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**PROGRAM MATERIALS**  
**Program #30170**  
**June 22, 2020**

## **False Claims Act Litigation**

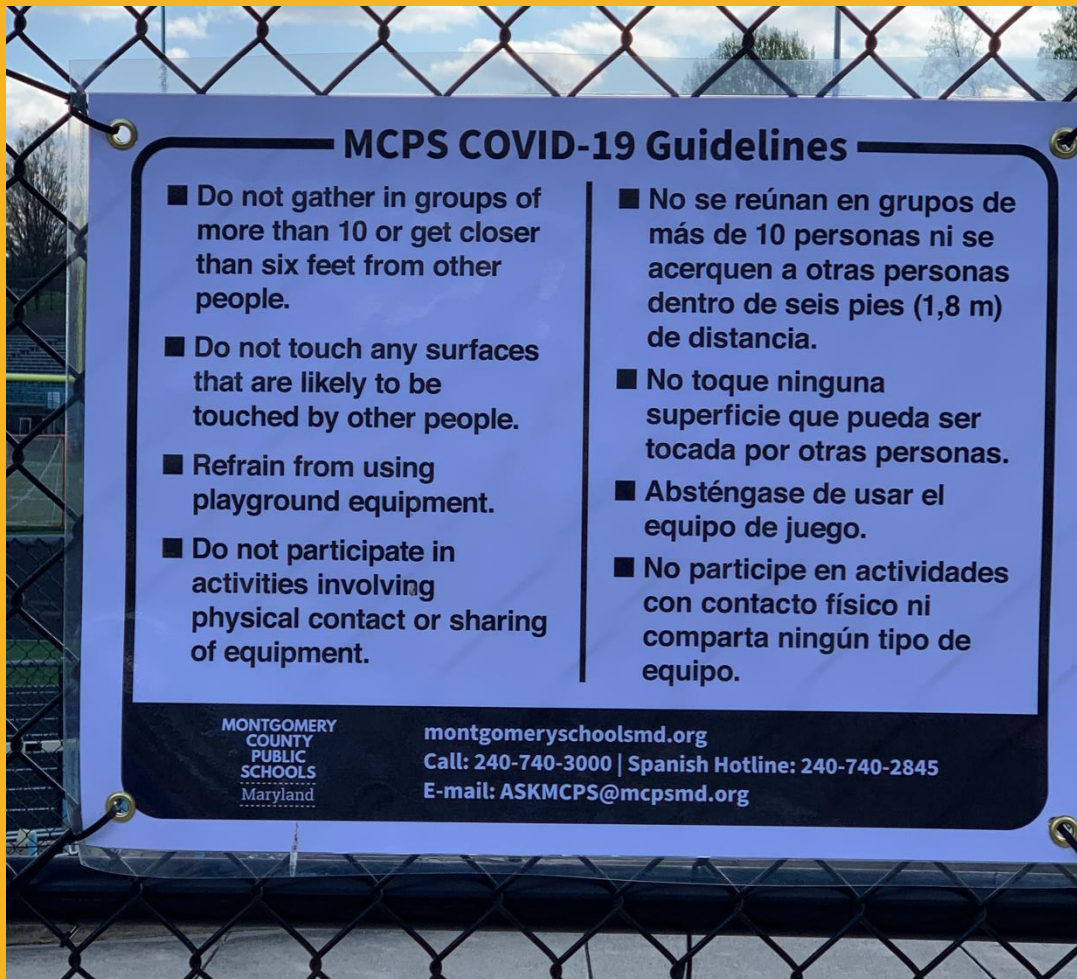
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# FALSE CLAIMS ACT IN THE COVID-19 ERA



