

False Claims Act

I. Be Forewarned

II. Be Forearmed



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I.
Be
Forewarned



Background

- Passed in 1863 during the Civil War to address fraud in military procurement contracts
- Also known as “Lincoln’s Law”
- Has undergone substantial amendments by Congress in 1943, 1986, and 2009
- Allows for triple damages



“For sugar it [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories.”

29 Harper's Monthly Magazine 228 (1864)



FCA Prohibits

- 1) Knowingly presenting, or causing to be presented, to the U.S. Government a false or fraudulent claim for payment or approval
- 2) Knowingly making, using, or causing to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government
- 3) Conspiring defraud the Government by getting a false or fraudulent claim allowed or paid

31 USC § 3729(a)

Qui Tam Provisions of FCA

- FCA includes “*Qui Tam*” provisions that allow private citizens (relators) to sue violators on behalf of the government.
- Relator receives a percentage of the recovery
 - 15% to 25% if government intervenes
 - 25% to 30% if government does not intervene, as well as attorneys fees and costs

***Qui tam** pro domino rege quam
pro se ipso in hac parte sequitur*

**“he who brings an action for the
king as well as himself”**



FCA Is A Powerful Government Weapon

- Over \$39B in settlements/judgments since 1986
- In FY 2013, total settlements/judgments of \$3.8B
- In FY 2013, Qui Tam settlements/judgments of \$2.9B
 - Procurement fraud was \$887M
- In FY 2013, Relators' share -- \$388M
- In FY 2013, 753 new *qui tam* lawsuits (15% increase)

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Top Health Care Settlements



Meet Dr. William LaCorte

Dr. LaCorte has received \$38M as a *qui tam* relator.



Common types of *qui tam* actions

- “Mischarging” for goods and services (i.e. charging employee labor to a government contract even though the employee did not work on the project)
- Submitting false cost and pricing data to the government during negotiations of a contract (“false negotiation”)
- Providing an inferior product or falsely certifying that the product met the specifications or that reliability testing was performed
- False certifications
- Sham quality control required by contract

Elements Of A FCA Violation

- 1) A “claim” must be submitted to the Government for payment or approval; and
- 2) The claim must be “false or fraudulent”
- 3) The person must “know” the claim is false.

Element #1: What Is A Claim?

- Any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the U.S. provides or reimburses any portion of the money or property
- Examples:
 - Direct requests for payment
 - Indirect requests for payment
 - Obligations owed to the Government
 - Proposals
 - Loan applications

Element #2: False or Fraudulent?

- Expressly
- By omission
- Implicit
 - Regarding the quality of goods or services
 - Regarding the process used to produce goods
 - Regarding representations to form contract
 - Violating laws and regulations

Element #3: What Is Knowingly?

- Actual knowledge.
- Acts in deliberate ignorance of the truth or falsity of the information.
- Acts in reckless disregard of the truth or falsity of the information.

Proof Of Specific Intent to Defraud not Required!



Reverse FCA – 2009 Amendment

- “Obligation” defined as “retention of any overpayment.”
- “knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government”

Case Study #1: Falsity In Proposal

United States v. Toyobo Co., 811 F. Supp. 2d 37 (D.D.C. 2011) – Alleged misrepresentations regarding Zylon rate of deterioration

U.S. ex rel. Longhi v. Lithium Power Techs. Inc., 2009 WL 1959259 (5th Cir. July 9, 2009) – great case!

Case Study #1: Falsity In Proposal

U.S. ex rel. Longhi v. Lithium Power Techs. (5th Cir. July 9, 2009)

Laid off employee bring action stating fraudulent statements in the SBIR proposals:

- same work on BMDO & AF SBIRs
- misrepresented facilities
- misrepresented “cooperative arrangements” with existing laboratories
- claimed corporation had more experience

Held: numerous False Claims Act violations

Case Study #2: False Small Business Status

Cadillac Asphalt

Frazier Masonry Corp

Case Study #3: False, Low Cost Estimate

United States ex rel. Hooper v. Lockheed Martin Corp., 688 F.3d 1037 (9th Cir. 2012) – Alleged knowing submission of false, low cost estimate

