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**ASSERTING COUNTERCLAIMS AND  
THIRD PARTY CLAIMS IN  
FALSE CLAIMS ACT LITIGATION**

by  
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# **ASSERTING COUNTERCLAIMS AND THIRD PARTY CLAIMS IN FALSE CLAIMS ACT LITIGATION**

by

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Defendants in suits brought either by the government or by *qui tam* plaintiffs (“relators”) pursuant to the False Claims Act, 31 U.S.C. § 3729-33 (“FCA”), frequently inquire of defense counsel if there is some mechanism for asserting their own claims in response. This is particularly a common occurrence in *qui tam* litigation, where the relator often is a current or former employee who has a personal connection with the defendant. Feelings usually run at a fever pitch level in *qui tam* cases, at least initially, and the desire to “strike back” and draw some relator blood can be irresistible. Defense counsel, however, must be most careful in advising their clients on this topic, as the area is a mine field where miscalculation can lead to disaster.

## **I. COUNTERCLAIMS AND THIRD-PARTY CLAIMS IN NON-FCA LITIGATION**

Ordinarily, defendants in federal litigation have a number of alternatives for asserting counterclaims against plaintiffs (including seeking indemnification and contribution), cross-claims against co-parties, and third-party complaints. *See Federal Rules of Civil Procedure* 13 and 14. Particularly significant in this regard are the so-called “compulsory counterclaims” which must be asserted or are considered waived. *See* Rule 13(a).

## II. ASSERTING COUNTERCLAIMS IN *QUI TAM* LITIGATION

The customary availability of counterclaims for defendants in ordinary litigation is placed in doubt when a *qui tam* is involved due to the extraordinary policy implications manifested in the FCA, its 1986 amendments, and the Act's legislative history. Even a cursory review of 31 U.S.C. § 3730 discloses a substantial commitment by Congress to encourage *qui tam* actions as a device to add resources to the Department of Justice's fraud-enforcement capabilities. *United States ex rel. Newsham v. Lockheed Missiles and Space Co.*, 779 F. Supp. 1252, 1253 (N.D. Cal. 1991).

For example, relators were made full parties to the litigation (§ 3730(c)); prior government knowledge of the alleged fraud no longer barred a relator action (§ 3730(e)(4)(B)); the relator's role in conducting discovery and litigating the matter was enhanced; the financial rewards were increased and relators were guaranteed at least 15% of any recovery (§ 3730(d)); and new "whistleblower" protections were added (§ 3730(h)). Because relators are acting technically on behalf of the United States, and the clear policy embedded in the FCA is to encourage such private attorney general activity, it has been suggested by the relators' bar that allowing defendants to assert any manner of counterclaims against relators would discourage the initiation of *qui tam* suits, and thereby frustrate the intent of Congress. *See, e.g.,* JAMES B. HELMER, JR., FALSE CLAIMS ACT WHISTLEBLOWER LITIGATION 390 (3d Ed. 2002). Unfortunately, the federal courts have been quite susceptible to this line of argument.

### A. Early Cases — Contribution and Indemnification

From the outset, relators have been overwhelmingly successful in persuading federal judges that to recognize a right to seek contribution or indemnification by way of counterclaims in *qui tam* cases would be contrary to

the legislative policy underlying the FCA. This is evident in the first case to discuss the question, *United States ex rel. Rodriquez v. Weekly Publications, Inc.*, 74 F. Supp. 763 (S.D.N.Y. 1947), which has set the pattern for subsequent judicial consideration of the issue. In this case, the defendant was accused of cheating the U.S. Postal Service, but the government declined intervention. Defendant then asserted a counterclaim for indemnification against relator Rodriquez on the basis that because his responsibilities included keeping abreast of new postal regulatory developments, any noncompliance by defendant was the direct result of relator's own negligence, and this breach duty should be remedied by indemnification plus attorneys' fees and expenses. *Id.* at 764, 768.

