

Special Contribution

The Georgia Taxpayer Protection and False Claims Act

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I. INTRODUCTION

On April 16, 2012, Governor Nathan Deal signed into law House Bill 822, the Georgia Taxpayer Protection False Claims Act (TPFCA).¹ Patterned after the federal False Claims Act (FCA),² the TPFCA significantly expands the scope of liability for government contractors who do business with the State of Georgia and its political subdivisions.

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1. Ga. H.R. Bill 822, Reg. Sess., 2012 Ga. Laws 127 (codified at O.C.G.A. §§ 23-3-120 to -126 (Supp. 2013)).

2. 31 U.S.C. §§ 3729-3733 (2006 & Supp. V 2011).

While courts have yet to report a decision addressing the TPFCA, little doubt exists that the TPFCA will become a central consideration for government contractors in the coming years. This Article examines the evolution of the TPFCA, issues related to some of its more conspicuous provisions, and the TPFCA's prospective applications given the experience of other jurisdictions.

II. ANALYSIS

A. *The Federal False Claims Act*

A proper understanding of the TPFCA begins with a review of the FCA. Known originally as the "Lincoln Law," the FCA was passed in 1863 to tackle the issue of widespread fraud perpetrated by contractors selling supplies to the Union Army during the Civil War.³

The United States Supreme Court observed in *United States v. McNinch*:⁴

The [FCA] was originally adopted following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department. Testimony before the Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war.⁵

As originally enacted, the FCA provided that any person who knowingly submitted a false claim to the government was liable for double the government's damages plus a penalty of \$2000 for each false claim submitted.⁶ The FCA also contained "qui tam" provisions⁷ that granted private whistleblowers, commonly referred to as "relators," the

3. False Claims Act, Pub. L. No. 37-88, ch. 67 § 3, 12 Stat. 696, 698 (1863) (current version at 31 U.S.C. §§ 3729-3733). The various abuses committed by these contractors included the sale to the government of non-existent firearms, lame horses, and defective boots and uniforms. As Jim Fisk, Jr., a Civil War profiteer who made millions of dollars selling ragged blankets to the Union Army, famously opined: "Why, as soon as war's declared you can sell anything to the Government at almost any price you've got the guts to ask." ROBERT H. FULLER, JUBILEE JIM: THE LIFE AND TIMES OF COLONEL JAMES FISK, JR. 58 (1928).

4. 356 U.S. 595 (1958).

5. *Id.* at 599.

6. False Claims Act § 3, 12 Stat. at 698.

7. "Qui tam" is an abbreviation of 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). The phrase "qui tam" is properly pronounced with a soft *q*, a long *i*, and a soft *a*. BLACK'S LAW DICTIONARY 1368 (9th ed. 1990).

right to file suit on behalf of the government, awarding the whistleblower 50% of any government recovery.⁸ Prior to the FCA's passage, only government officials could file suit against contractors defrauding the government.⁹

The FCA fell into disuse during World War II and the decades thereafter following amendments that significantly restricted the ability of whistleblowers to file *qui tam* actions and share in the proceeds of a government recovery.¹⁰ In October 1986, however, Congress passed the False Claims Amendments Act of 1986 (the "1986 Act")¹¹ to address widespread reports of defense-contractor fraud related to increased military spending during the first several years of former President Ronald Reagan's administration.¹² Among other changes, the 1986 Act (1) re-established the ability of whistleblowers to file actions on behalf of the government,¹³ (2) set the bounty available to whistleblowers in a successful action at 15% to 30% of the government's recovery, depending on whether the government intervenes in the lawsuit,¹⁴ (3)

8. False Claims Act § 6, 12 Stat. at 698.

9. "Congress intended that the False Claims Act and its *qui tam* action would help the government uncover fraud and abuse by unleashing a 'posse of ad hoc deputies to uncover and prosecute frauds against the government.'" *Harrison v. Westinghouse Savannah River Co.*, 176 F.3d 776, 784 (4th Cir. 1999) (emphasis omitted) (citations omitted) (quoting *United States ex rel. Milam v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992)).

10. Act of Dec. 23, 1943, Pub. L. No. 78-213, ch. 337, § 3491, 57 Stat. 608 (current version at 31 U.S.C. §§ 3729-3733) (limiting private suits for penalties and damages under the FCA); see also *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649-52 (D.C. Cir. 1994) (discussing the 1943 amendments to the FCA); *United States v. Pittman*, 151 F.2d 851, 853-54 (5th Cir. 1945) (discussing the 1943 amendments to the FCA).

11. Pub. L. No. 99-562, 100 Stat. 3153 (1986) (current version at 31 U.S.C. §§ 3729-3733).

12. Members of Congress described numerous examples of contractor abuse during the hearings on the reform amendments. These abuses included contractor payments of \$7622 for a coffee pot, \$435 for a hammer, and \$640 for a toilet seat. Jack Smith, *\$37 screws, a \$7,622 coffee maker, \$640 toilet seats[]: suppliers to our military just won't be oversold*, L.A. TIMES, available at http://articles.latimes.com/1986-07-30/news/wv-18804_1_nut (July 30, 1986).

