**American Bar Association**

**Forum on the Construction Industry**

---

# BRAVE NEW WORLD:

# CONTRACTING IN A FALSE CLAIMS ENVIRONMENT

**William T. Eliopoulos, Esq.**
**Chris Cruz, Esq.**
**Rutan & Tucker, LLP**
**San Jose, CA**

**April 7-9, 2005**
**Sheraton New Orleans – New Orleans, LA**

---

## I. Introduction: History and Proliferation of False Claims Actions

### *A. Evolution of the False Claims Act*

The federal False Claims Act was enacted in 1863 to stop war supplies procurement fraud during the Civil War.[1] The original Act provided for a civil forfeiture of $2,000 for every violation plus double the damages suffered by the government. In addition to authorizing the federal government to pursue violators, the Act permitted private citizens to bring civil actions in the name of the government in return for a share of any recovery—the so-called *qui tam* provision. Despite its incentives, the Federal False Claims Act received only sporadic use until Congress' amendment of the Act in 1986 expanded whistleblowers' shares of recovery and protected them from retaliation by an employer.[2] As a result, federal False Claims complaints increased from 33 in 1987 to 533 in 1997.[3] Between 1986 and 1993, the federal government recovered a whopping $1.45 billion under the Act. Of this, approximately $400 million, almost one-third, was recovered from suits initiated by private *qui tam* plaintiffs.[4]

The success of the 1986 Amendment to the Federal False Claims Act has spawned numerous "Baby" False Claims Acts among states. Commencing with California in 1987, the following nine states plus the District of Columbia have enacted False Claims Acts to address fraud against state and local government agencies: California, Delaware, Florida, Hawaii, Illinois, Massachusetts, Montana, Oklahoma, Tennessee, and Virginia.[5] These "Baby" False Claims Acts are largely modeled after the federal False Claims Act, although some differ in various respects from their federal counterpart. Thus, much of the growing case law interpreting the federal Act can be used as a precedent in state False Claims actions. Additionally, there is pending false claims act legislation in the following 15 states: Alabama, Alaska, Colorado,

Connecticut, Kansas, Maryland, Mississippi, Missouri, Montana, New Jersey, New York, Oklahoma, Pennsylvania, Texas, and Washington.[6]

Although the largest Federal False Claims recoveries historically have come in the Health Care and Aerospace Industries, the increased use of the federal Act since 1986 and the recent emergence of state "Baby" False Claims Acts is fueling a proliferation of False Claims actions by both the federal and state/local governments arising out of construction projects.

*B. The California Experience*

As explained above, California was the first state to enact a False Claims Act, in 1987.[7] The California Act largely mirrors the federal Act, expanding its coverage slightly in certain areas. Beginning with the new millennium, a number of California local government agencies began aggressively using the Act via complaints and counterclaims against prime and subcontractors on public works.

For example, in 2001, a jury awarded $30 million in damages and penalties against prime contractor, Tutor-Saliba-Perini, JV ("Tutor"), for violating California's False Claims Act and unfair competition laws. This judgment in favor of the Los Angeles County Metropolitan Transportation Authority ("MTA") was increased to over $60 million by awarding $31 million in attorneys' fees to MTA as the prevailing plaintiff under the False Claims Act.[8] The MTA's false claims counterclaim had been filed in response to Tutor's $16 million construction claim for extra work concerning the project.[9] Although this judgment was reversed by the court of appeals on January 25, 2005, due to procedural infirmities by the trial court against Tutor, it demonstrates the potentially devastating impact of the False Claims Act to contractors.

In 2001, Dillingham filed a $5 million construction claim against City and County of San Francisco, which then filed a counterclaim against Dillingham alleging False Claims Act

violations. San Francisco claimed that several of the minority business subcontractors Dillingham listed in its bid on a SF Airport project were not legitimate minority contractors and, thus, every Dillingham progress payment application was a false claim. Dillingham's response was, in part, that it listed these subcontractors because they had been certified by San Francisco's Human Relations Department as legitimate MBE's. Although San Francisco ultimately dismissed its counterclaim, the substantial expense of defending against this counterclaim and another false claims action by County of Los Angeles contributed to Dillingham's bankruptcy filing in early 2003.[10]

In 2002, San Francisco sued Tutor alleging False Claims Act and Civil RICO violations in connection with nearly $1 Billion of SF Airport construction contracts. The allegations included similar MBE/WBE subcontractor allegations to those claimed against Dillingham on the separate SF Airport contract, above. These claims against Tutor are pending as are California False Claims Act claims by a number of other local agencies against contractors throughout California.

These examples demonstrate an alarming trend for contractors--as more local public agencies become educated about the California False Claims Act, their use of the Act in litigation both affirmatively and in response to contractor claims, is exploding.

## II. Basic Elements of A Civil False Claims Action

### *A. Elements*

The federal False Claims Act imposes civil liability on any individual or entity (including local government entities) who (1) knowingly presents or causes to be presented, to the federal government, (2) a false claim for payment, or a false record or statement to get a false claim paid.[11] The Act also makes it illegal to conspire to defraud the government by getting a false

claim allowed or paid. This latter basis of liability is not insubstantial. It can be used to add individual defendants who are involved in submitting a claim, in addition to their contractor companies.

The Act covers false claims or statements made directly to the federal government on a federal public works project. It also covers other projects, whether administered by a private entity or state or local government, which are using federal funding for a portion of the project.[12] Thus, state or local public works projects receiving partial federal funding from agencies such as the Department of Transportation or Department of Education can form the basis of federal and/or state False Claims actions.

*1. Scienter*

"Knowingly", under the Act, means made with actual knowledge that the claim is false, or with a deliberate or reckless disregard of the truth or falsity of the information.[13] Proof of defendant's specific intent to defraud is not required.[14]

*2. "Claims" Covered*

The statute broadly defines a covered "claim":

> …any request or demand, whether made under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipients of the United States….[15]

The most obvious examples of false claims covered by the Act are false invoices, progress payment applications, change order requests, and requests for equitable adjustment.[16]

A false-claims action may not be based upon a contract dispute involving professional judgment (i.e., engineering or construction management). *See U.S. ex rel. Alva Bettis v. Odebrecht Contractors of California*, 297 F. Supp. 2d 272 (2004) (no basis for imposing FCA liability based upon faulty or mistaken engineering judgments). In *Odebrecht*, a *qui tam* plaintiff

sued a contractor under the federal False Claim Act, alleging that the contractor's differing site condition claim violated the Act because the contractor intentionally underestimated the amount of unsuitable material it expected to encounter at bid time and overestimated the actual amount encountered in submitting its claim. In response, the court noted, "the debate over [the contractor's] entitlement to additional money for differing site conditions is nothing more than a contract dispute between the parties..." which is not actionable within the meaning of the FCA.[17]

