THELEN REID BROWN RAYSMAN & STEINER ; fka THELEN REID & PRIEST, LLP

v.

FRANCOIS MARLAND, et al.

Case No.
C-06-2071 VRW

Report of Ronald H. Clark, Ph.D., J.D.
5/18/07

SIGNATURE:_____

I. Introduction

I have been retained on behalf of Mr. Francois Marland. Specifically, I was requested to explain the history, mechanics and public policies underlying the California False Claims Act , Cal. Gov't Code §§ 12650 *et seq.* ("CFCA"), and other *qui tam* laws as the Court may deem appropriate to assist the trier of fact understand the circumstances under which witnesses/whistleblowers may be compensated for assisting in the investigation and prosecution of false claims violations. I was also retained to evaluate issues relative to whether the underlying engagement was prosecuted in a manner that was in the best interests of the clients.

II. Nature of the Present Litigation

This case arises out of the 1997 retention by Mr. Marland of the law firm of Thelen Reid Brown Raysman & Steiner ("Thelen") (formerly Reid & Priest) to provide legal advice regarding his information that a secret agreement had existed involving Credit Lyonnais, a French bank, the purpose of which was to illegally purchase insurance assets and junk bonds from the California Department of Insurance ("DOI"). DOI seized these assets from Executive Life Insurance Company when it became insolvent. Pursuant to California law, the assets were sold by DOI via auction.

When Thelen was unable to negotiate an acceptable agreement with DOI on behalf of Marland, it recommended to Marland that he initiate an action as a qui tam plaintiff under the California False Claims Act. In order to preserve Marland's anonymity, Thelen assisted Marland in incorporating RoNo LLC to serve as a the qui tam plaintiff in the action. On February 18, 1999, Thelen did file such an action on RoNo's behalf in San Francisco Superior Court. On the same day, DOI independently filed a separate (non CFCA) complaint in Los Angeles containing

overlapping claims.

Subsequently, in May 1999, DOI asked Thelen to represent it in its separate action as well. The parties entered into a new representation agreement in June 1999. In July, 2001, the California Attorney General intervened in the RoNo *qui tam* action. The AG objected to Thelen representing RoNo; new counsel was secured for Marland in that matter. In order to secure advance payment from DOI, Thelen negotiated amended agreements with Marland, and eventually terminated its representation of him. Ultimately, another agreement was negotiated in December 2002, yielding Marland a reduced share of any DOI fees paid to Thelen. However, ultimately the *qui tam* action was dismissed. *See California v. Altus Finance, S.A.*, 36 Cal.4th 1284 (2005). However, civil penalty and injunctive relief elements of the Attorney General's cause of action under the unfair competition law (Bus. & Prof.Code §§ 17200 *et seq.*) were left viable by the Supreme Court. *See id.* at 1307-1309.

Marland eventually in 2006 sought to enforce his rights via arbitration as provided in the June 1999 agreement. Thelen then sued Marland in the present action to enjoin the arbitration. Marland next asserted counterclaims in this action including "breach of fiduciary duty, breach of contract, bad faith denial of a contract, intentional misrepresentation, and negligence." *Thelen v. Marland*, No. C 06-2071 VRW, 2006 WL 2619261 at *2 (N.D. Cal. Sept. 12, 2006). *See also, Thelen v. Marland,* No. C 06-2071 VRW, 2007 WL 578989 (N.D. Cal. Feb. 21, 2007). Thelen then moved this Court to either dismiss the counterclaims, or to stay all consideration of Marland's counterclaims pending a determination of the validity of the December 2002 agreement. *Id.* at *1. Currently pending are cross-motions for summary judgment (docket entries 141 & 184.

III. Background and Pertinent Experience

I am currently a partner in the health, government contracts and litigation groups at Arent Fox LLP in Washington, D.C. I am also a member of the bar of this Court. I joined Arent Fox in 1995 after 15 years in the United States Department of Justice, including 2 years as an Assistant United States Attorney ("AUSA") in the District of New Jersey (1982-84), and 11 years (1984-1995) as Trial Attorney and later Senior Trial Counsel in the Civil Fraud Section, Commercial Litigation Branch, Civil Division, at Main Justice in Washington. I first began working with the federal False Claims Act, 31 U.S.C. §§ 3729 *et seq.* ("FFCA"), while an AUSA. When I shifted to Washington, I worked almost exclusively on FFCA cases relating to all manner of governmental programs. Principally I was involved in defense procurement fraud cases and Medicare cases, although I also handled FFCA cases relating to the Departments of Education, Agriculture, Veterans Affairs and others. In 1986, I participated in the amendment of the FFCA, including helping to redraft one section.

