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Plus:

Deceptive Practices of Proprietary Schools

Challenging the Deceptive Practices of Proprietary Schools Under the Federal False Claims Act

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I. Introduction

Many legal services clients are attracted to private proprietary schools as a means of developing marketable skills and escaping poverty. Unfortunately, proprietary schools are often operated as purely money-making projects; providing quality educational programs to students is secondary. As a result, many proprietary school students are victims of an "education scam" which leaves them with no marketable skills, no jobs, and large loan debts.

This article explains how the Federal False Claims Act (FCA) /1/ can be used by advocates as part of a strategy to address this problem. Through the FCA's qui tam provisions, which allow private citizens to stand in the government's shoes for purposes of suing entities charged with defrauding the United States, students can bring charges against proprietary schools for fraud in their applications for eligibility to disburse loan funds. Ideally, such suits will encourage stricter federal and state investigation and monitoring of proprietary school programs.

II. An Overview of False Claims Act Litigation

The FCA is a civil statute designed to address fraud against the federal government by permitting qui tam actions against entities engaged in defrauding the government. /2/ "Qui tam" is short for qui tam pro domino rege quam pro se si ipso in hac parte sequitur—"one who brings the actions as well for the king as for himself." In a qui tam action, the plaintiff sues on behalf of both himself and the Government under a statute that allows for the sharing of any penalty recovered between the Government and the individual, known as a "whistle-blower" or a "relator."

The FCA was enacted in 1863 in response to fraudulent practices by contractors supplying the Union Army. /3/ The Act has been amended twice—in 1943 and in 1986. Prior to 1986, the FCA was used only a few times per year. The 1986 amendments, however, completely revised the FCA, and the FCA is now frequently used to redress Medicare and Medicaid fraud, as well as cases involving false applications for loan guarantees that result in the disbursement of government funds.

III. Proprietary Schools and Federal Student Loan Programs

A. Definitions and Requirements

Proprietary schools are post secondary institutions which, after meeting certain criteria, may qualify to participate in federal student loan programs administered under Title IV of the Higher Education Act of 1965 (HEA). /4/ In order to participate in the Title IV student loan programs, all postsecondary institutions must meet three requirements: licensing; accreditation; and eligibility and certification. /5/ In addition, the school must be certified by the Department of Education (DOE), which requires that the school have the financial responsibility and the administrative capability to participate in the student loan programs. The HEA regulations governing licensing, accreditation, and eligibility and certification are found at 34 C.F.R. part 600 ("Institutional Eligibility"); 34 C.F.R. part 602 ("Secretary's Procedures and Criteria for Recognition of Accrediting Agencies"); and 34 C.F.R. part 668 ("Student Assistance General Provisions").

Schools which meet the eligibility requirements outlined at 34 C.F.R. part 600 may disburse federal loan funds to their students, provided they also meet the definition of an "eligible institution." Among other requisites, the institution must have been in existence for at least two years. /6/ For proprietary schools, the program must have at least 600 clock hours of instruction, 16 semester hours, or 24 quarter hours offered during a minimum of 15 weeks. The program must prepare students for gainful employment in a recognized profession and admit only students who have not completed the equivalent of an associate degree. If a program is less than 600 clock hours, the Secretary of Education is directed to develop regulations to determine the quality of the program. The program, at a minimum, must have a verified rate of completion of at least 70 percent and a verified rate of placement of at least 70 percent. /7/ Students are not eligible to receive Title IV funds for correspondence courses unless the course is part of a program leading to an associate, bachelor's, or graduate degree. /8/

B. The Loan-Making Process

Students usually apply for loans through the school financial aid office. The school will have entered into an agreement with a guaranty agency and will use lenders supplied by that agency. In turn, the lenders will have made agreements with the guaranty agency. /9/ An "eligible lender" is a "National or State chartered bank, a mutual savings bank, a savings and loan association, a stock savings bank, or a credit union" which is under the supervision of the state or federal government. Other institutions qualifying as "eligible lenders" include insurance companies, certain pension funds, and state agencies or nonprofit agencies designated by a particular state. /10/

The lender is required to disclose certain information to the borrower at the time of the loan's first disbursement. This information includes a statement prominently displayed and in bold print that the borrower is receiving a loan that must be repaid, the principal amount of the loan, the rate of interest, any charges, and whether those charges will be deducted from the loan disbursements or are to be paid separately. Information regarding repayment schedules and consolidation and refinancing of loans is required. /11/ In addition, the lender must disclose the consequences of default. /12/

