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A PROFESSIONAL CORPORATION

FALSE CLAIMS ACT LITIGATION

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INTRODUCTION

In an era of “budget cuts” and financial uncertainty, government entities have to be extra cautious about their spending. However, when government contracts for goods and services are often awarded on a lowest-bidder basis, when the departments that are charged with overseeing and managing the contracts are understaffed, and when private contractors and suppliers are more sophisticated and litigious than ever, the government entity, it seems, doesn’t stand a chance. The result can be poor, shoddy or unusable goods and services, higher charges to the government than originally anticipated due to change orders, mistakes and surprises, followed by blistering attacks from angry supervisors, council members, communities and state and/or federal funding sources. In some cases, adding add insult to injury, the end-result also includes a lawsuit from the private contractor/supplier seeking even more money from the government. Historically, the government will settle in order to avoid a costly and potentially unsuccessful trial due to its own inadequacy in preventing the problems to begin with.

There is hope. The False Claims Act is a sleeping giant that can be used to protect government even under what at first appears to be the worst circumstances. Even more than protection, however, the False Claims Act can be a source of revenue for government entities in situations where private contractors are unscrupulous. The financial benefits can be astounding - from treble damages to civil penalties. A complaint or cross-complaint for False Claims can be made under state law or federal law and is a powerful tool.

The information in this publication is intended only as an overview and is not intended to be a complete recitation of the law on any of the areas concerned. Readers are encouraged to research the issues independently or to contact the authors for additional information.

Circumstances Giving Rise to A Lawsuit

A myriad of circumstances can give rise to a complaint or cross-complaint for false claims:

- A municipal corporation awards a contract for goods and/or services to a private company;
- The contract between the parties governs their respective rights, duties and obligations, and delineates the procedures and limitations on submission of documents such as requests for payments, progress payments, change order proposals, wage certifications often seen in prevailing wage contracts, and even plans and specifications;
- Each submission constitutes either a claim for payment, or a material statement relating to payment made under the contract;

- For each such claim or statement, the contract requires the private company to certify the correctness, completeness and veracity of the claims for payment based on any of its submissions;
- One or more of the private company's submissions was not correct, complete and/or accurate;
- The goods provided by the company did not meet the requirements of the government, and/or would not work as needed;
- The private company knew, or acted with deliberate indifference or reckless disregard concerning the inaccurate, incomplete and/or incorrect submissions, or concerning the defects in the work or product provided.

The company's submission of false, incorrect, misleading statements, its improper certifications, or its submission of defective product or work all can constitute a violation of the False Claims Act, both State (see e.g., Government Code 12650, *et seq.*, and specifically Government Code 12651(a)) and Federal (31 U.S.C. §§ 3729, *et seq.*).¹

Contracts which may give rise to a False Claims lawsuit can include construction projects of any type, contracts for labor services such as janitorial, security or even ongoing vendor contracts such as copy services, equipment lease and repair contracts. The important elements are that the contract between the government and private vendor exists and that the contract has outlined requirements for the payment of the vendor and obligations that the vendor must meet prior to payment, even if that obligation is simply to discharge its duties (fix the copier well).

For example:

A government entity ("government") contracts with private company ("vendor") to build a road. The contract calls for payment of federal prevailing wages since the funding for the road comes from the federal government.

In order to receive a progress payment, the vendor was contractually required to submit, on forms provided by the government, periodic estimates showing the value of the work performed during each period based upon the approved breakdown of the contract price. Along with each request for a progress payment, the vendor was required to certify (1) the accuracy and correctness of the line item amounts on the form; (2) that all work had been performed and materials supplied in full accordance with the terms and

¹ In the case of false certifications, this may subject a contractor or subcontractor to criminal and civil prosecution under Section 1001 of Title 18 and Section 3729 of Title 31 of the United States Code [i.e., the Federal False Claims Act].

conditions of the contract; (3) that the amounts requested were only for performance in accordance with the contract; (4) that payments to subcontractors and suppliers had been made from previous payments received under the contract, and that timely payments would be made from the proceeds of the payment covered by the certification; and (5) that the request did not include any amounts which the vendor intended to withhold or retain from a subcontractor or supplier in accordance with the terms and conditions of the subcontract.

