Chapter 2:08 Reverse False Claims

Prior to the 1986 FCA amendments, a number of cases held that the government could not establish an FCA violation when the defendant submitted false records or statements to the United States to reduce its obligation to pay money to the government because under these circumstances no affirmative "claim" was made to the government for its money or property.

In 1986, Congress amended the statute to clarify that such "reverse" false claims violated the FCA. However, notwithstanding such clarification, as with other provisions of the statute, conflict has arisen regarding the scope of one's "obligation" to pay money to the government. For example, if one makes a misrepresentation in order to avoid paying a statutory fine, did the person make a "false record or statement" to "decrease an obligation to pay" money to the government?

In answering this question, much turns on how broadly the term "obligation" should be construed. As is set forth below in more detail, the issue, prior to 1986, arose in two separate contexts: (a) a person, under a contract, was obligated to pay the government a fixed amount and yet used false statements to minimize the amount owed to the government, and (b) a person made a false representation to the United States to reduce her obligation to pay money to the government when the person had no explicit pre-existing contractual duty to pay money to the government. Under the first scenario, courts split on whether defendants' conduct violated the FCA. Under the second scenario, courts correctly ruled that the United States would need to look to other statutes to penalize defendants' misrepresentations, and not the FCA, because otherwise, thus broadly read, the FCA would become a general all-purpose antifraud statute used to police all types of statutory breaches or fraud against the government.[1]

In 1986, Congress overruled the first set of cases by enacting Subsection (a)(7). However, when it amended the statute, it made clear, in both the language it used and the cases it cited in the legislative reports, that it only intended to overrule those cases that related to breaches of contractual duties, and not the second line of cases, those cases related to any conceivable statutory or contractual violation. Courts, in construing the 1986

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[1] *Cf.* Universal Health Servs. v. United States ex rel. Escobar, 136 S. Ct. 1989, 2003–04 (2016) (finding that the FCA is not "an all-purpose antifraud statute" or a "vehicle for punishing garden-variety breaches of contract or regulatory violations" and emphasized that "the False Claims Act is not a means of imposing treble damages and other penalties for insignificant regulatory or contractual violations").

amendments, initially read Subsection (a)(7) broadly to encompass all misrepresentations made to the federal government. (Thus, rendering meaningless Congress' demarcation of seven types of prohibited conduct in Section 3729(a).) Subsequently, however, courts have read Subsection (a)(7) more narrowly, consistent with Congressional intent, to apply only when one submits a false record or statement to reduce a pre-existing contractual duty to pay money to the government.

In 2009, Congress further refined the FCA's reverse false claims provision in two significant respects. First, while its initial legislative history indicated a wholecloth repeal of case law finding that the FCA did not apply to contingent liabilities such as false statements made to potentially avoid the application of statutory penalties, Congress ultimately amended the statute to only reach those instances when the defendant had an established duty to repay a debt. Second, Congress expanded the provision to reach those who "knowingly and improperly" retain an overpayment.

Set forth below is the legislative history and case law that address the scope of the FCA's reverse false claims provision.

A. Historical Conflict Before 1986 Regarding Whether Reverse False Claims Fell Within the FCA

Prior to 1986, a number of courts reached different conclusions regarding whether "reverse" false claims were actionable under the statute. These cases were generally of two types: those cases under which the government had an express contract with a party under which the party would pay or provide services up to a specified percentage of revenue received under the contract; and those in which a party, who did not have a contract with the government, breached a duty to the government and thereby gained a financial advantage.

When Congress amended the statute in 1986, it stated that it created Subsection (a)(7) to overrule specific cases where parties created false records or statements in order to minimize their obligation to pay funds or provide services under their contracts with the government. Specifically, the Senate Report cited *United States ex rel. Kessler v. Mercur Corp.*,[2] *United States v. Howell*,[3] *United States v. Brethauer*,[4] as cases in which courts had misconstrued the FCA. However, Congress, during the course of the passage

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[2] 83 F.2d 178 (2d Cir. 1936).

[3] 318 F.2d 162 (9th Cir. 1963), *aff'g* on this point, United States v. Elliott, 205 F. Supp. 581 (N.D. Cal. 1962).

[4] 222 F. Supp. 500 (W.D. Mo. 1963).

of the 1986 amendments, never expressed any intent to overrule court decisions that had held that a person does not submit a "claim" to the government where the person merely breaches a general duty to the government which results in that person's financial advantage.

In *United States v. Mercur Corp.*, the government entered into a lease under which defendants would operate and use the Port Newark Army Supply Base for storage warehouse and manufacturing purposes.[5] Under the contract, defendants had a right to sublet portions of the Base provided that the defendant company would charge against gross revenues obtained in subletting all operating expenses including depreciation of equipment and repairs or improvements defendants made on the Base up to 95% of the gross revenue received in rent; the defendants were allowed to retain the remaining 5%.[6] The government asserted that defendants falsely claimed that certain expenses were chargeable to the lease and thereby breached its contractual obligation to expend a specified percentage of net revenue on the maintenance and repair of the premises.[7]

The court rejected the government's contentions. The court concluded that the government had no property interest in the earnings of the company from the operation and use of the land and buildings. Since the receipts of the lessee were the property of the company and not the government, the company did not present any "claims" to the government in order to obtain money or property under this arrangement.[8]

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[5] 83 F.2d at 179.

[6] *Id.* The lease underwent several subsequent amendments in which the defendant company was able to retain a higher percentage of the gross revenue. *Id.*

[7] The government's theory was that gross revenue was vested in the United States and no part of it became the property of the defendant company until it submitted its monthly accountings and thus the company absconded with the government's money or property (the vested gross revenue) when it inaccurately reported the amounts it expended under the lease. *Id.* at 180.

[8] *Id.* at 181–82. The court relied upon, in part, United States v. Cohn, 270 U.S. 339, 345 (1926), which construed the provisions of the FCA in the context of a criminal case and ruled that no "claim" had been submitted to the government when a consignee of nondutiable imported cigars obtained possession of the property by stating that he had lost the bill of lading. The Court ruled that no "claim" was submitted because:

> The provision relating to the payment or approval of a "claim upon or against" the Government relates solely to the payment or approval of a claim for money or property to which a right is asserted against the Government, based upon the Government's own liability to the claimant. And obviously it does not include an application for the entry and delivery of non-dutiable merchandise, as to which no claim is asserted against the

Similarly, in *United States v. Howell*, the government had contracted with concessionaires to operate cleaning facilities on military bases under which the government would receive a specified percentage of their gross receipts from their operations.[9] The government contended that defendants had mischaracterized their gross receipts in order to decrease their obligation to pay the government under the contract.[10] The court rejected the government's claim, ruling that no "claim" had been submitted to the government and thus the government had no claim under the FCA. Specifically, the court noted that to impose liability "there must be more than mere fraud; the fraud must be predicated on a claim. The fraudulent reduction of [defendants'] liability to the Government does not spell out a false claim as defined by the statute."[11] The court pointed out that if "the Act were intended to cover any and all attempts to cheat the United States, we doubt that the Congress would have used the word 'claim' to specify such an intent."[12]

Finally, in *United States v. Brethauer*, the defendant held concessionaire contracts with the government in which the defendant would remit to the government a specific percentage of the gross receipts.[13] The government contended that defendant had misrepresented the amount of net profits realized under the contact.[14] The court, in rejecting the government's contention, pointed out that defendant did not submit any "claim" to the government. The court reasoned that "[i]t is one thing to provide a statutory remedy to recover money taken from the Government by fraud; it is quite a different thing to attempt to recover under the same statute money allegedly fraudulently withheld from the Government."[15]

However, significantly, in some cases the United States had alleged a violation of the FCA when defendants had engaged in fraudulent conduct unrelated to any contract that party held with the government. Unlike the above referenced cases, Congress, in its 1986 amendments, did not expressly

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Government, to which the Government makes no claim, and which is merely in the temporary possession of an agent of the Government for delivery to the person who may be entitled to its possession.

[9] 318 F.2d at 163.

[10] *Id.*

[11] *Id.* at 166 (footnote omitted).

[12] *Id.* at 165.

[13] 222 F. Supp. at 501.