Similarly, disputes over statutory interpretation cannot form the basis of a false claim action. In *U.S. ex. rel. Siewick v. Jamieson Science and Engineering, Inc*., the court further explained why simple contract disputes do not rise to the level of an FCA violation:

> Disputes arise between the government and its contractors every day. Contractors do not win every penny they claim. On Siewick's theory, any contracting party that misunderstands its legal entitlements and therefore fails to recover on an invoice in full would be liable under the False Claims Act—except in instances where it was unaware of the facts that led to its failure to recover in full. This is not a prescription for fair or efficient contracting.[18]

At least one court has stated that a representation of legal opinion, as opposed to a statement of a fact, is not liable under the federal Act.[19]

Since the False Claims Act involves proof of a variant of fraud, claimants must plead the circumstances constituting the fraud with particularity pursuant to Federal Rule of Civil Procedure Rule 9(b).[20]

*3. False Records or Statements Supporting False Claims*

The second basis for liability under the Act—making a false record or statement to get a false claim paid—substantially expands the scope of conduct for which the contractor may be liable. For example, whereas a bid has been held by at least one court to be an offer, not a "claim" under the Act,[21] a false statement in a bid which results in the public agency awarding a

contract to a contractor could be determined to be a "false statement to get a false claim paid" and thus trigger liability.[22] Similarly, while a representation as to percentage of completion of work, alone, would not be a false claim, when it is submitted in support of a request for payment, such as a progress payment application, it may become a false statement in support of a claim for payment and trigger liability under the Act. Consequently, a contractor who "front-end loaded" its progress for payment applications has been held liable under the Act.[23]

*4. Materiality and Justifiable Reliance*

Although not expressly mentioned in the Act, most courts have held that the false claim or statement must be material. In other words, the False Claims Act plaintiff must prove that the false component or nature of the claim was material to the claimant's right of entitlement—that due to the false component or false nature of the claim, the government could and would reasonably refuse to pay the claim.[24] If the government paid the claim, it must also allege justifiable reliance and the specific damage caused by the submission of the claim.[25] If the government did not pay the claim, but the false claim or statement nevertheless was material in nature, then defendant still can be liable for civil penalties under the Act for each false claim or statement. As explained below, these penalties can add up to a substantial amount.

A corollary to the above elements of materiality and reasonable reliance is that in most circuits the Government's knowledge of the truth of the representation at the time it was made defeats the false claims action.[26] Stated in different terms, a claim cannot be false under the Act if the government knows and approves of the inaccurate particulars of the claim before that claim is presented to the government by the defendant contractor.[27]

There is some disagreement (and, perhaps, confusion) among the federal circuits as to whether the government must prove that the false claim or statement caused actual injury.[28]

However, it seems clear that a false claim action by the government may recover civil penalties as long as the false claim or statement was material in nature even if plaintiff government does not prove that it suffered damage as a result of the fraud.[29]

*5. Measure of Damage*

As a general rule, the measure of the government's damages would be the amount it paid out by reason of the false statements over and above what it would have paid if the claims had been truthful.[30] For example, if the false claim were an overcharge, the damage would be the amount the government would have paid had the claims been truthful. In cases in which the fraud consists of a defective product, the proper measure of damage generally is the cost to repair or replace the product.[31] However, as explained below, in the case of fraud in the inducement to contract, some courts have found that the recoverable damages equal the entire value of the contract. Most courts, however, will be reluctant to allow the government to recover the full amount of the contract where it has received something of value under the contract from defendant.

## III. Civil Remedies Under the False Claims Act

The federal False Claims Act provides for Civil and Criminal remedies for violations of the Act. Criminal remedies include imprisonment for up to five years, restitution of amounts lost, and a fine of up to $11,000 per false claim.[32]

Civil remedies available to the government for violations of the Act include treble damages and penalties of not less than $5,500 or more than $11,000 per false claim and false statement/record.[33] Courts have almost uniformly held that imposition of these penalties is mandatory under the Act.[34] The remedies available under the Act are cumulative. Thus, the contractor may be, and often is, held liable for both damages and penalties. As demonstrated in

the *MTA v. Tutor-Saliba-Perini* case, the exposure to penalties, alone, can run into the millions of dollars due to the stacking of false statement penalties.

Incidental injury to a contractor from an adverse False Claims judgment can be even worse than the substantial monetary punishment. For example, violators of the False Claims Act often will be subject to debarment or other disqualification from bidding public works projects by federal and/or state and local governments. This can have a devastating effect on contractors who are dependent on public works programs for their financial viability.

## IV. Current Issues Involving False Claims Actions

### *A. False Statements Inducing a Contract*

False statements by a contractor which are material to the government's decision to enter into a contract with the contractor violate the Act and may expose the contractor to substantial damages. Much of the information completed by the contractor in its bid submission arguably is material to the government agency's decision to award the prime construction contract. Classic examples of false statements in bid submittals are statements of qualifications, licenses and other experience requirements of the bid documents. However, other bidding and contracting requirements that can be problematic are MBE/WBE subcontractor listings, and insurance and bonding coverage. Thus, failure to meet contract insurance and bonding coverage requirements such as adding the owner and its consultants as additional insureds or obtaining a payment bond in the proper amount from a surety properly admitted in your state may form the basis for a False Claims Act complaint.

The consequences of committing fraud inducing a government entity to enter into a contract can be particularly harsh under the Act. Several courts have held that a contractor's false statement inducing the government to enter a contract can, in appropriate circumstances,

expose the contractor to liability for the entire value of the contract. These courts reason that each claim for payment following fraud inducing a contract would not have been paid absent the initial fraud and, thus, each request for payment constitutes a false claim.[35] For example, in *Island Park*,[36] village officials notified specially selected homeowners how to apply for subsidized HUD homes so that their applications would be received before any applications that might have been received by black homeowners.[37] The court determined that "the number of assertable False Claims Act claims is measured by the number of fraudulent acts committed by the defendant," and that "a separate claim for liability under the False Claims Act exists with respect to each monthly mortgage subsidy claim submitted."[38] As such, the defendants were found liable for *each* mortgage subsidy claim that the mortgagees submitted as a result of the village's conduct.[39]

Despite these cases, it appears likely that most courts would credit the contractor for the value of its performance under the contract created for the owner and, thus, limit a contractor's liability for damages to the government's extra costs to satisfactorily complete the project. However, even these courts may impose monetary penalties against the contractor for each false claim and statement made to the owner. If every progress payment application following fraud in the inducement is viewed as a false claim, the resulting penalty exposure can be substantial.

*B. Implied False Certifications*

There is a split of authority as to whether a claim submitted for payment is a false claim when the claim, itself, is not facially false, but the work for which payment is sought violates a contract obligation, federal statute or regulation. Courts finding that such claims violate the Act reason that such claims "impliedly certify" compliance with all material contract terms or statute/regulations even though they may not expressly certify them.