While confirming that the relator was an opposing party, even though the litigation was brought in the name of the United States, the district court nonetheless dismissed the counterclaim. As the court explained, "To permit the counterclaim pleaded would set a precedent that would be a strong deterrent to the institution of genuine informer's actions." *Id.* at 769. The potential deterrence arises because relators who participated in or contributed to the fraud would be reluctant to bring an FCA action for fear that their involvement might lay the basis for counterclaim liability, since the defendant might allege — as here — that the relator was responsible for the predicate statutory infraction. Further noted the court, since it was the intent of Congress to encourage *qui tam* actions, permitting such counterclaims to be filed against relators would be incompatible with legislative purpose.

Moreover, the district court was entirely unsympathetic to the argument that defendant's counterclaim was compulsory and had to be asserted or deemed waived. Rather, "[i]f the defendant has a claim against the [relator] he should pursue his remedy in a direct action, thus permitting the *qui tam* action to proceed in accordance with statutory direction." *Id.* at 769. The issue of whether an FCA defendant could counterclaim based on grounds unrelated to the *qui tam* complaint's fraudulent allegations was left open.

## **B. Subsequent Judicial Consideration of the Issue**

*Rodriquez*-style analysis has set the tone ever since in considering the question of asserting counterclaims for contribution or indemnification, even though *Rodriquez* was handed down long before the 1986 amendments to the FCA contained in 31 U.S.C. § 3730. It does seem evident, however, that the 1986 amendments further strengthened the impact of the *Rodriquez* holding and rationale as other courts have considered the issue.

For example, in the next major case decided on the issue, *Mortgages, Inc. v. United States District Court for the District of Nevada*, 934 F.2d 209 (9<sup>th</sup> Cir. 1991), involving federal loan guarantees, the defendant asserted counterclaims alleging that the relators “bear significant responsibility for the false statements in the loan applications.” *Id.* at 212. The Ninth Circuit concluded after reviewing the FCA and its legislative history that there was no recognition in the Act that *qui tam* defendants could seek indemnification or contribution from relators. The court considered this significant given the Supreme Court’s decision in *Texas Industries v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981), denying counterclaims under the antitrust laws. Looking to the history of the FCA, the court concluded, “The FCA is in no way intended to ameliorate the liability of wrongdoer by providing defendants with a remedy against a *qui tam* plaintiff with ‘unclean hands’. Congress did not intend to create a right of action for contribution or indemnification under the FCA.” *Id.* at 213. Furthermore, the congressional scheme embodied in the FCA is so comprehensive, courts are foreclosed from reading any federal common law right to assert counterclaims into the statute. *Mortgages*, 934 F.2d at 213-14.

Subsequent judicial consideration of the issue for the most part has echoed these early holdings that FCA defendants cannot assert counterclaims for indemnification or contribution against relators. *See, e.g., United States ex rel. Stephens v. Prabhu*, 1994 WL 761237, at \*1 (D. Nev. Dec. 14, 1994) (“Neither the



FCA nor federal common law provides a right to contribution or indemnification in a FCA action”). In *United States ex rel. Pogue v. Diabetes Treatment Centers of America*, 2004 WL 2009413, at \*7 (D.D.C. May 17, 2004), several physician defendants sought to oppose a proposed settlement between an institutional defendant, the United States and the relator because, they contended, it would impact negatively their ability to secure contribution and indemnification. The district court concluded that since defendants “do not have any rights to indemnity or contribution under the FCA,” they had no possible rights that could be impacted by the settlement. *See also, United States ex rel. Pogue v. Diabetes Treatment Centers of America*, 2004 WL 2009415, at \*2 (D.D.C. May 17, 2004) (defendants “do not have any indemnity or contribution rights under the FCA”).

### **C. The Minority Position**

Only one district court explicitly has recognized a right to counterclaim for indemnification or contribution in *qui tam* cases. The otherwise notoriously relator-friendly Southern District of Ohio adopted that position in *Burch ex rel United States v. Piqua Engineering, Inc.*, 145 F.R.D. 452 (S.D. Ohio 1992). Here, the counterclaims included “breach of contract, breach of duty of loyalty, breach of fiduciary duty, breach of duty of fair representation and defamation.” *Id.* at 455-56. The *Burch* court rejected earlier cases foreclosing counterclaims because *these* counterclaims did not allege that the relators had been participants in the FCA violations.

