

The Federal Stimulus Fund— Effect on False Claims Act Actions

by Richard S. Vermeire

This article provides an overview of recent federal stimulus legislation, including how the legislation affects claims brought under the False Claims Act.

The effectiveness of the massive federal stimulus legislation recently enacted to combat the economic downturn remains unknown. It is clear that the legislation will expand the reach of federal anti-fraud statutes and ensnare many entities and individuals desperate for the benefits of the stimulus legislation but unfamiliar with the pitfalls of accessing such benefits. The stimulus legislation includes the \$700 billion Emergency Economic Stabilization Act of 2008 (EESA),¹ signed into law by former President George W. Bush on October 3, 2008, and the \$782 billion American Recovery and Reinvestment Act of 2009 (ARRA),² signed into law by President Barack Obama on February 17, 2009.

This article provides an overview of EESA, ARRA, and the Troubled Assets Relief Program (TARP), as well as the overseeing of funds provided under these programs. It also discusses liability under the False Claims Act (FCA).³

Overview of the Federal Programs

Through TARP, the EESA has provided, under the auspices of the U.S. Department of the Treasury (Treasury), funds to U.S. financial institutions to stabilize the financial markets.⁴ The participating institutions access these funds by selling preferred stock and warrants to the Treasury through securities purchase agreements (SPA).⁵

The \$782 billion ARRA, through federal agencies and state governments, provides federal funds to “promote economic recovery, . . . spur[] technological advances in science and health, [and] invest in transportation, environmental protection, and other infrastructure.”⁶ Colorado is scheduled to receive these stimulus funds for a variety of infrastructure projects, including:

- \$171 million for energy and energy efficiency programs and weatherization improvements⁷
- \$403 million for highways and bridges⁸
- \$102 million for mass transit improvements⁹
- \$31 million for the Clean Water State Revolving Fund.¹⁰

By funding “shovel-ready” projects, the ARRA seeks to immediately infuse money into the economy through private entities that engage in competitive bidding for work on the projects.¹¹

Entities applying for and receiving this federal funding subject themselves to a variety of laws designed to deter fraud against the United States, including the FCA.¹² The FCA, enacted during the Civil War to prevent war profiteering, empowers whistleblowers, known as “*qui tam* relators” to bring civil actions on behalf of the United States to recover damages for false or fraudulent claims made to federal government programs. Since 1986, more than \$20 billion has been recovered under the FCA.¹³

Given the publicity and debate surrounding TARP, ARRA, and the stimulus package generally, the ultimate recipients of these federal funds can expect heightened scrutiny and oversight regarding how they conduct themselves when applying for and spending these funds. Sen. Chuck Grassley of Iowa, a primary architect of the 1986 amendments to the FCA, declared that the FCA will play an important role in prosecuting and ultimately deterring abuses by those who access such funds. He asked that the Treasury and the U.S. Department of Justice:

ensure that whistleblowers are treated seriously, their concerns are reviewed in an expeditious manner, and that any legitimate claims of fraud, waste, or abuse are aggressively investigated and prosecuted to the fullest extent of the law, including seeking recovery of all funds lost via the FCA.¹⁴

Coordinating Editor

Brad Bailey—(303) 670-0413,
bdbailey.law@q.com



About the Author

Richard S. Vermeire is a partner in Fennemore Craig, P.C.'s Denver office.

Government and Administrative Law articles provide information to attorneys dealing with state and federal administrative agencies, as well as attorneys representing public or private clients in the areas of municipal, county, and school or special district law.

Liability Under the FCA

The FCA enumerates seven bases for liability, the most common of which are found in 31 U.S.C. § 3729(a)(1) to (3). These are discussed below.