Given the morass of express contractual and code requirements involved in construction contracts, implied false certifications raise tremendous potential exposure for contractors under the False Claims Act. Every progress payment application involving work that does not meet a specification or applicable building code requirement is transformed into a potential false claim.

Cases holding that a violation of a contract obligation, statute or regulation can serve as the basis for liability under the Act even in the absence of a facially false claim are based on the expansive view that the False Claims Act was intended to cover both false claims and situations where a claimant engages in conduct contrary to their agreement with the purpose of inducing payment by the government.[40]

A number of courts that recognize this "implied certification" basis of liability under the Act nevertheless limit its application in the case of violations of statute or regulation to situations in which the government's payment is expressly conditioned (e.g., in the contract) upon certification of compliance with the second statute or regulation.[41]

Cases rejecting implied certification as a basis for liability under the Act reason that to hold otherwise would potentially permit liability for every document or request for payment submitted to the government, regardless of whether the submitting party was aware of its noncompliance.[42]

*C. Minority Business Enterprise Subcontractor Issues*

False Claims actions alleging contractor fraud concerning compliance with MBE/WBE bidding requirements has been a growing basis for government complaints against both prime and subcontractors. Typically, these claims allege that one or more MBE subcontractors listed in a prime contractor's bid to meet minimum minority subcontracting requirements were, in fact, not true minority firms, but "fronts" secretly owned and operated by white males in order to

subvert the local minority hiring regulations. The local government agency often sues both the alleged MBE "front" subcontractor and the prime contractor who included the subcontractor in its bid, as defendants to the false claims action.

The MBE/WBE False Claims cases raise a number of controversial legal issues, several of which are currently pending resolution in the California courts. First, to the extent the local MBE/WBE regulation is unconstitutional (California, for example, passed a state constitutional amendment in 1997 which prohibits such affirmative action regulations), can the government sustain its burden of proof that the alleged misrepresentation was material if it concerned the contractor's compliance with an unconstitutional regulation or ordinance?

Public entities contend that two doctrines preclude contractors from arguing the unconstitutionality of a statute as a defense to a false claims action. First, they argue the doctrine of Constitutional Estoppel, often citing *Fahey v. Mallonee* (1947) 332 U.S. 245. However, the Supreme Court's later opinion in *Kadrmas v. Dickinson Public Schools* (1988) 487 U.S. 450, 456 discusses serious limitations to the applicability of the Constitutional Estoppel Doctrine in *Fahey*. As Justice Sandra Day O'Connor explained in *Kadrmas*:

> *Fahey* was a shareholders' derivative suit in which a savings and loan association created under an Act of Congress sought to challenge the constitutionality of that same Act. This Court refused to consider the challenge, saying: 'It would be difficult to imagine a more appropriate situation in which to apply the doctrine that one who utilizes an Act *to gain advantages of corporate* existence is estopped from questioning the validity of its vital conditions.'[43]

Thus, the doctrine of constitutional estoppel is limited to where the party challenging a statute has benefited in its very corporate existence by virtue of the statute. Since most contractors do not owe their very corporate existence to a MBE/WBE Ordinance, the Doctrine of Constitutional Estoppel is inapplicable to this situation.

Second, some public entities have argued that the United States Supreme Court's holding in *Dennis v. United States*, 384 U.S. 855 (1966) precludes a contractor from defending itself against claims of its fraud by attacking the very statute it fraudulently sought to exploit. The petitioners in *Dennis* had been indicted for criminally conspiring to obtain NLRB services for their union by filing false "non-Communist" affidavits. They sought to set aside their criminal convictions on the grounds that the law prohibiting Communist Party membership was unconstitutional. The Supreme Court refused to hear the challenge because petitioners had been charged with "an effort to circumvent the law and not to challenge it."[44]

However, the Ninth Circuit in *Goland v. United States* (9th Cir. 1990) 903 F.2d 1247 held that the rule set forth in *Dennis* is confined to criminal cases and does not apply in civil actions.[45] *Goland* further called into question whether the *Dennis* doctrine even remains good law.[46]

Contractors further argue that the *Dennis* rule is inapplicable where the invalidity of the underlying law defeats an element of the charged offense.[47] *Justifiable* reliance is an element of fraud, e.g., *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal. App. 3d 1240, 1264 ("An indispensable element of fraud is a right to rely on the misrepresentation alleged.") (emphasis added). Thus, Contractors argue that the public entity cannot meet its burden to prove it had the legal right to rely on representations relating to compliance with a void Ordinance.[48]

Contractors also maintain that, under established case law, unconstitutional statutes must be treated as though they never existed and, thus, how can one be sued for falsely representing its compliance with a regulation or statutory requirement that legally could never have been imposed?[49] Logic would appear to dictate that the government cannot prove that the false claim

or statement was material, or that it reasonably relied on same, when the misrepresentation itself concerned compliance with a requirement that was unconstitutional.

The MBE/WBE cases also raise questions about the scientor requirement under the False Claims Act. As explained further below, several federal cases indicate that a prime contractor is not obligated to independently evaluate a subcontractor's claim before passing it through, but must have a good faith belief in the truth of the claim. Presumably, a prime contractor has some duty to obtain information about a subcontractor prior to including it in its bid. The extent of that duty remains to be defined by the courts. The extent of the contractors' duty in the case of MBE/WBE's is further complicated by the fact that these minority action programs often require that contractors select the MBE/WBE contractors from a list pre-approved ("certified") by the public agency. If the public agency investigated and certified the subject MBE/WBE subcontractor, how can the prime contractor be found to have been in reckless disregard of the fact that the subcontractor was in fact a "front"? Again, many of these issues are pending decision by courts in California.

*D. The Prime Contractor's Subcontractor Pass-Through Dilemma*

Subcontractors on construction projects generally are required to submit their contract claims to the prime contractor which then, in turn, submits ("passes-through") to the project owner the portions of the claims for which the owner may be responsible. This standard construction contract protocol creates several issues concerning the False Claims Act. First, it is clear under the Act that the subcontractor may be liable to the government for a false claim or statement under the Act even though the subcontractor did not submit its claim directly to the government.[50]

However, the prime contractor's potential liability for submitting the subcontractor's false claim and/or statement is a bit less defined under the Act. Is the prime contractor obligated to independently investigate and/or evaluate the claim? At least one court has held that a prime contractor's good faith belief that the subcontractor's claim was truthful is sufficient to protect the prime contractor from liability under the Act.[51] The author is aware of no decision requiring a prime contractor to independently investigate each of its subcontractor's pass-through claims for its truthfulness. However, if the prime contractor has reason to believe that a portion of its subcontractor's claim is not truthful, it should investigate this and, if it finds it to be false, refuse to pass-through that portion of the claim.