Beginning on or about 1988, I undertook initial supervision of all health care fraud cases in the Civil Fraud Section, including cases initiated by the Department as well as an increasing number of *qui tam* cases. As part of my responsibilities as Senior Trial Counsel, I supervised cases handled by the various U.S. Attorneys' offices across the nation, trained Assistant U.S. Attorneys in a number of offices, and helped write the internal Civil Division FCA manual that is used by United States Attorneys' offices and Main Justice.

An important dimension of my responsibilities as Senior Trial Counsel involved the evaluation of new FCA cases, whether originated by the Department or filed by *qui tam* relators. That process involved assessing the alleged violation of government rules and regulations, the

damages accruing to the government as a result, and the applicability of the FFCA's treble damages and penalty provisions. Based upon this analysis, I formulated recommendations to my superiors and to the respective agency investigative agency, usually its Office of Inspector General ("OIG"). While Senior Trial Counsel, I was involved in a wide variety of fraud cases involving government contracts, grants, and a variety of government programs. At any given time, I supervised as many as 100 cases, most of which had been initiated by *qui tam* relators.

An important dimension of my responsibilities as Senior Trial Counsel was to evaluate how well cases had been handled by the trial attorneys whom I supervised. This involved assessing their skill in drafting pleadings, trial and negotiation strategy, and effectiveness in conducting discovery and discharging courtroom responsibilities. Each year, I along with the other supervisors, would contribute to written evaluations of each trial attorney which measured how well performance rated against specified criteria. Therefore, I have substantial experience in evaluating how FCA cases are developed, negotiated, and tried.

Since April 1995, I have been at Arent Fox, first as Counsel and since 1997 as a partner. My practice is almost exclusively related to defensive FFCA and *qui tam* matters. Most of my FFCA cases involve healthcare issues. Once again, my primary responsibilities in representing defendants include assessing potential damages the government might seek to recover, resolving regulatory issues pertaining to Medicare statutes and policies, and developing litigation strategies. Since many of my cases involve the Department of Justice, I maintain contact with current DOJ thinking regarding theories of liability, methods for computing FCA damages and penalties, and new variations of FFCA legal strategy.

I also have had direct involvement with the CFCA. I successfully represented a Fresno-

area hospital in a *qui tam* action initiated by its former general counsel. The Superior Court for Fresno County dismissed this action for lack of jurisdiction. *See Bury v. Community Hospitals of Central California*, No. F036667, 2002 WL 968833 (Cal.App. 5th Dist. May 8, 2002). I also represented a California-based pharmaceutical manufacturer in a *qui tam* action under the CFCA that was taken over by the state Attorney General. In that matter, which is still under seal, I was able to persuade the AG that its office should not proceed against our client, although it has been litigating against a large number of other defendants named in the action. *See, In re Pharmaceutical Industry Average Wholesale Price Litigation*, 2007 WL 861178 (D. Mass. March 22, 2007).

Attached to my report, as Exhibit A, are my current Arent Fox webpage resume, including published FCA web articles, reported FCA-related federal decisions, and my general background. Also included is a listing of my published articles, book chapters and book, including those relating to the FCA.[1/] Exhibit B lists the sources upon which I relied in preparing my report.

IV. Summary of Conclusions

Relators under the FFCA and qui tam plaintiffs under the CFCA have made substantial and continuing contributions to the success of the two statutes. Their efforts have resulted in excess of 12 billion dollars in recoveries for both the United States and California. Qui tam plaintiffs are the device the California legislature adopted to enhance recoveries under the CFCA. In my opinion, as its legislative history indicates, the CFCA was designed by the legislature to encourage individuals in every way to assume the role of qui tam plaintiffs and initiate actions under the Act.

[1/] In accordance with Arent Fox LLP firm policy, my rate for expert testimony services is the same as my regular hourly billing rate. For work performed in 2007, my hourly rate is $510.

