

TABLE OF CONTENTS

CHAPTER 1

Scope and Introduction

§ 1.01	Introduction	1-1
§ 1.02	Significant Monetary Recoveries in Civil and Criminal Actions	1-3
§ 1.03	Debarment and Exclusion under the FCA	1-11
	[1] Debarment	1-11
	[2] Exclusion	1-12
§ 1.04	Criminal Imprisonment	1-13
§ 1.05	Penalties	1-15
§ 1.06	Relator's Recovery	1-16

CHAPTER 2

History of the False Claims Act

§ 2.01	An Overview of the FCA	2-3
§ 2.02	A Historical Perspective of the Informer's Role	2-5
§ 2.03	Why History Is Important	2-8
§ 2.04	Lincoln's Law	2-10
	[1] The Statute	2-10
	[2] Why It Passed	2-15
	[a] Historical Criticisms	2-16
	[b] Significant Decisions	2-17
	[c] Frequency of Filings	2-18
	[3] <i>Mens Rea</i>	2-19
	[4] Penalties and Damages	2-19
	[5] Relator Recovery	2-20
	[6] Statute of Limitations	2-21
	[7] Burden of Proof	2-22
§ 2.05	1943 Amendments	2-23
	[1] The Statute	2-23

FEDERAL FALSE CLAIMS ACT

	[2]	Why It Passed	2-27
		[a] Historical Criticisms	2-27
		[b] Significant Decisions	2-31
		[c] Frequency of Filings	2-32
	[3]	<i>Mens Rea</i>	2-32
	[4]	Statutory Amendments	2-32
		[a] Government Knowledge Bar	2-32
		[b] Penalties and Damages	2-33
		[c] Relator Recovery	2-34
		[d] Statute of Limitations	2-34
		[e] Burden of Proof	2-34
§ 2.06	1986	Amendments	2-35
	[1]	The Statute	2-35
	[2]	Why It Passed	2-37
		[a] Historical Criticisms	2-38
		[i] Increase in Fraud	2-38
		[ii] Difficulty in Detecting Fraud	2-39
		[iii] Infrequency of Reporting	2-40
		[iv] Inadequate Investigative Tools	2-41
		[b] Significant Decisions	2-42
		[i] Actual Knowledge and Corporate Blindness	2-42
		[ii] Burden of Proof	2-43
		[iii] Government Knowledge Bar	2-45
		[c] Frequency of Filings	2-45
	[3]	<i>Mens Rea</i>	2-45
	[4]	Statutory Amendments	2-46
		[a] Public Disclosure Bar	2-46
		[b] Whistleblower Protections	2-46
		[c] Penalties and Damages	2-47
		[i] Civil	2-47
		[ii] Criminal	2-47
		[d] Relator Recovery	2-48
		[e] Attorney's Fees	2-50
		[f] Statute of Limitations	2-50
		[g] Burden of Proof	2-51
		[h] Civil Investigative Demands	2-51
		[i] Conclusion	2-53
§ 2.07	2009	FERA Amendments	2-54
	[1]	The Statute	2-54
	[2]	Why It Passed	2-57
	[3]	Statutory Amendments	2-58
		[a] Subcontractor Liability	2-58
		[b] Retroactivity	2-59
		[c] Materiality	2-62

TABLE OF CONTENTS

xxi

	[d] Conspiracy	2-62
	[e] Overpayments	2-63
	[f] Relief from Retaliatory Actions	2-63
	[g] Relation Back Doctrine and Statute of Limitations	2-64
	[h] Civil Investigative Demands	2-65
§ 2.08	The Patient Protection and Affordable Care Act and The Health Care and Education Reconciliation Act of 2010	2-67
	[1] Anti-Kickback Statute	2-67
	[2] Public Disclosure Bar and Original Source	2-67
	[a] Public Disclosure Bar	2-68
	[i] State, Local, and Private Party Proceedings	2-68
	[ii] Government Opposition to Dismissal	2-69
	[b] Original Source	2-69
	[3] Overpayments	2-69
§ 2.09	Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010	2-71
§ 2.10	Relators' Experiences	2-72

CHAPTER 3

Causes of Action

§ 3.01	Introduction	3-2
§ 3.02	What is a "Claim"	3-5
§ 3.03	Actionable Conduct under the FCA	3-10
	[1] Presentment Claims: Section 3729(a)(1)(A)	3-11
	[2] False Record or False Statement Claims: Section 3729(a)(1)(B)	3-13
	[a] Elements	3-15
	[b] Pleading and Proof Requirements	3-17
	[c] Damages	3-17
	[i] No Actual Damages Required	3-17
	[ii] No Multiple Recovery	3-19
	[3] Conspiracy Claims: Section 3729(a)(1)(C)	3-20
	[a] Elements	3-22
	[b] Pleading and Proof Requirements	3-23

FEDERAL FALSE CLAIMS ACT

	[c] Damages	3-24
	[d] Statute of Limitations	3-25
	[e] Intracorporate Conspiracy Doctrine	3-25
[4]	Delivery of Less Property Claims:	
	Section 3729(a)(1)(D)	3-28
	[a] Elements	3-28
	[b] Pleading and Proof Requirements	3-29
[5]	False Receipts Claims:	
	Section 3729(a)(1)(E)	3-30
	[a] Elements	3-31
	[b] Pleading and Proof Requirements	3-31
[6]	False Purchase Claims:	
	Section 3729(a)(1)(F)	3-31
	[a] Elements	3-32
	[b] Pleading and Proof Requirements	3-32
[7]	Reverse False Claims:	
	Section 3729(a)(1)(G)	3-32
	[a] Elements	3-33
	[b] Pleading and Proof Requirements	3-33
	[c] Damages	3-41
§ 3.04	Perspectives	3-43
	[1] Relator Perspective	3-43
	[2] Defendant Perspective	3-44
	[3] Government Perspective	3-45
	[4] Judicial Perspective	3-46
	[5] Current Thoughts	3-47

CHAPTER 4**Elements and Defenses**

§ 4.01	Introduction	4-2
§ 4.02	Falsity	4-3
	[1] Theories of Falsity	4-4
	[a] Factual Falsity (Facially False Claims)	4-6
	[b] Legal Falsity (False Certification Theory)	4-7
	[i] Express False Certification Theory	4-9
	[ii] Implied False Certification Theory	4-11
	[c] Fraudulent Inducement (Promissory Fraud)	4-19

