

**F**raud upon the government has a long – if not venerable – history. An oft-quoted Senate investigatory committee convened in the wake of the Civil War famously observed:

Through haste, carelessness, or criminal collusion, the [Government] accepted almost every offer and paid almost any price ... regardless of character, quality, or quantity. ... For sugar, it often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors ...<sup>1</sup>

The government is the quintessential deep pocket, one that many apparently feel ambivalent about dipping into. Perhaps it's because so many of us pay taxes – perhaps we feel as though we're only getting back some of what we gave. Perhaps it's because, when the government spends \$900,000 to purchase a single patrol boat,<sup>2</sup> \$92 billion annually on “corporate welfare,”<sup>3</sup> and more than \$2.5 million on charitable boondoggles such as teaching Chinese prostitutes to use alcohol responsibly,<sup>4</sup> it seems – perhaps justifiably – that there is cash to spare.

The law that has emerged in response to this impulse, thankfully, is more easily fathomed than fraudsters' varied justifications and rationales. For more than 130 years, the federal False Claims Act (FCA) has been the chief weapon in the federal government's arsenal to combat contractor and vendor fraud.<sup>5</sup> The FCA is a dual deterrent and recovery tool. Under the Act, anyone who submits a “false claim” for payment or property to the United States is subject to civil penalties and multiplied actual damages. These remedies are typically brought to bear within the contractual relationship between the federal government and one of the many private contractors who provide it with goods and services. Since the passage of the 2005 Deficit Reduction Act (DRA),<sup>6</sup> a growing number of states have created analogous state-level legislation. Twenty-four have adopted their own versions of the FCA, and Kansas joined them in April 2009 with the Kansas False Claims Act (KFCA).<sup>7</sup>

Kansas legislators were initially attracted to the false claims act altar by the DRA's incentives.<sup>8</sup> But the DRA imposes relatively stringent, non-negotiable qualification requirements on the content of state false claims act legislation.<sup>9</sup> To qualify, state legislation must be “at least as effective in rewarding and facilitating qui tam actions for false and fraudulent claims” as the FCA.<sup>10</sup> Given the explicit reference to the FCA and a lack of other guidance clarifying what makes a state's act “at least as effective” as the FCA, many states opted to parrot the Act closely. Kansas is among them. This is fortunate for Kansas attorneys and courts, as it provides us with a ready-made and comprehensive body of authority to draw upon in construing the newly-minted KFCA.<sup>11</sup>

The KFCA is not, however, a carbon copy of the FCA. It differs in significant ways that bear comment and which this article will explore. Additionally, the KFCA provides the Kansas Attorney General's (AG) office with new powers, and many attorneys who might not otherwise suspect it to be the case may find their clients within the reach of its provisions.

## I. Construction of the Kansas False Claims Act

It seems appropriate to begin an examination of the KFCA with a note about how the Act should be construed. Courts construing the FCA have reached differing conclusions regarding the appropriate standard of construction, declining, in some instances, to apply a broad construction, but resisting, too, invitations to apply a strict construction across the board.<sup>12</sup> The KFCA demonstrates an awareness of this division and attempts to provide some guidance: The KFCA, it instructs, is to be “broadly construed to promote the public interest.”<sup>13</sup>

Superficially, the KFCA's construction clause may seem rather platitudinal. Would Kansas courts tend to construe the KFCA *against* the public interest? But the KFCA attempts to at least address inevitable questions concerning construction, and this broad appeal to public policy opens the door for Kansas lawyers and judges to refer to the state's existing jurisprudence evaluating when the public interest is and is not served in other contexts.<sup>14</sup> To the extent any of it illuminates and identifies the “public interest,” it is potential guidance and rhetorical fodder.

## II. Qui Tam Relators and the Kansas False Claims Act

A significant difference between the KFCA and the FCA is in the area of qui tam.<sup>15</sup> While a private party, or “relator,” may sue on behalf of the federal government under the FCA, and that Act encourages such suits by allowing relators to share in the recovery from any suit they initiate, only the AG can sue under the KFCA.<sup>16</sup>

Although it is often the substrate for meritorious suits,<sup>17</sup> qui tam litigation under the FCA may do more harm than good: relators' suits are often meritless and are always an expensive burden upon defendants.<sup>18</sup> It is thus unsurprising that Kansas opted not to copy the qui tam provisions of the FCA. Members of the Kansas Judicial Council's False Claims Act advisory committee were divided on this issue, with the AG's office favoring the inclusion of a qui tam provision.<sup>19</sup> Other members noted, however, that the majority of relators' suits under the FCA are rejected and only a small percentage actually recover anything, while the cost of defense to Kansas companies would be huge in any event.<sup>20</sup>

Ultimately, the KFCA was adopted without qui tam. It is therefore clear the KFCA does not comply with the DRA's requirement that it be “at least as effective as [the FCA] in rewarding and facilitating qui tam actions,” and so Kansas will not receive the DRA's incentives. But the AG's office will still enjoy the power of a KFCA-based fraud deterrent and recovery strategy, and is relieved of the more demanding requirements (in terms of intent and burden of proof) of the criminal statutes that were previously its chief remedy.

## III. Investigation, Prosecution, and Anti-retaliation

There are no relators under the KFCA – the Act expressly provides that it does not give rise to a private cause of action.<sup>21</sup> Whistle-blowers, consequently, do not share in any recovery under the KFCA, and the Act does not otherwise provide any reward to them. Only the AG's office can sue, and neither

whistle-blowers nor anyone else can do aught but report a violation of the KFCA and wait for the AG to investigate and prosecute.<sup>22</sup> This is perhaps the most significant difference between the KFCA and the FCA. The absence of *qui tam* removes the chief incentive for whistle-blowing and places the onus of enforcement upon the state – an arrangement which, in light of Kansas’ current budgetary problems, seems less than optimal.

Although the KFCA does not encourage whistle-blowers, it does endeavor to protect them from liability for coming forward, by providing a private cause of action for any employee who is retaliated against in any manner for actions that he or she, in good faith, undertakes to support an action under the KFCA.<sup>23</sup> The remedy for such a suit includes all relief required to make the employee whole,<sup>24</sup> which would presumably include attorney fees.

These anti-retaliation provisions were not included in the precursor to the enrolled KFCA, House Bill 2943, but were recommended by the Judicial Council Advisory Committee.<sup>25</sup> Committee members were concerned that the KFCA, because it lacked a *qui tam* provision, not only failed to encourage whistle-blowing, but also left whistle-blowers vulnerable to retaliation.<sup>26</sup> This concern, however, was tempered by the awareness that Kansas law already recognizes a claim for retaliatory discharge.<sup>27</sup> Thus, this provision of the KFCA was derived from the corresponding provision of the FCA, 31 U.S.C. § 3729(h), but the Legislature refrained from prescribing specific remedies.<sup>28</sup> The KFCA incorporates the common law tort of wrongful discharge, and makes firing for reporting a KFCA violation an instance of “state public policy clearly declared by the Legislature” upon which a claim of wrongful discharge may be based.<sup>29</sup>

The anti-retaliation provisions of the KFCA do contain a puzzling limitation: the legislative history of the Act suggests that the drafters intended for an employee to be able to maintain an action for retaliatory discharge if fired for blowing the whistle on his or her employer,<sup>30</sup> yet the KFCA expressly limits such a remedy to those instances where the whistle blowing actions were undertaken “in good faith.”<sup>31</sup> The “good faith” limitation is consistent with common law in Kansas, as our courts have held that the tort of retaliatory discharge is available only to those employees who acted in “good faith based on a concern regarding the wrongful activity reported rather than for a corrupt motive like malice, spite, jealousy, or personal gain.”<sup>32</sup>

The question this provokes is simply, why? Suppose a violator’s disgruntled employee, motivated by a desire to harm his or her employer, reports a violation-in-fact of the KFCA to the AG’s office. If the report is accurate, the public fisc may be protected and the greater good served no matter the whistle-blower’s subjective motivation. Indeed, it would hardly be a surprise to learn that many whistle-blowers are motivated, at some level, by a desire to harm the entity against whom they are informing. However, although “good faith” is an amorphous concept, it is at least commonly understood to be a state of mind mutually exclusive of an intent to injure.<sup>33</sup> Notwithstanding that the underlying goals of the KFCA would be served by granting this whistle-blower protection, the good faith requirement could well preclude his or her from

maintaining a cause of action for wrongful retaliation. The Legislature missed the opportunity to shed the good faith requirement and to further encourage free reporting of KFCA violations.