However, even if the counterclaims did seek contribution or indemnification, the district court still would have allowed them to be brought. Its stated rationale for the holding were constitutional considerations of due process — *i.e.*, otherwise compulsory counterclaims would be forfeited. *Id.* at 457. To foreclose *qui tam* defendants from having a forum to hear their case simply would deny procedural due process. Moreover, the FCA’s § 3730(d)(4)’s provision for the awarding of attorneys’ fees and costs to a successful *qui tam*

defendant cannot fully compensate a defendant for all of its damages. While the due process holding is apparent *dictum*, it nonetheless raised interesting contentions. To alleviate any problems, the district court ordered a separate trial for the counterclaim allegations. *Id.* at 457. Of equal importance, the *Burch* court anticipated the development of the most fundamental exception to the otherwise pervasive ban on *qui tam* counterclaims, so-called “independent damages.”

### **III. COUNTERCLAIMS SEEKING “INDEPENDENT DAMAGES”**

An important exception to the judicial ban on counterclaims against relators was announced in *United States ex rel. Madden v. General Dynamics Corp.*, 4 F.3d 827 (9<sup>th</sup> Cir. 1993). In this instance, the defendant filed a counterclaim against the relator, but sought what the court characterized as “independent damages.” That is, the requested relief in no way sought to offset through contribution or indemnification defendant’s potential FCA liability on the basis of alleged relator wrongdoing leading to the commission of the fraud, as was the situation in *Rodriquez and Mortgages*. Instead, the asserted counterclaims included: “1) breach of duty of loyalty and breach of fiduciary duty, 2) breach of implied covenant of good faith and fair dealing, 3) violations of [the] California Labor Code [ ], 4) libel, 5) trade libel, 6) fraud, 7) interference with economic relations, and 8) misappropriation of trade secrets.” *Madden* at 829. The district court below concluded that the case was governed by *Mortgages* and dismissed the counterclaims.

The Ninth Circuit disagreed, even though in 1991 it had handed down *Mortgages*. Unlike counterclaims for indemnification and contribution, these independent claims, if successful, would not have the effect of offsetting FCA liability. “Counterclaims for independent damages are distinguishable, however, because they are not dependant on a *qui tam* defendant’s liability.” *Madden* at 830-31. Therefore, there is no “blanket rule” foreclosing *qui tam* defendants

asserting counterclaims as long as they seek “independent damages.” Unlike the *Mortgages* court, this court was concerned about the procedural due process effect of denying the ability to assert compulsory counterclaims. Reviewing § 3730(d)(4)’s provision for the award of attorneys’ fees and costs to a successful *qui tam* defendant, the court concluded that even this relief was inadequate to fully compensate a defendant for the “actual harm” caused by a relator’s conduct. *Id.* at 831.

Nonetheless, the *Madden* court concluded that even independent counterclaims can be dismissed if the defendant is found to have FCA liability. In its view, once liability is established, to allow even independent counterclaims to proceed would “have the effect of providing for indemnification or contribution. On the other hand, if a *qui tam* defendant is found not liable, the counterclaims can be addressed on the merits.” *Id.* at 831. This would seem to suggest that the court was contemplating some manner of “bifurcated” proceeding, which only adds to the complexity of the issue.

