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P.L. 99-562, ****5266 FALSE CLAIMS AMENDMENTS ACT OF 1986**
DATES OF CONSIDERATION AND PASSAGE
Senate August 11, October 3, 1986
House September 9, October 7, 1986
Senate Report (Judiciary Committee) No. 99-345,
July 28, 1986 [To accompany S. 1562]
House Report (Judiciary Committee) No. 99-660,
June 26, 1986 [To accompany H.R. 4827]
Cong. Record Vol. 132 (1986)
The Senate bill was passed in lieu of the House bill. The Senate Report is set out below.

SENATE REPORT NO. 99-345
July 28, 1986

***1** The Committee on the Judiciary, to which was referred the bill (S. 1562) to amend the False Claims Act, and title 18 of the United States Code regarding penalties for false claims, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill, as amended, do pass.

I. PURPOSE OF THE BILL

The purpose of S. 1562, the False Claims Reform Act, is to enhance the Government's ability to recover losses sustained as a result of fraud against the Government. While it may be difficult to estimate the exact magnitude of fraud in Federal programs and ***2** procurement, the recent proliferation of cases among some of the largest Government contractors indicates that the problem is severe. This growing pervasiveness of fraud necessitates modernization of the Government's primary litigative tool for combatting fraud; the False Claims Act (31 U.S.C. 3729, 3730). The main portions of the act have not been amended in any substantial respect since signed into law in 1863. In order to make the statute a more useful tool against fraud in modern times, the Committee believes the statute should be amended in several significant respects.

The proposed legislation seeks not only to provide the Government's law enforcers with more effective tools, but to encourage ****5267** any individual knowing of Government fraud to bring that information forward. In the face of sophisticated and widespread fraud, the Committee believes only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds. S. 1562 increases incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government.

The False Claims Reform Act also modernizes jurisdiction and venue provisions, increases recoverable damages, raises civil forfeiture and criminal penalties, defines the mental element required for a successful prosecution and clarifies the burden of proof in civil false claims actions.

II. BACKGROUND STATEMENT

A. NEED FOR LEGISLATION

obtained. United States v. Veneziale, 268 F.2d 504 (3rd Cir. 1956). A fraudulent attempt to pay the Government less than is owed in connection with any goods, services, concession, or other benefits provided by the Government is also a false claim under the act. See Smith v. United States, 287 F.2d 299 (5th Cir. 1961); United States v. Garder, 73 F. Supp. 644 (N.D. Ala. 1947). For example, the Committee considers a false application for reduced postal rates to be a false claim for postal services, and agrees with the well-reasoned decision in United States ex rel. Rodriguez v. Weekly Publications, Inc., 68 F. Supp. 767, 770 (S.D. N.Y. 1946), that whether such benefits are received by means of a reduction in the amount paid by the Government or by means of subsequent claims for reimbursement is a matter of bookkeeping rather than of substance, and therefore, rejects the contrary result reached in United States v. Marple Community Record, Inc., 335 F. Supp. 95 (E.D. Pa. 1971); see also, United States v. Howell, 318 F.2d 162 (9th Cir. 1963).

Each separate bill, voucher or other 'false payment demand' constitutes a separate claim for which a forfeiture shall be imposed, see, for example, United States v. Bornstein, 423 U.S. 303 [FN25b] (1976), United States v. Collyer Insulated Wire Co., 94 F. Supp. 493 (D.R.I. 1950), and this is true although many such claims may be submitted to the Government at one time. For example, a doctor who completes separate Medicare claims for each patient treated will be liable for a forfeiture for each such may be submitted to the entries even though several such forms may be submitted to the fiscal intermediary to one time. Likewise, each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim. For example, all claims submitted under a contract obtained through collusive bidding are false and actionable under the act--**5275*10Murray & Sorenson, Inc. v. United States, 207 F.2d 119 (1st Cir. 1953); United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943)--as are all Medicare claims submitted by or on behalf of a physician who is ineligible to participate in the program. Peterson v. Weinberger, supra.

A claim upon any Government agency or instrumentability, quasi-governmental corporation, or nonappropriated fund activity is a claim upon the United States under the act. In addition, a false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States. United States v. Lagerbusch, 361 F.2d 449 (3rd Cir. 19666); Murray & Sorenson, Inc. v. United States, 207 F.2d 119 (1st Cir. 1953). For example, a false claim to the recipient of a grant from the United States or to a State under a program financed in part by the United States, is a false claim to the United States. See, for example, United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943); United States ex rel. Davis v. Long's Drugs, 411 F. Supp. 1114 (S.D. Cal. 1976).

