 F.3d at 1275. To allow FCA plaintiffs to pool the knowledge "of potentially thousands of ordinary employees" to show scienter, the court wrote—without evidence that the contractor acted recklessly or with deliberate ignorance, would allow juries "to impose liability for what is essentially negligence or mistake." Id. at 1277. It noted, however, that a contractor may be found to have "constructive knowledge" where its "structure prevented it from learning facts that made its claims for payment false." Id. at 1276.

The D.C. Circuit remanded the case. Back before the district court, Science Applications International Corp. sought summary judgment on the knowledge element, arguing that a reasonable jury could not find that it "knowingly submitted false claims and made false statements." 2013 WL 3791423 at *6. But the district court disagreed, finding a triable issue for the jury.

Because SAIC allegedly violated an organizational conflict of interest (OCI) provision in two contracts with the Nuclear Regulatory Commission, the Government had to prove that SAIC knew that it violated the OCI provision in its contracts *and* that its compliance with the OCI provision was material to the Government's decision to pay. Id. at *6. The Government could do this in one of two ways. It could either prove that a particular employee knew of SAIC's noncompliance with the OCI provision *and* knew that the OCI provision was material—i.e., actual knowledge. Or alternatively, it could show that SAIC had constructive knowledge by proving that SAIC deliberately ignored or recklessly disregarded the truth of its claims and statements to the NRC. Id. at *9. But the district court rejected the notion that the Government could prove knowledge by "showing that one employee knew that SAIC was noncompliant with the NRC contracts because SAIC had OCIs and that another employee knew the conflict of interest obligations were material." Id. at *8. The knowledge of two individuals—unaware of what the other was doing—could not be combined. The district court recognized that fusing separate scraps of knowledge together like this would make contractors liable for mere mistakes.

While the district court's decision reinforced the rule against collective knowledge, one aspect of its decision should give contractors pause. Namely, the district court found that there was sufficient evidence from which a jury could conclude that SAIC's compliance system did not allow it to determine the truth or falsity of its claims or statements. Id. at *13. This would mean that SAIC had constructive knowledge that its claims were false. What about the company's OCI compliance system was lacking? Not that much: Witness testimony indicated that it failed to incorporate some of SAIC's business relationships, contained incomplete descriptions of SAIC's work, and failed to associate relevant key words with certain descriptions. These three inadequacies were enough to survive summary judgment. And they illustrate the types of weaknesses in a compliance system that should be remedied to mitigate FCA risk.

8. Limited Liability for Regulatory Noncompliance: *U.S. ex rel. Hobbs v. MedQuest Assocs., Inc.* 711 F.3d 707 (6th Cir. 2013)—Some circuits have held that in FCA cases premised on false certifications, liability will attach to false certifications of conditions of payment in federal health care programs, but not to false certifications of conditions of participation. In recent years, a few other circuits have backed away from such a strict distinction in the false certification context, with the result that some courts now only require a relator to show that the contractor withheld information about noncompliance with a material contractual requirement. In *U.S. ex rel. Hobbs v. MedQuest Associates, Inc.*, the Sixth Circuit reaffirmed the distinction between conditions of payment and conditions of participation, and in doing so, emphasized that regulatory noncompliance does not create FCA liability where the regulations at issue are not "conditions of payment."

The district court in *Hobbs* had granted summary judgment in favor of the Government and relator on both express and implied certification theories. The district court interpreted the Medicare enrollment application form as including a certification that physicians listed on the form would provide direct supervision for contract magnetic resonance imaging or computed tomography scans. Therefore, by submitting claims for payment in cases where physicians who had supervised the tests were not listed on the enrollment form, MedQuest Associates Inc. (1) violated its express certification that physicians listed in its application would supervise testing, and (2) falsely impliedly certified that tests were provided in accordance with applicable Medicare regulations and by physicians approved by Medicare.