13. The 1986 Act § 3, 100 Stat. at 3154. Currently, the relator has primary responsibility for prosecuting the action unless the government intervenes. 31 U.S.C. § 3730(b), (c). In that event, responsibility for prosecuting the action shifts to the government. 31 U.S.C. § 3730(c)(1). The government can dismiss the action even over the objection of the relator so long as the court gives the relator an opportunity for a hearing, and can settle the action over the relator's objection so long as the relator is given a hearing and the court determines that the settlement is fair. 31 U.S.C. § 3730(c)(2)(A)-(B).

14. The 1986 Act § 3, 100 Stat. at 3156-57.

enhanced whistleblower protections against retaliation;¹⁵ (4) guaranteed the payment of the whistleblower's attorney fees;¹⁶ (5) extended the limitations period;¹⁷ and (6) increased available remedies, revising the FCA to make individuals and companies found liable for violating its provisions subject to treble damages and a \$5,000 to \$10,000 penalty for each false claim submitted.¹⁸ Congress further amended the FCA via the Fraud Enforcement and Recovery Act of 2009 (FERA)¹⁹ to avoid the conclusion that those dealing indirectly with the government, namely subcontractors, might avoid liability under the FCA per the United States Supreme Court's decision in *Allison Engine Co. v. United States ex rel. Sanders*,²⁰ and again amended the FCA in 2010 to provide the Department of Justice with greater discretion to bar a qui tam suit in which information regarding the fraud has already been publicly disclosed.²¹

Today, the FCA is the federal government's most potent weapon in combatting waste, fraud, and abuse.²² While the lion's share of FCA

15. The 1986 Act § 4, 100 Stat. at 3157-58.

16. The 1986 Act § 3, 100 Stat. at 3156.

17. The 1986 Act § 5, 100 Stat. at 3158.

18. In 1990, Congress enacted the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890, to peg federal fines and penalties to the rate of inflation. Federal Civil Penalties Inflation Adjustment Act § 5, 104 Stat. at 891. The Supreme Court has ruled that a district court has the discretion to determine the appropriate award of civil penalties within the range established by Congress. *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 230, 243 (1975). While the Senate report to the 1986 Act directs that a penalty shall be imposed for each false claim even if multiple claims are submitted in a single invoice, S. REP. NO. 99-345, pt. II(B), at 9-10 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5274, most courts award penalties for each invoice submitted regardless of the number of claims therein, *United States v. Krizek*, 192 F.3d 1024, 1026-27 (D.C. Cir. 1999).

19. Pub. L. No. 111-21, 123 Stat. 1617 (2009).

20. 553 U.S. 662 (2008). In *Allison Engine Co.*, the Supreme Court held that a subcontractor who submitted false invoices to a defense contractor who was building ships for the United States Navy could not be held liable under the pre-2009 version of the FCA because there was no evidence that the subcontractor specifically intended to defraud the government as opposed to the contractor. *Id.* at 665. FERA eliminated the necessity of demonstrating specific intent. FERA § 4(a), 123 Stat. at 1621.

21. Patient Protection and Affordable Care Act (ACA) § 10104(j)(2), Pub. L. No. 111-148, 124 Stat. 119, 901 (2010). Among other things, the 2010 amendments to the FCA eliminated the federal court's ability to use the FCA's public disclosure bar to dismiss a qui tam relator's action over the objections of the government. *Id.*, superseding *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007) (holding that the government could not cure a lack of jurisdiction by intervening because the FCA's pre-2010 public disclosure bar was jurisdictional in nature).

22. See Press Release, U.S. Dep't of Justice, Acting Assoc. Attorney Gen. Tony West Speaks at Pen & Pad Briefing Announcing Record Civil FY 2012 Recoveries (Dec. 4, 2012),

cases concern healthcare, pharmaceutical, and defense industry fraud, the FCA applies to virtually any claim for payment submitted directly or indirectly to the federal government.²³ Examples of the kind of conduct considered “fraudulent” for the purposes of the FCA include:

(1) A physician billing the federal Medicare program for a medical procedure he failed to perform.²⁴

(2) A contractor billing the Department of Defense for equipment that does not conform to government safety requirements.²⁵

(3) A private health insurer denying a covered claim in order to prompt Medicaid to pay it.²⁶

(4) A real estate vendor causing the Department of Housing and Urban Development (HUD) to pay out expenses related to home mortgage defaults after the vendor fraudulently induced HUD to insure the mortgages by falsely certifying that the buyers had used their own funds for down payments.²⁷

(5) A pharmaceutical company using improper promotional efforts to encourage physicians to prescribe a drug to Medicare patients for a purpose not approved by the Food and Drug Administration.²⁸

(6) A contractor being overpaid by the government and failing to make the appropriate refund.²⁹

B. Georgia Adopts the State Medicaid False Claims Act

Beginning with California’s passage of the California False Claims Act³⁰ in 1987, a number of states, including Georgia, adopted their own versions of the FCA to address fraud related to state programs.³¹

available at <http://www.justice.gov/iso/opa/asg/speeches/2012/asg-speech-1212041.html>.