The original False Claims Act also contained a provision allowing private persons, or 'relators', to bring suit under the act. After providing for general subject matter jurisdiction and venue for all actions brought under the act, the statute provided that a suit 'may be brought and carried on by any person, as well for himself as for the United States.' The 1863 law, R.S. 3492, provided that:

the (action) shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

The original statute also provided that the private relator who prosecuted the case to final judgment would be entitled to one half of the damages and forfeitures recovered and collected. If successful, the relator would also be entitled to an award of his costs.

Therefore, under the provisions of the original act, suits to redress fraud against the Government could be instituted as easily by a private individual, as by the Government's representative. Moreover, once the action was

While the original S. 1562, as well as the subcommittee substitute, contained amendments to Rule 6(e) of the Federal Rules of Criminal Procedure regarding access to grand jury information, Chairman Grassley announced at the November 7 mark-up that ****5282 *17** the full Senate Judiciary Committee would be addressing that issue separately and that Rule 6(e) amendments would be removed from S. 1562. On December 14, 1985, the full Senate Judiciary Committee voted by unanimous consent to favorably report S. 1562 to the Senate floor with the following amendments which came in respone to suggestions offered by other Committee members and then offered by Senator Grassley:

First, as already noted, grand jury access amendments were removed.

Second, language was added to further define the constructive knowledge definition so that it paralleled that found in S. 1134, the Program Fraud and Civil Penalties Act as reported favorably from the Governmental Affairs Committee. While the standards were already ready very similar, S. 1134 contained further clarifying language and the Committee thought it unwise to allow the possibility of confusion and the lack of a uniformly applied standard in administrative and judiciary civil false claims actions.

Third, the Committee adopted new language under the whistleblower protection provision to ensure that remedies afforded under the act will not be abused by employees acting in bad faith or who are discharged, demoted, etc. for legitimate reasons unrelated to any whistleblowing activity.

And finally, the CID authority was amended to require that other agencies seeking access to information obtained through CIDs must demonstrate to the appropriate Federal district court that they have a 'substantial need' for the information rather than allowing the Justice Department alone to determine outside agency access.

IV. SECTION-BY-SECTION ANALYSIS

SECTION 1

Section 1 of the bill amends section 3729 of title 31, United States Code, in several respects.

31 U.S.C. 3729, SUBSECTION (a)

Section 1, paragraphs (1) and (2) of the bill create a new subsection (a) of section 3729 and amend section 3729 to raise the fixed statutory penalty for submitting a false claim from $2,000 to $10,000. The $2,000 figure has remained unchanged since the initial enactment of the False Claims Act in 1863. The Committee reaffirms the apparent belief of the act's initial drafters that defrauding the Government is serious enough to warrant an automatic forfeiture rather than leaving fine determinations with district courts, possibly resulting in discretionary nominal payments.

Section 1, paragraph (3) of the bill amends section 3729 to increase the Government's recoverable damages from double to treble. The Committee adopts the treble damage level to comport with legislation passed earlier in the 99th Congress (P.L. 99-145, Department of Defense Authorization Act, 1986) which established treble damage liability for false claims related to contracts with the Department of Defense.

****5283 *18** Section 1, paragraph (4) of the bill amends section 3729 to permit the United States to bring an action against a member of the armed forces as well as against civilian employees. When the Act was first

enacted, in 1863, the military was excluded because the Government had available more severe military remedies. Under the 1863 statute, Act of March 2, 1863, chapter 62, section 1, any person in the Army, Navy, or militia who was charged with submitting a false claim could be held for trial by a court-martial and, if found guilty, punished by any level of fine or imprisonment felt proper. Only the death penalty was precluded. However, currently, while the Government might institute court-martial proceedings against a member of the armed services found guilty of fraud, it cannot seek monetary recovery under the False Claims Act and must instead rely on less effective common law remedies.

Section 1, paragraphs (5) and (6) of the bill make technical changes in section 3729 of title 31.

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.

The question of whether the False Claims Act covers situations where, by means of false financial statements or 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.), 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 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. Mercut 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 ****5284 *19** 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.

