LITIGATING *QUI TAM* ACTIONS

DEFENDING REVERSE FCA ACTIONS

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I. Reverse False Claims.

A. **The Statute.** Section 3729(a)(7) of the False Claims Act ("FCA") states that:

> Any person who —
>
> > (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . .

B. **The Elements**. The plaintiff has the burden of proving:

1) a record or statement;

2) the falsity of that record or statement;

3) an obligation to pay or transmit money or property to the government;

4) the use of the false record or statement to "conceal, avoid, or decrease" that obligation;

5) the performance of these acts with "knowledge" of the falsity. *United States ex rel. Lamers v. City of Green Bay*, 998 F. Supp. 971, 996-97 (E.D. Wis. 1998).

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C. **The Legislative History.** The legislative history of the False Claims Amendments Act of 1986, P.L. 99-562, which added Section 3729(a)(7) to the FCA, sets forth the rationale behind Section 3729(a)(7):

> Section 1, paragraph (7) of the bill amends section 3729 to provide that an individual who makes a material misrepresentation to avoid paying money owed the Government would be equally liable under the Act as if he had submitted a false claim to receive money.

S. REP. NO. 99-345, at 18 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5283 (emphasis added).

D. **Pre-1986 FCA Cases.** Prior to Congress's addition of the (a)(7) cause of action, the courts were split on whether reverse false claims were actionable.

1. Reverse False Claims Held Actionable.

The Fifth Circuit held that alleged false reports to the United States used to lower the amount of rent paid under a lease were actionable under the pre-1986 FCA. *Smith v. United States*, 287 F.2d 299 (5th Cir. 1961). In *Smith*, the United States alleged that the head of a municipal housing authority was liable under the FCA (then codified at 31 U.S.C. §§ 231, *et seq*.) for submitting false accounting reports in connection with a federal lease of a nonprofit housing project. The lessee (housing authority) was obligated to remit quarterly to the United States Public Housing Administration ("PHA") as rent the excess of the lessee's revenues from the project over its operating expenses and the PHA was obligated to advance to the lessee any funds necessary to cover anticipated deficits if the project's revenues were insufficient to defray expenses. *Id*. at 300. The head of the housing authority allegedly fraudulently inflated the project's operating expenses in quarterly reports filed with the PHA. As a result, the PHA paid more than it should have as a subsidy when the project reported a deficit and received less than it should have as a rent payment when the project reported a surplus. The Fifth Circuit held that the United States' allegations that fraud caused it to receive less rent than it should have stated a claim under the FCA. *Id*. at 304.

2. Reverse False Claims Held Not Actionable.

The Ninth Circuit held that "[t]he fraudulent reduction of [the defendant's] liability to the Government does not spell out a false claim" by the FCA. *United States v. Howell*, 318 F.2d 162, 166 (9th Cir. 1963). In *Howell*, the government alleged, among other things, that the defendants operated a laundry service at military bases under a concessionaire agreement that required defendants to pay the government a specified percentage of their gross receipts. The government further alleged that the defendants substantially understated the amounts of their gross receipts in order to pay less commissions to the government than were actually due. The Ninth Circuit held the FCA inapplicable because the government's allegations did not describe a demand upon the government for the payment of money or property, *i.e.*, there was no "claim."

II. **Traditional Reverse False Claims.** Until recently, most plaintiffs alleging violations of Section 3729(a)(7) alleged false statements to "conceal, avoid, or decrease" a debt or money owed to the government.

A. *United States v. Q Int'l Courier, Inc.*, 131 F.3d 770 (8th Cir. 1997). The United States alleged that the defendant owed an obligation to the United States to pay full domestic postage that defendant attempted to avoid through false statements coupled with a practice known as "ABA remail." *Id*. at 772. An ABA remailer ships bulk mail from the United States to Barbados for remail to the United States for as little as a tenth of the amount of postage charged for delivery if individually mailed within the United States. *Id*. at 772.

