THE YALE LAW JOURNAL

COMMENT

Seeking More Scienter: The Effect of False Claims Act Interpretations

The U.S. Treasury can now rely on recovering a billion dollars each year from antifraud efforts. Enacted during the Civil War to combat war profiteering,[1] the False Claims Act (FCA) prohibits the submission of false or fraudulent claims for payment to the United States.[2] An individual violates the FCA when he "knowingly presents, or causes to be presented" to the government "a false or fraudulent claim for payment or approval,"[3] or "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government."[4] A defendant acts "knowingly" if he acts with "actual knowledge," "deliberate ignorance," or "reckless disregard of the truth or falsity" of the claim.[5] The government or private individuals (in qui tam suits) may sue under the FCA for civil penalties and treble damages.[6] The amount of recovery under the FCA has greatly increased over the past two decades. In the 1980s and early 1990s, the government only recovered approximately three hundred million dollars per year,[7] but since 2000, the government has recovered well over one billion dollars in all but one year.[8]

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1. *See* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT §§ 2:13-2:19 (2007) (chronicling the Act's expansion).
2. Congress modernized the law in the 1980s. S. REP. NO. 99-345, at 17 (1986).
3. 31 U.S.C. § 3729(a)(1) (2000).
4. *Id.* § 3729(a)(2).
5. *Id.* § 3729(b).
6. *Id.* § 3729(a).
7. SYLVIA, *supra* note 1, app. D.
8. *Id.* The federal government recovered over three billion dollars in 2005. *Id. See* Press Release, Dep't of Justice, Justice Department Recovers $2 Billion for Fraud Against the

Two circuit conflicts have developed regarding the proper interpretation of the FCA. First, the circuits are divided over whether an implicit certification of compliance with a federal law, regulation, or contract is sufficient to give rise to liability under the FCA. Second, the circuits have split on what constitutes "presentment" of a claim to the government as required by the FCA.[9]

Part I of this Comment describes the circuit conflicts. Part II then argues that, while the two circuit splits involve separate questions of interpretation, courts that have rejected liability on both issues are motivated by a common but unacknowledged concern: ensuring that unsuspecting defendants do not face FCA liability. The interpretive moves used to achieve this result, however, in practice create additional scienter requirements that are imperfect solutions for the problem of unsuspecting defendants. In fact, the courts are doing more harm than good. Part III argues that the statutory scienter framework can better protect unsuspecting defendants than the courts' similarly intentioned reinterpretations of the FCA.

I. THE FALSE CLAIMS ACT IN THE COURTS

A. The Conflict over Implied Certification

Courts have long allowed FCA liability for claims based on a defendant's express false certification.[10] An "express false certification" occurs when a defendant "who makes a claim for payment from the United States submits a form or document expressly certifying compliance with a law, contract term, or regulation, when the defendant did not in fact comply."[11] An implied false certification, however, occurs when the claimant does not explicitly indicate compliance with a federal law or regulation but only submits a claim for payment.[12]

Most circuits that have addressed the issue have embraced implied certification as sufficient for FCA liability. For example, in *Shaw v. AAA Engineering & Drafting, Inc.*, the Tenth Circuit affirmed the liability of a government contractor who submitted an invoice for payment that "did not

Government in Fy 2007; More Than $20 Billion Since 1986 (Nov. 1, 2007), *available at* http://www.justice.gov/opa/pr/2007/November/07_civ_873.html.

9. 31 U.S.C. § 3729(a)(1) (2000).

10. *United States v. Hibbs*, 586 F.2d 347 (3d Cir. 1977), was the first case to refer to certification. *Id.* at 349-50.

