TESTIMONY OF JAMES B. HELMER, JR.
Helmer, Martins, Rice & Popham Co., L.P.A.

BEFORE THE HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

AND

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Hearing on the “False Claims Act Corrections Act of 2007"

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I. INTRODUCTION

Good morning Mr. Chairman and members of the Committee. My name is James B. Helmer, Jr., and I thank you for inviting me to testify in support of House Bill H.R. 4854, the "False Claims Act Corrections Act of 2007." I am currently President of the Cincinnati law firm of Helmer, Martins, Rice & Popham Co., L.P.A. I also serve on the President's Counsel of Taxpayers Against Fraud, an organization whose sole enduring purpose is to combat fraud against the Federal public fisc through use of the False Claims Act and specifically its *qui tam* whistleblower provisions.

In 1986 this body sought my testimony on the False Claims Amendments Act of 1986 because I had the only *qui tam* case then pending in the United States. All of my suggestions were eventually followed and became part of the Bill passed by this House and signed into law by President Ronald Reagan in October 1986.

I have been representing whistleblowers under the False Claims Act ("FCA") for the last 25 years in dozens of cases all across the country. Those cases have collectively resulted in over $700 million being returned to the Treasury by some of the most well-known and largest Federal Government contractors in history, including: General Electric; Boeing; Columbia HCA; Northrop Grumman; General Dynamics; Lockheed Martin; and almost all of the major oil companies. These companies were cheating the United States taxpayers, and they were caught

because courageous whistleblowers were empowered and encouraged by the FCA to put an end to the misconduct.

It has been my honor to represent whistleblowers over the years, and that is why I have devoted much of my private practice to it for so long. I previously served as a law clerk to the Honorable Timothy S. Hogan, United States Chief District Judge for the Southern District of Ohio from 1975 to 1977, and since that time I have been engaged in the private practice of law focused on prosecuting FCA litigation. There are more than 250 published opinions by jurists located throughout the country in cases in which I was lead trial counsel. I have lectured and written extensively about the FCA, and have even authored a book called *False Claims Act: Whistleblower Litigation* (5th ed. Top Gun Publishing, 2007) that is designed to help lawyers navigate their way through the complexities of this law. This treatise, originally published in 1993, is now in its fifth edition.

I have litigated at all levels of the Federal court system including, most recently, arguing to the United States Supreme Court on behalf of the Relators in a case decided June 9, 2008 captioned *Allison Engine Company v. United States ex rel. Sanders*, Case No. 07-214, 2008 U.S. LEXIS 4704 (2008). I was successful in convincing every Justice of the Supreme Court that the FCA applied to the subcontractor fraud alleged in my case, even though the defendant subcontractors never "presented" their false claims for payment directly to a Federal Government employee. However, while the Supreme Court agreed that the FCA does not contain a blanket "presentment" requirement, the opinion included additional language that I believe could be interpreted and applied in a way that will leave billions of taxpayer dollars unprotected. The clarifications in these FCA amendments will ensure this will not happen.

There are not many lawyers who have devoted their careers to the representation of whistleblowers pursuing Government contractors under the FCA—the *qui tam* bar numbers only in the low hundreds. I often hear suggestions made by those aligned with the FCA defense bar that *qui tam* attorneys view the FCA as some kind of get-rich-quick opportunity. I know most of the lawyers who are part of the small *qui tam* bar, and not one of them shares this view. In reality, it is exceedingly difficult to succeed as a *qui tam* lawyer, and those that are able to do so have found that there is absolutely nothing quick about the process.

FCA lawsuits are complex, very lengthy endeavors, with hurdles that are simply foreign to those who are classic plaintiffs' trial lawyers. This is why *qui tam* lawyers are, in really, a different breed than the classic trial lawyer. Because we sue Government contractors, every day we face adversaries with near-limitless resources who are represented by the largest law firms in the world, with hoards of paid-by-the-hour attorneys charging upwards of $1,000 per hour or more. We do not have the luxury of bringing and resolving cases within a matter of months or a year or two, nor can we afford a voluminous caseload as a way to manage our risk. We know and have accepted that these cases take many, many years, they are hard to win, they take thousands of hours of time, and they require expense outlays of at least hundreds of thousands, often millions of dollars. And even when we do achieve a successful outcome, it has invariably taken many years, sometimes more than a decade before any resolution is reached.

