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ARTICLE

VFATA: VIRGINIA'S FALSE CLAIMS ACT

Michael J. Davidson[†]

I. INTRODUCTION

In 2003, Virginia joined the growing body of states that have enacted some version of a civil false claims act.¹ The Virginia Fraud Against Taxpayers Act (VFATA) is based on and closely mirrors the highly successful federal civil False Claims Act (FCA).² As the VFATA becomes more widely used as a vehicle for challenging fraud, Virginia courts and practitioners will likely look to the FCA and associated interpretive case law when applying the VFATA.³ This article will discuss the general development of federal and state false claims acts, the VFATA in particular, and compare the VFATA to its federal counterpart. Further, this article will provide a general overview of the benefits and criticisms of civil false claims acts that will likely be applied to the VFATA, and will ultimately conclude that the benefits of such acts outweigh their disadvantages.

II. DEVELOPMENT OF CIVIL FALSE CLAIMS ACTS

The federal False Claims Act was enacted during the Civil War in response to massive fraud being committed by defense contractors against the United States.⁴ Union soldiers opened ammunition crates and found sawdust rather than gunpowder, and cavalry units reported being charged multiple times for the same horses.⁵ Contractors supplied the Army with

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1. *See infra* notes 22-23 and accompanying text.

2. *See infra* note 36.

3. *See infra* notes 48-49 and accompanying text.

4. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 1986 U.S.C.A.N. (100 Stat. 3153) 5266, 5273.

5. ANDY PASZTOR, WHEN THE PENTAGON WAS FOR SALE 11 (1995).

boots made of cardboard and provided unseaworthy ships to transport the soldiers.⁶ The Union Army purchased uniforms and blankets that turned out to be “little better than trash,” and fell apart after minimal exposure to the elements.⁷

The original version of the False Claims Act contained both civil and criminal remedies for the knowing submission of false claims to the government.⁸ In addition, the Act contained a *qui tam* provision,⁹ which permits an individual to bring suit on behalf of the federal government as a sovereign.¹⁰ The current version of the civil FCA, codified at 31 U.S.C. §§ 3729-3733, is now the federal government’s primary tool to combat and deter fraud when “payment of government monies, or to federally funded entities using government funds” is involved.¹¹ Although the original FCA was enacted to combat defense procurement fraud, the majority of the government’s FCA recoveries are now in the area of health care fraud.¹² Further, the civil FCA has proven extremely lucrative for the federal government. Since 1986, the United States has recovered more than \$20 billion.¹³

6. JAMES B. HELMER, JR., FALSE CLAIMS ACT: WHISTLEBLOWER LITIGATION 38 (3d ed. 2002).

7. JAMES F. NAGLE, A HISTORY OF GOVERNMENT CONTRACTING 205 (1992).

8. False Claims Amendments Act of 1986, Pub. L. No. 99-562, 1986 U.S.C.C.A.N. (100 Stat. 3153) 5266, 5273.

9. *Id.* at 5275. The term “*qui tam*” comes from “the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means ‘who pursues this action on our Lord the King’s behalf as well as his own.’” *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768 n.1 (2000). *Qui tam* provisions existed in both early Roman and Anglo-Saxon law, and were common in the American colonies. R. Harrison Smith, Commentary, *A Key Time for Qui Tam: The False Claims Act and Alabama*, 58 ALA. L. REV. 1199, 1200 (2007).

10. CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 12:2, at 747 (2004).

11. JOHN T. BOESE, CIVIL FALSE CLAIMS AND *QUI TAM* ACTIONS 1-3 (3d ed. Supp. 2008); see *United States ex rel. Roby v. Boeing Co.*, 302 F.3d 637, 641 (6th Cir. 2002) (stating the FCA is the “primary means by which the Government combats and deters fraud”). The criminal False Claims Act is codified at 18 U.S.C. § 287 (2006).

12. Press Release, Department of Justice, Justice Department Recovers \$2 Billion for Fraud Against the Government in FY 2007; More Than \$20 Billion Since 1986, (Nov. 1, 2007) (“As in the last several years, health care accounted for the lion’s share of fraud settlements and judgments”) [hereinafter DOJ Press Release], available at <http://www.usdoj.gov>.