*E. "Counting" the Penalties (the Excessive Fines Issue)*

The False Claims Act contemplates that multiple monetary penalties may be awarded in a single case. Where multiple false claims for payment are submitted to the government at one time, the courts generally have interpreted the Act to require one penalty per false claim. However, a significant issue exists as to how many penalties may be awarded, or "stacked," related to a single false claim where numerous false statements support it. In other words, a single false statement submitted in support of a false claim may be repeated in various letters and invoices 20 times on a project. Does this entitle the government to recover 21 penalties related to a single false claim (and one repeated false statement)?

The Sixth Circuit recently answered this question, holding that when one false claim is repeated in multiple cost reports the defendant can be penalized for each cost report.[52] In the case before it, the Sixth Circuit upheld a civil penalty of $100,000 where each of 20 cost reports submitted by the defendants included a false implied certification that the defendants would

comply with Medicare regulations.[53] As such, the defendant was penalized $5,000 for each of its 20 false cost reports.

On the other hand, the Court of Claims has held, at least under the circumstances of the case before it, that false records "do not equate to separate penalties when the records and the claim support the same false demand for money."[54] There, even though the contractor provided the government with multiple government delivery forms for each defective howitzer delivered, the court held that the number of penalties would likely be one for each howitzer with a government form that was submitted after the contractor became aware that its subcontractor was not performing its required inspections.[55] This approach was used rather than penalizing the contractor for each and every delivery form that it provided the government, which would have been multiple times the number of howitzers actually delivered. Furthermore, even though the contractor had submitted false records in support of its false claims, the court did not find that these records warranted separate penalties because they supported the same false claim as the delivery forms.[56] A similar approach hesitating to assess multiple penalties for false statements in support of false claims has been taken by a number of other courts.[57]

Court decisions assessing multiple monetary penalties against a defendant for false statements relating to a single false claim may be subject to Constitutional challenge under the Excessive Fines Clause of the Eighth Amendment to the United States Constitution. The Eighth Amendment provides that "[no] excessive fines [shall] be imposed...."

In 2001, the Ninth Circuit ruled that civil sanctions and treble damages awarded under the False Claims Act are subject to the Eighth Amendment's requirements because they are punitive in nature.[58] "A fine is unconstitutionally excessive if (1) the payment to the government constitutes punishment for an offense, and (2) the payment is grossly disproportionate to the

gravity of the defendant's offense."[59] In *United States ex rel. Smith v. Gilbert Realty Co.*, 840 F.Supp. 71 (E. D. Mich. 1993), a civil penalty of $290,000 was imposed where the False Claims Act violations resulted in actual damages of $1,630. The court held the civil penalty to be constitutionally excessive, however, and reduced it to $35,000.

## V. Strategies For Limiting False Claims Exposure:

### *A. Suggested Contract Landuage*

It is often impossible for a contractor to modify the prime contract terms during negotiations with a public entity. However, a prime contractor can often insert language into its progress payment applications, change order requests and claims that can help limit its exposure under the False Claims Act. For example, the contractor should attempt to add language to its payment applications that its representations as to the progress of its work are estimates and opinions made to the best of its ability, that owner's representative will make its own independent assessment of the progress without regard for contractor's progress estimate, and that contractor thus cannot guarantee the accuracy of its estimate.

Contractor on public works projects also should attempt to add language to their payment applications, change order requests and claims that contractor makes no representations other than those expressly stated in the document and therefore does not impliedly represent or certify compliance with other contract terms, regulations or statutes in addition to those expressly mentioned in the payment application, change order request, etc.

Prime contractors should modify their subcontracts and material supplier contracts in several respects to protect themselves from subcontractor/supplier pass-through false claims exposure. First, subcontracts should contain an express warranty by the subcontractor that, if it claims status as a DBE/MBE/WBE, it shall take all steps and provide all documentation

necessary to assure that subcontractor is in compliance with the owner's DBE/MBE/WBE requirements. Subcontractor also must be responsible to see that all of its subcontractors or material suppliers who are listed as a DBE/MBE/WBE meet all such requirements.

Subcontracts should also include in their indemnity provisions a clause indemnifying the prime contractor against any False Claims Act liability caused by its subcontractors. The subcontract's indemnity clause might include a clause similar to the following to effectuate this:

> Subcontractor shall defend, indemnify and hold harmless Contractor, its officers, partners and representatives, from and against any fines, penalties, assessments or damages imposed or incurred on account of the violation of any law, rule, order, regulation, ordinance or statute caused by, or contributed to, arising out of, or in any way connected with the action, inaction, statements and/or claims of Subcontractor and/or any lower tier subcontractor or supplier.

Although many states preclude indemnification against one's own intentional fraud, indemnity clauses such as the above may protect the contractor from unintentional "reckless disregard" liability under the False Claims Act.

Subcontracts also should include a clause whereby the subcontractor warrants that subcontractor shall, prior to submittal to prime contractor, thoroughly analyze all payment applications, change order requests, claims and statements in support thereof and by its submission of same certifies that all information therein is true and accurate.

Prime contractors also should include in their subcontracts language by which it reserves its right to review, obtain copies of, and audit any and all of subcontractor's financial information and documents concerning the project and any associated jobsite or home office overhead expenses.

*B. Internal Performance Claim Controls and Audits*

Contractors performing public works projects should establish internal procedures to review every request for payment and to audit large payment requests and claims prior to submittal. Such reviews and audits can be asserted in defense of allegations that the contractor submitted the false claim in "reckless disregard" of the truth. Contractors also should have cost tracking mechanisms in place to allow them to accurately track their actual costs of discrete tasks, including extra work tasks, so they can prove their actual costs caused by specific impacts.

*C. Use of Mediation, Settlement and Litigation Privileges During Claim Negotiation*

*U*se of the mediation, settlement and/or litigation privilege to avoid False Claims Act liability is extremely limited. Since nearly all construction contracts contain strict time deadlines for submitting change order requests or other claims for additional compensation, such requests virtually always are required to be submitted before a mediation can be arranged which would trigger protection of the submission under the mediation privilege. However, if an early mediation can be arranged, the broad coverage of a standard mediation privilege (preventing from discovery, disclosure or admission into evidence any written document or oral communication made for the purpose of the mediation) may be used to limit false claims exposure by providing a forum for exchanging documents and negotiating claims under the cloak of privilege protection from a later false claims action.[60]

The settlement privilege is much narrower and will not protect against false claims actions. The standard settlement privilege only makes the settlement communication inadmissible to prove a party's liability as to the underlying dispute. It is admissible if used for another purpose—i.e., proving that the communication, itself, constitutes a tort or actionable false claim.[61]

Likewise, a defendant cannot immunize itself from false claims exposure simply by arguing that its claim or supporting statement was made in anticipation of a legal action and, therefore, covered by the litigation privilege.[62] Some states, such as California, have gone so far as to specifically make the settlement privilege inapplicable to claims under the state's "Baby" False Claims Act.[63]

*D. Legislative changes*

Efforts are underway on behalf of contractors in California to modify the "Baby" False Claims Act to limit potential exploitation of the Act. For example, contractors are proposing legislation that would require a special early evidentiary hearing by the court to determine whether a false claims action has sufficient merit to allow it to proceed to trial. In particular, contractors are concerned about public agency misuse of the Act as a litigation strategy to deter legitimate contractor claims, rather than its intended use to discourage false claims.