A perfect example is the *Allison Engine* litigation. We filed that case in 1995, so it is approaching the end of its 13th year. My co-counsel and I have spent thousands of hours, millions in attorney time and millions in out-of-pocket expenses to this point. We won the case on summary judgment, had that victory overturned and then we tried the case for five weeks in

Dayton, Ohio. However, before the jury was permitted to render a verdict, the trial court dismissed the case on the ground that even though we proved that all money paid to the defendants came from the Navy, the case could not proceed because we had only shown that the defendant subcontractors had submitted their thousands of false claims to a prime contractor and not directly to the Navy. The Supreme Court has now afforded us the chance to try this case again, though the outcome is, of course, anything but certain. We have not yet received anything as a result of our work in this case, much less quickly, which my experience has found to be the norm in this area of the law. But even with such hindsight, I can tell you that we absolutely would do it all over again.

For the few of us who fight these fights, we find them worthwhile because our clients are true patriots. In my experience, whistleblowers are driven by a singular goal: They want to right the wrongs they see being committed against the taxpayers. They do not think to start this struggle by contacting a lawyer. They first work to resolve the problems on their own, for example by reporting to their employers the misconduct that they see and imploring the company do the right thing. The vast majority of Government contractors do so. But, of course, some do not. And in those situations, when a whistleblower eventually realizes that the company will not act voluntarily to rectify fraudulent conduct, the FCA gives whistleblowers another option. The False Claims Act Corrections Act of 2007 helps maintain the viability of that option.

Having testified back in 1986, my current perspective prompts this general observation: The 1986 Amendments were of a much different character than those we are discussing here today. The 1986 Amendments were an overhaul, a substantial re-writing of the FCA by which Congress expressed its intention that this law should be strengthened—after decades of relative

disuse following amendments to the FCA in 1943 that weakened the *qui tam* provisions—so that it could again be a useful weapon against fraudulent claims for taxpayer funds. The proposed 2007 amendments, by contrast, are not an overhaul and are not an expression of new Congressional intent. These amendments are simply a reaffirmation of the intent behind the 1986 Amendments, and are needed due to various judicial decisions that have gone against that intent.

By any measure, the 1986 Amendments have proven wildly successful in recovering taxpayer money fraudulently taken from the Treasury, with more than $20 billion dollars returned to the Treasury as of the end of fiscal year 2007. I am happy to report that nearly all of that money has been recovered in suits initiated by *qui tam* whistleblower Relators. The future effectiveness of the Act, though, is being eroded by successful attacks from the well-organized, well-financed FCA defense bar. This erosion has been accomplished, in large measure, by the FCA defense bar advocating interpretations of the FCA without regard for the intentions of Congress as expressed in the 1986 legislative history—which unambiguously stated that the FCA must be construed broadly to responsibly protecting taxpayer funds. By ignoring Congress's intent, and thus consistently pressing for narrow constructions of the FCA, the defense bar has achieved a growing body of caselaw erecting new hurdles making it much harder for both the United States and individual whistleblowers to redress fraudulent conduct with the FCA.

I am here today to urge this Congress to pass the False Claims Act Corrections Act of 2007 so that the intentions of Congress in 1986 can again be given full effect. In large part the Bill introduced in the House tracks the version introduced in the Senate, and my testimony will focus on the value of the most important of those shared provisions. In so doing, I will also

discuss the impact of the Supreme Court's recent *Allison Engine* decision on the Bills as they have been introduced. Finally, I will discuss an important aspect of the House version that does a better job of re-energizing the FCA than the Senate's Bill—the provision that would clarify the types of information that need be pled in a *qui tam* FCA complaint to satisfy Civil Rule 9(b).

