TAKING CONTROL:

How a False Claims Act Will Allow Alabama to Stop the Leeching of its Treasury

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by Don McKenna and David G. Wirtes, Jr.

INTRODUCTION

In recent Alabama history the following examples of fraud were committed against the State and its taxpayers:

- A vendor charged State agency $800,000 for website work valued at $35,000;
- A contractor billed the state $114,000 at $50 an hour as a consultant and did nothing; and,
- An advertising agency was paid $200,000 for media time that was never placed.

These are just examples of the type of fraud that pilfers money from the Alabama Treasury and the Alabama taxpayer every year. Yet, Alabama has no effective vehicle to encourage people with knowledge of this fraud to come forward and report it and Alabama has no effective civil law to recoup these stolen funds and financially penalize the wrongdoers.

Such a law exists in the Federal realm and in recent history has been adopted by sixteen States to combat fraud against their State Treasuries and citizen taxpayers. It is now time for Alabama to step up to the plate and enact legislation, patterned on the successful federal legislation, to combat fraud against our State.

Since its inception in 1863, the Federal False Claims Act ("FCA") has allowed the Federal Government to reclaim billions of dollars in lost revenue. Although amended two times, once in 1943 and again in 1986, the spirit of the original act still lives: the federal government wants to deter and punish all frauds against it and its agencies.

Numerous states have similarly adopted false claims acts. This article explains why Alabama should now enact such a false claims act.

ALABAMA'S OVERWHELMING NEED FOR A FALSE CLAIMS ACT

The Alabama Legislature first recognized the need for a state false claims act when it instituted criminal sanctions for submitting false Medicaid claims in 1980. While these criminal sanctions may provide deterrence and retribution, for Medicaid fraud, they do not expressly provide a method for recompensing the state treasury, nor do they provide protection against other species of fraud against the government. Alabama is vulnerable to any number of examples of fraudulent activity.[2] Adoption by Alabama of a State False Claims Act will provide enhanced protection of our public fisc, a means for recouping actual losses and a system for encouraging the reporting and prosecution of wrongdoing while safeguarding our scarce judicial resources.

Sixteen states and the District of Columbia have enacted their own versions of the False Claims Act.[3] The state legislatures that have enacted these statutes have given the same reasons for passing them: primarily, "to discourage fraud by enhancing the government's enforcement weapons with remedies such as treble damages and civil penalties, and to give private parties financial incentives to assist in the effort."[4] Alabama should join these sister states in enacting legislation to protect its treasury.

The amount of money potentially at stake is enormous. For example, at the federal level, the US Department of Justice has estimated that between one and ten percent of our government's annual budget is lost to fraudulent activity each year.[5] As reported to the U.S. Senate Finance Committee in April 2001,

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The acting Inspector General of the US Department of Health and Human Services estimated on the basis of statistical sampling that Medicare alone paid in proper fee-for-service claims aggregating $11.9 billion in fiscal year 2000 or about 6.8% of all processed fee-for-service payments reported by the Healthcare Finance Administration. That figure, which can include improper payments ranging from near mistakes to outright fraud and abuse, was down from an estimated $13.5 billion in 1999 and lower than the estimated losses of $12.6 billion in 1998, $20.3 billion in 1997 and $23.2 billion in 1996. [6]

Several states have used false claims acts successfully. Currently, Florida's attorney general is in the process of investigating a claim against pharmaceutical manufacturers that he believes led to the state's Medicaid program being overcharged by more than $100 million dollars from inflated drug prices.[7] In a recent settlement, Texas's Attorney General recovered $27 million dollars for that state from fraudulently under-paid Medicaid claims.[8] This settlement, involving Schering-Plough Corp., along with a previous Medicaid settlement with Dey, Inc., recouped for Texas' nearly $45.5 million.[9] Similarly, California recently recovered over $8 million in falsely submitted insurance benefits claims.[10]

Clearly Alabama is not immune to fraud against its government. There have been several recent cases in Alabama involving the federal FCA. In March 2004, two Federal FCA claims were settled. In a suit involving Baptist Health System, Inc.,[11] the Government received a $1.3 million dollar settlement arising from allegations of falsely submitted Medicare claims. In addition, the Government reached a $425,000 settlement with SunGard EBS (located in Birmingham Alabama),[12] which involved an FCA violation concerning falsified time records.[13]

HISTORICAL OVERVIEW

The idea of a private citizen suing on behalf of the government is a concept that has been around since ancient Rome.[14] The phrase "*qui tam*" is short for "*qui tam* pro domino rege quam pro se ipso in hac parte sequitur," which is translated to "who pursues this action on our Lord the King's behalf as well as his own."[15] England also adopted the concept in its penal statutes by allowing a claim to be brought by "any of the king's subjects" that would pursue the action.[16] Even if the person bringing the claim was not injured by the defendant's conduct, he was still allowed to proceed with the action under English law.[17] Blackstone[18] characterized these actions as "popular actions" brought by "common informers," because the claim could be brought by anyone on behalf of the government.[19] According to Blackstone, the "common informer" has two important functions: (1) advancing the public interest and (2) simultaneously precluding any subsequent prosecution involving the same claim.[20]

THE MODERN FALSE CLAIMS ACT

The Beginning of the FCA: Lincoln and The Civil War

While in the midst of the Civil War, President Lincoln urged Congress to pass a law protecting the country from those who sought to profit from defrauding the Government.[21] Specifically, Lincoln was concerned that army contractors were taking advantage of the Union Army's need for supplies during the War.[22] Particularly, treasury funds were being spent to pay fraudulent claimants "seeking payment for such items as rancid beef,[23] horses and mules that had already been sold, and crates of sawdust that were supposed to contain muskets."[24] "The FCA contained a *qui tam* provision which allowed a person to file suit on behalf of the United States that permitted the Government and the *qui tam* relator to share in the recovery of the money paid on fraudulent claims."[25] "The original FCA allowed for double damages against violators and a $2,000 forfeiture, fifty percent of which went to the relator."[26] Hence, the original FCA provided a "tripartite framework of values that underlie *qui tam* suits: (1) the use of citizens to discover and expose fraud; (2) activation and advancement of cases to prosecution; and (3) the addition of the relator's resources to the fraud action."[27]