California's statute allows defendants prevailing under a false claims action to recover their attorneys' fees but only if the court finds the claim to be "clearly frivolous...or brought solely for the purposes of harassment."[64] Contractors are likely to push for a more reciprocal "prevailing parties" attorneys' fees recovery clause in the statutes to level the false claims playing field and discourage unsupported false claims actions by public agencies. It is also likely that we will see further judicial, and perhaps legislative, efforts to clarify and limit the multiplier effect of penalties for statements in support of false claims.

[1] A congressional committee formed to investigate war fraud found "'an astounding amount of fraudulent activities…' For sugar it [government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories." Fred Albert Shannon, *The Organization and Administration of the Union Army*, 1861-65, pp. 55-56, 58 (P. Smith 1965) (quoting R. Tomes, *Fortunes of War*, 29 Harper's Monthly, 228 (July 1864).

[2] Amendments to the Act in 1943, and subsequent court decisions giving a restrictive interpretation of the amended Act, together with increases in the magnitude of fraud against the Government, caused considerable pressure on Congress in the 1980's to take action. A three volume report by the General Accounting Office in 1981 concluded that there was extensive fraud being practiced against the Government due to the expanded number and variety of Federal programs. General Accounting Office, *A Fraud in Government Programs: How Extensive Is It? How Can it Be Controlled*, pp. 1-15 (1981).

[3] John T. Boese, *Civil False Claims and Qui Tam Actions*, p. 1-4 2003-1 Supp. (Aspen Law & Business 2003).

[4] U.S. Senate., 103 Congress, First Session S. 841, *The False Claims Amendments Act of 1993: Hearing Before the Subcommittee on Courts and Administrative Practice of the Committee on the Judiciary*, September 9, 1993 (*U.S. G.P.O. 1994*).

[5] States with False Claims Acts include: California (Cal. Gov't Code §§ 12650-12655 (2004)); Delaware (6 Del. Code Ann. §§ 1201 et seq. (2004)); District of Columbia (D.C. Code Ann. §§ 2-308.14 et seq.(2004)); Florida (Fla. Stat. Ann. §§ 68.081-68.09 (2004); Hawaii (Hi. Rev. Stat. Ann. §§ 46-171 et seq. and Hi. Rev. Stat. §§ 661-21 et seq. ); Illinois (740 Ill. Comp. Stat. Ann. §§ 175/1 et seq.); Massachusetts (Mass. Gen. Laws. Ann. Ch. 12, §§ 5 et seq.(2004)); Montana (Mont. Code Ann. §§ 17-8-231, 45-7-210); Nevada (Nev. Rev. Stat. §§ 357.010, et seq. (2004)); Oklahoma (Okla. Stat. tit. 21, § 358); Tennessee (Tenn. Code Ann. §§ 4-18-101 et seq. (2004)); and Virginia (Va. Code Ann. §§ 8.01-216.1 et seq. (2004)).

In addition, the following states have false claims laws limited to health care contracts: Arkansas (Ark. Code. Ann. § 20-77-911), Louisiana (La. Rev. State. Ann. §§ 46:437.2A-440.3), Michigan (Mich. Comp. Laws Ann. § 400.601), New Mexico (N.M. Stat. Ann. §§ 27-14-1 to 27-14-15), North Carolina (N.C. Gen. Stat. §§ 108A-70.10 to 108-70.16), Texas (Tex. Hum. Res. Code Ann. §§ 36.0001-36.117), Utah (Utah Code Ann. §§ 26-20-1 to 26-20-13), and Washington (Wash. Rev. Code §§ 48.80.010 (2000)). See Aaron P. Silberman, *False Claims Laws: What Every Public Contract Manager Needs to Know*, Presented to the National Contract Management Association (NCMA) World Congress in Orlando, Florida on April 27, 2004, available at http://www.rjop.com/aps-falseclaimacts.pdf.

[6] The states where legislation has been introduced to adopt false claims statutes, or to amend existing false claims statutes are: Alabama (S.B. 24, 2001 Reg. Sess.), Alaska (S.B. 117 and H.B. 145, 22d Legis., 1st Sess.), Colorado (H.B. 1094, 62d Gen. Assem., 2d Reg. Sess., 2000), Connecticut (H.B. 5758, 2002 Reg. Sess.), Kansas (S.B. 535, 79th Legis., 2002 Reg.

Sess., 2001), Maryland (S.B. 317, 416th Gen. Assem., 2002 Reg. Sess.), Mississippi (H.B. 44 and 45, 2002 Reg. Sess.), Missouri (S.B. 732, 90th Gen. Assem., 2d Reg. Sess., 2000), Montana (Mt. D. 1089, 58th Reg. Sess., 2002), New Jersey (A.B. 2102, 211th Legis., 2004), New York (A.B. 6266 and 9150, S.B. 1605 and 5217), Oklahoma (H.B. 2237 and S.B. 1437, 48th Legis., 2d Sess., 2001), Pennsylvania (H.B. 1285, 185th Gen. Assem., 2001-02 Reg. Sess., 2001), Texas (H.B. 400, 78th Legis., Reg. Sess., 2003), and Washington (S.B. 5435, 57th Legis., 1st Reg. Sess., 2001). See Aaron P. Silberman, *False Claims Laws: What Every Public Contract Manager Needs to Know*, Presented to the National Contract Management Association (NCMA) World Congress in Orlando, Florida on April 27, 2004, *available at* http://www.rjop.com/aps-falseclaimacts.pdf.

[7] Cal. Gov't Code § 12650 et seq.

[8] The work for the MTA was performed by a partnership of Tutor-Saliba Corp. and Perini Corp. (Patrick Hoge, *Contractor Loses Big Suit in L.A.*, S.F. Chron., August 3, 2001); *see also* Paul Rosta, *Judge's Ruling Hits Tutor-Saliba*, Engineering News-Record, July 16, 2001 at 12.

[9] Matea Gold, *MTA Suit Goes to Jury for Damages*, L.A. Times, July 20, 2001.

[10] Carolyn Said, *Construction Giant Files Bankruptcy, Plans to Move*, S.F. Chron., February 6, 2003; Dean Calbreath, *Construction Firm Involved in Ballpark Files for Bankruptcy*, S.D. Union-Tribune, January 31, 2003; Jeffrey L. Rabin, *Firm Accepts 20-year Ban on County Work*, L.A. Times, April 19, 2000.Carolyn Said, Construction giant files bankruptcy, plans to move, San Francisco Chronicle, February 6, 2003.