13. *Id.*

In 1987, California became the first state to enact a false claims act designed to combat fraud committed against state and local governments.¹⁴ The California FCA is a direct by-product of the public awareness surrounding the significant reforms of the federal civil False Claims Act.¹⁵ Although the California FCA was largely inactive until the early 1990s, its use has grown dramatically since then.¹⁶

Patterned after the federal civil False Claims Act, the California statute also contains a *qui tam* provision.¹⁷ However, the California FCA does not exactly mirror its federal counterpart. For example, unlike the federal civil FCA, the California FCA imposes liability “upon anyone who is a ‘beneficiary of an inadvertently submitted false claim’ who later discovers the false claim and fails to report it within a ‘reasonable time’ after discovery.”¹⁸ Further, like the FCA, the California legislation provides for a maximum monetary limit on its penalty provision, but unlike the federal Act, the California FCA has no minimum.¹⁹ The California FCA’s *qui tam* provision is also more generous than the federal version.²⁰ For example, when the government does not intervene in a case, the maximum recovery under the federal civil FCA is thirty percent, whereas the California FCA provides for a maximum recovery of fifty percent.²¹

In 2003, Virginia joined the federal government as well as twenty-two states and the District of Columbia when it enacted a civil false claims act that includes a *qui tam* provision.²² In addition to Virginia and California, these states include Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Massachusetts, Michigan, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Rhode Island, Tennessee,

14. SYLVIA, *supra* note 10, § 12:1, at 747. While the federal civil FCA is “proven to be a powerful tool in combating fraud,” some states have chosen to enact even stronger false claims acts. James W. Taylor & Brian Taugher, *The California False Claims Act*, 25 PUB. CONT. L.J. 315, 316 (1996).

15. SYLVIA, *supra* note 10, § 12:3, at 748.

16. Taylor & Taugher, *supra* note 14, at 316.

17. City of Hawthorne *ex rel.* Wohlner v. H&C Disposal Co., 1 Cal. Rptr. 3d. 312, 313 (Cal. Ct. App. 2003).

18. SYLVIA, *supra* note 10, § 12:3, at 748 (citing CAL. GOV’T CODE § 12650(8)). Hawaii’s FCA also contains a similar provision. *Id.* § 12:20, at 761.

19. *Id.* § 12:3, at 749. The federal civil FCA provides for a penalty of \$5,500 to \$11,000. 31 U.S.C. § 3729(a) (2006); 28 C.F.R. § 85.3(a)(9) (2008).

20. SYLVIA, *supra* note 10, § 12:3, at 749.

21. 31 U.S.C. § 3730(d)(2); SYLVIA, *supra* note 10, § 12:3, at 749.

22. Taxpayers Against Fraud Education Fund, State False Claims Acts, <http://www.taf.org/statefca.htm> (last visited Jan. 17, 2009).

Texas, and Wisconsin.²³ Additionally, two major cities, Chicago and New York City, have enacted similar legislation.²⁴

Further, because of the Deficit Reduction Act (DRA) of 2005²⁵ and the Federal Medical Assistance Percentage (FMAP), it is likely that other states that have not enacted a false claims act will do so.²⁶ The DRA provides a financial incentive to states to enact a false claims act, if such enactment addresses Medicaid fraud.²⁷ If a state false claims act complies with the DRA, “the Federal medical assistance percentage with respect to any amounts recovered under a State action brought under such law, shall be decreased by 10 percentage points.”²⁸ “The FMAP is the percentage of total state Medicaid funding that comes from the federal government, as opposed to the state.”²⁹ For any amount a state recovers through a false claims act, the state must pay the federal government the FMAP, but the DRA decreases that amount by ten percent.³⁰ In other words, the state may keep an additional ten percent of all recoveries.³¹

One state taking advantage of federal incentives to enact a false claims act is Virginia. The Virginia Fraud Against Taxpayers Act (VFATA)³² is one of thirteen DRA compliant state false claim acts.³³ As a result, Virginia is “eligible to receive an additional ten percent on all Medicaid recoveries obtained through VFATA.”³⁴

III. THE VIRGINIA FRAUD AGAINST TAXPAYERS ACT (VFATA)

The VFATA went into effect on January 1, 2003 after receiving widespread support within the General Assembly.³⁵ The VFATA is based on and

23. *Id.*

24. *Id.*

25. Pub. L. No. 109-171, 120 Stat. 4 (2006).

26. *Cf. Smith, supra* note 9 (advocating for an Alabama false claims act).

