

Aspatore  
September, 2010

## NAVIGATING THE GOVERNMENT CONTRACTS PROCESS, 2010 EDITION

LEADING LAWYERS ON EXAMINING RECENT TRENDS IN GOVERNMENT CONTRACTING AND  
UNDERSTANDING THEIR AFFECT ON CLIENTS

## WHAT IS "FALSE" UNDER THE FALSE CLAIMS ACT?

**Marc A. Van Allen** [FNa1]

Partner

Jenner &amp; Block LLP

Copyright © 2010 by Thomson Reuters/Aspatore; Marc A. Van Allen

**Introduction: The Heightened Importance of the "Objectively" False Requirement in FCA Cases**

In 2009, Congress amended the civil False Claims Act (civil FCA), 31 U.S.C. § 3729, with the Fraud Enforcement and Recovery Act of 2009 (FERA or the 2009 amendments), Pub. L. 111-21, 123 Stat. 1621 (May 20, 2009). In passing the FERA, Congress sought to prevent unscrupulous government contractors from evading enforcement due to certain loopholes in the civil FCA. See Steven L. Briggerman, *False Claims Act Amendments: A Major Expansion in the Scope of the Act*, 23 No. 11 Nash & Cibinic Rep., ¶ 58 (November 2009) ("Whether taken individually or collectively, the amendments to the FCA constitute a major expansion in the coverage of the Act."); Laura Laemmle-Weidenfeld and Michael J. Schaengold, *Feature Comment: The Impact of the Fraud Enforcement And Recovery Act of 2009 on the Civil False Claims Act*, 51 No. 25 Gov't Contractor, ¶ 224 (July 8, 2009) ("FERA's amendments to the FCA significantly increase the FCA's scope and applicability while eliminating certain previous legal defenses to FCA violations."); Glenn V. Whitaker, et al., *From Bad to Worse: Changes to False Claims Act Increase Risk to Government Contractors*, 23 No. 7 Andrews Gov't Cont. Litig. Rep. 1 (August 10, 2009) ("[T]he collapse of the nation's preeminent financial institutions provided all the ammunition needed for proponents of expansive FCA liability to ... transform the statute into an even deadlier weapon against recipients of federal funding.").

The 2009 amendments substantially increased the scope of the civil FCA by (i) broadening the civil FCA's coverage over indirect claims made to the government by subcontractors; (ii) eliminating the *scienter* requirement to prove fraud by indirect claimants as established in *Allison Engine Co. Inc. v. United States ex. rel. Sanders*, 553 U.S. 662, \_\_\_, 128 S.Ct. 2123, 2128 (2008); (iii) confirming the Fourth Circuit's decision in *United States ex. rel. DRC Inc. v. Custer Battles LLC*, 562 F.3d 295, 304 (4th Cir. 2009), which adopted a broad definition of government funds that included those funds spent on behalf of the government but controlled by a grantee; (iv) expanding the scope of the reverse false claim provision to include mere avoidance to pay; (iv) expanding the scope of whistleblower protection beyond the defendant's employees; (v) extending the statute of limitations for government claims; and (vi) simplifying the process for the Department of Justice to obtain a

civil investigative demand. See *Briggerman*, 23 No. 11 Nash & Cibinic Rep., ¶ 58.

Because of the 2009 amendments, there will likely be an increase in the number of FCA suits filed by the Department of Justice and *qui tam* relators. In addition, it is anticipated that government contractors in these suits will increasingly rely on the handful of legal defenses that were not eliminated by the 2009 amendments. One of these remaining defenses involves the FCA's "falsity" requirement and the rule that a contractor can be liable under the FCA *only if* the contractor's statements were "objectively" false.