[11] 31 U.S.C. §§ 3729-3733.

[12] U.S.C. § Section 3729(c) (fraud perpetrated on federal "contractors, grantees, or other recipients" of federal funds falls within scope of the Act).

[13] 31 U.S.C. § 3729(b).

[14] *Id.*

[15] 31 U.S.C. § 3729(c).

[16] A contract claim, such as a request for equitable adjustment, has been held by a California court not to be protected by the litigation privilege. *Stacy and Witbeck, Inc. v. City & County of San Francisco*, 54 Cal. Rptr. 2d 530 (1996).

[17] *Id*. at 295. The *Odebrecht* court noted that complaints over contract interpretation and "twisted factual presumptions" generally are not actionable under the False Claims Act.

[18] *U.S. ex. rel. Siewick*, 214 F.3d 1372, 1378 (D.C. Cir. 2000), affirmed by *U.S. ex rel. Siewick v. Jamieson Science and Engineering, Inc.*, 322 F.3d 738 (D.C. Cir. 2003).

[19] *Tyger Constr. Co. v. United States*, 28 Fed. Cl. 35, 56 (1993).

[20] See, e.g., *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 228 (1st Cir. 2004); *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 389 F.3d 1251, 1256 (D.C. Cir. 2004); *United States ex rel. Bledsoe v. Cmty. Health Sys.*, 342 F.3d 634, 642 (6th Cir. 2003); *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1308-09 (11th Cir. 2002); *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir. 2001); *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 783-84 (4th Cir. 1999); *United States ex rel. LaCorte v. SmithKline Beecham Clinical Labs., Inc.*, 149 F.3d 227, 234 (3d Cir. 1998); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 903 (5th Cir. 1997); *Gold v. Morrison-Knudsen Co.*, 68 F.3d 1475, 1476-77 (2d Cir. 1995).

[21] *United States v. Farina*, 153 F.Supp. 819, 821 (D.N.J. 1957); *see also United States ex rel. Pentagen Technologies Int'l Ltd. v. CACI Int'l Inc.*, No. 96 Civ. 7827, 1997 WL 473549 (S.D.N.Y. Aug. 18, 1997) (finding no FCA claim where plaintiff failed to show government loss caused by defendant's allegedly fraudulent conduct in unsuccessful contract bidding).

[22] *See, e.g., United States* ex. rel. *Alexander v. Dyncorp, Inc.*, 924 F.Supp. 292, 298 (D.D.C. 1996); *Mayman v. Martin Marietta Corp.*, 894 F.Supp. 218, 221-223 (D.Md. 1995); *United States ex rel. Bettis v. Odebrecht Contrs. of California, Inc.*, 297 F.Supp.2d 272, 283 (D.D.C. 2004) ("a fraudulently induced contract by means of a low bid is not enough; there must also be an intent to recover additional monies above the contract price, as well as the submission of claims for monies to which the contractor is not otherwise entitled."); Anna Mae Walsh Burke, *Qui Tam: Blowing the Whistle for Uncle Sam*, 21 Nova L. Rev. 869, 899 (Spring, 1997) (a bid becomes a violation if the bidder wins the bid and tenders a bill or false claim to the government for the work).

[23] *See Young-Montenay, Inc. v. United States*, 15 F.3d 1040 (Fed. Cir. 1999).

[24] *City of Pomona v. Superior Court*, 89 Cal.App.4th 793, 802 (construing California False Claims Act with nearly identical language to federal Act); see also *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776 (4th Cir. 1999) (the test for False Claims Act liability requires that the false statement be material); *United States ex rel. Berge v. Bd. Of Trustees of Ala.*, 104 F.3d 1453, 1459 (4th Cir. 1997), cert. den., 522 U.S. 916 (1997) (materiality depends on "whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action."); *Tyger Construction Co. v. United States*, 28 Fed. Cl. 35, 60 (Fed. Cl. 1993) ("The FCA covers only those false statements that are material."); *United States v. Southland Management Corp.*, 95 F.Supp.2d 629, 639-640(S.D. Miss. 2000) (statements made were not material because HUD made payments regardless of the apartments' condition); but see *United States ex rel. Roby v. Boeing Co.*, 184 F.R.D. 107, 112 (D. Ohio 1998).

[25] *United States v. Miller*, 645 F.2d 473 (8th Cir. 1981); see also *United States ex rel. Berge v. Bd. Of trustees of Univ. of Alabama*, 104 F.3d 1453 (4th Cir. 1997); *United States v. Hill*, 676 F.Supp. 1158, 1177 (N.D. Fla. 1987); *City of Pomona v. Superior Court*, 89 Cal.App.4th 793, 802 (2001); *but see United States v. Bd of Education of Union City*, 697 F.Supp. 167, 179 (D.N.J. 1988).

[26] U*nited States ex rel. Becker v. Westinghouse Savannah River Co*., 305 F.3d 284, 289 (4th Cir. 2002) (the government's knowledge of the facts underlying an allegedly false record or statement can negate the scienter required for an FCA violation); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp*., 985 F.2d 1148, 1156 (2d Cir. 1993) (plaintiff has no claim under the FCA if government knew of the facts or characteristics which made defendant's claim false); *Wang ex rel. United States v. FMC Corp*., 975 F.2d 1412, 1421 (9th Cir. 1992) (government had extensive knowledge of all the engineering deficiencies identified by the *qui tam* relator, and the defendant had an ongoing dialogue with the government about the problems); *Boisjoly v. Morton Thiokol, Inc*., 706 F. Supp. 795 (D. Utah 1988) (dismissing FCA count where the government was aware of the facts that allegedly made the claims false); but see *Shaw v. AAA Eng'g & Drafting, In*c., 213 F.3d 519, 535 (10th Cir. 2000) (where there was conflicting evidence over government's knowledge of the truth, government's FCA claim is not necessarily defeated); *United States v. The Incorporated Village of Island Park*, 888 F.Supp. 419, 442 (E.D.N.Y. 1995) (government knowledge of falsity of the claim is not a defense where government continued to pay claims because it had already become contractually bound to make those payments as a result of the defendant's fraudulent course of conduct); *Tyger Construction Co. v. United States*, 28 Fed. Cl. 35, 60 (Fed. Cl. 1993) (court rejected plaintiff's argument that FDA's counterclaim must be dismissed based on government's knowledge of the facts which rendered plaintiff's claims false).