The Legislature was aware that effective action to protect the public treasury and the taxpayer from fraud would entail resources beyond those which the state and its political subdivisions could themselves bring to bear. Looking to the 1986 amendments to the FFCA, the Legislature asked the very individuals who had drafted the new relator provisions of the FFCA to draft comparable provisions in the CFCA, which they did. *See Altus,* 36 Cal.4th at 1296.

Mr. Marland implemented this public policy legacy when he filed his CFCA action. That is to say, he carried out the express expectations of the Legislature by assuming the mantle of qui tam plaintiff. In fact, as the Legislature intended, he became a private attorney general, contributing his own resources, knowledge and skill toward the prosecution of the action which could have yielded the state a substantial recovery had it not been dismissed. In fact, given the treble damages and penalty provisions of the CFCA, the state would have recovered substantially more under the CFCA than it realized as a result of the DOI action.

My experience in working with the California AG staff assigned to CFCA matters is that they coordinate very closely with, and are quite encouraging toward, qui tam plaintiffs. Simply put, the state enforcement personnel make their contribution through the CFCA cases they handle, as do qui tam plaintiffs in the cases they pursue either in conjunction with the AG or on their own if the state declines intervention. Close cooperation between the qui tam plaintiff and the AG, such as reflected in cooperation agreements, not only contributes to greater recoveries for the state, but it also directly impacts on the percentage of the qui tam plaintiff's recovery if the AG submits a favorable report to the court supervising the matter. *See* § 16252(g)(2). It takes both the state and qui tam plaintiffs for the state to realize the full degree of benefit to the public treasury and the taxpayer that the Legislature intended when it passed the CFCA.

While Mr. Marland acted in conformity with public policy, I have doubts after my review that the same can be said of Thelen. Under the CFCA, attorneys' fees are separately assessed against the unsuccessful defendant, and are not taken from the state and/or qui tam plaintiff recoveries. § 12652(g)(8). This provision encourages potential qui tam plaintiffs to bring actions and not be concerned about attorney fees, costs and expenses. The Legislature realized that qui tam plaintiffs would require the assistance of effective and knowledgeable counsel in order to maximize recoveries under the statute. I found several instances in which I was, quite frankly, puzzled by Thelen's strategy. As I discuss *infra*, disclosing the Marland information to the DOI *before* filing the CFCA action conceivably could have cost Marland his jurisdictional standing. Moreover, while the CFCA recognizes that differences of strategy may arise between the AG and qui tam plaintiffs in the conduct of their cases, it in no way seeks to foreclose the expression of those honest differences of opinion. Yet, Thelen said Marland could be dismissed from the case if it failed to "cooperate."

V. The CFCA and its *Qui Tam* Provisions

California was the first state to enact a state false claims act. Passage of section 6032 of the federal Deficit Reduction Act of 2005, which provides a 10% incentive in a state's share of Medicaid false claim recoveries if it has an acceptable state FCA provision on the books, has focused new attention on the importance of state FCA's, with some states looking to the CFCA as a likely model for their own statutes. The CFCA is found at Cal. Gov't Code §§ 12650-12656. Excellent commentaries on the legislative history of the CFCA are available. *See, e.g.,* James W. Taylor & Brian Taugher, *The California False Claims Act*, 25 Pub. Cont. L.J. 315 (1996). Also quite helpful is *A Section-by-Section Analysis of the California False Claims Act*, prepared by the

Center for Law in the Public Interest which took the lead in drafting the CFCA.[2/] It is well established under California law that the CFCA is not only modeled primarily upon the federal FCA, but that case authorities construing the federal act can be used to interpret the CFCA as well. *United States ex rel. Stierli v. Shasta Services, Inc.*, 440 F. Supp.2d 1108, 1111 (E.D. Cal. 2006). However, it would be a mistake to simply assume that the two statutes are identical, because they do manifest important differences.

Key Qui Tam Provision of the CFCA

Purpose of the Qui Tam Provision

Both the FFCA and the CFCA contain provisions whereby individuals can initiate actions on behalf of the government and share in the proceeds of any recovery. The CFCA provision is found at §12652(b)-(i). Under the FFCA, these individuals are referred to as "relators"; the CFCA designates them as "qui tam plaintiffs." In 1986 the qui tam, or private citizen suit provisions of the FFCA (found at 31 U.S.C. § 3730), were substantially strengthened and liberalized to provide greater incentives relators to come forward and report fraud against the government. Campbell v. Redding Medical Center, 421 F.3d 817, 823 (9th Cir. 2005). It was apparently this development that led the California legislature to pass the CFCA, including its qui tam provision. See Taylor & Taugher, 25 Pub. Cont. L.J. at 318.