B. *United States ex rel. S. Prawer & Co. v. Verrill & Dana*, 946 F. Supp. 87 (D. Me. 1996). The relators alleged that outside contract lawyers hired by the Federal Deposit Insurance Corporation ("FDIC") knowingly concealed that Fleet Bank of Maine ("Fleet") improperly required the FDIC to repurchase a non-performing loan through a transaction called a "put." Under relators' theory, upon the FDIC's unnecessary repurchase of the loan, Fleet automatically became obligated to repay the FDIC — an obligation that was avoided through the lawyers' concealment. *Id*. at 90.

C. *United States ex rel. Dunleavy v. County of Delaware*, 1998 U.S. Dist. LEXIS 4029 (E.D. Pa. 1998). The relator alleged that Delaware County fraudulently retained Department of Housing and Urban Development ("HUD") funds. In particular, the County allegedly retained proceeds of the sale of real property purchased with HUD funds without, as a prerequisite to retaining the proceeds, reporting to HUD that the proceeds qualified as "program income." *Id*. at *11.

III. **Reverse False Claims Actions Alleging Avoidance Of Potential Penalties.** More recently, plaintiffs have sought to expand Section 3729(a)(7) liability to alleged false statements, including omissions implying false statements, to "conceal, avoid, or decrease" the penalties that the government could assess for regulatory noncompliance.

A. *United States ex rel. American Textile Manufacturers Institute, Inc. v. The Limited, Inc.*, 1997 U.S. Dist. LEXIS 18142 (S.D. Ohio 1997) ("ATMI"). The relator alleged that the defendants submitted inaccurate entry documents to United States Customs officials for mislabeled imported clothing in order to avoid quotas for importing goods made in China and potential fines and forfeitures under several statutes. *Id*. at *7-16.

B. *United States ex rel. Stevens v. McGinnis, Inc.*, 1994 U.S. Dist. LEXIS 20953, at *19-20 (S.D. Ohio 1994) and *United States ex rel. Pickens v. Kanawha River Towing, Inc.*, 916 F. Supp. 702, 707-08 (S.D. Ohio 1996). In each case, the relator alleged that vessel owners violated Section 3729(a)(7) by failing to record and report to the United States illegal discharges of pollutants thus avoiding potential fines, penalties, and cleanup costs imposed by the Clean Water Act.

C. *United States ex rel. Sequoia Orange Co. v. Oxnard Lemon Co.*, 1992 U.S. Dist. LEXIS 22575 (E.D. Cal. 1992). The court considered allegations that fruit marketers violated Section 3729(a)(7) by fraudulently underreporting fruit shipments to avoid potential claims for forfeitures and fines for shipping in excess of weekly shipping quotas.

IV. **Avoiding Reverse False Claims Actions.** Litigation, even if frivolous, is not without cost to the defendant. To minimize or eliminate the possibility of becoming the target of a FCA *qui tam* suit based upon noncompliance with federal regulations, a company may consider doing several things, including to:

A. Identify the laws and regulations that the company's government contracts or subcontracts require compliance with as a prerequisite for payment.

B. Identify the laws and regulations that the company must comply with as a prerequisite to obtaining money or property from the government (for instance, under various grant and funding programs).

C. Develop and implement programs to monitor and document compliance with each law and regulation identified.

D. Document the substance of any discussions with government officials regarding the nature and extent of compliance information required to be disclosed, if any.

E. Notify the government of any interpretation of applicable law, regulation, or contractual provision that the company is using in connection with the matter.

F. If noncompliance occurs, notify appropriate company officials, including those officials actually requesting money or property from the government, to avoid making certifications, representations or other disclosures that might inaccurately reflect the extent of the company's compliance.

G. If law or contract requires that the noncompliance be disclosed to a government agency, make and document the required disclosure.

H. If a previous misrepresentation is discovered, consider notifying the government regarding the inadvertent misrepresentation.

Many companies already handle most of these functions through internal self-auditing and reporting programs. However, even sophisticated companies should consider the extent to which their current auditing and reporting functions offer adequate protection against making false statements in connection with concealing, avoiding, or decreasing an obligation that may be owing to the government.

V. Defending Against Reverse False Claims Actions.

A. **No Obligation.** Unlike the term "claim," which is defined in the FCA, the courts have been struggling to define the term "obligation" for FCA purposes. At this point, there appear to be three perspectives on the issue.