In *United States ex rel. Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037 (9th Cir. 2012), the Ninth Circuit held that contractors can incur FCA liability by making “false estimates,” which the court defined to include “fraudulently underbidding in which the bid is not what the [contractor] actually intends to charge.” The relator demonstrated that Lockheed employees were instructed to lower their bids without regard to actual cost, and the court found that this presented a genuine issue as to whether Lockheed had actual knowledge, deliberately ignored the truth, or acted in reckless disregard of the truth when it submitted an allegedly false bid. On March 27, 2014, a jury sided with Lockheed Martin

Case Study #3: False, Low Cost Estimate *(continued)*

The seminal decision on this issue is *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999), 41 GC ¶ 317. There, the court held that false statements that persuaded the Government to agree that certain work should be subcontracted could support False Claims Act liability

Case Study #4: Bid Rigging

- *United States ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 786 F. Supp. 2d 110 (D.D.C. 2011) - \$47 million settlement for alleged bid rigging of USAID-funded construction contract.
- *United States ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390 (4th Cir. 2013) Allegations including bid-rigging and price-fixing by military transport contractors

Case Study #5: GSA Schedule Obtained By Deception

- Axway Inc. - \$6.2 million settlement (Oct. 2013)– Defective pricing to obtain GSA Multiple Award Schedule (MAS) contract for software licenses and related services
- ■ RPMInt'l-\$60.9millionsettlement(Aug.2013)– Defective pricing to obtain GSA MAS contract for roofing supplies

Case Study #6: TINA

CyTerra Corporation - \$1.9 million settlement (July 2013)– TINA violations for sales of mine detectors

U.S. v. United Technologies Corp., No. 3:99-cv-093, 2008 WL 3007997 (S.D. Ohio 2008), the court found (1) that the contractor had made three false statements that amounted to false claims in the course of competing for a contract, [maybe not a TINA decision]

Case Study #7A: Defective Product

United States ex rel. Howard v. Lockheed Martin Corp., Case No. 1:99-CV-285, 2014 WL 1612165 (S.D. Ohio Mar. 25, 2014) – Alleged failure to comply with quality assurance requirements in F-22 contracts or to flow down applicable quality standards to tooling vendors

Case Study #7B: Defective Product

ATK Launch Systems. The government alleged that ATK sold illumination flares to the Army and the Air Force that were dangerous and defective because the flares were incapable of withstanding a 10-foot drop test without exploding or igniting, as required by specifications. The company agreed to pay \$21 million in cash and provide necessary in-kind services worth \$16 million to fix the 76,000 para-flares remaining in the government's inventory. CY 2012

Case Study #8: Unapproved Source

Sanborn Map Company - \$2.1 million settlement (Feb. 2014) –
Unapproved foreign and domestic subcontractors to produce maps for
U.S. convoy routes in Iraq

Case Study #9: Davis Bacon

United States ex rel. Int'l Bhd. Of Elec. Workers, Local Union No. 98 v. Farfield Co., Civ. A. No. 09-4230, 2013 WL 3327505 (E.D. Pa. July 2, 2013)

- Alleged systematic misclassification of employees to pay workers at a lower rate than required, with workers performing work as electricians classified as “laborers” and “groundsmen”

In *United States ex rel. Wall v. Circle C Construction, LLC*, 697 F.3d 345 (6th Cir. 2012), the Sixth Circuit held that the submission of false payroll certifications required by the Davis-Bacon Act (“DBA”), 40 U.S.C. § 3142, can form the basis of an FCA violation.