The Southern District of New York adopted the “independent damages” rationale in *United States ex rel Mikes v. Straus*, 931 F. Supp. 248 (S.D.N.Y. 1996). There, after a thorough review of all *then* existing case authority, the district court dismissed counterclaims predicated upon the relator’s “alleged participation in the submission of false claims in violation of the FCA,” *i.e.*, contribution and indemnification, because such claims are foreclosed under the Act. *Id.* at 261. Interestingly, the court also rejected the defendants’ contention that 31 U.S.C. § 3730(d)(3), which provides for the limiting of a relator’s share of any recovery should the district court find that person “planned and initiated the violation of [the FCA] upon which the action was brought,” can furnish *qui tam* defendants with standing to assert a counterclaim. The district court instead placed reliance upon *Mortgages*, 934 F.2d at 213: “The FCA is in no way intended to ameliorate the liability of wrongdoers by providing defendants with a remedy against a *qui tam* plaintiff with ‘unclean hands.’” *Straus* at 262.

However, an additional counterclaim had been alleged predicated upon extortion. Since this claim sought damages “independent” of contribution and indemnification, it did not run afoul of the long line of cases otherwise foreclosing counterclaims in *qui tam* cases. That is, the extortion counterclaim did not seek to offset the defendant’s FCA liability. The key test to distinguish the two types of counterclaims is whether the claim is “dependent upon a *qui tam* defendant’s liability.” That is, if the defendant is found liable, then the counterclaims must be dismissed. Therefore, much as the *Burch* court had suggested, the district court ordered that any surviving counterclaim must be tried separately to protect the defendants’ right of procedural due process. *Id.* at 263 & n. 7.

The *Madden* holding recently was reaffirmed in *United States ex rel. Hartman v. Allegheny General Hospital*, 2005 WL 2106627, at \*5 (W.D. Pa. Aug. 26, 2005). There, the district court rejected the relator’s contention that “[a]s a rule, counterclaims are not permitted in *qui tam* actions. (citing cases).” In response, the district court asserted: “There is no such rule.” Further the district court then succinctly restated the *Madden* rule:

Defendant’s counterclaim does not seek contribution from plaintiff for the damages caused by the allegedly false claims themselves. Instead, defendant seeks damages on a wholly unrelated claim. Counterclaims that seek damages on claims unrelated to the allegedly fraudulent claims under the False Claims Act are permitted [citing to *Madden*].

Whether this distinction in practice is capable of fluid application remains to be seen.

Another interesting recent case of note is *United States v. Cancer Treatment Centers of America*, 350 F. Supp. 2d 765 (N.D. Ill. 2004). After filing her complaint, the relator was greeted by a counterclaim alleging breach of fiduciary duty, breach of confidentiality agreement, and conversion. These

allegations arose out of the relator having responded to a government subpoena seeking the defendant's records, prior to filing her action, and without informing any of her superiors.

As is standard in these cases, the relator contended that the counterclaim had been brought in retaliation for the *qui tam* action, and therefore to allow it to proceed would be contrary to the FCA's policy of encouraging such actions to be filed. The district court did dismiss the breach of confidentiality and conversion counterclaims, despite some innovative arguments put forward by the defendant as to why these claims were not connected with the *qui tam* complaint. However, the court declined to dismiss the breach of fiduciary duty counterclaim.

Two considerations led to the rejection of relator's contention. First, noted the court, while the "FCA does encourage and protect individuals who file *qui tam* actions ... nowhere does it condone or shield individuals who receive and respond to subpoenas that are not theirs to address." In addition, the relator had responded to the subpoena, secretly, prior to filing her complaint. *Id.* at 770-71. Any potential for developing this authority into a device to circumvent the reluctance of district courts to entertain FCA counterclaims appears severely limited by the unique fact pattern involved.

While it appears that the "independent damages" rationale continues to be viable, the causes of action truly have to be independent of the FCA complaint in order to survive a motion to dismiss.

#### **IV. COUNTERCLAIMS FOR ATTORNEYS' FEES AND COSTS**

It is not clear at the present whether a defendant may assert a counterclaim against a relator predicated on 31 U.S.C. § 3730(d)(4), which provides:

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in

the action and the court finds that the claim of the person bringing the action was *clearly frivolous, clearly vexatious, or brought primarily for the purposes of harassment*. (Emphasis added).

Awards made under this section are separate and apart from routine costs sought through a bill of costs filed with the Clerk of the Court. *See United States ex rel. Lidenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1413 (9<sup>th</sup> Cir. 1995).