27. *See, e.g.,* the Virginia Fraud Against Taxpayers Act, VA. CODE ANN. §§ 8.01-216.1–216.19 (2007).

28. 42 U.S.C.A. § 1396h(a) (West Supp. 2008); Andrew B. Eills, *The Federal Deficit Reduction Act of 2006: Efforts to Cut Spending, Incentives to Enact New False Claims Acts*, 48 N.H.B.J. 6, 11 (2007).

29. Eills, *supra* note 28, at 11.

30. *Id.*

31. *Id.*

32. VA. CODE ANN. §§ 8.01-216.1–216.19 (2007).

33. Taxpayers Against Fraud Education Fund, State False Claims Acts, <http://www.taf.org/statefca.htm> (last visited Jan. 17, 2009).

34. 2007 VA. MEDICAID FRAUD CONTROL UNIT ANN. REP. 4.

35. Alan Cooper, *New State Law Models Federal Act*, RICH. TIMES-DISPATCH, Feb. 15, 2003, at B3 (“The legislation passed without a dissenting vote at any stage.”).

mirrors the language of the federal civil False Claims Act.³⁶ Shortly after enacting the VFATA, Virginia created a Special *Qui Tam* Unit to coordinate the investigation and prosecution of *qui tam* cases, permitting the Medicaid Fraud Unit to borrow investigators from other state agencies to pursue medical *qui tam* cases.³⁷

Most state false claims acts have little interpretive case law,³⁸ and the VFATA serves as no exception to the rule. As of January 2009, there were no reported VFATA cases and little mention of unreported cases existed elsewhere.³⁹ The first VFATA case was filed by a relator in April 2003 and alleged that a contractor had overcharged the Virginia Department of Transportation for equipment and services.⁴⁰ However, the number of VFATA cases is gradually increasing, and eventually the Virginia judicial system will begin to render interpretive decisions. A December 2005 law review article reported thirty-five filed VFATA cases of which none had yet to result in a recovery.⁴¹

At the beginning of 2008, there were approximately 100 pending *qui tam* cases, the vast majority of which are being handled by Virginia's Medicaid Fraud Control Unit (MFCU).⁴² Furthermore, the MFCU has reported a gradual increase in its case load, progressing from fifty-two open cases at the end of fiscal year 2006, the majority of which were filed against pharmaceutical companies. The case load increased to eighty-two open cases by the end of fiscal year 2007.⁴³

The fact that the bulk of VFATA cases is in the health care fraud area is not surprising. Because Medicaid is funded by both the Commonwealth and

36. 2006 VA. MEDICAID FRAUD CONTROL UNIT ANN. REP. 18 ("This Act is patterned after the Federal False Claims Act . . .").

37. James F. Barger, Jr. et al., *States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts*, 80 TUL. L. REV. 465, 480-81, app. B, at Question II(b) (2005); see also 2006 VA. MEDICAID FRAUD CONTROL UNIT ANN. REP. 18 ("The 2005 General Assembly approved an increase in appropriation to create the Civil Investigations Squad to be placed within the MFCU.").

38. SYLVIA, *supra* note 10, § 12:1, at 747 ("There is little case law interpreting most of these statutes.").

39. See VA. CODE ANN. §§ 8.01-216.1-216.19 (2007 & Supp. 2008).

40. Michelle Washington, *State Plans To Prosecute Contractor*, THE VIRGINIAN-PILOT, Dec. 3, 2003, at B3.

41. Barger et al., *supra* note 37, app. B, at Questions IV(a) (reporting that a settlement was being negotiated), IV(b).

42. E-mail from Michael Judge, Deputy Director, Prosecution and Litigation, Medicaid Fraud Control Unit (Jan. 24, 2008) (on file with author).

43. *Id.*

the federal government,⁴⁴ a relator who intends to file a federal FCA lawsuit can allege a violation of the VFATA as well.⁴⁵ In turn, the claimant is eligible for a recovery under both statutes.⁴⁶

Most state false claims acts, including the VFATA, are modeled at least in part after the federal civil False Claims Act.⁴⁷ Accordingly, state courts look to federal case law for interpretive guidance,⁴⁸ and Virginia courts will likely do the same. Indeed, because the two statutes are so similar, case law interpreting the federal civil FCA should serve as persuasive authority when interpreting the VFATA.⁴⁹