Instead, what the government ultimately discovered was that the vendor's requests for progress payments contained multiple line items and amounts that were materially false and fraudulent in that the vendor sought payment:

- for work that had not yet been performed by the vendor and/or its subcontractors under the contract at the time of the payment request (e.g., the vendor claimed to be at or near 70% complete with the grading of the road when in fact they were only 40% complete);
- that amounts sought for subcontractors were greater than the value of the work and materials supplied by the subcontractors (e.g., when comparing invoices submitted by subcontractors to the vendor and requests for payment from the vendor to the government, differing pricing and/or percentage of completion are reflected);
- that amounts sought were greater than the value of the work and/or materials (under the contract) supplied by the vendor and/or its subcontractors (e.g., higher prices than those shown on vendor's original schedule of values and/or materials never actually called for on a job).

Many government contracts also require that the vendor certify the payment of prevailing wages. Often, it can be demonstrated by a review of the vendor's and its subcontractors' payrolls that in fact not all of the workers on the project were paid prevailing wages.

THE FALSE CLAIMS ACT

A. THE CALIFORNIA FALSE CLAIMS ACT

California's False Claims Act can be found at Government Code Section 12650 *et seq.* It provides:

(a) This article shall be known and may be cited as the False Claims Act.

(b) For purposes of this article:

(1) "Claim" includes any request or demand for money, property, or services made to any employee, officer, or agent of the state or of any

political subdivision, or to any contractor, grantee, or other recipient, whether under contract or not, if any portion of the money, property, or services requested or demanded issued from, or was provided by, the state (hereinafter "state funds") or by any political subdivision thereof (hereinafter "political subdivision funds").

(2) "Knowing" and "knowingly" mean that a person, with respect to information, does any of the following:

(A) Has actual knowledge of the information.

(B) Acts in deliberate ignorance of the truth or falsity of the information.

(C) Acts in reckless disregard of the truth or falsity of the information.

Proof of specific intent to defraud is not required.

(3) "Political subdivision" includes any city, city and county, county, tax or assessment district, or other legally authorized local governmental entity with jurisdictional boundaries.

(4) "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.

(5) "Person" includes any natural person, corporation, firm, association, organization, partnership, limited liability company, business, or trust. Cal Gov't Code §12650.

California's FCA was enacted in 1987 and is patterned largely on its federal counterpart.² *City of Hawthorne ex rel. Wohlner v. H&C Disposal Co.* (2003) 109 Cal.App.4th 1668, 1676 ("City of Hawthorne"); accord *Laraway v. Sutro & Co. Inc.* (2002) 96 Cal.App.4th 266, 274-275, citing *Rothschild v. Tyco Internat.(US) Inc.*(2000) 83 Cal.App.4th 488, 494. Federal decisions are persuasive on the meaning of the FCA. *Laraway v. Sutro & Co. Inc., supra*, 96 Cal.App.4th at p. 275.

California's FCA is intended to supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities. *Debro v. Los Angeles Raiders* (2001) 92 Cal.App.4th 940, 946. In general, the FCA permits a governmental agency (or a qui tam plaintiff, i.e., one bringing an action on behalf of the governmental agency) to recover civil penalties and damages from any person who, for example, knowingly

² The federal FCA, 31 U.S.C. §§ 3729, *et seq.*

presents to the state or political subdivision a false claim for payment or approval. *Ibid.* The ultimate purpose of the FCA is to protect the public fisc. *City of Hawthorne, supra*, 109 Cal.App.4th at p. 1677, citing *American Contract Services v. Allied Mold & Die, Inc.* (2001) 94 Cal.App.4th 854, 858.