[14] *Id.*

[15] *Id.* at 502.

urge the reversal of these cases. Two cases that are illustrative are *United States v. Lawson*[16] and *Hageny v. United States*.[17]

In *United States v. Lawson*, United States sued a postmaster, alleging that he submitted false statements which resulted in financial losses to the United States.[18] Specifically, the government alleged that defendant, as postmaster, completed a sworn verification of the financial condition of the post office after it had been robbed.[19] The government contended that the completion of the form relieved defendant of financial liability resulting from the robbery. The government later learned that defendant had conspired with others in the robbery. The government contended, among other things, that defendant's completion of the sworn verification constituted a false "claim" because it had the effect of relieving defendant from personal liability for the post office's losses and thereby forced the government to bear the full brunt of the loss.[20]

The court, however, rejected that government broad theory of liability—that is, transforming a robbery case to a FCA case:

> Lawson's conduct did not have the purpose or effect of causing the Government to pay out money. The dissemination of money and property occurred at the time of the robbery. Count I of the suit really should not be characterized as an attempt to recover for losses resulting from the presentation of a false claim; rather, Count I actually is an attempt to use the False Claims Act's allowance of double damages and an amount as a forfeiture to recover from [defendant] twice the amount of Government property lost for the robbery plus the $2,000 forfeiture amount. Although the court looks with great disfavor on Lawson's participation in the robbery, we cannot allow the Government to utilize an inappropriate cause of action to replace lost Government property as

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[16] 522 F. Supp. 746 (D.N.J. 1981).

[17] 570 F.2d 924 (Ct. Cl. 1978).

[18] 522 F. Supp. at 747.

[19] *Id.* at 748, 751.

[20] United States Postal Service regulations provided that a postmaster is personally liable for any losses sustained by his post office until the evidence establishes that he "faithfully and conscientiously enforced Postal Service policies, programs, regulations and procedures for management of his/her post office." When this is established, the Postal Service relieves the postmaster of liability for the loss. *Id.* at 751, n. 4. Thus, the government's theory was that had the postmaster not lied on this form and accepted responsibility for the crime, the postmaster, and not the United States, would have been liable for the losses resulting from the crime.

well as obtaining additional money.[21]

Similarly, in *Hageny v. United States*, the government set forth an extremely broad theory of what precisely constitutes a false claim. There, a logger had contracted with the United States to obtain the right, in exchange for payment, to cut and remove timber from a national forest.[22] The United States contended that the logger had cut and removed timber beyond that called for in the parties' contract.[23] Moreover, the United States contended that the logger had violated the FCA. Although the government conceded that the logger had not made a written claim to the government for money or payment, the government, nonetheless, contended that the FCA applied because "any fraudulent conduct involving loss of government property, whether manifested in some written form or by conduct without any written predicate, falls within the ambit of the Act."[24] The court rejected the government's broad theory. It pointed out that the government "would have the fraudulent conduct itself constitute the 'claim' regardless of whether governmental approval of such conduct, in one form or another, was sought. Under this view, a simple theft of government property would constitute a 'claim' within the ambit of the False Claims Act."[25]

B. The 1986 Amendments

The House Judiciary Committee's bill and the Senate Judiciary Committee's bill both proposed identical language to proscribe the use of false record or statements to decrease an obligation to pay money or property to the United States:

> (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; . . .[26]

The House Judiciary Committee's Report stated that the purpose of the provision was to overrule case law that had held that no violation of the FCA occurred when the party's misrepresentation decreased its obligation to pay

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[21] *Id.* at 752.

[22] 570 F.2d at 925.

[23] *Id.*

[24] *Id.* at 932.

[25] *Id.* at 932. The court, while severely criticizing the government's view of what constitutes a "claim," nonetheless did not dispose of the action on this ground because the logger had not disputed the government view. The court dismissed the government's action on alternate grounds.

[26] H.R. REP. 660 at 2; S. REP. 345 at 39.

the government (because, under these circumstances, there was no obligation of the government to pay on a claim):

> Another amendment to the current law contained in H.R. 4827 allows the Government to prosecute a false claim which has been filed for the purpose of reducing the amount the claimant owes to the Government. Under the current statute, case law has held that the statute did not provide for liability in such a situation. The Committee felt that there is no reason to treat a false claim filed against the Government to fraudulently reduce an obligation owed to the Government differently from one filed for the purpose of fraudulently obtaining money. The Government should have the ability to collect all losses suffered through fraud.[27]

Like the pertinent House Judiciary Committee Report, the Senate Judiciary Committee Report pointed out that the provision was intended to resolve the split that had developed among the courts in construing the statute:

> 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.
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> The question of whether the False Claims Act covers situations where, by means of false financial statements of accounting reports, a person attempts to defeat or reduce the amount of a claim or potential claim by the United States against him, has been the subject of differing judicial interpretations. Although it is now apparent that the False Claims Act does not apply to income taxes cases, and the Committee does not intend that it should be so used, the act's earlier history serves to illustrate the problem which has come to be known as the "reverse false claim;" i.e., claims to avoid a payment to the Government. Thus, courts have held that there is no violation of the False Claims Act by the filing of a fraudulent Federal tax return (seeking to avoid payment of income tax) as distinguished from a fraudulent claim for a tax refund (seeking to obtain an inflated refund payment). *Olson v. Mellon,* 4 F. Supp. 947, 948 (W.D. Pa. 1933), *aff'd sub nom., United States ex rel. Knight v. Mellon*, 71 F.2d 1021 (3d Cir. 1934), *cert. denied*, 293 U.S. 615 (1934). *Cf. United States ex rel. Roberts v. Western Pac. R. Co.*, 190 F.2d 243, 247 (9th Cir. 1951), *cert. denied*, 342 U.S. 906 (1952). In the few contract or

[27] H.R. REP. at 20.

lease arrangement cases in which the issue arose, several courts have applied the same rationale, with the result that a person's fraudulent attempt to reduce the amount payable by him to the United States was considered not to constitute a violation of the False Claims Act. *United States ex rel. Kessler v. Mercur Corp.*, 83 F.2d 178 (2d Cir.), *cert. denied,* 299 U.S. 576 (1936); *United States v. Howell*, 318 F.2d 162 (9th Cir. 1963), *aff'g* on this point, *United States v. Elliott*, 205 F. Supp. 581 (N.D. Cal. 1962); *United States v. Brethauer*, 222 F. Supp. 500 (W.D. Mo. 1963).

A better reasoned result was reached in *Smith v. United States,* 287 F.2d 299 (5th Cir. 1961). In that case, a nonprofit housing project was operated by a municipal housing authority under a lease from the U.S. Public Housing Administration as lessor. The lessee (housing authority) was obligated to remit quarterly to PHA as rent the excess of the lessee's revenues from the project over its operation expenses and PHA was obligated to advance to the lessee such funds as might be necessary to cover anticipated deficits if the project's revenues were insufficient to defray expenses. Quarterly reports of the project's revenues and expenses were required to be submitted by the lessee to PHA. The manager of the local housing authority fraudulently inflated the project's operating expenses in each of two quarterly reports filed with PHA. The report for the first quarter showed a deficit in the project operations and the PHA paid the amount of such deficit to the local housing authority. The report for the second quarter showed a surplus in the project operations and the amount of such surplus was remitted by the local housing authority to PHA. The United States sued the project manager under the False Claims Act, demanding a forfeiture for each false report and asserting as its damage (subject to doubling) the amount of the fraudulent inflation of the project's operating expenses in each of the two quarterly reports. The Fifth Circuit affirmed judgment for the United States for double damages and forfeitures with respect to both reports, declaring that the False Claims Act was violated (a) by the fraud in the first report, but for which the Government "would have made a lesser payment," and (b) by the fraud in the second report, but for which the Government "would have received more rent." 287 F.2d at 304. This same rationale was adopted in the more recent case of *United States v. Peter Vincent Douglas*, 626 F. Supp. 621 (E.D. Va. 1985).

The Supreme Court's opinion in United States v. Neifert-White Co., 390 U.S. 228 (1968), indicated that the False Claims Act "was intended to reach all types of fraud, without qualification, that might result in

> financial loss to the Government." The Committee strongly endorses this interpretation of the act and, to remove any ambiguity, has included this amendment to resolve the current split in the caselaw relating to such material misrepresentations.[28]

As was noted previously, in its discussion of the proposed scope of Subsection (a)(7), Congress only cited to the contract cases and did not express its intent to overrule those cases in which courts refused to expand the scope of the statute to all fraudulent conduct.

C. Congress' 2009 FCA Amendments

The legislative path that the FCA's overpayment provision traversed is important to study in detail, because it demonstrates Congress' resolve that a higher, more stringent standard governs FCA overpayments and that the duty to repay does not arise from contingent obligations, but from an "established duty" to repay a debt owed.