Amendments to the FCA

Since its enactment in 1863, the FCA has undergone two revisions in the form of amendments. The first, in 1943, created a jurisdictional bar to bringing a claim under the FCA with information that had already been disclosed publicly and gave the Department of Justice the ability to intervene in the action.[28] Congress revised the 1943 Amendment in 1986, making the FCA more "relator-friendly," by allowing an exception to the jurisdictional bar if the relator was an original source of the information.[29] "Through the enactment of the 1986 Amendments, Congress obviously sought to expand *qui tam* law enforcement and to encourage more private citizens to bring FCA suits."[30]

Historical Parallels

The government is most vulnerable to fraud during times of war or crisis. Such was the state of the Union in 1863 when President Lincoln urged Congress to pass the Federal FCA. Similarly, the 1943 and 1986 amendments occurred during the midst of two of our country's most critical moments: World War II and the height of the Cold War, respectively.[31] Since the terrorist attacks of September 11, 2001, our country is currently in the middle of another crisis: the War on Terror. With our country currently involved in another crisis, there is no reason to believe that miscreants are not now again taking advantage of the situation. The federal government is protected through the Federal FCA. An appropriate way for the State of Alabama to protect itself is through enactment of the proposed Alabama False Claims Act. Alabama also faces the crisis of budget shortfalls and large budget cuts. Monies recouped under an Alabama False Claims Act would help make up for these shortfalls.

The bi-partisan support for the bill is another historic parallel with the Federal False Claims Act. The 1986 Amendments to the federal False Claims Act were sponsored by Republican Charles Grassley in the Senate and Democrat Howard Berman in the House. The Amendments were signed into law by

Republican President Reagan. The Alabama False Claims Act is similarly supported. In the House, it is sponsored by Representative Jim McClendon a Republican Optometrist representing Shelby and St. Clair Counties and Senator Pat Lindsey a Democrat lawyer representing Baldwin, Choctaw, Conecuh, Escambia, Mobile, Monroe and Washington counties. If enacted in the near future, it would be signed into law by Republican Governor Bob Riley.

ELEMENTS OF A FALSE CLAIMS ACT

Purposes for a False Claims Act

According to the Senate Report on the False Claims Act Amendment of 1986, "[t]he purpose of ... the False Claims Reform Act [] is to enhance the government's ability to recover loses sustained as a result of fraud against the Government."[32] In addition to wanting to recover sums lost, Congress also sought to "encourage anyone knowing of Government fraud to bring that information forward."[33] "By arming private citizens with not only the right to expose fraud, but also a direct prosecutorial role in the litigation, Congress supplemented limited monetary and human governmental resources with private resources."[34]

Causes of Action

Several causes of action are proposed for Alabama's False Claims Act. While most involve an intentional act and an intent to defraud, unintentional misrepresentations are also covered under the Act. These causes of action include:

1. Knowingly presents or causes to be presented to an officer or employee of the state or of any political subdivision, a false claim for payment or approval;
2. Knowingly makes, uses or causes to be made or used a false record or statement to get a false claim paid or approved by the state or by any political subdivision;
3. Conspires to defraud the state or any political subdivision by getting a false claim allowed or paid by the state or by any political subdivision;
4. Has possession, custody or control of public property or money used or to be used by the state or by any political subdivision and knowingly delivers or causes to be delivered less property than the amount for which the person receives a certificate or receipt;
5. Is authorized to make or deliver a document certifying receipt of property used or to be used by the state or by any political subdivision and knowingly makes or delivers a receipt that falsely represents the property used or to be used;
6. Knowingly buys or receives as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property;
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 state or to any political subdivision;
8. Is a beneficiary of an inadvertent submission of a false claim to the state or a political subdivision, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after the discovery of the false claim.[35]

Typically, for a relator to prevail in a false claims act lawsuit, he must prove at least three elements: "(1) that the defendant presented a claim for payment or approval; (2) that the claim presented was false or fraudulent; and (3) that the defendant acted knowingly."[36]

Proposed Scienter Provision

Whether a defendant acted "knowingly" is subject to the language of the particular false claims act in question. Alabama's proposed legislation would broadly construe the term "knowledge." This scienter provision would encompass any and all individuals who acted either purposely or with "deliberate ignorance of the truth or falsity of the information"[37] or one who acted with "reckless disregard for the truth or falsity of the information." Thus, like the federal statute, specific intent regarding the false claim would not be required to hold a defendant liable under the proposed act.

Parties

The purpose of a false claims act is to allow a private citizen to bring a lawsuit on behalf of the government to eliminate frauds against that government. In such an action, the person or entity that reports the fraudulent activity is known as a relator. It is the relator who brings the information forward needed to prosecute the defrauding defendants. It is up to the relator to bring such an action to the attention of the attorney general who has the option of intervening on behalf of the government. If the attorney general does not intervene in the action, the relator may pursue the claim himself on behalf of the government.[38]

Procedure for Filing a False Claims Act Suit

A relator initiates a claim under the false claims act by filing a complaint, under seal, with an Alabama Court. The attorney general is sent a copy of the complaint and has sixty days in which to intervene. During that time, the attorney general has the power to investigate the claim and assess whether to intervene based on the merits. After the sixty days, the attorney general may either proceed with the action, decline to proceed with the action or authorize a transfer to a separate local authority who then may proceed with the action. Regardless of the attorney general's decision, after the sixty days has passed, the seal is lifted and the defendant(s) must be served.[39] If the attorney general or the local prosecutor both decline to proceed with the action, the *qui tam* plaintiff may then continue the action, via private counsel, on behalf of the government.[40]

Damages

Under the Federal FCA, a defendant who loses a *qui tam* lawsuit is liable for three times the actual damages to the government plus a $5-10,000 fine per false claim.[41] The states' false claims acts have included similar damage provisions, with some variations, but the Federal FCA serves as the model that is principally followed.[42] Alabama's proposed false claims act contains a similar damages provision.[43] This will serve multiple purposes: it will allow the

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state to recover the money that was fraudulently taken, and it will deter potential fraudulent claimants from making false claims through the threat of imposition of treble damages and costs once caught.