Thus, cases interpreting the FCA have routinely recognized that the FCA must be construed broadly so as to give the widest possible coverage and effect to its prohibitions and remedies. *City of Hawthorne, supra*, 109 Cal.App.4th at p. 1677 citing *LeVine v. Weis* (2001) 90 Cal.App.4th 201, 210; accord *Stacy & Whitbeck, Inc. v. City and County of San Francisco* (1996) 47 Cal.App.4th 1, 7 [“the FCA is to ‘be liberally construed and applied to promote the public interest’”]; *LeVine v. Weis* (1998) 68 Cal.App.4th 758, 764 [“the False Claims Act must be construed broadly so as to give the widest possible coverage and effect to the prohibitions and remedies it provides in Government Code section 12653”].

Given the broad reach of the FCA, and its purpose of protecting the public fisc, Section 12651(a) imposes treble damages and statutory penalties on one who, among other things: “(1) Knowingly presents or causes to be presented to an officer or employee of the state or of any political subdivision thereof, a false claim for payment for approval[;]” “(2) Knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the state or by any political subdivision[;]” and “(7) Knowingly makes, uses or causes to be made or used a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the state or to any political subdivision.” Govt. Code, §§ 12651(a), subs. (1), (2), and (7).

B. THE FEDERAL FALSE CLAIMS ACT

The Federal False Claims Act, 31 U.S.C. §3729 *et seq.*³ provides:

(a) Liability for certain acts. Any person who--

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

³ For inflation adjusted civil monetary penalties, the federal Act refers readers to 28 Code of Federal Regulations 85.3.

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than \$ 5,000 and not more than \$ 10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that 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 30 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 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States

Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information--

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim defined. For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986. 31 USCS § 3729

As noted above, California's False Claims Act is patterned on this, its federal counterpart. A comparison of the two shows that the substantive provisions governing the liberal reading of what constitutes a claim, etc., are similarly construed and interpreted. The provisions concerning penalties and damages are somewhat different in that, for example, civil penalties under the California False Claims Act are awarded completely within the discretion of the trial judge. Under the federal counterpart, and subject to the Eighth Amendment proscription against Excessive Fines, the courts are required to award a minimum of \$5,000 per false claim as a penalty.⁴

⁴ Although this hypothesis has not been tested, as a practical matter, the mandatory nature of penalty awards at the federal level may make the federal courts less likely to find a high number of false claims in any given case. Indeed, there are very few reported cases where the federal courts have refused to award the minimum (footnote continued)

C. WHAT CONSTITUTES A POLITICAL SUBDIVISION

Under California's FCA, a "political subdivision" is defined as including "any city, city and county, county, tax or assessment district, or other legally authorized local governmental entity with jurisdictional boundaries." *Debro v. Los Angeles Raiders*, supra, 92 Cal.App.4th at p. 946, citing Govt. Code, § 12650, subd. (b)(3).

D. WHAT CONSTITUTES A CLAIM

A "claim" within the meaning of the FCA includes "any request or demand for money, property, or services made to any employee, officer, or agent of the state or any political subdivision."⁵ Govt. Code, 12650, subd. (b)(1); accord *Debro v. Los Angeles Raiders*, supra, 92 Cal.App.4th at p. 946.) And as set forth below, the courts have not construed the "claim" definition narrowly to include only bills. It covers any request for money, property or services in whatever form. Thus, for example, in the construction context, change order proposals, certified payroll records and draw requests all fall within the ambit of a claim.

Most often, a claim for money, such as an invoice or request for progress payment requires certification by the vendor that prevailing wages have been paid, that the work has actually been done, that the work will be done properly, etc.

Some contract certifications are rather simple:

"According to the best of my knowledge and belief, I certify that all items and amounts shown on the other side of this form are correct; that all work has been performed and material supplied in full accordance with the items and conditions of the contract between (name of owner) of the city of (applicable City) and (contractor) dated (mm/dd/yyyy)"

Other requests for payment require submission of documents such as with change order proposals. These change order proposals often are accompanied by itemized costs for goods and services which can be analyzed retroactively for accuracy. What we often find is that the documents submitted by the general contractor contain higher prices than those submitted to the general contractor by the subcontractor. Because government generally does not have a

penalties proscribed; although there are a number that reduce the number of false claims found by the lower courts.