1. Senate Bill 386 to Amend the FCA

On February 5, 2009, Sens. Leahy and Grassley introduced S.386, a bill to improve the enforcement of mortgage, securities, and financial institution fraud and other frauds related to federal assistance and relief programs.[29]

The Senate bill proposed expanding the scope of the reverse false claims provision. Prior to 2009, the FCA lacked an express provision mandating the repayment of a known overpayment and, under the interpretation of a majority of courts, a person had an obligation to pay the government only when it submitted a false record or statement to the government that breached a fixed duty to pay an owed amount to the government. Under the 2009 amendments, Congress sought to enact two significant revisions to close this "loophole": (1) expand the provision so that it would apply to a knowing avoidance to repay an overpayment to the government, and (2) enlarge the provision to apply to merely contingent obligations. Specifically, Congress proposed the following revisions (proposed revisions to the FCA's existing provision in bold and underscored):

> (G) 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, **<u>or knowingly conceals, avoids, or decreases an obligation to pay or transmit money or property to the Government,</u>**

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[28] S. Rep. 345 at 18, 19, reprinted *in* 1986 U.S.C.C.A.N 5283, 5284.

[29] *See* 155 Cong. Rec. S.1681 (Feb. 5, 2009).

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> (3) **the term 'obligation' means a fixed duty, or a contingent duty arising from an express or implied contractual, quasi-contractual, grantor-grantee, licensor-licensee, fee-based, or similar relationship, and the retention of any overpayment.**[30]

Thus, under the amendment, the provision would no longer require that a person submit an actual false record or statement, but could apply when a person simply received an overpayment, because the amendment would prohibit a person from "knowingly . . . avoid[ing] . . . an obligation to pay" and an obligation was defined to include the retention of any overpayment.

2. DOJ's February 24, 2009, Letter

Approximately three weeks after Sens. Leahy and Grassley proposed their bill, the Department of Justice, on February 24, 2009, wrote to Sen. Leahy to recommend additional revisions to the bill.[31] Specifically, DOJ proposed the following amendment to the Senate's bill:

> (G) knowingly makes, uses, or causes to be made or used, a false record or statement **material** to ~~conceal, avoid, or decrease~~ an obligation to pay or transmit money or property to the Government, or knowingly conceals, **or improperly** avoids~~;~~ or decreases, an obligation to pay or transmit money or property to the Government.

DOJ noted that the apparent purpose underlying the Senate bill's definition of "obligation" was to overrule cases that found that an obligation encompassed only duties that were "fixed in all particulars, including the specific amount owed."[32] However, DOJ also recognized that this amendment created the danger that those who merely sought to avoid or decrease an obligation to pay during an audit process may be subjected inappropriately to FCA liability. Specifically, DOJ noted:

> Section 4(a)(1) amends the FCA's reverse false claim provision to make the knowing concealment or avoidance of an obligation to pay a violation, and adds a definition of the term "obligation." The Department supports these changes . . . While the affirmative FCA provisions

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[30] *Id.* at S. 1683–84.

[31] Letter from M. Faith Burton, Acting Assistant Attorney General, Department of Justice, to The Honorable Patrick J. Leahy, United States Senate, Committee on the Judiciary (Feb. 24, 2009) (hereinafter, "DOJ Letter").

[32] *Id.* at 2.

> currently impose liability even in the absence of any false statement or record, there is no analogue in the reverse false claim context. Additionally, the new definition of obligation would address those cases that unduly narrowed the reverse false claim provision by holding or suggesting that the term "obligation" encompasses only a duty to pay that is fixed in all particulars, including the specific amount owed. *See, e.g., American Textile Mfrs. Inst. v. The Limited, Inc.*, 190 F.3d 729 (6th Cir. 1999); *United States v. Q Int'l Courier, Inc.*, 131 F.3d 770 (8th Cir. 1997).
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> Although the Department supports the Committee's efforts to revise and clarify the scope of the reverse false claim provision, the Department recommends . . . refinements to ensure that the provision reaches only a party's wrongful attempts to minimize the party's obligations to the Government. [T]he Department recommends inserting the words "or improperly" before the term "avoids" in the last clause of proposed subparagraph 3729(a)(l)(G), as follows: ". . . or knowingly conceals, or improperly avoids or decreases, an obligation to pay . . ."[33]

3. Senate Judiciary Committee Report (March 2009)

On March 5, 2009, the Senate Judiciary Committee issued its Report.[34] In its Report, the Committee proposed the following revisions to the amendment that DOJ proposed to create the "knowingly and improperly" standard regarding the retention of an overpayment:

> (G) 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.

Additionally, the Committee proposed an additional revision to the definition of "obligation":

> (3) the term "obligation" means a fixed duty, or a contingent duty arising from an express or implied contractual, quasi-contractual, grantor-grantee, licensor-licensee, **statutory,** fee-based, or similar relationship, and the retention of any overpayment~~.~~**;**

When comparing the Senate's bill to the actual language in the then existing 1986 reverse false claims provision, the bill reported out of the Committee proposed the following revisions:

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[33] *Id.*

[34] S. REP. 10, at 4, *reprinted in* 2009 U.S.C.C.A.N., at 433.

> (7)G knowingly makes, uses, or causes to be made or used, a false record or statement **material** to ~~conceal, avoid, or decrease~~ 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,**

As drafted at this point, the Committee's provision would create liability in two situations: (1) when a person knowingly uses or causes to be used, "a false record or statement material" to an obligation to pay, or (2) when a person "knowingly conceals or knowingly and improperly avoids or decreases" an obligation to pay. Also, at this point, it appears that the Committee envisioned that the reverse false claims provision would apply to merely contingent obligations, such as the creation of false statements to avoid the payment of tariffs:

> Further, this legislation addresses current confusion among courts that have developed conflicting definitions of the term "obligation" in Section 3729(a)(7). The term "obligation" is now defined under new Section 3729(b)(3) and includes fixed and contingent duties owed to the Government—including fixed liquidated obligations such as judgments, and fixed, unliquidated obligations such as tariffs on imported goods. It is also noteworthy to restate that while the new definition of "obligation" expressly includes contingent, non-fixed obligations, the Committee supports the position of the Department of Justice that current Section 3729(a)(7) "speaks of an 'obligation,' not a 'fixed obligation'." By including contingent obligations such as "implied contractual, quasi-contractual, grantor-grantee, licensor-licensee, fee-based, or similar relationship," this new section reflects the Committee's view, held since the passage of the 1986 Amendments, that an "obligation" arises across the spectrum of possibilities from the fixed amount debt obligation where all particulars are defined to the instance where there is a relationship between the Government and a person that "results in a duty to pay the Government money, whether or not the amount owed is yet fixed."[35]

Finally, the Committee addressed the balance that it intended to strike by inserting the prohibition against the "retention of an overpayment" in the statute. Specifically, the Committee noted that it simply intended to capture instances where a person knowingly used estimates to retain governmental funds to which the person was not entitled, but not capture instances like

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[35] S. REP. 10 at 14, *reprinted in* 2009 U.S.C.C.A.N., at 441–42 (footnote omitted).

hospital cost reports, where an entity may receive overpayments (or underpayments) as a natural byproduct of the regulatory scheme:

> The new definition of "obligation" includes an express statement that an obligation under the FCA includes "the retention of an overpayment." The Department of Justice supported the inclusion of this provision and provided technical advice that the proper place to include overpayments was in the definition of obligation. This new definition will be useful to prevent Government contractors and others who receive money from the Government incrementally based upon cost estimates from retaining any Government money that is overpaid during the estimate process. Thus, the violation of the FCA for receiving an overpayment may occur once an overpayment is knowingly and improperly retained, without notice to the Government about the overpayment. The Committee also recognizes that there are various statutory and regulatory schemes in Federal contracting that allow for the reconciliation of cost reports that may permit an unknowing, unintentional retention of an overpayment. The Committee does not intend this language to create liability for a simple retention of an overpayment that is permitted by a statutory or regulatory process for reconciliation, provided the receipt of the overpayment **is not based upon any willful act** of a recipient to increase the payments from the Government when the recipient is not entitled to such Government money or property. Moreover, **any action or scheme created to intentionally defraud the Government** by receiving overpayments, even if within the statutory or regulatory window for reconciliation, is not intended to be protected by this provision. Accordingly, **any knowing and improper retention of an overpayment** beyond or following the final submission of payment as required by statute or regulation—including relevant statutory or regulatory periods designated to reconcile cost reports, but excluding administrative and judicial appeals—would be actionable under this provision.[36]

4. April 22, 2009, Floor Statements

On April 22, 2009, on the Senate floor, Sen. Kyl proposed significant revisions to the Committee's definition of "obligation." The Senate agreed to Sen. Kyl's amendments, and those amendments were ultimately adopted into law unchanged. Specifically, Sen. Kyl proposed the following revision to the definition:

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[36] S. REP. 10 at 15, *reprinted in* 2009 U.S.C.C.A.N., at 442 (footnote omitted) (emphasis supplied).