II. KEY PROVISIONS SHARED BY THE HOUSE BILL AND SENATE BILL

A. False Claims Act Liability For Indirect Fraud Against The Government

Section Two of H.R. 4854 would amend the FCA to clarify its application to those making false claims for Federal Government funds even when those false claims are not physically presented to an employee of the United States Government. This is an important clarification given the realities of Government procurement. The Government buys all manner of goods and services, from military hardware to healthcare for the aged and disabled, and the interest that the Government has in the proper use of those funds does not necessarily end when the funds leave the Treasury.

Government funds are often distributed by private entities on behalf of the Government, and in those situations, there are Government strings still attached to the funds. The proposed amendments ensure that those claiming Federal dollars at all levels—whether directly from the Government or from those tasked with distributing Government funds—will be held accountable if such claims are against the purpose for which the Government allocated the funds.

Though the recent *Allison Engine* decision by the Supreme Court confirmed that the FCA reaches fraudulent conduct by subcontractors who do not "present" their false claims to the Government, the Supreme Court used language that could be misapplied to narrow the FCA in a way never intended by Congress. H.R. 4854 should be enacted without revision because it

provides a comprehensive framework for redressing fraud against the public fisc. The Bill covers issues not raised in *Allison Engine*. And the Bill also clarifies the reach of the FCA in light of potentially restrictive interpretations of the FCA that could flow from misapplication of the *Allison Engine* opinion.

1. Need For Clarification.

Prior to the 1986 Amendments, courts had usually, but not always, applied the FCA to reach indirect fraud committed by Government subcontractors against the public fisc. In 1986, both the House and Senate clarified that the FCA should, indeed, protect Federal Government funds even if they are not distributed by a Federal Government employee: "[C]laims or false statements made to a party other than the Government are covered by this term if the payment thereon would ultimately result in a loss to the United States." H.R. Rep. No. 99-660, at 21 (1986). "[A] false claim is actionable although the claims or false statements were made to a party other than the Government, if the payment thereon would ultimately result in a loss to the United States." S. Rep. No. 99-345, 99th Cong., 2d Sess. 10.

To ensure this reach, Congress added a new definition of actionable false "claims" to include "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States 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." 31 U.S.C. § 3729(c). The Senate was quite explicit as to the application of this definition: "For example, a false claim to a recipient of a grant from the United States or to a State under a program financed in part by the United States,

is a false claim to the United States." S. Rep. No. 99-345 at 10 (1986).

Despite the clarity of the FCA and Congress's clear intent, in 2004 the Court of Appeals for the District of Columbia Circuit decided that a false claim to a Federal Government grantee could never support liability under the FCA unless that false claim was eventually re-presented by the grantee to a Federal Government employee. *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005). While "presentment" of a false claim directly to the Federal Government is only mentioned as an element of liability in Section (a)(1) of the FCA, *Totten* decided that there must be a blanket "presentment" requirement in all provisions of the FCA in order to ensure that the Federal Government is truly the defrauded party. The rationale for *Totten* seems to have been driven by fact-specific concerns: The grantee (Amtrak) received both Federal grant money as well as private funds, so it was not clear whether Federal Government funds were used to pay the claims. And there was no identification of Government requirements violated by the subcontractors, so it was not clear whether the claims were false in a way that truly defrauded the Government.

Following the *Totten* decision, many lower courts throughout the country began to dismiss cases based on a rote application of the so-called *Totten* "presentment" requirement. Even where Government money was involved and Government requirements were violated, the FCA was found inapplicable to subcontractors unless their false claims actually reached a Government employee. The FCA was systematically being narrowed so that it no longer applied to Government subcontractors. Perhaps the starkest example of this involved the *Allison Engine* case that we tried for five weeks in early 2005 in Dayton, Ohio.