What is an objectively false statement? There is no simple definition, and courts have struggled to apply the objectively false standard in a consistent manner. Nevertheless, in some civil FCA cases, courts appear to apply the objectively false standard in a manner that roughly parallels the application of the falsity standard in criminal fraud cases brought under (i) the False Statements Act, 18 U.S.C. § 1001, and (ii) the criminal False Claims Act (criminal FCA), 18 U.S.C. § 287. Under these criminal statutes, a statement is "false" only if it is literally false under "any reasonable interpretation" of the relevant facts and circumstances. In many cases, it is difficult for the government to prove that a statement is literally false under any reasonable interpretation of the facts and circumstances. As a result, in future civil FCA suits, contractors will likely argue that the objectively false standard is essentially the same as the any reasonable interpretation standard for falsity that is used in criminal cases.

### Three Fraud Statutes

All government contractors need to be mindful of three statutes that prohibit fraudulent conduct: (i) the False Statements Act, (ii) the criminal FCA, and (iii) the civil FCA.

The False Statements Act provides that when communicating with *any* government official, it is a felony if a person knowingly "falsifies, conceals, or covers up by any trick, scheme, or device a material fact; makes any materially false, fictitious, or fraudulent statement or representation; or makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry." 18 U.S.C. § 1001.

The criminal FCA provides: "Whoever makes or presents to ... the United States ... any claim upon or against the United States ... knowing such claim to be false, fictitious, or fraudulent, shall be imprisoned." 18 U.S.C. § 287. Under the criminal FCA, "the mere inclusion of a false statement in a claim is sufficient to give rise to criminal liability." *United States ex rel. A+ Homecare Inc. v. Medshares Mgmt. Group Inc.*, 400 F.3d 428, 444 n.12 (6th Cir. 2005).

The civil FCA provides: "Any person who ... knowingly presents ... a false or fraudulent claim for payment; [or] knowingly makes [or] uses ... a false record or statement material to a false or fraudulent claim" shall be liable. FERA, Pub. L. 111-21, 123 Stat. 1621 (May 20, 2009) (to be codified at 31 U.S.C. § 3729(a)(1)(A)-(B)). The civil FCA is "intended to reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968). For example, "where a private company overcharges under a government contract, the claim for payment is itself literally false or fraudulent." *United States ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1170 (9th Cir. 2006). In addition, courts have developed "two doctrines that attach potential FCA liability to claims for payment that are not explicitly and/or independently false: (1) false certification (either express or implied); and (2) promissory fraud [also called fraudulent inducement]." *Id.* at 1171. Under false certification theory, the plaintiff must show that the de-



defendant's certification that it would comply with a statute or regulation as a condition of payment was false. *Id.* Under promissory fraud, "liability will attach to each claim submitted to the government under a contract, when the contract or extension of government benefit was originally obtained through false statements or fraudulent conduct." *Id.* at 1173.

### The "Falsity" Standard in Criminal Cases

In several criminal False Statements Act cases, courts have held that a contractor's statement is "false" only if the government negates any reasonable interpretation that would make the statement factually correct. See *United States v. Dale*, 991 F.2d 819, 832-33 (D.C. Cir. 1993) (affirming defendant's conviction under § 1001 because "her statements ... were not literally true under a reasonable interpretation."); *United States v. Race*, 632 F.2d 1114, 1120 (4th Cir. 1980) (reversing defendant's conviction because "defendants cannot be convicted under § 1001 for a statement or billing which may be said to be accurate within a reasonable construction of the contract."); *United States v. Anderson*, 579 F.2d 455, 460 (8th Cir. 1978) ("[T]he government must negative any reasonable interpretation that would make the defendant's statement factually correct."); see also *United States v. Calhoon*, 97 F.3d 518, 525-28 (11th Cir. 1996) (rejecting defendant's invocation of *Race* because his interpretation of Medicare reimbursement guidelines was not reasonable).