23. Peter B. Hutt II, *The False Claims Act Correction Act of 2007: The Wrong Direction*, 43 *PROCUREMENT LAW* 4, 5 (Winter 2008). Even a bid for a government contract can form the basis for a false claim. *See, e.g.*, *Hooper v. Lockheed Martin Corp.*, 688 F.3d 1037, 1049 (9th Cir. 2012) (holding that payments requested in connection with a contract obtained through fraudulent underbidding can form the basis for a claim under the FCA). The FCA does not apply to tax fraud. 31 U.S.C. § 3729(e) (expressly excluding “claims, records, or statements made under the Internal Revenue Code” from the FCA).

24. *See, e.g.*, *United States ex rel. Grubbs v. Ravikumar Kanneganti*, 565 F.3d 180, 190 (5th Cir. 2009).

25. *See, e.g.*, *United States ex rel. Dye v. ATK Launch Sys., Inc.*, 2011 U.S. Dist. LEXIS 28536 at *7 (N.D. Utah Mar. 16, 2011).

26. *See, e.g.*, *United States v. Caremark, Inc.*, 634 F.3d 808, 810 (5th Cir. 2011).

27. *See, e.g.*, *United States v. Eghbal*, 548 F.3d 1281, 1284 (9th Cir. 2008).

28. *See, e.g.*, *United States ex rel. Carpenter v. Abbott Labs., Inc.*, 723 F. Supp. 2d 395, 397 (D. Mass. 2010).

29. *Am. Textile Mfrs. Inst., Inc. v. Limited, Inc.*, 190 F.3d 729, 731 (6th Cir. 1999).

30. CAL. GOV’T CODE §§ 12650-12656 (West 2011 & Supp. 2013).

31. The jurisdictions that followed California with a false claims act of general application are Illinois (1987), Florida (1994), District of Columbia (1998), Nevada (1999),

While many of these statutes dealt with fraud related to the submission of claims generally,³² Georgia's State Medicaid False Claims Act,³³ enacted in 2007, applied only to false claims related to the state's medical assistance programs.³⁴ Passage of the Georgia Medicaid False Claims Act was prompted by the federal government's enactment of the Deficit Reduction Act of 2005 (DRA),³⁵ which enabled states with conforming anti-fraud legislation to receive an additional 10% of any Medicaid false claims recovery.³⁶ Unsurprisingly, the amount of Medicaid recoveries in Georgia and other states adopting conforming legislation soared in the wake of the DRA.³⁷ Georgia recovered more than \$169 million during the period from 2007 to 2011, with \$99 million recovered in fiscal year 2011 alone.³⁸

C. Georgia Enacts the TPFCA

In 2011, changes to the FCA resulting from the enactment of FERA, the Patient Protection and Affordable Care Act of 2010 (ACA),³⁹ and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank)⁴⁰ prompted the United States Department of Health and Human Services (HHS) to review state false claims acts across the country.⁴¹ As part of its review, HHS determined that Georgia's State Medicaid False Claims Act was not as aggressive as the revised FCA and that Georgia would no longer be able to take advantage of the enhanced Medicaid recovery program unless Georgia updated its own statute.⁴²

Delaware (2000), Hawaii (2000), Massachusetts (2000), Tennessee (2001), and Virginia (2003). State of Connecticut, Office of Legislative Research, *False Claims Acts*, Report No. 2005-R-0181 (Feb. 9, 2005), available at <http://www.cga.ct.gov/2005/rpt/2005-R-0181.htm>.

32. *Id.*

33. O.C.G.A. §§ 49-4-168 to -168.6 (2013).

34. See O.C.G.A. § 49-4-168(1).

35. Pub. L. No. 109-171, 120 Stat. 4 (2005).

36. Pub. L. No. 109-171, 120 Stat. at 73.

37. See Office of the Attorney General of Georgia, Medicaid Fraud Control Unit, available at <http://law.ga.gov/medicaid-fraud-control-unit>.

38. *Id.*

39. Pub. L. No. 111-148, 124 Stat. 119 (2010).

40. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

41. Office of Inspector Gen., U.S. Dep't of Health & Human Servs., State False Claims Act Reviews, available at <https://oig.hhs.gov/fraud/state-false-claims-act-reviews/index.asp>.

42. Letter from Daniel R. Levinson, Inspector Gen., Dep't of Health & Human Servs. to Toni Prine, Interim Inspector Gen., Ga. Dep't of Cmty. Health (Apr. 3, 2013), available at <https://oig.hhs.gov/fraud/docs/falseclaimsact/Georgia.pdf>.