#### IV. Damages and Remedies Under the Kansas False Claims Act

The KFCA’s penalty provisions provide that a violator is liable for triple damages plus a civil penalty between \$1,000 and \$11,000 per violation.<sup>34</sup> And, similar to the FCA’s fee-shifting provisions in favor of relators, a violator under the KFCA is liable for all attorney’s fees and costs the state incurs.<sup>35</sup> The Act offers a relative safe harbor for violators who self-report within 30 days of learning of a violation, and then cooperate fully in the subsequent investigation.<sup>36</sup>

Under both the KFCA and FCA penalties can quickly surpass actual damages, even when doubled or tripled. Especially in the health-care context, where a provider invoices the government far more frequently than, for instance, a seller of supplies, penalties accrue with startling rapidity.<sup>37</sup>

The KFCA aims to be at least partially self-funding, providing that 10 percent of any “recovery” is to be deposited in the “false claims litigation revolving fund.”<sup>38</sup> That money can then be used to hire “necessary staff” and otherwise fund enforcement efforts, including the retainer of counsel outside the AG’s office.<sup>39</sup> The AG is also authorized to hire other “necessary staff,” a phrase which is not defined by the Act or explicated by the legislative history, but which could include not only administrative personnel, but also lay investigators.<sup>40</sup>

#### V. Grounds for Liability Under the Kansas False Claims Act

The business end of the KFCA closely mirrors that of the pre-Federal Enforcement and Recovery Act (FERA) FCA.<sup>41</sup> The following table provides a side-by-side comparison of the relevant provisions. All elements must be proven by a preponderance of the evidence.<sup>42</sup> Those areas in which the KFCA deviates from the FCA are bolded.

(See chart, p. 26, for reference to notes 43 and 44.)

##### A. Common Elements: No Proof of Damage

The plain language of the FCA and the KFCA do not seem to require a showing of actual damage. Federal courts differ on the question – some have held the FCA requires damage,<sup>45</sup> while others have reasoned that because the FCA is intended to serve not just as a means of recouping damage caused by fraud, but as deterrent against further fraud, that purpose is best served “by [not] waiting until the public fisc is actually damaged. By attaching liability to the claim or demand for payment, the statute encourages contractors to ‘turn square corners when they deal with the government.’”<sup>46</sup> Obviously, without damages, the state’s recovery under the KFCA will be limited to penalties.

The purpose of the KFCA is similar to that of the FCA.<sup>47</sup> However, given the extremely broad scope of the KFCA, which extends to false claims presented not just to the state and its political subdivisions, but also to anyone who receives “funds” from the state, a threshold requirement of damage

	Federal FCA		Kansas FCA
(a)(1) <sup>43</sup>	knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;	(a)(1) <sup>44</sup>	knowingly presents, or causes to be presented, to an employee, officer, or <b>agent of the state or political subdivision thereof or to any contractor, grantee or other recipient of state funds or funds of any political subdivision thereof</b> , a false or fraudulent claim for payment or approval;
(a)(2)	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;	(a)(2)	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;
(a)(7)	knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government;	(a)(3)	<b>defrauds the state or any political subdivision thereof</b> by getting a false claim allowed or paid or by knowingly making, using, or causing to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the <b>state or to any political subdivision thereof</b> .
(a)(4)	has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;	(a)(4)	has possession, custody, or control of <b>public</b> money or property used, or to be used, by the <b>state or any political subdivision thereof</b> and <b>knowingly</b> delivers or causes to be delivered less property <b>or money</b> than the amount for which the person receives a certificate or receipt;
(a)(5)	authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;	(a)(5)	is authorized to make or deliver a document certifying receipt of property used or to be used by the <b>state or any political subdivision thereof</b> and <b>knowingly</b> makes or delivers a receipt <b>that falsely represents the property received</b> .
(a)(6)	knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or	(a)(6)	knowingly buys, or receives as a pledge of an obligation or debt, public property from <b>any person</b> who lawfully may not sell or pledge the property; or
		(a)(7)	is a beneficiary of an inadvertent submission of a false claim to any employee, officer, or agent of the state or political subdivision thereof, or to any contractor, grantee, or other recipient of state funds or funds of any political subdivision thereof, who subsequently discovers the falsity of the claim and fails to disclose the false claim and make satisfactory arrangements for repayment to the state or affected political subdivision thereof within a reasonable time after discovery of the false claim.
(a)(3)	conspires to defraud the Government by getting a false or fraudulent claim allowed or paid.	(a)(8)	conspires to <b>commit any violation set forth in paragraphs 1 through 7, above</b> .

would be appropriate.<sup>48</sup> Furthermore, as a practical matter, damage is still likely to be key in many KFCAs suits. The state’s recovery is still limited to a multiple of actual damages, and the penalty provisions that might otherwise make a KFCAs suit worth pursuing can be abrogated by the defendant’s conduct.<sup>49</sup>

**B. Common Elements: Knowledge**

There is no liability under the KFCAs or the FCA unless an act is done “knowingly,” which requirement is met when a defendant (1) has actual knowledge, (2) is deliberately ignorant of it, or (3) acts in reckless disregard of truth or falsity.<sup>50</sup> Specific intent – purpose – to defraud is not required (except perhaps under (a)(3), see section VI, *infra*, discussing *Allison Engine*).<sup>51</sup> The KFCAs thus addresses a broad spectrum of intent.

The “actual knowledge” standard addresses deliberate falsehoods; however, because specific intent to defraud is not required (but see section VI, *infra*), a defendant need not actually intend to induce the government’s reliance upon the falsehood.<sup>52</sup> All that is necessary is that the defendant actually know that he submitted a false claim.<sup>53</sup>

The purpose of the deliberate ignorance and reckless disregard standards is to reach conduct that is more than merely

negligent, but which does not quite rise to the level of a knowing falsehood: “ostrich-like” behavior or the “refusal to learn of information which an individual, in the exercise of prudent judgment, had reason to know.”<sup>54</sup> The standard imposes an affirmative duty of care upon government contractors.<sup>55</sup> Courts construing the FCA have agreed that mere negligence, or even gross negligence, is not sufficient to satisfy the requirement that an act be done “knowingly.”<sup>56</sup> Rather, “[t]he severity of conduct required to constitute ‘reckless disregard’ underscores that innocent mistakes, mere negligence, or even gross negligence (without more) are not actionable under the False Claims Act.”<sup>57</sup> Said another way, deliberate ignorance and reckless disregard is “an aggravated form of gross negligence, or ‘gross negligence-plus.’”<sup>58</sup>

The KFCAs contains an oddity, however, that did not come from the FCA. It provides that “an innocent mistake” is a defense.<sup>59</sup> This is odd because this proposition goes without saying – it is clear from the plain language of the KFCAs that liability flows only from “knowing” acts, and even without the benefit of FCA jurisprudence, it is equally clear that an “innocent mistake” falls far short of “deliberate ignorance” or “reckless disregard.” And this gratuity may present a problem: the presumption in Kansas, as in most – if not all – other

jurisdictions, is that the Legislature does not intend to include meaningless surplusage in a statute.<sup>60</sup> Kansas courts may be pressed to reconcile the “innocent mistake” defense with the statutory definition of “knowing,” a labor the Legislature could have avoided by simply omitting the former. Hopefully, courts will recognize that this *is* surplusage, and does not loosen the intent requirement of the KFCA so that negligence, or even gross negligence, will suffice.<sup>61</sup>

**C. Common Elements: A Claim**

With the exception of subsection (a)(3),<sup>62</sup> the “reverse false claims” provision, the KFCA applies only to “claims.”<sup>63</sup> A “claim” is

[A]ny request or demand ... for money, property or services made to any employee, officer or agent of the state or any political subdivision thereof or made to any contractor, grantee or other recipient if the state or any political subdivision thereof provides any portion of the money, property or services which is requested or demanded, or if the state will reimburse such contractor, grantee or other recipient for any portion of the money or property which is requested or demanded.<sup>64</sup>

This broad definition focuses on the source of funds: so long as the state or some political subdivision thereof provides the money, property, or services at issue, there is a claim.<sup>65</sup> The KFCA’s definition of a “claim” is substantially similar to that of the FCA.<sup>66</sup>

**D. Common Elements: False or Fraudulent, and Does it Make a Difference?**

Neither the KFCA nor the FCA define “false” or “fraudulent.” Federal courts have variously defined “false,” as will be discussed, *infra*, but the Ninth Circuit may have done so most simply when it said that “false . . . means a lie.”<sup>67</sup> This may not be entirely accurate, however, as it implies a level of intent beyond which the KFCA actually requires: a lie is generally interpreted as an intentional misrepresentation, while the KFCA imposes liability upon reckless misrepresentations, too.<sup>68</sup> But it is pithy, easy to remember, and comes close.