CONGRESS HAS PROVIDED A FINANCIAL INCENTIVE FOR ALABAMA TO PASS A STATE FALSE CLAIMS ACT.

The United States Congress recognizes the effectiveness of the False Claims Act in combating fraud on the Government and recovering over $17 billion since the 1986 amendments.[44] However, the Federal False Claims Act only reaches fraud on the Federal Treasury and not the states. Seeking to close this loophole, in February 2006 Congress enacted section 6031 of the Deficit Reduction Act of 2005 S.1932, which added section 1909(b) to the Social Security Act.[45] This provision encourages states to pass their own false claims acts covering Medicaid fraud by providing a ten percent bonus to states that enact such qualifying legislation. The bonus is paid on the recovery of all fraudulently procured Medicaid funds.

Alabama's federal matching rate is 69 percent – meaning that federal dollars account for 69 percent of all Alabama Medicaid funds spent. Thus, if a federal False Claims Act case were brought based upon fraud on the Alabama Medicaid system, the Federal Government would only be able to recover 69 percent of the money fraudulently procured, because the Federal FCA only reaches Federal funds. Under the current status of Alabama law, the State would receive nothing. However, if Alabama passes a qualifying false claims act, Alabama would receive 41 percent of all fraudulently procured Medicaid funds recovered under the False Claims Act – the 31 percent State portion plus a 10 percent bonus the Federal Government would give Alabama from its share.

Using a 2005 Texas Medicaid prescription drug False Claims Act settlement of $27 million illustrates how the law would work.

Current Alabama Law
$27 million fraud
-Federal Govt. recovery (
69% matching fund rate) $18.63 million
-Alabama recovery $0

After Alabama Enacts a False Claims Act
$27 million fraud
-Federal Govt. recovery
(69% - 10% bonus to Ala.)
$15.93 million
-Alabama Share
(31% State contribution + 10% bonus)
$11.07 million

THERE ARE NO VALID ARGUMENTS AGAINST ENACTING A FALSE CLAIMS ACT

Are there arguments against adoption by Alabama of a false claims act? None good. One argument that might arise would be the timeworn complaint about "frivolous" lawsuits. In addition, critics may add, with an increase in frivolous litigation comes an increase in the workload on an already overworked and overburdened judicial system.

This issue is a non-starter. Alabama already has mechanisms in place to deter frivolous lawsuits and to punish the litigants and their attorneys should they be filed. Indeed, other states, and the Federal FCA, provide that a relator who is unsuccessful in bringing a *qui tam* lawsuit is responsible for court costs and attorneys' fees as a result of the litigation if it is found to be frivolous.[46] Alabama does not need such a provision in its false claims act, however, since we already have the Alabama Litigation Accountability Act ("ALAA").[47] The ALAA allows "courts to award fees and costs against the attorney or party who brought [an] action without substantial justification."[48] This Act, which has been in place since 1987, allows the court to police against "frivolous" lawsuits. In addition, the Ala. R. Civ. P. 11 allows for sanctions if a party brings a lawsuit he or she knows to be without merit.[49]

Another opposing argument might be that since the burden falls on the attorney general's office to investigate each claim, either more staff would be needed to accommodate the increased workload, or the current cases would receive less attention and the judicial process would be jeopardized.

Although the relator notifies the attorney general of the potential fraud, and it is the attorney general's duty to investigate the claims, the attorney general can decide not to intervene in the action and allow the *qui tam* plaintiff to proceed with private counsel on behalf of the state. Even if the attorney general declines to intervene, the state remains the plaintiff in the action and simply receives a lesser portion of the recovery.[50] Specifically, in the proposed Alabama false claims act, if the attorney general does intervene in the action, the *qui tam* plaintiff is limited to no more than thirty-three percent of the proceeds; if the state does not intervene, however, the *qui tam* plaintiff may receive no more than fifty percent of the recovery.[51] So even if the state does not intervene in the action, it will still recover a minimum of fifty percent of the award, or more, at the judge's discretion.[52]

Insurance industry lobbyists might argue that adoption of a state false claims act could lead to an increase in insurance premiums. While such an argument is at the forefront of debate in the current political environment in this state, it is misguided. In the experience of co-author McKenna in litigating federal False Claims Act cases, there is no insurance that can be purchased to insure against committing fraud upon the government. While it is true that healthcare providers who defraud the state government through submission of fraudulent claims may be subject to large repayments, it is only wrongdoers who need to worry about this prospect.

CONCLUSION

Much like the Federal FCA and its state counterparts, Alabama needs to adopt a state false claims act to combat and deter fraud. Halting the current leeching of the state treasury and depriving our government of the use of its tax dollars should be incentive enough for the Alabama legislature to unanimously and expeditiously adopt this Act.

APPENDIX
Proposed Legislation

SYNOPSIS: Existing law does not provide a specific remedy for the state or political subdivisions in the state to pursue damages sustained when a person or entity commits false or fraudulent acts against the state or a political subdivision of the state. This bill would establish the Alabama False Claims Act, to provide a remedy for combating fraud in government programs. This bill would provide that certain persons who make false claims or commit fraud against the state or a political subdivision of the state shall be liable to the state or political subdivision for three times the amount of damage sustained, and any associated costs. This bill would provide for the responsibilities of the Attorney General, local prosecuting authorities, and individuals, as qui tam plaintiffs, in investigating and proceeding against violators in civil actions.