The VFATA and the FCA contain similar provisions. With the exception of language distinguishing application of the statute to the Commonwealth, rather than the United States, the sections describing the conduct giving rise to liability are virtually identical.⁵⁰ Generally, both statutes subject any person to civil liability that knowingly makes or presents, or causes to be made or presented, a false claim, or conspires to get a false claim paid.⁵¹ In the Fourth Circuit, any false statement or claim must also be “material,” that is, having “a natural tendency to influence agency action or is capable of influencing agency action.”⁵² Without squarely addressing the issue, a recent Supreme Court decision appeared to agree with the Fourth Circuit, suggesting that FCA liability requires proof of materiality.⁵³ Further, both

44. 2007 VA. MEDICAID FRAUD CONTROL UNIT ANN. REP. 18 (“Medicaid is funded by both the federal and state governments . . .”).

45. 2006 VA. MEDICAID FRAUD CONTROL UNIT ANN. REP. 18.

46. *Id.* (“[T]he relator [sic] will be eligible for a percentage of the state share of the Medicaid recovery as well as the federal share.”).

47. SYLVIA, *supra* note 9, § 12:2, at 747.

48. *Id.* § 12:1, at 747 (“For those state statutes modeled after the federal False Claims Act, it is likely that federal precedent will be valuable in construing the statutes, at least where the provisions are similar or identical.”); *see, e.g.*, *State v. Altus Fin., S.A.*, 116 P.3d 1175, 1184 (Cal. 2005) (“[T]he CFCA ‘is patterned on similar federal legislation’ and it is appropriate to look to precedent construing the equivalent federal act.”).

49. *See United States ex rel. Stierli v. Shasta Servs. Inc.*, 440 F. Supp. 2d 1108, 1111 (E.D. Cal. 2006) (“Because of the similarity between the [FCA and California FCA], federal decisions are deemed persuasive authority in interpreting both state and federal provisions.”).

50. 31 U.S.C. § 3729(a)(1)-(7) (2006); VA. CODE ANN. § 8.01-216.3(A)(1)-(7) (2007).

51. 31 U.S.C. § 3729(a)(1)-(7); VA. CODE ANN. § 8.01-216.3(A)(1)-(7).

52. *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 785 (4th Cir. 1999); *see also United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 378 (4th Cir. 2008); SYLVIA, *supra* note 10, § 4:57, at 198-99 (recognizing that the issue of whether materiality is required “has generated significant debate”).

53. *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 128 S. Ct. 2123, 2126 (2008) (“[A] plaintiff asserting a § 3729(a)(2) claim must prove that the defendant intended

statutes contain causes of action for reverse claims; that is, making, using, or causing to be made or used, a false statement or record to both statutes only require that a case be proven by a preponderance of the evidence.⁵⁴ Furthermore, both define a “claim” broadly using virtually identical language.⁵⁵ Under the VFATA and the FCA, a claim includes:

any request or demand, whether under a contract or otherwise, for money or property that is made to a contractor, grantee, or other recipient if the [Commonwealth/United States Government] provides any portion of the money or property that is requested or demanded, or if the [Commonwealth/Government] will reimburse such contractor, grantee, or other recipient for any portion of the money or property that is requested or demanded.⁵⁶

Although a FCA claim is defined broadly, “neither mistaken conduct nor negligence is actionable under the False Claims Act.”⁵⁷ Similarly, “reasonable, but incorrect, interpretation[s] of a contract” generally will not support FCA liability.⁵⁸ Further, both statutes exclude tax-related claims as a cause of action.⁵⁹ Also, the remedy provisions of both statutes provide for treble damages in addition to civil penalties ranging from \$5,500 to \$11,000.⁶⁰ Under the FCA, civil penalties are mandatory and are imposed for each false claim.⁶¹ The penalties are not dependent upon proof of actual damages, and the court determines the amount of each penalty.⁶²

that the false record or statement be material to the Government’s decision to pay or approve the false claim.”); *id.* at 2130-31 (for purposes of § 3729(a)(3), “it must be established that [the alleged conspirators] agreed that the false record or statement would have a material effect on the Government’s decision to pay the false or fraudulent claim.”).

54. 31 U.S.C. § 3731(c); VA. CODE ANN. § 8.01-216.9.

55. 31 U.S.C. § 3729(c); VA. CODE ANN. § 8.01-216.2.

56. 31 U.S.C. § 3729(c); VA. CODE ANN. § 8.01-216.2.