Case Study # 10A: Overcharging

United States ex rel. McBride v. Halliburton Co., 1:05–CV–828 (FJS/JMF), 2014 WL 2197854 (D.D.C. May 27, 2014) – Allegations that defense contractors operating facilities in wartime Iraq inflated the headcount of the number of patrons using their facilities to overstate their costs for Government reimbursement

Case Study #10B: Overcharging

On March 1, 2005, Northrop Grumman and Chicago US attorney settled for \$62M qui tam law suit involving the B-2 radar for inflated cost and misrepresenting progress. Relators received \$12.4M

Case Study #11: Allocation Fraud

- Deliberately allocating a disproportionate share of indirect or overhead costs to Government, rather than private commercial, contracts
- Vector Planning and Services Inc. - \$6.5 million settlement (Feb. 2014)
 - Direct costs for Navy contracts double-billed as allowable indirect costs

Case Study #12: Unallowable Costs

Northwestern University - \$2.9 million settlement (July 2013) - Alleged spending of NIH grant funds on goods and services ineligible under grant guidelines

Macalan Group, Inc. - \$2.1 million settlement (Sept. 2013) – Alleged excessive or unallowable costs on contract to deploy specialized personnel to warzones to combat improvised explosive devices

Case Study #13: Overpayment Not Refunded

United States ex rel. Kane v. Continuum Health Partners, Inc., Civ. A. No. 11-2325 (ER) (S.D.N.Y June 27, 2014) – Allegations that hospital failed to timely refund overpayments to the government

Case Study #14: GSA Price Reduction Clause

EMC Corporation agrees to \$87.5M settlement

Case Study #15: OCI

in *United States v. Science Applications International*, 626 F.3d 1257 (D.C. Cir. 2010), the D.C. Circuit endorsed the implied certification theory, thereby broadening the scope of potential liability under the FCA. Even though SAIC's invoices to the federal government were not false on their face and included no express false certifications, the court held that the invoices were implied certifications that the contractor complied with all material contractual requirements, and that SAIC's non-compliance with a conflict of interest requirement rendered each invoice false.

Case Study #16: False Certification

U.S. v. ex rel Harrison v. Westinghouse Savannah River, 352 F.3d 908 (4th Cir 2004) Jury held Kr knew false when made certificate

Case Study #17: Withholding Info

Payment not entitled

the government need only show that 'the contractor withheld information about its noncompliance with material contractual requirements.'

THE UNITED STATES v. KELLOGG BROWN & ROOT SERVICES, INC.. D.D.C. No. 10-cv-530 (RCL), August 03, 2011

Case Study #18: Work Not Done

In *United States ex rel. Daniel Feldman v. van Gorp*, 697 F.3d 78 (2d. Cir. 2012), the United States Court of Appeals for the Second Circuit determined that when a grant recipient provides the Government with a good or service that is different than what the Government bargained for, the recipient is liable for damages under the False Claims Act for all funds received subsequent to the date of the alleged materially false statement. Specifically, the court held that where a false statement was made in the renewal application for grant funds, and the funding agency found that statement to be material to its decision to renew the award for another year, all funds distributed based on that renewal application are considered to be fraudulently obtained.

Case Study #19: Indirect Rates

Calnet Inc. The intelligence analysis, information technology, and language services company agreed to pay \$18.1 million to resolve allegations that it overstated its provisional indirect or overhead rates in submitting claims to the Department of Defense. The FCA settlement related to three contracts under which the company provided translation and linguist services at Guantanamo Bay and several other facilities beginning in 2005.

Case Study #20: Trade Agreement Act

The company agreed to pay \$1 million to resolve allegations that it submitted false claims to federal agencies when it sold telecommunications goods manufactured in countries prohibited by the Trade Agreements Act (TAA). According to the Department of Justice press release, ADC manufactured and sold telecommunications hardware, e.g., modems, extender modules, and shelf adapters, to various federal agencies through its General Services Administration (GSA) Multiple Award Schedule contract. The settlement concerned allegations - disclosed by the company - that it manufactured and sold products from countries such as China that do not have reciprocal trade agreements with the United States and are not on the list of designated countries Ref: 2012 YIR p. 11-1