This bill would prohibit any employer from taking retaliatory action or preventing an employee from disclosing information to government or law enforcement agencies investigating false or fraudulent claims actions. This bill would also provide for the limitation of actions.

A BILL TO BE ENTITLED AN ACT

To create the Alabama False Claims Act, relating to false or fraudulent claims made upon state government; to subject certain violators, making false claims or committing fraud against the state or a political subdivision of the state, to treble damages; to provide for the responsibilities of the Attorney General, local prosecuting authorities, and individuals, as qui tam plaintiffs, in investigating and proceeding against violators in civil actions; to prohibit retaliatory actions by employers against employees who disclose information to government or law enforcement agencies investigating false claims actions; and to provide for the limitation of actions.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. This act shall be known and may be cited as the Alabama False Claims Act.

Section 2. Definitions.

For the purposes of this act, the following terms have the following meanings:

(1) CLAIM. Includes any request or demand for money, property, or services made to any employee, officer, or agent of the state or of any political subdivision, or to any contractor, grantee, or other recipient, whether under contract or not, if any portion of the money, property, or services requested or demanded issued from, or was provided by, the state or by any political subdivision.

(2) KNOWING and KNOWINGLY.

a. When a person, with respect to information, does any of the following:

1. Has actual knowledge of the information.

2. Acts in deliberate ignorance of the truth or falsity of the information.

3. Acts in reckless disregard of the truth or falsity of the information.

b. Proof of specific intent to defraud is not required.

(3) PERSON. Includes any natural person, corporation, firm, association, organization, partnership, business, or trust.

(4) POLITICAL SUBDIVISION. Any city, city and county, county, tax or assessment district, or other legally authorized local governmental entity with jurisdictional boundaries.

(5) POLITICAL SUBDIVISION FUNDS. Any money, property, or services requested or demanded issued from, or provided by, any political subdivision.

(6) PROSECUTING AUTHORITY. The county counsel, city attorney, or other local government official charged with investigating, filing, and conducting civil legal proceedings on behalf of, or in the name of, a particular political subdivision.

(7) STATE FUNDS. Any money, property, or services requested or demanded issued from, or provided by, the state.

Section 3. Acts subjecting person to treble damages, costs, and civil penalties; exceptions.

(a) A person shall be liable to the state or to the political subdivision for three times the amount of damages sustained by the state or the political subdivision as a result of the person committing any of the following acts:

(1) Knowingly presents or causes to be presented to an officer or employee of the state or of any political subdivision, a false claim for payment or approval.

(2) Knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the state or by any political subdivision.

(3) Conspires to defraud the state or any political subdivision by getting a false claim allowed or paid by the state or by any political subdivision.

(4) Has possession, custody, or control of public property or money used or to be used by the state or by any political subdivision and knowingly delivers or causes to be delivered less property than the amount for which the person receives a certificate or receipt.

(5) Is authorized to make or deliver a document certifying receipt of property used or to be used by the state or by any political subdivision and knowingly makes or delivers a receipt that falsely represents the property used or to be used.

(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property.

(7) Knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obliga-

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tion to pay or transmit money or property to the state or to any political subdivision.

(8) Is a beneficiary of an inadvertent submission of a false claim to the state or a political subdivision, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim.

(b) A person who commits any of the acts listed in subsection (a) shall also be liable to the state or to the political subdivision for the costs of a civil action brought to recover any of those penalties or damages, and may be liable to the state or political subdivision for a civil penalty of up to ten thousand dollars ($10,000) for each false claim.

(c) Notwithstanding subsection (a), the court may assess not less than two times and not more than three times the amount of damages which the state or the political subdivision sustains because of the act of the person described in that subdivision, and no civil penalty, if the court finds all of the following:

(1) The person committing the violation furnished officials of the state or of the political subdivision responsible for investigating false claims violations with all information known to that person about the violation within 30 days after the date on which the person first obtained the information.

(2) The person fully cooperated with any investigation by the state or a political subdivision regarding the violation.

(3) At the time the person furnished the state or the political subdivision with information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation regarding the violation.

(d) Liability pursuant to this section shall be joint and several for any act committed by two or more persons.

(e) This section does not apply to any controversy involving an amount of less than five hundred dollars ($500) in value. For purposes of this subsection, the term "controversy" means any one or more false claims submitted by the same person in violation of this act.

(f) This section does not apply to claims, records, or statements made under Title 40, Code of Alabama 1975, relating to taxation.

Section 4. Attorney General investigations and prosecutions; powers of prosecuting authority; civil actions by individuals as qui tam plaintiff; jurisdiction of courts.

(a)(1) The Attorney General shall diligently investigate violations pursuant to Section 3 involving state funds. If the Attorney General finds that a person has violated or is violating Section 3, the Attorney General may bring a civil action against that person.

(2) If the Attorney General brings a civil action on a claim involving political subdivision funds as well as state funds, the Attorney General shall, on the same date that the complaint is filed in the action, serve by mail, return receipt requested, a copy of the complaint on the appropriate prosecuting authority.

(3) The prosecuting authority may intervene in the action brought by the Attorney General within 60 days after receipt of the complaint pursuant to subdivision (2). The court may permit intervention thereafter for good cause shown.

(b)(1) The prosecuting authority of a political subdivision shall diligently investigate violations pursuant to Section 3 involving political subdivision funds. If the prosecuting authority finds that a person has violated or is violating Section 3, the prosecuting authority may bring a civil action against that person.

(2) If the prosecuting authority brings a civil action on a claim involving state funds as well as political subdivision funds, the prosecuting authority shall, on the same date that the complaint is filed in the action, serve a copy of the complaint on the Attorney General.

(3) Within 60 days after receiving the complaint pursuant to subdivision (2), the Attorney General shall do either of the following:

a. Notify the court that the office of the Attorney General intends to proceed with the action, in which case the Attorney General shall assume primary responsibility for conducting the action and the prosecuting authority may continue as a party.

b. Notify the court that the office of the Attorney General declines to proceed with the action, in which case the prosecuting authority may proceed with the action.