Allison Engine involved Navy subcontractors hired to build generator sets for the Navy's

new fleet of *Arleigh Burke* class destroyers. Over the course of a five-week trial, we introduced evidence that the defendant subcontractors made the generator sets in violation of Navy specifications that had been specifically imposed upon them by contract. We also showed that the defendants were required to certify in writing to the Navy that the generator sets had been made to the Navy's specifications in order to be paid with Navy funds. These defendants submitted thousands of invoices to the shipyards, and each one falsely claimed payment of Navy funds for their defective work. And the defendants were in fact paid with Navy funds after they falsely certified to the Navy that the generator sets met the Navy's standards. Accepting all this as true in passing on a Motion for Directed Verdict, the district court still dismissed the action because, while the defendants made false statements to the Navy in order to get paid with Navy funds, the district court found that the defendants did not violate the FCA because their invoices were not "presented" to the Navy.

The Court of Appeals for the Sixth Circuit reversed the district court. *United States ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610 (6th Cir. 2006). The Sixth Circuit found that while "presentment" of false claims to the Government was required for liability under FCA Section (a)(1), FCA Sections (a)(2) and (a)(3) did not mention "presentment"—liability was triggered under those sections for the much different conduct of making false statements to get false claims paid, or for conspiring to defraud the Government. The Sixth Circuit found clear evidence of that misconduct in this case. In reaching this decision, the Sixth Circuit found that "presentment" of false claims to the Government was not required to establish FCA liability so long as there was evidence that the false claims were paid with Federal Government funds.

The defendants in *Allison Engine* convinced the Supreme Court to grant *certiorari* by

misstating the Sixth Circuit's holding. Ignoring the facts of the case, the defendants claimed that the Sixth Circuit greatly expanded the FCA to reached any and all claims made to anyone that has "Government funds." In reality, the Sixth Circuit merely held that the FCA reaches claims for Federal Government funds that are false claims because the claimant violated the Federal Government requirements attendant to those claims. These were not simply claims for "Government funds." These were claims for Government funds that the defendants were only permitted to make by certifying to the Government that Government requirements had been met.

Notwithstanding the factual context, the Supreme Court clearly was concerned about whether the Sixth Circuit had somehow effected a broad expansion of the FCA. Thus, in *Allison Engine*, the Supreme Court would address the split with *Totten*, namely whether there is a blanket "presentment" requirement throughout the FCA (as *Totten* held) or whether the FCA applies to all claims for "Government funds" (as the defendants mischaracterized the Sixth Circuit decision). Before the Supreme Court's decision issued, though, both the House and Senate introduced the proposed FCA amendments that charted an appropriate middle course.

2. Proposed Amendments Covering Indirect Fraud Against The Government.

The proposed amendments rectify the "presentment" problem caused by the *Totten* opinion, and in a fashion that keeps the FCA focused on fraud perpetrated on the Federal Government rather than on all claims, without qualification, that might seek "Government funds." Section Two of the Bill clarifies that the FCA does reach false claims that are not "presented" to a Government employee, so it does not matter whether the Federal Government itself pays the claim or whether the Government funds are distributed by a third party. The important inquiry is not whether "presentment" has occurred, but instead whether "Government

money or property" is requested. But this does not mean that the FCA reaches any and all claims for "Government funds."

Amended Section 3729(b)(2) would define "Government money or property" as money "belonging" to the United States. And when it is Government money being distributed indirectly by a "contractor, grantee, agent, or other recipient," the FCA will only be implicated if the Government money "is to be spent or used on the Government's behalf or to advance a Government program[.]" This provision thus addresses any concerns that the FCA somehow reaches false claims merely because they are made to and paid by a private entity that has received funds from the Government. Claims to a private entity will only be actionable "false claims" if the private entity is essentially acting as conduit for disbursing Government funds in a manner prescribed by the Government. This structure would ensure that the FCA will continue to be an effective weapon against fraud on Government programs (such as Medicare and Medicaid) that are administered on the Government's behalf by Government contractors, but do not necessarily involve "presentment" of claims to the Government.

As a result of the new definition of "Government money or property," the current definition of "claim" in Section 3729(c)(2) could be vastly simplified. There would no longer be any need for "claim" to address whether and when funds should be considered sufficiently "Government" funds for purposes of triggering FCA liability. Instead, "claim" would need only clarify that the FCA covers "any request or demand" for the separately-defined "Government money or property."