The school is also obliged to provide entry and exit counseling to borrowers to insure that students understand their obligations. Such counseling sessions must include information regarding default and repayment, and the school must document that this information was provided. /13/

C. Description of Loan Programs

Most proprietary students receive funds through the Federal Stafford Loan Program—Guaranteed Student Loans (GSL), Federal Supplemental Loans for Students (SLS), and Federal Parent Loans for Undergraduate Students (PLUS)—and the Federal Perkins Loan Program (formerly National Defense Student Loans). Students may also receive funds through the Pell Grant Program and the Supplemental Educational Opportunity Grant, which are both grant programs and do not require repayment. /14/

An eligible school must enter into an agreement with the Secretary of Education that it will not make or originate loans that "would be outstanding to or on behalf of more than 50 percent of its [students] in attendance at that school on at least a half-time basis." /15/ The school may request a waiver of the 50-percent limit if it can show that the school's present or prospective students would be placed under a "substantial hardship" by that limit. In determining if such a waiver will be granted, the Secretary looks at the number of economically disadvantaged students serviced by the school—defined as students from low-income families who, without aid, would be unable to obtain a comparable education elsewhere. /16/ Similarly, the school may lose its eligibility to make student loans if the school reaches a 15-percent limit on loan default, but the school may qualify for a waiver of the limit if its students will be adversely affected. /17/

If a school's eligibility is to be terminated, the Secretary must provide notice to the school of that possibility. The school may submit written material and request a hearing to show why its eligibility should not be terminated. /18/

Loan funds are sent directly to the school by the lender. After the student has registered for classes, the loan check is negotiated. The amount which covers the student's registration is credited to the student's account and the remainder is disbursed to the student. In some cases, the funds are disbursed by electronic transfer, requiring the school to obtain the student's authorization to release the funds. /19/ Loan funds may not be credited to a student's account earlier than three weeks before the first day of classes in the period intended to be covered by the loan. If the school finds that the student has not registered for classes, the funds must be returned to the lender within 30 days of that determination. If a student withdraws or is expelled before the loan period begins, the school must return to the lender any loan funds credited directly by the school to the student's account and any loan funds given to the student which were then paid to the school. /20/

IV. Drafting the FCA Complaint

A. The Plaintiffs

1. Standing to Sue Under the FCA

The FCA specifically authorizes "actions by private persons." /21/ Possible qui tam plaintiffs suing a proprietary school on behalf of the federal government might include students, employees of the school, or other whistle-blowers with direct knowledge of the school's fraudulent practices. /22/ Qui tam suits under the FCA often include multiple plaintiffs. /23/ However, the Senate Judiciary Committee has indicated that the FCA was "not meant to produce class actions or multiple separate suits based on identical facts and circumstances," /24/ although no language in the statute specifically precludes class actions.

Since the revival of qui tam litigation in 1986, numerous defendants have challenged the FCA's constitutionality, arguing that, in permitting private litigants to sue on the Government's behalf, Congress violated the separation-of-powers requirement. These challenges have not succeeded. /25/ Opponents of the FCA qui tam provision have also argued that Congress is prohibited from appointing officers, and that duly appointed officers are the only ones who may litigate on behalf of the Government. These challenges have been rejected on the ground that qui tam relators are not "officers" within the meaning of the constitutional appointments clause. /26/

2. "Original Source" Under the FCA

The FCA provides that a court shall not have jurisdiction to hear a qui tam case under the FCA if the case is based on information made available to the public during the course of a criminal, civil, administrative, or congressional hearing, investigation or audit, or from the news media. There are two exceptions: (1) if the action is brought by the Attorney General or (2) if the qui tam plaintiff bringing the action is an "original source of the information." /27/

"Original source" is defined as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." /28/ Congressman Howard Berman (D-CA), co-author of the FCA, defined an "original source" as a person who "had some of the information related to the claim which he made available to the government or the news media in advance of the false claims being publicly disclosed." /29/ In essence, if the information on which a qui tam suit is based is "in the public domain," and the qui tam plaintiff was not a source of that information, then the suit is barred. /30/

3. When the Government Intervenes in the Action

If the Government decides to take over the action, it is responsible for prosecuting the action and is not bound by any actions of the qui tam plaintiff. The qui tam plaintiff may remain as a party, but the Government may dismiss the action over the objections of the qui tam plaintiff, provided that

the individual has been afforded notice and an opportunity for a hearing. The Government may also settle the action over the individual plaintiff's objections if the Government determines, after a hearing, that the settlement is fair and equitable. If the Government can show that unlimited participation by the plaintiff would hamper the Government's case, the court may limit the individual's participation. /31/

B. The Defendants

In suing proprietary schools, plaintiffs may find that the school itself is judgment proof due to bankruptcy. While it is possible for plaintiffs to lift the automatic stay accompanying a declaration of bankruptcy, other potential defendants—lenders, guarantee agencies, accrediting agencies, owners and operators of the schools—may be more apt to be solvent.