1. An "Obligation" Must Be A Fixed Sum, Immediately Due.

a. ***Q Int'l***. The Eighth Circuit held that the United States must demonstrate that the defendant had some duty to the government to pay money or property that it sought to evade by using false statements to recover under Section 3729(a)(7). The Eighth Circuit affirmed the district court's entry of summary judgment in favor of the ABA remailer because the United States failed to demonstrate that the Postal Service was owed a specific, legal obligation at the time the alleged false statement was

made, used, or caused to be made or used. *Q Int'l*, 131 F.3d at 773. According to the Eighth Circuit,

> a defendant must have had a present duty to pay money or property that was created by statute, regulation, contract, judgment, or acknowledgement of indebtedness. The duty, in other words, must have been an obligation in the nature of those that gave rise to actions of debt at common law for money or things owed.

Id. "A debt, and thus an obligation under the meaning of the False Claims Act, must be for a fixed sum that is immediately due." *Id*. at 774 (emphasis added). The court noted that a regulation that merely provided a range of potential penalties that might be assessed did not "create an immediate duty to pay a specific sum." *Id*. The Eighth Circuit's analysis relied, in part, upon the repeated use of the term "money owed" in the legislative history of Section 3729(a)(7). *Id*. at 773 ("The deliberate use of the certain, indicative, past tense suggests that Congress intended the reverse false claims provision to apply only to existing legal duties to pay or deliver property.").

b. ***Prawer.*** The district court held that no obligation to repay the FDIC automatically sprung from the FDIC's repurchase of the loan because the Assistance Agreement, which gave Fleet the right to put non-performing loans to the FDIC, provided a "framework for final decisions on whether a put [was] proper." *Prawer*, 946 F. Supp. at 90. Under the framework, the FDIC was entitled, if it so chose, to demand extensive documentation from Fleet to supplement the loan information package submitted by Fleet along with the original notice putting the loan. *Id*. at 91. "In other words, the Assistance Agreement [gave] the FDIC access to whatever information it believe[d was] necessary to evaluate Fleet's put." *Id*.

The court, in *Prawer,* also held that, even if relators eventually prove that Fleet committed common law fraud against the FDIC, "Fleet had no then current 'obligation to pay or transmit money' to the FDIC within the meaning of the reverse false claim provision of the [FCA]

at the time the lawyer defendants took their challenged actions." *Id.* at 93. "Money is not 'owed' [for Section 3729(a)(7) purposes] without a specific contract remedy, a judgment or an acknowledgment of indebtedness." *Id.* at 95. To illustrate, the court stated that:

> I may breach a contract, but absent a specific remedy provided in the contract, I have no obligation to pay or transmit money to the other contracting party until he obtains a judgment.

Id. at 94. Upon subsequent reconsideration of this holding, the court clarified that its holding "does not limit the term 'obligation to pay' to a judgment, but includes settlements, other contract remedies and acknowledgements of indebtedness." *United States ex rel. S. Prawer & Co. v. Verrill & Dana*, 962 F. Supp. 206, 209 (D. Me. 1997).

2. The Term "Obligation" Excludes Potential Penalties.

a. ***ATMI.*** The District Court for the Southern District of Ohio recently retreated from its earlier rulings in *Stevens* and *Pickens* (discussed below) to determine that allegations of knowing false statements to avoid potential penalties and fines did not state a claim under Section 3729(a)(7). The court held that the term "obligation" may not be strictly limited to "direct contractual obligations or claims which have been reduced to judgment" but that it was "not intended to apply to each and every statement which might conceal from the government the existence of criminal or civil violations to which monetary penalties might attach." *ATMI*, 1997 U.S. Dist. LEXIS 18142, at *36-37, 48. The court's analysis considered that under relator's theory ordinary, everyday business activity which, because it is regulated by the United States under statutes providing for specific fines and sanctions, could be targeted under the FCA in each case in which the United States fails to seek a fine or sanction. *Id.* at *39 and 48 ("The discharge of pollutants scenario addressed in the [*Stevens*] and *Pickens* cases is a good example of the potentially limitless reach of the FCA under relator's interpretation."). The court also expressed concern that statutory enforcement procedures, including burdens of

proof and statutes of limitations, could be circumvented by allowing enforcement via the FCA. *Id.* at *54-55.