In addition, these courts have held that the government may not introduce evidence regarding the defendant's actual state of mind to determine falsity. *Race*, 632 F.2d at 1120 ("It thus makes no difference what the defendants thought if [defendant]'s billings were authorized under a reasonable interpretation of the contract."). In other words, there is a rigid division between the falsity and the *scienter* elements. For this reason, a court may evaluate whether a contractor's statement is literally true under any reasonable interpretation of the facts and circumstances, before turning to *scienter* issues.

Similarly, in several criminal FCA cases, courts have applied the any reasonable interpretation standard to determine whether a contractor's statement was false. See *United States v. Blecker*, 657 F.2d 629, 634-35 (4th Cir. 1981); *United States v. White*, 765 F.2d 1469, 1479-80 (11th Cir. 1985) (affirming conviction of defendant under § 287 because no reasonable reading of the contract supported defendant's representations); *United States v. Computer Sci. Corp.*, 511 F.Supp. 1125, 1136 (E.D. Va. 1981) (applying the § 1001 falsity standard to a § 287 suit, but refusing to apply it to a Fed. R. Crim. P. 12(b) motion), *rev'd* on other grounds, 689 F.2d 1181 (4th Cir. 1982).

For example, in *Blecker*, the government alleged that the defendant submitted invoices for fees based upon false résumés to the prime contractor, knowing the prime contractor would, in turn, submit the claims to the government. *Blecker* at 631. After being convicted under § 287 in the trial court, the defendant appealed on numerous grounds, including the ground that the prosecution had provided insufficient evidence that the claim was false. *Id.* at 634. The court rejected this challenge to the conviction, however, because the prime contract was clear that the prime contractor would be paid hourly rates "based on the experience and educational background of the consultants performing the work." The *Blecker* court pointed to *Race*, a False Statements Act case, as a contrast to its facts because in *Race* the court agreed that the defendant's interpretation of the contract was reasonable. *Id.*

However, in at least one criminal False Statements Act case, a court has refused to adopt the any reasonable interpretation standard when determining whether a false statement has been made. See *United States v. Camper*, 384 F.3d 1073, 1078 (9th Cir. 2004) (holding that even when a question has two plausible meanings, "where



the evidence proves that the defendant understood one such meaning and answered falsely to it, a jury can convict for a false statement.”).

In *Camper*, the defendant was convicted at trial of making a false statement to the government when he filled out a criminal history questionnaire as part of an airport security badge application. *Id.* at 1074. One of the questions asked whether the defendant had been convicted of “unlawful possession, use, sale, distribution, or manufacture of an explosive or weapon.” The defendant answered no, but seven months earlier, the defendant had pleaded guilty to a misdemeanor charge of carrying a loaded firearm in public without being the registered owner. In his guilty plea, the defendant wrote, “I willfully and unlawfully possessed a loaded firearm in a car. The firearm was not registered to me.” *Id.* On appeal, the defendant argued that the questionnaire was ambiguous because “unlawful possession” could reasonably have meant, under the applicable California criminal laws, that the defendant had illegally acquired the weapon. *Id.* at 1077. The Ninth Circuit agreed that this was a plausible interpretation of the questionnaire, and that courts in other jurisdictions would not sustain a conviction under these circumstances. *Id.* at 1078. Nevertheless, the Ninth Circuit held that “where the evidence proves that the defendant understood one such meaning and answered falsely to it, a jury can convict for a false statement.” *Id.*