Both the 1986 FFCA amendments and the creation of the CFCA reflect a considered judgment by government authorities that the seriousness of fraud committed against government

---

[2/]This document is reproduced in Appendix I.2 to John T. Boese, *Civil False Claims and Qui Tam Actions* (3d ed. 2007).

is so severe, that it has outstripped the resources of law enforcement mechanisms.[3/] Hence, drawing upon the concept of "private attorneys general," the qui tam provisions seek to enhance the government's ability to fight fraud against the public fisc. And this is certainly the way that things have developed. Both the California and federal governments have discovered, as my own experience demonstrated, that far greater volumes of recoveries are possible with individuals having the ability to initiate qui tam suits. In addition, many of the qui tam cases I was involved in represented allegations that the government would never otherwise have become aware of, because the relators were insiders with unique knowledge.[4/]

The California legislature attached such great importance to encouraging qui tam actions, that it even wrote into the act inducements which substantially exceed those contained in the FFCA. Under the California Act, if the Attorney General does not intervene in the case, the qui tam plaintiff may recover at least 15 percent but not more than 33 percent of the judgment or settlement. If the government declines to intervene, the qui tam plaintiff can recover between 25 and 50% of any settlement or judgment. See §12652(g)(2) & (3). In addition, the successful qui tam plaintiff is entitled to recover its attorneys fees, costs and expenses. §12652(g)(8). [5/]

[3/]The Center for Law in the Public Interest explained in its analysis of the CFCA that "evidence of fraud on the state and local level had increased dramatically." Boese, *supra*, at *id.*

[4/] The CFCA does contain some broader limits upon *qui tam* actions than the federal Act. For example, state employees are foreclosed from initiating actions unless (1) they have exhausted internal reporting procedures for dealing with allegations of fraud, and (2) the government failed within a "reasonable time" to act upon the information they provided. § 12652(d)(4).

[5/]However, much as is the case with the FFCA, a qui tam plaintiff can lose its jurisdictional standing if the defendant or the state can demonstrate that its complaint is "based upon" public disclosures of its essential "allegations or transactions." § 12652(d)(3)(A). However, if the qui tam plaintiff can establish that it is the "original source" of allegations underlying the public disclosure (*see* § (d)(4)), the so-called "public disclosure bar" will not foreclose jurisdictional standing. *See generally, Hawthorne ex rel. Wohlner v. H&C Disposal Co.*, 109 Cal.App.4th

To further encourage individuals to act as qui tam plaintiffs, the CFCA contains even more extensive "whistleblower" protection than does the FFCA. See § 12653. For example, in addition to providing protection from retaliation, the section also forecloses an employer from implementing any policy that would prevent employees from disclosing information about fraud to the government. Unlike the FFCA, it also provides for punitive damages for unlawful retaliation.

As is true under the federal act, the CFCA qui tam plaintiff files its complaint in camera and under seal so that it remains secret and unknown to the defendant. It is also the qui tam plaintiff's responsibility to serve the Attorney General with a copy of the complaint and a disclosure statement comprising all material evidence upon which the complaint is based. The AG then has 60 days to evaluate the complaint and decide whether to intervene or decline intervention. § 12652(c)(4)-(6). This was the procedure followed in filing Mr. Marland's qui tam complaint. The Attorney General decided to intervene in Mr. Marland's action.

Joint Management of Qui Tam Litigation

The CFCA recognizes that in cases where the state intervenes, differences of strategy and approach may result between it and the qui tam plaintiff. Several provisions of the CFCA address this potential problem. The court to which the matter is assigned can stay a qui tam plaintiff's discovery for 60 days if the Attorney General (or other prosecuting authority) can demonstrate it would interfere with any civil or criminal investigation growing out of the same facts. § 12652(h). This provision is similar to § 3730(c) of the FFCA, although the federal provision is limited to interference with prosecution of the qui tam case, and does not contain a

---

1668, 1676-79 (2003).

60-day limit.