⁵ The statute gives no precise definition of "claim," but only states what that term includes. According to at least one court, "the term 'false claim' employs ordinary English words. It has no technical meaning." *LeVine v. Weis* (2001) 90 Cal.App.4th 201, 212.

contractual relationship with the subcontractor (as the general is the one who is awarded the contract), the government generally never sees the subcontractor's back up documents. This is an easy way for the general contractor to inflate prices through the change order process.

A defense often used by construction vendors is that change order proposals are not actually claims for money as these "proposals" necessarily require some negotiating and haggling on the part of the government. However, most courts reject this notion since the vendor should always submit accurate, not inflated documents.

In *Stacy & Whitbeck, Inc. v. City and County of San Francisco* (1996) 47 Cal.App.4th 1, the vendor/ contractor (Stacy) filed a complaint for damages against the City and County of San Francisco alleging, among other things, breach of contract in connection with a public works project it was constructing. In response, the City filed a cross-complaint alleging (inter alia) violations of the False Claims Act. The City contended that the "change order requests" (which had been aggregated and presented as a single claim for contract overages) were "claims" under the False Claims Act. The contractor disagreed. The contractor explained that the claim it submitted to the City for payment (i.e., its claim for overages above the contract amount) was intended as a starting point for negotiations so the parties could "sit down and negotiate" in an effort to "settle our differences." *Id.* at p. 5.

The court was not persuaded by the contractor's argument. In its examination of the claim submitted to the City for payment, the court noted that "the contract claim is comprised of pages and pages of detailed overages, with direct costs and indirect costs separately portrayed, numerous exhibits and a 'preliminary quantum summary' showing a claim to date of \$790,277.22." *Id.* at p. 9. Accordingly the court held that contractor's submissions came within the FCA. *Id.* at pp. 9-10.

Periodic Estimate for Partial Payment forms used in construction cases also often contain cautionary language which specifically references the federal False Claims Act - "Warning: HUD will prosecute false claims and statements. Conviction may result in criminal and/or civil penalties. (18 U.S.C. 1001, 1010, 1012; 31 U.S.C. 3729, 3802)."

In *United States of America, ex rel. Plumbers and Steamfitters Local Union No. 38 v. C.W. Roen Construction Co.* ("Roen"), the court held that "the FCA does indeed extend to false statements regarding the payment of prevailing wages." *Roen* (9th Cir. 1999) 183 F.3d 1088, 1092. In reality, the court explained, false claims actions may be sustained under different theories of liability, including false certifications. *Ibid.*, citing *Unites States v. Hibbs* (3d Cir. 1977) 568 F.2d 347.

The *Roen* court focused on *United States ex rel. Hopper v. Anton* ("Anton") (9th Cir. 1996) 91 F.3d 1261, 1266, which held that "it is the false certification of compliance which creates liability when certification is a prerequisite to obtaining a government benefit." *Roen, supra*, 183 F.3d at p. 1092 (emphasis in original). In order to qualify for federal construction projects subject to the Davis-Bacon Act and related statutes, the *Roen* court reasoned,

contractors must “certify” that “each laborer or mechanic has been paid not less than the applicable wage rates.” (*Id.*, citing 29 CFR §5.5(a)(3)(B)(3).) Under *Roen* and *Anton*, if a contractor submits a false certification pursuant to this requirement, he may be liable under the FCA. *Roen, supra*, 183 F.3d at p. 1092; *Anton, supra*, 91 F.3d at 1266. Moreover, those regulations state explicitly that “the falsification of any such certification may subject the contractor to civil prosecution under section 231 of title 31 of the United States Code [The False Claims Act].” *Roen, supra*, 183 F.3d at p. 1092 citing 29 CFR § 5.5(a)(3)(D). Indeed, the court stated “[w]e have no doubt, therefore, that a false certification that workers have been paid at the legally required wage rate may give rise to liability under the FCA.” *Id.* at p. 1092.