> (3) the term "obligation" means ~~a fixed~~ **an established** duty, **whether** or ~~a contingent duty~~ **not fixed,** arising from an express or implied contractual, ~~quasi-contractual,~~ grantor-grantee, **or** licensor-licensee, **relationship, from a** fee-based, or similar relationship, ~~and~~ **from statute or regulation or from** the retention of any overpayment.[37]

As to the purpose underlying these proposed revisions, Sen. Kyl pointed out that the definition of obligation previously proposed was too broad, because it would include "contingent" obligations, such as a duty to pay a fine upon the commission of some transgression. If the statute were expanded in that fashion, as Sen. Kyl pointed out, a person conceivably could be held liable to pay treble damages for a fine before the duty to pay the fine was established. Thus, he proposed to strike the words "contingent duty" and that the language "established duty" be inserted in its place. By revising the statutory language in this fashion, Sen. Kyl believed that the reverse false claims provision would not be inappropriately expanded to reach contingent obligations like duties to pay penalties or fines:

> The bill's new definition of the word "obligation," in particular, posed several problems. The original language spoke of "contingent" obligations. Such contingent or potential duties could include duties to pay penalties or fines, which could arise—and at least become "contingent" obligations—as soon as the conduct that is the basis for the fine has occurred.
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> Obviously, we don't want the Government or anyone else suing under the False Claims Act to treble and enforce a fine before the duty to pay that fine has been formally established. It is unlikely that Justice would ever have brought suit to enforce a claim of this nature, but the FCA can also be enforced by private relators who often may be motivated by personal gain and not always exercise the same good judgment that the Government usually does.
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> To preclude such a reading of the act, my amendment strikes contingent obligations from the FCA's new definition of "obligation."[38]

Also consistent with the limited scope of the provision, Sen. Kyl reiterated prior governmental statements that "overpayments" would be a source of obligation only when a defendant "knowingly and improperly" retains an overpayment. Specifically, Sen. Kyl clarified that this standard applied only

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[37] 155 CONG. REC. S.4539.

[38] *Id.* (emphasis supplied).

when defendant's conduct was "*malum in se,*" or inherently wrongful, and does not apply when the defendant is "pursuing in good-faith the exhaustion of a reconciliation procedure":

> I might also say a few words about aspects of the definition of obligation that I ultimately concluded that it was not necessary to address in this amendment. At the Judiciary Committee's mark up of this bill, I circulated an amendment that would limit obligations arising out the retention of any overpayment so as to make clear that no obligation arises if the defendant is pursuing some type of administrative, judicial, or other process for reconciliation of alleged overpayments. The sponsors of the bill raised the concern, however, that such a safe harbor might immunize parties that intentionally and maliciously obtain an overpayment, and then spend years exhausting a reconciliation process, all in bad faith and knowing full well that they must repay the money, but earning interest on the overpayment in the interim. Apparently incidents like this have occurred, in cases involving sums that allowed the defendant to earn tens of millions of dollars in interest. The sponsors of the bill also noted to me that, under subparagraph (G)'s modification of the reverse False Claims Act, avoiding or decreasing an obligation is only actionable, in relevant part, if the defendant "knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." Therefore, a good-faith pursuit of a reconciliation process would not be actionable.
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> **I asked my staff to research the meaning of "knowingly and improperly" to confirm that a person who pursues reconciliation of an overpayment in good faith could not be held liable under the reverse False Claims Act. The answer that I received is that the term "knowingly and improperly," though infrequently used in the caselaw, is consistently construed to mean that a person either acted with bad intent or that he employed means that are inherently tortious or illegal.**
>
> . . . In the False Claims Act context, this list may include other **improper means, but "improper means" must be means that are *malum in se*—that is, means that are inherently wrongful and constitute an independent tort.**
>
> * * *
>
> **Given that the words "knowingly and improperly" have a fixed meaning that, at the very least, requires either improper motives or inherently improper means**, the changes made by this bill cannot be

> read to make actionable the retention of an overpayment when the defendant is pursuing in good faith the exhaustion of a reconciliation procedure. It is with this understanding that I have declined to insist on further qualification of the bill's predication of liability on the retention of an overpayment.[39]

Thus, significantly, Congress' precise intent, as reflected in the plain language it employed, the "knowingly and improperly" standard**—**rather than to use the FCA's general knowledge standard, reckless disregard and deliberate ignorance**—**was to ensure that the FCA would **never** be used unless the plaintiff established that the person's conduct in retaining an overpayment was "*malum in se*," or "inherently wrongful," or "willful" and where a person "employed means that are inherently tortious or illegal."[40] Moreover, in another clause of the reverse FCA provision, although Congress initially intended to expand the reverse FCA provision to reach contingent obligations, ultimately, Congress struck that language to mandate that the provision would apply only to established duties.

D. Case Law Applications

Under the current version of the reverse false claims provision, the requirement that a person must make or use a false record or statement to conceal, avoid, or decrease an obligation to pay the government is no longer the sole basis upon which a claim can be premised. Instead, there are now two separate prongs under which a defendant may be liable under the FCA's reverse false claims provision: a relator can either prove (1) that the defendant made or used a false record or statement that was "material to" an obligation to pay the government *or* (2) that the defendant "knowingly conceal[ed] or knowingly and improperly avoid[ed] or decrease[d] an obligation to pay or transmit money or property to the Government."[41] The second ground for potential liability permits a relator to state a reverse false claim without alleging that the defendant used a false record or statement. Both prongs, however, require that the defendant owe an "obligation" to the government. The case law relevant to both prongs is set forth below.

1. False Statement Material To an Obligation To Pay

To establish a violation of the reverse false claims provision, courts ruled that plaintiff must demonstrate: "(1) a false record or statement; (2) the

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[39] *Id.* at S4539–40.

[40] *See* 155 CONG. REC. S4539–40 (2009); *see also* S. REP. 10 at 15, *reprinted in* 2009 U.S.C.C.A.N., at 442.

[41] 31 U.S.C. § 3729(a)(1)(G).

defendant's knowledge of the falsity; (3) that the defendant made, used, or causes to be made or used a false statement or record; (4) for the purpose to conceal, avoid, or decrease an obligation to pay money to the government; and (5) the materiality of the misrepresentation."[42]

Prior to the 2009 amendment to the reverse FCA provision, "courts struggled to define when exactly defendants have an 'obligation' to pay funds to the Government."[43] Courts, however, for the most part, consistent with Congressional intent, limited the application of then Subsection (a)(7) to when the defendant had a pre-existing contract or lease with the government that creates the obligation or otherwise an established economic relationship, as opposed to merely a regulatory relationship, with the government. Courts declined to impose liability under Subsection (a)(7) when the obligation was merely contingent.

In Congress' 2009 amendments to the reverse false claims provision, Congress' initially proposed revisions that would have potentially resulted in a wholescale repeal of its past limitation on the provision applying to contingent liabilities. The Senate bill provided that an "obligation" expressly included "a contingent duty."[44] However, immediately, prior to passage, the reference to contingent duty was expunged from the statute and replaced with an "established duty" so that, as Sen. Kyl explained, the provision would not apply to general obligations to pay penalties or fines because "we don't want the Government or anyone else suing under the False Claims Act to treble and enforce a fine before the duty to pay that fine has been formally established."[45]

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[42] United States ex rel. Matheny v. Medco Health Solutions, Inc., 671 F.3d 1217, 1222 (11th Cir. 2012) (citations omitted); *see also* United States ex rel. Ramsey-Ledesma v. Censeo Health, L.L.C., No. 3:14-CV-00118, 2016 U.S. Dist. LEXIS 135392, at *38–39 (N.D. Tex. Sept. 30, 2016); United States ex rel. Schaengold v. Mem'l Health, Inc., No. 4:11-cv-58, 2014 U.S. Dist. LEXIS 169555 at *3–4 (S.D. Ga., Dec. 8, 2014) (same); United States ex rel. Wilson v. Crestwood Healthcare, L.P., No. 11-S-3361, 2012 U.S. Dist. LEXIS 69763 at *25 (N.D. Ala. May 18, 2012) (same).