The Sixth Circuit quickly rejected the notion that the enrollment application or claims forms contained express certifications as to the physician-supervision requirements. As to the Government's implied certification theory, the Court rejected the Government's attempt to paint conditions of participation as conditions of payment. The Court refused to accept the Government's "cut-and-paste approach" to reading Medicare regulations: the Government's "weaving together isolated phrases from several sections in the complex scheme of Medicare regulations" could not create a condition of participation into a condition of payment. Instead, the court found that even though the defendant's actions may have been at odds with the goals and aims of Medicare, because the regulations were not conditions of payment, "they do not mandate the extraordinary remedies of the FCA and are instead addressable by the administrative sanctions available, including suspension and expulsion from the Medicare program."

Hobbs reaffirms that FCA liability may follow for false certifications relating to conditions of payment, but not conditions of participation. This distinction is consistent with the understanding that the FCA is not a tool to enforce compliance with regulatory schemes. Although *Hobbs* was a health care fraud case, its principle should extend to Government contractors to protect them from nuisance FCA suits based on small minor or regulatory violations, allowing for early dismissal. It also highlights a circuit split that may need to be addressed by the Supreme Court.

7. Settling FCA Cases over A Relator's Objection: *U.S. ex rel. Schweizer v. Océ*, 956 F.Supp.2d 1 (D.D.C. July 19, 2013)—Even if the Government does not initially intervene in a qui tam case, it may nonetheless negotiate a settlement with the defendant after investigating the relator's allegations. This is the case even if the relator opposes the settlement. That is precisely what happened in *U.S. ex rel. Schweizer v. Océ*. The Government first declined to intervene, but it remained active in the parties' settlement discussions. After reaching a bilateral agreement with Océ—but not the relator—to settle the case for $1.2

million, plus interest, the Government filed a notice to intervene and moved to dismiss the case. There was just one problem: The relator rejected the settlement as too meager.

The question for the district court, one of first impression in the D.C. Circuit, was the standard by which it should evaluate the adequacy of an FCA settlement. The court noted that the text of the FCA provides that the Government may settle an FCA case "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." Id. at 10. But there was nothing in the statute that would guide the court on the particular factors that would make a settlement fair, adequate and reasonable. It therefore looked for guidance from—and ultimately adopted—the five-factor standard governing judicial review of class action settlements.

Under the class action standard, courts will weigh "(a) whether the settlement is the result of arm's length negotiations; (b) the terms of the settlement in relation to the strengths of plaintiffs' case; (c) the status of the litigation proceedings at the time of settlement; (d) the reaction of the class [here, relator]; and (e) the opinion of experienced counsel." Id. at 11 (citation omitted). Weighing these factors, the Court concluded that they tilted in favor of the proposed settlement. Although the relator may have felt that $1.2 million was meager, the Court observed that the settlement was reached after arm's length negotiations and "after an extensive investigation" by the Government into the alleged wrongdoing. It also noted that the Government had offered "an extensive and detailed account of its decision to settle…. [including] its calculations of the ultimate settlement.... [And] the government was eager to avoid bringing close or difficult cases to litigation that might risk making 'bad law' for them." Id. at 15.

The relator sought discovery from the Government to prove the settlement inadequate, but the Court declined. A right to full-blown discovery would "risk transforming" the adequacy hearing "into a trial on the merits of plaintiff's claims and the government's estimations of the litigation risks." Id. at 11. This would "put the cart before the horse, in essence making trial a precondition of settlement." Id.

Schweizer provides a helpful framework for contractors negotiating a settlement with the Government while knowing (or suspecting) that the relator is likely to object to the proposed amount. To prevent the relator from halting the settlement, negotiations must be done at an arm's length, the proposed settlement amount must be reasonable given the strength or weaknesses in the Government's case, which should be well documented and may be discoverable, and the settlement should be made after the Government has had an opportunity to investigate the relator's claims fully. Although the district court did not permit discovery, it did not foreclose the possibility in future cases.

6. Fraud-in-the-Inducement Theory Survives Even Where Fraud Is Unconnected to Claims for Payment: *In re Baycol Prods. Litig.*, 732 F.3d 869 (8th Cir. 2013)—Under the fraud-in-the-inducement theory, FCA liability attaches to every claim submitted to the Government when the contract was obtained through false statements or fraudulent conduct. This theory is attractive to relators and the Government because, if liability is found, damages can amount to the entire value of the contract, trebled. In *In re Baycol Products Litigation*, a divided panel for the Eighth Circuit used a broad standard when determining whether a complaint based on this theory satisfied Federal Rule of Civil Procedure 9(b)'s particularity requirements. The Court reversed dismissal of a claim based on the fraud-in-the-inducement theory where the relator had not tied the alleged fraud to any claim for payment.