(c)(1) A person may bring a civil action for a violation of this act in the name of the person and the State of Alabama, if any state funds are involved, or, in the name of the person and the political subdivision, if only political subdivision funds are exclusively involved. The person bringing the action shall be known as the qui tam plaintiff. Once filed, the action may be dismissed only with the written consent of the court, taking into account the best interests of the parties involved and the public purposes behind this act.

(2) A complaint filed by a person shall be filed in the circuit court in camera and may remain under seal for up to 60 days. No service shall be made on the defendant until after the complaint is unsealed.

(3) On the same day a complaint is filed pursuant to subdivision (2), the qui tam plaintiff shall serve by mail, return receipt requested, the Attorney General with a copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses.

(4) Within 60 days after receiving a complaint alleging violations, which involve only state funds, the Attorney General shall do either of the following:

a. Notify the court that the office of the Attorney General intends to proceed with the action, in which case the seal shall be lifted.

b. Notify the court that the office of the Attorney General

declines to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff may proceed with the action.

(5)a. Within 15 days after receiving a complaint alleging violations, which involve only political subdivision funds, the Attorney General shall forward the complaint and written disclosure to the appropriate prosecuting authority for disposition and shall notify the qui tam plaintiff of the transfer.

b. Within 45 days after the Attorney General forwards the complaint and written disclosure pursuant to paragraph a., the prosecuting authority shall do either of the following:

1. Notify the court that the office of the prosecuting authority intends to proceed with the action, in which case the seal shall be lifted.

2. Notify the court that the office of the prosecuting authority declines to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff may proceed with the action.

(6)a. Within 15 days after receiving a complaint alleging violations which involve both state funds and political subdivision funds, the Attorney General shall forward copies of the complaint and written disclosure to the appropriate prosecuting authority, and shall coordinate the review and investigation conducted by the Attorney General with the review and investigation conducted by the prosecuting authority.

b. Within 60 days after receiving a complaint alleging violations, which involve both state funds and political subdivision funds, the Attorney General shall do either of the following:

1. Notify the court that the office of the Attorney General intends to proceed with the action, in which case the seal shall be lifted.

2. Notify the court that the office of the Attorney General declines to proceed with the action and that the prosecuting authority of the political subdivision involved intends to proceed with the action, in which case the seal shall be lifted and the prosecuting authority shall proceed with the action.

3. Notify the court that both the office of the Attorney General and the prosecuting authority decline to proceed with the action, in which case the seal shall be lifted and the qui tam plaintiff may proceed with the action.

c. If the Attorney General proceeds with the action pursuant to subparagraph 1. of paragraph b., the political subdivision may intervene in the action within 60 days after the Attorney General notifies the court that the office of the Attorney General intends to proceed with the action. The court may permit intervention thereafter pursuant to applicable state law or rules adopted by the Alabama Supreme Court.

(7) Upon a showing of good cause and reasonable diligence in an investigation, the Attorney General or the prosecuting authority of a political subdivision may move the court for extensions of the time during which the complaint remains under seal, but in no event may the complaint remain under seal for longer than 90 days.

(8) When a person brings an action pursuant to this subsection, no other person may bring a related action based on the facts underlying the pending action.

(d)(1) No court shall have jurisdiction over an action brought pursuant to subsection (c) against a member of the Legislature, a member of the state judiciary, an elected official in the executive branch of the state, or a member of the governing body of any political subdivision if the action is based on evidence or information known to the state or political subdivision when the action was brought.

(2) In no event may a person bring an action pursuant to subsection (c) which is based upon allegations or transactions, which are the subject of a civil suit or an administrative civil money penalty proceeding in which the state or political subdivision is already a party.

(3)a. No court shall have jurisdiction over an action brought pursuant to this act based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in an investigation, report, hearing, or audit conducted by or at the request of the Legislature, State Auditor, or governing body of a political subdivision, or from the news media, unless the action is brought by the Attorney General or the prosecuting authority of a political subdivision, or the person bringing the action is an original source of the information.

b. For purposes of paragraph a., the term "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based, who voluntarily provided the information to the state or political subdivision before filing an action based on that information, and whose information provided the basis or catalyst for the investigation, hearing, audit, or report which led to the public disclosure as described in paragraph a. (4) No court shall have jurisdiction over an action brought pursuant to subsection (c) based upon information discovered by a present or former employee of the state or a political subdivision during the course of his or her employment, unless that employee first in good faith exhausted existing internal procedures for reporting and seeking recovery of such falsely claimed sums through official channels and unless the state or political subdivision failed to act on the information provided within a reasonable period of time.

(e)(1) If the state or a political subdivision proceeds with the action, the entity proceeding shall have the primary responsibility for prosecuting the action. The qui tam plaintiff shall have the right to continue as a full party to the action.

(2)a. The state or political subdivision may seek to dismiss the action for good cause notwithstanding the objections of the qui tam plaintiff if the qui tam plaintiff has been notified by the state or political subdivision of the filing of the motion and the court has provided the qui tam plaintiff with an opportunity to oppose the mo-

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tion and present evidence at a hearing.

b. The state or political subdivision may settle the action with the defendant notwithstanding the objections of the qui tam plaintiff if the court determines, after a hearing providing the qui tam plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate, and reasonable under all of the circumstances.

(f)(1) If the state or political subdivision elects not to proceed, the qui tam plaintiff shall have the same right to proceed in the action as the Attorney General or prosecuting authority would have had if the Attorney General or the prosecuting authority had chosen to proceed pursuant to subsection (c). If the state or political subdivision so requests, and at its expense, the state or political subdivision shall be served with copies of all pleadings filed in the action and supplied with copies of all deposition transcripts.

