# If You Represent Government Contractors, Beware:

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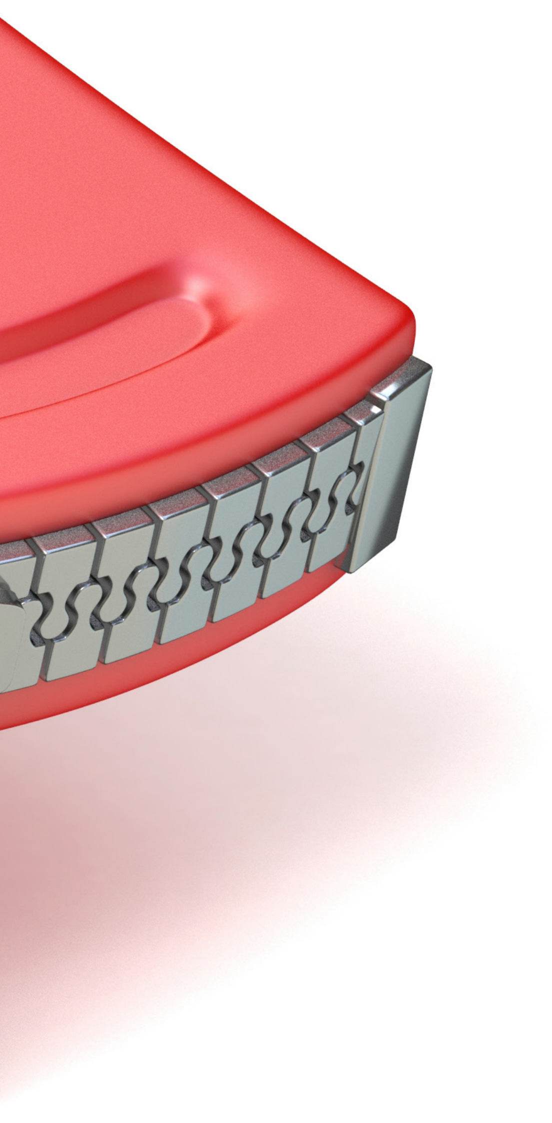
## False Claims Act Litigation Is Rapidly Becoming a Growth Industry



If your clients do business with the federal government, the possibility of a whistleblower suing them under the False Claims Act (FCA) should keep both you and your clients awake at night. The FCA is the government's primary civil weapon to pursue contractors who submit false claims for payment to the federal government under a wide variety of circumstances: whether as government contractors, such as in the defense industry; health care providers seeking reimbursement for providing services to Medicare and Medicaid patients; or banks and financing companies who process federally insured loans and mortgages. What makes the threat of being subject to an FCA suit so great is that private parties, formally called "relators" (but sometime referred to as "bounty hunters"[1]), are authorized to file and pursue false claims cases in the name of and on behalf of the United States. Referred to as *qui tam* actions, these cases have become extremely popular with sophisticated plaintiffs' lawyers because of the potential for huge monetary awards for relators and their counsel.

Indeed, the number of FCA cases, not to mention the amount of the recoveries in these cases, has grown exponentially over the past few years, particularly in the financial and health care industries. The growth of these FCA cases is directly attributable to relators bringing *qui tam* suits. Of the new FCA matters and investigations opened by the U.S. Department of Justice during the last five years, more than 85 percent were initially brought by *qui tam* relators.[2] The growth of FCA cases comes as no surprise, given the financial incentive that exists for relators and their counsel to prosecute FCA claims. The upward trend of these cases appears likely to continue into the future.

## What Is The FCA?

The FCA prohibits the "knowing" submission of false or fraudulent claims to the federal government. In basic terms, FCA liability is incurred when (1) a person presents, or causes to be presented, a claim for payment or approval to the federal government; (2) the claim is false or fraudulent; and (3) the person's acts are undertaken "knowingly."[3] For purposes of the FCA, acts are done "knowingly" if undertaken with actual knowledge of a claim's falsity. Yet, to prove that a government contractor submitted a false claim does not require the government to show that the contractor acted willfully or even that it knew that the claims it submitted were false; proof of a specific intent to defraud the government is not required for FCA liability. FCA liability extends to contractors who were deliberately ignorant of or recklessly disregarded whether the claims being submitted were true or false.[4] If found liable for submitting false claims, government contractors along with the managers or executives who caused false claims to be submitted are subject to harsh civil penalties of between $5,500 to $11,000 for each false claim submitted, plus treble damages, and the government and relator's costs and attorney's fees incurred in bringing the FCA litigation.[5]

