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WHEN THE GOVERNMENT'S BEST DEFENSE IS A GOOD OFFENSE: LITIGATING FRAUD AND OTHER COUNTERCLAIM CASES BEFORE THE U.S. COURT OF FEDERAL CLAIMS

By Matthew H. Solomson

The U.S. Federal Government is *always* the defendant in cases before the U.S. Court of Federal Claims.[1] The Federal Government cannot initiate suit in the COFC; rather, a private party initiates an action in the COFC by filing suit against the Federal Government, which is represented, in such cases, by the U.S. Department of Justice. The initial litigation risk calculus performed by the assigned DOJ trial attorney handling a COFC matter often favors the plaintiff because, from the Government's point-of-view, as the defendant, there is only downside. In other words, assuming that the Government may owe the plaintiff some money, the issue becomes one of quantum only. Put yet differently, the best outcome the Government can hope for at the outset of a case is dismissal or a judgment in the Government's favor, but there is no potential upside.

Counterclaims can be a game changer for the Government because they create a potential upside for the Government to litigate the case to judgment. Counterclaims, therefore, have the capacity to dramatically alter the Government's litigation risk analysis and, in turn, the relative settlement positions held by the parties. Indeed,

IN BRIEF

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once filed, counterclaims have the ability to all but tie the hands of the DOJ trial attorney, precluding the attorney from settling a matter, and thereby locking the plaintiff into a lengthy, and correspondingly costly, contest.

Accordingly, potential plaintiffs must carefully consider, well in advance of actually filing suit in the COFC, whether the Government possesses viable grounds for counterclaims. In completing such an assessment—and certainly in order to do so once the Government threatens or actually files counterclaims—plaintiffs must have a thorough understanding of the procedural rules and substantive law governing counterclaims. This BRIEFING PAPER provides an overview of many of the issues that often are at play in a case involving Government counterclaims.

In the first section, this BRIEFING PAPER addresses the statutory basis of the COFC's jurisdiction to entertain Government counterclaims and the implications of that jurisdiction. This PAPER next addresses how counterclaims are filed, including both the applicable internal DOJ procedures and also the relevant COFC procedural rules that typically become the subject of litigation in counterclaim cases. In the third section, this PAPER analyzes the pleading requirements to which counterclaims must adhere. The fourth section discusses the availability and scope of discovery with respect to both proposed and filed counterclaims. The fifth section looks at the substantive law surrounding the most common types of counterclaims, including civil fraud claims, and Government claims for liquidated damages and reprocurement costs. In the sixth section, this PAPER discusses the impact of parallel criminal proceedings in the context of civil fraud counterclaims. Finally, this Paper explains the settlement process from the DOJ's view and discusses how counterclaims may affect a DOJ trial attorney's litigation risk calculus.

In examining these issues, this BRIEFING PAPER will focus primarily upon decisions of the COFC, the U.S. Court of Appeals for the Federal Circuit, and the Supreme Court. In that regard, a primary goal of this PAPER is to cover the salient, recent decisions that may affect the counterclaim litigation landscape.

Statutory Basis For Counterclaims

Section 1503 of Title 28 of the U.S. Code provides that "[t]he United States Court of Federal Claims shall have jurisdiction to render judgment upon any set-off or demand by the United States against any plaintiff in such court."[2] Quite apart from that specific statutory provision, the U.S. Supreme Court long has recognized "that the Government has the same right as any other creditor to apply monies of his debtor, in his hands, in extinguishment of debts due him."[3] With respect to Government contractors, in particular, the United States "has the right to set off any claim it has against a contractor through the withholding of funds that are otherwise payable to the contractor."[4] Moreover, the Government's set-off right "extends to monies owed as a result of separate and independent contract transactions" distinct from those at issue in a contractor's complaint.[5] In sum, according to the Supreme Court, there is "no doubt but that the set-off and counterclaim jurisdiction of the Court of Claims [predecessor to the COFC] was