TABLE OF CONTENTS

xxiii

	[d] <i>Per Se</i> False Claims (Inherently False Claims)	4-23
	[2] The Role of Conditions of Payment v. Conditions of Participation	4-24
§ 4.03	Mental State (Scienter)	4-28
	[1] No Specific Intent Requirement	4-29
	[2] Knowledge of Falsity	4-31
	[a] Actual Knowledge	4-33
	[b] Deliberate Ignorance	4-34
	[c] Reckless Disregard	4-34
	[d] Negligence is Insufficient	4-38
§ 4.04	Materiality	4-40
	[1] The Pre-2009 and Pre-Escobar Materiality Standard	4-41
	[a] Claim Materiality	4-41
	[b] Outcome Materiality (“Actual Effect” Test)	4-42
	[c] The “Natural Tendency” Test	4-43
	[d] Statutory “Natural Tendency” Test	4-45
	[2] <i>Escobar</i> Materiality Standard	4-47
§ 4.05	Causation	4-55
§ 4.06	Defenses	4-59
	[1] Defenses to Falsity	4-59
	[a] Objective Falsehood	4-59
	[2] Defenses to Scienter and Materiality	4-61
	[a] The “Government Knowledge” Defenses	4-61
	[i] “Government Knowledge” Bar	4-62
	[ii] “Government Knowledge Inference” (“Government Acquiescence Inference”) Defense	4-63
	[iii] “Government Knowledge” Materiality Defense	4-69
	[b] Ambiguity	4-71
	[c] Reliance on Advice and Agency Guidance Documents	4-75
§ 4.07	Perspectives	4-79
	[1] Relator Perspective	4-79
	[2] Defendant Perspective	4-81
	[3] Government Perspective	4-83
	[4] Judicial Perspective	4-85
	[5] Current Thoughts	4-86

FEDERAL FALSE CLAIMS ACT

CHAPTER 5

Healthcare Fraud Cases Under the FCA

§ 5.01	Introduction	5-4
§ 5.02	Fraudulent Billing	5-7
	[1] Treatment Issues	5-7
	[a] Total Neglect or No Services Provided	5-7
	[b] Worthless Services	5-9
	[c] Inadequate Services	5-12
	[d] Standard of Care	5-14
	[e] Unnecessary Treatment	5-17
	[f] Hospice Care	5-21
	[g] Skilled Nursing Facilities	5-24
	[h] Hospital Admission: Observation and Inpatient Status	5-24.1
	[2] Misrepresentation of Credentials	5-24.2
	[3] Upcoding or Improper Coding of Goods and Services	5-26
	[4] Bundling and Unbundling Procedures	5-32
	[5] Misrepresentation of Patient Population Data	5-34
	[6] Retention of Overpayments	5-34
	[7] Items Obtained at No Cost	5-35
	[8] Medicare Advantage	5-36
§ 5.03	Kickbacks and Self-Referrals	5-38
	[1] Anti-Kickback Statute	5-38
	[a] Scienter	5-42
	[b] Pharmaceutical Benefit Managers	5-44
	[c] Performance-Based Discounts	5-45
	[d] Healthcare Provider Acquiring Medical Practice in Violation of AKS	5-46
	[e] Government and Industry Guidelines on Remuneration	5-47
	[i] Statutory Definitions and “One Purpose Test”	5-47
	[ii] OIG’s Perspective: Risky Behaviors	5-50
	[iii] Applicable Industry Standards	5-58
	[iv] Safe Harbor Provisions	5-63
	[v] Problematic Remuneration Analysis	5-67
	[f] Swapping Arrangements	5-70

TABLE OF CONTENTS

xxv

	[g] Debt Forgiveness	5-70.1
	[h] What Is a Referral?	5-70.1
[2]	Self-Referrals	5-70.2
	[a] Refund Obligation	5-70.6
	[b] Self-Disclosure Protocol	5-70.6
	[c] Physician-Owned Hospitals	5-70.7
	[d] Referral Tracking of Physicians Under Compensation Arrangements	5-70.7
	[e] Stark Law Exceptions	5-70.8
	[i] In-office Ancillary Services	5-70.8
	[ii] Bona Fide Employment Relationship	5-70.9
	[iii] Fair Market Value Compensation and Personal Service Arrangements	5-70.9
	[iv] Non-monetary Compensation	5-70.11
	[v] Academic Medical Center Exception	5-70.11
§ 5.04	Best Price	5-70.14
	[1] Definition of Best Price	5-70.14
	[2] Key Players	5-70.15
	[3] Calculation of the “Best Price”	5-70.15
	[a] Calculation of the Basic Rebate	5-70.15
	[b] Calculation of Any Additional Rebate	5-70.20
	[c] Calculation of the Unit Rebate Amount	5-70.20
	[4] The Role of “Best Price” in Defrauding the Government	5-70.21
	[4A] “Usual and Customary Price” Fraud	5-70.23
	[5] New Best Price Calculations—Average Sale Price	5-70.24
	[a] Single Source Drugs	5-71
	[b] Multiple Source Drugs	5-72
§ 5.05	Best Value: Capital Medical Equipment	5-75
	[1] Background	5-75
	[2] Manufacturer’s Failure to Provide Accurate Pricing Information	5-76
	[3] Manufacturer’s Fraud Involving the Coding and Configurations System	5-77
§ 5.06	Off-Label Marketing	5-78
	[1] Medicare and Medicaid Off-Label Drug Reimbursement	5-80
	[a] Drug Coverage under Medicare	5-80