57. *United States ex rel. Phillips v. Pediatric Servs. of America, Inc.*, 142 F. Supp. 2d 717, 733 (W.D.N.C. 2001).

58. *United States ex rel. Tyson v. Amerigroup Ill., Inc.*, 488 F. Supp. 2d 719, 730 (N.D. Ill. 2007).

59. 31 U.S.C. § 3729(e); VA. CODE ANN. § 8.01-216.3(D).

60. 31 U.S.C. § 3729(a); VA. CODE ANN. § 8.01-216.3(A); 28 C.F.R. § 85.3(a)(9) (2008).

61. *United States v. Rogan*, 459 F. Supp. 2d 692, 720, 726-27 (N.D. Ill. 2006).

62. *Id.* at 720, 727.

For most provisions, the express language of both statutes only requires that the government prove a knowing violation.⁶³ Further, both statutes define “knowing” broadly.⁶⁴ Neither the United States nor the Commonwealth must prove specific intent, and “knowing” means that “a person, with respect to information (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information.”⁶⁵ The 1986 Amendments to the FCA eased the scienter requirement in order “to address ‘the problem of the “ostrich-like” refusal to learn of information which an individual, in the exercise of prudent judgment, had reason to know.’”⁶⁶ Presumably, liability under the VFATA, like the FCA, extends to “those who ignore obvious warning signs.”⁶⁷

Although the term “knowing” is interpreted broadly, it is not without limitation. Mere negligence, or an “innocent mistake,” is insufficient to establish liability.⁶⁸ Similarly, federal courts have opined that “a difference in interpretation growing out of a disputed legal question,”⁶⁹ and “the common failings of scientists or engineers,”⁷⁰ will not support liability.

Because neither the VFATA nor the FCA specifically provide for a knowing violation of a conspiracy, it remained an open question whether specific intent to defraud was required.⁷¹ Both statutes impose liability on a person who “conspires to defraud [the Commonwealth/Government] by getting a false or fraudulent claim allowed or paid.”⁷² Under the FCA, “[g]eneral civil conspiracy principles apply,”⁷³ and some courts looked to

63. 31 U.S.C. §§ 3729(a)(1)-(2), (6)-(7); VA. CODE ANN. § 8.01-216.3(A)(1)-(2), (6)-(7).

64. 31 U.S.C. § 3729(b); VA. CODE ANN. § 8.01-216.3(C).

65. VA. CODE ANN. § 8.01-216.3(C); *see also* 31 U.S.C. § 3729(b).

66. *Crane Helicopter Servs., Inc., v. United States*, 45 Fed. Cl. 410, 433 (Fed. Cl. 1999).

67. *Id.*

68. *Minn. Ass’n of Nurse Anesthetists v. Allina Health System Corp.*, 276 F.3d 1032, 1053 (8th Cir. 2002) (negligence insufficient); *United States ex rel. Humphrey v. Franklin-Williamson Human Servs., Inc.*, 189 F. Supp. 2d 862, 867 (S.D. Ill. 2002) (“innocent mistakes or negligence will not suffice”); *Crane Helicopter Servs.*, 45 Fed. Cl. at 434 (“[A]n innocent mistake or mere negligence such as a math error or flawed reasoning may be excused.”).

69. *Franklin-Williamson Human Servs.*, 189 F. Supp. 2d at 867.

70. *United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 297 F. Supp. 2d 272, 277 (D.D.C. 2004).

71. *See SYLVIA*, *supra* note 10, § 4:4, at 120.

72. 31 U.S.C. § 3729(a)(3); VA. CODE ANN. § 8.01-216.3(A)(3).

73. *United States v. Rogan*, 459 F. Supp. 2d 692, 726 (N.D. Ill. 2006); *see also United States ex rel. Phillips v. Pediatric Servs. of America*, 142 F. Supp. 2d 717, 733 (W.D.N.C. 2001).

these general principles to find a heightened level of scienter.⁷⁴ Other courts simply assumed that the scienter element was the same for a conspiracy to defraud as it is for a knowing presentation of a false claim.⁷⁵