[43] *See* United States ex rel. Boise v. Cephalon, Inc., No. 08-287, 2015 U.S. Dist. LEXIS 94448, at *10 (E.D. Pa., July 21, 2015) (quoting Robert Salcido, *The 2009 False Claims Act Amendments: Congress' Efforts to Both Expand and Narrow the Scope of the False Claims Act*, 39 PUB. CONT. L.J. 741, 742–43 (2010)).

[44] *See* S. REP. 10, *reprinted in* 2009 U.S.C.C.A.N. at 441–42 (describing Senate Bill).

[45] 155 CONG. REC. S.4539. *See also* United States ex rel. Simoneaux v. E.I. du Pont de Nemours & Co., 843 F.3d 1033, 1035 & 1038 (5th Cir. 2016) (noting "[b]y a vote of ninety-four to one, the Senate adopted Senator Kyl's amendment to change the language to the current, enacted version" and the "fact that Congress deleted the word 'contingent,' added

Consistent with this legislative history, courts have continued to find that an established economic relationship must exist between the government and the defendant—such as a contract or a mandated, non-discretionary penalty for the movement of commerce, such as some tariffs on imported goods. However, where the penalty or fine is discretionary (that is, contingent), courts have continued to find that the FCA's reverse false claims provision does not apply. Set forth below is a discussion of these cases.

(a) Courts Do Not Apply Subsection (a)(1)(G) When There is a Contingent Duty to Remit an Overpayment

As with pre-2009 case law, courts have refused to apply the FCA reverse false claims provision when the FCA plaintiff contends that the defendant violated the FCA because defendant failed to disclose that it violated a statute or regulation that resulted in defendant avoiding the payment of fines based upon that breach.[46]

'whether or not' modifier to 'fixed,' and inserted the word 'established' suggests that it did not intend to cover contingent penalties" and finding that the Fraud Enforcement and Recovery Act of 2009 did not intend to abrogate prior precedent ruling that the FCA's reverse false claims provision did not apply to contingent penalties) (footnote omitted).

[46] **Prior to the 2009 amendments, courts, almost uniformly, ruled that a person is only liable under prior Subsection (a)(7) when the person owes the United States a clear, current legal duty to pay an ascertainable amount, and not for contingent liabilities.** *See, e.g.,:*

D.C. Circuit: United States ex rel. Hoyte v. Am. Nat'l Red Cross, 518 F.3d 61, 66–67 (D.C. Cir. 2008) (finding that Subsection (a)(7) does not apply when defendant is in the same position as any regulated entity that is subject to possible sanctions for violating an administrative requirement because an unassessed potential penalty for regulatory noncompliance does not constitute an obligation that gives rise to a viable FCA claim).

First Circuit: United States ex rel. S. Prawer & Co. v. Verrill & Dana, 946 F. Supp. 87, 94–95 (D. Me. 1996) (rejecting relator's contention that private lawyers and a Federal Deposit Insurance Corporation (FDIC) lawyer had violated Subsection (a)(7) because they knew that a bank had improperly transferred a loan to the FDIC but concealed and covered up the impropriety, noting that the legislative history twice refers to "money owed," as "the kind of obligation that the reverse false claims prohibition is designed to cover" and that "[m]oney is not 'owed' without a specific contract remedy, a judgment or an acknowledgment of indebtedness").

Second Circuit: United States ex rel. Taylor v. Mario Gabelli, 345 F. Supp. 2d 313, 332 (S.D.N.Y. 2004) ("Although the Act does not define the word 'obligation,' courts have found that a defendant's obligation must be a 'present duty to pay money or property that was created by a statute, regulation, contract, judgment, or acknowledgment or indebtedness,' as contrasted with a 'potential liability' or penalty") (footnote omitted).

Fifth Circuit: United States ex rel. Bain v. Ga. Gulf Corp., 386 F.3d 648, 657 (5th Cir. 2004) (finding that Subsection (a)(7) "does not extend *to* the potential or contingent

(Text continued on page 364)

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obligations to pay the government fines or penalties which have not been levied or assessed (and as to which no formal proceedings to do so have been instituted) and which do not arise out of an economic relationship between the government and the defendant (such as a lease or a contract or the like)"); United States ex rel. Marcy v. Rowan Cos., No. 03-3395, 2006 U.S. Dist. LEXIS 57936 at *40, *48, *52 (E.D. La. Aug. 17, 2006) (no violation of Subsection (a)(7) when relator alleges that defendants lied to avoid obligation to pay fines under the Clean Air Act because government had not sought to impose fines and the mere contingent liability was insufficient to state a claim), *aff'd*, 520 F.3d 384 (5th Cir. 2008); United States ex rel. Coppock v. Northrop Grumman Corp., No. 3:98-CV-2143-D, 2003 U.S. Dist. LEXIS 12626 at *46 (N.D. Tex. July 22, 2003) ("An obligation refers to existing legal duties to pay or deliver property . . . rather than to speculative duties, or duties that do not exist at the time of the false statements") (internal quotation, citation, and footnote omitted).

Sixth Circuit: Am. Textile Mfrs. Inst., Inc. v. The Limited, Inc., 190 F.3d 729 (6th Cir. 1999); United States ex rel. Wilkins v. Ohio, 885 F. Supp. 1055, 1064–65 (S.D. Ohio 1995) (rejecting relator's contention that state breached its obligation to disclose non-compliance by contractor to United States under federal regulations because the "amended complaint fails to allege that defendants were required to identify incidents of misspent funds or amounts due the government due to misspent funds on the application forms for new grant monies such that the failure to reveal this information on the application forms could be deemed a fraudulent omission. The complaint is devoid of any other allegations concerning records or statements which were false due to omissions submitted to or reviewed by the government. The bare allegation that 'defendants did not tell the United States Government about the misuse of federal funds and they all acted to prevent repayment to the United States Government' is not sufficient to state a claim under § 3729(a)(7)").

Seventh Circuit: United States ex rel. Lusby v. Rolls-Royce Corp., No. 1:03-CV-0680, 2008 U.S. Dist. LEXIS 69300 at *31–*32 (S.D. Ind. Sept. 10, 2008) (rejecting relator's contention that defendant breached Subsection (a)(7) when defendant made statements to the government that its practices conformed to law to induce the government to settle a dispute for a lower payment, thus allegedly avoiding or decreasing its obligation to the government, because "[i]nterpreting [defendant's] alleged misrepresentations as imposing an obligation to pay would result in a potential second cause of action against anyone who attempted to defend against a claim for payment brought by the Government" and concluding that the relator "has failed to allege that [the defendant] had an obligation to pay money to the Government" because it had "no pre-existing legal duty to pay at the time of the alleged misrepresentations"), *aff'd in relevant part, rev'd* 570 F.3d 849 (7th Cir. 2009); United States ex rel. Lamers v. City of Green Bay, 998 F. Supp. 971 (E.D. Wis. 1998), *aff'd,* 168 F.3d 1013 (7th Cir. 1999).

Eighth Circuit: United States v. Q Int'l Courier, Inc., 131 F.3d 770, 773 (8th Cir. 1997).

Ninth Circuit: United States ex rel. Huangyan Imp. & Exp. Corp. v. Nature's Farm Prods., Inc., 370 F. Supp. 2d 993 (N.D. Cal. 2005).

Tenth Circuit: United States ex rel. Lemmon v. Envirocare of Utah, 2:02-CV-904, 2008 U.S. Dist. LEXIS 29619 at *43–*44 (D. Utah Apr. 9, 2008) ("The Relators do not argue that [Defendant] incurred any prescribed fee or a fixed or formulaic assessment per occurrence concerning the incidents of improper waste handling alleged in the . . . Complaint, similar to the fees for replacement certificates incurred in *ConAgra*. Instead, they insist that those alleged incidents *may* subject [defendant] to liability for fines, penalties, clean-up costs *or*

But, as noted, in 2009, as part of the FERA amendments, Congress added a definition of the term "obligation," specifying that an obligation means "an *established duty, whether or not fixed*, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment."[47] In enacting this provision, Congress had stripped from a prior version of the proposed amendment language that would have permitted FCA plaintiffs, for the first time, to sue based upon contingent obligations.[48] Senator Kyl explained that the purpose of this revision was to eliminate the possibility that a plaintiff could sue to enforce contingent obligations like a duty to pay a fine upon the commission of some transgression.[49]

In light of the statutory revision, courts have had to consider whether Congress intended, by the language "whether or not fixed," to include contingent duties or that it sought to preclude the statute's application to contingent duties by striking the word contingent and replacing it with an "established duty" because a contingent or potential fine is not an "established duty."