FEDERAL FALSE CLAIMS ACT

	[b] Drug Coverage under Medicaid	5-81
	[i] Medically Accepted Indication.	5-82
	[ii] State Drug Formularies.	5-84
	[iii] Prior Authorization	5-85
	[2] FDA Regulation of Prescription Drugs.	5-86
	[3] Misbranding of Prescription Drugs	5-88
	[4] FDA Regulation of Manufacturers’ Marketing of Prescription Drugs.	5-89
	[a] 1996 FDA Guidances on Reference Texts and Reprints	5-90
	[b] 2009 FDA Guidance on Good Reprint Practices	5-91
	[c] 1997 FDA Guidance on Manufacturer Support of CME Activities.	5-92
	[d] Food and Drug Administration Modernization Act.	5-93
	[e] 2008 FDA Draft Guidance on Good Reprint Practices	5-94
	[f] Pharmaceutical Companies’ Defense of Off-Label Promotion	5-95
	[g] Adverse Event Reporting	5-98
§ 5.06A	Fraud on the FDA or Formulary Committees	5-99
	[1] “Fraud on the FDA” Theory	5-99
	[2] “Fraud on the Formulary Committee” Theory.	5-102
§ 5.07	Submission of Claims for Defective Medical Devices	5-102.1
	[1] Federal and State Laws Require Medical Devices to Be Safe, Reliable, and Effective	5-102.1
	[2] Defective Medical Equipment Fraudulently Inflates Medicare and Other Federal- and State-Funded Health Program Reimbursements	5-104
§ 5.07A	Privacy Concerns in Healthcare Fraud Cases	5-105
	[1] Privacy Regulations Under the Health Insurance Portability and Accountability Act of 1996 (HIPAA)	5-105
	[2] HIPAA Concerns in <i>Qui Tam</i> Cases.	5-105
	[3] <i>Qui Tam</i> Suits Based on HIPAA Violations	5-107
§ 5.07B	Manufacturing Standards	5-108
	[1] Current Good Manufacturing Practices (cGMPs)	5-108

TABLE OF CONTENTS

xxvii

	[2] Adulterated Drug Prohibition.	5-108
	[3] <i>Qui Tam</i> Cases Involving Manufacturing Standards	5-109
§ 5.08	Perspectives	5-112
	[1] Relator Perspective.	5-112
	[a] Uncertain Government Participation	5-112
	[b] Most Winnable Fraud Allegations	5-112
	[c] Medicaid and Medicare Off-Label Drug Reimbursement	5-113
	[d] Off-Label Marketing and FCA Violations	5-115
	[e] Pharmaceutical Anti-Kickback Statute Violations and FCA Liability	5-118
	[f] Pharmaceutical Compendia and Off-Label Marketing	5-120
	[2] Defendant Perspective	5-121
	[3] Government Perspective.	5-123
	[4] Judicial Perspective	5-124
	[5] Current Thoughts	5-124

CHAPTER 6

Other Kinds of Fraud Cases Under the FCA

§ 6.01	Government Procurement Fraud.	6-2
	[1] Generally.	6-2
	[2] Defense Industry.	6-5
	[a] History of FCA Enforcement	6-5
	[b] Decline in FCA Cases.	6-5
	[c] Current Enforcement	6-6
	[i] False Product Information Cases	6-6
	[ii] Mischarge Cases	6-9
	[iii] Federal Acquisition Regulation.	6-14
	[3] Small Business	6-16
	[4] Military Healthcare.	6-18
§ 6.02	Environmental Regulation.	6-19
	[1] Problems in Enforcing Environmental Regulations and Private Lawsuit Limitations	6-19
	[2] Government Contract Fraud and Environmental Law Violations	6-19
§ 6.03	Financial Services Industry.	6-23

	[1] Loan Application Fraud	6-23
	[2] Effect of FERA Amendments	6-24
	[3] Mortgage Fraud	6-25
§ 6.04	Oil, Gas, and Mining	6-27
§ 6.05	Scientific Research	6-30
§ 6.06	Education Fraud	6-35
§ 6.07	U.S. Customs Duties	6-39
§ 6.08	Prevailing Wage Laws and the False Claims Act	6-40
§ 6.08A	Immigration and Visa Fraud	6-43
	[1] Generally	6-43
	[2] Theories of Liability	6-43
	[a] Reverse False Claims	6-43
	[b] Express False Certification	6-44
	[c] Implied False Certification	6-44
§ 6.09	Perspectives	6-46
	[1] Relator Perspective	6-46
	[2] Defendant Perspective	6-46
	[3] Government Perspective	6-48
	[4] Judicial Perspective	6-48
	[5] Current Thoughts	6-48

CHAPTER 7

Protection from Retaliation

§ 7.01	Overview of a Cause of Action	7-2
§ 7.02	“Any Employee” Defined	7-8
	[1] Employees Responsible for Investigating Fraud	7-8
	[2] Independent Contractors	7-9
	[a] Found to Be an Employee	7-11
	[b] Found to Be an Independent Contractor	7-11
	[3] Federal Government Employees	7-12
	[4] State Government Employees	7-13
	[5] Local Government Employees	7-14
	[6] School Board Employees	7-14.1
§ 7.03	“Discriminated Against” Defined (Adverse Employment Action)	7-15
§ 7.04	“Employer” Defined	7-20
	[1] General Construction of “Employer”	7-21
	[2] Corporate Shield Exception	7-22
	[3] Government Employers	7-23
	[4] Post-FERA Issues	7-24
§ 7.05	Protected Activity: Lawful Actions “in Furtherance of” an FCA Claim	7-26

TABLE OF CONTENTS

xxix

	[1] Protected Activity: Circuit Court Views . . .	7-26
	[a] Investigation That Reasonably Could Lead to a Viable FCA Action	7-28.1
	[b] Litigation Is a Distinct Possibility . . .	7-30
	[c] Combination Test.	7-32
	[d] Good Faith and Objectively Reasonable Belief	7-33
	[2] Relator Did Not Engage in Protected Activity.	7-35
	[3] Examples of Protected Activity.	7-41
§ 7.05A	Evidence, Burdens of Proof, and Causation	7-43
	[1] Initial Burden of Proof.	7-43
	[2] Shifting Burdens Once a <i>Prima Facie</i> Case for Retaliation is Made.	7-43
	[3] Evidence of Pretext	7-45
	[4] Causation.	7-46
§ 7.06	Employer Knowledge Prerequisite.	7-50
	[1] Two-Pronged Approach	7-50
	[a] Employer Knowledge	7-50
	[i] Informing Employer of “Fraudulent and Illegal” Activity	7-51
	[ii] Performing Duties Outside Normal Job Responsibilities.	7-52.2
	[iii] “Cat’s Paw” Theory of Employer Knowledge	7-52.3
	[b] Retaliation Motivated by Employee Engaging in Protected Activity.	7-52.6
	[2] Employees Responsible for Investigating Fraud.	7-54
§ 7.07	Damages	7-58
	[1] Double Back Pay	7-58
	[2] Other Damages.	7-59
	[a] Damages for Emotional Distress.	7-59
	[b] Special Damages	7-61
	[c] Loss of <i>Qui Tam</i> Damages.	7-62
	[3] Limits on Recovery: After-Acquired Evidence	7-62.1
	[4] Mitigating Damages	7-62.3
§ 7.08	Preliminary Injunctive Relief	7-63
§ 7.09	Statute of Limitations	7-64
§ 7.10	Perspectives	7-71
	[1] Relator Perspective.	7-71
	[2] Defendant Perspective	7-73
	[3] Government Perspective.	7-75