In *Allison Engine Co., Inc. v. United States ex rel. Sanders*,⁷⁶ the Supreme Court of the United States recently addressed the issue. In *Allison Engine*, two *qui tam* relators brought suit based on allegedly false invoices submitted by a subcontractor on a Navy contract.⁷⁷ With regard to the conspiracy cause of action, the Court stated that § 3729(a)(3) of the FCA requires proof “that the conspirators intended ‘to defraud the Government.’”⁷⁸ The Court posited that “it is not enough for a plaintiff to show that the alleged conspirators agreed upon a fraud scheme that had the effect of causing a private entity to make payments using money obtained from the Government.”⁷⁹ If the alleged misconduct involves an agreement to make a false statement or record, the plaintiff must also establish “that the conspirators had the purpose of ‘getting’ the false record or statement to bring about the Government’s payment of a false or fraudulent claim.”⁸⁰

In addition to the government bringing suit, the *qui tam* provisions of both the VFATA and the FCA permit a private person to bring suit on behalf of that person and the sovereign.⁸¹ Known as relators or whistleblowers, these persons bring suit in the name of the government,⁸² the real party in interest,⁸³ and relators then act on behalf of the government.⁸⁴ Because of this unique relationship between relators and the federal government, “a joint-prosecutorial privilege exists” between the United States and relators.⁸⁵ Further, both statutes contain provisions designed to protect whistleblowers against retaliation.⁸⁶

74. See, e.g., *United States ex rel. Reagan v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, 274 F. Supp. 2d 824, 857 (S.D. Tex. 2002).

75. SYLVIA, *supra* note 10, § 4:4, at 120.

76. *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008).

77. *Id.* at 2127.

78. *Id.* at 2130.

79. *Id.*

80. *Id.*

81. 31 U.S.C. § 3730(b)(1); VA. CODE ANN. § 8.01-216.5(A).

82. 31 U.S.C. § 3730(b)(1); VA. CODE ANN. § 8.01-216.5(A).

83. *United States ex rel. Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870, 872 (8th Cir. 1998); *United States ex rel. McCready v. Columbia/HCA Healthcare Corp.*, 251 F. Supp. 2d 114, 120 (D.D.C. 2003).

84. BOESE, *supra* note 11, at 4-36.1.

85. *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 27 (D.D.C. 2002).

86. 31 U.S.C. § 3730(h); VA. CODE ANN. § 8.01-216.8.

Relators initiate the lawsuit by serving upon the government a motion for judgment under the VFATA or a complaint under the FCA as well as a “written disclosure of substantially all material evidence and information the person possesses”⁸⁷ The motion for judgment or complaint is filed in camera and remains under seal for at least sixty days under the FCA and 120 days under the VFATA.⁸⁸ During this period, the government investigates and determines whether it will intervene in the case.⁸⁹ Under both statutes, the government may request further time to make the intervention decision,⁹⁰ and under the FCA, the government frequently requests and receives extensions of time.⁹¹ If the government elects to intervene, it assumes control over the lawsuit; otherwise, the government can decline to intervene and the relator may prosecute the case.⁹²

Even in cases where the government declines to intervene, it still exercises significant control over the case’s ultimate outcome. Upon request, and at the government’s expense, relators must provide the government with a copy of all pleadings and deposition transcripts.⁹³ Under both statutes, the case may not be dismissed without the written authorization of the court and the respective Attorney General.⁹⁴ Further, both statutes permit the government to settle or dismiss a case over the objection of the relator after notice and an opportunity for a hearing.⁹⁵

Under both statutes, the financial incentives for relators to bring suit are substantial. When the government intervenes, a relator under both statutes is entitled to fifteen to twenty-five percent “of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.”⁹⁶ If the government declines to intervene, a successful relator is entitled to twenty-five to thirty percent of the proceeds, in addition to an award against the defendant for reasonable expenses, attorneys’ fees, and costs.⁹⁷ However, if the relator “is convicted of criminal conduct arising from [his or her] role in

87. 31 U.S.C. § 3730(b)(2); VA. CODE ANN. § 8.01-216.5(B).

88. 31 U.S.C. § 3730(b)(2); VA. CODE ANN. § 8.01-216.5(B).

89. 31 U.S.C. § 3730(b)(2); VA. CODE ANN. § 8.01-216.5(B).

90. 31 U.S.C. § 3730(b)(3); VA. CODE ANN. § 8.01-216.5(C).

91. *See, e.g., United States ex rel. Permison v. Superlative Technologies, Inc.*, 492 F. Supp. 2d 561, 563 (E.D. Va. 2007) (United States received three extensions of time).