Similarly in *LeVine v Weis* (2001) 90 Cal.App.4th 201, a teacher brought an action for wrongful termination against a school district and individual supervisors for the district, alleging (among other things) that he was wrongfully terminated for reporting what he believed to be violations of the FCA by the district. The trial court initially granted summary adjudication in favor of the school district and the individual supervisors. The teacher appealed and the court of appeals reversed.

After a trial, the jury found for the teacher and he was awarded damages and attorneys’ fees. The school district and individual supervisors appealed. The Court of Appeal reversed the judgment against the individual defendants but in all other respects affirmed holding, that the FCA imposed liability upon the school district.⁶ The appellate court noted that the evidence showed that the teacher threatened to inform the Department of Education as well as other authorities that the school district was claiming average daily attendance (“ADA”) funds from the state, without providing the expected level of classroom staffing. *Id.* at p. 210. The “[school district’s] certification of the ADA constituted an actual claim for money based on a representation of fact.” *Id.* at p. 211. In other words, the school district’s false certification of a present fact - the certification of ADA – caused the government to provide an improper benefit – funding which was based on the ADA. That, according to the *LeVine* court, was sufficient to come within the broad purpose and scope of the FCA. *Ibid.*

Thus, when the courts say that they construe the FCA “broadly,” they mean it. What is generally required to determine whether false claims have been submitted is a thorough review of the contract and all documents submitted by the vendor.

Remedies

⁶ *LeVine* is actually an example of a private plaintiff (in a “qui tam” capacity) suing on behalf of the public under the False Claims Act.

A. DAMAGES

False Claims Act liability is somewhat punitive in nature. A judgment in favor of the government means that damages are trebled by operation of law. Moreover, the Court can award penalties for each false claim.

Damages take the form of compensatory damages just as in any other type of litigation. Some examples of false claims damages are:

- The vendor submitted inflated change order proposals and as a consequence was overpaid \$20,000; or
- The vendor failed to credit the government for work deleted from the contract and as a consequence should have deducted \$10,000 from its requests for payment; or
- The vendor used different materials than those specified in the agreement without the consent of the government and saved itself \$30,000 in material charges which was never credited to the government; or
- The vendor billed for services which were not performed in full or in part.

B. PENALTIES

Penalties can also be awarded for each false claim submission. These can be counted several ways and will depend on the Court and/or jury. For example,

- Payroll certifications may be presented as one false claim per payroll, one false certification per employee per payroll, or if the certification is for hourly wages, one false claim per hour per employee per payroll. The latter may be too aggressive depending on the circumstances as it could result in hundreds of millions of dollars in penalties;
- Change order proposals may be presented as one false claim per change order proposal or one false claim per line item per proposal;
- Failure to provide services may be presented as one false claim for the entire contract for services or one false claim per instance of failure to provide.⁷

⁷ As noted earlier, federal courts use the way they count false claims to affect the amount of penalties awarded. There is a line of authority in the federal courts that false claims are counted per invoice or shipment. There are no California cases construing how false claims are counted.

If the case involves an extremely unscrupulous vendor, courts and juries may tolerate a more aggressive presentation of the number of false claims.

As noted above, although there is a mandatory minimum penalty per claim under the federal FCA, the federal courts do exercise some discretion in awarding penalties. Penalties range from approx. \$5,500 to \$11,000 dollars per false claim, adjusting for inflation. Any award of penalties has to keep in mind the excessive penalties clause of the Eighth Amendment. In the absence of guidance as to what number should be applied with respect to penalties, the courts have recognized that “up to a certain point, the number of civil penalties, or whether to even assess civil penalties, is not discretionary. ... However the point at which a court [gains] discretion [to] limit the number of penalties is when the penalties are deemed ‘excessive’” *U.S. v. Cabrera-Diaz* (D.P.R. 2000) 106 F.Supp.2d 234.