Federal courts generally treat false and fraudulent as synonymous.<sup>69</sup> However, “fraudulent” reaches defendants who have defrauded the Government, but not necessarily made a false statement.<sup>70</sup> Such cases involve schemes where the heart of the fraud is a deceptive omission, rather than an affirmative misrepresentation.<sup>71</sup> If the sweeping and highly criticized implied certification doctrine gains acceptance, *see infra*, “fraudulent” may become superfluous.<sup>72</sup>

It is clear that the knowledge requirement – “knowingly” – applies to the element of falsity.<sup>73</sup> Thus, a defendant is not liable unless it actually knew a claim was false, acted with reckless disregard of that fact, or was deliberately ignorant of whether a claim was false. Math errors or other technical mistakes do not make a false claim.<sup>74</sup>

As noted previously, it is an oversimplification to say that a false claim is simply a “lie.” Courts construing the FCA have identified subcategories of false claims: every false claim is either “legally false” or “factually false.”<sup>75</sup> Factual falsehood is

*(Continued on next page)*

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straightforward: the defendant submits an “incorrect description of goods or services provided or a request for reimbursement for goods or services never provided.”<sup>76</sup>

Legal falsehood is easily explained, as well, but is somewhat more difficult to identify in practice. A defendant makes a legally false claim when it expressly or impliedly “certifies compliance with a statute[,] regulation” or a contractual provision “as a condition to government payment, yet knowingly fail[s] to comply” with it.<sup>77</sup> “An expressly false claim is, as the term suggests, a claim that falsely certifies compliance with a particular statute, regulation, or contractual term, where compliance is a prerequisite to payment.”<sup>78</sup> The government’s Standard Form 1443, which is sometimes used by a contractor of the United States to request payment, contains an express certification: “I certify that the above statement ... has been prepared from the books and records of the above-named contractor in accordance with the contract ... .”<sup>79</sup>

A defendant submits an impliedly false claim, conversely, when it requests payment pursuant to a contract or statute, but has not satisfied its terms.<sup>80</sup> It is not necessary to expressly certify compliance – the act of requesting payment constitutes an “implied certification” of compliance. When government procurement contracts are hundreds of pages long, incorporating supporting process documentation of equal or greater length, instances of such noncompliance are not uncommon. The sweep of the implied certification doctrine is broad, to put it mildly.<sup>81</sup>

Two additional requirements mitigate the scope of the FCA. First, courts have held that a false statement must be “material” to the government’s decision to pay.<sup>82</sup> Second, particularly where regulatory non-compliance is an issue, compliance must be a precondition of payment, rather than merely a condition of participation in a particular government program.<sup>83</sup> These requirements apply to any “false certification” claim – either express or implied; however, their effects are a critical limitation upon the implied false certification doctrine.<sup>84</sup> The materiality and precondition to payment requirements prevent every breach of contract or instance of regulatory noncompliance from becoming a predicate for a suit.<sup>85</sup> As courts have noted, the FCA is not for policing contractual compliance.<sup>86</sup> Mere breach of contract, without more, should not activate the punitive remedies of the FCA or the KFCA.<sup>87</sup>

Courts have construed “material” to mean different things, and the circuits were split on what test to use. Some adopted a plaintiff-friendly, “natural tendency” test, under which a false statement was “material” if it had “a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed.”<sup>88</sup> Other courts utilized an “outcome” test, which seemed to apply straightforward principles of “but-for” causation: Would the government have paid the claim had it known of the noncompliance?<sup>89</sup> Recent revisions to the FCA<sup>90</sup> have codified the materiality requirement and expressly adopted the natural tendencies test; however, the KFCA does not reflect these amendments, and Kansas courts remain free to adopt the version that best suits this state’s public policy. Given the comparatively broad scope of the KFCA (*see* VI, *infra*), the more restrictive “outcome” test seems to be the only reasonable choice.

## VI. Specific Bases of Liability

### A. K.S.A. 75-7503(a)(1)/31 U.S.C. 3729(a)(1) – **Knowingly presents, or causes to be presented, to any employee, officer, or agent of the state or political subdivision thereof or to any contractor, grantee or other recipient of state funds or funds of any political subdivision thereof, a false or fraudulent claim for payment or approval.**

Subsection (a)(1) of the FCA, which the KFCA closely copies, gets more mileage in the federal courts than any other section. The scenario it addresses – “anyone who ... presents, or causes to be presented ... a false or fraudulent claim for payment or approval” – is the archetype of government procurement fraud, that of an unscrupulous contractor blithely requesting payment for goods or services that it never provided.<sup>91</sup> “[C]auses to be presented” has been construed to reach subcontractors who submit false claims indirectly because their connection to the government is attenuated by one or more intermediaries.<sup>92</sup> Thus, to establish liability under subsection (a)(1) of the FCA, the federal government must show that a defendant, with “knowledge” of every element, presented or caused a false claim to be presented to a member of the armed forces or an officer or employee of the federal government.<sup>93</sup>

The KFCA differs from the corresponding FCA provision in that it extends not only to false claims submitted to the state, but to (1) any “political subdivision thereof” or (2) to any contractor, grantee, or other recipient of state funds *or* the funds of any political subdivision thereof.<sup>94</sup> A defendant may therefore be liable not only for submitting a false claim to the state of Kansas, but to also, for instance, the City of Wichita. The FCA contains no analog – if it did, the KFCA would be unnecessary, because Kansas and other “political subdivisions” would be within the FCA’s umbrella of protection. This provision, however, seems consistent with the KFCA’s purpose of deterring fraud against the government, by extending its deterrent effect to all instances where a defendant attempts to obtain taxpayer money through deceit.

Another area where the KFCA differs significantly is the provision regarding claims “to any contractor, grantee, or other recipient of state funds or the funds of any political subdivision thereof.” This thought-provoking provision seems to extend liability to instances where a false claim has been directly or indirectly presented not to the state or any identifiable subdivision thereof, but to anyone to whom the state or a political subdivision thereof has given “funds,” be he or she a “contractor” (someone who, presumably, has received “funds” in return for services or materials) a “grantee” (someone to whom funds have simply been given), or “any other recipient.” How many businesses in Kansas receive such “funds”? Each of them, according to this provision, is poisonous fruit to anyone who recklessly or intentionally presents it with a false claim. The “parade of horrors” practically writes itself. Prosecutorial discretion, presumably, will prevent an \$11,000 penalty from being levied against the waiter who overcharges a table of construction workers building a municipal roadway, or other absurd scenarios. But the potential scope of liability gives one pause, to say the least.

**B. K.S.A. 75-7503(a)(2)/31 U.S.C. 3729(a)(2) – 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.**

Subsection (a)(2) of the KFCA and the FCA are identical. The chief difference between this subsection and (a)(1) is the requirement of a false record or statement, which may be satisfied by a document that contains false assertions misleading omissions.<sup>95</sup> The false statement must be submitted “to get” a false statement paid or approved, as in the case, for instance, of an invoice that falsely represents work was performed when it was not.<sup>96</sup> The Supreme Court has held that because “[t]o get” denotes purpose,” the false record or statement must be made for the purpose of obtaining payment or approval, that appears to be a more exacting intent requirement than “knowingly.”<sup>97</sup>

**C. K.S.A. 75-7503(a)(3)/31 U.S.C. 3729(a)(3) – Defrauds the state or any political subdivision thereof by getting a false claim allowed or paid or by knowingly making, using, or causing to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state or any political subdivision thereof.**

Subsection (a)(3) addresses “reverse false claims”: situations where, rather than fraudulently inducing the government to pay a liability that it does not actually owe, the defendant deceives the government regarding a liability or obligation that the defendant owes to the government.<sup>98</sup> This provision typically comes into play in situations where a defendant uses a false statement or record to underpay some obligation, such as rent, postage, or oil royalties.<sup>99</sup>

Courts are divided whether this section of the FCA also applies where a defendant uses a false record or statement to evade some other provision of the law.<sup>100</sup> In one case, a defendant whose incomplete records would have revealed a penalty-incurring violation of the Clean Water Act was liable not only for that violation, but also for a “reverse false claim.”<sup>101</sup>