11. SYLVIA, *supra* note 1, § 4:43.

12. *Id.*

contain any factual misrepresentations regarding [contractual compliance]" because "a false implied certification may constitute a 'false or fraudulent claim.'"[13]

Several circuits, however, have criticized the implied certification theory. For example, in *United States ex rel. Hopper v. Anton*, the Ninth Circuit expressed disdain for the argument that a school district whose forms did "not contain any certification concerning regulatory compliance" could nonetheless face FCA liability for its receipt of federal education monies.[14] The court argued that "[v]iolations of laws, rules, or regulations alone do not create a cause of action under the FCA" because "[i]t is the false *certification* of compliance which creates liability when certification is a prerequisite to obtaining a government benefit."[15]

B. The Conflict over Presentment

The two primary provisions of the FCA use different language to describe prohibited conduct. One subsection imposes liability on any person who "knowingly *presents*, or causes to be *presented*" a false claim,[16] while the other imposes liability on any person who "knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved *by the Government*."[17] The language of the first subsection has given rise to the requirement that a plaintiff prove that a defendant "presented" a claim to the government.[18] The circuits have split, however, on whether every plaintiff, regardless of the subsection under which he seeks FCA liability, must show that a false claim was "presented" to the government.

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13. 213 F.3d 519, 531 (10th Cir. 2000). The Sixth, Second, and D.C. Circuits, and the Court of Federal Claims also have accepted the implied certification theory. United States *ex rel.* Augustine v. Century Health Servs., Inc., 289 F.3d 409, 415 (6th Cir. 2002); Mikes v. Straus, 274 F.3d 687, 700 (2d Cir. 2001); United States *ex rel.* Siewick v. Jamieson Sci. & Eng'g, Inc., 214 F.3d 1372 (D.C. Cir. 2000); Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429 (Fed. Cl. 1994), *aff'd*, 57 F.3d 1084 (Fed. Cir. 1995).

14. 91 F.3d 1261, 1267 (9th Cir. 1996).

15. *Id.* at 1266. Other circuits have reached similar conclusions. *E.g.*, United States *ex rel.* Willard v. Humana Health Plan of Tex., Inc., 336 F.3d 375 (5th Cir. 2003); Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 786 & n.8 (4th Cir. 1999).

16. 31 U.S.C. § 3729(a)(1) (2000) (emphasis added).

17. *Id.* § 3729(a)(2) (emphasis added).

18. United States *ex rel.* Sanders v. Allison Engine Co., 471 F.3d 610, 622 (6th Cir. 2006); United States *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 492 (D.C. Cir. 2004).

The D.C. Circuit in *United States ex rel. Totten v. Bombardier Corp.* recently held that FCA liability always requires presentment of a claim by a defendant to a U.S. government officer or employee.[19] The court rejected FCA liability for the contractor of a federal grantee, Amtrak, who only submitted claims to Amtrak and was paid out of funds previously granted by the federal government because the "clear unambiguous language" of § 3729(a)(1)[20] requires presentment to the government and the phrase "by the Government" in subsection (a)(2) "supports" an identical presentment requirement for FCA liability under that provision.[21]

The Sixth Circuit in *United States ex rel. Sanders v. Allison Engine Co.*[22] explicitly rejected the *Totten* approach. The court upheld liability for subcontractors on a Navy project who did not present claims "directly" to the government because "the plain language of subsections (a)(2) and (a)(3) simply does not require that a claim must be presented to the government to be actionable."[23] Instead, the court concluded that a plaintiff must only "show that government money was used to pay the false or fraudulent claim."[24]

II. THE MOTIVATION AND EFFECT OF THE RECENT INTERPRETATIONS

A. The Motivation of the Courts

A common fear motivates the courts that limit FCA liability in both the implied certification and presentment splits. With growing numbers of FCA suits yielding increasingly large recoveries,[25] these courts fear that unsuspecting entities that interact with the government will be liable for harsh damages.[26]

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19. *Totten*, 380 F.3d at 488; *see, e.g.*, United States *ex rel.* Atkins v. McInteer, 345 F. Supp. 2d 1302 (N.D. Ala. 2004), *aff'd*, 470 F.3d 1350 (11th Cir. 2006) (following *Totten*).

20. *Totten*, 380 F.3d at 492 (quoting Brief for Respondent Envirovac, Inc., at 9 (No. 03-7128)).