Section 3729(a)(1)

Section 3729(a)(1) provides liability for a person who: 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 violation of this section can exist, for example, when a person knowingly presents an inflated invoice for payment to the appropriate federal officer.¹⁵

The requirement that the claim be presented to the appropriate federal government or military officer soon may be eliminated. On February 24, 2009, Sen. Grassley introduced Senate Bill 458, which would make numerous amendments to the FCA, including the elimination of any requirement under § 3729(a)(1) that a claim be presented directly to the federal government or armed forces. Under the proposed amendment, a claim submitted to a contractor, grantee, or other recipient will be actionable under § 3729(a)(1), as long as the money to pay a claim comes from or will be reimbursed by the government.¹⁶ This potential change would have specific application to stimulus-related fraud claims, because many claims under the stimulus plan, including invoices for state and local infrastructure projects funded with federal money, will be presented to states, local governments, or private entities, and not

the federal government. Liability also may arise through fraud—including bid rigging—in the ARRA's competitive bidding process.¹⁷

Section 3729(a)(2)

Section 3729(a)(2) provides liability for a person who “[k]nowingly 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.” To establish liability under this section, the false record or statement must be material to the government's decision to pay or approve the false claim.¹⁸ If the government would have paid the claim regardless of the alleged falsity, or if the defrauded party was someone other than the United States, the activity is outside the scope of the FCA.

A violation of § 3729(a)(2) can occur when a person falsely certifies compliance with a statute, regulation, or contractual provision, if the certification is a prerequisite to obtaining government payment.¹⁹ For purposes of the stimulus legislation, this could happen in a number of ways, from falsely certifying compliance with the “Buy American” provision of the ARRA,²⁰ to falsely certifying compliance with the Davis-Bacon wage provisions in the ARRA,²¹ to falsely certifying compliance with the various representations and warranties contained in an SPA for TARP funds. Liability under this section also could exist against individuals who make false certifications in connection with obtaining mortgage relief under the Making Homes Affordable program.²²

Section 3729(a)(3)

Conspiracy also is actionable under the FCA. Section 3729(a)(3) provides liability for a person who “[c]onspires to defraud the Government by getting a false or fraudulent claim allowed or paid.”²³

Intent

Unintentional violations are not actionable under the FCA. Although the FCA requires that a person act knowingly, there is no specific intent requirement.²⁴ Instead, a person acts knowingly under the FCA if that person has actual knowledge of the information, acts in deliberate ignorance of the information, or acts in reckless disregard of the information.²⁵

Damages

An FCA claim can have devastating consequences to a defendant. The statute provides for treble damages, as well as a civil penalty of \$5,000 to \$10,000 for each false or fraudulent claim.²⁶ The FCA defines a “claim” as:

any request or demand, whether under a contract or otherwise, for money or property, which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.²⁷

A claim arises whenever the government is asked to “pay out money or to forfeit money due.”²⁸ Thus, when a defendant knowingly submits inflated invoices, each inflated invoice is a separate false claim, and the civil penalty applies to each invoice.

A defendant may be subject to substantial penalties under the FCA even if no damages are shown. For example, if a contractor falsely certified compliance with the Buy American provision, but there was no damage to the United States because the foreign steel purchased was the same price as the domestic steel, the contractor still can be liable for the civil penalties for each falsely certified invoice.

Statute of Limitations

The FCA provides for a generous statute of limitations period. A claim under the FCA can be brought within six years of the date of the violation, or within three years of the date the facts material

to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances. In no event can a claim be brought more than ten years after the date on which the violation was committed.²⁹ The proposed amendments to the FCA would expand the statute of limitations to ten years after the date on which the violation occurred.³⁰

Qui Tam Relators

The FCA empowers individual whistleblowers, or *qui tam* relators, to file suit in the name of the relator and the U.S. Government. The suit is filed *in camera* and under seal in the U.S. District Court and served only on the U.S. Attorney General and the U.S. Attorney for the district where the lawsuit is filed.³¹ The lawsuit is not served on the defendant “until the court so orders.”³²