Although the government may initiate and prosecute FCA litigation, individual whistleblowers most often file FCA actions, which are subject to stringent procedural requirements.[6] But if individuals initiate such actions, the government can intervene in these *qui tam* cases and literally take them over.[7] If the government elects to intervene, the relator usually continues as a co-plaintiff, but the government controls the litigation post-intervention. Even if the government declines to intervene, the relator may continue to pursue the *qui tam* action as plaintiff.[8]

With the exception of FCA retaliation claims, any recovery obtained from the defendant in an FCA case, whether by settlement or a judgment, is for the benefit of the government. This is true whether the case is prosecuted solely by the relator or by the government as an intervening party. However, a relator who initiates a *qui tam* case is entitled to receive a substantial portion of any recovery. If the government opts to intervene, the relator can be awarded between 15 percent and 25 percent of a recovery, and in a case in which the government declines to intervene, the relator can be awarded between 25 percent and 30 percent of the recovery.[9] Relators thus have a huge financial incentive to file and successfully prosecute FCA *qui tam* cases.

## FCA Recoveries Are Exploding

By any measure, FCA litigation has become "big business" for the government, relators, and their legal counsel. According to U.S. Department of Justice statistics, total recoveries in civil fraud cases from January 2009 through the end of fiscal year 2016 totaled $31.3 billion.[10] And fiscal year 2016 was another banner year, with recoveries exceeding $4.7 billion—the third highest annual amount recovered by the government in FCA cases.[11] In fact, the government has achieved the five largest annual recoveries ever recorded under the FCA during the past five fiscal years.[12]

Health care-related cases continue to lead the way for civil FCA cases and recoveries. Of the $4.7 billion recovered by the government during fiscal year 2016, approximately 55 percent ($2.597 billion) was attributable to health care cases. This is the seventh consecutive year that civil health care fraud recoveries exceeded $2 billion.[13] And *qui tam* cases played a significant role in these recoveries, accounting for $2.427 billion or 93 percent of the $2.597 billion health care recovery during 2016. And of the 702 *qui tam* cases filed during the 2016 fiscal year, 501 or 71 percent were health care-related actions.[14]

During the 2016 fiscal year, the government also had its second highest total of recoveries since 1987 in FCA cases that did not involve health care or the Department of Defense, recovering $2.041 billion in non-health care and non-Department of Defense cases. The largest portion of these 2016 recoveries ($1.698 billion) was attributable to *non-qui tam* cases, with recoveries from *qui tam* cases totaling only $343 million—down nearly 64 percent from the $936 million recovered from non-health care and non-Department of Defense *qui tam* actions during the 2015 fiscal year.[15] Indeed, fiscal year 2016 was the government's best year ever since 1987 for recoveries in <u>all</u> *non-qui tam* cases. Its 2016 recovery of $1.856 billion in *non-qui tam* actions was more than double the recovery from fiscal year 2015 in such cases, and approximately 10 percent better than its best previous year in 2014.[16]

Department of Defense related FCA cases, on the other hand, continued their longtime downward trend, with relators filing only 31 *qui tam* cases related to the Department of Defense during fiscal year 2016, the fewest since 1989. And the government filed only eight of these cases on its own in 2016, exceeding by only one the seven *non-qui tam* Department of Defense related cases the government filed in fiscal year 2015 (which was the lowest number filed by the government since 1987).[17]

Consistent with the exponential rise in FCA recoveries during recent years, FCA "new matters" increased during fiscal year 2016 for both *qui tam* and *non-qui tam* cases. Indeed, the number of *qui tam* filings has continued to explode, with more than 600 *qui tam* cases filed every year since 2011. And as noted, relators filed 702 new *qui tam* actions in 2016, which was up almost 10 percent from the 639 *qui tam* actions initiated during the 2015 fiscal year. *Non-qui tam* case filings increased almost 23 percent in 2016, rising from 110 in 2015 to 143 in 2016. In fact, 2016 was the third best year for government-filed cases since 1987.[18]