21. *Id.* at 498-99.

22. 471 F.3d 610 (6th Cir. 2006); *see, e.g.*, United States *ex rel.* Crews v. NCS Healthcare of Ill., Inc., 460 F.3d 853, 856 n.1 (7th Cir. 2006) (requiring presentment only for subsection (a)(1)).

23. 471 F.3d at 616.

24. *Id.* at 622.

25. *See* SYLVIA, *supra* note 1, app. D.

26. This criticism of the FCA comes from multiple perspectives. *See, e.g.*, Dayna Bowen Matthew, *An Economic Model To Analyze the Impact of False Claims Act Cases on Access to Healthcare for the Elderly, Disabled, Rural, and Inner-City Poor*, 27 AM. J.L. & MED. 439, 443

The *Hopper* court and its followers sought to protect defendants who did not know they were breaking federal laws or regulations, while the *Totten* court sought to protect defendants who did not know they were associating with the federal government.

The courts rejecting implied certification often voice a fear of imposing liability on unknowing parties. For example, in *United States ex rel. Joslin v. Community Home Health of Maryland, Inc.*, the court argued that the implied certification theory would allow FCA liability "regardless of whether the submitting party is aware of its non-compliance."[27] In response to the *Joslin* court's fear, the *Shaw* court went out of its way to expressly state that FCA liability under the implied certification theory "requires that the contractor knew, or recklessly disregarded a risk, that its implied certification of compliance was false."[28] The *Hopper* court evidenced a similar concern when it argued that implied certification imposes liability on unknowing parties in a way that "misinterprets the breadth of the Act" in part because "the heart of fraud is an intentional misrepresentation."[29]

The *Totten* court's discussion of the presentment requirement similarly demonstrates a fear of imposing liability on unsuspecting defendants, although in the presentment context the concern is for defendants who did not know they were fraudulently interacting with the federal government, and not for defendants who did not know the federal law or regulation. The court argued that not imposing a presentment requirement raises "complicated questions in applying the statute's scienter requirement" because "if the claimant has told the grantee pertinent facts that would, in the absence of such disclosure, make a claim fraudulent, it seems that the claimant has not 'knowingly' presented a false claim *to the grantee*."[30] In other words, the court feared that not requiring presentment would impose liability on undeserving defendants by removing the protection of the government knowledge defense, which provides that

(2001); Franklin Hoke, *Novel Application of Federal Law to Scientific Fraud Worries Universities and Reinvigorates Whistleblowers*, SCIENTIST, Sept. 4, 1995, at 1.

27. 984 F. Supp. 374, 383-84 (D. Md. 1997).

28. Shaw v. AAA Eng'g & Drafting, Inc., 213 F.3d 519, 533 (10th Cir. 2000).

29. United States *ex rel.* Hopper v. Anton, 91 F.3d 1261, 1266-67 (9th Cir. 1996) (quoting X Corp. v. Doe, 816 F. Supp. 1086, 1093 (E.D. Va. 1993)).

30. United States *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 496-97 (D.C. Cir. 2004) (citing United States *ex rel.* Durcholz v. FKW Inc., 189 F.3d 542, 545 (7th Cir. 1999) (reaffirming that government knowledge of a defendant's action precludes FCA liability)).

government knowledge of a defendant's practice makes it impossible for the defendant to meet the scienter requirement for FCA liability.[31]

B. The Effect of the Recent Interpretations

The *Hopper* and *Totten* approaches both have the effect of imposing an additional scienter element. These additional elements, however, are at best imperfect solutions for alleviating the courts' fear of imposing liability on unsuspecting entities.

In the implied certification context, the *Hopper* court required express certification to prevent liability for unknowing defendants. The implied certification theory, however, does not eliminate the scienter requirement and expose the unsuspecting to liability. On the contrary, certification—express or implied—relates to the requirement that there be a false claim, not the requirement that there be knowledge that the claim was false.[32] In other words, a plaintiff must prove knowledge, or scienter, for falsity, even if he proves express certification.[33] *Hopper*'s requirement of express certification, therefore, adds another scienter element: it forces plaintiffs to prove both that the defendant knew he violated a federal law or regulation (normal scienter) *and* that the defendant evidenced his own knowledge by expressly stating that he knew he violated a federal law or regulation (express certification).