It is essential to recognize that a successful defendant is only entitled to an award of fees and expenses if it can be demonstrated that the relator's action was "clearly frivolous, clearly vexations, or brought for the purposes of harassment." The infrequent awards under Section 3730(d)(4) demonstrate that in most cases it will be extremely difficult to establish to the district court's satisfaction that these stringent criteria have been satisfied.

Pertinent legislative history is limited and does not address the counterclaim issue. For example, the Senate Report on the 1986 Amendments to the FCA notes:

The Committee added this language in order to create a strong disincentive and send a clear message to those who might consider using the private enforcement provision of this Act for illegitimate purposes. The Committee encourages courts to strictly apply this provision in *frivolous or harassment suits* as well as any applicable sanctions available under the Federal Rules of Civil Procedure. S. Rep. No. 345, 99th Cong. 2d Sess. 29 (1986) (emphasis supplied), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5294.

Thus far only two decisions have addressed this issue. In *Mikes*, the district court denied the defendant's ability to assert such a counterclaim as being premature. "If and when defendants prevail in this action, the court will entertain defendants' application for fees and costs." *Mikes*, 931 F. Supp. at 262. By contrast, in *United States ex rel. Cooper v. Gentiva Health Services, Inc.*, 2003 WL 22495607, at \*20 (W.D. Pa. Nov. 4, 2003), the court left the door ajar a

bit. While the court granted summary judgment against Gentiva Health Service's § 3730(d)(4) counterclaim, it apparently was more concerned about the lack of substance supporting the allegation than whether it could be asserted via counterclaim. It will be interesting to see how this issue works itself out, especially given the relator's bar, which argues vociferously that such fee awards are contrary to the public policy designed to encourage *qui tam* actions.

## **V. THIRD-PARTY CLAIMS FOR CONTRIBUTION AND/OR INDEMNIFICATION**

Many of the same policy concerns that have foreclosed counterclaims against *qui tam* relators for contribution or indemnification have been recognized by the courts to bar third-party claims designed to accomplish the same objective. This rule prevails whether the litigation is generated by a *qui tam* complaint or involves solely an action initiated by the United States. *Israel Discount Bank, LTD v. Entin*, 951 F.2d 311, 315 (11<sup>th</sup> Cir. 1992) (*dictum*).

In *United States v. Kennedy*, 431 F. Supp. 877 (C.D. Cal. 1977), defendants had been sued under the FCA by the United States. Defendants then filed a third-party complaint seeking indemnification. The district court, however, dismissed the third-party complaint: "If defendant and third party plaintiffs are liable under the Act, they are not entitled to indemnification from the third party defendant, even if it can be proven that he too would have been jointly and severally liable under the FCA." While the district court cited no authority to substantiate this position, it is almost a certainty the court was basing its decision on *Rodriquez* and its progeny which, even by this point, had become accepted principles of law.

*Kennedy* and *Entin*, in turn, were relied upon in *United States v. Nardone*, 782 F. Supp. 996, 999 (M.D. Pa. 1990). Nardone had been found guilty on criminal charges of making false statements and false claims to a federal agency. Invoking the stringent collateral estoppel provision of the FCA, 31 U.S.C. § 3731(d), the government moved for summary judgment in a subsequent FCA

action. Nardone filed both a counterclaim and a third-party claim for indemnification. The district court not only denied the third-party claim, but also refused to consider Nardone's contention that to deny him the ability to assert it would "deprive him of property without due process of law," due to his failure to cite any authority in support of the argument. Without any discussion, the counterclaim against the government also was dismissed.