As the number of *qui tam* lawsuits has increased, so has the amount of whistleblower awards. During fiscal year 2016, relators received over $519 million from *qui tam* cases. Of this total, $450 million was attributable to health care cases, up 14 percent from fiscal year 2015. And from January 2009 to the end of fiscal year 2016, share awards to relators exceeded $3 billion.[19] The 2015 fiscal year statistics suggested that relators were continuing to vigorously pursue *qui tam* cases in which the government has declined to intervene. Indeed, fiscal year 2015 was the best year ever for relator recoveries in declined *qui tam* cases, exceeding all previous years of relators' share awards in such cases put together since 1987. Moreover, 2015 was the first fiscal year in which relators' share awards from FCA cases in which the government declined to intervene exceeded that of *qui tam* cases in which the government intervened.[20] Because these statistics showed that relators increasingly were pursuing and obtaining recoveries in declined cases, the days when relators dropped most of their *qui tam* cases if the government declined to intervene appeared to officially be over. However, both recoveries and awards in non-intervened cases declined dramatically during fiscal year 2016: relators recovered only $105 million in 2016, a 91 percent decrease from 2015, and received share awards of only $28 million in 2016, a 92 percent drop from 2015. Likewise, relator share awards for all cases were down nearly 23 percent, from $667 million in 2015 to $519 million in 2016.[21] Whether the 2016 statistics signal a new trend remains to be seen. But because of the potential "pot of gold" waiting at the end of a successful FCA case, it is anticipated that the rising trend of *qui tam* litigation and government recoveries will continue.

## Recent Developments and Trends in FCA Litigation

The rapid growth of FCA litigation is generating a wealth of new case law. Indeed, it seems that hot-off-the-press FCA decisions are issued almost daily. Some of these cases reflect significant trends or developments in the law that are likely to impact how FCA actions will be litigated in the future. The following presents just a few of these recent developments.

### Scope of Discovery in FCA Litigation

An issue garnering considerable attention in FCA circles concerns the scope of discovery. Courts have long recognized that FCA claims are subject to the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure, which mandates that the circumstances constituting fraud be stated with particularity. Proper application of Rule 9(b) prevents frivolous claims and nuisance lawsuits, and provides defendants with appropriate notice of whatever specific conduct allegedly violated the FCA.[22] Courts play an important gatekeeping function under Rule 9(b) in FCA cases. For instance, the court in *U.S. ex rel. Donegan v. Anesthesia Associates of Kansas City* recently declined to permit a relator to pursue an unpled theory of liability, concluding that, "[a]lthough [Relator's new] theory may well be meritorious, Relator may not assert it now because it was not asserted in the Amended Complaint."[23]

Assuming that the claimed fraud is pled with specificity under Rule 9(b), disputes often arise regarding the scope of the discovery that the relator is entitled to obtain from the defendant. Typically, the relator will wish to conduct extensive discovery, seeking information regarding both the specifically pled claims as well as other potential, but unpled, claims. For example, a relator frequently will couple allegations regarding a few specific claims with more generalized allegations depicting a broad fraudulent scheme, and then seek to conduct wide-ranging and quite often burdensome and intrusive discovery to prove the FCA claim. In contrast, the defendant typically will seek to limit discovery only to those claims specifically pled in the relator's complaint. Is the relator limited to discovering information merely about the claims specifically pled in the complaint? Or can the relator seek open-ended discovery regarding potential claims that are not specifically pled, but that derive from or relate to the specifically pled claims?

Although courts normally permit broad discovery in traditional civil litigation, courts are increasingly willing to limit a relator's discovery to the specific allegations of the relator's pleadings. In the *Donegan* case, the court recognized that "[a] relator may not assert new theories of liability based on information learned during discovery."[24] And if a relator cannot pursue unpled claims, discovery related to such claims would be pointless. Similarly, the Eleventh Circuit recently applied Rule 9(b) to deter the filing of *qui tam* lawsuits solely for discovery purposes.[25] A number of other courts over the past several years similarly have forbidden the use of discovery to search for brand-new claims.[26] Consistent with the evolving case law on this issue, the Sixth Circuit in *Bledsoe v. Community Health Systems Inc.* expressed the following view regarding the scope of permissible discovery in an FCA case:

> In order for a relator to proceed to discovery on a fraudulent scheme, the claims that are pled with specificity must be "characteristic example[s]" that are "illustrative of the [class] of claims covered by the fraudulent scheme. The examples of false claims pled with specificity should, in all material respects, including general time frame, substantive content, and relation to the allegedly fraudulent scheme, be such that a materially similar set of claims could have been produced with a reasonable probability by a random draw from the total pool of all claims.[27]