[4] Judicial Perspective	7-75
[5] Current Thoughts	7-75

CHAPTER 8

Jurisdiction, Venue, and Other Threshold Issues

§ 8.01	Jurisdiction and Venue Generally	8-3
§ 8.02	Federal Court Proceedings	8-4
	[1] Personal Jurisdiction	8-4
	[2] Subject Matter Jurisdiction	8-7
	[3] Supplemental Jurisdiction over State Law Claims	8-8
	[a] Common Law Claims	8-10
	[b] Contract Disputes	8-12
§ 8.03	Multidistrict Litigation	8-14
§ 8.04	State Court Jurisdiction	8-18
	[1] Jurisdiction Over FCA Claims	8-18
	[2] Removal Issues	8-20
	[3] Foreign Corporations Registered to Do Business in a State	8-22
§ 8.05	Concurrent Proceedings	8-24
	[1] Criminal	8-24
	[a] Concurrent Use of Information in Parallel Proceedings	8-25
	[b] <i>Qui Tam</i> Investigation May Forewarn Defendant of Criminal Investigation	8-29
	[c] Collateral Estoppel	8-30
	[2] Bankruptcy	8-32
	[a] Automatic Stay	8-32
	[i] Pecuniary Purpose Test	8-33
	[ii] Public Policy Test	8-35
	[b] Discretionary Stay	8-36
	[c] Relator Bankruptcy	8-37
	[3] Federal Agency Proceedings	8-37
	[a] Rejection of Primary Jurisdiction	8-37
	[b] Exercise of Primary Jurisdiction	8-38.2
§ 8.06	Venue	8-39
	[1] District Court Venue	8-39
	[a] Where Defendant May Be Found	8-39
	[b] Where Defendant Transacts Business	8-40
	[c] Where Defendant Commits Acts	8-41

TABLE OF CONTENTS

xxxii

	[2] Alien Venue Act	8-41
	[3] Transfer of Venue	8-42
	[4] Curing Defective Venue	8-46
	[5] <i>Forum Non Conveniens</i>	8-46
§ 8.07	Other Threshold Issues	8-50
	[1] Service of Process	8-50
	[1A] Statute of Limitations	8-51
	[a] Generally	8-51
	[b] 31 U.S.C. § 3731(b)(1): Six-Year Limitation	8-52
	[i] Date of Submission of Claim	8-53
	[ii] Date Claim Paid	8-54
	[iii] Distinction Based on Whether Damages or Penalties Are Sought	8-54
	[c] 31 U.S.C. § 3731(b)(2): Three-Year Tolling Provision	8-55
	[i] Who Is an Official Charged with Responsibility to Act?	8-56
	[ii] Construction of “Material Facts”	8-59
	[d] The Wartime Suspension of Limitations Act	8-59
	[2] Laches	8-59
	[3] Joinder	8-60
	[3A] Double Jeopardy	8-61
	[3B] Preclusion	8-62
	[a] Collateral Estoppel	8-62
	[b] Res Judicata	8-64
	[4] Alternative Dispute Resolution Procedures	8-66
	[a] Arbitrating FCA Retaliation Claims	8-66
	[b] Arbitrating Other FCA Claims	8-69
	[5] Dual Representation	8-71
	[6] Who Can Be a Relator?	8-72
	[a] Relator Anonymity	8-76
	[b] Survival of Relator’s Rights Upon Death	8-78.1
	[7] Litigation Funding	8-78.2
§ 8.08	Perspectives	8-79
	[1] Relator Perspective	8-79
	[2] Defendant Perspective	8-81
	[3] Government Perspective	8-81
	[4] Judicial Perspective	8-82
	[5] Current Thoughts	8-82

FEDERAL FALSE CLAIMS ACT

CHAPTER 9

Pleadings and Disclosures

§ 9.01	Preparing the Disclosure Statement	9-2
§ 9.02	Filing the Complaint	9-5
	[1] Generally	9-5
	[a] Filing Suit Under Seal	9-5
	[b] Failure to Comply with Seal Requirements	9-8
	[c] Unsealing the Case	9-11
	[2] Consequences of Governmental Intervention	9-16
	[3] Consequences of Nonintervention	9-17
	[a] Generally	9-17
	[b] Proceeding <i>Pro Se</i>	9-19
	[4] Drafting the Complaint	9-21
§ 9.03	Pleadings	9-23
	[1] Subject Matter Jurisdiction	9-23
	[2] Amending the Complaint	9-25
	[a] Generally	9-25
	[b] Relation Back	9-28
	[3] Counterclaims	9-31
	[a] Generally Allowed	9-31
	[b] Restrictions on Counterclaims	9-31
	[i] Indemnity and Contribution	9-31
	[ii] Counterclaims Against the Government	9-33
	[iii] Counterclaims for Independent Damages	9-35
	[iv] Counterclaims Arising Out of Relator's Employment	9-36.2
	[4] Preliminary Injunctions	9-39
	[5] Collateral Estoppel	9-41

CHAPTER 9A

Pretrial Motions and Discovery

§ 9A.01	Discovery	9A-3
	[1] Generally	9A-3
	[2] Discovery Prior to Unsealing the Case	9A-4
	[a] Civil Investigative Demands	9A-4
	[b] Subpoenas	9A-5
	[c] Settlement Documents	9A-6
	[3] Discovery After Unsealing Case	9A-6.1