The established rule is the same when the third-party complaint seeks to recover contribution under state law. The FCA pre-empts any right to common law contribution under state law *because* of the strong policy prescriptions contained in the Act. As the district court explained in *United States v. Warning*, 1994 WL 396432, at \*8 (E.D. Pa. 1994):

In the instant case, a right to contribution under state law would conflict with the purposes of the False Claims Act. As the Ninth Circuit stated in *Mortgages*, the Act was designed to deter future misconduct and to compensate the government. This goal would be undermined by a right to contribution under state law in the same way as it would by a right to contribution under federal law. Accordingly, the Court concludes that the same reasons that militate against a right to contribution under federal law militate in favor of federal preemption of any right to contribution under state law.

Therefore, it appears dubious given the policy-based approach implemented in both *Mortgages* and *Warning* that any ability to invoke state law causes of action as FCA third-party claims will be recognized by federal district courts.

Of course, as is to be expected, the same rule barring third-party contribution in cases brought by the Department of Justice controls in *qui tam* cases as well. *See, e.g., United States ex rel. Public Integrity v. Therapeutic Technology, Inc.*, 895 F. Supp. 294, 296 (S.D. Ala. 1995). *Public Integrity* asserts a number of policy justifications for the rule, not the least of which is that since



third-party claims are not compulsory counterclaims, they will not be waived if dismissed in a FCA action.

## **VI. COUNTERCLAIMS AGAINST THE GOVERNMENT**

Counterclaims against the United States in FCA actions are governed by a separate set of rules and separate policy considerations. The name of the game here is the enigmatic concept of “sovereign immunity” which plays just as much of a role in FCA litigation as other types of proceedings. Nonetheless, certain categories of counterclaims against the government have been recognized by the courts in FCA actions.

### **A. Permissible Categories of Counterclaims**

The most well established ground for counterclaims against the government, including FCA actions, is the doctrine of recoupment which can “defeat or diminish the sovereign’s recovery.” *United States v. Agnew*, 423 F.2d 513, 514 (9<sup>th</sup> Cir. 1970); *see also United States v. Dalm*, 494 U.S. 596, 611 (1990). That is, by initiating a suit under the FCA, the government waives its sovereign immunity as to counterclaims which satisfy the definition of recoupment. However, the recoupment counterclaim must satisfy three conditions: “(1) the claim must arise from the same transactions or occurrence as the government’s suit; (2) the relief sought must be of the same kind or nature as the [government’s] requested relief; and (3) any [offset] damages sought cannot exceed the amount sought by the government’s claim.” *United States v. Ownbey Enters., Inc.*, 780 F. Supp. 817, 820 (N.D. Ga. 1991); *see also, United States v. Forma*, 42 F.3d 759, 764 (2d Cir. 1994).

As to be expected in this area, there are significant limitations even when invoking the recoupment rationale. First, if the FCA action was brought against a government contractor, then any recoupment counterclaim is governed by the Contracts Disputes Act, 41 U.S.C. § 605(a) (“CDA”). The CDA mandates that the

contractor must first submit a written claim to the contracting officer for a final decision before asserting the counterclaim. Failure to comply with this requirement will result in the dismissal of the counterclaim. *United States v. The Intradocs/International Management Group*, 277 F. Supp. 2d 55, 63-64 (D.D.C. 2003). While the CDA vests exclusive jurisdiction in the Court of Federal Claims to hear appeals from contracting officer decisions, if a valid recoupment counterclaim is filed in an FCA action, the district court will entertain jurisdiction pursuant to *Federal Rule* 13(a). *Id.* at 63 & n. 6. As long as the counterclaim is a valid one for recoupment, it should not be barred by the \$10,000 jurisdictional bar contained in 28 U.S.C. § 1346(a)(2). *United States v. Livecchi*, 2005 WL 2420350, at \*19-20 (W.D.N.Y. Sept. 30, 2005).

Some FCA defendants have attempted to invoke the Federal Tort Claims Act, 28 U.S.C. § 2674 (“FTCA”), as a basis for their counterclaims. While case authority is scant, that which does exist suggests that this approach may only be successful if the alleged tort offense has not been excluded from the FTCA’s waiver of sovereign immunity. *See* § 2680(a). In addition, an administrative claim also must be filed as a condition precedent to a district court having jurisdiction. *See* § 2675. *United States v. Chilstead Building Co.*, 18 F. Supp.2d 210, 214 (N.D.N.Y. 1998).