b. ***Lamers***. In *Lamers*, the relator alleged that the City of Green Bay ("City") violated Section 3729(a)(7) of the FCA by making several false statements over a period of several years in order to avoid repayment of improperly obtained Federal Transportation Administration ("FTA") funding for certain bus services. *Lamers*, 998 F. Supp. at 973. While declining to adopt the conclusion in *Q Int'l* that an "obligation" must be for a fixed sum that is immediately due, the district court found the Eighth Circuit's reasoning to be persuasive and held that "the FCA's reverse false claims provision has in mind an obligation to pay which is at least as immediate and recognizable as affirmative claims for payment under the statute." *Id.* at 997.

3. Potential Penalties May Be "Obligations."

a. ***Stevens* and *Pickens*.** The United States District Court for the Southern District of Ohio has twice held that alleged potential penalties for violations of the Clean Water Act satisfy the "obligation" requirement under Section 3729(a)(7). *See Stevens,* 1994 U.S. Dist. LEXIS 20953, at *19-20 (allegations that vessel owners failed to record and report to the United States illegal discharges of pollutants "thus, avoiding fines, penalties, and cleanup costs imposed by" the Clean Water Act, state reverse false claims under Section 3729(a)(7)) and *Pickens*, 916 F. Supp. at 707-08 (if government, as part of its regulatory role, relies upon or otherwise reviews vessel logs which exclude information about discharges of pollutants that it should ordinarily contain, the vessel operator would have submitted a false report in order to avoid an obligation to the government).

b. ***Sequoia*.** The district court reasoned that:

> The loss alleged [due to avoidance of potential fines for shipping excessive amounts of fruit] is analogous to the potential claim which the Government has against a remiss or fraudulent tax payer, or contract or lease arrangement cases where a

> person attempts to reduce the amount payable by him to the United States. Although defendants' actions did not directly deplete the Federal Treasury, if proved, defendants have avoided or reduced an obligation to pay the Government money.

Sequoia, 1992 U.S. Dist. LEXIS 22575, at *26-27 (footnote omitted). The court relied, in part, on the legislative history of the post-1986 FCA in concluding that "potential claims" qualified as "obligations" under Section 3729(a)(7). In particular, the court concluded that:

> Section (a)(7) was added to the FCA in 1986 to cover 'situations where, by means of false financial statement or accounting reports, a person attempts to defeat or reduce the amount of a claim or potential claim by the United States against him.'

Id. at 25 (citing S. REP. NO. 99-345, at 18 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5283). Based upon this analysis, the court held that any false reports submitted by the defendants to the government with the effect that payment of forfeitures or fines to the government were avoided, constitute false claims within the meaning of Section 3729(a)(7). *Id.* *29-30.

4. Justice Department's Position.

The Justice Department's current position on what constitutes an "obligation" under the Act is set forth in its brief filed with the Sixth Circuit on October 16, 1998, in *United States ex rel. American Textile Mfg. Inst.:*

> Thus, the "reverse false claims" provision encompasses within its scope those obligations owed to the government (under statute, regulation, contract or quasi-contract) arising from the provision of some privilege, right or benefit in return for which the recipient owes money or property. If the government has provided no privilege, right or benefit, but is imposing liability on a party solely because that party performed an act that the government has defined as wrongful, the consequences of that wrongful act are *not* actionable under the FCA.

Accordingly, the Act applies to false statements made to avoid payment of contractual obligations, or monetary obligations, such as customs duties or user fees, imposed by statute or regulation. It does not apply, however, where the government has granted no right, privilege or benefit and where the false statements at issue conceal only the fact that a defendant engaged in criminal or otherwise unlawful conduct and therefore might properly be subject to fines, penalties, or forfeitures.

B. **Other Defenses**. Aside from the "no obligation" defense, there are several other reverse false claim defenses that are equally applicable to traditional (*i.e.*, Section 3729(a)(1) and (a)(2)) false claim allegations.