More importantly, if the prosecuting authority can establish that "unrestricted participation" by the qui tam plaintiff 'would interfere with or unduly delay the ... prosecution of the case," or be "repetitious, irrelevant, or for purposes of harassment," the court can limit the qui tam plaintiff's participation. Specifically, the court could limit the number of witnesses the qui tam plaintiff wants to call; limit the length of their testimony; place limits on the ability to cross-examine witnesses; or otherwise limit participation. § 12652(i).

Government Dismissal of Qui Tam Action

Under the federal FCA, dismissal of a *qui tam* action at the request of the government is virtually automatic pursuant to 31 U.S.C. § 3730(c)(2)(A). This is seen as an exercise of prosecutorial discretion. *Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139, 1143 (9th Cir. 1998), *cert. denied*, 525 U.S. 1067 (1999). A prescribed test can be applied to make such determinations. The two-step test has been articulated in *Sequoia Orange, supra*, at 1145: "(1) identification of a valid government purpose; and (2) a rational relation between dismissal and the accomplishment of the purpose." If the government satisfies this test, then the burden shifts to the relator "to demonstrate that dismissal is fraudulent, arbitrary and capricious, or illegal."

However, this is not the situation under the CFCA. § 12652(e)(2)(A) mandates that the government must be able to demonstrate "good cause" to justify the dismissal. "Good cause" however is not defined in the statute. The California courts interpreting this provision have employed a very broad approach to determining what is "good cause." For example, in *American Contract Services v. Allied Mold & Die, Inc.*, 94 Cal.App.4th 854, 860-61 (2001), the

court declared that the meaning is relative, and depends upon the circumstances of each case. "Essentially, any matter that has a bearing on the issues at hand may be considered." Particularly important are the relative merits of the action. If the qui tam plaintiff's allegations do not state a viable CFCA cause of action, then good cause is established. *Id.*

A later decision established a more meaningful test for "good cause." The dismissal must be "rationally related to a legitimate government purpose, and not arbitrary, capricious, made in bad faith, based on improper or illegal motives, founded on an inadequate investigation, or pretextual." Moreover, "in exercising its discretion the trial court may consider any matter relevant to the issue, including the relative merits of the action, the interest of the qui tam plaintiff, the purposes underlying the False Claims Act, and the potential waste of government resources." *Laraway v. Sutro & Co.*, 96 Cal.App.4th 266, 275-76 (2002). So it is a more difficult task for the state to secure a dismissal over the objections of the qui tam plaintiff than is true under the FFCA.

Other Important Provisions Affecting Qui Tam Cases

Act Reaches Only Defrauding the "Public Fisc"

One of the most important parameters of the CFCA is that it is designed to reach only fraud committed against the California state government, involving public funds. § 12650(b)(1); § 12652(c)(1). This limitation played a rather important role in Mr. Marland's qui tam action, which was dismissed on this ground. California v. Altus Finance, S.A., 36 Cal.4th 1284 (2005). This California Supreme Court holding arose out of a request from the Ninth Circuit for clarification of California legal issues arising from a motion to dismiss the Marland's action. See, California ex rel. RONO v. Altus Finance, S.A., 344 F.3d 920 (9th Cir. 2003). The key question at issue was whether when the state acting as conservator seized the assets of Executive

Life Insurance Co., those funds for CFCA purposes temporarily became state funds. Id. at 929.

The California Supreme Court granted the 9th Circuit's request. Its opinion flatly rejected this contention. "The legislative history of the CFCA indicates that the statute's purpose was to protect the public treasury and the taxpayers." Altus, 36 Cal.4th 1284, 1296. Further noted the Court, "California courts have consistently reaffirmed that the Legislature 'obviously designed [the CFCA] to prevent fraud on the public treasury,'" citing to numerous California decisions sustaining this limitation. Id. at 1296-97. In light of these considerations, the court found that the Insurance Commissioner's temporary trusteeship over the escrowed funds did not convert them into public funds under the CFCA. Id. at 1297-98. Other sections of the CFCA, the court found, also supported its conclusion that there was no threat to the "public treasury" that could support a CFCA action. Id. at 1299.[6] In my opinion, this is exactly the same conclusion a federal court would have reached had the issue been presented to it under the FFCA.