#### The “Falsity” Standard in Civil FCA Cases

The civil FCA requires the plaintiff to demonstrate that the contractor's statement is *objectively or literally false*. See *United States ex rel. Wilson v. Kellogg Brown & Root Inc.*, 525 F.3d 370, 376 (4th Cir. 2008) (“[T]he statement or conduct alleged must represent an objective falsehood.”); *United States ex rel. Ramadoss v. Caremark Inc.*, 586 F.Supp.2d 668, 687 (W.D. Tex. 2008) (“An essential element to a reverse false claims act claim is actual falsity.”); *United States ex rel. DRC Inc. v. Custer Battles, LLC*, 472 F.Supp.2d 787, 797 (E.D. Va. 2007) (“It is well-established that the FCA requires proof of an objective falsehood.”), *aff’d*, 562 F.3d 295 (4th Cir. 2009); *United States v. Prabhu*, 442 F.Supp.2d 1008, 1033 (D. Nev. 2006) (“[P]laintiff must demonstrate that an objective gap exists between what the Defendant represented and what the Defendant would have stated had the Defendant told the truth.”); *United States ex rel. Roby v. Boeing Co.*, 100 F.Supp.2d 619, 629 (S.D. Ohio 2000) (“At a minimum, the FCA requires proof of an objective falsehood.”), *aff’d*, 302 F.3d 637 (6th Cir. 2002); *United States ex rel. Milam v. Regents of Univ. of Cal.*, 912 F.Supp. 868, 883 (D. Md. 1995) (“False Claims Act liability cannot be imposed on the basis of a literally true statement.”).

The civil FCA cases have described a statement that is “objectively” true or false in various ways:

- It is a “statement of fact that can be said to be either true or false,” *Boisjoly v. Morton Thiokol Inc.*, 706 F.Supp. 795, 810 (D. Utah 1988)
- It is not an “expression of opinion,” *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 792 (4th Cir. 1999)
- It is not the “exercise of scientific or professional judgment as to an applicable standard of care,” *Luckey v. Baxter Healthcare Corp.*, 2 F.Supp.2d 1034, 1037 (N.D. Ill. 1998), *aff’d*, 183 F.3d 730 (7th Cir. 1999)
- It is not an “expression of opinion, scientific judgment, or statement as to conclusions about which reasonable minds may differ,” *Boeing Co.*, 100 F. Supp. 2d at 625-26
- It does not exist where “there was and still is a good-faith disagreement over a complex area of law,” *Caremark*, 586 F. Supp. 2d at 688



- It does not exist where “there are legitimate grounds for disagreement over the scope of a contractual or regulatory provision, and the claimant's actions are in good faith,” *Southland*, 326 F.3d at 682 (Jones, concurring)
- It does not exist where there are “differences in interpretation growing out of a disputed legal question,” *United States ex. rel. Lamers v. City of Green Bay*, 168 F.3d 1013, 1018 (7th Cir. 1999); *Hagood*, 81 F.3d at 1477
- It does not exist when “reasonable persons can disagree regarding whether the service was properly billed to the Government,” *Prabhu*, 442 F. Supp. 2d at 1026
- It does not exist where a “legitimate estimate by a contractor of work performed” is made, *Custer Battles LLC*, 472 F.Supp.2d at 797
- It is not “bad math,” *Wang ex rel. United States v. FMC Corp.*, 975 F.2d 1412, 1420-21 (9th Cir. 1992)

Clearly, these descriptions of what constitutes an objective falsehood do not provide a single coherent test for courts to apply in civil FCA cases. Nevertheless, one common denominator in some of these descriptions is the reference to “reasonable persons” and their ability to differ about close questions of fact or law. See *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir. 2008) (“*KBR*”).

In *KBR*, the contractor entered a contract with the Department of Defense to provide operational support to the military. *Id.* The contract permitted the government to request specific services through task orders. Under Task Order 43, the Army asked the contractor to provide transport of fuel and other supplies from Kuwait to Iraq. *Id.* at 373-74. The contract's statement of work and Task Order 43 provided general safety and maintenance requirements for KBR vehicles. One requirement stated that vehicles shall “be maintained in a safe operating condition and good appearance.” *Id.* KBR signed a DD Form 1155 in connection with Task Order 43, indicating that KBR expressly accepted the “terms and conditions” of the task order. *Id.* The relators, former truck drivers for KBR in Iraq, claimed that KBR neglected to perform routine maintenance, such as oil changes, fuel filter changes, and windshield repairs, on the trucks in their convoy. *Id.* As a result, the alleged false statement was the DD Form 1155 for Task Order 43 signed by KBR.