In *Baycol*, the relator alleged that Bayer fraudulently induced the Department of Defense to enter into a contract for Baycol by making allegedly false representations about the safety of Baycol. The relator alleged that after entering into an initial contract with Bayer in 1999 for the purchase of Baycol, DOD became concerned about a certain side effect, and contacted Bayer on a number of occasions regarding its concerns. Bayer allegedly responded with false information about the safety of Baycol. DOD extended the initial contract and entered into a blanket purchase agreement with Bayer for the purchase of Baycol. Both of these actions, according to the relator, were fraudulently induced because had DOD known the truth about Baycol's side effects, DOD would have been unlikely to extend its contract with Bayer or enter into a new one. The district court dismissed this claim on the basis that the relator had not tied her allegations of fraud to specific fraudulent claims for payment submitted to the Government.

The Eighth Circuit reversed the district court on this issue, holding that a relator relying on a fraud-in-the-inducement theory of liability need not allege that any specific claims for payment were, in and of themselves, false or fraudulent. The Court reasoned that the focus of a fraud-in-the-inducement allegation is on whether the false or fraudulent statements "induced the Government to enter into the contract at the outset," not on whether any subsequent claims for payment were in and of themselves false or fraudulent. In analyzing whether the relator satisfied Rule 9(b)'s particularity requirement, the Court found that the relator satisfied the "who, what, where, when, and how" by describing the fraud that induced DOD to extend one contract and enter into another contract with Bayer, in conjunction with alleging that the Government made payments to Bayer under these allegedly fraudulently induced contracts.

This decision requires very little for a complaint alleging a fraud-in-the-inducement FCA count to survive a Rule 9(b) motion to dismiss. This decision seemingly allows a relator to skirt Rule 9(b) because the "who, what, where, when, and how" does not have to concern claims for payment, but rather the fraud that induced the Government to enter the contract. Under *In re Baycol*, any untruthful statement or failure to disclose complete information in the context of negotiating a contract with the Government could allow relators to skate past a motion to dismiss and build a case through discovery.

5. The Standard for Pleading Fraud with Particularity: *U.S. ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451 (4th Cir. 2013)— To survive dismissal, complaints alleging fraud must meet Rule 9(b)'s heightened pleading requirements. They "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). This means that complaints "must, at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentations and what he obtained thereby." *U.S. ex rel. Wilson v. Kellogg, Brown & Root, Inc.*, 525 F.3d 370 (4th Cir. 2008). But what must be alleged if the fraud is the presentment of a false claim? This was the question before the Fourth Circuit in *U.S. ex rel. Nathan v. Takeda Pharmaceuticals North America, Inc*.

In *Takeda*, a relator filed a qui tam complaint against his former employer, a pharmaceutical manufacturer, alleging that it had violated the FCA by causing others to present false claims to the Government for payment under Medicare and other federal health insurance programs. Id. at 453. Noah Nathan alleged that Takeda Pharmaceuticals North America Inc. marketed a prescription drug (Kapidex) for medical uses that were not approved by the Food and Drug Administration or listed in statutorily specified drug compendia, causing the federal health care programs to pay for prescriptions that were not properly reimbursable. Id. at 455. Although Nathan could not identify specific claims that sought reimbursement for these allegedly "off-label" uses, despite amending his complaint three times, he did allege two marketing practices that he believed would have caused physicians to prescribe Kapidex off-label. The district court finally dismissed his complaint with prejudice. Nathan appealed.

On appeal, Nathan argued, as relators in other circuits have, that he "need only allege the existence of a fraudulent scheme that supports the inference that false claims were presented to the government for payment." Id. at 456. The Fourth Circuit balked at what it viewed as a "more lenient" or "relaxed" reading of Rule 9(b). Id. at 456. It concluded that alleging a fraudulent scheme—without alleging that "a specific false claim was presented to the government for payment"—was insufficient. Id. Because the "critical question" was whether the defendant caused the submission of false claims, Nathan needed to "plead plausible allegations of presentment." Id.