Under this line of authority, a relator is permitted to conduct discovery regarding the well-pled allegations of the complaint, but not with respect to insufficiently pled allegations or claims. These cases suggest that discovery in the FCA context should be targeted at and limited to the particularized transactions that share the same characteristics as the claims specifically alleged in the complaint. Although specific examples of false claims contained in a complaint can support discovery of other similar instances of those types of claims, the alleged specific examples must be representative of the theory actually advanced by the *qui tam* plaintiff.[28] In other words, a relator should be allowed to conduct discovery regarding the specific transactions pled in the complaint and other transactions sharing the same characteristics as the specifically pled transactions. But the relator should be barred from obtaining discovery concerning transactions that do not share the same substantive content, general time frame, and overall relation to the allegedly fraudulent scheme as the representative transactions detailed in the complaint.

A recent example of this trend is the case of *Dalitz v. AmSurg Corp.*[29] The court refused to permit relators to conduct nationwide discovery because they had alleged FCA violations at only one location of the defendants. Important to the court was the fact that relators' factual allegations were confined to the one location where they actually worked, and no facts were alleged to support relators' claim that the purported fraud was the standard practice of the entire corporate enterprise.[30] The court also rejected relators' request for approximately eight years of discovery, limiting the temporal scope of discovery to a period encompassing less than four years (commencing on the date that the location where relators worked was acquired and ending on the date on which the lawsuit was initiated by relators). The court found, among other things, that relators had failed to demonstrate why discovery before the date of acquisition was warranted and that the relators' allegations strongly suggested that their claims were limited to the time period before they filed the lawsuit.[31]

The case of *U.S. ex rel. Rigsby v. State Farm Fire and Casualty Co.* also demonstrates that appellate courts are willing to permit trial courts to limit pre-trial discovery in FCA cases.[32] In *Rigsby*, the relators alleged that insurer State Farm defrauded the federal flood insurance program in the processing of flood insurance claims arising from Hurricane Katrina—a potentially huge case, given that State Farm had processed thousands of claims. Notwithstanding the relators' broad theory of liability, the district court permitted the relators to obtain discovery about, and proceed to trial on, only the single *specific* claim that relators had pled, reserving ruling on whether to allow the relators to expand their suit and obtain additional discovery until completion of trial on the single claim. After prevailing at trial on their single claim and proving that the defendant violated the FCA, relators sought expanded discovery for other potential claims. The district court refused to permit relators to conduct additional discovery, concluding that they had failed to plead sufficient facts about any claims unrelated to the single claim that was tried.[33]

On appeal, the Fifth Circuit concluded that Rule 9(b) did not apply post-trial, and that the relators were entitled to at least some additional post-trial discovery because the scope of discovery is broad and the relators had both alleged and actually already proven at trial a scheme far beyond the realm of the single claim that was pled and tried. However, although the Fifth Circuit permitted the relators to engage in much broader post-trial discovery, it approved the district court's decision to limit discovery and initially to confine the case to the single claim, leaving until after trial the decision whether additional discovery and further proceedings were warranted. *Rigsby* stressed that the case "presents something exceptional that most (if not all) plaintiffs in FCA cases are unable to show when seeking discovery: a jury's finding of a false claim and a false record."[34] The Fifth Circuit "emphasize[d] that [the] decision hinge[d] in large part on the idiosyncratic nature of this case—seldom will a relator in an FCA case present an already-rendered jury verdict in her favor while seeking further discovery"—and further observed that "the typical case might warrant shutting the door to more discovery."[35] In short, *Rigsby* recognizes that courts in FCA cases may balance the interests of the relator and defendant in determining the proper scope of discovery and may limit discovery and trial to representative claims.