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intended to permit the Government to have adjudicated in one suit all controversies between it and those granted permission to sue it, whether the Government's interest had been entrusted to its agencies of one kind or another."[6]

Thus, even where the United States already has instituted a claim against a private party in district court, the Government may reassert that same claim—as a counterclaim—against that same private party in the COFC.[7] The pendency of district court litigation does not preclude the filing of a counterclaim on the same subject matter in the COFC, as 28 U.S.C.A. § 1500 does not apply to Government claims.[8]

In contrast to district court proceedings, a "plaintiff, by instituting suit in [the COFC], impliedly consent[s], as a condition to such right to sue the United States, that any counterclaim interposed by the United States should be heard and determined by this court without the intervention of a jury" because "[t]he right to a jury trial in a civil case may be waived."[9]

Not only may the Government assert a "counterclaim even though…it does not arise out of the transaction or occurrence that is the subject matter of the petition," the Government also may pursue a claim of a type (e.g., a tort) over which the COFC "would not have jurisdiction if sought to be maintained by a plaintiff."[10]

The COFC's "counterclaim jurisdiction requires, as a prerequisite, the existence of a claim filed against the United States within the jurisdiction of the [COFC]."[11] That means that if "a complaint filed in the [COFC] does not state a claim within the limited jurisdiction provided to [that] court, the dismissal of the complaint for lack of jurisdiction carries with it the dismissal of any counterclaim filed in the matter by the United States."[12] On the other hand, "[t]he fact that it has been concluded that plaintiff's pleaded contract claim is not meritorious does not deprive the [COFC] of counterclaim jurisdiction . . . under 28 U.S.C. §§ 1503, 2508."[13] Instead, "the procedure generally employed is to defer entry of a final judgment on a plaintiff's claim within the court's jurisdiction pending final resolution of any counterclaim(s) correctly asserted in the matter involved."[14]

Notwithstanding the COFC's generally broad counterclaim jurisdiction, the then-Court of Claims held that the court cannot entertain a Government counterclaim seeking only a declaratory judgment.[15] In so holding, the Court of Claims reasoned that Congress could not have "intended to give us jurisdiction to enter a declaratory judgment on a counterclaim when we have no authority to enter such judgment on the main claim."[16] In other words, according to the court, 28 U.S.C.A. § 1503, "like the Tucker Act itself, gives [the COFC] jurisdiction to adjudicate only money claims" and authorizes the court "to adjudicate claims by the United States against the plaintiff for monies up to the amount of the claim that therefore reduce or eliminate any recovery by the plaintiff (a set-off), or exceed or exist independently of the claim and therefore warrant a money judgment in favor of the United States against the plaintiff (a demand)."[17] In sum, "[t]he fact that [the court] ha[s] broad jurisdiction over counterclaims for money that arise in a wide variety of situations…does not establish that that jurisdiction also extends to claims in which no money is sought."[18]

Counterclaim Initiation

The U.S. Attorneys' Manual[19] instructs that "[e]very report of fraud or official corruption should be analyzed for its civil potential before the file is closed" and that, "[i]n the first instance, this review should be conducted by an Assistant United States Attorney or Departmental Trial Attorney assigned" to the case."[20] Government contract cases before the COFC are handled by trial attorneys of the National Courts Section of the Commercial Litigation Branch.[21] Trial attorneys are to file fraud-based claims "[a]bsent a specific, detailed statement that there is a strong likelihood that institution of a civil action would materially prejudice contemplated criminal prosecution of specific subjects," and unless there is some "doubt as to collectability or…doubt as to the facts or law."[22]

The USAM further instructs Commercial Litigation Branch attorneys to "urg[e] client agencies to withhold payment of claims presented by any subject known to have engaged in fraudulent conduct" because