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# TYPES OF CASES; SOME WILL COME UP IN THE COVID-19 ERA

## HEALTHCARE:

**Pharma:** Off label marketing

Kickbacks

Adulterated product

**Providers:** Kickbacks

Up-coding

Billing for medically unnecessary services

**Carriers/Medicare Part C Providers**

Up-coding and not returning monies

## EDUCATION:

Kickbacks for referral of students

Falsifying graduation and employment rates

## Defense:

Specification violations

Kickbacks

Over-billing

## SERVICE CONTRACTS:

Wage and hour violations

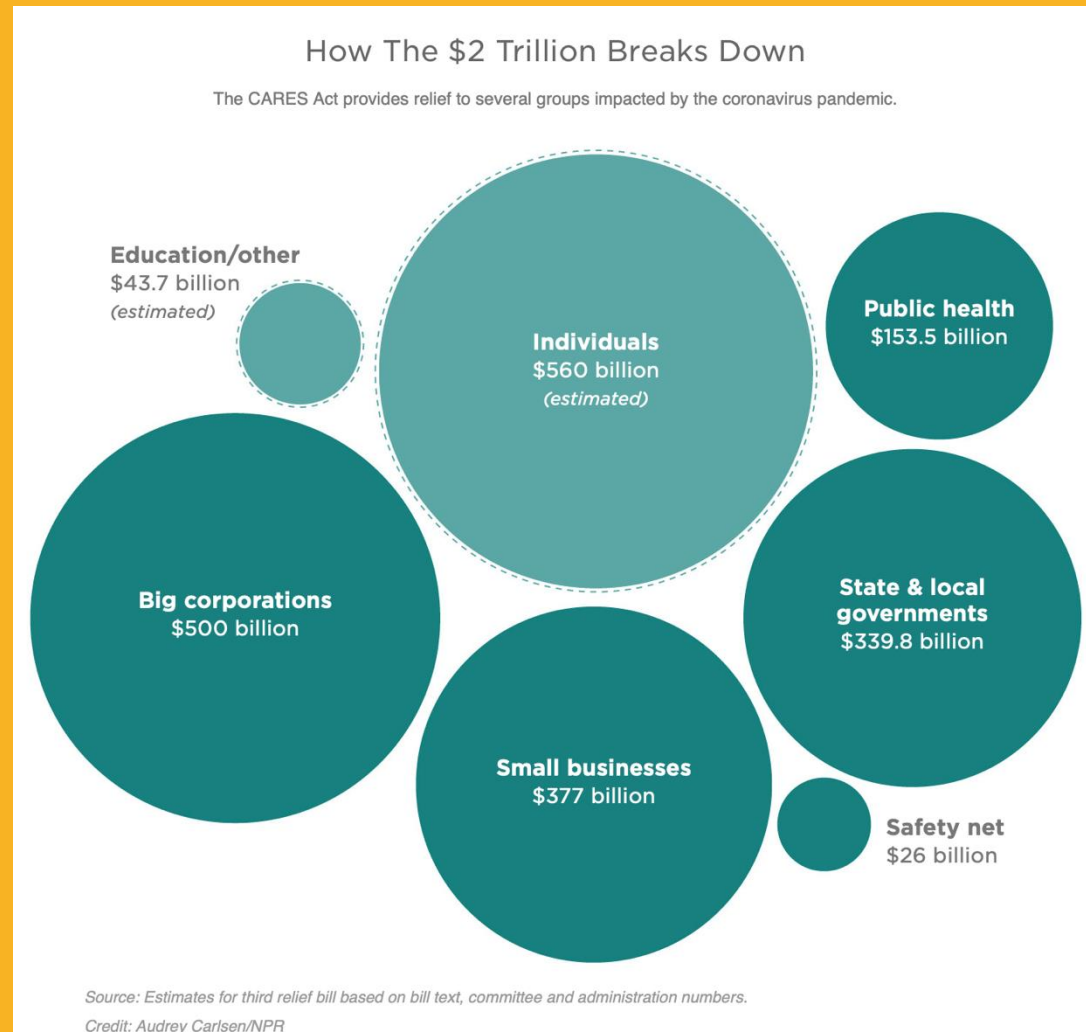
Billing for hours not worked

Best price requirements

## GENERAL:

- Billing for services not rendered
- Not meeting loan or grant requirements
- Defective products

# THIS IS HOW THE MONEY IS BEING SPENT



# THE STIMULUS PACKAGE IS LADEN WITH THIS TYPE OF LANGUAGE

IN THE SENATE OF THE UNITED STATES—116th Cong., 2d Sess.

H. R. 748

(e) FRAUD AND OVERPAYMENTS.—

(1) IN GENERAL.—If an individual knowingly has made, or caused to be made by another, a false statement or representation of a material fact, or knowingly has failed, or caused another to fail, to disclose a material fact, and as a result of such false statement or representation or of such nondisclosure such individual has received an amount of pandemic emergency unemployment compensation under this section to which such individual was not entitled...