In addressing this issue, courts, consistent with Senator Kyl's statement, have ruled that Congress did not intend to extend the reverse false claims provision to contingent obligations as evidenced by using the language "established duty" and that the intent of the language "whether or not fixed" was to cover fixed unliquidated obligations such as tariffs on imported goods.[50]

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offsets—all of them yet to be determined, and none of them prescribed on a sum certain or formulaic per-occurrence basis by [defendant's] government contracts, or by the applicable statutes and regulations. [Thus, defendant's] Rule 12(b)(6) motion should be granted"), *rev'd other grounds*, 614 F.3d 1163 (10th Cir. 2010); United States ex rel. Conner v. Salina Reg'l Health Ctr., 459 F. Supp. 2d 1081, 1091 (D. Kan. 2006) (dismissing claim because "any potential liability for future fines or sanctions at some indefinite point in the future for some unknown amount is not an 'obligation to pay' under [Subsection] (a)(7)").

[47] 31 U.S.C. § 3729(b)(3) (emphasis added).

[48] *See* S. REP. 10, *reprinted in* 2009 U.S.C.C.A.N. at 441–42 (describing Senate Bill).

[49] 155 CONG. REC. S.4539.

[50] **Post-FERA case law continues to find that the FCA's reverse false claims provision does not apply to contingent liabilities**. *See, e.g.,*

Third Circuit: United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC, No. 12-1562, 2016 U.S. Dist. LEXIS 97159, at *20, 22, 24 (D. Del. July 26, 2016) (refusing to apply provision to defendants' failure to disclose violation of Vessel Documentation Act to avoid payment of fines because that provision is contingent on the government's discretion to

Thus, as the district court explained in *Nissman*, the reverse false claims provision still does not apply to contingent obligations that attach only after the exercise of administrative or prosecutorial discretion and after the selection of a range of penalties:

> Although the definition of "obligation" under the amended version of the FCA includes "a relationship between the Government and a person that 'results in a duty to pay the Government money, whether or not the amount owed is yet fixed,' " S. Rep. No. 111-10, at 14 (2009) (citation omitted), *reprinted at* 2009 U.S.C.C.A.N. 430, 441, the type of contingent liability that is excluded from the scope of the reverse false claims provision has not changed. There remains no liability under the FCA for contingent obligations that "attach only after the exercise of administrative or prosecutorial discretion, and often after a selection from a range of penalties." *United States ex rel. Schaengold v. Mem'l Health, Inc.*, 2014 U.S. Dist. LEXIS 169555, at *39 (S.D. Ga. Dec. 8, 2014) (quoting *Am. Textile Mfrs.*, 190 F.3d at 738 (internal quotation marks omitted)).[51]

(b) Courts Apply Subsection (a)(1)(G) When There is a Pre-Existing Contract or Established Economic Relationship

Historically, the catalyst for Congress' creation of the reverse false claims provision was to address instances in which the government had an express contract with defendant and the defendant lied in order to reduce an obligation to pay under the contract.

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impose fines and the potential obligation to pay unassessed fines are not within the scope of the FCA); United States ex rel. Nissman v. Southland Gaming of the Virgin Islands, Inc., No. 2011-0010, 2016 U.S. Dist. LEXIS 45049, *41–47 (D.V.I. Mar. 31, 2016) (finding that "the addition of the phrase 'whether or not fixed' to the reverse false claims provision was not meant to cover the type of contingent obligations Plaintiff contemplates—i.e., unadjudicated and unassessed statutory fines" but "was to cover 'fixed unliquidated obligations,' such as tariffs on imported goods" and noting that given that "Senator Kyl's amendment was accepted without objection," his "explanation of the amendment provides further support for the Court's conclusion") (citations omitted).

Fifth Circuit: United States ex rel. Simoneaux v. E.I. du Pont de Nemours & Co., 843 F.3d 1033, 1037–38 (5th Cir. 2016) (noting "the overwhelming weight of authority, before FERA, held that contingent penalties are *not* obligations under the FCA. Given that we presume that Congress is 'aware of judicial interpretation of the law and . . . act[s] with awareness of judicial interpretations of prior law,' it necessarily follows that 'whether or not fixed' resolved the active dispute over whether an obligation could be for an uncertain sum, while 'established' confirmed the accepted holding that contingent penalties are not obligations under the FCA") (footnotes omitted).

[51] *Nissman*, at *44–45 (footnote omitted).

As to contractual duties creating an established duty under the FCA, the majority of courts have ruled that a defendant's violation of a Corporate Integrity Agreement (CIA's) can result in an FCA violation. CIA's typically mandate that the company report to the Office of Inspector General (OIG) "reportable events," including alleged violations of law applicable to federal health care programs.[52] If the company fails to make a report, it may lead to the imposition of stipulated penalties if the OIG determines that penalties are appropriate.[53] Thus, there are cases where relators who are employed by companies operating under CIAs have reported alleged misconduct and when their employer did not report the conduct to the OIG have filed FCA actions alleging that by failing to disclose the reportable event to the government the companies' conduct constituted avoidance of their "obligation" to pay the CIA's stipulated penalty.[54]

In *Ruscher*, a district court found that because the CIA constituted a "contract" between the company and the OIG and because a contractual breach can be the source of an "obligation" under the FCA, the relator stated a cause of action under the FCA's reverse false claims provision.[55] The court noted that the relator's theory was that the CIA was a contract between the government and the defendant and the defendant allegedly breached that contract by failing to report a "reportable event," namely to report to the government the relator's internal complaint that the defendant was engaging in illegal activities and other probable violations of applicable laws.[56] The court noted that other courts have rejected the viewpoint that the avoidance of statutory fines or penalties can be the source of an FCA obligation but have held that breaches of contracts can be an actionable source of an FCA obligation. The court concluded that it "is convinced that the contact makes a difference, and could ultimately provide the 'obligation' necessary for a Reverse False Claims Act claim."[57] Other courts have similarly ruled that violation of the CIA provisions can state a cause of action under the FCA.[58]

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[52] *See generally* United States ex rel. Booker v. Pfizer, Inc., 9 F. Supp. 3d 34, 49 (D. Mass. 2014), *aff'd other grounds,* 847 F.3d 52 (1st Cir. 2017).

[53] *Id.*

[54] *See id.*; *see also* United States ex rel. Ruscher v. Omnicare, Inc., No. 4:08-CV-3396, 2014 U.S. Dist. LEXIS 123831, at *12–13 (S.D. Tex. Sept. 5, 2014).

[55] *Ruscher*, at *12–14.

[56] *Id.* at *12.

[57] *Id.* at *15. Ultimately the Fifth Circuit affirmed the district court's dismissal of the relator's claim at summary judgment because the relator's notification to the company that it was committing Medicare fraud was insufficient to constitute a "reportable event" under the

Courts generally find that false statements made to reduce obligations to pay an amount under a contract with the government can state a cause of action under the FCA.[59] Similarly, courts have generally ruled that false

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CIA because it was insufficient to demonstrate that there was a probable violation of law. *See* United States ex rel. Ruscher v. Omnicare Inc., 663 Fed. Appx. 368, 376–77 (5th Cir. 2016).

[58] **Some courts have ruled that violation of the provisions of an CIA can state a cause of action under the FCA.** *See, e.g.,*

Third Circuit: United States ex rel. Boise v. Cephalon, Inc., No. 08-287, 2015 U.S. Dist. LEXIS 94448, at *21 (E.D. Pa., July 21, 2015) (finding that defendant's "contractual obligation to pay the government is an 'established duty' as contemplated by § 3729(b)(3) upon breach of the CIA's relevant requirements and that therefore relators have stated a claim under § 3729(a)(1)(G)").

Fifth Circuit: United States ex rel. Ruscher v. Omnicare, Inc., No. 4:08-CV-3396, 2014 U.S. Dist. LEXIS 123831, at *12–13 (S.D. Tex. Sept. 5, 2014).

Eleventh Circuit: United States ex rel. Matheny v. Medco Health Solutions, Inc., 671 F.3d 1217, 1223 (11th Cir. 2012) (finding that duty created in defendants' corporate integrity agreement to remit an overpayment constituted an "express contractual obligation to remit excess government property" and thus "is a definite and clear obligation for FCA purposes") (footnote omitted).