Nothing in the legislative history of the KFCA reveals whether the Legislature intended the statute to cover such “reverse false claims.” If applied without restriction, this interpretation of the reverse false claims provision seems to create an additional penalty overlaid upon any crime or regulatory violation for which a defendant incurs a liability in the form of a fine, penalty, or forfeiture that he or she then tries to avoid through the use of a false statement.<sup>102</sup> That such an application might have a powerful deterrent and punitive effect seems undeniable, but it is equally undeniable that it could cause the KFCA’s triple damages and substantial penalty provisions to be brought to bear in unexpected ways against undeserving defendants whose transgressions are perhaps already sufficiently addressed by the same fines and penalties they sought to avoid. It may be, as one district judge observed (and as the Court of Appeals for the Sixth Circuit eventually agreed), that “[s]o drastic an expansion in the scope of the False Claims Act ... could not reasonably have been intended ... .”<sup>103</sup> Kansas courts may find the line of reasoning employed by the Eighth Circuit persuasive, which held that a noncontractual liability was not the sort of “obligation” that the reverse false claims provision was intended to reach:

To recover under the False Claims Act. ... the United States must demonstrate that it was owed a specific, legal obligation at the time that the alleged false record or statement was made, used, or caused to be made or used. The obligation cannot be merely a potential liability: instead ... a defendant must have had a present duty to pay money or property that was created by a statute, regulation, contract, judgment, or acknowledgment of indebtedness. The duty, in other words, must have been an obligation in the nature of those that gave rise to actions of debt at common law for money or things owed. This interpretation of the term “obligation” is supported by the legislative history of the reverse false claims provision, which refers twice to “money owed,” ... as the kind of duty that the reverse claims provision is designed to address. The deliberate use of the certain, indicative, past tense suggests that Congress intended the reverse false claims provision to apply only to existing legal duties to pay or deliver property. Had Congress wished to cover attempts to avoid potential fines or sanctions it would have used language appropriate to that end.<sup>104</sup>

The KFCA’s reverse false claims provision also contains an addendum not present in the FCA – it prohibits “defraud[ing] the state ... by getting a false claim allowed or paid.”<sup>105</sup> The pre-FERA<sup>106</sup> FCA contained similar language in subsection (a)(3), which imposed liability upon defendants who “conspire to defraud the government by *getting a false or fraudulent claim allowed or paid.*”<sup>107</sup> Courts construing that language have held that to establish liability under this subsection, the government must show the existence of a conspiracy with *the purpose* of getting a false or fraudulent claim allowed or paid.<sup>108</sup> Thus, this provision may require a more specific intent than “knowingly.” The Supreme Court’s recent holding in *Allison Engine* that “to get” and “getting” denotes something akin to specific intent further supports this conclusion,<sup>109</sup> as does the fact that the standard intent requirement of the KFCA – that the act be done “knowingly” – is omitted from the first clause of subsection (a)(3). It therefore appears that (a)(3) addresses both “reverse false claims” and serves as a generic catchall applying to any situation where a defendant has purposefully deceived the government into paying or allowing a false claim.

**D. K.S.A. 75-7503(a)(4)/31 U.S.C. § 3729(a)(4) – Has possession, custody, or control of public money or property used or to be used by the state or any political subdivision thereof and knowingly delivers or causes to be delivered less property or money than the amount for which the person receives a certificate or receipt.**

This subsection of the KFCA also closely mimics the corresponding subsection of the FCA, which was designed to address instances where a defendant has temporary custody of government property and refuses to return it.<sup>110</sup> Courts construing the FCA provision have determined that the elements of liability include a showing that the defendant (1) intending to defraud the government or to willfully conceal the property; (2) had possession, custody, or control of government

money or property; and (3) the defendant delivered less of the property than the amount for which he or she received a certificate or receipt from the government, created by the government.<sup>111</sup> The KFCA's language is identical to that of the FCA's (a)(4), except in its description of the intent requirement.

The KFCA improved upon its inspiration here. Where the pre-FERA<sup>112</sup> FCA contained a confusing and mixed scienter requirement – both “willful” and “intending to defraud” – the KFCA simply requires the acts be done “knowingly.” The government must therefore to show that a defendant – recklessly, intentionally, or with willful ignorance – failed to deliver all of the government property for which he or she received a certificate or receipt.<sup>113</sup>

**E. K.S.A. 75-7503(a)(5)/31 U.S.C. § 3729(a)(5) – Is authorized to make or deliver a document certifying receipt of property used or to be used by the state or any political subdivision thereof and knowingly makes or delivers a receipt that falsely represents the property received.**

Subsection (a)(5) of the KFCA substantially mirrors the corresponding section of the FCA. As with (a)(3) of the KFCA, however, the Kansas Legislature loosened the scienter requirement so that while the FCA requires the government to show intent to defraud, liability attaches under the KFCA so long as the defendant acted “knowingly.”<sup>114</sup>

There appears to be little or no law usefully construing the federal counterpart, but it was a part of the original version of the FCA written in 1863, and appears to have been included to address Civil War-era concerns with government agents who falsely certified receipt of goods that were either never delivered or that did not meet the description certified.<sup>115</sup> Subsection (a)(5) of the KFCA, therefore, requires the state to show that a defendant, authorized to certify receipt of property on behalf of the state or some political subdivision thereof, makes or delivers such a document that incorrectly describes the property received – either as the result of reckless disregard, deliberate ignorance, or actual knowledge of the falsity thereof.<sup>116</sup>

**F. K.S.A. 75-7503(a)(6)/31 U.S.C. § 3729(a)(6) – Knowingly buys or receives as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property.**

Subsections (a)(6) of the pre-FERA FCA and the KFCA are identical, with one exception. Whereas the FCA imposes liability only when a defendant receives public property from a government employee or member of the armed forces, the KFCA applies when a defendant receives public property from anyone who is not authorized to pledge or sell it, regardless of affiliation.<sup>117</sup> This subsection of the FCA was added to address concerns about soldiers selling government property.<sup>118</sup>

**G. K.S.A. 75-7503(a)(7) is a beneficiary of an inadvertent submission of a false claim to any employee, officer or agent of the state or political subdivision thereof, or to any contractor, grantee or other recipient of state funds or funds of any political subdivision thereof, who subsequently discovers the falsity of the claim and fails to disclose the false claim and make satisfactory arrangements for repayment to the state or affected**

**political subdivision thereof within a reasonable time after discovery of the false claim.**

Subsection (a)(7) has no counterpart in the FCA, and the available legislative history is uninformative. It appears to reach defendants who have benefited from an overpayment of government funds as the result of unintentional submission of a false claim. Elements of liability include that a defendant be a (1) beneficiary of an inadvertent submission of a false claim; (2) that such a false claim be inadvertently submitted to the state, some political subdivision thereof, or to any recipient of the funds of either; (3) said beneficiary discovers the claim to be false; (4) fails to disclose such knowledge; (5) fails to make satisfactory arrangement for repayment of the funds to their originator (unless the originator is the recipient of the funds, in which case the funds are apparently to be repaid to the state of political subdivision that first paid them); and (6) the beneficiary's repayment arrangement must be made within a “reasonable time” after discovery of the false claim.

This section raises a number of questions. First, when does one become a beneficiary of a false claim? Second, when is the submission of a claim “inadvertent?” Third, what level of disclosure is required? Fourth, when is a repayment arrangement satisfactory, and by whose satisfaction is such repayment arrangement evaluated – that of the court, the AG, the originator of the funds, or a “reasonable person?” Fifth, and finally, what is a reasonable time?

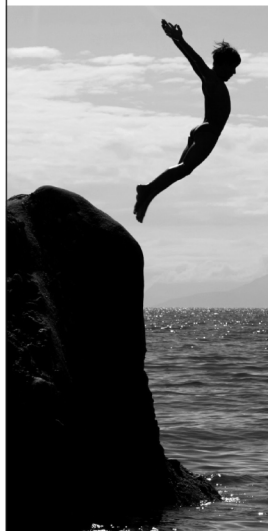
The legislative history of the KFCA is silent on these matters.<sup>119</sup> Some answers can be inferred. “Beneficiaries” to whom

*(Continued on next page)*

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this subsection extends liability may include more than simply those who receive funds paid upon a false claim; otherwise, the legislature could merely have referred to “payees.” Because liability under (a)(7) does not depend upon the submission of the false claim, but rather on the knowing acceptance and detention of the wrongful benefits, construing “inadvertence” to comprehend all unintentional conduct does not seem out of the question. Answers to the other questions, however, are not so readily apparent.