State by Humphrey v. Alpine Air Products, Inc., 490 N.W.2d 888, 896-897 (Minn. Ct. App., 1992) opined that courts should consider the following factors in determining the size of a civil penalty: (1) the good or bad faith of the defendant; (2) the injury to the public; (3) the defendant’s ability to pay; and (4) the desire to eliminate the benefits derived by the violation. (citing *United States v. Reader’s Digest Ass’n.*, 662 F.2d 955, 967 (3d Cir. 1981), cert denied, 455 U.S. 908 (1982))

See also *Peterson v. Weinberger* (5th Cir. 1975) 508 F.2d 45. In that case, the court awarded \$100,000 in penalties for 120 false claims, representing forfeitures for 50 of the 120 claims at issue. Here, the court did not even award the minimum amount of penalties per claim. Commentators have explained this as follows: “the *Weinberger* court’s rationale for limiting forfeitures was precisely that which was later approved in *United States v. Halper* ... to prevent imposition of forfeitures that might prove excessive and out of proportion to the damages sustained by the government.”

In *U.S. ex rel. Garibaldi v. Orleans Parish School Board* (E.D.La.1999) 46 F. Supp.2d 546, the court reduced the statutory penalty awarded by the jury from \$7.85 million (1,570 claims at \$5,000 each) to \$100,000, finding that the court has discretion to ensure that penalties reflect a fair ratio to damages and are not excessive and out of proportion. In that case, the reduction also had to do with the fact that the false claims judgment was against a public school district responsible for educating many poor children, and the court did not feel it appropriate that the children should become the victims of the School Board’s actions.

In *U.S. ex rel. Smith v. Gilbert Realty* (E.D. Mich. 1993) 840 F. Supp. 71, the district court held that a court’s ability to limit penalties was restricted to instances in which assessment of full penalties raised successful excessive fines/due process constitutional challenges.

Under California’s False Claim Act, the trial court has full discretion whether and to what extent to award penalties. These same factors – the nature of the defendant’s conduct (i.e, bad faith), the harm to the public, the amount of actual compensatory damages, and the ratio of damages to penalty will all likely be taken into account.

C. ELECTION OF REMEDIES

The doctrine of election of remedies is based upon the principle of estoppel. “Whenever a party entitled to enforce two remedies [and] either institutes an action upon one of such remedies or performs any act in pursuit of such remedy, whereby he has gained an advantage over the other party, ... he will be held to have made an election of such remedy, and will not be entitled to pursue any other remedy for the enforcement of his right.” *Acme Paper Co. v. Irwin Goffstein* (1954) 125 Cal.App.2d 175, 178. In *Acme Paper*, the court held that the plaintiff’s act of obtaining an attachment was an election of a contractual remedy and, therefore, they could not recover their tort damages. *Id.*

Because of the nature of this type of litigation, where the government is successful in a false claims case, the likelihood is that awards for compensatory damages (invoking treble damages), punitive damages (where fraud is also alleged), and false claims (invoking the penalties provision) will be obtained.

If the public entity prevails on fraud and false claims theories and is awarded punitive damages and False Claims Act treble damages and penalties, the opponent may claim, and a court may find, that the government is required to elect between punitive damages and False Claims Act treble damages and penalties.

There are a number of cases, including *De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890 and *Turnbull & Turnbull v. ARA Transportation, Inc.* (1990) 219 Cal.App.3d 811, *Marshall v. Brown* (1983) 141 Cal.App.3d 408, *Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, and *Troensegaard v. Silvercrest Industries, Inc.* (1985) 175 Cal. App. 3d 218, which required an election between different types of remedies, often statutory and punitive damages, on the ground that the statutory remedies and the punitive damages serve the same purposes. A close reading of these cases show that they are procedurally inapplicable to a case in which statutory and punitive damages are awarded after trial; and in any event involve statutory penalties under statutory schemes that are not intended to be cumulative of other remedies provided by law.