[27] See *United States ex rel. Costner v. United States*, 317 F.3d 883, 887 (8th Cir. 2003) ("defendants' openness with the EPA about their problems and their close working relationship in solving the problems negated the required scienter regarding these issues"); *American Contract Services v. Allied Mold & Die, Inc*., 94 Cal.App.4th 854, 864 (2001) ("If the government knows and approves of a claim for payment before the claim is presented ... the government's knowledge effectively negates the fraud or falsity required by the FCA."), quoting *United States ex rel. Durcholz v. FKW, Inc.* 189 F.3d 542, 544-45 (7th Cir. 1999).

[28] *See, e.g., United States ex rel. Joslin v. Community Homes Health of Md., Inc.* 984 F.Supp. 374, 383 (D.Md. 1997) (no actual loss to the government is required for a False Claims Act claim); *United States ex rel. Pogue v. American Healthcorp*, 914 F. Supp. 1507, 1509 (D. Tenn. 1996) (allegations of facts concerning actual damages need not be shown to recover under False Claims Act); *United States v. Kensington Hosp*., 760 F. Supp. 1120, 1127 (D. Pa. 1991) (the "government need not show actual damage in order to prove a violation of the False Claims Act"); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (affirming opinion of a trial court which had held in part that a forfeiture could be recovered under the False Claims Act even where the Government had discovered the fraud before it paid the false claim); *see also Rex Trailer Co., Inc. v. United States*, 350 U.S. 148, 152-154 (1956) (relating to Surplus Property Act); but *see United States ex rel. Berge v. Bd. Of Trustees of Ala.*, 104 F.3d 1453, 1458 (4th Cir. 1997), cert. den., 522 U.S. 916 (1997) (in order to have standing, government, as real party in interest, must have suffered an injury in fact); *Young-Montenay, Inc. v. United States*, 15 F.3d 1040, 1043 (Fed. Cir. 1994).

[29] *See, e.g., United States v. Hughes*, 585 F.2d 284, 286 n1 (7th Cir. 1978); *Fleming v. United States*, 336 F.2d 475, 480 (10th Cir. 1964) (Government can recover civil penalties

without proof of damage, but can only obtain double (now treble) damages upon proof of damages); *United States v. Tieger*, 234 F.2d 589, 590 (3d Cir. 1956); *United States v. Rohleder*, 157 F.2d 126, 127 (3d Cir. 1946) (affirming lower court decision granting civil penalties even though government offered no proof of actual damages); *United States ex rel. Luther v. Consolidated Industries, Inc*., 720 F.Supp. 919, 922-923 (N.D. Ala. 1989) (civil penalty is available for knowing submission of a claim, but plaintiff must show actual damages to obtain treble damages); *United States v. Rapoport*, 514 F.Supp. 519, 523-524 (S.D.N.Y. 1981) (government can recover the statutory forfeiture without proving damages); *see also United States ex rel. Pogue v. American Healthcorp, Inc*. 914 F.Supp. 1507, 1513 (M.D. Tenn. 1996).

[30] *United States v. Woodbury*, 359 F.2d 370 (9th Cir. 1966); *see also BMY—Combat Systems Div. of Harsco Corp. v. United States*, 44 Fed. Cl. 141, 147 (1998).

[31] *United States ex rel. Roby v. Boeing Co.*, 79 F. Supp. 2d 877 (S.D. Ohio 1999); *Daff v. United States*, 78 F.3d 1566 (Fed. Cir. 1996).

[32] 18 U.S.C. § 287; 31 U.S.C. § 3729(a).

[33] The amounts stated in the False Claims Act, 31 U.S.C. section 3729, are $5,000 and $10,000; however, under the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134, § 31001, 110 Stat. 1321-373 (1996), federal agencies are required to review and adjust statutory civil penalties for inflation every four years. Consequently, the Department of Justice has adjusted penalties under the False Claims Act to range not less than $5,500 and not more than $11,000 per violation. 28 C.F.R. § 85.3(a)(9)(2000).

[34] *See, e.g., United States v. Halper*, 664 F. Supp 852 (S.D.N.Y. 1987), judgment vacated on other grounds, 490 U.S. 435 (1989)(2d Cir.); *United States v. Brown*, 274 F.2d 107 (4th Cir. 1960); *United States ex rel. Luther v. Consolidated Industries, Inc.*, 720 F. Supp. 919 (N.D. Ala 1989)(5th Cir.); *United States ex rel. Fahner v. Alaska*, 591 F.Supp. 794 (N.D., Ill. 1984)(6th Cir.); *United States v. Hughes*, 585 F.2d 284 (7th Cir. 1978); *United States v. Ehrlich*, 643 F.2d 634 (9th Cir. 1981); *United States v. Killough*, 848 F.2d 1523 (11th Cir. 1988); *Brown v. United States*, 207 Ct. Cl. 768 (1975). Possible limitation to such penalty stacking is discussed below in Section IV. E.

[35] *See Marcus v. Hess*, 317 U.S. 537 (1943) (False Claims Act liability for collusive bidding inducing contract exposes defendants to liability for entire value of contract); *see also Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 787 (4th Cir. 1999), *affirmed by* 352 F.3d 908 (4th Cir. 2003) (liability for *each claim submitted* to the government under a contract, when the contract or extension was obtained originally through false statements or fraudulent conduct); *Ab-Tech Construction v. United States*, 31 Fed. Cl. 429, 435 (Fed. Cl. 1994) (where contractor submitted 21 payment vouchers to the government, all under the same overall contract, each payment voucher considered to be a separate claim); *United States v. CFW Constr. Co*., 649 F. Supp. 616, 617 (D.S.C. 1986) (civil penalties should be assessed for each false claim submitted and in bid rigging cases the harm does not stop with the execution of the contract, but extends to each intermediate step along the path to payment by the government); *United States v. Ehrlich*,

643 F.2d 634, 638 (9th Cir. 1981) (where defendant obtained an insured and subsidized HUD mortgage, each monthly voucher submitted by defendant was considered a false claim); but see *United States v. Rohleder*, 157 F.2d 126, 127 (3d Cir. 1946) (defendant found liable for false statements relating to each of defendant's 16 subcontracts, but defendant was not liable for statutory forfeitures for each of the 90 purchase orders it submitted to the government).

[36] *United States v. The Incorporated Village of Island Park*, 888 F.Supp. 419 (E.D.N.Y. 1995).

[37] *United States v. The Incorporated Village of Island Park*, 888 F.Supp. 419, 434 (E.D.N.Y. 1995).

[38] *United States v. The Incorporated Village of Island Park*, 888 F.Supp. 419, 441 (E.D.N.Y. 1995).