However, the court held that this was not a false statement because the assertion that it is false “rests not on an objective falsehood ... but rather on Relators' subjective interpretation of KBR's contractual duties.” *Id.* Further, “Given the imprecise nature of the general maintenance provisions at issue here, it is not exactly clear what would qualify as adequate (or inadequate) maintenance under Task Order 43.” *Id.* The court concluded from this that “the question of whether KBR performed sufficient maintenance under the contract represents, at the very least, ‘a disputed legal question’ about the ‘inefficient management of [one's] contractual duties.’ This is precisely the sort of claim that courts have determined not to be a false statement under the FCA.” *Id.* The court upheld the district court's dismissal of the suit.

The court contrasted the subjective falsehood in *KBR* with an objective falsehood in *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 788 (4th Cir. 1999). There, the FCA relator claimed that the defendant made several objectively misleading statements in an attempt to fraudulently induce the government to award it a Department of Energy contract. The alleged misleading statement was that a particular project would take no more than one and a half years to complete. The relator claimed that the contractor knew it would take significantly longer. The relator also claimed that the defendant had “underestimated specific overhead costs when submitting a bid.” According to the court, these statements were objective falsehoods, while “the maintenance provisions in the [KBR] contract [did not] set forth anything resembling a specific maintenance program for the convoy trucks.” *Id.* at 377. Instead, “KBR's alleged defalcations involve several general and relatively vague



maintenance provisions ... These sorts of claims do not qualify as objective falsehoods.” *Id.*

In addition, it is important to note that with the “objectively false” standard, courts often seem to focus more on *scienter* than falsity. For example, incorrect mathematical computations and “good faith” mistakes of fact are objectively false. However, these statements are usually not fraudulent-- even though they are objectively false--because there is no *scienter*. See *Lamers*, 168 F.3d at 1018.

The relator in *Lamers* was the owner of a private bus service in Green Bay, Wisconsin, whose company had a contract with Green Bay Area Public School District to provide school bus services for its students. *Id.* at 1014. Due to financial concerns, the school district contracted with the city-owned Green Bay Transit to provide an alternative for transporting children to and from schools on their buses. *Id.* Green Bay Transit was funded in part by the Federal Transit Administration, which regulates the ability of administration-funded transportation services to transport schoolchildren. *Id.* The relator informed the Federal Transit Administration that Green Bay Transit was not complying with the applicable regulations regarding the transportation of schoolchildren, and subsequently filed an FCA suit. *Id.* at 1015.

After the trial court dismissed the case, the relator appealed. The Seventh Circuit noted that “the FCA does not define ‘false’ or ‘fraudulent.’” Based on prior case law, the Seventh Circuit recognized that certain categories of false statements were *per se* not actionable: “innocent mistakes or negligence are not actionable”; “errors based simply on faulty calculations or flawed reasoning are not false under the FCA”; “imprecise statements or differences in interpretation growing out of a disputed legal question are simply not false under the FCA.” In addition, the Seventh Circuit noted with approval the district court’s view that “it is impossible to meaningfully discuss falsity without implicating the knowledge requirement.” As a result, the Seventh Circuit opined, “our consideration of the falsity question will be incorporated into our knowledge discussion.” *Id.* After reviewing the falsity and the *scienter* requirements, the Seventh Circuit court ruled that there was no basis to infer that the city “knowingly misrepresented its compliance” and that “minor technical violations [of the regulations] seem normal for a new bus program, and they do not give rise to an FCA claim.” *Id.* at 1019.

### Overlap between the Criminal and Civil Standards

In the majority of jurisdictions, the criminal falsity standard asks one legal question: is there some reasonable interpretation of the facts, without taking any regard of the defendant’s state of mind, that would make the defendant’s statement true? In contrast, the civil falsity standard has been articulated in many different ways and often in an *ad hoc* manner based on the particular facts of the case. In addition, with the civil falsity standard, courts often seem to focus more on *scienter* than falsity.