Statute of Limitations

There is a marked disparity between the FFCA and the CFCA in regards to their respective statute of limitations provisions. In any action alleging violations of the FFCA, the statute of limitations provision contained within the FCA controls. See 31 U.S.C. § 3731(b). Under § 3731(b)(1), a six year statute of limitations provision is mandated.[7] For FCA purposes, the statute of limitations begins to run once the claim for payment is submitted to the government.

---

[6]The *qui tam* provisions of the Act underline the validity of the court's conclusion. For example, § 12652(c)(1) states a person may bring a civil action "if any state funds are involved...."

[7]Sec. 3731(b)(1) reads: A civil action under section 3730 may not be brought
(1) more than 6 years after the date on which the violation of section 3729 is committed, or...

See United States v. Entin, 750 F. Supp. 512, 517-18 (S.D. Fla. 1990). In 1986, the FCA was amended to include a second statute of limitations provision, § 3731(b)(2). [8] This dual structure has led to significant litigation as to whether relators are entitled to place reliance upon (b)(2) provision and thereby possibly bring actions as late as 10 years after the date of violation.

By contrast, the CFCA contains a more concise definition in § 12654(a):

> A civil action under Section 12652 may not be filed more than three years after the date of discovery by the official of the state or political subdivision charged with responsibility to act in the circumstances or, in any event, no more than 10 years after the date on which the violation of Section 12651 is committed.

This section raises several issues, some of which have been resolved by the California courts. First, who is the responsible individual? Generally speaking under the federal FCA, that person would be a Main Justice attorney, Assistant U.S. Attorney, or even an Inspector General official. Because under the CFCA both the state Attorney General or the affected "political subdivision" may prosecute the action under § 12650(b)(4), the issue is somewhat more complicated. It appears that the clock begins to run when either the AG or the affected "prosecuting authority" discovers the violation. *Debro v. Los Angeles Raiders*, 92 Cal.App. 4th 940, 949 (2001).

How then is the "date of discovery" to be determined? Given the marked disparity in language between the CFCA and federal FCA provisions, decisions interpreting the federal act are inapposite. However, according to the *Debro* court, analogous language has long been used in other California statutes of limitations. Drawing an analogy with one of those statutes, the court

---

[8] A civil action under section 3730 may not be brought–

(2) more than 3 years after the date when 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, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

determined that the statute begins to run "upon the discovery by the aggrieved party of the fraud *or* facts that would lead a reasonably prudent person to suspect fraud." *Id.* at 950. Therefore, each situation involves a detailed examination of the pertinent facts and whether they would suggest to a "reasonably prudent" prosecuting authority on "inquiry notice" that fraud had occurred. However, discovery by the qui tam plaintiff does *not* trigger the running of the statute, given the explicit language of § 12654(a). So, for all practical purposes, qui tam plaintiffs have a 10 year statute of limitations within which to file a complaint. *Id.* at 951. *See also, State ex rel. Metz v. CCC Information Services, Inc.*, 149 Cal.App.4th 402 (2007).

"Prosecuting Authority"

Section 12650(b)(4) of the CFCA defines prosecutorial authority somewhat more broadly than the FFCA which vests it in the Department of Justice. " 'Prosecuting authority' " refers to the county counsel, city attorney, or other local government official charged with investigating, filing, and conducting civil legal proceedings on behalf of, or in the name of, a particular political subdivision."

Under section 12652 (a) & (b), the "suit may be brought by the Attorney General where state funds are involved or by the "prosecuting authority" of a political subdivision where the political subdivision's funds are involved, subject to intervention, and participation by the other official where *both* state and political subdivision funds are involved." *State ex rel. Harris v. PricewaterhouseCoopers, LLP*, 39 Cal.4th 1220, 1223 (2006). This approach has several advantages in the state context. First, it increases substantially the available prosecutorial resources to pursue CFCA violations. Second, it immediately puts the government officials most closely tied to the fraud investigation in a position to play a leading role in the actual prosecution

of the matter. Yet, overall coordination of CFCA litigation remains available through the Attorney General.

The Claim Need not be False

To qualify as a false claim under the CFCA , the claim need not actually be false. Rather, the test is whether the claim is "underpinned by fraud." *City of Pomona v. Superior Court*, 89 Cal.App.4th 793, 802 (2001).