## Use of Statistical Sampling to Prove FCA Liability

Another issue that courts currently are grappling with is whether to allow the use of statistical sampling to establish FCA liability. Statistical sampling is typically invoked where there is such a large universe of claims that individual review of each claim would be impracticable. For instance, in *U.S. ex rel. Ruckh v. Genoa Healthcare*, the court concluded that no universal ban exists on the use of statistical sampling in a *qui tam* action.[36] The relators contended that statistical sampling was an appropriate way to establish liability because "individually analyzing each claim from [the defendants'] 53 facilities is impractical."[37] Rejecting defendants' argument that "statistical sampling and extrapolation cannot form the basis for liability in a [*qui tam*] case due to the lack of individual proof," the court relied on other recent decisions that approved statistical sampling and extrapolation in FCA cases.[38] Conversely, a federal district court in South Carolina recently adopted a different view of statistical sampling, following the rationale of *U.S. v. Friedman,* a 1993 case that had rejected the use of statistical sampling where there was a limited universe of claims. In *U.S. ex rel. Michaels v. Agape Senior Community Inc.*, the court concluded that statistical sampling could not be used because each asserted claim presented the question of whether services were medically necessary.[39] Although recognizing that cases are legion on both sides of the issue, the *Michaels* court reasoned that, because the question involved a highly fact-intensive inquiry requiring medical testimony and review of detailed medical information regarding each patient, statistical sampling was inappropriate. The court noted: "Some cases are suited for statistical sampling and, indeed, in many cases that method is the only way that damages may be proved. This civil action, however, is not such a case."[40]

Although existing case law is thus conflicted on the issue of statistical sampling in the FCA context, recent decisions suggest at least some receptivity to the idea of using statistical sampling methodology in cases involving an unwieldy number of FCA claims. Because of the impracticality of presenting evidence concerning each and every claim in such cases, a "statistical" approach provides a more efficient means of presenting proof at trial. But decisions like *Michaels* reflect the reluctance of courts to endorse extrapolation based on statistical sampling where the number of claims is not overly voluminous or the claims require an individualized analysis not well suited for statistical methodology.[41]

## FCA Claims Based on Medicare/Medicaid Overpayments

Although many FCA cases involve claims that the defendants submitted false claims for payment to the government, FCA liability also can arise if a person knowingly retains money or property that properly should be returned to the government.[42] Such claims, which are commonly referred to as "reverse" false claims, are triggered when a person "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."[43] Overpayments in the health care context must be reported and be returned to the government within 60 days following the "date on which the overpayment was identified," and any overpayments retained beyond the 60-day period constitute "obligations" carrying liability under the FCA.[44] In other words, any person who receives overpayments from Medicare or Medicaid, and who knowingly fails to report and return them within 60 days after the date the overpayments are *identified*, violates the FCA.

In *U.S. ex rel. Kane v. Healthfirst Inc.*, the Southern District of New York issued what appears to be the first judicial opinion interpreting the meaning of "identified" for purposes of the "report and return" requirement.[45] *Kane* involved a group of hospitals that allegedly failed to timely repay money overbilled to Medicaid as a result of a software glitch. The relator, Robert P. Kane, was an employee of one of the defendants and performed an internal investigation to determine the scope of the overpayment issue. After Kane identified a pool of more than 900 potentially improperly billed claims, he was terminated by his employer. By the time all of the claims finally were refunded, more than two years had elapsed since Kane's initial identification of the problematic claims.[46]

After Kane initiated a *qui tam* lawsuit and the government partially intervened, the defendants moved to dismiss the case. The defendants contended that overpayments are not "identified" by a mere notice of potential but unconfirmed overpayments and that the 60-day "report and return" period is thus not activated until overpayments actually have been confirmed and quantified. Predictably, the government maintained that Kane had identified the majority of the improperly billed claims, and the fact that additional analysis was necessary to corroborate his findings did not delay commencement of the 60-day "report and return" period.[47] Denying defendants' motion to dismiss, the court sided with the government and held that "[t]o define 'identified' such that the 60-day clock begins ticking when a provider is put on notice of a potential overpayment, rather than the moment when an overpayment is conclusively ascertained," is consistent with the FCA's legislative history.[48] However, perhaps giving some comfort to providers, the *Kane* court noted that prosecutorial discretion likely would limit enforcement actions against "well-intentioned health care providers working with reasonable haste to address erroneous overpayments."[49]

The *Kane* decision has significant implications for providers who submit Medicare and Medicaid claims. Pursuant to *Kane,* provid-

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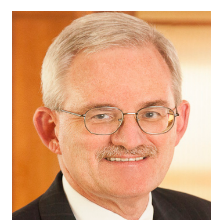

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ers must act promptly upon learning of a potential overpayment problem and cannot necessarily postpone reporting and returning any overpayments until the issue is fully investigated. If the confirmation process exceeds 60 days, a risk exists that providers could incur significant FCA liability by failing to refund "potential" overpayments that later are identified after the 60-day period as "actual" overpayments.