(2)a. Upon timely application, the court shall permit the state or political subdivision to intervene in an action with which it had initially declined to proceed if the interest of the state or political subdivision in recovery of the property or funds involved is not being adequately represented by the qui tam plaintiff, or for other good cause shown.

b. If the state or political subdivision is allowed to intervene pursuant to paragraph a., the qui tam plaintiff shall retain principal responsibility for the action and the recovery of the parties shall be determined as if the state or political subdivision had elected not to proceed.

(g)(1) If the state or political subdivision proceeds with an action brought by a qui tam plaintiff pursuant to subsection (c), the qui tam plaintiff shall, subject to subdivision (3) and subdivision (4), receive at least 15 percent, but not more than 33 percent, of the proceeds of the action or settlement of the claim, depending upon the extent to which the qui tam plaintiff substantially contributed to the prosecution of the action.

(2) If the state or political subdivision does not proceed with an action pursuant to subsection (c), the qui tam plaintiff shall, subject to subdivision (3) and subdivision

(4), receive an amount which the court decides is reasonable for collecting the civil penalty and damages on behalf of the government. The amount shall be at least 25 percent, but not more than 50 percent, of the proceeds of the action or settlement and shall be paid out of those proceeds.

(3) Where the action is one provided for pursuant to subdivision (4) of subsection (d), the present or former employee of the state or political subdivision may not receive any minimum guaranteed recovery from the proceeds. The court, however, may award the qui tam plaintiff those sums from the proceeds as the court considers appropriate, but in no case more than 33 percent of the proceeds if the state or political subdivision proceeds with the action or 50 percent if the state or political subdivision declines to proceed, taking into account the significance of the information, the role of the qui tam plaintiff in advancing the case to litigation, and the scope of, and response to, the attempts of the employee to report and gain recovery of falsely claimed funds through official channels.

(4) Where the action is one, which the court finds to be based primarily on information from a present or former employee, who actively participated in the fraudulent activity, the employee may not receive any minimum guaranteed recovery from the proceeds. The court, however, may award the qui tam plaintiff those sums from the proceeds as the court considers appropriate, but in no case more than 33 percent of the proceeds if the state or political subdivision proceeds with the action or 50 percent of the proceeds if the state or political subdivision declines to proceed, taking into account the significance of the information, the role of the qui tam plaintiff in advancing the case to litigation, the scope of involvement of the present or past employee in the fraudulent activity, the attempts of the employee to avoid or resist the activity, and all other circumstances surrounding the activity

(5) The portion of the recovery proceeds not distributed pursuant to subdivisions (1) to (4), inclusive, shall revert to the state if the underlying false claims involved only state funds and to the political subdivision if the underlying false claims involved only political subdivision funds. If the violation involved both state and political subdivision funds, the court shall make an apportionment of the recovery proceeds between the state and political subdivision based on their relative share of the funds falsely claimed.

(6) For purposes of this section, the term "proceeds" includes civil penalties as well as double or treble damages as provided in Section 3.

(7) If the state, political subdivision, or the qui tam plaintiff prevails in or settles any action pursuant to subsection (c), the qui tam plaintiff shall receive an amount for reasonable expenses, which the court finds, were necessarily incurred, plus reasonable costs and attorneys' fees. All expenses, costs, and fees shall be awarded against the defendant and under no circumstances shall the expenses, costs, and fees are the responsibility of the state or political subdivision.

(8) If the state or political subdivision does not proceed with the action and the qui tam plaintiff conducts the action, the court may award to the defendant reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the qui tam plaintiff was clearly frivolous, clearly vexatious, or brought solely for purposes of harassment.

(h) The court may stay an act of discovery of the person initiating the action for a period of not more than 60 days if the Attorney General or local prosecuting authority show that the act of discovery would interfere with an investigation or a prosecution of a criminal or civil matter arising out of the same facts, regardless of whether the Attorney General or local prosecuting authority proceeds with the action. Such a showing shall be conducted in

camera. The court may extend the 60-day period upon a further showing in camera that the Attorney General or local prosecuting authority has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(i) Upon a showing by the Attorney General or local prosecuting authority that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay prosecution of the case by the Attorney General or local prosecuting authority, or would be repetitious, irrelevant, or for purposes of harassment, the court, in its discretion, may impose limitations on the participation by the person, including the following limitations:

(1) Limiting the number of witnesses the person may call.

(2) Limiting the length of the testimony of witnesses.

(3) Limiting the cross-examination of witnesses by the person.

(4) Otherwise limiting the participation by the person in the litigation.

Section 5. Employer interference with employee disclosures, liability of employer, remedies of employee.

(a) No employer may make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency or from acting in furtherance of a false claims action, including investigating, initiating, testifying, or assisting in an action filed or to be filed pursuant to Section 4.

(b) No employer may discharge, demote, suspend, threaten, harass, deny promotion to, or in any other manner discriminate against, an employee in the terms and conditions of employment because of lawful acts done by the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency or in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed pursuant to Section 4.

(c) An employer who violates subsection (b) shall be liable for all relief necessary to make the employee whole, including reinstatement with the same seniority status that the employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, compensation for any special damage sustained as a result of the discrimination, and, where appropriate, punitive damages. In addition, the defendant shall be required to pay litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate circuit court of the state for the relief provided in this subsection.

(d) An employee who is discharged, demoted, suspended, harassed, denied promotion, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of participation in conduct which directly or indirectly resulted in a false claim being submitted to the state or a political subdivision shall be entitled to the remedies provided in subsection (c) if, and only if, both of the following occur:

(1) The employee voluntarily disclosed information to a government or law enforcement agency or acted in furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed.

(2) The employee had been harassed, threatened with termination or demotion, or otherwise coerced by the employer or employer management into engaging in the fraudulent activity in the first place.

Section 6. Limitation of actions; activities antedating this article; burden of proof.

(a) A civil action pursuant to Section 4 may not be filed more than three years after the date of discovery by the official of the state or political subdivision charged with responsibility to act in the circumstances or, in any event, more than 10 years after the date on which the violation of Section 3 is committed.