Requiring express certification, however, does not make FCA liability coextensive with knowing fraud. The requirement both fails to alleviate the courts' fear of imposing liability on unsuspecting entities and protects knowing defendants from liability. In practice, focusing on express certification obscures the real scienter requirement. While the addition of an express certification requirement in theory does not vitiate, and rather adds to, the regular requirement of scienter,[34] courts have replaced a scienter inquiry with an

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31. *E.g.*, United States *ex rel.* Costner v. United States, 317 F.3d 883 (8th Cir. 2003); United States *ex rel.* Becker v. Westinghouse Savannah River Co., 305 F.3d 284 (4th Cir. 2002); United States *ex rel.* Durcholz v. FKW Inc., 189 F.3d 542, 543-45 (7th Cir. 1999); United States *ex rel.* Butler v. Hughes Helicopters, Inc., 71 F.3d 321, 328 (9th Cir. 1995); United States *ex rel.* Hagood v. Sonoma County Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991).

32. *Shaw*, 213 F.3d at 533; SYLVIA, *supra* note 1, § 4:43; *see also* SECTION OF PUB. CONTRACT LAW, AM. BAR. ASS'N, QUI TAM LITIGATION UNDER THE FALSE CLAIMS ACT 16-20 (2d ed. 1999).

33. *E.g.*, United States *ex rel.* Fallon v. Accudyne Corp., 880 F. Supp. 636, 638 (W.D. Wis. 1995); *see also* James B. Helmer, Jr., & Robert M. Rice, *The False Claims Act and Implied Certification: An Overview*, 34 FALSE CLAIMS ACT & QUI TAM Q. REV. 51, 51 (2004).

34. *See, e.g.*, United States *ex rel.* Hendow v. Univ. of Phoenix, 461 F.3d 1166, 1171-72 (9th Cir. 2006) (distinguishing among "false claim" and scienter requirements).

express certification inquiry, based on a variation of the widely accepted legal fiction that a submitted form evidences knowledge.[35] This tendency has the counterproductive effect, especially from the point of view of the *Hopper* court, of weakening the FCA's built-in scienter protection because defendants who expressly certify do not necessarily have the requisite scienter in the context of the multiple complexities of regulations and the generalities of certification.[36]

Furthermore, the express certification requirement protects some defendants who know they are breaking federal law or regulations in their claims for payment because those who omit certifications from their claims do not necessarily lack scienter. In fact, an express certification requirement encourages defendants not to certify anything unless absolutely necessary and encourages the government to require express certifications of every potential regulation at issue. A battle of forms or a lengthy unworkable claim submission form seems the inevitable result.[37]

In the presentment context, the *Totten* court requires presentment to protect from liability those defendants who did not know that they were interacting with the government and that, consequently, their cooperation with the grantee would not prevent fraud liability. The FCA, however, does not require plaintiffs to prove that the defendant knew he was defrauding the government.[38] The presentment requirement in *Totten*, therefore, adds an additional scienter element in that it forces a plaintiff to show both that the defendant knowingly submitted a claim and that he knowingly submitted it *to the government*. The Sixth Circuit recognized that presentment constitutes an additional requirement when it commented that "[e]vidence of presentment of a false claim is highly relevant to establishing the requisite intent" for FCA liability and that "[its] ruling here determines only that presentment evidence is not required" for FCA liability.[39]

Requiring presentment, however, does not make knowledge of defrauding the government coextensive with FCA liability: the requirement both fails to

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35. *E.g.*, United States v. Hibbs, 586 F.2d 347, 349-50 (3d Cir. 1977) (forsaking discussion of scienter after mentioning submission of certifications); *Fallon*, 880 F. Supp. at 638 (imposing liability for an express certification that the work was performed in accordance with applicable environmental laws).