#### **H. K.S.A. 75-7503(a)(8) – Conspires to commit any violation set forth in paragraphs (1) through (7) above.**

Subsection (a)(8) of the KFCA attaches liability to any conspiracy to commit any of the seven categories of actions that the KFCA prohibits.<sup>120</sup> This provision is fairly straightforward, but raises at least two questions.

First, what constitutes a conspiracy? Courts construing the anti-conspiracy provisions of the FCA have held that “general civil conspiracy principles apply.”<sup>121</sup> Assuming Kansas courts apply the same principles to the KFCA, the state must show an unlawful objective to be accomplished, a “meeting of the minds” among the co-conspirators with respect to their unlawful objective, and an unlawful overt act in furtherance of that conspiracy.<sup>122</sup>

Second, while the pre-FERA<sup>123</sup> FCA addressed only conspiracies formed “to get” false claims allowed or paid, the broader anti-conspiracy provisions of the KFCA apply to subsections with a less exacting intent requirement – “knowingly” – that includes not just actual knowledge, but also unintended consequences, such as those acts achieved through deliberate ignorance and reckless disregard. The KFCA consequently contains the potential to present courts with a difficult-to-answer question: how does one prove a conspiracy – an agreement – to produce an unintended result?<sup>124</sup> Kansas courts and the courts of other jurisdictions have rejected, in other contexts, conspiracy-based liability for negligent wrongdoing.<sup>125</sup> Because the “reckless disregard” component of the KFCA’s requirement of knowledge presumably incorporates the “gross negligence-plus” standard developed by federal courts (a breed of carelessness even more bereft of anything resembling intent than regular negligence), it stands to reason that an (a)(8) conspiracy action will only lie for violations of the KFCA that are committed with actual knowledge.<sup>126</sup>

## **VII. Procedure**

Procedurally, the KFCA and the pre-FERA FCA are materially identical in most respects.

### **A. Prospective Defendants**

Any “person” can be a defendant under the KFCA, and “person” is defined as any natural person, corporation, firm, association, organization, partnership, business, or trust.<sup>127</sup> Although the FCA exempts certain classes of defendants,<sup>128</sup> the KFCA contains no such exceptions. Eleventh Amendment immunity for states, agency principles (e.g., to what extent is a corporate principal liable for the actions of its employee), and other independent doctrines, however, may mitigate and curtail the ostensible scope of the KFCA.<sup>129</sup>

Neither the FCA nor the KFCA extends to violations of the tax code.<sup>130</sup> The purpose of this “Tax Bar,” as it has been

called by federal courts, is to “reserve[] discretion to prosecute tax violations to the IRS and bar[] FCA actions based on tax violations.”<sup>131</sup>

### **B. Statute of Limitations**

Under both the FCA and the KFCA, the statute of limitations may be as much as 10 years, provided the 10 years does not run before the later of (1) six years from the date on which a violation of the KFCA occurred or (2) three years after the date when the material facts of the violation are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances.<sup>132</sup>

### **C. Pleading Requirements**

Every circuit that has considered the question has held that FCA claims must be plead with the same sort of particularity required for allegations of civil fraud.<sup>133</sup> The same rule will likely apply under the KFCA, as the same policy considerations that are served by requiring fraud to be plead with particularity also apply in the context of a KFCA suit: ensuring that defendants have adequate notice of the claim, protecting against the economic and reputational harm that often attends a charge of fraud, and “prohibit[ing] plaintiff[s] from unilaterally imposing upon the court, the parties[,] and society enormous social and economic costs absent some factual basis.”<sup>134</sup> Generally speaking, the allegations must include the “who, what, when, where, and how” of the alleged false claim to satisfy the particularity requirement.<sup>135</sup>

### **D. Venue**

The venue provisions of the KFCA and the FCA are identical: A suit may be brought in any jurisdiction in which any single defendant can be found, resides, transacts business, or in the jurisdiction where any violation occurred.<sup>136</sup>

### **E. Procedure: Discovery and the Joint Prosecution Privilege**

Under the FCA, the defendant’s ability to obtain discovery from the government and/or a relator may be circumscribed by the “joint prosecution” or “joint investigative” privilege.<sup>137</sup> Communications between a relator and the government or between two relators made in the prosecution of an FCA suit, designed to further that effort, and not subject to a waiver, are privileged.<sup>138</sup> Generally, this means the defendant cannot obtain work product of the investigation, including notes from the government’s interviews with relators.

Since the KFCA lacks a *qui tam* provision, the joint prosecution privilege is unlikely to find a home in Kansas. One of the key elements of the joint prosecution privilege is, of course, the existence of a joint prosecution or something like it, such as two parties acting in concert and sharing a commonality of interests in their mutual success.<sup>139</sup> At most, a whistle-blower under the KFCA will be a plaintiff in his or her own wrongful discharge suit, not a joint plaintiff whose interests are aligned with those of the state in such a way as to support the assertion of this privilege.<sup>140</sup> After all, a whistle-blower can sue for retaliatory discharge under the KFCA regardless whether his or her report results in a prosecution under the KFCA.<sup>141</sup>

The FCA contains some discovery-related provisions that address issues raised by *qui tam* relators, and so were not in-

corporated in the KFCA.<sup>142</sup> This is not the case with the federal government's power to issue civil investigative demands,<sup>143</sup> but the Kansas AG's ability to issue inquisition subpoenas may be a suitable substitute.<sup>144</sup>

## F. Estoppel Effect of a Prior Criminal Conviction

Both the FCA and the KFCA explicitly provide that a defendant who has been convicted of fraud or making false statements – either after trial or upon a guilty or no contest plea – is estopped from denying the essential elements of the offense in any FCA action involving the same transaction as the criminal proceeding.<sup>145</sup>

## G. Settlement and Corporate Integrity Agreements

The FCA contains settlement-specific provisions; however, their presence is at least partially necessary because of the involvement of qui tam relators.<sup>146</sup> Because the KFCA does not allow qui tam actions, similar settlement-related language is unnecessary. But at least one practice that has developed in the federal arena may find a home in Kansas. As part of the terms of a settlement the federal government may require a defendant to execute a “corporate integrity agreement” (CIA), which is a contract designed to ensure that future violations of the FCA do not occur.<sup>147</sup> A violation of a CIA may give rise to a suit for breach of contract, and, if the defendant falsely certifies compliance with the CIA, a separate suit under the FCA pursuant to the express and implied false certification doctrines, discussed *supra*.<sup>148</sup>

## VIII. Conclusion

Fraudsters raid this state's treasuries, just as they do those of every other jurisdiction. The KFCA will be at least a par-

tial remedy for this problem. Further, by deriving it from the FCA, the Kansas Legislature has constructed the KFCA upon a solid foundation, and Kansas jurists may turn to more than a century of federal jurisprudence construing the FCA for guidance. Kansas attorneys should be proactive, however: The KFCA contains some twists that federal courts construing the FCA have never previously encountered. In particular, the extension of the KFCA's protection to any individual or entity who receives public funds may create unexpected liability. However, the omission of qui tam relators from the equation, with prosecutorial discretion vested solely in the office of the AG, will hopefully prevent undeserving offenders from becoming the focus of the KFCA's punitive multiple damages and heavy fines. ■

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### ENDNOTES

1. Claire Sylvia, *The False Claims Act: Fraud Against the Government*, § 2.6, at 42 (West 2004) [hereinafter C. Sylvia].

2. New Border Patrol Boat On Display, [http://www.myfoxdc.com/dpp/news/national/092209\\_new\\_border\\_patrol\\_boat\\_displayed](http://www.myfoxdc.com/dpp/news/national/092209_new_border_patrol_boat_displayed) (last visited May 16, 2010).

3. Stephen Slivinski, *The Corporate Welfare State: How the Federal Government Subsidizes U.S. Businesses*, CATO INSTITUTE, May 14, 2007, at [http://www.cato.org/pub\\_display.php?pub\\_id=8230](http://www.cato.org/pub_display.php?pub_id=8230) (last visited May 16, 2010).

4. U.S. Will Pay \$2.6 Million to Train Chinese Prostitutes to Drink Responsibly on the Job, <http://www.cnsnews.com/public/content/article.aspx?RsrcID=47976> (last visited May 16, 2010).