Definition of "person"

The CFCA further departs from its federal counterpart by defining the term "person" in § 12650(b)(5). This definition serves both to delineate potential defendants as well as qui tam plaintiffs. Such clarity of definition becomes particularly important in avoiding confusion about which state entities can be sued as false claimants under the CFCA. *Wells v. One2One Learning Foundation*, 39 Cal.4th 1164, 1179 n. 1 (2006). Thereby, California courts are spared the difficulties faced by federal courts in interpreting the FCA, such as was well illustrated in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), and its progeny.

No Minimum Penalty

Unlike the federal FCA, which mandates ranges of penalties (such as $5500 - $11,000 in § 3729(a) for each false claim), the CFCA imposes a penalty "up to" $10,000 for each separate violation of the Act. *See* § 12651(a). As does the FFCA, the California act also imposes triple damage liability for violations. *Id.* In addition, the CFCA creates joint and several liability for acts committed by two or more persons. § 12651(c). Damages, however, can be mitigated and penalties waived under the disclosure provision of the Act. § 12651(b).

Passive Beneficiary Liability

One provision unique to the CFCA is § 12651(a)(8), the so-called "passive beneficiary" clause. Under this section, any person who "[i]s a beneficiary of an inadvertent submission of a false claim to the state or a political subdivision, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery" is liable under the Act.

There is hardly any case authority interpreting this section, and there is no comparable provision under the federal FCA. The key decision interpreting this section is *Armenta ex rel. City of Burbank v. Mueller Co.*, 142 Cal.App.4th 636 (2006). As the text indicates, the purpose of this provision is to impose liability for any person who knowingly benefits from the submission of a false claim to the government. It is not necessary for establishing liability that the potential defendant itself submitted the claim; only that it learned of the falsity, benefitted therefrom, and did not immediately inform the government of the false claim. *Id.* at 647. The *Armentia* court pointed to the CFCA's legislative history to substantiate this conclusion, which the dissent rejected. *Id.* at 648.

The court also dismissed the contention that because the section speaks of "inadvertent submission," the Act did not also reach intentionally submitted false claims. *Id.* This section recently popped up in the Average Wholesale Price litigation brought under the CFCA. *See, In re Pharmaceutical Industry Average Wholesale Price Litigation*, 2007 WL 861178 (D. Mass. March 22, 2007).

VI. Thelen's Management of the *Qui Tam* Case

While Marland's actions appear to be entirely consistent with the public policy embodied in

the CFCA, several actions of Thelen raise tactical questions in my mind as somebody who has been litigating these cases for 25 years.

The California legislature recognized how essential adequate representation of qui tam plaintiffs is to the operation of the CFCA. *See, e.g.,* § 12652(g)(8), which provides reimbursement for attorneys' fees by the defendant. It is obviously in the interest of public policy for any representation to be effective and without the presence of conflicting interests. After all, if the AG declines to intervene, then in order for the state to recover any money, and protect the public treasury, representation of its interests rides with the qui tam plaintiff.

I worked extensively with relators' counsel while at the Department of Justice, and have litigated against them while in private practice. On occasion, I have represented relators under the FCA, such as my current appeal in the United States Court of Appeals for the Tenth Circuit in *Conner v. Salina Regional Health Center, Inc.*, Nos. 07-3033 and 07-3035. Therefore, I believe I have a solid background for assessing Thelen's handling of Marland's *qui tam* action. In that light, the following points attracted my attention:

1. Approaching DOI prior to filing the CFCA action.

In reviewing this matter, I found it very surprising that Thelen approached the DOI with Mr. Marland's information prior to filing the CFCA action. Such an action could well have jeopardized Marland's jurisdictional standing under the CFCA and resulted in his action (and the state's as well if it had later chosen not to intervene) being dismissed. This is because the CFCA contains a provision I mentioned above (modeled on its federal counterpart) that forecloses an action which is "based upon the public disclosure of allegations or transactions" alleged in the complaint. See § 12652(d)(3)(A); note 5 *supra*. Armed with Mr. Marland's inside information, DOI might well have

initiated an investigation and litigation of the very same allegations that would later be raised in the CFCA action. Unless Marland could demonstrate "original source" status under § 12652(e)(3)(B), any subsequent Marland CFCA action would be foreclosed.