"[w]ithholding is an important tool for effecting civil redress, and in recent years the government has successfully defended a number of cases in which client agencies have employed this self-help remedy."[23] In particular, the USAM specifically advises that "[t]he negotiation of favorable settlements in unliquidated matters also may be enhanced by the bargaining leverage which withholding affords."[24] With respect to settlement negotiations, the USAM provides that "[f]lagrant frauds, justifying the initiation of suits for multiple damages and penalties under relevant statutes generally, should not be compromised for less than multiple damages and some forfeitures."[25]

The delegations of authority to initiate, settle, and appeal cases are located in various statutes and regulations, including, most notably, 28 C.F.R. § 0.160–0.172, and the appendix to 28 C.F.R., Chapter I, Part 0, Subpart Y. Under the regulations, the Directors of the Commercial Litigation Branch possess authority to initiate suits and counterclaims "where the gross amount of the original claim does not exceed $1,000,000."[26] The approval of the Commercial Litigation Branch's Deputy Assistant Attorney General is required to initiate suits and counterclaims "where the gross amount of the original claim" exceeds $1 million.[27]

The Director of the National Courts section possesses authority to initiate counterclaims, regardless of amount, brought pursuant to the Contract Disputes Act based upon a Contracting Officer's final decision because such counterclaims arguably are compulsory, as explained below. In contrast, to file fraud counterclaims, a DOJ trial attorney must obtain the approval of the Directors of both the National Courts and the Civil Frauds sections.

After obtaining authority to pursue a counterclaim, the Government will move for leave to amend its answer—if the counterclaim has not already been asserted in the initial answer—pursuant to Rules 13 and 15 of the Rules of the COFC.

RCFC 13(a)(1) is identical to Federal Rule of Civil Procedure 13(a)(1)[28] and provides that "[a] pleading must state as a counterclaim any claim that—at the time of its service—the pleader has against an opposing party if the claim…arises out of the transaction or occurrence that is the subject matter of the opposing party's claim." Such a counterclaim is known as a "compulsory counterclaim," and identifying one correctly is important because "if [a] defendant fails to assert [such a] claim in a counterclaim,…the doctrine of res judicata [will] bar him from presenting it in a future action."[29]

Although the terms of RCFC 13 suggest that a compulsory counterclaim must be pled in the Government's initial answer or is forever waived, that is incorrect. Instead, "the court has the power under…RCFC 15 to permit amendments to the pleadings and thus [may] allow the government to amend its answer to assert a counterclaim."[30] The compulsory counterclaim requirement of RCFC 13(a) is not relevant, however, where "[d]efendant never filed, nor was required to file, an answer," for example where "the prior action was decided upon the basis of defendant's motion to dismiss."[31]

As with just about any procedural decision, the COFC's rulings pursuant to RCFC 13 and RCFC 15 are subject to an abuse-of-discretion standard of review.[32] In practice, although pleading amendments ordinarily are liberally allowed, the court makes such rulings on a case-by-case basis, with the COFC decisions reflecting a range of outcomes regarding which litigators must be aware.

The general rule, derived from the Supreme Court's decision in *Foman v. Davis*, is that the COFC will grant leave to amend "[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment."[33] According to a fairly recent COFC decision, these so-called "*Foman* exceptions have been widely accepted as defining the latitude contemplated by 'freely given' amendments under RCFC 15(a)(2)."[34] The two factors most commonly taken into account are prejudice and delay.[35] The bottom line, however, is that "it is clear that absent a firm showing of prejudice to the opposing party, as a matter of law, an amendment to a complaint must be allowed."[36]

That is not to say that the COFC simply will rubberstamp any attempt by the Government to assert a counterclaim, no matter how late in a case

the Government seeks to inject new issues. To the contrary, the COFC frequently will undertake a detailed analysis of any undue delay or prejudice alleged by the plaintiff.