TABLE OF CONTENTS

xxxiii

[4]	E-Discovery	9A-10
[5]	Sanctions	9A-11
[6]	Jurisdictional Discovery	9A-13
[7]	Privileges	9A-14
	[a] Attorney-Client Privilege and Work Product Doctrine	9A-15
	[i] Attorney-Client Privilege	9A-15
	[ii] Work Product Doctrine	9A-19
	[iii] Discoverability of Relator’s Disclosure Statement	9A-20
	[iv] Common Interest and Joint Prosecution Doctrines	9A-24
	[v] Prior Disclosure to the Government	9A-26
	[vi] Discoverability of Expert Materials	9A-26
	[b] Proprietary and Trade Secret Material	9A-27
	[c] Self-Critical Analysis and Self-Evaluative Privilege	9A-27
	[d] Medical Privileges	9A-29
	[i] Physician-Patient Privilege	9A-29
	[ii] HIPAA	9A-29
	[iii] Peer Review Privilege	9A-29
	[e] Governmental Privileges	9A-30
	[i] State Secrets Privilege	9A-30
	[ii] Deliberative Process Privilege	9A-31
	[iii] Investigative Process and Law Enforcement Privilege	9A-32
	[8] <i>Touhy</i> Regulations	9A-33
	[9] Taking Documents	9A-34.1
§ 9A.02	[Reserved]	9A-38
§ 9A.03	Applicability of Rules 8 and 9(b) to the False Claims Act.	9A-39
§ 9A.04	Level of Particularity Required	9A-43
	[1] Strict Particularity Requirements	9A-43
	[2] Pleading the Details of the Claim	9A-48
	[a] Particular Details Required	9A-49
	[b] Pleading the Scheme without Particular Details	9A-50.1
	[3] Relaxed Particularity Requirements	9A-54
	[a] Numerous or Long-Running Fraudulent Transactions	9A-55

FEDERAL FALSE CLAIMS ACT

	[b] Facts Within Defendant's Knowledge and Control	9A-56
	[c] Specific Personal Knowledge of Billing Practices	9A-57
	[d] Inducement Claims	9A-59
	[4] Statistical Sampling	9A-59
§ 9A.05	Waiver of Rule 9(b) Objection.	9A-60.3
§ 9A.06	Pretrial Motions.	9A-61
	[1] Rule 12 Motions to Dismiss	9A-61
	[a] Generally	9A-61
	[b] Partial Motions to Dismiss	9A-61
	[2] Summary Judgment	9A-62
	[3] Other Motions by a Defendant	9A-62
	[4] Motions by a Relator	9A-62
	[5] Motions by the Government	9A-62.1
	[6] Statements of Interest by the Government	9A-62.1
§ 9A.07	Perspectives.	9A-63
	[1] Relator Perspective.	9A-63
	[2] Defendant Perspective	9A-67
	[3] Government Perspective.	9A-69
	[4] Judicial Perspective	9A-69
	[5] Current Thoughts	9A-70

CHAPTER 9B**Trial and Appellate Issues**

§ 9B.01	Burden of Proof	9B-1
§ 9B.02	Expert Witnesses.	9B-3
	[1] Generally.	9B-3
	[2] Work Product Protection for Expert Witnesses	9B-5
	[3] Attorney-Client Privilege for Expert Witnesses	9B-7
§ 9B.02A	Motions in Limine—Excluding Evidence	9B-8
§ 9B.03	Timeliness of Appeals	9B-10
§ 9B.04	Subpoenas	9B-13
§ 9B.05	Jury Issues.	9B-14
	[1] Collective Knowledge	9B-14
	[2] Juror Bias	9B-14
§ 9B.06	Interlocutory Appeals	9B-16

CHAPTER 10

Pitfalls of Filing Suit

§ 10.01	Tax Bar: 31 U.S.C. § 3729(e)	10-3
§ 10.02	First-to-File Rule: 31 U.S.C. § 3730(b)(5)	10-5
	[1] Multi-claim Complaints	10-11
	[2] Jurisdictional Issues	10-12
	[3] Rule 9(b)'s Role in First-to-File Cases	10-20.1
	[4] Location Considerations	10-20.4
§ 10.03	Members of Armed Forces: 31 U.S.C. § 3730(e)(1)	10-21
§ 10.04	Members of Legislative, Judiciary, or Executive Branches: 31 U.S.C. § 3730(e)(2)	10-23
§ 10.05	Government Action Bar: 31 U.S.C. § 3730(e)(3).	10-25
§ 10.06	Public Disclosure Bar: 31 U.S.C. § 3730(e)(4).	10-28
	[1] Have Allegations or Transactions Been Publicly Disclosed?	10-33
	[a] The Meaning of “Allegations or Transactions”.	10-33
	[b] What Constitutes Public Disclosure	10-37
	[i] Administrative Proceedings	10-37
	[ii] Civil Proceedings	10-43
	[iii] Criminal Proceedings	10-44.2
	[iv] Public Disclosure “In a Congressional, Administrative, or Government Accounting Office Report, Hearing, Audit, or Investigation”	10-45
	[v] Freedom of Information Act and Related Statutes	10-50
	[vi] News Media	10-52
	[vii] Letters	10-55
	[viii] Internal Investigations.	10-56
	[ix] Amended Complaints	10-56
	[x] Subpoenas	10-57
	[xi] Communications with Government Agencies	10-58
	[xii] Corporate Integrity Agreements and Self-Disclosure Protocol	10-59
	[xiii] Industry-wide Fraud	10-59
	[xiv] Medicare and Medicaid Billing Data.	10-60

[2]	Is the <i>Qui Tam</i> Action “Based Upon” Publicly Disclosed Allegations or Transactions?	10-61
[3]	Are the Public Disclosures Substantially the Same as the Allegations or Transactions of the Relator’s Suit?	10-67
§ 10.07	Is the Relator the Original Source? 31 U.S.C. § 3730(e)(4)(B)	10-71
[1]	Direct and Independent Knowledge	10-75
[a]	Direct	10-76.1
[b]	Independent	10-77
[c]	Materially Adds To	10-79
[2]	Voluntarily Provided the Information	10-80
[3]	Additional Requirements	10-82.2
[a]	Sixth Circuit	10-84
[b]	Second Circuit	10-84
[4]	Allegations in the Complaint	10-85
[5]	Can Multiple Relators Be Original Sources?	10-88
[6]	The Effect of Government Intervention	10-89
§ 10.08	Pre-Filing and Post-Filing Release Bar	10-90
§ 10.09	Constitutional Concerns	10-94
[1]	Standing	10-94
[2]	Sovereign Immunity and Eleventh Amendment Immunity	10-96
[3]	Take Care Clause	10-101
[4]	Appointments Clause	10-102
[5]	Other Constitutional Issues	10-103
§ 10.09A	Ethical Concerns	10-104
[1]	State Ethical Rules and Guidance	10-104
[2]	<i>Ex Parte</i> Contact with Represented Persons	10-104
[3]	Fee Agreements	10-104.1
[4]	Breach of Contract with Client	10-104.2
[5]	Tape Recordings	10-104.3
§ 10.10	Perspectives	10-105
[1]	Relator Perspective	10-105
[2]	Defendant Perspective	10-106
[3]	Government Perspective	10-107
[4]	Judicial Perspective	10-107
[5]	Current Thoughts	10-107