Georgia's General Assembly responded by unanimously passing the TPFCA.⁴³ The TPFCA, as enacted, closely resembles the FCA upon which it is based and extends the scope of Georgia's false claim mechanism well beyond Medicaid. Section 23-3-121 of the Official Code of Georgia Annotated (O.C.G.A.) provides:

- (a) Any person, firm, corporation, or other legal entity that:
- (1) Knowingly presents or causes to be presented a false or fraudulent claim for payment or approval;
 - (2) Knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim;
 - (3) Conspires to commit a violation of paragraph (1), (2), (4), (5), (6), or (7) of this subsection;
 - (4) Has possession, custody, or control of property or money used, or to be used, by the state or local government and knowingly delivers, or causes to be delivered, less than all of that money or property;
 - (5) Being authorized to make or deliver a document certifying receipt of property used, or to be used, by the state or local government and, intending to defraud the state or local government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
 - (6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the state or local government who lawfully may not sell or pledge the property; or
 - (7) Knowingly makes, uses, or causes to be made or used a false record or statement material to an obligation to pay or transmit money or property to the state or local government, or knowingly conceals, knowingly and improperly avoids, or decreases an obligation to pay or transmit money or property to the state or a local government shall be liable to the State of Georgia for a civil penalty of not less than \$5,500.00 and not more than \$11,000.00 for each false or fraudulent claim, plus three times the amount of damages [that] the state or local government sustains because of the act of such person.⁴⁴

For the purposes of the TPFCA, O.C.G.A. § 23-3-120 defines "local government" to include

any Georgia county, municipal corporation, consolidated government, authority, board of education or other local public board, body, or commission, town, school district, board of cooperative educational

43. Ga. H.R. Bill 822, Reg. Sess., 2012 Ga. Laws 127 (codified at O.C.G.A. §§ 23-3-120 to -126 (Supp. 2013)). The reasons for the General Assembly's support for the TPFCA are both obvious and several. Among other things, the TPFCA provides an avenue for cash-strapped governments in Georgia to realize new revenues without having to contend with the politics associated with tax increases.

44. O.C.G.A. § 23-3-121.

services, local public benefit corporation, hospital authority, taxing authority, or other political subdivision of the state or of such local government, including the Metropolitan Atlanta Rapid Transit Authority.⁴⁵

The TPFCA thus represents a radical expansion of liability under Georgia law—any person or entity who knowingly or recklessly submits a false claim for payment to the state or any of its political subdivisions, regardless of industry or purpose, is subject to the punishing regimen of damages and penalties articulated by the TPFCA.⁴⁶

D. Examining the Specifics of the TPFCA

That the TPFCA is modeled after the FCA suggests that courts are likely to interpret the former's provisions consistent with the weight of established federal authority regarding the latter. Given that the TPFCA differs in several material respects from the FCA, however, and in light of the fact that federal false-claims jurisprudence has shifted in the wake of the ACA and other recent changes to federal statutes,⁴⁷ a proper understanding of the TPFCA necessitates an examination of several of its more conspicuous provisions.

1. Prohibition Restricting the Filing of Qui Tam Actions by Public Employees. One of the TPFCA's more conspicuous provisions and a major difference from the FCA is the former's express prohibition against the filing of qui tam actions by public employees and officials. O.C.G.A. § 23-3-122(i) states:

For purposes of this subsection, the term "public employee," "public official," and "public employment" shall include federal, state, and local employees and officials. No civil action shall be brought under this article by a person who is or was a public employee or public official if the allegations of such action are substantially based upon: (1) Allega-

45. O.C.G.A. § 23-3-120(3).

46. O.C.G.A. § 23-3-121(a). Section 23-3-120(2) provides:

"Knowing" and "knowingly" mean that a person, with respect to information: (A) Has actual knowledge of the information; (B) Acts in deliberate ignorance of the truth or falsity of the information; or (C) Acts in reckless disregard of the truth or falsity of the information. No proof of specific intent to defraud is required.

O.C.G.A. § 23-3-120(2). Like its federal counterpart, O.C.G.A. § 23-3-121(e) specifically prohibits application of the TPFCA to "claims, records, or statements made concerning taxes under the revenue laws of this state." O.C.G.A. § 23-3-121(e).

47. See, e.g., *United States v. Sci. Applications Int'l Corp.*, 653 F. Supp. 2d 87, 106 (D.D.C. 2009) (observing that FERA legislatively overruled the holding of *Allison Engine* by amending the language of § 3729(a)(2), replacing the word "to get" with the word "material").

tions of wrongdoing or misconduct [that] such person had a duty or obligation to report or investigate within the scope of his or her public employment or office; or (2) Information or records to which such person had access as a result of his or her public employment or office.⁴⁸

The TPFCA's prohibition against suits brought by public employees has no federal counterpart. While the United States Department of Justice has argued on numerous occasions that the FCA's reference to *qui tam* actions as "actions [brought] by private persons"⁴⁹ implicitly excludes public employees, federal courts routinely reject this argument,⁵⁰ pointing to the absence of any specific proscription against such suits and the important role government employees play in uncovering fraud.⁵¹ Presumably, Georgia's General Assembly concluded that public officials and employees are already obliged to divulge knowledge of any fraud against the government, and permitting them to file *qui tam* actions might simply reward them for doing that for which they are already paid. It remains to be seen whether the General Assembly's decision compromises the government's ability to ferret out fraud.