Although the lawsuit is under seal, the United States can investigate the claims made in the lawsuit and determine whether to file a complaint in intervention and conduct the litigation, or whether to decline intervention and allow the relator to proceed on his or her own. This initial period is limited by the FCA to sixty days. The FCA provides for extensions of this period for good cause, and it is not uncommon for this period to last six months or longer, during which time the defendant is unaware of the lawsuit.³³

If the government ultimately decides to file a complaint in intervention, it will assume responsibility for conducting the lawsuit, although the relator remains a party to the lawsuit.³⁴ If the government decides against intervention, the relator may conduct the action on his or her own, although the government is entitled to re-

ceive copies of all pleadings filed in the action, as well as all deposition transcripts, and it may intervene in the case at a later date, subject to a showing of good cause.³⁵

The FCA is attractive from a relator's perspective for a variety of reasons. If the government decides to intervene and proceeds with the action, it will take over the litigation. The relator is entitled to receive between 15 and 25 percent of the proceeds or settlement, depending on "the extent to which the person substantially contributed to the prosecution of the action."³⁶ If the government decides not to intervene, the relator is entitled to receive between 25 and 30 percent of any recovery.³⁷

Protections for Whistleblowers

In addition to increased oversight, both the FCA and the stimulus legislation provide additional protections for whistleblowers who file FCA suits or otherwise bring matters to the attention of law enforcement and then are retaliated against by their employers. The FCA provides that any employee who is "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer" as a result of lawful conduct in furtherance of an FCA action is entitled to be made whole.³⁸ The FCA provides various forms of relief, including reinstatement at the same seniority level, two times the amount of back pay and interest on the back pay, and litigation costs and attorney fees.³⁹

The ARRA also contains express protections for whistleblowers.⁴⁰ An employee of an entity receiving the stimulus funds under the ARRA may not be "discharged, demoted, or otherwise discriminated against" in response to the employee's disclosure of information, including when made in the ordinary course of performing his or her job duties,⁴¹ that the employee reasonably believes is evidence of, *inter alia*, gross mismanagement of an agency contract or grant relating to covered funds, or a gross waste of covered funds.⁴² The ARRA contains a detailed procedure outlining the inquiry to be conducted by the appropriate agency once an employee complains about retaliatory treatment to the relevant inspector general, and the relief available to the employee, including reinstatement with back pay, abatement of the reprisal, and payment of the employee's costs and expenses, including attorney fees.⁴³

Options for Defendants

The FCA provides a defendant with some unique defenses and options. The FCA does not allow a relator to simply package public knowledge into a lawsuit. A relator's lawsuit is subject to dismissal on jurisdictional grounds if the lawsuit is based on a prior public disclosure of allegations or transactions in a civil, criminal, or administrative hearing; in a government report, hearing, investigation, or audit; or from the news media, unless the relator is the original source of the information.⁴⁴ The FCA defines an "original source" as "an individual who has direct and independent knowledge of the information of which the allegations are based and has voluntarily provided the information to the government before filing" an FCA action.⁴⁵ Under the proposed amendments to the FCA, however, a defendant's power to dismiss a relator's lawsuit based on a prior public disclosure could be severely limited, if not foreclosed.⁴⁶

Further, a person who has committed a violation of the FCA can reduce the amount of his or her damages by self-reporting the

violation to the government. Such a report must be made within thirty days after the date on which the person first obtained the information, and that person must fully cooperate with any subsequent government investigation. In such an event, the FCA provides for a recovery of double, instead of treble, damages, and no imposition of a civil penalty.⁴⁷

Oversight of Funds

In addition to the increased scrutiny from the press and Congress, the stimulus legislation contains several provisions to strengthen oversight of these funds. These are discussed below.