CHAPTER 11

FCA Damages and Penalties

§ 11.01	Damages in False Claims Cases Generally	11-2
§ 11.02	Damages for Mischarge and Overcharge Cases	11-5
§ 11.03	Variations of Mischarge and Overcharge Damage Models in Substandard Product and Services Cases	11-8
	[1] Benefit of the Bargain	11-8
	[2] Out of Pocket	11-8.2
	[3] Repair and Replacement Costs	11-8.3
	[4] Entire Amount Expended	11-10
	[5] Government Utilization	11-11
	[6] Failure to Test	11-12
§ 11.04	Damages in False Negotiation Cases	11-14.1
	[1] Bid Rigging Cases	11-14.1
	[2] Defective Pricing Cases	11-15
	[a] Damages for Defective Pricing in Multiple Award Schedule Cases	11-16
	[b] The Truth in Negotiations Act	11-17
	[3] Damages in Kickback Cases	11-18
	[a] Medicare and Medicaid	11-18
	[b] Government Contracting	11-21
	[4] Damages in Fraud in the Inducement Cases	11-21
	[5] Equitable Issues: Void and Voidable Contracts in False Negotiation Cases	11-34
	[a] Recovery Under a Contract Deemed Void <i>Ab Initio</i>	11-34
	[b] Exceptions to Contractor Recovery for Contracts Deemed Void <i>Ab Initio</i>	11-36
	[c] Contracts Deemed Voidable	11-37
§ 11.05	Damages in False Certification Cases	11-39
	[1] Actual Loss Test	11-40
	[2] But For Test	11-41
	[3] Reduction for Amounts Reimbursed or Otherwise Paid to the Government	11-44
§ 11.06	Reverse False Claim Cases	11-46
§ 11.06A	Damages in Small Business Status Misrepresentation Cases	11-46.1
§ 11.07	Additional Damages	11-46.3
	[1] Recovery of Consequential Damages	11-46.3
	[2] Indirect Damage Elements	11-46.3

	[a] Prejudgment Interest	11-46.3
	[b] Investigative Costs	11-46.4
	[c] Credits and Offsets	11-46.5
§ 11.08	Proving Damages	11-46.7
§ 11.09	Reduction of Damages for Voluntary Disclosure; Reduction of the Multiplier	11-46.10
§ 11.09A	Freezing Assets Through Preliminary Injunctions	11-46.12
§ 11.10	Penalties Under the FCA	11-48
	[1] The General Rule	11-48
	[2] Determining the Number of Penalties	11-48
	[3] Determining the Level of Penalties	11-50
§ 11.11	Constitutional Issues Relating to Damages and Penalties	11-53
	[1] Double Jeopardy	11-53
	[2] Excessive Fines	11-54
§ 11.12	Perspectives	11-59
	[1] Relator Perspective	11-59
	[2] Defendant Perspective	11-59
	[3] Government Perspective	11-60
	[4] Judicial Perspective	11-61
	[5] Current Thoughts	11-61

CHAPTER 12

Defending and Preventing Suit

§ 12.01	Introduction	12-2
§ 12.02	Initial Defensive Considerations and Strategies	12-3
	[1] Selecting Counsel	12-3
	[2] Anticipating <i>Qui Tam</i> Suits	12-3
§ 12.03	Conducting an Internal Investigation	12-5
	[1] Overview	12-5
	[2] Procedures for Internal Investigations	12-6
	[a] Special Counsel	12-6
	[b] Written Guidelines and Procedures	12-8
	[c] Witness Interviews	12-8
	[d] Multiple Representation and Joint Defense Options	12-10
	[e] Disclosure of Findings	12-12
	[i] Waiver of Attorney-Client Privilege	12-13
	[ii] Waiver of Qualified Privilege of Work Product	12-14
§ 12.04	The Government's Intervention Decision	12-16

TABLE OF CONTENTS

xxxix

§ 12.05	Pretrial Strategies	12-18
	[1] Motions to Dismiss and for Summary Judgment	12-18
	[2] Discovery Issues	12-20
	[3] Offers of Judgment	12-20
§ 12.06	Parallel Issues in Criminal and Civil Cases	12-20.1
	[1] Search Warrants	12-20.1
	[2] Grand Jury Subpoenas	12-22
	[3] Stays of Litigation	12-25
	[4] Government Interviews	12-26
§ 12.07	Corporate Liability and Knowledge	12-30
	[1] Vicarious Liability	12-30
	[a] Imputing Liability Requires an Intent to Benefit the Employer (Minority View)	12-30
	[b] Liability Does Not Require That the Employee Intends to Benefit the Employer (Majority View)	12-31
	[c] Other Theories	12-32
	[2] Corporate Officers' Liability	12-33
	[3] Imputing Scienter to the Corporation	12-34
	[a] Doctrine of Collective Knowledge	12-35
	[b] Benefit Rule	12-37
	[c] Agency Principles	12-37
	[4] Parent/Subsidiary Liability	12-37
	[a] General Rule: Parent Is Not Liable	12-37
	[b] Exceptions: Parent Is Liable	12-38
	[i] Piercing the Corporate Veil	12-38
	[ii] Integrated Enterprise Test	12-38.3
	[5] Successor Liability	12-38.3
§ 12.07A	Insurance Coverage	12-38.9
§ 12.08	Preventing <i>Qui Tam</i> Suits	12-39
	[1] Organizational Compliance and Ethics Programs	12-39
	[a] Generally	12-39
	[b] Federal Sentencing Guidelines	12-40
	[2] Department of Justice Guidelines on Corporate Compliance	12-43
	[3] Other Compliance Issues	12-46.3
	[4] Mandatory Arbitration	12-46.4
	[5] Employee Releases	12-46.4
§ 12.09	Perspectives	12-47
	[1] Relator Perspective	12-47
	[2] Defendant Perspective	12-47
	[3] Government Perspective	12-49