Government Code Section 12655, which is part of California’s False Claims Act, specifically states that its remedies are in addition to any other remedies provided at law. Moreover, California Supreme Court Authority never overturned — *Greenburg v. Western Turf Association* (1903) 140 Cal. 357 — has recognized that statutory penalties and punitive damages serve different purposes. See also, *Los Angeles County Metropolitan Transportation Authority v. Superior Court* (2004) 123 Cal.App.4th 261 and *People v. L.A. Palm* (1981) 121 Cal.App.3d 25; *People v. Toomey* (1984) 157 Cal.App.3d 1, 21-22. Under these authorities, the government may argue that it should not be required to elect. Until the Supreme Court revisits the issue, this will remain an open issue.

D. ATTORNEY'S FEES AND COSTS

1. Attorney's Fees

Under both the state and federal False Claims Act, a prevailing qui tam plaintiff (i.e. a plaintiff bringing a claim on behalf of the government) may obtain its attorney's fees, and a prevailing defendant may obtain its attorneys fees if the plaintiff's action was frivolous and harassing. If the contract between the government and the vendor contains an attorney's fees provision, then, under Civil Code § 1717, reasonable attorney's fees will likewise be available to the prevailing party.

In construction cases, where the government has withheld a percentage of the contract amount under Public Contracts Code §7107, and the retention is in dispute in the litigation, if the government prevails, it is entitled to recover its reasonable attorney's fees.

Public Contracts Code Section 7107 requires that the court award attorney's fees and costs to the prevailing party on an action to collect retention allegedly wrongfully withheld. It states: "Additionally, in any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to attorney's fees and costs." *Ketchum III v. Moses* (2001) 24 Cal.4th 1122, 1141 ("overwhelming majority of courts" hold that fees recoverable include those incurred to establish and defend fee claim).

In any case where attorney's fees on one of a number of claims are recoverable, they will be recoverable for all issues common to the claim for which fees are recoverable.

"When a cause of action for which attorney fees are provided by statute is joined with other causes of action for which attorney fees are not permitted, the prevailing party may recover only on the statutory cause of action. However, the joinder of causes of action should not dilute the right to attorney fees. Such fees need not be apportioned when incurred for representation of an issue common to both a cause of action for which fees are permitted and one for which they are not. All expenses incurred on the common issues qualify for an award." *Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1133. (Emphasis added.)

2. Costs, and When Attorney's Fees Are Costs

A party may successfully shift costs, including the costs of expert fees, by serving a Code of Civil Procedure Section 998 offer on the opponent.⁸ If the opponent does not obtain a judgment more favorable than the offer, then even if the party otherwise "prevailed," i.e. obtained a judgment, costs from the

⁸ The award of expert witness fees under § 998 is discretionary.

time of the offer are shifted. In addition, the costs of experts for the period of the entire action, can be shifted to the opponent who refused the offer.

Under Code of Civil Procedure Section 1033.5, costs include: "Attorney's fees, when authorized by any of the following: (A) Contract. (B) Statute. (C) Law." Thus, for example, in a breach of contract case containing an attorney's fees provision, if a party does not receive a more favorable judgment than contained in a proffered §998 offer, attorney's fees from the time of the offer are shifted under contract and Civil Code Section 1717. *Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1112 (affirming defendants entitlement to post offer attorneys' fees when plaintiff did not recover a more favorable judgment than the offer: "by operation of section 998, a defendant whose settlement offer exceeds the plaintiff's recovery is entitled to post-offer attorney fees in any case in which, as here, attorney fees are otherwise available as costs."

The cost shifting provisions of §998 serve the important public policy objective of encouraging settlement of cases. Thus, where a party receives a reasonable and good faith statutory settlement offer, but does not accept it, he or she is given notice that there are consequences to forcing the litigation to continue. That party will be liable for the costs. *Culbertson v. R.D. Werner Co., Inc.* (1987) 190 Cal.App.3d 704; *Thompson v. Miller* (2003) 112 Cal.App.4th 327, 339-340.

E. PREJUDGMENT INTEREST

Civil Code Section 3287 provides:

"Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state."