36. *Fallon*, 880 F. Supp. at 638.

37. A longer list also undermines the legal fiction that an express certification evidences knowledge.

38. Application of the scienter standard to the "to the government" element is not even required in the criminal version of the FCA. *E.g.*, United States v. Gumbs, 283 F.3d 128, 131 (3d Cir. 2002); United States v. Wright, 988 F.2d 1036, 1038 (10th Cir. 1993).

39. United States *ex rel.* Sanders v. Allison Engine Co., 471 F.3d 610, 622 (6th Cir. 2006).

alleviate the courts' concern of imposing liability on unsuspecting defendants and protects defendants who knowingly defrauded the federal government. First, *Totten*'s presentment requirement does not protect all unsuspecting defendants because the court allows liability in cases of indirect presentment, which occurs when "the Government—again, upon presentment of the claim [by the grantee]—reimburses the grantee for funds that the grantee has already disbursed to the claimant."[40] It is still possible, therefore, for a defendant not to know he is subject to FCA liability because he only interacts with the grantee.[41] The presentment requirement only protects those defendants who interact with the grantee after the grantee has interacted with the government *for the last time*. It presumes that defendants will be aware of government involvement if the grantee and the government are continuing to interact.

Second, the presentment requirement protects some defendants who were knowingly trying to defraud the government.[42] Those who do not present to the federal government but rather only interact with a federal grantee who has already interacted with the government for the last time often do have knowledge that they are defrauding federal funds. It is hard to imagine that Medicaid-funded hospitals, school districts, and even government contractors do not know they are claiming government funds solely because their grantee is no longer interacting with the federal government.

By adding these additional elements, courts are contributing to more false positives—imposing liability on unsuspecting defendants—and false negatives—protecting knowing defendants—regarding FCA liability. In addition to creating uncertainty in the law and impeding legitimate fraud recovery, this imperfection undermines the courts' laudable goal of not subjecting unsuspecting entities to FCA liability.

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40. United States *ex rel.* Totten v. Bombardier Corp., 380 F.3d 488, 493 (D.C. Cir. 2004).

41. United States *ex rel.* Tyson v. Amerigroup Ill., Inc., No. 02-C-6074, 2005 WL 2667207, at *1 (N.D. Ill. Oct. 17, 2005).

42. *See* John T. Boese, *Court Limits False Claims Liability in Cases Involving Federal Grantees*, LEGAL BACKGROUNDER, Jan. 14, 2005, at 1, 4, *available at* http://www.wlf.org/upload/011405LBBoese.pdf ("Because federal grantees disburse significant amounts of money under block grants and other federal programs without directly passing contractors' claims on to the federal government, the ramifications of this decision [*Totten*] are potentially enormous.").

III. THE STATUTORY SCIENTER REQUIREMENT

The statutory scienter standard is more normatively appealing than the *Hopper* and *Totten* courts' well-intentioned interpretations for several reasons.[43] First, the statutory scienter standard does not suffer from the flaw of the courts' interpretations—overprotecting undeserving defendants—yet nonetheless succeeds in protecting many unsuspecting defendants because it directly addresses the possibility of punishing the unsuspecting. By creating additional elements that are only imperfectly correlated with knowledge, the express certification and presentment requirements protect defendants who are cunning or fortunate enough not to expressly certify compliance or to interact only with Amtrak-like federal grantees. The statutory scienter standard, however, already protects those defendants who lack knowledge of federal law, which, at least in theory, alleviates the concern of the *Hopper* court.[44]

Furthermore, the statutory "knowing" standard provides a better framework for alleviating the courts' concern of imposing liability on unsuspecting defendants. Courts have evolved defenses, such as the government knowledge defense, within the statutory scienter framework to fill in any gaps in the protection of unsuspecting defendants that emerge when the scienter standard is implemented in practice. This defense could be extended through the grantee to the party who interacted with the grantee. The grantee, after all, is the deserving defendant because he ultimately approved of the actions that defrauded the government.