1. Lenders and Guarantee Agencies

Several courts have recently clarified that banks and other lenders may be sued in lieu of the proprietary school. In Tipton v. Secretary of Educ., the proprietary school had gone out of business and the judge agreed that the suit could proceed with the bank as the defendant. /32/ The court, in Jackson v. Culinary School of Wash., also permitted students to proceed against lenders. /33/

Consumer laws in many states hold banks liable if they act as business partners of fraudulent companies. State laws may also designate that guarantee agencies (i.e., assignees of related lenders) are liable as lenders. /34/

A lender may be responsible to students also under the common-law doctrines of respondeat superior or agency. This relationship is supported by HEA regulations. /35/ DOE has also stated that borrowers are not liable for student loans if a "relationship exists between the lender and the school that would make the school's failure to render educational services a defense to repayment of the loan to the lender." /36/ Thus, the school may be viewed as the lender's agent in completing the loan paperwork, making the lender liable for the school's actions during the loan process and for the school's failure to provide appropriate services. /37/

2. Accrediting Agencies

A claim may also be raised against the private accrediting agency charged with responsibility for accrediting the proprietary school. Accrediting agencies are often arms of the trade associations representing proprietary schools. If the plaintiff can prove that the agency was negligent in performing its monitoring function, the agency may be held responsible for the student's injury. /38/

3. Parent Companies

Often, proprietary schools are franchised or operate as chains throughout the country. DOE may require a parent company to make a "corporate pledge of assets" before it will grant eligibility to one of the company's branches. This pledge may allow a plaintiff to move against the parent company. /39/

4. Owners and Officers of Proprietary Schools

Proprietary schools may be wholly owned by one individual, a family, or a corporation. Regardless of the configuration, the owners and officers should be named since they may be responsible for their own actions even when acting in their corporate capacities. /40/

V. Elements of a Cause of Action Under the FCA

"Any person" is liable under the FCA if (1) he or she "knowingly" presents a false or fraudulent claim to the Government for payment; (2) conspires to defraud the Government by getting such a claim paid; (3) in contracting with the Government for property or funds, delivers or causes to be delivered less than the amount specified in the contract; or (4) creates, uses, or causes to be used false records or statements for the purpose of getting a fraudulent claim paid. /41/

A. Requisites of a "Claim" Under the FCA

The term "claim" includes any request or demand, whether under contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient, if the U.S. Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded. /42/ The legislative history indicates that claims submitted to state agencies under the Medicaid program are "claims" under the FCA and that "[s]imilar reasoning should apply in other circumstances where claims are submitted to State, local, or private programs funded in part by the United States where there is significant Federal regulation and involvement." /43/

The most frequently cited case defining a claim under the FCA is United States v. Neifert-White Co. /44/ In that case, the Government brought an action against a grain storage bin dealer who inflated prices in an effort to get the Commodity Credit Corporation to give loans to his customers. The Supreme Court held that the term "claim" in the FCA was to be construed broadly, "reaching to all fraudulent attempts to cause the Government to pay out sums of money." /45/

More recently, the Fourth Circuit Court of Appeals defined the term "claim" in United States v. Uzzell. /46/ The defendants were convicted under the criminal FCA of filing false claims with the Small Business Administration (SBA). On appeal, the court held that submission of false funding requests constituted a filing of "claims" within the meaning of the FCA: "Within the statutory scheme the SBA's advanced funding approval is a commitment that, upon proper documentation, the advance will be disbursed." /47/

Finally, in United States v. Hill, /48/ the Government filed suit for recovery of damages sustained through bank loans guaranteed by the SBA and FHA. The defendants were originally convicted under the criminal FCA. /49/ In discussing whether this conviction also established a violation of the civil FCA, the court indicated that a "false statement" is different from a "false claim." According to the court, "[i]t is the ultimate demand for payment on the guarantee that constitutes the claim." /50/ The Hill court acknowledged, however, that, under the civil FCA, submission of a false statement in a loan guarantee application may trigger liability as a result of the false claim that may follow. /51/

B. Defining the Elements of an FCA Cause of Action

1. "Knowingly"

Section 3729 of the FCA sets forth the standard of intent necessary for a finding of liability: "[T]he terms 'knowing' and 'knowingly' mean that a person, with respect to information[,] (1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required." /52/