The test for recovery of prejudgment interest under Civil Code Section 3287, subd. (a), is (1) whether the vendor actually knew the amount owed or (2) from reasonably available information could have computed that amount. *Wisper Corp. v California Commerce Bank* (1996) 49 Cal.App.4th 948; *Children's Hospital & Medical Center v Bonta* (2002) 97 Cal.App.4th 740, *Polster, Inc. v. Swing*, (1985) 164 Cal.App.3d 427; *House Grain Co. v Finerman & Sons* (1953) 116 Cal.App.2nd 485

Under section 3287, subdivision (a), the Court has no discretion, but must award prejudgment interest upon request, from the first day there exists both a

breach and a liquidated claim. *North Oakland Medical Clinic v. Rogers* (1998) 65 Cal. App. 4th 824, 828. Under California law, an award of interest upon money is calculated from the time it falls due. *Los Angeles v City Bank* (1893) 100 C 18, 34 P 510; Civil Code § 3287. An award of prejudgment interest is intended to make the party whole for the accrual of wealth which could have been produced during the period of loss. *Wisper Corp. v California Commerce Bank* (1996, 4th Dist) 49 Cal App 4th 948. Under California law, prejudgment interest is a matter of right where there is a vested right to recover "damages certain" as of a particular day. Civil Code § 3287(a); *Otto v. Niles (In re Niles)*, 106 F.3d 1456, 1463 (9th Cir., 1997).

In a successful breach of contract action by a farm workers' service center against numerous agricultural employers arising out of their failure to make certain payments to the service center, plaintiff was entitled to prejudgment interest from the date of the breach of the contracts and not from the first day of trial, at which time the parties entered into a stipulation regarding disputed payments. *National Farm Workers Service Center, Inc. v Caratan* (1983, 5th Dist) 146 Cal App 3d 796.

When there is no contract to pay interest, the law awards interest at a rate of 10% per annum, on money from the time it becomes due and payable, if such time is certain and sum is certain or can be made certain by calculation. Civil Code § 3289(b); *Schmidt v Waterford Winery, Ltd.* (1960) 177 CA2d 28; *Munier v Hawkins* (1961) 190 CA2d 655; *Pilch v Milikin* (1962) 200 CA2d 212; *Overholser v Glynn* (1968) 267 CA2d 800.

APPENDIX 1

SAMPLE JURY INSTRUCTIONS

SPECIAL INSTRUCTION NO. ___

False Claims Act, Generally

In general, the False Claims Act permits a governmental entity to recover civil penalties and damages from any person who “knowingly” presents to the state or political subdivision a false claim for payment or approval.

Authority:

Debro v. Los Angeles Raiders (2001) 92 Cal.App.4th 940, 946; *City of Hawthorne ex rel. Wohlner v. H&C Disposal Co.* (2003) 109 Cal.App.4th 1668, 1676

___ GIVEN

___ GIVEN AS MODIFIED

___ REFUSED

___ WITHDRAWN

SPECIAL INSTRUCTION NO. ___

False Claims Act, Claims

A "claim" within the meaning of the FCA includes "any request or demand for money, property, or services made to any employee, officer, or agent, or agent of the state or any political subdivision."

In this case, the court has determined that the following types of submissions constitute claims for purposes of the False Claims Act:

1. Change Order Proposals;
2. Requests for Progress Payments;
3. Certified payroll statements.

Authority:

Govt. Code, § 12650, subd. (b)(1); *Debro v. Los Angeles Raiders* (2001) 92 Cal.App.4th 940, 946; *City of Hawthorne ex rel. Wohlner v. H&C Disposal Co.* (2003) 109 Cal.App.4th 1668, 1677; *Stacy & Whitbeck, Inc. v. City and County of San Francisco* (1996) 47 Cal.App.4th 1, 4-5, 9-10; *United States of America, ex rel. Plumbers and Steamfitters Local Union No. 38 v. C.W. Roen Construction Co.* (9th Cir. 1999) 183 F.3d 1088, 1092; *United States ex rel. Hopper v. Anton* (9th Cir. 1996) 91 F.3d 1261, 1266

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