[39] *Id.*

[40] *United States ex rel. Pogue v. American Healthcorp*, 914 F. Supp. 1507, 1509-1511 (D. Tenn. 1996); *See Shaw v. AAA Engineering & Drafting, Inc.*, 213 F.3d 519 (10th Cir. 2000) (by submitting monthly invoices for its services the defendant impliedly certified that it had complied with environmental provisions in its contract which gave rise to liability under the False Claims Act); *United States ex rel. Wright v. Cleo Wallace Ctrs.*, 132 F.Supp.2d 913 (D. Colo. 2000) (submission of claims for acquiring Medicaid funds while not in compliance with all relevant laws, rules and regulations may constitute a false claim under the FCA, even without an affirmative or express false statement of such compliance); *United States v. NHC Healthcare Corp.*, 115 F.Supp.2d 1149, 1155 (W.D. Mo. 2000) (a health care provider can be held to have impliedly certified that it will comply with the relevant standard of care as set forth in the regulations and statutes if that standard of care lies at the core of the parties' agreement); *United States ex rel. Kneepkins v. Gambro Healthcare, Inc.*, 115 F.Supp.2d 35, 43 (D. Mass. 2000) (omission of the existence of illegal kickback agreement sufficient to state claim for fraud under implied certification theory); *Ab-Tech Construction v. United States*, 31 Fed. Cl. 429, 434 (Fed. Cl. 1994) (progress payment vouchers represented implied certification of plaintiff's continuing adherence to the requirements in the government program and caused the government to pay out funds in the mistaken belief that it was furthering the aims of its program).

[41] *See United States ex rel. Augustine v. Century Health Svs., Inc.*, 289 F.3d 409, 415 (6th Cir. 2002); *United States ex rel. Willard v. Humana Health Plan of Texas Inc.*, 336 F.3d 375, 382 (5th Cir., 2003); *United States ex rel. Siewick v. Jamieson Science and Engineering, Inc.*, 214 F.3d 1372, 1376 (D.C. Cir. 2000); *United States ex rel. Plumbers & Steamfitters Local Union No. 38 v. C.W. Roen Constr. Co.*, 183 F.3d 1088 (9th Cir. 1999); *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997).

[42] *United States ex rel. Joslin v. Community Home Health of Maryland*, 984 F.Supp. 374 (D. Md. 1997); *see also United States ex rel. Mikes v. Straus*, 274 F.3d 687, 700 (2d Cir. 2001) (restricting application of false implied certification theory only to those limited cases in which the underlying statute or regulation "expressly states that the provider must comply in order to be

paid"); *compare Harrison v. Westinghouse Savannah River Co*., 176 F.3d 776, 787 n8 (4th Cir. 1999) (although not addressing the validity of the implied certification theory, the Court noted that an implied certification claim was questionable in the Fourth Circuit).

[43] *Kadrmas v. Dickinson Public Schools* (1988) 487 U.S. 450, 456, quoting *Fahey, supra*, 332 U.S. at 256 (emphasis by Justice O'Connor).

[44] *Dennis, supra,* 384 U.S. at 865-66); *see also United States v. Kapp,* 302 U.S. 214, 217-18 (1937).

[45] *Id.* at 1253 ("*Dennis* restricted the availability of certain defenses against criminal charges. The present case is civil.")

[46] *Goland, supra*, 903 F.2d at 1253-54.

[47] *See Bryson v. United States* (1969) 396 U.S. 64, 68-69.

[48] *See Kopp, supra,* 11 Cal.4th at 623.

[49] *See Norton v. Shelby County*, 118 U.S. 425, 442 (An invalidated statute "is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."), cited with approval by *Kopp v. Fair Political Practices Com.*, 11 Cal.4th 607, 623 (1995).

[50] *See, e.g., Tanner v. United States*, 483 U.S. 107 (1987); *United States v. Bornstein*, 423 U.S. 303, 309 (1976); *United States v. Ueber*, 299 F.2d 310, 313-14 (6th Cir. 1962); *Murray & Sorenson, Inc. v. United States*, 207 F.2d 119, 123 (1st Cir. 1953).

[51] *See, e.g., Turner Construction Co*., 84-1 B.C.A. (CCH) P16,996 (ASBCA 1983) (certification by a contractor of a subcontractor's claim must state that the claim is made in good faith, that the supporting data are accurate and complete to the best of the contractor's knowledge and belief, and that the amount requested accurately reflects the contractual adjustment for which the contractor believes the government is liable).

[52] *United States ex rel. Augustine v. Century Health Services, Inc.*, 289 F.3d 409, 416 (6th Cir. 2002); *see also United States ex rel. Augustine v. Century Health Services, Inc.*, 289 F.3d 409, 416 (6th Cir. 2002).

[53] *United States ex rel. Augustine v. Century Health Services, Inc.*, 289 F.3d 409, 416 (6th Cir. 2002).

[54] *BMY-Combat Systems Div. of Harsco Corp. v. United States*, 44 Fed. Cl. 141, 150 n.4 (1998).

[55] *BMY-Combat Systems Div. of Harsco Corp. v. United States*, 44 Fed. Cl. 141, 151 (1998).

[56] *BMY-Combat Systems Div. of Harsco Corp. v. United States*, 44 Fed. Cl. 141, 150 n.4 (1998).

[57] See *United States v. Cooperative Grain & Supply Co*., 476 F.2d 47 (8th Cir. 1973); *United States v. Woodbury*, 359 F.2d 370 (9th Cir. 1966) (false papers attached to a false claim for payment did not warrant separate penalty); *United States v. Grannis*, 172 F.2d 507 (4th Cir. 1949) (awarding penalty for each false invoice presented but not for false schedules attached to invoices); *United States v. Rohleder*, 157 F.2d 126, 131 (3d Cir. 1946) (awarding penalty for each of defendant's 16 subcontracts, even though 90 purchase orders with false representations were submitted to the government); *United States v. Hibbs*, 420 F. Supp. 1365 (E.D.Pa. 1976), judgment vacated on other grounds, 568 F.2d 347 (3d Cir. 1977) (awarding penalty for each false claim only, even though several false representations were submitted to induce payment).

[58] *United States v. Mackby*, 261 F.3d 821, 830-831, *superseding withdrawn opinion*, 243 F.3d 1 159 (9th Cir. 2001).

[59] *United States v. Mackby*, 261 F.3d 821, 829 (9th Cir., 2001) citing *United States v. Bajakajian*, 524 U.S. 321, 327-28, 334 (1998). In *United States ex rel.*

[60] *See, e.g.*, Cal. Evid. Code section 1119.

[61] *See, e.g*., Fletcher v. Western Nat'l Life Ins. Co. (1970) 10 Cal. App. 3d 376.

[62] *Stacy & Witbeck, Inc. v. City and County of San Francisco*, 47 Cal.App.4th 1, 7 (1996) (contractor's claim submitted to comply with administrative procedures was not privileged simply because the contractor also anticipated suing the agency for the sums detailed in the contract claim).

[63] Gov't Code § 12654(e) (making inapplicable the judicial proceeding privilege of Civil Code section 47(b) for claims under the FCA).

[64] Cal. Gov't Code section 12652(g)(9).