It was not enough to merely allege a fraudulent scheme "in detail but then to allege simply and without any stated reason for his belief that claims requesting illegal payments must have been submitted, were likely submitted or should have been submitted to the Government." Id. at 456–57 (quoting *U.S. ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301 (11th Cir. 2002)). When a defendant's conduct as alleged *could* have led, but *need not necessarily* have led, to the submission of false claims, "a relator must allege with particularity that specific false claims were presented to the government for payment." Id. at 457.

Takeda may help deter cases brought by relators without any knowledge of whether fraud has occurred who think they saw something "fishy." It is not enough to allege a fraudulent scheme under which false claims *could* have or *may* have been submitted to the Government. For Nathan, this meant that merely alleging a scheme to market drugs for uses not approved by the FDA was not enough to survive dismissal. Many future relators in the Fourth Circuit may find *Takeda* insurmountable—unless the Supreme Court overturns it: In October 2013, the Supreme Court invited the solicitor general to file a brief expressing the views of the U.S. on the issues raised in Nathan's petition for certiorari. The Supreme Court may yet unite the varying Rule 9(b) interpretations given by the lower courts.

4. Determining Unconstitutionally Excessive Fines: *U.S. ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 2013 WL 6671270 (4th Cir. Dec. 19, 2013)—The Eighth Amendment to the U.S. Constitution bars the Government from imposing "excessive fines" or inflicting "cruel and unusual punishment." While some punishments are obviously cruel and unusual—drawing and quartering has always been off-limits, for example—the line separating constitutional fines and punishments from unconstitutional ones is less obvious in FCA cases, where money is the deterrent. When is a monetary penalty unconstitutionally excessive or cruel and unusual? That was the question before the Fourth Circuit in *U.S. ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, when it was asked to decide whether imposing a $24 million penalty on a Government contractor—for services that were worth $3.3 million, a sevenfold increase—was constitutional. Surprisingly, the court said the penalty was fine.

The question in *Bunk* arose in the context of two separate qui tam actions consolidated into one action that alleged the defendants had engaged in a bid-rigging scheme to artificially inflate DOD's transportation costs for moving military and civilian goods and effects across the Atlantic Ocean and within Europe. A group of packing and transportation service companies—who controlled the lion's share of such work within Germany—met in Sonthofen, Germany, and agreed to charge a non-negotiable minimum price for local transportation services in Germany.

Although the Government intervened in one action, which concerned 12 Germany-U.S. channels, it did not intervene in Bunk's case, so he pursued separate but similar claims that the defendants engaged in an unlawful conspiracy to defraud DOD and submitted false claims for transportation services within Germany. But Bunk did not pursue damages; he sought a civil penalty for the 9,136 invoices, each of which he argued was a false claim because it certified that the successful contractor had not discussed pricing or soliciting strategy with any other potential suppliers. Following a multi-week trial and nine hours of deliberations, a jury found the sole remaining defendant, Gosselin World Wide Moving, N.V., liable under the FCA for every one of the 9,136 invoices.

After trial, Gosselin argued that awarding Bunk a civil penalty for all 9,136 false claims would be excessive: even if the minimum statutory penalty were applied—$5,500—Gosselin would be fined more than $50 million for a scheme in which it was paid only $3.3 million. Bunk, also seeking to avoid such a huge penalty and acting in consultation with the Government, offered to accept $24 million from Gosselin in settlement of the entire judgment. But the district court rejected Bunk's proposed remittitur. It concluded that the amount that Gosselin was paid by DOD could not justify a $50 million penalty—indeed, it said that any penalty in excess of $1.5 million would be unconstitutionally excessive—and that it was not authorized by the FCA to award a penalty less than $5,500 per claim.