# HOW A FALSE CLAIM CAN ARISE

From Treasury Department information sheet:

- The Paycheck Protection Program (“PPP”) authorizes up to \$349 billion in forgivable loans to small businesses to pay their employees during the COVID-19 crisis. ***All loan terms will be the same for everyone.***
  
- **What can I use these loans for?** You should use the proceeds from these loans on your:
  - Payroll costs, including benefits;
  - Interest on mortgage obligations, incurred before February 15, 2020;
  - Rent, under lease agreements in force before February 15, 2020; and
  - Utilities, for which service began before February 15, 2020.

# OVERVIEW OF THE FALSE CLAIMS ACT 31

## U.S.C. §§ 3729-3733 § 3729. FALSE CLAIMS

(a) Liability for certain acts.—

(1) In general.—Subject to paragraph (2), any person who—

- (A) knowingly **presents**, or **causes to be presented**, a **false or fraudulent claim** for payment or approval;
- (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
- (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
- (D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;
- (E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
- (F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or
- (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410 [FNI]), plus 3 times the amount of damages which the Government sustains because of the act of that person.

# KEY DEFINITIONS § 3729(B)(2) THE TERM “CLAIM”

- •(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—
- •(i) is presented to an officer, employee, or agent of the United States; or
- •(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest, and if the United States Government—
- •(I) provides or has provided any portion of the money or property requested or demanded; or
- •(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; .....
- •3729(B) (4) the term “material” means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property. (B)(4)



# KEY PROCEDURES § 3730. CIVIL ACTION FOR FALSE CLAIMS

- (a) Responsibilities of the Attorney General.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

- (b) Actions by private persons.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

- (2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. [FNI] The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

# STANDING

- 2730E(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which

are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

- (4)(A) The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the

same allegations or transactions as alleged in the action or claim were publicly disclosed—

- (i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party;

- (ii) in a congressional, Government [FN2] Accountability Office, or other Federal report, hearing, audit, or investigation; or

- (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original

source of the information.

- (B) For purposes of this paragraph, “original source” means an individual who either (i) prior to a public disclosure under subsection (e)(4)(a), has voluntarily disclosed to the government to the Government the information on which allegations or transactions in a claim are based, or (2) who has knowledge that is independent of and materially adds to the \_\_\_\_\_ [RG: The other powerpoint you sent cuts off here, how do you want to end it?]

# STATUTE OF LIMITATIONS

## § 3731. FALSE CLAIMS PROCEDURE

- (a) A subpoena requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.
- (b) A civil action under section 3730 may not be brought—
  - (1) more than 6 years after the date on which the violation of section 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.

# CASES

1. *United States v Neifert-White Co*, 390 US 228 (1968)

(The Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.)

2. *Vermont Agency of Natural Resources v. Stephens*, 529 US 765 (2000)

(Addressing challenge to standing of Relator's under Article III "injury in fact" standard.)

3. *Universal Health Services v. Escobar*, \_\_\_ US \_\_\_ (June 17, 2016)

(Sustaining implied certification "theory.")

4. *US ex Rel Cafasso v. General Dynamics*, 637 F.3d 1047 (2011)

(Addressing the right to take documents from the workplace for use in an FCA case)

# ABA RULE 1.4: COMMUNICATIONS

- *Client-Lawyer Relationship*

(a) A lawyer shall:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
- (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client reasonably informed about the status of the matter;
- (4) promptly comply with reasonable requests for information; and
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

# MAKE SURE THE CLIENT KNOWS:

- this case is on behalf of the government
- unless there is a retaliation claim, the damages are measured by the government's loss
- the government has final say - subject to court approval - on the disposition of the case.

# **ABA RULE 1.7 CONFLICTS; SPECIAL CONSIDERATIONS:**

1. The case is under seal
2. No disclosure of the conflict
3. No waiver of the conflict

# FRONT LOADING THE CASE; SET THE TABLE FOR SUIT



- 1) Plead as if there will be no discovery
- 2) Focus on what the case will look like at trial
- 3) Assume a motion to dismiss
- 4) Remember that the real client in interest is a government agency.
- 5) The government will look at the complaint and disclosure statement in determining whether to participate in the case.



# **BUILD CASES FROM CIRCUMSTANTIAL EVIDENCE (*FRE 401* DOES NOT DISTINGUISH CIRCUMSTANTIAL AND DIRECT EVIDENCE)**

## ***FRE Rule 401. Test for Relevant Evidence***

***Evidence is relevant if:***

***(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and***

***(b) the fact is of consequence in determining the action.***



***Just as pyramids were built from small stones, we build cases from small factoids called circumstantial evidence.***

***Argue inferences from circumstantial evidence.***

# IMPORTANT CONSIDERATIONS IN EVIDENCE ANALYSIS

## FACTS VS. CONCLUSIONS

EXAMPLE OF A CONCLUSION: “I like lemonade.”