But see United States ex rel. Ibanez v. Bristol-Myers Squibb, No. 16-3154, 2017 U.S. App. LEXIS 21328, at *30 (6th Cir. Oct. 27, 2017) ("The amended reverse false claims allegations rely on the Corporate Integrity Agreements . . . Relators assert these documents created an obligation to pay the government under the FCA. However, section 3729(a)(1)(G)'s 'obligation' does not include 'those contingent obligations that arise only because the government has prohibited an act, or arising after the exercise of government discretion' . . . . The district court found the Corporate Integrity Agreements to be 'contingent obligations' and failed to trigger a reverse false claim. We agree") (citation omitted); United States ex rel. Booker v. Pfizer, Inc., 9 F. Supp. 3d 34 (D. Mass. 2014), *aff'd other grounds,* 847 F.3d 52 (1st Cir. 2017). In *Booker*, the district court ruled that the CIA did not impose on defendant an "obligation" to pay the government. *Id.* at 50. The court noted no obligation to pay arose merely upon occurrence of reportable events. *Id.* at 49–50. Rather, upon the occurrence of a qualifying event, the CIA merely imposed on the defendant an obligation to report—an activity not inherently linked to the payment of any money to the government. *Id.* at 50. The obligation to pay would only arise upon the OIG's decision to assess the stipulated penalties. *Id.* Thus the court concluded that the "discretion retained by the OIG here is thus the discretion whether to impose a penalty and thereby create an obligation to pay, rather than the discretion whether to enforce an existing obligation to pay the government." *Id.*

[59] *See* United States ex rel. Maxwell v. Kerr-McGee Oil & Gas Corp., 2009 U.S. Dist. LEXIS 95328 at *21–*24 (D. Colo. Sept. 30 2009) (rejecting defendant's contention that it was not liable because the agency had not issued an order to pay and hence any debt was "contingent," not fixed, because defendant had a lease with the government that required it to pay regular royalties and if defendant breached its obligations to pay those royalties under the lease that would constitute an "existing debt" potentially subjecting it to liability under the FCA); United States ex rel. Hunt v. Merck-Medco Managed Care, L.L.C., 336 F. Supp. 2d

statements used to minimize the amount a provider must remit after a cost report submission can create a cause of action under the FCA.[60] However, courts have ruled that when the reverse false claims allegation merely creates a duplicate or redundant cause of action, it should be dismissed because the purpose of the provision is to address conduct that would otherwise escape liability under the FCA, not to provide a duplicate basis to assert a false statement claim.[61]

430, 445 (E.D. Pa. 2004) (ruling that an "obligation" exists under Subsection (a)(7) because under defendant's contract it "incurs the obligation to pay a penalty when its conduct falls below specific contractual obligations, and when there is a contractual provision specifying that such conduct will incur a penalty" and pointing out, for example, that under the contract defendant incurred a sum certain penalty of $3.50 for each prescription "in excess of 2.5% of the prescriptions received on [a] business day" that were not dispensed to plan participants within five business days); *see also* United States ex rel. Spay v. CVS Caremark Corp., 09-4672, 2012 U.S. Dist. LEXIS 180602, at *128–29 (E.D. Pa. Dec. 20, 2012).

[60] Courts have ruled that the submission of nonexistent, nonallowed, or inflated costs on cost reports that reduce a provider's duty to pay the government could create a sufficient obligation to create liability under Subsection (a)(7). *See* United States v. Bourseau, 531 F.3d 1159, 1170 (9th Cir. 2008) ("By including nonexistent, nonallowed and inflated costs in their cost reports, Appellants concealed and decreased amount that they were obligated to repay to Medicare. This obligation was fixed, even if the specific amount of the repayment obligation was not").

[61] **Courts have rejected the notion that the FCA's reverse false claims provision should be used interchangeably with the FCA's false statement provision.** *See, e.g.*:

Second Circuit: United States ex rel. Taylor v. Gabelli, 345 F. Supp. 2d 313, 338–39 (S.D.N.Y. 2004) (noting that "the reduction in money owed to the Government" was "the very same money that the defendants will procure from the U.S. Treasury (as a government payment), according to [the relator's] claims under either section 3729(a)(1) and (a)(2)" and thus the court held that "[b]ecause [the relator's] allegations state a claim under sections 3729(a)(1) and (2), they cannot also form the basis for a claim under subsection (a)(7)" and thus dismissing the later claim).

Third Circuit: United States ex rel. Petratos v. Genentech, Inc., No. 11-3691, 2015 U.S. Dist. LEXIS 146525, at *24 (D.N.J. Oct. 29, 2015) (noting that Section 3729(a)(1)(G) requires an "established duty" and ruling that claims "raised under the FCA's reverse false claims provision may not be redundant of FCA claims asserted under other" FCA provisions) (internal quotation and citations omitted) *aff'd,* 855 F.3d 481 (3d Cir. 2017); United States ex rel. Thomas v. Siemens AG, 708 F. Supp. 2d 505, 514 (E.D. Pa. 2010) (rejecting the relator's reverse FCA allegation when he was "merely recasting his false statement claim under § 3729(a)(2)").

Fifth Circuit: United States ex rel. Ramsey-Ledesma v. Censeo Health, L.L.C., No. 3:14-CV-00118, 2016 U.S. Dist. LEXIS 135392, at *40 (N.D. Tex. Sept. 30, 2016) (noting that "the purpose of a reverse false claim cause of action is to ensure that a person who makes a false statement to avoid paying money owed to the Government is equally liable under the FCA as if that person had submitted a false claim to receive the money . . . . The reverse

Finally, the one context beyond the core instance in which the government has a contract with the defendant, in which Congress apparently intended to expand the reverse false claims provision beyond those rooted in an express governmental contract are those in which a statute provides fixed unliquidated obligations such as tariffs on imported goods.

In *United States ex rel. Custom Fraud Investigations, LLC, v. Victaulic Co.,* the Third Circuit ruled that the FCA false claims provision could apply to import regulations which imposed a 10 per centum ad valorem on improperly marked goods where the marking duty is deemed to have accrued at the time of importation and the imposition of the duty is non-discretionary.[62] The court noted, citing the Senate Report, that the reverse false claims provision applies when "there is a relationship between the Government and a person that results in the duty to pay the Government money, whether or not the amount owed is yet fixed."[63] The court pointed out that under the regulatory scheme if the imported goods without correct marking escape detection the ten percent ad valorem duty is deemed to have accrued at the time of importation and is due and owing without exception.[64] Under these circumstances, if the defendant knowingly concealed information from the government by not informing customs officials that the

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false claim provision of the FCA is thus intended to address conduct that would otherwise escape liability under the FCA, not to provide a duplicate basis to assert a false statement claim under the Act"); United States ex rel. Ruscher v. Omnicare, No. 4:08-cv-3396, 2014 U.S. Dist. LEXIS 79885, at *85–86 (S.D. Tex. June 12, 2014) (rejecting the relator's reverse false claims theory when the relator's "theory on liability on the (a)(2) claims is that SNFs used Medicare and Medicaid cost reports to get claims paid, and that those claims were false because they were tainted by kickbacks paid by [the defendant]" and her "theory of liability on the (a)(7) claims is that the SNFs used those same reports to conceal that the SNFs were duty-bound to reimburse the Government for all the claims it paid, because those claims, tainted by [the defendant's] kickbacks, were false" because the Reverse False Claims Act's purpose was not to provide a redundant basis to state a false statement claim under Subsection (a)(2)) (citation and internal quotation omitted).

But cf. United States ex rel. Schaengold v. Mem'l Health, Inc., No. 4:11-cv-58, 2014 U.S. Dist. LEXIS 169555 at *52–53 (S.D. Ga., Dec. 8, 2014) (finding that government's reverse false claim cause of action was not redundant of a false statement cause of action because the government identified an independent obligation—violation of Stark Law's duty to refund payments made in violation of the statute—as a basis to refund payments for services provided pursuant to prohibited referrals).

[62] No. 15-2169, 2016 U.S. App. LEXIS 18026, at *2–4 (3d Cir. Oct. 5, 2016).

[63] *Id.,* at *22–23. The court's reliance on the Senate Report is somewhat suspect because the statutory language to which the Report was referencing was substantially amended prior to passage.

[64] *Id.* at *24.

imported goods were not marked properly and it knew that it owed marking duties as a result and did not pay them, there is a violation of the reverse false claims provision.[65]

Although the reverse false claims provision is anchored in contract, and as the Supreme Court has admonished the FCA is not a "an all-purpose antifraud statute" or a "vehicle for punishing garden-variety breaches of contract or regulatory violations,"[66] the FCA's application to the facts in *Victualic* appears justified in that the relationship between the defendant, an importer, and the government appears in essence as an implied contract where, an exchange for not having the goods properly marked, the defendant agrees to pay the ten percent marking duty owed. In this sense, under these facts, the defendant's conduct fits within the statutory language of making a false record to avoid an obligation to pay because the obligation to pay is automatic and payable at the time the underlying conduct occurs and does not depend on the exercise of discretion and hence is not contingent.