Case Study #21: Lobbying

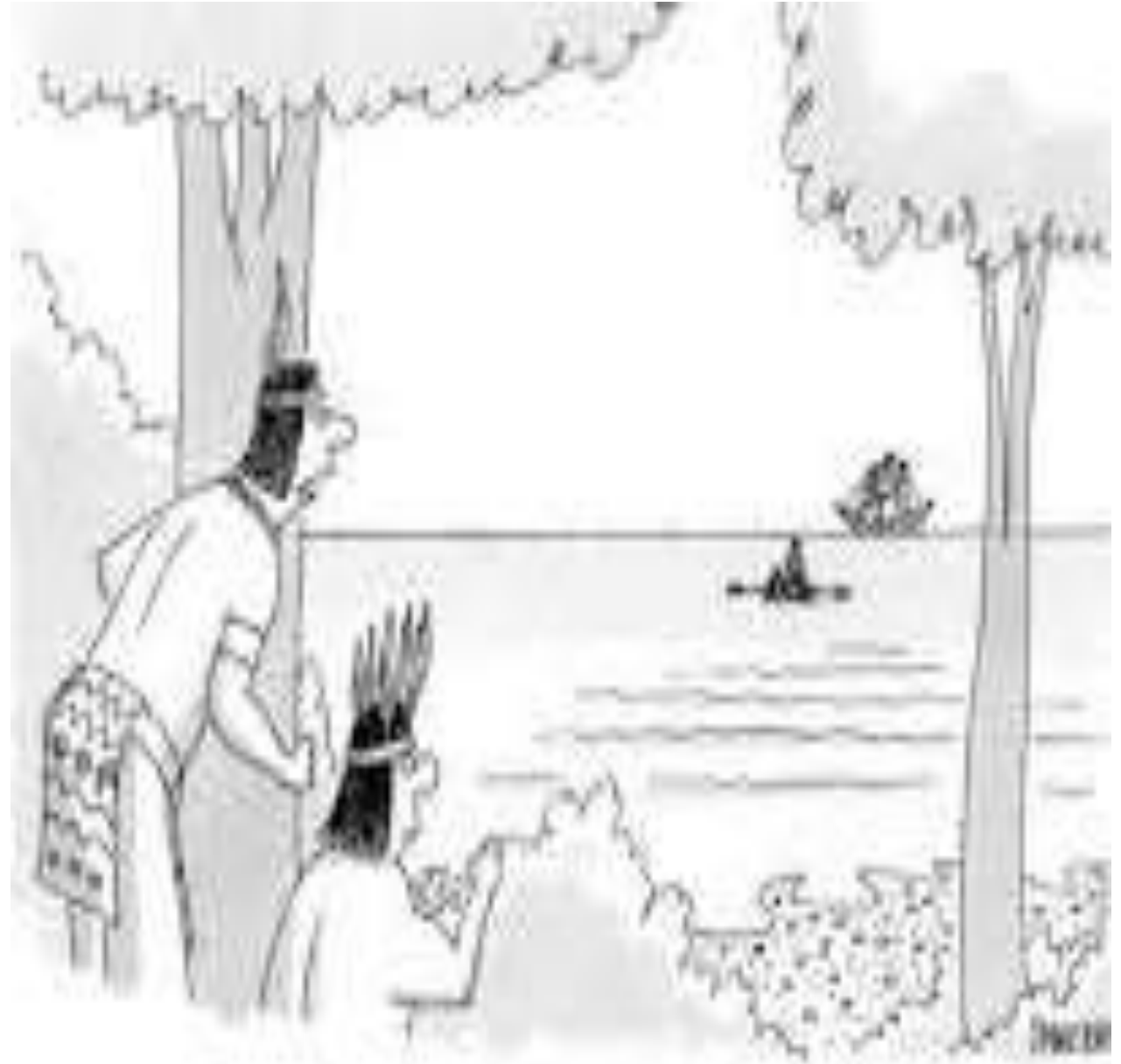
U.S. ex rel. Rambo v. Fluor Hanford LLC, 2:11-cv-05037, (E.D. Wash. Feb. 23, 2011) - The Government recently joined an FCA case filed in 2011 against Fluor alleging violations of the Byrd Amendment, which prohibits use of appropriated funds for lobbying, specifically, paying “any person for influencing or attempting to influence” an employee of a federal agency or a Member of Congress or staff in connection with any contract awards or extensions. In joining this suit, the Government has signaled that it now considers violations of the Byrd Amendment to be violations of the FCA under an implied certification theory, which has implications for contractors making MDR disclosure decisions.

You Have Been Forewarned!



BREAK

II. Be Forearmed



What Is At Stake?