Under this definition, actual knowledge is not necessary to establish liability. Rather, a defendant is liable if he or she knows, or has reason to know. /53/ Congressman Berman, one of the sponsors of the 1986 Amendments, explained the standard as one designed to reach the "ostrich-with-his-head-in-sand" problem, in which individuals protest that they were not personally aware of any false or fraudulent practices. /54/

2. "Any Person"

The phrase "any person" refers to the defendant in an FCA action. /55/ The principal question is whether this "person" must be the beneficiary of the false claim or in a contractual relationship with the Government to incur liability under the Act. In United States ex rel. Marcus v. Hess, /56/ the Supreme Court concluded that, reading the first two clauses of the statute together, "[t]hese provisions . . . indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government." /57/

This clause was also construed in United States v. Veneziale, /58/ in which the defendant did not make the false claim but caused another couple to make a fraudulent application for a bank loan. The couple alleged in the application that the money was for home improvements, when the money was, in fact, used to purchase real estate from the defendant. The loan application was used to secure a guarantee by the bank from the FHA. The couple later defaulted on the loan, causing the Government to have to pay under its guarantee. The Third Circuit Court of Appeals stated that the provisions of the FCA "indicate a purpose to reach any person who knowingly assists in causing

the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government." /59/

3. "Cause to Be"

A person is liable under the FCA for false claims he or she "presents, or causes to be presented" and for false records he or she "makes, uses, or causes to be made or used." /60/

There is little case law or commentary explaining the phrase "cause to be." However, in United States v. Hill, the court did attempt to establish a "sufficient nexus" between the making of a false statement on a federal loan guarantee application and the presentation of a false claim based on that statement; it concluded that the connection was sufficiently close to fall within the FCA's "causation" language. /61/

The court, in Veneziale, discussed "cause to be" in the context of an "innocent third party" being induced to submit a false loan application to the Government. /62/ Citing 31 U.S.C. Sec. 231, /63/ the court concluded that a person who causes such false applications to be made is liable under the FCA.

4. "False or Fraudulent"

Black's Law Dictionary states that a "thing is called 'false' when it is done or made, with knowledge, actual or constructive, that is untrue or illegal." "Fraudulent," on the other hand, is defined as "a statement or claim or document [which is] falsely made, or caused to be made, with the intent to deceive." /64/

According to these accepted definitions, intent is an element in proving a fraudulent statement, claim or document. However, proving intent is not necessary when the thing itself is false. Establishing that something is false may be easier than proving intent to defraud. Since the statute uses the disjunctive "or," it seems that one may choose to prove either fraud or falsity, or both.

5. "Conspiracy"

The conspiracy section of the FCA has been interpreted to require the following elements: (1) a conspiracy between the defendant and one or more individuals to get a false or fraudulent claim paid or allowed; (2) an act performed by one or more conspirators to achieve the object of the conspiracy; and (3) damages suffered by the Government as a result of the conspiracy. /65/ Proof that a false claim was actually presented to, or paid by, the Government as a result of the conspiracy is unnecessary for a defendant to be held liable under 31 U.S.C. Sec. 3729(a)(3). /66/

In Hill, the court determined that the elements for conspiracy under the FCA and those under its counterpart in the criminal code are different. /67/ The court found that the filing of false

statements was enough to bring the defendants under the criminal statute, whereas, under the civil statute, courts look to the connection between the false statement and the false claim.

6. "Materiality"

The court, in Hill, also held that materiality is an element of a cause of action under the FCA: "In order for a false statement in a guarantee application to 'cause' the submission of a false claim . . . the Government would certainly need to prove that it relied on a false statement in issuing the guarantee." /68/

The legislative history of the 1986 Amendments tends to support the proposition that materiality is an element of the cause of action. Specifically, the Senate Report states that "[t]he act should cover representations which cause the Government to . . . pledge its full faith and credit, including the risk of insurable loss, based upon another, but material false statement." /69/

VI. Procedural Issues

A. Venue and Jurisdiction

The FCA's venue provision allows an action to be brought "in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred." /70/ The provision is basically a form of a long-arm statute allowing courts to obtain jurisdiction over individuals or corporations who are not residents of the state or are not physically present in the state at the time of service. /71/ A summons may be served "at any place within or outside the United States." /72/

B. Statute of Limitations

According to the 1986 Amendments, a civil action under the FCA

> may not be brought . . . (1) more than 6 years after the date on which the violation of Sec. 3729 is committed, or (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last. /73/