1. No Falsity.

a. **Opinion Or Judgment.** If the allegedly false statements reflect assertions of judgment or opinion, rather than fact, they may not be false. *United States ex rel. Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795, 810 (D. Utah 1988) (The certification "reflects an engineering judgment and recommendation. . . . It is clearly not a statement of fact that can be said to be either true or false, and thus cannot form the basis of an FCA claim.").

b. **Literal Truth.** Statements may lack falsity because they are literally true or true on their face. *Hindo v. University of Health Sciences*, 65 F.3d 608, 613 (7th Cir. 1995), *cert. denied*, 516 U.S. 1114 (1996) (Because "there is nothing false in the [defendant's] invoices," the court "must look then for some purposeful scheme by the [defendant] to defraud" the government.). Note, however, that paragraph (7) of Section 3729(a), unlike paragraphs (1), (2) and (3), does not use the word "fraudulent."

2. No Knowledge.

a. **Reasonable Interpretation.** Even if the statement is false, based upon the defendant's reasonable interpretation of a contract, law, or regulation, the statement may not be "knowingly" false. *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321, 329 (9th Cir. 1995) ("The improper interpretation or unauthorized amendment of a contract, without more, does not constitute a false claim for payment.").

b. **Government Knowledge.** In light of the level of the government's knowledge, the defendant may reasonably have believed that its statements did not mislead the government. *Lamers*, 998 F. Supp. at 988 ("[T]he presence of an open dialogue with government officials about relevant factual circumstances does mitigate a defendant's specific intent to defraud, or the degree to which false statements and claims were 'knowingly' submitted.").

c. **Good Faith Judgment.** If the defendant's statement is false but made in good faith based upon the defendant's judgment, the knowledge element is lacking. *Luckey v. Baxter Healthcare Corp.*, 2 F. Supp. 2d 1034, 1049 (N.D. Ill. 1998) ("[A]ssuming the claim or certification was false, a defendant in a FCA suit would not have 'knowingly' submitted a claim if it was submitted as the product of the defendant's good faith professional opinion or judgment.").

d. **Negligence.** Negligent or "reckless" performance of a contract may not demonstrate "reckless disregard" of the truth or falsity of a statement. *United States ex rel. Pentagen Technologies Int'l, Ltd. v. CACI Int'l Inc.*, 1997 U.S. Dist. LEXIS 12244, at *33 (S.D.N.Y. 1997) (allegations of "extreme incompetence" are not enough).

3. **No Materiality.** Five Circuit Courts of Appeal, the Federal Claims Court, and all but one district court, *see United States ex rel. Roby v. The Boeing Co.*, 1998 U.S. Dist. LEXIS 8129, at *14 (S.D. Ohio May 11, 1998), that have considered the issue agree that the alleged falsity must be material to the government's decision to pay.

a. The FCA "gives the United States a means to recover from someone who makes a material misrepresentation to avoid paying some obligation owed to the government." *Q Int'l*, 131 F.3d at 772 (8th Cir. 1997).

b. "Thus, where the government has conditioned payment of a claim upon a claimant's certification of compliance with, for example, a statute or regulation, a claimant submits a false or fraudulent claim when he or she falsely certifies compliance with that statute or regulation." *United*

States ex rel. Thompson v. Columbia/HCA Healthcare Corp., 1997 U.S. App. LEXIS 29090, at *8 (5th Cir. 1997).

c. "If previously unclear, we now make explicit that the current civil False Claims Act imposes a materiality requirement." *United States ex rel. Berge v. Board of Trustees of University of Alabama*, 104 F.3d 1453, 1459 (4th Cir. 1997).

d. Alleged false claims do not give rise to a FCA violation where the contracting government agency was happy with what it received despite the alleged fraud. *United States ex rel. Harrison v. National Semiconductor Corp.*, 1997 U.S. App. LEXIS 194, at *3 (4th Cir. 1997) (affirming summary judgment for defendant where alleged false statements were not "material" to government's decision to pay).