Nevertheless, in a growing line of cases, the descriptions of the criminal and civil falsity standards appear to be converging. Compare *Regents of Univ. of Cal.*, 912 F.Supp. at 883 (“False Claims Act liability cannot be imposed on the basis of a *literally true* statement.”) (civil FCA case) (emphasis added) and *Prabhu*, 442 F.Supp.2d at 1026 (a false statement does not exist when “*reasonable persons can disagree*”) (civil FCA case) (emphasis added) with *Dale*, 991 F.2d at 832-33 (statements “were not *literally true* under a *reasonable interpretation*”) (criminal FCA case) (emphasis added).

As a result, contractors will likely argue that the two standards simply describe the same concept in different terms. The civil standard defines falsity in the affirmative as an “objective” falsehood, while the criminal standard defines falsity in the negative as not existing when there is a reasonable interpretation of the underlying facts



that makes a statement true. However, the government may respond that the criminal and civil falsity standards are distinct. In particular, the government will argue that the basis for the any reasonable interpretation rule in *Race* was that the criminal burden of proof is higher than the civil burden. See *United States v. Mackby*, 261 F.3d 821, 827 (9th Cir. 2001) (“These cases [*Race* and *Anderson*] state that in a *criminal* FCA proceeding, when there are ambiguities as to the falseness of a claim, ‘the government must negative any reasonable interpretation.’ ... In those cases, the government had to prove falsity ‘beyond a reasonable doubt.’”) (emphasis in original).

### **Conclusion: How Government Contractors Can Decrease the Risk of FCA Liability**

Government contractors need to be more attuned than ever to the statutory requirements of the civil FCA. Fortunately, there are several steps government contractors can take to lower the risk of civil FCA liability:

- *Identifying the risks.* Contractors may benefit from identifying the areas of contracts or contracting regulations that give rise to the most difficulty in interpretation. This may direct contractors toward focusing their legal and technical resources on the areas of contracts and regulations that may give rise to interpretation disputes.
- *Mitigating the risks.* Contractors may implement reviews or compliance systems that seek to routinely identify areas of contracting that may give rise to interpretive risks. Brainstorming and reviewing past experiences with the aid of ongoing legal developments may give a contractor insight into where the most sensitive issues lie.
- *Disclosure.* Maintaining strong communication lines with the government regarding the existence of any interpretation difficulties provides a means of avoiding FCA suits down the road, and may even result in a formal waiver from the government on particular interpretation issues.

### **Key Takeaways**

- The 2009 amendments by Congress to the civil FCA, 31 U.S.C. § 3729, eliminated numerous legal defenses previously available to contractors. To avoid liability under the expanded FCA statute, government contractors may consider evaluating the strength of remaining legal defenses, such as the falsity doctrine.
- Civil FCA cases from the past two decades have embraced an objective test to determine falsity. Contractors may argue that the current objective falsity test is congruous with the any reasonable interpretation test used to determine falsity under the criminal FCA and the criminal False Statements Act.
- The government may contend, however, that the objective falsity test is incongruous with the reasonableness test. The government may argue that the different burdens of proof for criminal and civil liability require that the two tests remain distinct.
- In general, a government contractor can decrease the risk of an FCA suit arising by identifying the risks, mitigating those risks, and maintaining open communication with the government.

[FN1]. Marc Van Allen is a partner at Jenner & Block LLP and a member of his firm's Government Contracts Practice Group. During his career, he has tried a broad spectrum of civil and criminal cases. As part of his practice, he regularly defends clients accused of fraud in cases involving tax law, securities law, and government contracts.

***Acknowledgment:** Shaun M. Van Horn, an associate at Jenner & Block LLP, contributed substantially to the writing of this chapter.*

END OF DOCUMENT