## **B. Rejected Categories of Counterclaims**

Any counterclaim asserting breach of contract or seeking contractual remedies in excess of \$10,000 (i.e., not seeking recoupment) almost certainly will be dismissed for lack of jurisdiction on the basis of the Tucker Act, 28 U.S.C. § 1491(a)(1), which vests sole jurisdiction over such claims in the Court of Federal Claims. Section 1346(a)(2), of title 28, however does vest jurisdiction over claims under \$10,000 in the district courts so they may be brought as counterclaims. *See Federal Rule* 13(d). Furthermore, 28 U.S.C. § 1367 supplemental jurisdiction is not available to circumvent this limitation. *See, e.g., United States v. Cushman*

*& Wakefield, Inc.*, 275 F. Supp. 2d 763, 775-6 (N.D. Tex. 2002); *United States ex rel. Fallon v. Accudyne Corp.*, 921 F. Supp. 611, 617-8 (W.D. Wisc. 1995), *aff'd*, 97 F.3d 937 (7<sup>th</sup> Cir. 1996).

Similarly, FCA defendants cannot predicate a counterclaim against the United States on the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202; *Federal Rule 57*. This is because the Declaratory Judgment statute is procedural and does not expand the jurisdiction of the district court. Moreover, success under the Declaratory Judgment statute could result in potential damages far in excess of \$10,000. *United States v. Intervest Corp.*, 67 F. Supp. 2d 637, 643 (S.D. Miss. 1999). It has also been held that the Mandamus Act, 28 U.S.C. § 1361, likewise does not waive the federal government's sovereign immunity. *Thomas v. Pierce*, 662 F. Supp. 519, 524 (D. Kansas 1987).

### **C. Counterclaims Related to the Medicare Program**

Another important limitation involves cases related to Medicare, no small consideration given that such cases predominate *qui tam* filings in recent years. A Medicare contractor or provider seeking to counterclaim against the government for offsets, must contend with 42 U.S.C. § 405(h). This section always has posed a virtual lethal roadblock to any efforts by health care providers to sue Medicare to correct incorrect fiscal intermediary payment decisions or to contest other aspects of Medicare payment policy. It poses the same jurisdictional difficulties regarding counterclaims. Section 405(h) as it applies to Medicare reads:

#### Finality of [Secretary's] decision

The findings and decision of the [Secretary] after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decisions of the [Secretary] shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the [Secretary] or any officer or employee thereof shall be

brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

This section is made applicable to the Medicare Act via operation of 42 U.S.C. § 1395ii.

The Department of Justice (“DOJ”) has maintained consistently in litigation that no provider can sue the Secretary of Health and Human Services (“HHS”) or the United States regarding a coverage decision unless and until the provider has exhausted the dazzling range of administrative remedies enumerated in HHS’s regulations. Several district courts have held that any counterclaim seeking set-offs against the Department of Health and Human Services relating to Medicare claims must comply with § 405(h) or face dismissal. *United States ex rel. Kirsch v. Armfield*, 56 F. Supp.2d 588, 592-3 (W.D. Pa. 1998); *United States v. Royal Geropsychiatric Services*, 8 F. Supp. 2d 690, 696-7 (N.D. Ohio 1998).

## **CONCLUSION**

While it is entirely too broad a statement to declare that counterclaims can *never* be brought in FCA/*qui tam* cases, defense counsel must nonetheless be most careful in advising their clients. This is particularly true since emotions can run high and the client may be willing to tolerate a higher level of risk than otherwise. Careful explanation of the various competing concepts and the fairly bright line rules established in the case law should be sufficient to restrain even the most fervid client from undertaking ill-advised aggressive action in the form of defective counterclaims. There does, happily, remain the category of “independent damages” against relators, and several situations in which the United States has waived its sovereign immunity. But most likely, the situation where appropriate counterclaims can be asserted will remain “few and far between.”