(b) A civil action pursuant to Section 4 may be brought for activity prior to the effective date of this act if the limitations period set in subsection (a) has not lapsed.

(c) In any action brought pursuant to Section 4, the state, the political subdivision, or the qui tam plaintiff shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, a guilty verdict rendered in a criminal proceeding charging false statements or fraud, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, except for a plea of nolo contendere made prior to the effective date of this act, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought pursuant to subsection (a), subsection (b), or subsection (c) of Section 4.

Section 7. Remedies under other laws; severability of provisions; liberality of article construction.

(a) The provisions of this act are not exclusive, and the remedies provided for in this act shall be in addition to any other remedies provided for in any other law or available under common law.

(b) If any provision of this act or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the act and the application of the provision to other persons or circumstances shall not be affected thereby.

(c) This act shall be liberally construed and applied to promote the public interest.

Section 8. This act shall become effective on the first day of the third month following its passage and approval by the Governor, or its otherwise becoming law.[53]

continued on page 42

REFERENCES

[1] Ala. Code 1975 § 22-1-11 et seq. (1980).

[2] While the majority of fraudulent claims seem to occur in the healthcare realm, claims have arisen on the contexts of military acquisitions, construction, and other aspects of government. Fraudulent claims exist in every aspect of society. In 1952 the United States brought an FCA action against a milk supplier who provided constituted milk instead of fresh whole milk, as had been contracted for. *Faulk v. U.S.*, 198 F.2d 169 (5th Cir. 1952). More recently, Alabama was the victim of allegedly fraudulent underpayments of natural gas royalties. *See e.g.,* Phillip Rawls, *Alabama's Exxon Mobil Verdict No. 1 for 2003,* The Associated Press, Feb. 10, 2004.

[3] Arkansas, Ark. Code Ann. § 20-77-901 et seq. (1993) (Medicaid only); California, Cal. Govt. Code §§ 12650-12655 (1987); Delaware, Del. Code Ann. Title VI § 1201 et seq. (1975); District of Columbia, D.C. Code Ann. § 1-1188.13 et seq. (1981); Florida, Fla. Stat. § 68.081 et seq. (1994); Hawaii, Haw. Rev. Stat. § 661-21 et seq. (2001); Illinois, 740 Ill. Comp. Stat. Ann. § 175/1 et seq. (1992); Louisiana, La. Rev. Stat. Ann. §§ 46:437.1 et seq., 438.1 et seq., 439.1 et seq., 440.1 et seq. (1997) (Medicaid only); Massachusetts, Mass. Ann. Laws Ch. 12 § 5A-O (2000); Michigan, MCL 400.601 et seq. (1977) (Medicaid False Claims Act), MCLA 752.1001 et seq. (1985) (Healthcare False Claims Act); New Mexico (House Bill 468 signed by Governor effective May 19, 2004) (Medicaid only); Nevada, Nev. Rev. Stat. § 357.010 et seq. (1999); North Carolina, NC ST § 108A-70.10 et seq. (1997); Tennessee, Tenn. Code Ann. § 71-5-181 et seq. (1993) (Medicaid only); Texas, Tex. Hum. Res. Code §§ 36.001-36.117 (1997); Utah, Utah Code Ann. § 26-20-1 et seq. (1981) (Medicaid only); Virginia, Va. Code Ann. Art. 19 § 801-216.1 et seq. (2003).

[4] *E.g.,* 65 Tex. B.J. 120, 122-23 (citing 31 U.S.C. § 3730 (d) (1994)); Tex. Hum. Res. Code Ann. § 36.110 (Vernon 2001).

[5] Hearing on the Departments of State, Justice, and Commerce Before the Subcomm. on the Dep'ts of State, Justice, and Commerce, the Judiciary and Related Agencies of the House Comm. on Appropriations, 96th Cong. (1980), as cited in S. Rep. No. 345, at n.6, reprinted in 1986 U.S.C.C.A.N. 5266.

[6] Senate Appropriations Committee, Subcommittee on Labor, Health and Human Services, and Education, March 9, 2000 *available at* 2000 WL 11070010

[7] U.S. News, "Florida Subpoenas Generic Drug Makers on Medicaid" (July 20, 2004), *available at* http://www.reuters.com/newsArticle.jhtml?type=domesticNews&storyID=5720621. Florida is among twelve states that are currently investigating this allegation of fraudulent pharmaceutical conduct.

[8] "Attorney General Reaps $27 Million Medicaid Fraud Settlement With Major Drug Maker" (May 3, 2004) *available at* http://www.oag.state.tx.us/oagnews/release.php?id=453&PHPSESSID=44cefd9bbde62da5b1c0568bcec41b6f.

[9] Id.

[10] *People ex rel. Allstate Ins. Co. v. Muhyeldin,* 112 Cal. App.4th 604, 608 (Cal. Ct. App. 2003), the defendant was cited with 318 false claims against the state and was fined between $7,500 and $10,000 per claim, totaling $7,028,080. Combined with attorney's fees and costs, the state was able to recover over $8 million.

[11] *U.S. ex rel. Flanagan v. Baptist Health System, Inc.*, No. CV-97-BE-3070-S (N.D. Ala.)(2004).

[12] *U.S. ex rel. Roemer v. SunGard Employment Benefit Systems* (N.D. Ala.)(2004). (co-author McKenna was counsel for the Relator).

[13] Bret Boyce, *False Claims Act and Qui Tam Quarterly Review,* 34 at 69 (April 2004).

[14] O.F. Robinson, *The Criminal Law of Ancient Rome,* 100(1995); J. Randy Beck The False Claims Act and the English Eradication of Qui Tam Legislation, 78 N.C. L. Rev. 539, 566 (2000)

[15] *Vermont Agency of Natural Resources v. United States ex rel. Stevens,* 529 U.S. 765, 769 n.1 (2000) (citing 3 W. Blackstone, Commentaries *160); *See also Bass Angler Sportsman's Soc'y of Am. V. US Plywood-Champion Papers, Inc.*, 324 F.Supp. 302, 305 (S.D. Tex. 1971)

[16] 3 W. Blackstone, Commentaries at *161

[17] *Id.*

[18] English jurist, professor of common law at Oxford, and author of Commentaries on the Laws of England; which had considerable influence on the importation and adaptation of English common law in America.