- Triple damages
- Penalty of > \$5,000 and < \$11,000 per claim
- Pay Relator's costs & attorney fees
- Damage to corporate reputation
- Unhappy shareholders
- Possible exit of concerned employees
- Possible suspension & debarment

What Is At Stake?

Retaliatory Provision

“Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees.” [31 USC § 3730(h)]

Many States Have Own FCAs

- California
- Colorado
- Connecticut
- Delaware
- Florida
- Georgia
- Hawaii
- Illinois
- Indiana
- Iowa
- Louisiana
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Montana
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- New York
- North Carolina
- Oklahoma
- Rhode Island
- Tennessee
- Texas
- Virginia
- Washington
- Wisconsin



Qui Tam Road Map

- Relator files complaint under seal
- Department of Justice has 60 days to investigate and decide whether to intervene or not
 - Typically, DOJ asks for extension
- DOJ often uses Civil Investigation Demands to investigate
- DOJ goal is to make decision in nine months
- If DOJ declines – files a notice of non-intervention
 - DOJ can intervene at later time
 - DOJ declination rate is approximately 75%
 - Relator free to pursue law suit unless DOJ moves to dismiss
- If DOJ intervenes
 - DOJ runs the litigation
 - DOJ often files new complaint with additional FCA allegation

The Qui Tam Dynamics

DOJ or U.S. Attorney's Office

Limited resources – “cherry picks” cases to intervene based on:

- Dollars involved and likelihood of a substantial recovery
- Egregiousness of alleged misconduct
- Quality of vendor's compliance program

The Alleged Defrauded Government Agency

- The operational user has
 - Concern for operation impact on being prohibited from using vendor
 - Concern over reduced competition if vendor suspended or debarred
- The agency IG typically seeks harsh treatment of vendors regardless of long-standing record of compliance or agency need for vendor
- The Agency Suspension & Debarment Officials are under pressure to debar

The Relator has a strong personal financial interest

How To Be Forearmed

I. Prevent

II. Preparation

III. Reaction

I. Prevent

The most likely person to bring a qui tam law suit is a disgruntled employee.

- Screen candidate employees thoroughly for history of being troublemaker
- Give employees opportunities to air complaints without fear of retaliation.
- Strong NDAs, releases & severance agreements

I. Prevent

**Implement
an effective
compliance
program**



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"I'm not going to lie to you. We've been having our share of legal problems."

I. Prevent

A compliance program is a management system for preventing inappropriate conduct within an organization. It provides guidance and support across the organization for employees to make appropriate decisions regarding both clinical and business practices, decisions and behaviors

I. Prevent

Why an effective compliance program?

- Creates environment where misconduct less likely
- Whistleblowers are more knowledgeable and active
- Hedge against suspension & debarment
- Federal sentencing guidelines
- Possible reduction in criminal & civil penalties
- Protect senior management from top-down liability

I. Prevent

What Makes A Compliance Program Effect?

- BOD & management buy-In
- Company-wide commitment & support
- Enforcement with vigor & visibility
- Each employee understanding expectations and role

I. Prevent

What Makes A Compliance Program Effect?

- Resources
 - Keep current with changing laws/regs/trends
 - Diligent enforcement/monitoring/evaluation
 - Anonymous reporting capabilities
 - Thorough education and training at all levels
 - Employee understanding & accountability
 - Timely, thorough investigations and follow-up

I. Prevent

FAR Subpart 3.10 – Contractor Code of Business Ethics & Conduct

Expects all contractors to have a written code business ethics and conduct as well as an internal control system to timely disclose improper conduct and take corrective measures.

I. Prevent

FAR Subpart 3.10 – Contractor Code of Business Ethics & Conduct

“a contractor may be suspended and/or debarred for knowing failure by a principal to timely disclose to the Government, in connection with the award, performance, or closeout of a Government contract ... credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act.”