For example, in *Chinook Research Laboratories, Inc. v. United States*, the Government sought to assert a counterclaim and, in so doing, to forestall a plaintiff's motion to dismiss voluntarily its own complaint.[37] The Government, in support of its motion for leave to amend its answer to assert the counterclaim, argued that the plaintiff would not be prejudiced because it had not engaged in any discovery, and because no relevant evidence or witnesses would be unavailable to the plaintiff.[38] The plaintiff countered, however, that the parties had engaged in extensive settlement negotiations and that, until the Government had raised the possibility of a counterclaim, the parties had agreed on a settlement. The plaintiff explained that its failure to engage in any discovery was due to a lack of resources, a circumstance which the court agreed would be "certainly prejudicial to plaintiff" if it "now [had to] undertake a counterclaim defense" potentially requiring "a new discovery phase based on different issues than those upon which the case had been proceeding for over fourteen months."[39] The Government explained that "its year and a half delay in seeking to file a counterclaim was due to changes in the identity of counsel on both sides"—a contention that the court rejected as "most unpersuasive."[40]

Ultimately, the court in *Chinook Research* denied the Government's motion to amend because the counterclaim was "related to the reasons which led to the termination for convenience from which plaintiff's complaint arose" and because, at the time the Government filed its answer, "defendant had sufficient facts in hand…to file a counterclaim."[41] According to the court, the Government was "outside the pale of [RCFC] 13(f) since its decision not to file a counterclaim in its answer was not an oversight, or inadvertent, or the result of excusable neglect."[42]

Similarly, in *Veridyne Corp. v. United States*, although the COFC permitted the Government to amend its answer to assert fraud counterclaims, the court carefully applied the various *Foman* factors and embarked on an extensive discussion of the relevant facts.[43] The COFC first concluded that "on the whole defendant d[id] not provide a reasonable justification for the delay in asserting the additional fraud claims."[44] The court allowed the amendment, however, because "the burden to demonstrate prejudice is plaintiff's, and plaintiff has not substantiated how fading memories or absent documents would cause evidentiary prejudice to plaintiff."[45]

Notwithstanding the court's conclusion in *Veridyne*, "[d]elay alone, even without a demonstration of prejudice, has…been sufficient grounds to deny amendment of pleadings."[46] Moreover, the "party seeking to amend its complaint after significant delay bears the burden of justifying the delay."[47]

On the other hand, where a "[p]laintiff was early-on effectively placed on notice of the scope of defendant's investigation into the alleged fraudulent consulting claims"—for example, "when the Government deposed plaintiff's former employees specifically on the alleged fraudulent nature of the plaintiff's" conduct—the COFC concluded that plaintiff could not "prove prima facie surprise, undue delay, or an excessive burden sufficient to justify its contention that defendant's motion to amend should be denied."[48]

A party faced with the possible denial of a request to amend a pleading based on futility "'must demonstrate that its pleading states a claim on which relief could be granted, and it must proffer sufficient facts supporting the amended pleading that the claim could survive a dispositive pretrial motion.'"[49] This standard is the same standard of legal sufficiency that applies under RCFC 12(b)(6), permitting motions to dismiss for failure to state a claim upon which relief can be granted, which is discussed further below.[50]

One additional case—a true outlier upon which the Government is likely to rely—bears mentioning. In *Americold Corp. v. United States*, the COFC all but rejected using the *Foman* factors to deny the Government leave to amend its answer to assert a counterclaim for a setoff, explaining that the case "generally is invoked to permit the amendment and its *obiter dictum* regarding exceptions to the 'freely given' standard does not require denial of the Government's right to assert a setoff."[51] The COFC went on to distinguish *Foman v. Davis* as "involving

a motion by plaintiff to amend a complaint" that "was not filed by or against the government."[52] Moreover, according to the COFC in *Americold*, not only does "*Foman*…not address or implicate 28 U.S.C. §§ 1503 and 2508,"[53] but also "the liberal pleading rule approved by *Foman* has been relied upon to protect the government's right to plead an offset against arguments that it is precluded by missed pleading deadlines or laches."[54] This approach does not appear to have been followed by any subsequent COFC decision.[55]