92. 31 U.S.C. § 3730(b)(4); VA. CODE ANN. § 8.01-216.5(D).

93. 31 U.S.C. § 3730(c)(3); VA. CODE ANN. § 8.01-216.6(F).

94. 31 U.S.C. § 3730(b)(1); VA. CODE ANN. § 8.01-216.5(A).

95. 31 U.S.C. § 3730(c)(2)(A)-(B); VA. CODE ANN. § 8.01-216.6(B)-(C).

96. 31 U.S.C. § 3730(d)(1); VA. CODE ANN. § 8.01-216.7(A).

97. 31 U.S.C. § 3730(d)(2); VA. CODE ANN. § 8.01-216.7(B).

the violation of [the FCA or VFATA], that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action.”⁹⁸ If the court finds that the relator planned and initiated the misconduct giving rise to the lawsuit, under the FCA the court may reduce the relator’s share of the proceeds, but under the VFATA the relator recovers nothing.⁹⁹

Unique to the VFATA is the fact that inmates incarcerated in a state or local correction facility may not bring suit.¹⁰⁰ Additionally, current and former Commonwealth employees may not bring suit based on information they acquired as Commonwealth employees unless they “first, in good faith, exhausted existing internal procedures for reporting and seeking recovery of the falsely claimed sums through official channels and unless the Commonwealth failed to act on the information provided within a reasonable period of time.”¹⁰¹

IV. LONG TERM OUTLOOK

If the federal civil FCA serves as an example, a robust VFATA in general, and its *qui tam* provisions in particular, will be met with various forms of criticism. One of the most controversial features of the FCA has been its *qui tam* provision, which the VFATA mirrors.¹⁰² Disgruntled employees may use actual or threatened FCA litigation “to deflect legitimate discipline, extract unwarranted termination arrangements, or second-guess valid management decisions.”¹⁰³ Further, a FCA may serve as another vehicle for meritless litigation¹⁰⁴ or “creative” lawyering as relators

98. 31 U.S.C. § 3730(d)(3); VA. CODE ANN. § 8.01-216.7(C).

99. 31 U.S.C. § 3730(d)(3); VA. CODE ANN. § 8.01-216.7(C). In addition, the VFATA contains a public disclosure bar modeled after the federal FCA, which generally prohibits private persons from receiving a reward if their claim is based upon information already in the public domain, unless they were an original source of such information. VA. CODE ANN. § 8.01-216.8. For a comprehensive review of the public disclosure bar and original source exception, see Joel D. Hesch, *Restating the “Original Source Exception” to the False Claims Act’s “Public Disclosure Bar,”* 1 LIBERTY L. REV. 111 (2006).

100. VA. CODE ANN. § 8.01-216.8.

101. *Id.*

102. See 31 U.S.C. § 3730(b)-(d); VA. CODE ANN. § 8.01-216.5–216.7.

103. William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1826 (1996).

104. *Id.* at 1820 (“[T]he DOJ seldom has moved to dismiss a *qui tam* suit on the ground that the underlying substantive allegations were threadbare.”); see Smith, *supra* note 9, at 1212 (“The primary criticism of statutes that encourage whistleblower suits—such as the FCA and its state equivalents—is that the possibility of a generous recovery increases the number of frivolous suits and leads to the creation of a hostile business environment.”).

attempt to fit routine business disputes under the FCA's broad umbrella.¹⁰⁵ Companies must bear the inconvenience and substantial expense of defending against such lawsuits and may elect to settle these cases for purely business reasons. *Qui tam* lawsuits may lead to "increased industry-wide costs" and "increase[d] medical prices."¹⁰⁶ Also, rather than reporting misconduct to corporate management, false claims acts arguably provide relators with a financial incentive to allow the fraud to continue in order to increase the amount of damages and concomitantly, the relator's recovery.¹⁰⁷

False claims acts are subject to other forms of criticism as well. For example, adding a state false claims act to the government's already complex anti-fraud regime, consisting of criminal, civil, administrative, and contractual remedies, makes it even more difficult for all parties to achieve a global settlement.¹⁰⁸ Further, the aggressive use of a FCA will require a business to devote greater resources to compliance efforts and may ultimately either discourage businesses from entering into contractual arrangements with the government or force a small or struggling concern out of business.¹⁰⁹

However, despite these criticisms, many of which are legitimate, on the whole federal and state FCAs provide significant benefits, which more than outweigh any disadvantages. The FCA and VFATA provide a legal mechanism to make the government whole for fraud committed against it. Indeed, the VFATA provides a separate vehicle to attack fraud in state-

105. See *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 373 (4th Cir. 2008) ("Relators have consistently sought to shoehorn what is, in essence, a breach of contract action into a claim that is cognizable under the False Claims Act."); BOESE, *supra* note 11, at 1-5 ("[A]ll the prosecutors—*qui tam* relators, federal and state attorneys—have become extremely creative, attempting to apply the statute's treble damages and penalty provisions to unusual circumstances never viewed as traditional 'fraud' cases.").