Courts concur that the statute of limitations under the FCA does not begin to run until a demand has been made upon the Government for payment on a claim. /74/ The statute of limitations is not triggered by the date of an allegedly false claim or by approval for payment. /75/

C. Jury Versus Nonjury Trial

The parties in a suit under the FCA are entitled to a jury trial. /76/ In order to secure this right, a party must serve a demand on the other parties "any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue." /77/

D. Standard of Proof

The 1986 Amendments clarified the standard of proof under the FCA, reducing the standard from a criminal to a civil standard. The statute requires that, "[i]n any action brought under [the FCA], the United States shall be required to prove all essential elements of the cause of action, including damage, by a preponderance of the evidence." /78/

VII. Relief

A. Damages

The FCA prescribes that a defendant is liable for "[three] times the amount of damages which the Government sustains because of the act of [the defendant]." An exception to treble damages may be made if the person committing the violation (1) provides the Government with information about the violation within 30 days after which that person obtained the information; (2) cooperates with a Government investigation of the violation; and (3) was neither involved in any other action stemming from the same violation, nor had actual knowledge of an ongoing investigation into that violation. In these exceptional cases, the court may assess not less than double damages. /79/

A showing of measurable damages is not an essential element of a cause of action under the FCA. /80/ Rather, the plaintiff must submit evidence sufficient to allow for a reasonable estimate of damages. /81/

The statute states that damages will be assessed "because of" the act of the defendant. /82/ "Because of" has been interpreted to mean that there must be a showing of causation between the violation of the Act and the Government's damages. /83/ Despite this statement, courts have held that "actual reliance is not essential to the recovery of damages under the False Claims Act." /84/

1. "Each False Claim"

Courts have consistently interpreted the FCA to impose liability for each false claim made. /85/

2. Joint and Severable Liability

Although the FCA does not address the issue of joint and severable liability, courts have held defendants jointly and severally liable for damages /86/ as well as for penalties under the statute.

/87/ Conspiracy, which is viewed as a separate violation of the Act, triggers yet another penalty. /88/

3. Value of Benefits Received

If a benefit has accrued to the Government, these "benefits" will offset the damages for which the defendant is liable. For example, in loan guarantee situations, the defaulters may repay part of their obligation. These repayments will be subtracted from the total damages. /89/

4. Consequential Damages

Neither the pre- nor post-1986 versions of the FCA provide for consequential damages. Several pre-1986 cases addressed the issue, but courts were split over the intent of the Act. In United States v. Aerodex, Inc., the Fifth Circuit held that the FCA did not include consequential damages resulting from the delivery of defective goods. /90/ In contrast, the Sixth Circuit in United States v. Ekelman & Assoc. /91/ distinguished Aerodex and allowed the Government to recover expenses which it incurred as a result of the default on loans at issue.

B. Share of Recovery by the Qui Tam Relator

The amount of the recovery accruing to the qui tam relator depends on the extent of the Government's involvement in the action.

1. If the Government Elects to Intervene in the Action

The qui tam relator is entitled to at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim. If the action is based primarily on information other than that brought forward by the relator, the relator's share will be limited to 10 percent of the proceeds. The relator is also entitled to "reasonable expenses" and attorneys' fees and costs. These expenses, fees, and costs are assessed against the defendant. /92/

2. If the Government Does Not Choose to Intervene

The court may award the relator an amount not less than 25 percent nor more than 30 percent of the proceeds. The relator also receives reasonable expenses, attorneys' fees, and costs, all of which are assessed against the defendant. /93/

3. Penalties

The FCA provides for a penalty of not less than $5,000 nor more than $10,000 for each violation. /94/ According to the 1986 Senate report, the original drafters of the Act felt that defrauding the Government was sufficiently serious to warrant an "automatic forfeiture," rather than forfeiture at the discretion of the courts. /95/ The case law corroborates the mandatory nature of the penalties. /96/ Since the penalty is mandatory, the Government need not establish causation. /97/

VIII. Conclusion

To date, the FCA has been used in litigation against proprietary schools on only a few occasions. However, the 1986 Amendments clearly make the FCA a more attractive vehicle for plaintiffs seeking redress for fraud. Lawyers working on education and consumer issues should be familiar with, and be ready to use, this statute on behalf of individuals prepared to "blow the whistle" on educational scams by proprietary schools.

Footnotes

/1/ Federal False Claims Act, 31 U.S.C. Secs. 3729-33.