e. False certifications of compliance with a statute do not create a cause of action under the FCA unless the certification is a prerequisite to obtaining a government benefit. *United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996).

f. "While the Ninth Circuit has not explicitly ruled on the issue of whether or not alleged false statements must be material, it has so implied." *United States ex rel. Butler v. Hughes Helicopter Co.*, 1993 U.S. Dist. LEXIS 17844, at *42 (C.D. Cal. 1993), *aff'd*, 71 F.3d 321 (9th Cir. 1995).

g. Materiality is an element of a FCA action. *United States v. Data Translation, Inc.*, 984 F.2d 1256, 1267 (1st Cir. 1992).

h. "The [FCA] . . . interdicts material misrepresentations made to qualify for government privileges or services." *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 461 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978).

i. "[D]eliberate withholding and active concealment" of "information critical to the [government's] decision to pay" gives rise to a FCA action. *BMY-Combat Systems Div. of Harsco Corp. v. United States*, 38 Fed. Cl. 109, 125 (1997).

j. "[A]ll that [relator] needs to do to avoid dismissal is allege that the [government] would have withheld payment if the regulations had been complied with." *United States ex rel. Dihu v. IIT Research Inst.*, 1998 U.S. Dist. LEXIS 8360, at *16 (N.D. Ill. 1998).

k. "Although the Seventh Circuit has not yet addressed the issue, we believe [that a materiality] . . . requirement is appropriate and consistent with the FCA." *United States ex rel. Durcholz v. FKW Inc.*, 997 F. Supp. 1159, 1167 (S.D. Ind. 1998).

l. "[E]ven if [the defendant's employee] knowingly mischaracterized [certain facts], his statements are not material and therefore are not actionable false statements in support of false claims within the meaning of the FCA." *Lamers*, 998 F. Supp. at 992.

m. Under the FCA, "[a] plaintiff may establish the claim's falsity by showing that the defendant omitted material information or that the defendant recklessly or deliberately ignored that possibility." *United States v. Frierson*, 1997 U.S. Dist. LEXIS 3368, at *33 (N.D. Ill. 1997).

n. "[T]he FCA covers only those false statements that are material." *Tyger Constr. Co., Inc. v. United States*, 28 Fed. Cl. 35, 55 (1993).

o. "[T]here is a requirement that the false claim be a material misrepresentation." *United States ex. rel. Walle v. Martin Marietta Corp.*, 1997 U.S. Dist. LEXIS 138, at *4-5 (E.D. La. 1997).

VI. Reverse False Claims Actions Alleging Environmental Noncompliance.

A. **Incentives For Suit.** Unfortunately for government contractors whose operations may occasionally violate an environmental law or regulation, the FCA provides an attractive vehicle for obtaining *qui tam* bounties for several reasons:

1. It is nearly impossible to maintain 100 percent compliance with all environmental laws 100 percent of the time. *See*, *e.g.*, *American Petroleum Institute v. EPA*, 661 F.2d 340, 350 (5th Cir. 1981) ("Despite best efforts at compliance, even a facility

employing the best available equipment will occasionally exceed discharge limitations" under the Clean Water Act.) and *Dirty Water Scoundrels*, U.S. Public Interest Research Group, March, 1997 (concluding that nearly 20 percent of the nation's 6,884 major industrial, municipal, and federal facilities were in "significant noncompliance" with the Clean Water Act during at least one quarter from January, 1995 through March, 1996).

2. Generally all government contracts in excess of $100,000 must contain a provision requiring "best efforts" to comply with the Clean Water Act and Clean Air Act. *See* FAR 52-223-2.

3. Discovering a factual predicate for an environmental FCA action is not particularly difficult. Most permits issued pursuant to federal environmental laws require permit holders to file reports about their compliance with permit requirements that can be obtained under the Freedom of Information Act.

4. Penalties for noncompliance with federal environmental laws may be as high as $25,000 per day per violation. *See, e.g.*, 33 U.S.C. § 1321(b)(7)(A) ("Any person who is the owner . . . of any . . . onshore facility . . . from which oil or a hazardous substance is discharged in violation of [the Clean Water Act], shall be subject to a civil penalty in an amount up to $25,000 per day of violation[.]").