2. When Retention of an Overpayment May Result in FCA Liability

The second prong of the FCA's reverse false claims provision only applies if the person "knowingly and improperly" retains the overpayment.[67] Thus, the provision affixes the additional element "improperly" in addition to the typical FCA "knowledge" liability standard.

Sen. Kyl stated, when discussing the provision, that this enhanced knowledge element was intended to ensure that the provision would only apply when the defendant's conduct was "*malum in se*," or inherently wrongful, and would not apply to defendants "pursuing in good-faith the exhaustion of a reconciliation procedure."[68]

In construing the FCA's overpayment obligation, consistent with this intent, courts have ruled that the provision does not apply to merely negligent retentions of overpayment but only to fraudulent retentions of payment.[69] Moreover, CMS, in promulgating its final rule regarding

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[65] *Id.* at *26–27.

[66] Universal Health Servs. v. United States ex rel. Escobar, 136 S. Ct. 1989, 2003 (2016).

[67] 31 U.S.C. § 3729(a)(1)(G).

[68] *See* 155 Cong. Rec. S4539–40 (2009).

[69] *See, e.g.,* United States ex rel. Olson v. Fairview Health Servs. of Minn., 831 F.3d 1063, 1074 (8th Cir. 2016).

Reporting and Returning Overpayments, has clarified that its interpretation of the rule is not intended to reflect how courts construe, or should construe, the FCA's knowledge element.[70]

The Eighth Circuit's decision in *United States ex rel. Olson v. Fairview Health Servs. of Minn.*,[71] illustrates that the FCA overpayment provision only applies to fraudulent conduct. In *Olson,* the State promulgated a law reducing Medicaid expenditures for hospital inpatient services by 10%, but exempted "children's hospitals" from the reimbursement reduction. The relator contended that the State health department's legislative language exempting children's hospitals from a rate reduction was clear that it applied only to children's hospitals and not to children units within other hospitals.

The defendant medical center operated a children's unit that was not licensed as a children's hospital.[72] The medical center believed that its children's unit should be considered a children's hospital, and, hence, the legislative rate reduction did not apply to the unit, and it lobbied State officials accordingly.[73] Initially, the State agency agreed, and it retroactively exempted the unit from the rate reduction and paid the defendant approximately $500,000 to compensate it for prior admissions that had applied the rate reduction.[74] However, the State agency ultimately found the exemption was likely erroneous and notified the defendant that it would be issuing a notice of recovery once the overpayment was calculated.[75]

The relator filed an FCA action asserting that the defendant violated the FCA's reverse false claims provision by "knowingly conceal[ing] an obligation to pay back [Medicaid] monies to the federal and state government, that it knew it illegally received."[76] The relator contended that it was clear and that the defendant knew that the rate reduction was intended to apply to its children's unit based upon the definition of "children's hospital" and the common understanding of the term in the State.[77] Moreover, the relator contended that the defendant's interpretation of the law was patently unreasonable because it applied the exemption, not just to children treated in

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[70] 81 Fed. Reg. 7654 (Feb. 12, 2016).

[71] 831 F.3d 1063 (8th Cir. 2016).

[72] *Id.* at 1067.

[73] *Id.* at 1067–68.

[74] *Id.* at 1068.

[75] *Id.* at 1068.

[76] *Id.* at 1072.

[77] *Id.* at 1070.

the children's unit, but to all inpatients younger than the age of 18 treated elsewhere in the hospital (e.g., birth services to newborns and appendectomies for children, which the relator contended would normally not be provided at a children's hospital).[78]

The Eighth Circuit rejected the relator's contention. The court noted that to establish a violation of the FCA provision in dispute—"knowingly concealing an obligation to pay money to the government"—the relator must demonstrate that the defendant committed a fraud because to "conceal is to fail to disclose," and the "*Restatement (Second) of Contracts* § 160 treats concealment as equivalent to a misrepresentation."[79] The court also noted that its "understanding comports with the punitive nature of liability that the FCA imposes. Without fraud, punitive damages—a mandatory penalty of up to $10,000 for each claim and treble damages—would seem an unreasonable levy against individuals guilty of only 'knowingly' receiving an overpayment from the government fisc."[80] Thus, if "there is no allegation of fraudulent conduct under the FCA, then there can be no reverse liability under § 3729(a)(1)(G)."[81] The court concluded that the relator did not establish any fraudulent conduct because the meaning of children's hospital was ambiguous as to whether the term could be applied to a hospital's children unit and thus it was reasonable for the defendant to inquire about the proper classification about its children's unit and even though it was found that the medical center's interpretation was likely wrong, there was no FCA liability.[82]

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[78] *See id.,* at 1077 (dissenting opinion).

[79] *Id.* at 1074.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 1072. *But cf.* Kane ex rel. United States v. Healthfirst, Inc., No. 11 Civ. 2325 (ER), 2015 U.S. Dist. LEXIS 101778 (S.D.N.Y. Aug. 3, 2015). There a district court found that for purposes of defendants' motion to dismiss, the government adequately pleaded that defendants avoided returning the overpayments because the complaint alleges that a software glitch was brought to defendants' attention by at least December 2010 and although the defendants tasked the relator with investigating the scope of the issue, when he presented them with a list of potentially affected claims, he was fired, and the government alleges that defendants did nothing further with his analysis and although they repaid certain claims that were specifically brought to their attention by the Comptroller, they neglected to repay more than three hundred claims until they received the Government's Civil Investigative Demand in June 2012. *Id.* at *55; *see also* United States ex rel. Keltner v. Lakeshore Med. Clinic, LTD, 2013 U.S. Dist. LEXIS 44640 at *10 (E.D. Wis. Mar. 28, 2013) (finding where clinic had previously found that certain physicians upcoded claims but then stopped conducting audit reviews, the relator could state "a plausible claim for relief under the amended reverse

Finally, although CMS in its proposed rule regarding a person's overpayment obligation, appeared to apply the FCA merely to negligent conduct,[83] CMS's final regulation specifically clarified that the agency had no intent to address or interpret the application of the FCA's intent standard as courts have developed and applied the FCA's intent standard. Specifically, CMS stated:

> We note that in discussing the standard term "reasonable diligence" in the preamble, we are interpreting the obligation to "report and return the overpayment" that is contained in section 1128J(d) of the Social Security Act. We are not seeking to interpret the terms "knowing" and "knowingly", which are defined in the Civil False Claims Act and have been interpreted by a body of False Claims Act case law.[84]

Instead, CMS clarified that it only sought to elucidate the duty that creates an "obligation" under the FCA and not when one "knowingly and improperly" conceals or avoids that obligation.

> ***Comment:*** . . . . Commenters suggested that a failure to report and return an identified overpayment should not lead to reverse FCA liability, unless the provider "knowingly concealed" or "knowingly and improperly avoided" the obligation. Other commenters stated that the proposed rule inappropriately applies the FCA, specifically the "reverse false claims" cause of action, to honest mistakes or inadvertent overpayments.
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> ***Response:*** We are interpreting Section 1128J(d) of the Act in this rulemaking, not the FCA. In this rule, our discussion of the FCA is limited to its explicit inclusion in the enforcement provision under Section 1128J(d) of the Act, which states that any overpayment retained by a person after the deadline for reporting and returning the overpay-

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false claim provision of the FCA for overpayments withheld after May 20, 2009. If the government overpaid defendant for E/M services and defendant intentionally refused to investigate the possibility that it was overpaid, it may have unlawfully avoided an obligation to pay money to the government").

[83] 77 Fed. Reg. 9179, 9182 (Feb. 16, 2012) (emphasis added). For example, CMS noted as examples of when a business may fail to discharge its obligation to report an overpayment included "[w]hen there is reason to suspect an overpayment, but a provider or supplier fails to make a reasonable inquiry into whether an overpayment exists, it may be found to have acted in reckless disregard or deliberate ignorance of any overpayment." This formulation—on its face—conflates a negligence standard with a reckless disregard and a deliberate ignorance standard and treats each of these standards as if they were merely interchangeable, which is clearly contrary to law.

[84] 81 Fed. Reg. at 7661.

ment under this rule is an obligation for purposes of the FCA.[85]

Accordingly, because CMS's rule does not ultimately determine whether the defendant acted with sufficient intent to breach the FCA, the FCA plaintiff will have to establish that evidence independent of CMS's rule and in accordance with the FCA's "knowingly and improperly" standard that Congress engrafted as part of the second prong of the FCA's reverse false claims provision.

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[85] *Id.* at 7665.