I. Prevent

FAR 52.203-13 – Contractor Code of Business Ethics and Conduct

- Requires periodic review to evaluate effectiveness of internal control system
- Requires confidential hot line
- Requires disciplinary action for failure to prevent or detect improper conduct
- Requires reasonable efforts not to employ individuals who have engaged in conduct that conflicts with code of conduct

I. Prevent

Compliance Plan Content

	<i>Organization For Economic Co-Operation</i>	<i>US Sentencing Commission</i>	<i>Federal Acquisition Regulation</i>	<i>Federal Corrupt Practice Act Guidance</i>
Standards & Procedures	Y	Y	Y	Y
Knowledgeable Leadership	Y	Y	N	Y
Exclude Risky Personnel	Y	Y	Y	Y
Training	Y	Y	Y	Y
Monitor & Evaluate	Y	Y	Y	Y
Hot Line	Y	Y	Y	Y
Discipline	Y	Y	Y	Y
Adjust To Risk	Y	Y	Y	Y

I. Prevent

Gabig's Recommendation

To assure the compliance program has the resources and visibility necessary to protect the corporation, any company that derives the majority of its revenue from government contracts should have a Compliance Committee (not unlike it has an Audit Committee and a Compensation Committee)

II. Prepare

- Make an off-site discussion topic how company will re-act if FBI shows up with search warrant
- Evolve into contingency plan

II. Prepare

Contingency Plan Topics

- No Comment v. Press Release
- Denial v. Admissions
- Commit to full cooperation v. Do not cooperate
- Call an “All-Hands” meeting; answers for Q&A
- Offer to pay legal fees for any employee whom Government wishes to interview

II. Prepare

- For documents vital to carry on operation of the company, have “cloud” backup
- Make sure privileged documents are marked

II. Prepare

- Review insurance coverage and decide what is appropriate
- Review indemnity in employment contracts and bylaws

III. React

Be vigilant for signs of trouble

- Exit interviews of employees
- Rumors about a disgruntle employee
- Activity by DOJ, IG or investigative entities (FBI, CID, AFOSI, NIS etc)
 - CIDs, subpoenas, search warrants, interviews etc.
- Compliance program feedback (e.g., hot line)

III. React

Internal Investigation

- Essential for management to make an informed decision on how to proceed
- Must be impartial and inaccurate
- Unless under attorney-client privilege, govt likely to acquire copy
- Must be promptly done to be pro-active (not reactive) to Govt decisions

III. React

Immediate goal – dissuade DOJ from intervening

Long term goal – unless allegations meritless, global settlement with DOJ & agency

III. React

Significance On No Govt Intervention

- If Govt intervenes, most verdicts favor the Govt
- If Govt does not intervene, most verdicts favor Defendant
- Indicative of not being in Govt “cross-hairs”
- Relator likely to have less litigation resources

III. React

Make A Disclosure Statement? *Pro:*

- Protection against suspended/debarred under FAR Subpart 3.10
- Subsequent qui tam law suits barred
- Proactive strategic of showing good corporate character to avoid S&D
- Govt may reduce FCA damages
- Help persuade Govt not to intervene

III. React

Make A Disclosure Statement? *Con:*

- Gamble that Govt will not learn facts or not make its case
- Negative publicity
- Govt can use admission against vendor
- Concern for shareholder reaction

III. React

Prohibited Qui Tam Lawsuits

- “Parasitic” suits – action already pending on allegations
- “First-to-file” -- another relator has already filed a lawsuit
- Defendant has already disclosed misconduct to the Govt

III. React

Common Defensive Strategies

- Motion to dismiss for failure to pled fraud with specificity as required by Rules of Civil Procedure
- Motion to dismiss for failure to state a claim
- Mere breach of contract, not fraud
- Government complicity
- Reasonable ambiguity in contract or regulation
- Amount of damages reduced based on benefit received by Govt
- Statute of limitations (six years)
- Severity of penalties violates 8th Amendment

Summary

High Level Of Complexity

- Defendant is battling three different parties with different interests: DOJ, the Agency, and the Relator
- The goal is to prevent a large judgment in FCA damages while avoiding suspension & debarment
- The law is complex and occasionally unsettled
- The dynamics depend on the underlying facts and the aggressiveness/competence of the three adverse parties

Dynamics Of A Qui Tam Lawsuit



Relator – DOJ - Agency