The amended Section Two would also allow the Government recourse against those making false claims for money or property the United States holds in trust or administers for an

"administrative beneficiary." This clarification is needed in light of the recent decision involving Iraq reconstruction fraud, where a district court found the FCA inapplicable to claims made for reconstruction money administered but not owned by the U.S. Government. *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 444 F. Supp.2d 678 (E.D. Va. 2006). This decision (and others that will surely follow) does not appreciate the ranging Government interests advanced when the United States holds and administers property of another. Though Government funds may not be sought by the fraudfeasor, the Government certainly loses administrative resources that were invested in order to advance important Government interests. In addition, properly protecting such funds often saves the Government from having to satisfy funding gaps in programs the Government administers for others. The FCA should reach such claims.

Finally, H.R. 4854 closes a loophole in the present conspiracy provision. As it now exists, Section (a)(3) only reaches those who conspire "to defraud the Government by getting a false or fraudulent claim allowed or paid[.]" But defrauding the Government via false or fraudulent claims is not the only method addressed in the current FCA—the other liability sections involve such actions as making false record or statements, or delivering less Government property than promised. The amendments clarify that the FCA reaches conspiracies to violate any of the liability provisions in Section 3729.

3. The Impact Of *Allison Engine*.

While the Supreme Court's *Allison Engine* decision post-dates the introduction of the proposed FCA amendments, the House and Senate Bills provide the very same clarification that the Supreme Court unanimously did—that "presentment" of false claims is not an element of liability for all provisions of the FCA, so that subcontractors are still answerable for their false or

fraudulent statements that impact the public fisc. But the amendments go further by specifying that FCA liability attaches where "Government money or property" is sought from a private party only when that money or property is distributed for a distinctly Government purpose. In this way, the Bills provide better guidance to future litigants and courts than *Allison Engine* does.

As with both the House and Senate Bills, *Allison Engine* strikes a balance between the rigid *Totten* "presentment" requirement, on the one hand, and some perhaps too-broad language in the Sixth Circuit's opinion, on the other. The Supreme Court unanimously rejected the *Totten* "presentment" requirement, but also unanimously found that FCA liability should not extend to all claims merely because the claims are paid with "Government funds." For the Supreme Court, the best middle ground involved a more searching inquiry to determine whether the Federal Government is being defrauded in a given circumstance. The Supreme Court stated this inquiry in a variety of ways—whether a subcontractor makes a false statement to a prime contractor "intending for the statement to be used by the prime contractor to get the Government to pay its claim" (2008 U.S. LEXIS 4704 *16), or whether there is a "direct link between the false statement and the Government's decision to pay or approve a false claim" (2008 U.S. LEXIS 4704 *16).

Of course, there was such "intent" and a "direct link" for the subcontractors in *Allison Engine*, since Navy money did not flow for the generator sets until the subcontractors specifically and falsely certified to the Navy in writing that the generator sets were of the required quality. With that being said, however, the language used by the Supreme Court to construe the FCA (including atextual references to "intent" and "materiality" and "reliance" and "direct link") will, in my experience, provide opportunities for FCA defendants to argue for narrow constructions of

the FCA—in effect creating hurdles that are not supported by the text or intent behind the FCA.

The False Claims Act Corrections Act of 2007 provides a clearer and more easily applied standard that does not invite judicial decisions against the FCA text and Congressional intent. "Presentment" is not required. But there must still be a "direct link" to impacting the Government's funding process. This is why the amendments will allow the FCA to reach false claims made to private entities only if the Government money involved is being used "on the Government's behalf or to advance a Government program[.]" This formulation of the "direct link" standard is also satisfied by the subcontractors in *Allison Engine*, since the Government money spent for the generator sets certainly was to advance the Navy's procurement of new destroyers.