Inspectors General

The ARRA requires agency inspectors general to investigate fraud claims.⁴⁸ To promote these efforts, the ARRA provides more than \$200 million for various agency inspectors general and authorizes the inspectors general, in addition to reviewing company records, to "interview any employee of the contractor, grantee, sub-grantee, or agency regarding such transactions."⁴⁹ A special inspector general has been appointed to oversee the TARP funds. The SIGTARP, as he is known, has already committed to building "a robust whistleblower system that will both encourage individuals to come forward and protect those individuals once they have done so."⁵⁰ A SIGTARP Hotline has been set up to receive information from whistleblowers by Internet, telephone, e-mail, and fax.⁵¹

General Accounting Office Investigations

The ARRA requires the General Accounting Office (GAO) to conduct ongoing oversight regarding the use of stimulus dollars. It also requires that all recipients of stimulus funds agree to the GAO audit process.⁵²

Recovery Accountability and Transparency Board

The "RAT" Board is charged to conduct "oversight of covered funds to prevent fraud, waste and abuse."⁵³ The ARRA empowers the RAT Board to conduct its own independent audits and reviews and to hold public hearings.⁵⁴ The findings of the RAT Board, as well as findings from the GAO and the inspectors general, will be made publicly available on a website.⁵⁵

Conclusion

For many, the stimulus funds can be a life-line during the economic downturn. The recipients of such funds, whether they be financial institutions, construction contractors, or homeowners, must be mindful that by applying for and receiving federal funds, stimulus-related or otherwise, they may face potential liability under the FCA and other federal statutes.

Notes

1. Emergency Economic Stabilization Act of 2008 (EESA), Pub. L. No. 110-343.
2. American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5.
3. 31 U.S.C. §§ 3729 *et seq.*
4. Press Release, U.S. Department of Treasury, Remarks by Secretary Henry M. Paulson, Jr., on Financial Rescue Package and Economic Update (Nov. 12, 2008).

5. See www.treas.gov/initiatives/eesa/docs/SA-Private.pdf.

6. ARRA, *supra* note 2 at § 3(a). The ARRA contains approximately \$520 billion in spending programs, with the remainder consisting of tax cuts.

7. See www.energy.gov/colorado.htm.

8. House Transportation and Infrastructure Committee, “Additional T&I Committee Infrastructure Investment Formula Funding provided under P.L. 111-5, the American Recovery and Reinvestment Act of 2009,” available at [transportation.house.gov/Media/file/Full Committee/ Stimulus/20090311 Highway and Bridge Investment by State and Large Urbanized Areas.pdf](http://transportation.house.gov/Media/file/Full%20Committee%20Stimulus/20090311%20Highway%20and%20Bridge%20Investment%20by%20State%20and%20Large%20Urbanized%20Areas.pdf).

9. *Id.*

10. *Id.*

11. ARRA, *supra* note 2 at § 1554. The ARRA provides that “to the maximum extent possible” projects are to be funded through fixed-price contracts through the use of competitive procedures.

12. In addition to the False Claims Act (FCA), recipients of the stimulus funds are subject to other federal anti-fraud statutes, including criminal statutes prohibiting false statements. 18 U.S.C. § 1001.

13. Written comments from Michael Hertz to the U.S. Committee on the Judiciary (Feb. 27, 2008).

14. Press Release, Senator Chuck Grassley, “Grassley Urges Federal Government to Utilize ‘Lincoln’s Law’ to Help Protect and Recover Taxpayer Dollars Lost to Fraud in Economic Stabilization Program” (Nov. 18, 2008), available at www.iowapolitics.com/index.html?Article=141766.

15. *U.S. ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1170 (9th Cir. 2006) (noting that such inflated invoice claims are the “archetypal *qui tam* False Claims action”).

16. False Claims Clarification Act of 2009, S. 458 111th Cong. § 2(b)(2).

17. *U.S. ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996).

18. *Allison Engine Co., Inc. v. United States*, 128 S.Ct. 2123 (2008).

19. *Hopper*, *supra* note 17 at 1266; *U.S. ex rel. Mikes v. Strauss*, 274 F.3d 687, 698 (2nd Cir. 2001).