[4]	Judicial Perspective	12-50
[5]	Current Thoughts	12-50

CHAPTER 13

Settlement, Attorney's Fees, Relator Share, and Dismissal

§ 13.01	Statutory Settlement Requirements: The Rights of Government and the Relator to Object	13-3
[1]	Settlement Must Be "Fair, Adequate, and Reasonable"	13-3
[2]	Relator's Right to Object When Government Intervenes	13-6
[3]	Government's Right to Object if There Was No Previous Intervention	13-7
[a]	Limited Ability to Block Settlement	13-9
[b]	Broad Ability to Block Settlement	13-10
[c]	Unresolved Ability to Block Settlement	13-11
§ 13.02	Calculating the Relator's Share	13-13
[1]	Impact of Settlement Before Trial	13-13
[2]	Impact of Government Intervention	13-14.2
[a]	"Senate Factors"	13-15
[b]	Department of Justice Guidelines	13-16
[c]	If Based on Public Disclosure	13-19
[3]	Effect of Government Nonintervention	13-21
[4]	Effect of Relator Involvement in Wrongdoing	13-21
[5]	When the Government Pursues Alternate Remedies	13-22
[6]	Other Government Attempts to Minimize Relator's Contribution	13-28
[7]	Breach of the Seal	13-30
[8]	Impact of Multiple Relators	13-30.1
§ 13.03	Determining the "Proceeds of the Action"	13-31
[1]	Non-Cash Remedies	13-31
[2]	Actual Recovery	13-32
§ 13.04	Attorney's Fees, Costs, and Expenses	13-34
[1]	Who Owns the Fee?	13-34
[2]	What Constitutes "Reasonable Attorney's Fees"	13-36
[2A]	Fees and Costs for Matters Deemed Unrelated	13-46

TABLE OF CONTENTS

xli

	[2B] Multiple Whistleblowers	13-48
	[3] Apportionment of Attorney’s Fees, Costs, and Expenses Among Multiple Defendants	13-48
	[4] Defendant’s Right to Recover Attorney’s Fees, Costs, and Expenses.	13-48.1
	[a] Costs from the Government	13-48.1
	[b] Attorney’s Fees, Costs, and Expenses from the Relator	13-48.2
	[c] Attorney’s Fees, Costs, and Expenses from the Relator’s Counsel	13-48.9
§ 13.05	Settlement Documents.	13-48.11
	[1] Confidentiality Agreements	13-48.11
	[2] Corporate Integrity Agreements.	13-48.11
§ 13.05A	Defendant’s Inability-to-Pay Claim	13-48.15
	[1] Overview.	13-48.15
	[2] Defendant’s Role	13-48.16
	[3] Government’s Role.	13-48.17
	[4] Relator’s Role.	13-48.18
	[5] Payment Options	13-48.18
§ 13.06	Dischargeability of FCA Settlement Payment in Bankruptcy	13-49
	[1] Debtor Is a Corporation	13-49
	[2] Debtor Is an Individual	13-50
	[a] Substance Over Form of Settlement Agreement	13-50
	[b] What Part of the Debt Is Nondischargeable.	13-51
	[c] Ownership of an FCA Claim	13-52
§ 13.07	Taxes	13-54
	[1] Deductibility of Settlement Payment by Defendant	13-54
	[2] Taxability of Relator’s Share of Recovery. . .	13-55
	[3] Taxability of Contingent Attorney’s Fees Paid from Relator’s Share of Recovery Before 2004	13-57
	[4] Deductibility of Relator’s Contingent Attorney’s Fees for Federal and State FCA Claims, and for Federal and State FCA Retaliation Claims	13-59
§ 13.07A	Statutory Dismissal Requirements: The Rights of the Government versus the Rights of the Relator to Object	13-60
	[1] Standards for Dismissal	13-60

	[2] Rights of the Relator to Object	13-64.1
	[3] Tension Between Relator's Right to Object to Settlement and the Right to Object to Dismissal	13-64.1
§ 13.07B	Alternative Dispute Resolution.	13-64.3
	[1] Arbitration.	13-64.3
	[2] Mediation	13-65
§ 13.07C	Voluntary Dismissal	13-67
§ 13.07D	Bellwether Trials	13-69
§ 13.08	Perspectives.	13-70
	[1] Relator Perspective.	13-70
	[2] Defendant Perspective	13-71
	[3] Government Perspective.	13-72
	[4] Judicial Perspective	13-72
	[5] Current Thoughts	13-73

CHAPTER 14

State and Municipal False Claims Acts and Other Whistleblower Statutes

§ 14.01	Overview of State False Claims Acts	14-2
§ 14.02	The Deficit Reduction Act of 2005 and HHS Review of State FCAs	14-6
	[1] The Deficit Reduction Act of 2005.	14-6
	[2] HHS Review of State FCAs	14-6
	[3] Retroactivity of State FCAs.	14-8
§ 14.03	Liability and Damages Provisions	14-10
§ 14.04	Procedural Issues.	14-17
	[1] Who Can Be a Relator?	14-17
	[1A] Who Can Be a Defendant?	14-20
	[2] Statute of Limitations.	14-20
	[3] Privileges.	14-22
	[4] Anti-SLAPP Statutes	14-23
	[a] Arizona	14-24
	[b] California	14-25
	[c] Texas	14-26
	[5] Other Procedural Issues	14-27
§ 14.05	Jurisdictional Bars to Actions.	14-35
	[1] First to File Bar	14-35
	[2] Public Disclosure Bar.	14-37
§ 14.06	Retaliation	14-40
§ 14.07	Relator's Share	14-44
§ 14.08	Municipal and County False Claims Acts.	14-46.4
	[1] Chicago	14-46.4
	[a] Liability and Damages Provisions	14-46.4