On appeal, the Fourth Circuit observed that a plaintiff's discretion to accept a lesser penalty was "virtually unbounded," and "injustice was avoided" if the Government or a qui tam relator agreed "to accept reduced penalties within constitutional limits, as ultimately adjudged by the courts." Because Bunk had discretion to accept a lesser penalty, making the proposed remittitur proper, the Fourth Circuit next examined whether $24 million was excessive. After noting that the Eighth Amendment proscribes those fines that are "grossly disproportionate to the gravity of a defendant's offense," id. at 20, and looking at both the economic and noneconomic harm that Gosselin's conduct inflicted, e.g., a loss of public faith in the contracting process, the Fourth Circuit wrote that it was "satisfied" that $24 million was not unconstitutionally excessive. The FCA was enacted during the Civil War to combat defense contractor fraud such as this, the court noted, and a $24 million penalty "appropriately reflects the gravity of Gosselin's offenses and provides the necessary and appropriate deterrent effect going forward." Id. at 22.

The Fourth Circuit's decision is noteworthy because the jury did not determine the amount of the Government's harm—economic or otherwise. And so there was no record of actual harm to the Government. While Gosselin was paid $3.3 million, DOD presumably did receive *something* in return, some benefit of the bargain, which meant that the Government's actual economic harm was less than

$3.3 million, and perhaps much less. Noneconomic harm may be difficult to quantify, but the jury did not try. The Fourth Circuit may have written that the "touchstone" of its Eighth Amendment analysis was whether the $24 million penalty was proportional to the gravity of Gosselin's offense, but it did not articulate a formula for making this calculation.

Bunk should make FCA defendants nervous. The Fourth Circuit emphasized the Government's noneconomic harm and the award's "deterrent effect on the defendant and on others perhaps contemplating a related course of fraudulent conduct." Id. at 22. Fraud on the Government is so offensive, the Court seemed to reason, that large penalties are necessary to deter would-be fraudsters, even when the actual economic harm is much smaller. Contractors battling FCA cases in the Fourth Circuit may now be challenged to argue that a penalty is unconstitutionally excessive, to relators' delight.

3. The Public Disclosure Bar May No Longer Be Jurisdictional: *U.S. ex rel. May & Radcliffe v. Purdue Pharma L.P.*, 737 F.3d 908 (4th Cir. 2013); 56 GC ¶ 9—The public disclosure bar prohibits relators from bringing FCA claims based on publicly disclosed information unless a relator is an original source of the information. Prior to the Patient Protection and Affordable Care Act, P.L. 111-148, § 10104(j)(2) (2010) (PPACA), the FCA provided that "*[n]o court shall have jurisdiction over* an action under this section based upon the public disclosure of allegations or transactions." 31 USCA § 3730(e)(4) (2005) (emphasis added). In 2010, the PPACA made several changes to the FCA, including removing the phrase "have jurisdiction over" from the public disclosure bar statute and giving the Government the ability to veto a dismissal under this section. 31 USCA § 3730(e)(4) (2010) ("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."). This amendment raised the following question: Was the public disclosure bar still jurisdictional?

The Fourth Circuit held that it was not, becoming the first court of appeals to address this question. In *U.S. ex rel. May & Radcliffe v. Purdue Pharma L.P.*, the Fourth Circuit ruled that "[i]t is apparent ... that the public-disclosure bar is no longer jurisdictional." The PPACA replaced "the unambiguous jurisdiction-removing language" in the previous version of the statute with a "generic, not-obviously-jurisdictional phrase," while at the same time retaining jurisdiction-removing language in other parts of the statute. In addition, the Fourth Circuit questioned how the amended public disclosure bar could be jurisdictional when the PPACA amendment grants the executive power to veto a dismissal under that section.

The consequences of this decision are manifold. Whether the public disclosure bar is jurisdictional affects when a defendant can raise the public disclosure bar, whether the court can consider the issue sua sponte, whether this defense is waived if not immediately raised, and whether this defense is subject to equitable considerations. Defendants, rather than moving for Rule 12(b)(1) dismissal for lack of personal jurisdiction, will now have to include their public disclosure defense in 12(b)(6) motions to dismiss for failure to state a claim upon which relief can be granted, or risk having the defense waived. But as some relators have argued, courts may not consider the public disclosure bar until the summary judgment stage (after discovery) because under Rule 12(b)(6), a plaintiff's claim must be assumed to be true. This suggests that only those public disclosures that are judicially noticeable may be considered by the court at the motion to dismiss stage. Courts may be unable to raise the issue sua sponte if the public disclosure bar no longer concerns jurisdiction.