2. Relaxed Pleading Standard. Another difference between the TPFCA and the FCA is the pleading standard. As a general proposition, federal courts require litigants pursuing claims under the FCA to plead their allegations regarding fraud with sufficient particularity to satisfy the requirements of Federal Rule of Civil Procedure 9(b).⁵² In enacting the TPFCA, however, the General Assembly relaxed the application of the pleading requirements in O.C.G.A. § 9-11-9(b),⁵³ dispensing with the necessity of pleading fraud with particularity in whistleblower

48. O.C.G.A. § 23-3-122(i).

49. 31 U.S.C. § 3730(b).

50. See, e.g., *United States ex rel. Holmes v. Consumer Ins. Grp.*, 318 F.3d 1199, 1209 (10th Cir. 2003); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1501-02 (11th Cir. 1991).

51. See, e.g., *United States ex rel. Little v. Shell Exploration & Prod. Co.*, 690 F.3d 282, 289-92 (5th Cir. 2012) (holding that government employees and investigators can file *qui tam* actions based on information uncovered during the course of their employment and stating "the prospect of monetary awards might provide public servants with additional incentives to ferret out fraud").

52. FED. R. CIV. P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.")

53. O.C.G.A. § 9-11-9(b) (2006).

actions and making it easier for whistleblowers to state and maintain claims.⁵⁴ Section 23-3-123(c) provides:

For purposes of applying subsection (b) of Code Section 9-11-9, in pleading a civil action brought under this article, the qui tam plaintiff shall not be required to identify specific claims that result from an alleged course of misconduct or any specific records or statements used if the facts alleged in the complaint, if ultimately proven true, would provide a reasonable indication that one or more violations . . . are likely to have occurred and if the allegations in the pleading provide adequate notice of the specific nature of the alleged misconduct to permit the state or a local government to investigate effectively and defendants to defend fairly the allegations made.⁵⁵

On its face, O.C.G.A. § 23-3-123(c) appears to permit a whistleblower to allege generally a pattern of fraudulent conduct without having to identify any specific claims actually submitted to the government. The majority of federal courts frown on this practice, typically dismissing FCA suits where the relator fails to identify specific information concerning at least one false claim.⁵⁶ The extent and degree of particularity required by courts in future TPFCA actions is likely to be a hotly contested issue.

3. Damages and Penalty Awards. Another provision warranting examination is the TPFCA's mechanism for awarding damages and penalties. Like its federal counterpart, the TPFCA makes available to both the government and whistleblowers the award of damages, penalties, costs, and reasonable expenses and attorney fees in actions where the defendant is found to have violated the act.⁵⁷ While the TPFCA mirrors the FCA in most respects in regard to these remedies, the TPFCA differs markedly from the FCA in regard to the imposition of damages in those circumstances where a defendant voluntarily discloses a violation of the act prior to the filing of a claim or the initiation of an investigation by the government. O.C.G.A. § 23-3-121(b) provides:

54. *Id.* ("Fraud, mistake, condition of the mind. In all averments of fraud or mistake, the circumstance constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.")

55. O.C.G.A. § 23-3-123(c).

56. *See, e.g.,* *United States ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, 707 F.3d 451, 456-57 (4th Cir. 2013); *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 379 (4th Cir. 2008); *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 727 (10th Cir. 2006); *United States ex rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1311 (11th Cir. 2002).

57. O.C.G.A. §§ 23-3-121(c), -122(h)(1)-(4).

The provisions of subsection (a) of this Code section notwithstanding, if the court finds that: (1) The person committing the violation of this subsection furnished officials of the state or local government responsible for investigating false claims violations with all information known to such person about the violation within [thirty] days after the date on which the defendant first obtained the information; (2) Such person fully cooperated with any government investigation of such violation; and (3) At the time such person furnished the state or local government with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this article with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation, *the court may assess not more than two times the amount of the actual damages [that] the state or local government sustained because of the act of such person.*⁵⁸

In contrast, 31 U.S.C. § 3729(a)(2) provides:

If the court finds that (A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within [thirty] days after the date on which the defendant first obtained the information; (B) such person fully cooperated with any Government investigation of such violation; and (C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation, *the court may assess not less than [two] times the amount of damages [that] the Government sustains because of the act of that person.*⁵⁹

Relatively speaking, the TPFCA's cap on damages makes voluntary disclosure an extremely attractive proposition. Yet it remains unclear from the text of the TPFCA whether the cap on damages occasioned by the act of self-reporting includes a concomitant modification or elimination of statutory penalties and the award of costs, expenses, and attorney fees. On the federal level, the act of self-reporting does not immunize a defendant against the filing of a FCA action by the government,⁶⁰ and nothing in the text of the FCA bars a court from awarding additional

58. O.C.G.A. § 23-3-121(b) (emphasis added).

59. 31 U.S.C. § 3729(a)(2) (emphasis added).