Moreover, had DOI turned over the Marland information to the Attorney General, and had his office commenced a CFCA action, then very likely the so-called "first-to-file" provision of the Act, § 12652(c)(10), would have foreclosed Marland from initiating his own CFCA action. *See City of Hawthorne*, 109 Cal.App.4th at 1672 & 1677-80.

Similarly, § 12652(d)(2) also casts doubt upon the wisdom of speaking to the DOI before filing an action. It reads: "In no event may a person bring [a qui tam action] that is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the state or political subdivision is already a party." There is no exemption for "original source" under this provision.

Had I been defending Altus, I would certainly have moved to terminate any Marland CFCA action in light of these two provisions. In my opinion, Thelen should have filed the CFCA action before disclosing any specific information to DOI to avoid just this potential problem.

2. Threat to dismiss RoNo from the CFCA action.

In paragraph 32 of Marland's counterclaim, it is alleged: "Thelen also told Marland that the Attorney General could dismiss RoNo from the qui tam case for failure to cooperate." Such a reading of the CFCA clearly is in error. As discussed above at 11-12, the only sanctions that can be levied against a "disruptive" qui tam plaintiff are limitations on its discovery rights and its ability to participate in a trial. The CFCA is explicit: "The qui tam plaintiff shall have the right to continue as a full party to the action." § 12652(e)(1).

And there is good reason for this. One justification for the inclusion of *qui tam* provisions in the CFCA is because California legislature wanted false claims act enforcement activities to be "taken up a notch." That is, to create an incentive for qui tam plaintiffs to push to the hilt in asserting and litigating their cases. This is why qui tam plaintiffs have the right to contest the adequacy and reasonableness of settlements proposed by the Attorney General before the Superior Court judge overseeing the case. § 12652(e)(2)(B). That public policy encourages vigorous enforcement of the CFCA via *qui tam* actions in order to protect state taxpayers and the treasury from fraud is evident throughout the CFCA.

Based on my experience with federal relators, I can attest to the fact that the road to successful litigation of *qui tam* cases can be a rocky one. Relators and the government may have interests that diverge substantially along the way. For example, the government may be interested in achieving policy goals in addition to monetary recovery. Relators (and qui tam plaintiffs) are primarily interested in maximizing the total recovery and enhancing their share of the proceeds. Differences in litigation strategy may also develop. Therefore the CFCA strikes a reasonable balance–it allows for disagreements between qui tam plaintiffs and the government unless they escalate to levels serious enough to merit imposition of limits upon the private plaintiff. On the other hand, the Act does not go so far as to allow the state to curtail the involvement of the qui tam plaintiff in the action. Therefore, Thelen was in error in asserting this contention to Marland.

In my opinion, by raising this threat with Mr. Marland, Thelen was in effect short-circuiting the structure of the qui tam plaintiff/government relationship as designed by the California legislature. Qui tam plaintiffs, as full litigation partners, are supposed to be free to raise their views as to litigation strategy, without fear of recrimination or retaliation. The Thelen threat

would likely defeat the very purposes of building qui tam plaintiff protections into the CFCA.

Conclusion

For the reasons stated above, it is my conclusion that (1) Mr. Marland acting as a qui tam plaintiff was performing the very function that the California legislature envisioned for him in furtherance of public policy; and (2) Thelen's management of Mr. Marland's *qui tam* case manifested several problematic strategic and other elements.

EXHIBIT B

In connection with the preparation of my report, I have reviewed and relied upon the following:

-Case authorities cited in the text

-Selected pleadings filed in this matter

-John T. Boese, *Civil False Claims and Qui Tam Actions* (3d. Ed. 2007)

-Brian Taugher, *Comparison Between the California and Federal False Claim Acts*, reprinted in Boese, *supra*, at Appendix I.3

-James W. Taylor & Brian Taugher, *The California False Claims Act*, 25 Pub. Con. L.J. 315 (1996)

-John Phillips & Janet Goldstein, *Qui Tam: Beyond Government Contracts*, Practicing Law Institute (1993) (available on WestLaw)

-Cotchett, Pitre & McCarthy, *California Qui Tam Actions: A Primer for the General Litigator*, Consumer Attorneys of California, 1997 (available on WestLaw)

-Kayhan M. Fatemi & Matthew Lankenau, *A Practical Guide to Establishing or Avoiding False Claims Act Liability*, 24 WTR Construction Law 5 (2004) (available on WestLaw)

-Any and all other sources identified in my report