[19] *Id.*

[20] *Id.* "Thus the *qui tam* informer stands in the shoes of a government attorney" who is self-appointed "and statutorily empowered to enforce the social contract in place of public officials." *Id.*

[21] Gary W. Thompson, A Critical Analysis of Restrictive Interpretations Under the False Claims Act's Public Disclosure Bar: Reopening the *Qui Tam* Door, 27 Pub. Cont. L.J. 669, 672-73 (1998). The original False Claims Act was known as the "Lincoln Law." *Id.* Note, however, that the history of *qui tam* actions in America dates back to the early colonies, which employed *qui tam* statutes "in a variety of cases." Evan Caminker, The Constitutionality of *Qui Tam* Actions, 99 Yale L.J. 341, 342 n.2 (1989). The first Congress also employed *qui tam* statutory provisions in numerous forms for violations such as "harboring runaway mariners" or "avoidance of liquor import duties." *Id.* At 342 n.3. Other *qui tam* statutes enacted over 100 years ago still remain on the books – for example, 25 U.S.C. § 81 (2000) (providing a private cause of action against one who unlawfully contracts with Indians) and 35 U.S.C. § 292 (b) (2000) (providing a private cause of action against one who falsely marks patented articles). Stevens, 529 U.S. at 769 n.1.

[22] *See,* e.g. Marc S. Raspanti and David M. Laigaie, Current Practice and Procedure Under the Whistleblower Provisions of the Federal False Claims Act, Temp. L. Rev. 23, 24 (1998); *See also U.S. v. Bornstein*, 423 U.S. 303, 309 (1976).

[23] James R. Moncus, III, The Marriage of the False Claims Act and the Freedom of Information Act: Parasitic Potential of Positive Synergy, 55 Vand. L. Rev. 1549, 1554 (2002) (*citing* Anthony L. Dewitt, Badges? We Don't Need No Stinking Badges! Citizen Attorney Generals and the False Claims Act, 65 UMKC L. Rev. 30, 31 (1996)).

[24] *Id.* (*citing* James Fisher et al., Privatizing Regulation: Whistleblowing and Bounty Hunting in the Financial Services Industries, 19 Dick. J. Int'l L. 117, 120-21 (2000)).

[25] *Id.* (*citing* Thompson, *supra,* note 22, at 673).

[26] *Id.*

[27] Thompson, *supra,* note 22, at 673

[28] *Id.* at 676 (*quoting* 89 Cong. Rec. 7569, 10849 (1943)); *See also* Raspanti and Laigaie, *supra,* note 23, at 25-26 (citing Act of December 23, 1943, Chapter 377, at § 3491(c)).

[29] Moncus, 55 Vand. L. Rev. 1549 n.50 "That is, if the relator is the source of the publicly disclosed information regarding the fraud at issue, then the suit will be allowed; therefore, the court will not dismiss the case for lack of jurisdiction as it would have under the previous statute." (*citing* 31 U.S.C. § 3730 (e)(4)(A)(2000). "The Supreme Court noted that this amendment, by 'exapand[ing] the universe of plaintiffs,' 'essentially create[d] a new cause of action, not just an increased likelihood that an existing cause of action will be pursued.'" (*quoting Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 950 (1997)).

[30] *Id.* (*citing* Frederick M. Morgan, Jr. & Julie Webster Popham, The Last Privateers Encounter Sloppy Seas: Inconsistent Original Source Jurisprudence Under the Federal False Claims Act, 24 Ohio N.U. L. Rev. 163, 166-67 (1998)).

[31] During the height of the Cold War, contractors charged the Government $600 for toilet seat, $400 for hammers and $7,622 for coffee makers. Richard A. Bales, A Constitutional Defense of *Qui Tam*, 2001 Wis. L. Rev. 381, 390 (2001).

[32] 1986 U.S.C.C.A.N. 5266

[33] *Id.*

[34] Moncus, 55 Vand. L. Rev. at 1559.

[35] App. A., Alabama False Claims Act (proposed), § 3, sub § (a)(1-8). H.R. 326, 2004 Leg. Reg. Sess. (Ala. 2004).

[36] Moncus, 55 Vand. L. Rev. at 1559-60 (citing Ann M. Lininger, The False Claims Act and Environmental Law Enforcement, 16 Va. Envtl. L.J. 577, 580 (1997).

[37] *Id.* (*citing* § 3729 (b))

[38] App. A, Alabama False Claims Act (proposed), § 4, sub § 6(a)(2).

[39] *Id.* at § 4, sub § (c)(2).

[40] *Id.* at § 4, sub § 6(a)(2).

[41] § 3729 (a)(7).

[42] *See* Note 4, *supra*

[43] App. A, Alabama False Claims Act (proposed), § 3, sub § (b).

[44] U.S. Department of Justice Press Release February 2006.

[45] Codified at 42 U.S.C. § 1396h.

[46] 31 U.S.C. § 3730 (g)

[47] Ala. Code § 12-19-270, et seq. (1987)

[48] § 12-19-272

[49] Ala.R.Civ.P. 11. Specifically, the rule states: "[t]he signature of an attorney constitutes a certificate by the attorney that the attorney has read the pleading, motion, or other paper; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading, motion, or other paper is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading, motion, or other paper had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action."

[50] App. A, Alabama False Claims Act (proposed), § 4, sub §(g)(1-4).

[51] *Id.* at § 4, sub §(g)(4).

[52] *Id.*

[53] H.R. 326, 2004 Leg., Reg. Sess. (Ala. 2004).