EXAMPLE OF A FACT: “I just spent \$10,000 on lemonade”

THE POINT: *FACTS CAN BE POWERFUL; ARGUE WITH FACTS.*

# ***FRE 801 (D) (2)* – STATEMENTS OF A PARTY OPPONENT**

- ***Emails***
- ***Powerpoints***
- ***Linkedin profiles***
- ***Tweets***
- ***Marketing materials***

## ***FRE 801 (d) (2)***

**(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:

**(2) An Opposing Party's Statement.** The statement is offered against an opposing party and:

**(A)** was made by the party in an individual or representative capacity;

**(B)** is one the party manifested that it adopted or believed to be true;

**(C)** was made by a person whom the party authorized to make a statement on the subject;

**(D)** was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

**(E)** was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

If authentic, they come in as evidence even without a witness.

# ***FRE 901 & 902 - AUTHENTICATION***



*Is the purported evidence what it appears to be?*

## ***FRE 902 13 & 14***

***13) Certified Records Generated by an Electronic Process or System.*** A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

***(14) Certified Data Copied from an Electronic Device, Storage Medium, or File.*** Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule (902(11) or (12). The proponent also must meet the notice requirements of Rule 902 (11).

# ***FRE 1006-* SUMMARIES TO PROVE CONTENT**

*For FCA Cases:*

## **THE SLEEPER OF ALL RULES**

*“The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.”*

**USE THIS FOR CLAIMS**

# BRING IN GOVERNMENT REPORTS TO DEMONSTRATE MATERIALITY

## *FRE 201*

### Adjudicative Facts

**(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

**(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:

**(1)** is generally known within the trial court's territorial jurisdiction; or

**(2)** can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

**(d) Timing.** The court may take judicial notice at any stage of the proceeding.

**(e) Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

**(f) Instructing the Jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

# AND NOW TO PLEADING

*In determining the sufficiency of a complaint, the court strips out conclusory allegations, focuses on the factual allegations, and determines plausibility.*

**Ashcroft v. Iqbal, 556 U.S. 662 (2009)**

**&**

**Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)**

## ***FRCP 9 (B)***

### ***-PLEADING SPECIAL MATTERS***

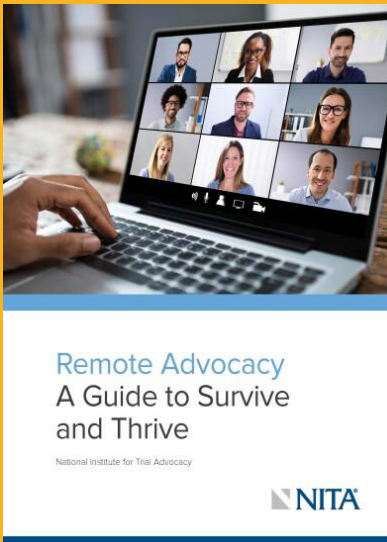
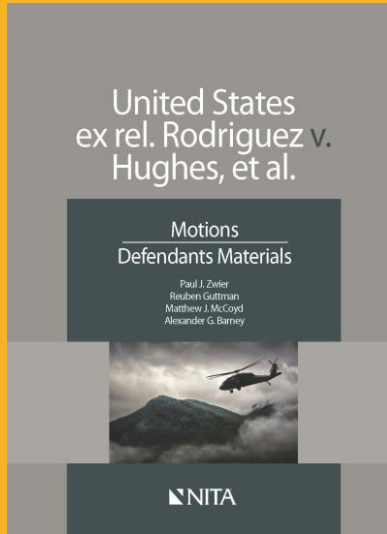
Think about the rules of evidence when pleading.

#### *FRCP 9 (b)*

Fraud or Mistake; Conditions of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.