106. Stephen Moore & Phil Kerpen, *Blowing the Whistle on Jackpot Justice*, at *3 (April 22, 2005), available at <http://www.philkerpen.com/?q=node/25>.

107. Kovacic, *supra* note 103, at 1829 ("Rather than promptly bringing problems to management's attention, employees may allow them to persist—thus increasing the size of the injury and the relator's potential recovery—and to gather evidence for pursuing a *qui tam* suit."); see also Moore & Kerpen, *supra* note 106, at *2 ("Whistleblowers often quietly collect evidence for months while fraud continues.").

108. See Barger et al., *supra* note 37, at 486.

109. See Michael J. Davidson, *Governmental Responses to Elder Abuse and Neglect in Nursing Homes: The Criminal Justice System and the Civil False Claims Act*, 12 ELDER L.J. 327, 347 (2004) (discussing opposition to the aggressive use of Florida's FCA against the nursing home industry); William E. Kovacic, *The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets*, 6 SUP. CT. ECON. REV. 201 (1998).

funded programs that are beyond the reach of the FCA.¹¹⁰ In a similar vein, these statutes provide a financial disincentive that discourages companies and individuals from defrauding the government. Beyond the monetary sanctions, the FCA and VFATA provide a mechanism to improve the quality of government-funded programs. For example, the FCA has been used effectively to improve the quality of care in nursing homes that participate in Medicare or Medicaid.¹¹¹ Not only does the FCA encourage potential relators on staff in nursing homes to report elder abuse, but the FCA also provides an incentive for nursing homes to identify, report, and correct quality of care deficiencies. In addition, the government may mandate improvements in patient care as part of a compliance agreement when settling FCA cases.¹¹²

Additionally, relators serve a beneficial function with regard to maintaining the integrity of the government's programs. As insiders, relators have unique access to information concerning fraud, waste, and abuse being committed by their organization and/or by other corporate employees. The VFATA and FCA both provide relators with a financial incentive to report misconduct. Further, relators serve as a resource that offsets inadequate government contract and law enforcement staffing.¹¹³

If measured by no other standard than its ability to recover money for the government, the *qui tam* provisions of the federal civil FCA have been a tremendous success. During Fiscal Year 2007, the United States obtained approximately \$2 billion in civil FCA settlements and judgments, of which \$1.45 billion was attributable to *qui tam* lawsuits.¹¹⁴ A potential windfall for Virginia and its relators may be achieved by joining a VFATA claim to a FCA case when both federal and state funds are implicated.¹¹⁵

V. CONCLUSION

As indicated by the increasing number of VFATA cases being filed, it appears that the VFATA will soon enjoy a measure of the popularity possessed by the federal civil FCA rather than remain as a relatively obscure addition to the Virginia Code. To date, the VFATA has been

110. See Barger et al., *supra* note 37, at 487.

111. See Davidson, *supra* note 109, at 345, 350.

112. See *id.*

113. United States *ex rel.* Purcell v. MWI Corp., 209 F.R.D. 21, 26 (D.D.C. 2002) (“offset inadequate law-enforcement resources”).

114. DOJ Press Release, *supra* note 12, at *1.

115. See Barger et al., *supra* note 37, at 485 (“[M]ost of the significant recoveries in the states have resulted from states’ ability to join federal law enforcement efforts and global settlements.”).

underutilized, but the statute possesses enormous potential to deter fraud in state-funded programs and to recover ill-gotten gains from those cheating the state. Given the significant financial incentives to the Commonwealth and to relators, particularly with health care fraud, it appears likely that this enormous potential will soon be realized.

With few exceptions, the VFATA is a carbon copy of the FCA. By mirroring the FCA, the General Assembly provided a ready-made body of interpretive law for Virginia courts and practitioners.