/2/ Related criminal statutes are found at 18 U.S.C. Sec. 287 (False, Fictitious or Fraudulent Claims) and 18 U.S.C. Sec. 1001 (Fraud and False Statements). In addition, 18 U.S.C. Secs. 286 and 371 deal with conspiracy to defraud the federal government.

/3/ Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (reenacted as Rev. Stat. Secs. 3490-94, 5438 (1875 ed.); later codified at 31 U.S.C. Secs. 231-35; recodified at 31 U.S.C. Secs. 3729-731 (1982)).

/4/ Title IV of the Higher Education Act of 1965, 20 U.S.C. Secs. 1001 et seq. The statutory definition of a proprietary institution is set out at 20 U.S.C. Sec. 1088(b).

/5/ Abuses in Federal Student Aid Programs, Part 2: Licensing, Accreditation, Certification, and Eligibility, Hearings Before the Sen. Perm. Subcomm. on Investigations of the Sen. Comm. on Gov't Affairs, 101st Cong., 2d Sess. 189 (Sept. 12, 1990) (statement of James P. Thomas, Jr., Inspector General, U.S. Department of Education).

/6/ 20 U.S.C. Sec. 1085(a); 34 C.F.R. Sec. 600.5.

/7/ 20 U.S.C. Sec. 481(e) (effective July 1, 1993).

/8/ Id. Sec. 1091(k).

/9/ Abuses in Federal Student Aid Programs, Part III: Lenders, Guarantee Agencies, Loan Services and the Secondary Market, Hearings Before the Sen. Perm. Subcomm. on Investigations of the Sen. Comm. on Gov't Affairs, 101st Cong., 2d Sess. 167 (Sept. 25, 1990) (staff statement).

/10/ 20 U.S.C. Sec. 1085(d).

/11/ 20 U.S.C. Sec. 1083.

/12/ Id. Sec. 1083(a)(12).

/13/ Id. Sec. 1092.

/14/ The regulations governing these programs are found at 34 C.F.R. pts. 668, 682 (1990).

/15/ 34 C.F.R. Sec. 682.601(b)(1).

/16/ Id. Sec. 682.601(c).

/17/ Id. Sec. 682.608.

/18/ Id. Sec. 682.608(d).

/19/ Id. Sec. 682.604.

/20/ Id.

/21/ 31 U.S.C. Sec.3730(b)(1).

/22/ The statute bars jurisdiction over (1) actions by members of the armed forces if the suit is directed at another member of the armed forces and (2) actions against members of Congress, the judiciary, or executive branch officials if the action is based on evidence known to the government when the action was brought. 31 U.S.C. Sec. 3730(e).

/23/ See, e.g., United States ex rel. LaValley v. First Nat'l Bank, 707 F. Supp. 1351 (D. Mass. 1988) (FCA action brought by a group of private citizens); United States ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13 (2d Cir. 1990) (qui tam action under FCA brought by two plaintiffs).

/24/ S. Rep. No. 99-345, 99th Cong., 2d Sess. 10, 25 (1986), reprinted in 1986 U.S.C.C.A.N. 5277, 5290 [hereinafter S. Rep. No. 99-345].

/25/ See, e.g., U.S. ex rel. Kelly v. Boeing, 62 U.S.L.W. 2165 (9th Cir., Sept. 21, 1993); U.S. ex rel. Kreindler & Kreindler v. United Tech. Corp., 985 F.2d 1148 (2d Cir.), cert. denied, 113 S. Ct. 2962 (1993). See generally Valerie R. Park, The False Claims Act, Qui Tam Relators, and the Government: Which Is the Real Party to the Action?, 43 Stan. L. Rev. 1061, 1073 (1991).

/26/ See, e.g., U.S. ex rel. Givler v. Smith, 775 F. Supp. 172 (E.D. Pa. 1991); United States ex rel. Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607, 613 (N.D. Cal. 1989).

/27/ 31 U.S.C. Sec. 3730(e)(4)(A).

/28/ Id. Sec. 3730(e)(4)(B).

/29/ 132 Cong. Rec. H9389 (daily ed. Oct. 7, 1986). See also Richard J. Oparil, The Coming Impact of the Amended False Claims Act, 22 Akron L. Rev. 525, 548 (1989).

/30/ United States ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13, 17 (2d Cir. 1990). See also United States ex rel. Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992).

/31/ 31 U.S.C. Sec. 3730(c)(2)(C),(D).

/32/ Tipton v. Secretary of Educ., 768 F. Supp. 540 (D.W. Va. 1991) (Clearinghouse No. 45,765). Tipton was filed by students against Northeastern Business College. The school processed all the paperwork for the loans and received funds mailed directly from the bank. Students had no contact with the bank, and plaintiffs were unaware that they would be asked to repay the funds.