Section 1, paragraph (7) of the bill also amends section 3729 to permit the Government to recover any consequential damages it suffers from the submission of a false claim. For instance, where a contractor has sold the Government defective bearings for use in military aircraft, the Government could recover not only the cost of new ball bearings, but the much greater cost of replacing the defective ball bearings. See, United States v. Aerodex, Inc., 469 F.2d 1003 (5th Cir. 1972). The court's conclusion in that case was based on a narrow and form-bound interpretation of the act:

Upon careful analysis, we hold that the language of the False Claims Act does not include consequential damages resulting from delivery of defective goods. The statute assesses double damages attributable to the 'act,' which in this case is the submission of the false vouchers. The submission of these vouchers was not the cause of the government's consequential damages. The delivery and installation of the bearings in the airplanes, not the filing of the false claims, caused the consequential damages. Id. at 1011.

****5285 *20** 31 U.S.C. 3729, SUBSECTION (b)

New paragraph (1) of subsection (b) of the statute includes damages that the Government would not have sustained but for its entry into a grant or contract as a result of a material false statement. When the Government changes its position, and commits its financial resources based upon a material false statement, it should be able to recover the resulting losses, but, under some court interpretations, it may not. For instance, in United States v. Hibbs, 568 F.2d 347 (3rd Cir. 1977), the FHA agreed to insure a mortgage based upon a representation, which was false, that the residence was habitable and in compliance with the housing code. The Government will not issue insurance to a non-code-conforming house. However, the court ruled that the default on the mortgage occurred because the borrower lost his job, and therefore could not meet his monthly payments--that the default was not related to the false statement. While the court may have been technically correct, the Committee believes that this position is unsound public policy. The act should cover representations which cause the Government to change its position and pledge its full faith and credit, including the risk of insurable loss, based upon another, but material false statement. This provision is not intended, however, to provide additional penalties where only a false statement has occurred.

31 U.S.C. 3729, SUBSECTION (c)

New subsection (c) of section 3729 clarifies the standard of intent for a finding of liability under the act. This language establishes liability for those 'who know, or have reason to know' that a claim is false. In order to avoid varying interpretations, the Committee further defined the standard as making liable those who have 'actual knowledge that the claim is false, fictitious, or fraudulent, or acts in gross negligence of the duty to make such inquiry as would be reasonable and prudent to conduct under the circumstances to ascertain the true and accurate basis of the claim.'

prejudgment remedies. While the bill provides for provisional remedies comparable to those provided for under Rule 65, Federal Rules of Civil Procedure, it is intended that the Government shall be required only to show likelihood of success on the merits as a precondition to obtaining relief. Other traditional prerequisites to granting equitable relief, such as adequacy of remedy at law, irreparable harm and the like, shall not be required.

SECTION 2

Section 2 of the bill rewrites section 3730 of title 31, United States Code.

31 U.S.C. 3730, SUBSECTION (a)

Subsection (a) of 3730, which authorizes the Government to bring a civil action for violations of section 3729, remains unchanged.

31 U.S.C. 3730, SUBSECTION (b)

Subsection (b)(1) of 3730, under current law, authorizes a 'person' to bring a civil action for a violation of section 3729 on behalf of the Goverment. Additionally, current law provides that when a private person brings an action under this subsection, the action will be dismissed only if the court and the Attorney General consent to the dismissal. Subsection (b)(1) remains unchanged except for those portions of the paragraph dealing with jurisdiction and venue which are amended and incorporated into a new section 3732 of this title.

Subsection (b)(2) of section 3730 provides, as under current law, that the Government be served with a copy of the complaint filed by a person under this subsection as well as 'substantially all material evidence.' Paragraph (2) is amended to impose a new requirement that all qui tam actions will be filed in camera and remain under seal for at least 60 days, and to clarify that the 60 day period does not begin to run until both the complaint and material evidence are received--a point of some, albeit minor, confusion previously.

The Committee's overall intent in amending the qui tam section of the False Claims Act is to encourage more private enforcement **5289 *24 suits. The Justice Department raised a concern, however, that a greater number of private suits could increase the chances that false claims allegations in civil suits might overlap with allegations already under criminal investigation. The Justice Department asserted that the public filing of overlapping false claims allegations could potentially 'tip off' investigation targets when the criminal inquiry is at a sensitive stage. While the Committee does not expect that disclosures from private false claims suits would often interfere with sensitive investigations, we recognize the necessity for some coordination of disclosures in civil proceedings in order to protect the Government's interest in criminal matters.

Keeping the qui tam complaint under seal for the initial 60-day time period is intended to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action. Nothing in the statute, however, precludes the Government from intervening before the 60- day period expires, at which time the court would unseal the complaint and have it served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

By providing for sealed complaints, the Committee does not intend to affect defendants' rights in any way. Once the court has unsealed the complaint, the defendant will be served as required under Rule 4 of Federal