5. C. Sylvia, *supra* note 1, § 1.1.

6. The 2005 Deficit Reduction Act of 2005, Pub. L. No. 109-171 (2006) (codified in various sections of 42 U.S.C.), was intended to improve state-level deterrence of Medicaid fraud and abuse. As a means of achieving that goal, DRA mandated that states implement employee education programs regarding false claims, and, optionally, provided that states enacting local laws that materially mirror the federal False Claims Act will share in 10 percent of any recovery obtained in Medicaid enforcement actions brought under such law that would have otherwise gone to the federal government. 42 U.S.C. § 1396(b).

7. K.S.A. 75-7501 – 7511.

8. See *supra* note 6; Report of the Kansas Judicial Council False Claims Act Advisory Committee On 2008 HB 2943, at 3 (Nov. 19, 2008) [hereinafter Report].

9. State legislation must establish liability to the state for false and

fraudulent claims with respect to Medicaid funds; must allow filing under seal for 60 days, to allow review by the state AG; and must impose a civil penalty at least that of the federal False Claims Act (\$5,000 to \$10,000 per offense, plus triple actual damages). 42 U.S.C. § 1396(b)(1), (3)-(4).

10. 42 U.S.C. § 1396h(b)(2).

11. Since the passage of the Kansas False Claims Act, 31 U.S.C. § 3729 has been extensively revised as a part of the Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, May 20, 2009, 123 Stat. 1617 (FERA). The KFCA, however, was drafted with reference to the pre-FERA FCA. References to the FCA herein, therefore, are to the pre-FERA version.

12. See, e.g., *Pettis ex rel. United States v. Morrison-Knudsen Co. Inc.*, 577 F.2d 668, 673 (9th Cir. 1978) (rejecting plaintiff's invitation to construe the FCA broadly); but see, e.g., *United States v. Neifert-White*, 390 U.S. 228, 232, 88 S. Ct. 959, 19 L. Ed. 2d 1061 (1968) (“In the various contexts in which questions of the proper construction of the [False Claims Act] have been presented, the Court has consistently refused to accept a rigid, restrictive reading, even at the time when the statute imposed criminal sanctions as well as civil.”).

13. K.S.A. 75-7507(b).

14. The “public interest” plays a role in 4th amendment case law, see, e.g., *City of Salina v. Ragnoni*, 42 Kan. App. 2d 405, 213 P.3d 441, (2009), makes an appearance in cases construing the Kansas Uniform Trade Secrets Act, *Progressive Products Inc. v. Swartz*, 41 Kan. App. 2d 745, 205 P.3d 766 (2009), is a feature of Kansas case law regarding injunctive relief, see, e.g., *Winkel v. Miller*, 288 Kan. 455, 205 P.3d 688 (2009), and is a factor in other analyses.

(Continued on next page)

15. “Qui tam” is an abbreviation for “qui tam pro domino rege quam pro se ipso hac parte sequitur,” meaning “who as well for the king as for himself sues in this matter.” BLACK’S LAW DICTIONARY, 1282 (8th Ed. 2004). Qui tam legislation, like the FCA, allows private parties to bring suit on behalf of the government.

16. Compare 31 U.S.C. § 3730(b) (allowing a private person to sue on behalf of the government); with K.S.A. 75-7504(a)-(b) (providing that the office of the AG shall investigate and prosecute actions under the KFCA, and nothing in the KFCA, with the exception of the anti-retaliation provisions discussed *infra*, shall be construed to create a private cause of action).

17. Qui tam relators have recovered more than \$13,677,467,064 in 6,199 lawsuits for the federal government since 1986 – an average of \$2,206,398 per suit. Civil Div., U.S. Dep’t of Justice, Fraud Statistics – Overview, <http://justice.gov/opa/pr/2008/November/fraud-statistics-1986-2008.htm> (last visited May 17, 2010).

18. William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 Loy. L.A. L. Rev. 1799, 1855 (1996).

19. Minutes of the Kansas Judicial Council Advisory Committee for the False Claims Act, Sept. 5, 2008.

20. *Id.*

21. See K.S.A. 75-7504.

22. *Id.*

23. K.S.A. 75-7506.

24. *Id.*

25. Report, *supra* note 8, at 9-10.

26. *Id.* at 10.

27. *Id.*

28. *Id.*

29. See *Hysten v. Burlington Northern Santa Fe Ry. Co.*, 277 Kan. 551, 555, 108 P.3d 437 (2004).

30. Minutes of the Kansas Judicial Council Advisory Committee On 2008 HB 2943, at 2 (Sept. 5, 2008).

31. See K.S.A. 75-7506.

32. *Goodman v. Wesley Med. Ctr. LLC*, 276 Kan. 586, 591, 78 P.3d 817 (2003).

33. See, e.g., *Dobbyn v. Nelson*, 2 Kan. App. 2d 358, 363, 579 P.2d 721 (1978).

34. See K.S.A. 75-7503(a).

35. *Id.*

36. See K.S.A. 75-7503(b)(1)-(3).

37. See *United States v. S. Md. Home Health Services Inc.*, 95 F. Supp. 2d 465 (D. Md. 2000) (government sought penalty of \$1,710,000 for approximately 171 allegedly false claims submitted for \$60,000 in Medicare reimbursement – 32 times the government’s actual damages – over approximately a 10-month period).

38. K.S.A. 75-7508(c). It is unclear whether “recovery” refers not just to damages, but penalties.

39. *Id.*

40. *Id.*

41. See *supra* note 11.

42. 31 U.S.C. § 3731(c); K.S.A. 75-7505(c).

43. Of 31 U.S.C. § 3729 (2008) (pre-FERA – see *supra* note 11).

44. Of K.S.A. 75-7503.

45. *Blusal Meats Inc. v. United States*, 637 F. Supp. 824, 828 (S.D.N.Y. 1986).

46. *United States v. Rivera*, 55 F.3d 703, 709-710 (1st Cir. 1995).

47. Report, *supra* note 8, at 9.

48. See K.S.A. 75-7503(a)(1) (extending liability to any defendant who presents or causes a false claim to be presented to the state, any political subdivision thereof, or any “other recipient of state funds or funds of any political subdivision thereof.”).

49. K.S.A. 75-7503(a), (b).

50. 31 U.S.C. § 3729(b)(1) – (3); K.S.A. 75-7502(e).

51. 31 U.S.C. § 3729(b); K.S.A. 75-7503(b).

52. *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) (“But what constitutes the offense is

not intent to deceive but knowing presentation of a claim that is either ‘fraudulent’ or simply ‘false.’ The requisite intent is the knowing presentation of what is known to be false.”).

53. *United States v. Krietemeyer*, 506 F. Supp. 289, 292 (D.C. Ill. 1980) (defendant’s submission of false information entitled government to summary judgment on claims that he violated the FCA; intent to defraud was not required; rather, “it is enough that the defendant knowingly defrauded the government.”)

54. C. Sylvia, *supra* note 1, § 4:47, at 189 (quoting S. Rep. No. 99-345, at 15).

55. See, e.g., 1323 Cong. Rec. S11244 (daily ed. Aug. 11, 1986) (“Federal contractors, persons and entities doing business with the government must be made to understand that they have an affirmative obligation to ascertain the truthfulness of the claims they submit. No longer will federal contractors be able to bury their heads in the sand to insulate themselves from the knowledge a prudent person should have before submitting a claim to the government. Contractors who ignore or fail to inquire about red flags that should alert them to the fact that false claims are being submitted will be liable for those false claims.”).

56. *United States v. Krizek*, 111 F.3d 934 (D.C. Dir. 1997) (psychiatrist’s submission of more than 1,100 false claims to the government, consisting of bills claiming he had treated patients more than nine hours – and more than 24 hours, in many cases – in a single day satisfied the scienter requirement of the false claims act when submission of those claims was reckless, or “gross negligence-plus”).

57. *United States ex rel. Ervin & Assoc. Inc. v. Hamilton Sec. Group*, 298 F. Supp. 2d 91, 101 (D.D.C. 2004) (defendant’s error in arranging auction of government assets, even if defectively designed and executed, was not the result of gross negligence or aggravated negligence, and so could not satisfy the requirements for liability under the FCA).

58. *United States ex rel. Aakhus v. Dyncorp Inc.*, 136 F.3d 676, 682 (10th Cir. 1998).

59. K.S.A. 75-7503(c) (“An innocent mistake shall be a defense to an action under this act.”).

60. See *State v. Van Hoet*, 277 Kan. 815, 826-27, 89 P.3d 606 (2004).

61. See also *Fisher v. Kansas Crime Victims Comp. Bd.*, 280 Kan. 601, 613, 124 P.3d 74 (2005).

62. K.S.A. 75-7503(a)(3) (imposing liability upon anyone who uses a false claim to decrease or avoid an obligation to the government).