## 'First-To-File' Rule

Another hot topic in the FCA arena involves the so-called "first-to-file" rule, which provides that "[w]hen a person brings an action … no person other than the government may intervene or bring a related action based on the facts underlying the *pending* action."[50] This rule thus gives the first filing relator priority over subsequent FCA claims by barring a later FCA *qui tam* case involving the same underlying facts. Not surprisingly, considerable litigation has arisen concerning whether a newly asserted *qui tam* case is based on the same underlying facts as a previously filed case and whether a prior-filed action is pending for purposes of the "first-to-file" rule.

Fortunately, the Supreme Court provided some clarity to the "first-to-file" rule in its May 27, 2015, decision in *Kellogg Brown & Root Services Inc. v. U.S. ex rel. Carter*.[51] Although recognizing that "[t]he False Claims Act's *qui tam* provisions present many interpretive challenges, and it is beyond our ability in this case to make them operate together like a finely tuned machine," the Supreme Court succinctly held in *Kellogg* "that a *qui tam* suit under the FCA ceases to be 'pending' once it is dismissed."[52] The Court noted that "[t]he term 'pending' means '[r]emaining undecided; awaiting decision,'" and, seeing no reason to depart from the ordinary meaning of the word, the Court reasoned that "an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed."[53] The Supreme Court expressly rejected defendants' arguments that "pending" was intended to be "short-hand for the first filed action," and that "the first-filed action remains pending even after it has been dismissed; [forever barring] any subsequent related action."[54] In the Court's view, such a construction would "lead to strange results that Congress is unlikely to have wanted. Under [defendants'] interpretation, a first-filed suit would bar all subsequent related suits even if that earlier suit was dismissed for a reason having nothing to do with the merits."[55] Thus, following *Kellogg*, a relator no longer is at risk of being kicked out of court based on a previously filed, but dismissed, FCA case that was based on the same underlying facts.

## Reliance on Advice-of-Counsel

Yet another recent FCA development involves the parameters of the "advice-of-counsel" defense, which is typically invoked by defendants who assert that they could not knowingly have committed an FCA violation because they were simply following their lawyer's advice.[56] To establish the "advice-of-counsel" defense, the defendant must show that it (1) fully disclosed all of the pertinent facts to counsel and (2) acted in good faith reliance on counsel's advice. However, mere consultation with an attorney will not confer "automatic immunity from the legal consequences of conscious fraud."[57]

In *U.S. ex rel. Drakeford v. Toumey Healthcare System,* the advice-of-counsel defense was asserted by a health care provider who was sued in a *qui tam* case for allegedly entering into compensation arrangements with physicians in violation of the Stark Law and then knowingly submitting more than 21,730 false claims to Medicare for reimbursement.[58] After a question arose about whether the proposed compensation arrangements were illegal, Toumey obtained an opinion from its counsel that the agreements raised "significant 'red flags.'"[59] Toumey then terminated this counsel and later obtained more favorable opinions from other counsel without disclosing the previous negative opinion of former counsel.[60] A judgment in the amount of $237,454,195 was ultimately entered against the provider.[61] On appeal, the Fourth Circuit affirmed the jury's rejection of Toumey's advice-of-counsel defense, stating that "a reasonable jury could have concluded that Toumey was … no longer acting in good faith reliance on the advice of its counsel when it refused to give full consideration to [the] negative assessment of the [contracts] and terminated counsel's representation."[62]

Under the rationale of *Toumey*, a company doing business with the government cannot set up an advice-of-counsel defense by shopping around until it finds legal advice that it likes. If a negative opinion is obtained regarding a proposed course of action, the negative opinion must be shared with any other counsel that the company consults, and it cannot simply be ignored for purposes of a later attempt to invoke the advice-of-counsel defense.

## Bifurcation of Trial for Initial Liability Determination

Finally, at least one court has experimented of late with a new FCA procedure in which the "falsity" element of an FCA claim is bifurcated from the rest of the claim. In *United States v. AseraCare Inc.*, a federal district court in Alabama recently required the government first to prove the "falsity" element of its claim before proceeding with the balance of the case.[63] The court ruled that, if necessary, a second phase of the trial would address the other elements of the FCA case. Rejecting the government's argument that such a bifurcation was "an extraordinary and unprecedented action," the court stated that "[j]ust because a trial technique has never been done does not preclude the court from using its discretion to do so." The court also stressed the inherent prejudice, jury confusion, and waste of resources that could result if the government were permitted to adduce evidence of general corporate practices and conduct unrelated to specific patients before a threshold determination of whether the subject claims were actually false.[64]