At whatever stage defendants raise the public disclosure bar, there will be a shift in the burden of persuasion borne by the parties. Pre-PPACA, when defendants raised the public disclosure bar, the burden would shift to the relator because plaintiffs bear the burden of pleading jurisdiction. Post-PPACA, the burden of persuasion will remain on the defendant. The changes due to the public disclosure bar no longer being jurisdictional may well result in increased costs in defending against a FCA suit. Thorny questions also exist as to how to apply the public disclosure bar where the allegations both predate and post-date the PPACA.

2. WSLA Suspends the FCA's Statute of Limitations, Even When the Government Does Not Intervene: *U.S. ex rel. Carter v. Halliburton Co.*, 710 F.3d 171 (4th Cir. 2013); 55 GC ¶ 98—Qui tam actions must be brought within six years after the date on which the alleged violation occurred. 31 USCA § 3731(b). A criminal code provision, the WSLA, 18 USCA § 3287, suspends the statute of limitations applicable to "any offense ...

involving fraud or attempted fraud against the United States" when the U.S. is "at war." In 2008, the Wartime Enforcement of Fraud Act, P.L. 110-417(WEFA), § 855, amended the WSLA, expanding the statute's reach to include situations in which "Congress has enacted a specific authorization for the use of the Armed Forces." WEFA also extended the suspension period until "5 years after the termination of hostilities" as proclaimed by either the president, with notice to Congress, or a concurrent resolution of Congress.

Is a formal declaration of war required to trigger suspension of the FCA's statute of limitations under the WSLA? In *U.S. ex rel. Carter v. Haliburton Co.*, the Fourth Circuit answered no. Under either version of the WSLA, a formal declaration of war is not required. In so answering that question, the Fourth Circuit became the first federal appellate court in over 50 years to hold that the WSLA applies to civil FCA cases.

In *Carter*, the relator claimed that the defendants used fraudulent billing practices for services provided to the military forces serving in Iraq. He filed his original complaint in 2006. Following multiple dismissals of his complaint without prejudice, the relator again refiled in 2011. The defendants moved to dismiss this 2011 complaint on the basis that it was time-barred, as well as barred by two related cases and by the FCA's public disclosure provision. The district court dismissed the complaint on the basis that the complaint alleged substantially similar claims as other pending related FCA actions, as well as because the relator's 2011 complaint was beyond the FCA's six-year statute of limitations. The district court held that the relator's action was not tolled by the WSLA, and that the WSLA does not apply to claims under the FCA brought by private relators. Because the complaint was barred by two pending cases and was also time-barred when it was filed, the court dismissed the case with prejudice because a refiled complaint would be time-barred.

The Fourth Circuit found it unnecessary to decide which version of the WSLA applied because, under either version, the WSLA "does not require a formal declaration of war." The Fourth Circuit read the WSLA as applicable to both criminal and civil cases, notwithstanding that it is found in title 18, U.S. Code and applies to "offense[s]," a term typically limited to criminal matters. Overturning the district court, the Fourth Circuit found that the WSLA applies in actions even where the U.S. is not a party. The Court held that the U.S. has been "at war" in Iraq since Congress authorized the president to use military force on Oct. 11, 2002, and the formal requirements for declaring the termination of a war had not been met with regard to the war in Iraq. Thus the WSLA saved the relator's qui tam complaint from dismissal even though it was filed more than six years after the alleged violations occurred.

Also in *Carter*, the Fourth Circuit confronted the question of whether the first-to-file bar means that the first case filed forever bars other related complaints, or if it merely serves as a "one-case-at-a-time" rule. Like the district court, the Fourth Circuit ruled that when the 2011 complaint was filed, it was barred by two pending cases. But this did not end the Fourth Circuit's inquiry; rather, the Fourth Circuit held that "once a case is no longer pending the first-to-file bar does not stop a relator from filing a related case." And under these circumstances—in which the WSLA tolled the FCA's statute of limitations indefinitely—the relator would not be time-barred from refiling his complaint. Thus, the Fourth Circuit held that the lower court erred in dismissing with prejudice.