/33/ Jackson v. Culinary School of Wash.,788 F. Supp. 1233 (D.D.C. 1992).

/34/ Jonathan Sheldon, Unfair and Deceptive Acts and Practices (National Consumer Law Center, 2d ed. 1988 & Cumulative Supp. 1991) (hereinafter NCLC).

/35/ 34 C.F.R. Sec. 682.200 (1990). See also discussion of DOE policy in Jackson, 788 F. Supp. at 1240-41 (D.D.C. 1992).

/36/ Correspondence from Kenneth Whitehead, DOE Acting Assistant Secretary, to Congressman Stephen Solarz (May 19, 1988) (Clearinghouse No. 44,343).

/37/ See Jackson, 788 F. Supp. at 1241 (“students may assert school-based claims arising out of an origination relationship against the Secretary”).

/38/ NCLC, supra note 34, at 100.

/39/ Id. at 99-100.

/40/ Id. at 100.

/41/ The elements of a cause of action under the FCA are spelled out in 31 U.S.C. Sec. 3729.

/42/ 31 U.S.C. Sec. 3729(c).

/43/ S. Rep. No. 99-345, supra note 24, at 22, 1986 U.S.C.C.A.N. at 5287.

/44/ United States v. Neifert-White Co, 390 U.S. 228 (1968).

/45/ Id. at 233.

/46/ United States v. Uzzell, 780 F.2d 1143 (4th Cir. 1986).

/47/ Id. at 1146.

/48/ United States v. Hill, 676 F. Supp. 1158 (N.D. Fla. 1987).

/49/ 18 U.S.C. Sec. 371.

/50/ Hill, 676 F. Supp. at 1174.

/51/ Id.

/52/ 31 U.S.C. Sec. 3729(b) (emphasis added). See, e.g., United States v. Ettrick, 683 F. Supp. 1262, 1267 (W.D. Wis. 1988). Because FCA claims rest on the defendant's alleged fraud, the complaint should plead each of the elements described here and below relating to fraud "with particularity," in accordance with Fed. R. Civ. P. 9(b). See United States ex rel. Kreindler & Kreindler v. United Tech. Corp. 985 F.2d 1148 (2d Cir. 1993) (applying Rule 9(b) to FCA complaint); United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991) (same); Department of Housing & Urban Dev. ex rel. Givler v. Smith, 775 F. Supp. 172 (E.D. Pa. 1991) (same).

/53/ S. Rep. No. 99-345, supra note 24, at 20, 1986 U.S.C.C.A.N. at 5285. See also Richard Oparil, The Coming Impact of the Amended False Claims Act, 22 Akron L. Rev. 525, 533 (1989).

/54/ 132 Cong. Rec. H9389 (daily ed. Oct. 7, 1986) (statement of Congressman Berman).

/55/ 31 U.S.C. Sec. 3729.

/56/ United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943).

/57/ Id. at 544-45.

/58/ United States v. Veneziale, 268 F.2d 504 (3d Cir. 1959).

/59/ Id. at 505-6 (quoting Hess, 317 U.S. at 544-45 (1942)).

/60/ 31 U.S.C. Sec. 3729(1), (2).

/61/ Hill, 676 F. Supp. at 1174.

/62/ Veneziale, 268 F.2d at 506.

/63/ Section 231 is an earlier version of 31 U.S.C. Sec. 3729, recodified after the 1986 Amendments to the Act.

/64/ Black's Law Dictionary 540 (5th ed. 1979).

/65/ S. Rep. No. 99-345, supra note 24, at 21, 1986 U.S.C.C.A.N. at 5286.

/66/ United States v. Blusal Meats, Inc., 638 F. Supp. 824, 827 (S.D.N.Y. 1986), aff'd, 817 F.2d 1007 (2d Cir. 1987) (interpreting 31 U.S.C. Sec. 3729(a)(3)).

/67/ Hill, 676 F. Supp. at 1174.

/68/ Id.

/69/ S. Rep. No. 99-345, supra note 24, at 20, 1986 U.S.C.C.A.N. at 5285.

/70/ 31 U.S.C. Sec. 3732(a).

/71/ S. Rep. No. 99-345, supra note 24, at 32, 1986 U.S.C.C.A.N. at 5297.

/72/ 31 U.S.C. Sec. 3732(a).

/73/ Id. Sec. 3731(b).

/74/ United States v. Ettrick, 683 F. Supp. 1262, 1263 (W.D. Wis. 1988).