# RESOURCES



# REUBEN GUTTMAN

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## BIO:

<https://www.gbblegal.com/reuben-a-guttman/>

## WEBSITES:

[www.whistleblowerlaws.com](http://www.whistleblowerlaws.com)

[www.gbblegal.com](http://www.gbblegal.com)



## VIDEOS:

<https://www.youtube.com/watch?v=yiUS5Zf9HRI>

<https://www.youtube.com/watch?v=wimn7cLLjeA>

[https://www.youtube.com/watch?time\\_continue=129&v=HHMpP9YQSjY](https://www.youtube.com/watch?time_continue=129&v=HHMpP9YQSjY)

<https://www.youtube.com/watch?v=FAfnVdZ6le0>

[https://www.youtube.com/watch?time\\_continue=1&v=n4bRF\\_6CB0I](https://www.youtube.com/watch?time_continue=1&v=n4bRF_6CB0I)

Defense Strategies  
In  
False Claims Cases

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I. Introduction

A. Some tips from perspective of defending a false claims case

B. Commonly brought against companies in healthcare, defense,  
education industries

## II. "Front Loading the Case"

- A. How to do so on defense side?
- B. Kill the case at the earliest possible opportunity
  - 1. Prevent intervention by the Government
  - 2. Move to dismiss Relator's case

## IIA. Prevent Intervention By the Government

### A. Deprive relator of its most valuable asset

1. Government funding
2. Government resources
3. Government participation

### B. Recommendation to decline intervention

1. Written and oral, if able
  - (a) Persuasive written requests
  - (b) Power Point presentation
2. Upon notice from Government
3. Granston Memorandum
  - (a) Michael D. Granston, Director, Commercial

Litigation Branch, Department of Justice Fraud Section

- (b) January 10, 2018

C. Test = whether Government's interests are served by  
declination

1. "Non-exhaustive list of factors"

(a) Curbing meritless qui tams

(b) Preventing parasitic opportunistic qui tam actions

(c) Preventing interference with agency policies and

programs

(d) Controlling litigation brought on behalf of the

U.S.

(e) Safeguarding classified information and national

security interests

(f) Preserving Government resources

(g) Addressing egregious procedural errors

D. Granston Memo included in U.S. Atty's Manual (USAM)  
("Justice Manual")

1. Guidelines/not mandatory

E. At end of 2018, Government filed wave of motions to  
dismiss consistent with Granston memo

1. 10 motions

2. 7 jurisdictions

F. Circuit split:

1. Sequoia, 151 F.3d 1139 (9<sup>th</sup> Cir. 1998)

(a) 2 step process

(i) Valid Government purpose

(ii) Rational relation between dismissal and

Government purpose

(iii) Then burden shifts to relator

2. Swift, 318 F.3d 250 (D.C. 2003)

(a) DC Circuit rejected Ninth Circuit's Sequoia

standard

(b) Government has "unfettered right to dismiss"

(c) Other courts have followed Swift (Minn., Miss.,

Texas)



## IIB. Move to Dismiss Relator's Case

A. If Government has declined to intervene, but relator proceeds on its own

### B. False Claims Act Defenses:

#### 1. Statute of limitations

(a) 6 years after violation or

(b) 3 years after knowledge (but not more than 10 years after violation)

(c) Cochise, 139 S.Ct. 1507 (S. Ct. 2019)

(i) Where no Government intervention, longer statute of 10 years applies

#### 2. Escobar materiality

#### 3. Rule 9(b) particularity

4. Public disclosure bar/original source exception

(Affordable Care Act 2010)

(a) Dismissal of FCA claims "if substantially the same allegations or transactions as alleged in the action were publicly disclosed"

(b) Unless relator "is an original source of the information

(i) "Independent of and materially adds to the publicly disclosed allegations or transactions"

(ii) "Materially adds" = discloses "new information that is sufficiently significant or important"

(1) Reed, 923 F.3d 729 (10<sup>th</sup> Cir. 2019)

5. Other common bases for dismissing civil cases (not particular to FCA)

- (a) Failure to state a claim
- (b) Lack of personal jurisdiction
- (c) Lack of subject matter jurisdiction

### III. Parallel Proceedings

#### A. Pending criminal investigation

1. DOJ will often move to stay civil False Claims Act pending resolution of criminal case

2. Courts usually grant

3. DOJ does not want defense to get discovery in civil case not available in criminal case

4. Defendant does not want to provide discovery

5. 5<sup>th</sup> Amendment invocation can be used against defendant in civil case

## B. Collateral Estoppel

1. Defendant may be estopped in subsequent FCA case from denying elements established by criminal conviction

(a) But see Doe, 923 F.3d 308 (3d Cir. 2019)

(i) Estoppel does not apply to employer of defendant who entered plea of guilty

(b) Whyte, 918 F.3d 339 (4<sup>th</sup> Cir. 2019)

(i) Government not estopped from bringing criminal case following a prior FCA case in which it did not intervene