5. As noted above, some recent decisions hold that "potential penalties" qualify as "obligations" for purposes of Section 3729(a)(7).

6. *Qui tam* relators alleging environmental noncompliance may side-step the constitutional standing requirements that must be met by persons suing under the citizen suit provisions found in most federal environmental laws.

B. Environmental FCA *Qui Tam* Actions Have Had Mixed Results.

1. ***Fallon.*** In *United States ex rel. Fallon v. Accudyne Corp.*, 921 F. Supp. 611 (W.D. Wis. 1995), the relators alleged, among other things, the defendants knowingly failed to comply with the environmental compliance provisions of their government contract and implicitly represented that it was in full compliance. The relators, including the Atlantic States Legal Foundation, obtained a $12 million settlement, although the defendants' counsel have reported that the defendants paid all

or most of this sum to settle relators' non-environmental FCA claims.

2. ***M/G Transport.*** In *United States ex rel. Davis v. M/G Transport Services, Inc.*, Civil Action No. C-1-92-1001 (S.D. Ohio, second amended complaint filed June 23, 1995), the relators' allegations were nearly identical to those in *Stevens* and *Pickens* – that defendants violated the FCA by failing to disclose to the government that the defendants' towboats discharged oily bilge water into the Ohio River in violation of the Clean Water Act. The defendants settled the *qui tam* action for over $1 million.

3. ***Stevens.*** The towboat services company and government contractor that won victory at the district court level in *Stevens* settled for a low six-figure sum rather than litigate further after the relator appealed.

4. ***Pickens.*** Prior to trial in the *Pickens* matter, companies that supplied towboat services to the prime contractor, GLR Constructors, settled before trial for over $2 million. GLR Constructors obtained a jury verdict finding it not liable after a 15 day trial and defeated the relator's motion for a new trial. *Pickens* is now on appeal before the Sixth Circuit.

5. ***North Santiam.*** In *United States ex rel. North Santiam Watershed Council v. Kinross Gold USA, Inc., et al.*, No. C 96-3674 TEH (N.D. Cal., first amended complaint filed August 18, 1997) a *qui tam* action against eighteen mining companies, the relators alleged, in part, that foreign-owned U.S. mining companies submitted false claims when they filed mining claim documents with the Department of the Interior. The relators alleged that the claims were false because they did not disclose the defendants' failure to register as foreign agents under a separate statute, the Foreign Agents Registration Act ("FARA"), in conjunction with testifying before Congress on proposed natural resources legislation. The district court threw out the relators' suit, along with its request for $60 *billion* in treble damages because, among other things, relators failed to state a claim upon which relief could be granted.

C. Special Considerations In Defending Environmental FCA Actions.

1. Obtain and review any environmental protection plan, policy, or training program implemented by the defendant.

2. Consider whether any contract provisions protect the defendant from environmental noncompliance of subcontractors and suppliers operating outside the defendant's facility or work site.

3. Consider whether any contract provisions define the defendant's standard of care with respect to environmental compliance or set forth a procedure whereby the defendant may "cure" incidents of environmental noncompliance.

4. Contact state and federal environmental regulators to explore whether the alleged environmental noncompliance already has been reported and attributed to a party other than the defendant.

5. Review preambles to regulations and other guidance documents in assessing whether the defendant's interpretation of relevant environmental regulations was reasonable.

D. No End in Sight.

1. Although resolved favorably to industry, the *North Santiam* case sends a chilling message: Even relatively small nonprofit environmental groups, like the North Santiam Watershed Council, are not reluctant to file *qui tam* suits seeking enormous rewards.

2. As of this writing, the Environmental Protection Agency and Department of the Interior have not publicly discouraged citizens from bring *qui tam* actions against government contractors thought to be in violation of environmental and natural resource laws and regulations. (Arguably, environmental FCA *qui tam* actions should be discouraged because they: 1) may provide a perverse incentive since relators may rack up damages based on potential penalties as long as the unlawful pollution continues; and 2) do not provide injunctive relief to stop pollution as do traditional environmental citizens suits.)

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