20. *U.S. v. Rule Indus., Inc.*, 878 F.2d 535 (1st Cir. 1989). The ARRA’s “Buy American” provision mandates that “none of the funds appropriated or otherwise made available by this Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.” ARRA, *supra* note 2 at § 1605.

21. *U.S. ex rel. Plumbers and Steamfitters Local Union No. 38 v. C.W. Roen Constr. Co.*, 183 F.3d 1088, 1092 (9th Cir. 1999) (“[w]e have no doubt, therefore, that a false certification that workers have been paid at a legally required wage rate may give rise to liability under the FCA”).

22. See U.S. Department of the Treasury, “Making Home Affordable: Summary of Guidelines” (March 4, 2009), available at www.treas.gov/press/releases/reports/guidelines_summary.pdf. Applicants for the Making Home Affordable program must document their financial hardship, as well as occupancy status, to be eligible for the program.

23. The FCA further imposes liability for one who “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”; “is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true”; “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 “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.” 31 U.S.C. § 3729(a)(4) to (7).

24. *Id.*

25. 31 U.S.C. § 3729(b).

26. 31 U.S.C. § 3729(a).

27. 31 U.S.C. § 3729(c).

28. *Hendow*, *supra* note 15 at 1173.

29. 31 U.S.C. at § 3731(b).

30. False Claims Clarification Act of 2009, *supra* note 16 at § 6.

31. 31 U.S.C. § 3730(b)(1) and (2).

32. 31 U.S.C. § 3730(b)(2).

33. 31 U.S.C. § 3730(b)(2) and (3). See also Johnson, “A Backlog of Cases Alleging Fraud: Whistle-Blower Suits Languish at Justice,” *Washington Post* A-1 (July 2, 2008).

34. 31 U.S.C. § 3730(b) and (c). The government may, on motion, limit a relator’s participation in the lawsuit by showing that unrestricted participation of the relator “would interfere with or unduly delay the Government’s prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment.” 31 U.S.C. § 3730(c)(2)(C). The defendant also may prevent the relator’s unrestricted participation if such participation is for “purposes of harassment or would cause the defendant undue burden or unnecessary expense.” 31 U.S.C. § 3730(c)(2)(D).

35. 31 U.S.C. § 3730(c)(3).

36. 31 U.S.C. § 3730(d)(1). The award can be reduced to 10 percent if the court determines that the action is based “primarily on disclosures of specific information” contained in public hearings or government reports or audits, as opposed to information provided by the relator. *Id.* In addition, if the relator is found by the court to have “planned or initiated” the subject violation, the court may reduce the relator’s recovery “to the extent the court considers appropriate.” If the relator is convicted of criminal conduct related to his or her role in violation of the FCA, the relator is to be dismissed from the FCA case and may not receive any proceeds of the action. 31 U.S.C. § 3730(d)(3).

37. 31 U.S.C. § 3730(d)(2).

38. 31 U.S.C. § 3730(h).

39. *Id.*

40. ARRA, *supra* note 2 at § 1553.

41. *Id.* at § 1553.

42. *Id.* at § 1553(a)(1) to (5).

43. *Id.* at § 1553(c)(2).

44. 31 U.S.C. § 3730(e)(4)(A).

45. 31 U.S.C. § 3730(e)(4)(B).

46. False Claims Clarification Act of 2009, *supra* note 16 at §§ 3 and 4.

47. 31 U.S.C. § 3729(a)(A) to (C).

48. ARRA, *supra* note 2 at §§ 1514 and 1515.

49. *Id.* at § 1515(a)(2).

50. Letter from Neil Barofsky, Special Inspector General, Office of the Special Inspector General, Troubled Asset Relief Program (Feb. 2, 2009).

51. *Id.*

52. ARRA, *supra* note 2 at §§ 901 and 902.

53. *Id.* at § 1521.

54. *Id.* at § 1523.

55. *Id.* at § 1526. ■