Although *AseraCare* appears to be the first time that a court has bifurcated the trial of FCA claims in this manner, authority now exists for FCA defendants to seek an advance determination of the gateway issue of whether false claims actually were submitted. Whether other courts will follow the *AseraCare* court's approach remains unclear. But FCA defendants in future cases at least should consider the desirability of requesting an *AseraCare* bifurcation of trial.[65]

## Conclusion

Any company doing business with the government is a potential target for "bet-the-business" FCA litigation. Because such actions present opportunities for substantial recoveries by the government, relators, and relators' counsel, it is unlikely that the explosive growth of FCA lawsuits will diminish anytime soon. Recent cases suggest a number of ways in which FCA litigation can be strategically shaped and better managed by the parties. With the rapidly increasing number of both reported and unreported decisions, new strategies inevitably will emerge in the future. Accordingly, counsel seeking to represent potential FCA litigants should strive to keep abreast of the ever-changing developments in this burgeoning area of the law. ⊙

## Endnotes

[1]*U.S. ex rel Grenadyor v. Ukrainian Village Pharmacy Inc.*, 772 F.3d 1102, 1103 (7th Cir. 2014).
[2]*See* U.S. Department of Justice, Civil Division, *Fraud Statistics—Overview: Oct. 1, 1987-Sept. 30, 2016*, www.justice. gov/opa/press-release/file/918361/download [hereinafter *2016 DOJ Statistics*].
[3]*See* 31 U.S.C. § 3729. Under § 3729, liability can be triggered by a number of different specified acts, including, without limitation, presenting a false claim to the government, using or making a false statement material to a false claim, and conspiring to commit a violation of the FCA. *Id.*
[4]*See* 31 U.S.C. § 3729(b).
[5]*See* 31 U.S.C. §§ 3729(a) and 3730(d).
[6]*See* 31 U.S.C. §§ 3730(b) and (c).
[7]*See* 31 U.S.C § 3730(b).
[8]*See* 31 U.S.C. § 3730(c).
[9]*See* 31 U.S.C. §§ 3730(d)(1) and (2).
[10]*See* 2016 DOJ Statistics.
[11]*Id.*
[12]*Id.*
[13]*Id.*
[14]*Id.*
[15]*Id.*
[16]*Id.*
[17]*Id.*
[18]*Id.*
[19]*Id.*
[20]*Id.*
[21]*Id.*
[22]*See, e.g., U.S. ex rel. Mastej v. Health Mgmt. Assoc. Inc.,* 591 Fed. App'x 693, 703-04 (11th Cir. 2014); *U.S. ex rel. Keeler v. Eisai Inc.,* 568 Fed. App'x 783, 801 n.23 (11th Cir. 2014); *U.S. ex rel. Clausen v. Lab. Corp. of Am.*, 290 F.3d 1301, 1308 (11th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003).
[23]*U.S. ex rel. Donegan v. Anesthesia Assocs. of Kansas City*, 2015 WL 3616640, at *7 (W.D. Mo. June 9, 2015), *aff'd,* 833 F.3d 874 (8th Cir. 2016).
[24]*Id.*
[25]*Keeler*, 568 Fed. App'x at 803 ("[A] relator cannot segue into discovery simply by filing prolix but unsubstantiated claims"). As Keeler further stated, allowing a relator to "use documents obtained in discovery to overcome pleading hurdles would circumvent the purpose of Rule 9(b)." *Id.* at 804-05.
[26]*See, e.g., U.S. ex rel. Duxbury v. Ortho Biotech Prods.,* 719 F.3d 31, 38-39 (1st Cir. 2013); *U.S. ex rel. Grubbs v. Kanneganti*, 565 F.3d 180, 191 (5th Cir. 2009); *U.S. ex rel. Clausen v. Lab. Corp. of Am.*, 198 F.R.D. 560, 564 (N.D. Ga. 2000), *aff'd*, 290 F.3d 1301 (11th Cir. 2002).
[27]*Bledsoe v. Cmty. Health Sys. Inc.,* 501 F.3d 493, 510-11 (6th Cir. 2007) (citations omitted).
[28]*Id.*
[29]*Dalitz v. AmSurg Corp.*, 2015 WL 8717398 (E.D. Cal. Dec. 15, 2015).
[30]*Id.* at *2.
[31]*Id.* at *3-4.
[32]*U.S. ex rel. Rigsby v. State Farm Fire & Cas. Co.*, 794 F.3d 457 (5th Cir. 2015), *aff'd,* 137 S.Ct. 436.