63. A “reverse false claim” occurs when a defendant, rather than use falsehood to obtain money, property, or some other thing of value from the government, uses deception to reduce or evade a liability it owes. See generally Seena Foster, Annotation, Construction and Application of the Reverse False Claim Provision of the False Claims Act, 162 A.L.R. Fed. 147 (2000).

64. K.S.A. 75-7502(b).

65. C. Sylvia, *supra* note 1, § 4.14, at 137.

66. 31 U.S.C. § 3729(c).

67. *Wang v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992).

68. C. Sylvia, *supra* note 1, § 4.36, at 172.

69. *Id.* at 171.

70. *Id.*

71. See, e.g., *United States v. Incorporated Village of Island Park*, 888 F. Supp. 419, 439 (E.D. N.Y. 1995) (defendants obtained government housing funds without complying with prerequisite that housing be made available on a first-come, first-serve basis, and instead conspired to use an illegal, non-compliant pre-selection scheme to preferentially bestow benefits: “The ... scheme ... clearly constitutes the type of fraudulent conduct which the False Claims Act was intended to reach. [Defendants] intentionally failed to follow the prescribed scheme for awarding Section 235 housing ... knowing that it was improper and illegal. ... The [beneficiaries of government aid] were chosen in violation of the conditions on which the program was approved. ...”).

72. Some federal courts have adopted an “implied certification” doctrine, which applies when a government contractor submits a claim to the United States government and thereby “impliedly certifies” that it has complied with all material terms of its contract. For example, in *Shaw v. AAA Eng’g & Drafting Inc.*, 213 F.3d 519 (10th Cir. 2000), a government contractor provided photography services to the United States under a

contract requiring the contractor to recover silver from photographic development chemicals. *Id.* at 527. The contractor, however, failed to honor that provision but sought payment under the contract notwithstanding. *Id.* at 529-530. The Tenth Circuit held that the contractor submitted false claims by requesting payment from the federal government without having satisfied its contractual obligations, because each request for payment impliedly certified contractual compliance. *Id.* at 530-531.

Implied certification has the potential to render the “fraudulent” proscriptors of the FCA superfluous because most government contracts are sufficiently comprehensive that the “fraudulent” omission cases will necessarily involve claims that are impliedly false due to corresponding contractual noncompliance. In *Shaw*, for instance, the contractor’s failure to reveal its contractual noncompliance might have supported a claim that its conduct was fraudulent, rather than false, but the availability of the implied certification doctrine made it unnecessary for the Court to take the less well-traveled “fraudulent” claim path in its analysis. Implied certification is extremely broad, and so courts that have adopted this approach have had to rein the doctrine in with additional judge-made requirements of materiality and pre-condition to payment. See notes 85 – 86, *infra*.

73. See *United States v. Bourseau*, 531 F.3d 1159, 1167 (9th Cir. 2008) (holding that, with regard to the element of falsity, “[t]he requisite intent is the knowing presentation of what is known to be false, as opposed to innocent mistake or mere negligence.”).

74. See, e.g., *United States ex rel. Anderson v. N. Telecom Inc.*, 52 F.3d 810 (9th Cir. 1995). In this case, the defendant sold the United States military telecommunications equipment called “switches,” costing about \$2 million each. *Id.* at 812. The plaintiff claimed that the defendant knowingly sold defective switches to the military. *Id.* The district court held – and the Ninth Circuit affirmed – that the defendant was entitled to summary judgment in its favor because its claims were not knowingly false. *Id.* at 816. Though the court’s holding acknowledged that the switches in question had problems, those problems were in the nature of glitches, bugs, and other good-faith engineering defects. *Id.* at 816-817.

The Ninth Circuit also explored and explained this difference between good faith mistakes and false claims in *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992). There, the plaintiff sued his former employer under the 3FCA, alleging that the defendant presented false claims to the United States military by billing for defective or substandard goods and services in a variety of projects. *Id.* at 1420-21. The plaintiff’s allegations, however, focused primarily on technical deficiencies and engineering faults: an engineer’s calculations were off; the design of a howitzer was faulty; the engineering work of another project demonstrated a “lack of engineering insight” by the defendant. *Id.* The court was unimpressed, noting that “[b]ad math is no fraud. ... [T]he common failings of engineers and other scientists are not culpable under the [False Claims Act]. ... What is false as a matter of science is not ... wrong as a matter of morals. The Act would not put either Ptolemy or Copernicus on trial.” *Id.* (internal citations omitted).

75. *United States ex rel. Conner v. Salina Reg’l Health Center Inc.*, 543 F.3d 1211, 1217 (10th Cir. 2008).

76. *Id.*; see, e.g., *United States v. Bornstein*, 423 U.S. 303, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976) (subcontractor intentionally misbranded radio tubes, which were sold to federal government).

77. *Conner*, 543 F.3d at 1218.

78. *Mikes v. Straus*, 274 F.3d 687, 698 (2d Cir. 2001).

79. Standard Form 1443 – Contractor’s Request for Progress Payment, available at [www.onl.gov/adm/contracts/library/articles\\_forms/sf1443.pdf](http://www.onl.gov/adm/contracts/library/articles_forms/sf1443.pdf) (last visited Oct. 17, 2009) (emphasis supplied).

80. *Shaw v. AAA Eng’g & Drafting*, 213 F.3d 519, 531 (10th Cir. 2000). In *Shaw*, a government contractor providing photographic services to the government under a contract requiring it to recover silver used in photographic development. *Id.* at 527. By requesting payment under the contract without having actually complied with the silver recovery provisions, the contractor impliedly certified compliance with those contractual provisions and submitted a false claim. *Id.* at 529-530.

81. *Defending False Claims Act/Qui Tam Actions: Failure to Comply with Administrative Regulations and Statutes Standing Alone Cannot Constitute a Valid Cause of Action Against a Health Care Provider Under the Act*, [www.arentfox.com/publications/index.cfm?fa=legalUpdateDisp&content\\_](http://www.arentfox.com/publications/index.cfm?fa=legalUpdateDisp&content_)

id=872 (last visited Oct. 17, 2009) (criticizing the implied false certification doctrine and noting a split among the circuits regarding adoption of the doctrine). Per *Shaw*, however (see *supra* note 81), the Tenth Circuit appears to have accepted the implied certification doctrine in at least some contexts.

82. *United States ex rel. Longhi v. United States*, 575 F.3d 458 467(5th Cir. 2009).

83. *Rodriguez v. Our Lady of Lourdes Med. Ctr.*, 552 F.3d 297, 304 (3d Cir. 2008); see also *Conner*, 543 F.3d at 1219 (“Where a contractor participates in a certain government program in order to perform the services for which payments are eventually made ... courts are careful to distinguish between conditions of ... participation and ... payment.”).

84. *Conner*, 543 F.3d at 1219 – 20; see also, e.g., *United States ex rel. Marcy v. Rowan Cos.*, No. 03-3395, 2006 WL 2414349, at \*1 (E.D. La. Aug. 17, 2006) (finding that relator failed to state a claim under an implied certification theory where her complaint did not allege that the contractual terms breached were material); *United States ex rel. Coppock v. Northrop Grumman Corp.*, No. 3:98-CV-2143-D, 2003 WL 21730668, at \*11–12 (N.D. Tex. July 22, 2003) (finding that relator did not state a cognizable claim under the federal FCA where his complaint failed to allege that the contractual terms the defendant breached were material).

85. See *United States ex rel. Norbeck v. Basin Elec. Power Coop.*, 248 F.3d 781, 795 (8th Cir. 2001) (“[S]imple contract breaches ... cannot provide evidence of a knowing violation of the [False Claims] Act.”).

86. *United States v. Southland Mgmt. Corp.*, 326 F.3d 669, 580 (5th Cir. 2003) (emphasizing the “crucial distinction between ‘punitive’ federal FCA liability and ordinary breaches of contract ...”).

87. See *id.*

88. *Split Circuits: Ninth Cir. Adopts Natural Tendency Test in Deciding Materiality in Context of False Claims Act*, <http://splitcircuits.blogspot.com/2008/07/ninth-cir-adopts-natural-tendency-test.html> (last visited September 20, 2010) (citing *United States v. Bourseau*, 531 F.3d 1159, 1171 (9th Cir. 2008)).