After nearly a quarter century fighting defense lawyers over the proper construction of the FCA, I can certainly appreciate how some of the Supreme Court's language regarding such matters as "intent" and "direct link" could be twisted and misconstrued to add hurdles to the FCA and make it harder to redress fraud against the Government. Both the House and Senate Bills will forestall such potential for abuse.

B. Clarifying True "Public Disclosures"

The primary goal of the 1986 FCA Amendments was to create a statutory scheme that would encourage true whistleblowers to report fraud on the Government, while at the same time still preventing the truly "parasitic" lawsuits—such as when an opportunistic Relators merely takes a criminal indictment, attaches a Civil Cover Sheet, and files it as a *qui tam* FCA suit. It was and continues to be very important that this balance is achieved, since the effectiveness of the FCA absolutely depends upon it being used as intended, as a tool for real whistleblowers.

In 1986, then, Congress decided in Section 3730(e)(4) to prohibit FCA suits "based on the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or 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." Unfortunately, the language in this so-called "public disclosure" provision has been increasingly used by FCA defendants, and applied by the courts, to dismiss meritorious cases, rather than parasitic ones. The proposed 2007 amendments will help put an end to this misuse in a variety of ways.

First, and perhaps most important, Section 3(d) of the H.R. 4854 converts the "public disclosure" bar from a jurisdictional issue to one that can be raised only by the Government "upon timely motion." This is entirely appropriate because the "public disclosure" provision is meant to prevent parasitic lawsuits, not provide FCA defendants a grounds to escape liability. Indeed, this is why publically-disclosed allegations can always be used by the Government to initiate an FCA action on its own. But because the current "public disclosure" provision is framed in jurisdictional terms, FCA defendants are absolutely entitled to raise subject-matter jurisdiction challenges even though that provision was never meant for their benefit. This inconsistency is rightly corrected by the amendments.

Second, the Bill clarifies that some types of information gathered by a whistleblower should not be considered "publically disclosed" information. Most notable on this issue are the judicial decisions finding that information obtained by a Relator through a Freedom of Information Act request is sufficiently "public" to potentially bar a *qui tam* action. *E.g. United States ex rel. Mistick PBT v. Housing Authority,* 186 F.3d 376, 383 (3rd Cir. 1999); *United States*

ex rel. AD Roe Co., 186 F.3d 717, 723024 (6th Cir. 1999). The amendments clarify that FOIA information obtained by a Relator does not raise "public disclosure" issues. Similarly, the amendments provide that information obtained by the Relator due to "exchanges of information" with Government employees is not, of itself, sufficient to disqualify a *qui tam* suit. These are common-sense provisions, since such information obtained by the Relator cannot credibly be deemed "public."

Third, the Bill corrects court decisions that have dismissed cases that are not really "based upon" publically disclosed information, but instead merely contain some allegations that are loosely "similar to" some publically disclosed information. I have seen FCA defendants in my cases exploit such decisions to great advantage. The defendants will take each allegation in a Complaint, conduct a search for any public statement anywhere that might mention anything about the allegation (no matter how far removed, either geographically or temporally, from my whistleblower), and then submit reams of such "public" information to the court and argue that my Relator's case must have been "based upon" the "public" information. These are not efforts to weed out parasitic lawsuits. They are, all too often, successful efforts to end lawsuits brought by whistleblowers who have brought real "insider" information to the Government—and by whistleblowers who knew nothing of the "public disclosures" concocted by the defendants.

This is a situation in clear need of correction, and the amendments do a fine job. H.R. 4854 provides for dismissal of an action on "public disclosure" grounds only if the action really is a parasitic one: The Relator's knowledge of the allegations regarding "all essential elements of liability" in the action must have been derived "exclusively" from the publically disclosed information. And the Bill clarifies that a public disclosure occurring in a Government

proceeding refers to a Federal Government proceeding, not a State Government proceeding.