60. See, e.g., HHS Office of Inspector Gen., *Provider Self-Disclosure Protocol* (Apr. 17, 2013), available at <http://org.hhs.gov/compliance/self-disclosure-info/files/Provider-Self-Disclosure-Protocol.pdf>.

damages, penalties, costs, expenses, and fees in connection with the filing of a lawsuit, notwithstanding a voluntarily disclosure. While the TPFCA's cap on damages suggests that a court might reasonably interpret its provisions to limit the award of any further relief in the event of a voluntary disclosure, the TPFCA's further requirement that courts construe its provisions broadly⁶¹ suggests that interpretations limiting the tools, remedies, and range of applications available to government and whistleblowers are unlikely to prevail.

4. Whistleblower Protections. Another area warranting examination is the TPFCA's dramatic expansion of whistleblower protection. Prior to passage of the TPFCA, Georgia's whistleblower protections extended only to government employees⁶² and Medicaid fraud.⁶³ Now, any person with knowledge of fraud against Georgia or its political subdivisions is entitled to the TPFCA's protections, regardless of employment status or industry. In relevant part, O.C.G.A. § 23-3-122(1)⁶⁴ states:

(1) Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of a civil action under this Code section or other efforts to stop one or more violations of this article.

(2) Relief under paragraph (1) of this subsection shall include reinstatement with the same seniority status that the employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney[] fees. An action under this subsection may be brought in the appropriate superior court of this state for the relief provided in this subsection.⁶⁵

61. O.C.G.A. § 23-3-126(b) ("This article shall be broadly construed and applied to promote the public's interest in combating fraud and false claims directed at the public's funds.")

62. O.C.G.A. § 45-1-4 to -6 (2002 & Supp. 2013).

63. O.C.G.A. § 49-4-168.4 (2013).

64. O.C.G.A. § 23-3-122(1).

65. O.C.G.A. § 23-3-122(1)(1)-(2).

The TPFCA also provides whistleblowers with immunity from prosecution for misappropriating proprietary, confidential, and possibly, privileged documents.⁶⁶ O.C.G.A. § 23-3-122(b)(6)⁶⁷ provides:

Any evidence and information provided to the Attorney General or his or her designee, including any district attorney or local government, by a private person in connection with an action under this Code section shall not constitute public records and shall be exempt from disclosure under Article 4 of Chapter 18 of Title 50. Any such evidence also shall be protected by the common interest privilege and work product doctrine. To effectuate the law enforcement purposes of this article in combating fraud and false claims directed at the public's funds, *it is the public policy of this state that private persons be authorized to take actions to provide to the Attorney General or local government such information and evidence* [relevant to a violation of the TPFCA].⁶⁸

The application of the TPFCA's whistleblower protections is likely to be a contentious issue. Notwithstanding the fact that Georgia's public policy authorizes whistleblowers to take actions to provide the government with information and evidence relevant to a TPFCA violation, the anti-retaliation protections described in O.C.G.A. § 23-3-122(1)(1) specifically refer to "lawful acts."⁶⁹ Yet the likelihood that a whistleblower might procure tangible information and evidence of fraud without committing an unlawful act is slim. Georgia's Computer Systems Protection Act,⁷⁰ for example, criminalizes the unauthorized conversion or removal of data stored on a computer or computer network by an employee.⁷¹ This apparent contradiction raises the question whether courts will find Georgia's generalized public policy sufficient to protect from criminal and civil prosecution whistleblowers who commit unlawful acts in order to provide the government with evidence of fraudulent activity.

5. The Public Disclosure Bar. The TPFCA's public disclosure bar also merits further examination. Added to the FCA in 1986, the FCA's public disclosure bar was intended to weed out "parasitic" lawsuits, namely lawsuits based upon information already disclosed to the public through government hearings, audits, investigations, and news media,

66. O.C.G.A. § 23-3-122(b)(6).

67. *Id.*

68. *Id.* (emphasis added).