89. See *Conner*, 543 F.3d at 1219-20 (“A false certification is ... actionable under the FCA only if it leads the government to make a payment which it would not otherwise have made.”); see also *supra*, note 90.

90. See *supra* note 11.

91. C. Sylvia, *supra* note 1, § 4.2, at 111.

92. *Id.*; *United States v. Bornstein*, 423 U.S. 303, 309, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976) (it is “settled that the [federal FCA] ... gives the United States a cause of action against a subcontractor who causes a prime contractor to submit a false claim to the Government.”).

93. C. Sylvia, *supra* note 1, § 4.3, at 116; *Shaw v. AAA Eng’g & Drafting*, 213 F.3d 519, 531 (10th Cir. 2000).

94. Though the KFCRA does not define “political subdivision,” Kansas case law suggests that such term includes not only cities and towns, for instance, but also school districts and other subdivisions of the state. *Wichita Pub. School Employees Union v. Smith*, 194 Kan. 2, 4-5, 397 P.2d 357 (1964) (describing characteristics of political subdivisions as distinguished from private entities).

95. C. Sylvia, *supra* note 1, § 4.3, at 114.

96. *Shaw*, 213 F.3d at 530-531.

97. *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662, 128 S. Ct. 2123, 2128, 170 L. Ed. 2d 1030 (2008).

98. See, e.g., *United States v. Bourseau*, 531 F.3d 1159, 1164-71 (9th Cir. 2008) (applying the reverse false claims provision of the FCA).

99. C. Sylvia, *supra* note 1, § 4.12 at 141 (collecting cases).

100. *Id.* at 142.

101. *Id.* (citing *Pickens v. Kanawha River Towing*, 916 F. Supp. 702 (S.D. Ohio 1996))

102. *American Textile Mfrs. Inst. Inc. v. The Limited Inc.*, 190 F.3d 729 (6th Cir. 1999). In *American Textile*, the defendant allegedly mislabeled the country of origin for textiles, an illegal act already specifically addressed and penalized by eight or more statutes, other than the FCA. *Id.* at 731-732. The defendant already faced liability for various fines, duties, and damages under these statutes. *Id.* at 732. See also *supra* note 99.

103. *Id.*

(Continued on next page)

104. *United States v. Q International Courier Inc.*, 131 F.3d 770, 773 (8th Cir. 1997). In this case, the defendant engaged in a mail re-routing scheme to reduce its postage costs. The federal government brought suit under the FCA, claiming that Q had used false statements and records to evade its obligation to pay proper postage. *See also supra* note 99.

105. K.S.A. 75-7503(a)(3).

106. *See supra* note 11.

107. 31 U.S.C. § 3729(a)(7).

108. C. Sylvia, *supra* note 1, § 4.4, at 115-116.

109. *Allison Engine*, 128 S. Ct. at 2130.

110. C. Sylvia, *supra* note 1, § 4.5, at 121.

111. *Id.* at 121-22. Though few courts have applied this section – it receives far less use than, for instance, (a)(1) or (a)(3) – those that have, have held that the requisite receipt or certificate must be created by the government – the defendant's own internal records are not sufficient. *Id.* (citing *United States ex rel. Aakhus v. Dyncorp Inc.*, 136 F.3d 676 (10th Cir. 1998)).

112. *See supra* note 11.

113. K.S.A. 75-7503(a)(4).

114. K.S.A. 75-7503(a)(5).

115. C. Sylvia, *supra* note 1, § 4.6, at 123.

116. *Id.*

117. Compare 31 U.S.C. § 3729(a)(6) with K.S.A. 75-7503(a)(6).

118. C. Sylvia, *supra* note 1, § 4.7, at 124.

119. *See* Letter from Mark Desetti, Kansas National Education Association to Senate Judiciary Committee (January 23, 2009) (expressing concerns regarding the breadth and meaning of terms in 75-7501(a)(7)).

120. K.S.A. 75-7503(a)(8).

121. *United States ex rel. Durcholz v. FKW Inc.*, 189 F.3d 542, 545 n.3 (7th Cir. 1999).

122. *Gillespie v. Seymour*, 19 Kan. App. 2d 754, 767, 876 P.2d 193 (1994).

123. *See supra* note 11.

124. *Triplex Communications Inc. v. Riley*, 900 S.W.2d 716, 720 (Tex. 1995) (“One cannot agree, either expressly or tacitly, to the commission of a wrong which he knows not of.”); *cf. State v. Wilson*, 30 Kan. App. 2d 498, 501, 43 P.3d 851 (2002) (“One cannot intentionally conspire to commit a crime which only requires a *mens rea* of negligence or no *mens rea* at all.”)

125. *Gillespie*, 19 Kan. App. 2d at 767 (“Based on the [standard] definition of conspiracy, [defendants] cannot be liable for [negligent] breach of trust. If it is accepted that [the defendant's] breach of trust was negligence, it would be illogical to find a ‘meeting of the minds’ (conspiracy) to act negligently.”).

126. Federal courts often do not distinguish between “reckless disregard” or “deliberate ignorance,” analytically lumping both together. Both terms were apparently included out of a desire to address the same sort of careless conduct: “ostrich like” behavior and “refusal to learn of information which an individual, *in the exercise of prudent judgment*, had reason to know.” C. Sylvia, *supra* note 1, § 4.47, at 188 (quoting S. Rep. No. 99-345, at 15 (1986)) (emphasis supplied).

127. K.S.A. 75-7502(d).

128. A relator may not sue a member of the military arising out of

the relator's own armed forces service, if the relator is a current or former member of the military, 29 U.S.C. § 3730(e)(1); or members of Congress, the judiciary, and senior executive branch officials defined by 5 U.S.C. app. 101(f)(1)-(8), but only if based on information already known to the Government when the action was brought. 29 U.S.C. § 3730(e)(2)(A). These proscriptions apply only to *qui tam* relators; the Government itself is not precluded from bringing suit against these persons.

129. *See* C. Sylvia, *supra*, §§ 4:66-79; *see also, e.g., Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 120 S. Ct. 1858, 146 L. Ed. 2d 836 (2000).

130. K.S.A. 75-7503(d); 31 U.S.C. § 3729(e)

131. *United States ex rel. Lissack v. Sakura Global Capital Markets Inc.*, 377 F.3d 145, 152 (2d Cir. 2004).

132. K.S.A. 75-7505(a); 31 U.S.C. 3730(b).

133. *United States ex rel. Bledsoe v. Cmty Health Systems Inc.*, 342 F.3d 634, 641, 642 n.7 (6th Cir. 2003); *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985)

134. *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985).

135. *United States ex rel. Told v. Interwest Const. Co. Inc.*, 267 Fed. Appx. 807, 810 (10th Cir. 2008).

136. 31 U.S.C. § 3732(a); K.S.A. 75-7510.

137. *See United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 25 (D.D.C. 2002).

138. *Id.*

139. *United States ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 686 (S.D. Cal. 1996) (“For all practical purposes, plaintiff and the government are essentially the same party. All of plaintiff's claims, litigation strategies, and ultimate goals, are all asserted on behalf of the government. Consequently, the court concludes that plaintiff and the government have sufficient commonality of interests such that they can successfully assert the joint prosecution privilege.”).

140. *See id.*; *see also Purcell*, 209 F.R.D. at 27 (holding that a joint prosecutorial privilege exists because, in part, of the “unique relationship of the government and the relator in *qui tam* cases ...”)

141. K.S.A. 75-7506.

142. *See, e.g.*, 31 U.S.C. § 3730(c)(4) (authorizing the federal government to restrict the participation of a relator in discovery).

143. 33 U.S.C. § 3733(a)(1).

144. K.S.A. 22-3101.

145. 31 U.S.C. § 3731(d); K.S.A. 75-7505(d).

146. The government can move to settle a federal FCA suit notwithstanding the objections of the relator, if a hearing establishes that the proposed settlement is fair, adequate, and reasonable under all the circumstances. 31 U.S.C. § 3730(c)(2)(B). For good cause shown, the hearing may be held in camera. *Id.* The Government's release of claims is binding upon the relator. C. Sylvia, *supra* note 1, § 10:109, at 584.

147. C. Sylvia, *supra* note 1, § 10:110, at 585; *see also United States ex rel. McCarthy v. Straub Clinic & Hosp. Inc.*, 140 F. Supp. 2d 1062, 1065 (D. Haw. 2001).

148. *See, e.g., Mitchell v. Beverly Enter. Inc.*, 248 Fed. Appx. 73 (11th Cir. 2007).