[33]*Id.* at 464-65.
[34]*Id.* at 468-69.
[35]*Id.* at 469-70.
[36]*U.S. ex rel. Ruckh v. Genoa Healthcare*, 2015 WL 1926417, at *4 (M.D. Fla. Apr. 28, 2015).
[37]*Id.* at *1.
[38]*Id.* at *3.
[39]*U.S. ex rel. Michaels v. Agape Senior Cmty. Inc.*, 2015 WL 3903675, at *7-8 (D. S.C. June 25, 2015).
[40]*Id.* at *8. The Supreme Court also has been reluctant to permit proof of liability through statistical sampling in other contexts. *See, e.g., Wal-Mart Stores Inc. v. Dukes*, 131 S. Ct. 2541 (2011).
[41]On Sept. 29, 2015, the Fourth Circuit agreed to hear the *Michaels* case after it was certified by the district court. Oral argument was conducted on Oct. 26, 2016. As of this writing, no decision has been issued by the Fourth Circuit in the case. The forthcoming Fourth Circuit decision in *Michaels* should yield federal circuit court guidance regarding the scope and parameters of statistical sampling in such cases. *See U.S. ex rel. Michaels v. Agape Senior Cmty. Ctr. Inc.*, No. 15-238 (4th Cir. Sept. 29, 2015).
[42]*See U.S. ex rel. Kane v. Healthfirst Inc.*, 120 F. Supp. 3d 370, 379 (S.D.N.Y. 2015).
[43]31 U.S.C. § 3729(b)(1)(A); *see also Kane*, 120 F. Supp. 3d at 379.
[44]42 U.S.C. §§ 1320a-7k(d)(2)-(3); *see also Kane*, 120 F. Supp. 3d at 379.
[45]*Kane*, 120 F. Supp. 3d at 384.
[46]*Id.* at 377.
[47]*Id.* at 383-84.
[48]*Id.* at 388.
[49]*Id.* at 389. The court relied on a statement by the government that it would not prosecute actions against providers who work diligently to reconcile overpayments because they "would not have acted with the reckless disregard, deliberate ignorance, or actual knowledge of an overpayment required for an FCA claim." *Id.* at 389-90.
[50]31 U.S.C. § 3730(b)(5) (emphasis added).
[51]*Kellogg Brown & Root Servs. Inc. v. U.S. ex rel. Carter*, 135 S. Ct. 1970 (2015). In *Kellogg*, the Supreme Court also addressed whether the Wartime Suspension of Limitations Act (WSLA) applied to FCA litigation. Under the WSLA, certain statutes of limitations are suspended during times of war, thus effectively tolling the time for filing specified claims. The Court concluded that the WSLA does not apply to toll the statute of limitations in civil FCA litigation. *Id.* at 1978.
[52]*Id.* at 1979.
[53]*Id.* at 1978 (quoting Black's Law Dictionary).
[54]*Id.* at 1978-79.
[55]*Id.* at 1979.
[56]*U.S. ex rel. Drakeford v. Toumey Healthcare Sys.*, 792 F.3d 364, 381 (4th Cir. 2015).
[57]*Id.*
[58]*Id.* at 369-73.
[59]*Id.* at 372.
[60]*Id.* at 381-82.
[61]*Id.* at 373. On Oct. 16, 2015, the Department of Justice announced that it had settled the *Toumey* case for $72.4 million, putting an end to 10 years of litigation. *See* Press Release, Department of Justice, United States Resolves $237 Million False Claims Act Judgment Against South Carolina Hospital That Made Illegal Payments to Referring Physicians (Oct. 16, 2015), https://www.justice.gov/opa/pr/united-states-resolves-237-million-false-claims-act-judgment-agaist-south-carolina-hospital.
[62]*Id.*
[63]Memorandum Opinion, ECF No. 314, Civil Case No. 2:12-CV-245-KOB (N.D. Ala. June 25, 2015).
[64]*Id.*
[65]The liability phase of the trial in *AseraCare* initially resulted in a jury finding that the defendant had submitted false claims to the government. However, the court subsequently granted a motion for a new trial regarding the "falsity" element of the government's case because the court concluded that faulty instructions had been given to the jury. *See* 153 F. Supp. 3d 1372 (N.D. Ala. 2015).