69. O.C.G.A. § 23-3-122(1)(1).

70. O.C.G.A. §§ 16-9-90 to -94 (2011).

71. O.C.G.A. § 16-9-93(b).

filed by those without direct and independent knowledge of fraud.⁷² The TPFCA reflects recent changes made in regard to the FCA's public disclosure bar, including, as described above, the 2010 amendment eliminating the federal court's ability to use the FCA's public disclosure bar to dismiss a qui tam relator's action over the objections of the government.⁷³ This change severely curtails defendants' ability to invoke lack of jurisdiction as a threshold defense to a false claims action. Indeed, so long as the possibility of a significant recovery remains outstanding, little incentive exists for the Attorney General or its designated representative to consent to dismissal of an action.⁷⁴

6. Statute of Limitations. Finally, there is an apparent difference between the TPFCA's statute of limitations and the FCA's limitations period that warrants consideration. In relevant part, O.C.G.A. § 23-3-123(a) provides:

[A]ll civil actions under this article shall be filed pursuant to Code [§] 23-3-122 within six years after the date the violation was committed or three years after the date when facts material to the right of civil action are known or reasonably should have been known by the state or local government official charged with the responsibility to act in the circumstances, whichever occurs last; provided, however, that in no event shall any civil action be filed more than ten years after the date upon which the violation was committed.⁷⁵

On its face, the limitations period described in O.C.G.A. § 23-3-123(a), including the three-year tolling provision described in O.C.G.A. § 23-3-123(a), applies to "all civil actions,"⁷⁶ which presumably includes claims brought by whistleblowers. Federal courts are split, however, over whether the FCA entitles a whistleblower to take advantage of the three-year tolling provision described in 31 U.S.C. § 3731(b)(2).⁷⁷ The majority of courts hold that the tolling provision is inapplicable to

72. 1986 Act, § 3, 100 Stat. at 3157.

73. Compare ACA § 10104(j)(2), 124 Stat. at 901 with O.C.G.A. § 23-3-122(3).

74. See, e.g., *United States ex rel. Stierli v. Shasta Servs., Inc.*, 440 F. Supp. 2d 1108, 1114 (E.D. Cal. 2006) (dismissing meritless lawsuit upon government request only after the government was served with what the government perceived to be burdensome discovery requests).

75. O.C.G.A. § 23-3-123(a).

76. *Id.*

77. See *infra* notes 78 & 79.

whistleblowers.⁷⁸ A minority of courts hold that the tolling provision applies to cases brought by the government and relators.⁷⁹

E. Prospective Application of the TPFCA

Courts have yet to report a decision addressing the TPFCA, and it remains uncertain how the TPFCA might be applied and in which contexts and industries it is most likely to be invoked. Reported decisions in other jurisdictions with similar state statutes provide some guidance, however, and suggest that state and county construction and procurement contracts are likely targets.

Like most states, Georgia and its political subdivisions spend billions of dollars annually on significant public-works projects.⁸⁰ These projects range from routine items, such as the construction and repair of roads and bridges, the renovation of schools, and the construction of government office buildings, to extraordinary items, such as the deepening of the Savannah Harbor and the construction of a multi-purpose stadium facility in downtown Atlanta to replace the Georgia Dome.⁸¹ The scale of these kinds of projects renders them particularly vulnerable to billing improprieties and thus likely targets of TPFCA suits. In regard to procurement, Georgia and its political subdivisions spend billions of dollars each year purchasing a vast array of goods and services, such as computers, textbooks, legal services, automobiles, buses, food, and copying services. Given the penalty structure of the TPFCA, and because procurement contracts typically involve the submission of

78. See, e.g., *Sikkenga*, 472 F.3d at 725-27 (holding that the tolling provision is inapplicable to “private qui tam relators”); *United States ex rel. Amin v. George Washington Univ.*, 26 F. Supp. 2d 162, 172-73 (D.D.C. 1998) (“The plain meaning of the statute supports the conclusion that the three year knowledge requirement . . . only applies to cases in which the government intervenes.”).

79. See *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1216 (9th Cir. 1996) (“[W]e conclude that Congress . . . intended the tolling provision to apply to *qui tam* plaintiffs as well.”).

80. See The Associated Gen. Contractors of Am., *Voters Approve \$122 Billion In Infrastructure Funding*, http://www.agc.org/cs/State_and_Local_Ballot_Initiative (last visited Sept. 8, 2013).

81. See Press Release, Ga. Office of the Governor, *Deal Calls for \$50 Million in New Funds For Deepening Port* (Nov. 19, 2012), available at <http://www.gaports.com/corporate/tabid/379/xmmid/1097/xmid/7714/xmview/2/default.aspx>; see also Janel Davis, *Would New Stadium be Cheaper Than a Dome Rehab?* (Mar. 8, 2013), available at <http://www.politifact.com/georgia/Statements/2013/Mar/08/kasim-reed/would-new-stadium-be-cheaper-dome-rehab-depends/>.

multiple claims for payment, the cumulative effect of repeated improper billing for even low-cost items could result in significant liability.⁸²

Suits filed in other jurisdictions illustrate the potential application of the TPFCA in cases involving construction and procurement fraud. In *United States & Commonwealth of Massachusetts ex rel. Johnston v. Aggregate Industries, PLC*,⁸³ the United States and Massachusetts intervened in a whistleblower suit filed pursuant to the FCA and the Massachusetts False Claims Act⁸⁴ against contractors responsible for the design, construction and oversight of Boston's "Big Dig" project, alleging, among other things, that the contractors knowingly used substandard materials and falsely certified compliance with state regulations and construction requirements.⁸⁵ The contractors eventually settled with the state and federal government for \$458 million, the primary contractor agreeing to pay \$407 million, almost three times the \$150 million profit it cleared in connection with the project.⁸⁶