Finally, the proposed amendments resolve the much litigated and very inconsistent jurisprudence regarding whether a Relator who has filed an action based upon public information is an "original source" of the information. Currently, the "original source" inquiry is only triggered if a court finds that there has been a public disclosure, after which a Relator must demonstrate having "direct and independent knowledge of the information on which the allegations are based." It has been my experience, and the reported decisions attest, that even the most obvious insider Relators have great difficulty making such a showing, usually because they cannot conclusively show that they personally had the information and were not "tainted" because it may have been elsewhere in the public realm.

The amendments appropriately remove the "original source" inquiry. Now, since a case will only be dismissed if the Relator derives all the allegations exclusively from public information—and will thus not have any "direct and independent knowledge" of the information—the "original source" concept is subsumed in the "public disclosure" provisions. This will greatly simply prosecution of FCA actions for all involved.

C. Statute Of Limitations

The amendments clarify the FCA statute of limitations in two important respects so that they are consistent with Congressional intent. First, a uniform statute of limitation must be clarified for those bringing actions under the Act's anti-retaliation provisions. Although the current FCA does provide for a statute of limitations for all civil actions "under Section 3730," the Supreme Court recently held that this limitation provision did not apply to the anti-retaliation action found in 3730(h). *Graham County Soil & Water Conservation District v. United States ex*

rel. Wilson, 545 U.S. 409 (2005). According to the Supreme Court, those wishing to file such actions must comply with whatever statute of limitations governs the most similar sort of action available under that person's state law.

This is inappropriate protection for whistleblowers. Usually the most analogous state laws are for unlawful discharge, and statutes of limitations governing those actions are often quite short, sometimes as little as six months. It has been my experience and that of many others in the *qui tam* bar that those suffering retaliation for trying to expose fraud sometimes do not learn why they were really fired for many months or years. After all, fraud is secretive business. To account for this reality, the amendments provide for a uniform ten-year limitations period.

For FCA actions, the applicable statute of limitations has been the subject of much wasteful litigation and should also be clarified. As currently written, an action may be brought within six years of the violation, or within three 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." This provision has been inconsistently applied, with litigation regarding who is the appropriate "official" who has the "responsibility" to act, and differing judicial views as to the applicability of the 10-year period in non-intervened cases.

There is no reason for such confusion. The amendments provide for a uniform 10-year period for all FCA claims, without regard for whether the Government intervenes. As one who has litigated the statute of limitations issue on countless occasions, I believe that this clarification will be beneficial to all.

D. "Relation Back" Of The Government's Complaint

When the Government decides to intervene in a *qui tam* case, it usually files its own complaint at that time. An issue has recently arisen regarding whether the Government's complaint would, for statute of limitations purposes, properly relate-back to the date that the Relator's complaint was filed. The current FCA is silent on the issue, so the amendments clarify that the "relation back" doctrine does apply. This has positive practical significance. It will mean that the Government does not have to compromise or prematurely end its under-seal investigation solely for statue of limitation concerns.

While the FCA does not address the issue, Civil Rule 15(c)(2) provides that an amended pleading relates back to the date of the original pleading if the claims "asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the in the original pleading." In a matter of first impression, the Second Circuit recently ruled that the Government's complaint does not "relate back" to the Relator's complaint under this rule. *United States v. Baylor Univ. Medical Center*, 469 F.3d 263 (2nd Cir. 2006). This decision certainly hampers the Government's ability to combat fraud. So the proposed amendments expressly provide that the Government's complaint does "relate back" to the originally-filed *qui tam* complaint.

III. SOLVING THE RULE 9(b) ISSUE.

There is one major substantive improvement that the House Bill adds over the Senate version, and that involves the interplay between the FCA and the pleading requirements found in Civil Rule 9(b), which governs actions alleging fraud or mistake. For more than a decade, Rule 9(b) challenges have been raised by FCA defendants as a matter of course at the very initial

stages of post-seal litigation, and it has resulted in dismissal of countless meritorious actions based upon nothing more than this: The inability of a Relator to identify specific false claims for payment. The House Bill rightfully removes this judicially-created obstacle to FCA actions.