/75/ United States ex rel. Duvall v. Scott Aviation, 733 F. Supp. 159 (W.D.N.Y. 1990).

/76/ See, e.g., United States ex rel. Rodriguez v. Weekly Publications, 9 F.R.D. 179 (S.D.N.Y. 1949) (qui tam plaintiff, suing under FCA, is entitled to jury trial under Fed. R. Civ. P. 38).

/77/ Fed. R. Civ. P. 38(b). If the attorney opts for a jury trial, it is advisable to request special verdicts. This is particularly important in an action under the FCA since the defendant is liable for each false claim.

/78/ 31 U.S.C. Sec. 3731(c) (emphasis added). Under the earlier FCA, some courts had required a criminal standard of proof, arguing that the FCA was penal in character. In United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943), the Supreme Court rejected the higher standard of proof. "Preponderance of the evidence" is the appropriate standard in civil and administrative litigation. S. Rep. No. 99-345, supra note 24, at 30-31, 1986 U.S.C.C.A.N. at 5295-96.

/79/ 31 U.S.C. Sec. 3729(a). A person violating this subsection is also liable to the Government for the costs of a civil action brought to recover damages or penalties. See United States v. Macomb Contracting Corp., 763 F. Supp. 272 (M.D. Tenn. 1990).

/80/ United States v. CFW Construction Co, 649 F. Supp. 616, 618 (D.S.C. 1986). See also United States ex rel. Hagood v. Sonoma County Water Agency, 929 F.2d 1416 (9th Cir. 1991); United States v. Hughes, 585 F.2d 284, 286 n.1 (7th Cir. 1978).

/81/ Michael A. DiSabatino, Annotation, Measure and Elements of Damages Under False Claims Act, 35 A.L.R. Fed. 805, 813 (1977).

/82/ 31 U.S.C. Sec. 3729(a).

/83/ United States v. Hill, 676 F. Supp. 1158, 1180 (N.D. Fla. 1987). See also Michael A. DiSabatino, supra note 81, at 837-42.

/84/ United States v. Board of Educ. of Union City, 697 F. Supp. 167, 179 (D.N.J. 1988). See also United States v. Ehrlich, 643 F.2d 634 (9th Cir.), cert. denied, 454 U.S. 940 (1981) (Government does not have to be deceived in order to recover damages under FCA).

/85/ United States ex rel. Marcus v. Hess, 317 U.S. 537, 552 (1943). See also CFW, 649 F. Supp. at 618 ("civil penalties should be assessed against the defendants for each false claim submitted").

/86/ See, e.g., United States v. Entin, 750 F. Supp. 512, 519 (S.D. Fla. 1990) (defendants jointly and severally liable for damages and cost of lawsuit); CFW, 649 F. Supp. at 619 (defendants were jointly and severally liable for both damages and penalties); United States v. Globe Remodeling Co., 196 F. Supp. 652, 657 (D. Vt. 1960) (defendants jointly and severally liable for double damages).

/87/ See, e.g., Hughes, 585 F.2d at 286 (defendants jointly and severally liable on ten separate counts for penalties); Union City, 697 F. Supp. at 175 (conspiracy viewed as separate violation for each participant is jointly and severally liable); CFW, 649 F. Supp. at 618 (defendants jointly and severally liable for statutory civil penalties).

/88/ Union City, 697 F. Supp. at 176.

/89/ Globe Remodeling, 196 F. Supp. at 657-58. See also United States v. Bornstein, 423 U.S. 303 (1976) (damages must be doubled and then reduced by the amount of any previous payments made on the claim); United States v. Ekelman & Assocs., 532 F.2d 545, 549 (6th Cir. 1976) (lower court erred in subtracting credit due the defendants, i.e., benefits to the Government, before, rather than after, the damages were doubled).

/90/ United States v. Aerodex, Inc.,469 F.2d 1003 (5th Cir. 1972).

/91/ United States v. Ekelman & Assoc., 532 F.2d 545, 551 (6th Cir. 1976).

/92/ 31 U.S.C. Sec. 3730(d)(1).

/93/ Id.. Sec. 3730(d)(2).

/94/ Id. Sec. 3729(a).

/95/ S. Rep. No. 99-345, supra note 24, at 17, 1986 U.S.C.C.A.N. at 5282.

/96/ See, e.g., United States v. Hughes, 585 F.2d 284, 286 (7th Cir. 1978) (forfeiture is mandatory, leaving trial court with no discretion to modify the statutory amount).

/97/ United States v. Hill, 676 F. Supp. 1158, 1182 (N.D. Fla. 1987).