The statutory scienter framework also can accommodate two additional reforms that could better alleviate the *Hopper* and *Totten* courts' concerns. First, courts could modify the way they use certification—express or implied—to analyze the scienter element. Currently, courts often appear to presume knowledge if the defendant expressly certifies compliance.[45] A better approach would be to recognize that express certification only evidences scienter when it is highly specific. The evidentiary value of certification for scienter is best represented as a spectrum with at least three categories: specific express certification, which is the clearest case; general express certification, which is an intermediate category; and implied certification, which is of little value in proving scienter. Nuanced recognition of this interaction between scienter and certification would both help courts to recognize the independence of the two

43. *See supra* note 5 and accompanying text.

44. While the statutory scienter framework does not already address the *Totten* court's concern, it can easily incorporate a better solution for alleviating it, as this Part argues.

45. *See supra* Part II.

as elements—that acceptance of the implied certification theory need not mean that courts do not require scienter—and to analyze more realistically the relevance of certification for scienter. Second, courts could interpret the scienter requirement of the FCA like a criminal mens rea requirement and apply it to all of the important elements of FCA liability. This move would allow courts to require that a defendant know that he is making the false claim "to the Government" or requesting payment "by the Government,"[46] and would thus alleviate the *Totten* courts' concerns without generating the inaccuracies of the presentment requirement. It is also consistent with the Supreme Court's view that the civil FCA is "essentially punitive in nature."[47]

CONCLUSION

The FCA has served to combat fraud for over a century. The legislature,[48] the executive branch,[49] and the courts[50] have adapted it to fit the changing needs of the nation, including peacetime fraud, growing government programs, and corporate executives' fraudulent behavior. Many of these changes, such as the 1986 amendment to the scienter standard and the government knowledge defense, were necessary to punish the deserving and protect the unsuspecting.

The two recent modifications imposed by the courts in *Hopper* and *Totten*, however, do not achieve their goal of preventing the imposition of liability on unsuspecting entities. Instead, these interpretations needlessly complicate and undermine fraud recovery by in effect imposing additional scienter requirements. More importantly, the courts' concerns are already partly alleviated by the statutory scienter standard and its development in the courts and can be further addressed by reforms within the statutory framework.

Ironically, the courts' interpretations may stifle the very reforms that would best achieve their goal as defendants' counsel direct their resources to *Hopper*

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46. 31 U.S.C. § 3729(a) (2000). Of course, this interpretation is inconsistent with the interpretation of the criminal False Claims Act. *See supra* note 38.

47. Vermont Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 784 (2000).

48. *Confirmation Hearing on the Nomination of Judge John G. Roberts, Jr. To Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 320 (2005) (recording a question by Sen. Grassley regarding *Totten*).

49. Memorandum from Eric H. Holder, Jr., Dep. Att'y Gen., to All U.S. Attorneys, Guidance on the Use of the False Claims Act in Civil Health Care Matters (June 3, 1998), *reprinted in* 14 FALSE CLAIMS ACT & QUI TAM Q. REV. 41-45 (1998).

50. SYLVIA, *supra* note 1.

and *Totten* arguments that in the end are ineffective protections.[51] These courts' rulings to protect unknowing defendants will likely prevent defendants and courts from knowing the best way to achieve that goal.

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51. *E.g.*, Boese, *supra* note 42, at 4; Susan C. Levy, Daniel J. Winters & Aaron M. Forester, *Getting Sued for False Statements You Never Made: The Use of the Implied Certification Theory in FCA Cases*, FOR THE DEFENSE, Sept. 2007, at 24, 48, *available at* http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C1837%5CFTD_0907_LevyWintersForester.pdf; *see also* Mark Labaton, *Whistle Stop: A Split Among Federal Courts Means that Chief Justice Roberts May Have an Opportunity To Revisit His 2004 Decision Limiting Whistle Blower Suits*, L.A. LAW., July/Aug. 2006, at 25.