The Rule 9(b) problem has arisen because FCA defendants have successfully convinced most courts that Rule 9(b) applies to FCA actions. But that conclusion is a mistake. Rule 9(b) requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." But FCA actions are not fraud actions. They are statutory causes of actions whose elements have already been defined by Congress. And unlike fraud cases, where the victim alleging fraud is exclusively in control of and knowledgeable of most, if not all, elements of the cause of action, whistleblowers filing *qui tam* cases often—if not usually—know only those parts of a contractor's misconduct to which he or she has been privy. The details of that conduct are typically known only, and certainly known best, by the Government contractor defendant.

Moreover, the policy considerations which underlie Rule 9(b)—that "fraud" claims are disfavored and therefore a defendant needs particularized information about claims of fraud made against it in order to defend—have no application here. Congress has been very clear that FCA cases are not at all disfavored but are, quite the opposite, to be actively encouraged. Thus, the heightened pleading requirements of Rule 9(b), which apply to common law causes of action for fraud, should not be and should never have been applied to statutory FCA allegations.

Though it should not apply to FCA actions, Rule 9(b) has been regularly used to test the sufficiency of FCA allegations, and with decidedly harsh consequences. Most importantly, many courts have decided that a *qui tam* complaint will not satisfy Rule 9(b) unless the Relator has

identified "with specificity" the specific claims for payment that are alleged to be false. As a practical matter, this often means that a Relator who is not a billing clerk or at least an office worker with access to the billing documents will be forever unable to bring a *qui tam* case. While they may well have vast information about the underlying fraudulent conduct, they simply will not have any information regarding the claims. This leads to anomaly: A factory machinist who sees his employer making military hardware with substandard parts is surely witnessing fraud on the taxpayers, but he cannot and will not ever be able to get the claims for payment his company makes to the Government for that hardware. Similarly, a physician assistant who sees his employer taking kickbacks from a hospital to refer Medicare patients to that hospital will never see the false claims—the hospital claims for payment to Medicare—though the assistant certainly knows that such claims were made because the hospital is not in the business of treating patients for free.

These pleading hurdles are actually not even overcome by billing clerks. They may have copious detail regarding the claims for payment, but they will have no idea that they are false. If the factory accountant may never speak to the machinist, or the hospital billing clerk never speaks to the physician assistant, those with information about the claims will never have information indicating that those claims are in any way false. And this, of course, is an absolute business-model blueprint for fraud: Segregate the billing office from every other employee, and that will effectively ensure that Rule 9(b) can never be met.

Congress certainly did not intend Rule 9(b) to systematically thwart whistleblower actions. The House Bill contains an reasonable and appropriate remedy for this situation. Section 4(e) provides that the identification of specific claims for payment that result from

fraudulent conduct need not be identified by a *qui tam* Relator so long as that person alleges sufficient other facts that "provide a reasonable indication" that FCA violations have occurred—and so long as the allegations give the Government sufficient notice to investigate the case and the defendants sufficient notice to defend themselves.

The House provision is a decided compromise. It does not take FCA actions outside the ambit of Rule 9(b), since the allegations will still need to be more specific than required by the classic notice-pleading standard of Civil Rule 8(a). But the House provision does remove any requirement that only certain kinds of information must be pled to overcome Rule 9(b). Congress should amend the FCA to include this provision because is will certainly result in better detection and reporting of fraud on the Government.

IV. Conclusion.

Let me close by again thanking the Committee for the opportunity to testify in support of the False Claims Act Corrections Act of 2007.

Twenty-two years ago this House, pursuant to legislation sponsored by Congressman Berman, undertook to modernize the Civil War-ear False Claims Act so that it could become an effective tool in protecting taxpayer dollars. The wisdom of this body in enacting the False Claims Amendments Act of 1986 has been demonstrated repeatedly. Billions of taxpayer dollars have been recovered from those Government contractors who have abused the public trust. Undoubtedly, fraud against billions of additional taxpayer dollars has also been deterred.

The clarifying amendments proposed by both the House and Senate should be adopted as a full expression of the intent Congress has for the FCA as the Government's chief weapon for combating fraud.