Similarly, in *California v. Toshiba Corp.*,⁸⁷ California filed suit pursuant to the California False Claims Act against a computer manufacturer, alleging that computers sold to California public agencies contained a defect in the micro-code that resulted in varying amounts of

82. In addition to the direct financial consequences associated with violating the TPFCA, claimants who make false claims may subject themselves to suspension or debarment from further public contracts. Section 7.7.4 of Georgia's Department of Administrative Services Procurement Manual provides that the State Purchasing Division can suspend or debar a contractor for, among other things, "[d]eliberate failure without good cause to perform in accordance with the specifications or within the time limit provided in the contract," "falsification . . . of records," and "other offense[s] indicating a lack of business integrity or business honesty [that] currently, seriously, and directly affects [a contractor's] responsibility as a state supplier." Dep't of Admin. Servs., *Georgia Procurement Manual* § 7.7.4 (2011), available at pur.doas.ga.gov/gpm/MyWebHelp/GPM_Main_File.htm. Courts in other jurisdictions have upheld the right of local governments to debar contractors based on the contractor's submission of false claims. See, e.g., *Stacy & Witbeck, Inc. v. City & Cnty. of San Francisco*, 44 Cal. Rptr. 2d 472, 475, 485 (1995) (holding that the public works commission had the right to debar a contractor where the commission had determined that the contractor had submitted a false claim in violation of state false claims act).

83. Andrew G. Simpson, *\$458M Big Dig Settlement Reached; Criminal Charges Dropped*, INSURANCE JOURNAL, available at <http://www.insurancejournal.com/news/east/2008/01/23/86666.htm> (Jan. 23, 2008).

84. MASS. GEN. LAWS ch. 12 §§ 5A-50 (2010).

85. Simpson, *supra* note 83.

86. *Id.*

87. See Press Release, Office of the Attorney Gen., State of Cal. Dep't of Justice, *Computer Co. Agrees to Pay State & Local Gov't Agencies More Than \$30 Million* (Dec. 12, 2000), available at <https://oag.ca.gov/news/press-releases/attorney-general-announces-settlement-false-claims-lawsuit-against-toshiba>.

lost and altered data during operations.⁸⁸ The manufacturer settled the state's claims for \$30.1 million.⁸⁹

While overbilling or billing for substandard materials in construction and procurement contracts are likely target areas, the nature of a robust false claims statute like the TPFCA lends itself to a range of other applications. False claims acts in other jurisdictions have been used to prosecute litigants in less obvious circumstances, including cases involving bid-rigging, bribery, illegal kickbacks, and falsification of compliance with disadvantaged business enterprise program requirements.⁹⁰ In *New York v. Sodexo*,⁹¹ for example, whistleblowers filed suit against a food services company pursuant to the FCA and the New York False Claims Act⁹² after the whistleblowers learned that the company had secretly pocketed kickbacks from its suppliers instead of passing the savings on to the public schools and hospitals served by the company.⁹³ The company settled the suit for \$20 million.⁹⁴

III. CONCLUSION

The lesson is clear. Although courts have yet to report a decision applying Georgia's new state false claims statute, the TPFCA represents a radical expansion of state authority and a powerful weapon in the fight against fraud and abuse. The potential applications of the TPFCA are wide-ranging, and the mere presence of the statute is certain to change the way contractors do business with the state of Georgia and its political subdivisions.

88. *Id.*

89. *Id.*

90. See, e.g., *In re Bank of N.Y. Mellon Corp. False Claims Act Foreign Exch. Litig.*, 851 F. Supp. 2d 1190, 1200-01 (N.D. Cal. 2012); *United States v. Dynamics Research Corp.*, 441 F. Supp. 2d 259, 262 (D. Mass. 2006); *In re Duxbury*, 304 P.3d 480, 489 (Wash. Ct. App. 2013). If past controversies serve as any indication, the TPFCA seems likely to play a prominent role in resolving future disputes concerning the method and manner in which the City of Atlanta administers its Disadvantaged Business Enterprises (DBE) program in connection with the award of contracts at Hartsfield-Jackson International Airport and other venues. DBEs serving as "fronts" for other interests and individuals falsely certifying their income to satisfy DBE criteria are virtually certain to be named as defendants in suits alleging violations of the TPFCA.

91. *Whistleblower in Sodexo Kickback Case Comments on New York Settlement*, PR NEWSWIRE, available at <http://www.prnewswire.com/news-releases/whistleblower-in-sodexo-kickback-case-comments-on-new-york-settlement-98931359.html> (July 21, 2010).

92. N.Y. STATE FIN. §§ 187-194 (McKinney 2002, Supp. 2012).

93. See *Whistleblower in Sodexo Kickback Case Comments on New York Settlement*, *supra* note 91.

94. *Id.*