TABLE OF CONTENTS

xliii

	[b] Procedural Issues	14-46.4
	[c] Bars to Actions	14-46.5
	[d] Retaliation	14-47
	[e] Relator’s Share.	14-47
[2]	Philadelphia.	14-47
	[a] Liability and Damages Provisions	14-47
	[b] Procedural Issues	14-48
	[c] Bars to Actions	14-49
	[d] Retaliation	14-49
	[e] Relator’s Share.	14-50
[3]	Miami-Dade County.	14-50
	[a] Liability and Damages Provisions	14-50
	[b] Procedural Issues	14-51
	[c] Bars to Actions	14-51
	[d] Retaliation	14-52
	[e] Relator’s Share.	14-52
[4]	Allegheny County.	14-53
	[a] Liability and Damages Provisions	14-53
	[b] Procedural Issues	14-53
	[c] Bars to Actions	14-53
	[d] Retaliation	14-54
	[e] Relator’s Share.	14-54
§ 14.09	Issues Arising from State and Municipal False Claims Acts.	14-56
	[1] Interpretation of State and Municipal Statutes	14-56
	[2] Constitutional Challenges.	14-56
§ 14.09A	Private Insurance False Claims Acts	14-58.1
	[1] California Insurance Frauds Prevention Act	14-58.1
	[2] Illinois Insurance Claims Fraud Prevention Act	14-58.3
§ 14.10	Perspectives and Summary Tables.	14-59
	[1] Relator Perspective.	14-59
	[2] Defendant Perspective	14-60
	[3] Government Perspective.	14-60
	[4] Judicial Perspective	14-60
	[5] Summary Tables.	14-61

CHAPTER 15

Non-FCA Federal Whistleblower Programs

§ 15.01	Immunity for Whistleblowers Who Disclose Trade Secrets (DTSA).	15-4
	[1] Generally.	15-4

	[2]	Whistleblower Immunity	15-5
		[a] Elements	15-6
	[3]	Perspectives and Criticisms	15-6
§ 15.02		Automotive Industry Whistleblower Program	15-7
	[1]	Generally	15-7
	[2]	Whistleblower Incentive Program	15-7
	[3]	Retaliation Protections	15-8
		[a] Administrative Complaint Procedures	15-9
		[b] Civil Action	15-9
		[c] Remedies	15-9
		[d] Elements of a Claim	15-10
	[4]	Perspectives and Criticisms	15-10
§ 15.03		IRS Whistleblower Program	15-11
	[1]	Generally	15-11
	[2]	Whistleblower Incentive Program	15-12
		[a] Award Requirements	15-12
		[b] Filing a Claim using Form 211	15-13
	[3]	Retaliation Protections	15-15
		[a] Administrative Complaint Procedures	15-15
		[b] Civil Action	15-16
		[c] Remedies	15-16
		[d] Elements of a Claim	15-16
	[4]	Perspectives and Criticisms	15-16
§ 15.04		Banking Industry Whistleblower Program (FIRREA and FIAFEA)	15-18
	[1]	Generally	15-18
	[2]	Whistleblower Incentive Program	15-19
	[3]	Retaliation Protections	15-21
		[a] Administrative Complaint Procedures	15-22
		[b] Civil Action	15-22
		[c] Remedies	15-22
		[d] Elements of a Claim	15-22
	[4]	Perspectives and Criticisms	15-22
§ 15.05		Anti-Money Laundering Whistleblower Program (AM-LA)	15-24
	[1]	Generally	15-24
	[2]	Whistleblower Incentive Program	15-25
	[3]	Retaliation Protections	15-26
		[a] Administrative Complaint Procedures	15-27
		[b] Civil Action	15-27
		[c] Remedies	15-28

TABLE OF CONTENTS

xlv

	[d] Elements of a Claim	15-28
	[4] Perspectives and Criticisms	15-28
§ 15.06	Sarbanes-Oxley: Retaliation Protections	15-29
	[1] Generally	15-29
	[2] No Whistleblower Incentive Program	15-29
	[3] Retaliation Protections	15-29
	[a] Administrative Complaint Procedures	15-32
	[b] Civil Action	15-32
	[c] Remedies	15-33
	[d] Elements of a Claim	15-33
	[4] Perspectives and Criticisms	15-34
§ 15.07	Dodd-Frank Whistleblower Program (SEC and CFTC)	15-35
	[1] Generally	15-35
	[2] Whistleblower Incentive Program	15-35
	[a] Award Requirements	15-35
	[b] Claiming an Award	15-39
	[3] Retaliation Protections	15-39
	[a] Administrative Complaint Procedures	15-41
	[b] Civil Action	15-41
	[c] Remedies	15-41
	[d] Elements of a Claim	15-42
	[3A] Statute of Limitations and First-to-File Issues	15-42
	[3B] Illegal Employment Agreements to Impede Whistleblowing	15-44
	[4] Perspectives and Criticisms	15-45
§ 15.08	OSHA Whistleblower Retaliation Protection Program	15-48
	[1] Generally	15-48
	[2] Retaliation Protections	15-48
	[3] Administrative Complaint Procedures	15-50
	[4] Perspectives and Criticisms	15-50
§ 15.09	Energy Reorganization Act: Retaliation Protections	15-51
	[1] Generally	15-51
	[2] No Whistleblower Incentive Program	15-51
	[3] Retaliation Protections	15-51
	[a] Administrative Complaint Procedures	15-52
	[b] Civil Action	15-52
	[c] Remedies	15-52

FEDERAL FALSE CLAIMS ACT

	[d] Elements of a Claim	15-53
	[i] Prima Facie Burden	15-53
	[ii] Causation	15-55
	[iii] Adverse Employment Action	15-55
	[4] Perspectives and Criticisms	15-57
§ 15.10	Employees of Government Contractors or Grantees: Retaliation Protections (NDAA)	15-58
	[1] Generally	15-58
	[2] No Whistleblower Incentive Program	15-58
	[3] Retaliation Protections for Whistleblowers	15-58
	[a] Administrative Complaint Procedures	15-60
	[b] Civil Action	15-60
	[c] Remedies	15-61
	[d] Elements of a Claim	15-61
	[i] Protected Activity	15-61
	[ii] Employer Knowledge	15-62
	[iii] Causation	15-62
	[4] Perspectives and Criticisms	15-62
§ 15.11	Antitrust: Retaliation Protections (CAARA)	15-63
	[1] Generally	15-63
	[2] No Whistleblower Incentive Program	15-63
	[3] Retaliation Protections	15-63
	[a] Administrative Complaint Procedures	15-64
	[b] Civil Action	15-64
	[c] Remedies	15-64
	[d] Elements of a Claim	15-65
	[4] Perspectives and Criticisms	15-65
§ 15.12	Medicare Secondary Payer Act	15-67

Appendices

APPENDIX A: State, Municipal, County, and Territory False Claims Acts: A List of Statutes	A-1
APPENDIX B:	B-1
TABLE OF ABBREVIATIONS	TA-1
INDEX	I-1