One could read *Carter* to mean that the statute of limitations on FCA claims has been tolled since 2001 when the war on terror began, and possibly from prior military engagements, like Korea, because those wars, like the Iraq war, may not meet the WSLA's formal termination requirements. Although this case was limited to alleged false claims connected to the Iraq war, an expansive reading of *Carter* could result in FCA defendants facing indefinitely tolled statutes of limitations for claims unconnected to any war effort.

A pending petition for certiorari on both the WSLA and first-to-file bar holdings is under consideration by the Supreme Court and, as it did in the *Nathan* case, the Court has asked for the solicitor general's views on these issues.

1. FCA Damages Must Be Calculated Using the "Net Trebling" Approach: *U.S. v. Anchor Mortg. Corp.*, 711 F.3d 745 (7th Cir. 2013)—The FCA's damages provision calls for "3 times the amount of damages which the Government sustains because of the act of that person." 31 USCA § 3729(a)(1)(G). But the statute is silent on the manner in which courts should calculate the Government's actual damages, which should then be multiplied by three (trebled). Where the Government receives no benefit under a contract, the calculation is straightforward: its loss is the full value of the contract or grant, the amount that is then trebled.

But where the Government has received some, but not all of the benefit for which it bargained, is that partial benefit deducted before or after trebling? That was the question before the Seventh Circuit in *U.S. v. Anchor Mortgage Corp.*

After a bench trial, Anchor Mortgage Corp. and its chief executive officer were found liable under the FCA for submitting false certificates when applying for federal guarantees of 11 loans. The district court found that Anchor submitted false statements that relatives had supplied the down payments that the borrowers purported to have made, when it knew that neither the borrowers nor their relatives had made any down payments on the properties. Anchor was also found to have misrepresented that it had not paid any referral fees, when it had paid at least one fee in violation of Federal Housing Administration regulations.

To calculate damages, the district judge added the amounts that the Government had paid to lenders under the guarantees and trebled this amount. He then subtracted any amounts that had been realized—at the time of trial—from selling the properties that secured the troubled loans.

> For example, the Treasury paid $131,643.05 on its guaranty of a particular loan. Three times that is $394,929.15. The real estate mortgaged as security for that loan sold for $68,200. The judge subtracted the sale price from the trebled guaranty; the result of $326,729.15 represented treble damages. To this the judge added the $5,500 penalty, for a total of $332,229.15.

Writing for the Court, Chief Judge Easterbrook concluded that damages equal the difference between the contract price and the value the Government received, which is the amount that is then trebled. The Seventh Circuit rejected the Government's approach to calculating damages (adopted by the district court) under which the full value paid would be trebled before any deduction was made for the value the Government received. It called this approach to calculating damages "gross" trebling, because it did not take into account what the Government had received from Anchor until after trebling. After examining the text of the FCA's damages provision and the manner in which damages are calculated in analogous cases, e.g., breaches of contract, the Seventh Circuit concluded that the gross trebling was the wrong approach if the Government has received a benefit from the defendant.

Judge Easterbrook explained that instead of using gross trebling, endorsed by the U.S., the district court should have used the "net trebling" approach. Under net trebling, the Government's actual loss is determined by first deducting any value that the Government received from the defendant. This is the amount that is trebled, resulting in the Government's damages under the FCA. He noted that this approach is consistent with the Supreme Court's decision in *U.S. v. Bornstein*, 423 U.S. 303 (1976), which "unambiguously uses the contract measure of loss."

Anchor Mortgage's net trebling approach to calculating damages should be a welcome development for contractors caught in FCA investigations or litigation because it likely lessens their potential FCA exposure, at least if they can point to a benefit that the Government received. This may make negotiating a settlement with the Government more likely, and, failing that, the possibility of trial more palatable. Judge Easterbrook's analysis may also impact other FCA cases in which the Government received all—or even more—than it bargained for, in which case there would be no loss to the Government, and the only penalty would appear to be the civil fine ($5,500–$11,000) for making a false claim (for example, in General Services Administration schedule cases involving alleged Trade Agreements Act violations).

✦

This Feature Comment was written for The Government Contractor by* Andy Liu, Jonathan Cone *and* Olivia Lynch*, attorneys at Crowell & Moring LLP.