Pleading Requirements

Government counterclaims, whether filed in an initial or amended answer to a plaintiff's complaint, must comply with RCFC 12(b)(6) and, in the case of fraud-related counterclaims, RCFC 9(b).[56]

A counterclaim will survive a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted if the counterclaim "contain[s] sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[57] Thus, the counterclaim must allow "the court to draw the reasonable inference that the [plaintiff] is liable for the misconduct alleged."[58]

As recently explained by the Federal Circuit in *Todd Construction, L.P. v. United States*, the question posed by a Rule 12(b)(6) motion to dismiss is whether "[a]ll of the *facts* alleged… could be true and yet it does not follow that" the complaining party is entitled to any relief.[59] That is, a complaint (or counterclaim), to survive a motion to dismiss, cannot merely allege facts that are consistent with a cause of action, but rather must demonstrate that the complaining party is entitled to relief, if the court were to assume—as it must in the context of such a motion—that all the facts pled are, indeed, true. *Todd Construction* also is notable because of the case's clear holding that the trial court is "not required to assume that legal conclusions are true."[60] RCFC 9(b) goes beyond RCFC 12(b)(6) to create a "heightened pleading standard,"[61] which applies to "all cases sounding in fraud or mistake."[62] The rule provides that, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake," although "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally."[63] In *In re BP Lubricants USA Inc.*, the Federal Circuit explained that Rule 9(b) serves a "gatekeeping function" to "assure that only viable claims alleging fraud or mistake are allowed to proceed to discovery" and adjudication, and prevents the use of "discovery as a fishing expedition."[64]

Moreover, "[a]lthough 'knowledge' and 'intent' may be averred generally," the pleadings must still "allege sufficient underlying facts from which a court may reasonably infer that a party acted with the requisite state of mind."[65] In addition, "[a] pleading that simply avers the substantive elements of [a fraud claim], without setting forth the particularized factual bases for the allegations, does not satisfy Rule 9(b)."[66]

Accordingly, to satisfy RCFC 9(b), "the pleading must identify the specific who, what, when, where, and how" of the alleged fraud, and plaintiffs should scrutinize the Government's counterclaims for compliance with this rule.[67]

In at least one case, however, the COFC has held that "the remedy for failure to allege fraud with the particularity required by rule 9(b), generally, is an order requiring particularity, not dismissal."[68] Indeed, according to that decision, "[d]ismissal generally is granted only when a [FCA] complainant fails to amend following the objection."[69]

For example, in *BMY-Combat Systems Division of Harsco Corp. v. United States*, the Government's counterclaims alleged that the plaintiff used false records and statements to present fraudulent claims for payment on certain howitzers.[70] The Government, however, failed to "identify the specific actors, records, or statements contributing to the fraud."[71] The court held that although "defendant has identified in general terms the 'how, when, and...manner' of the fraud, it must reasonably plead the particularities of the charge to comply with the requirements of [RCFC] 9(b)."[72] Rather than dismissing the counterclaims, the court merely ordered the Government to "provide plaintiff with a more detailed explanation of the charges in the counterclaims."[73]

But that does not mean that the COFC will not carefully scrutinize the Government's allegations. Thus, for example, in the court's recent decision in *Kellogg Brown & Root Services, Inc. v. United States* (*KBR*), the court concluded that "even if [plaintiff's] reimbursement vouchers were inflated…, defendant has not alleged facts tending to show that anyone at [plaintiff]…knew of that inflation."[74] In other words, the Government's mere recitation that a plaintiff's employee "'knew or should have known'" of inflated payment vouchers—"without buttressing this claim with facts that would allow the court to infer such knowledge"—is precisely "the sort of conclusory allegation that is not entitled to a presumption of truth."[75] Although the COFC dismissed the Government's FCA counterclaim, the court denied plaintiff's more general "motion to dismiss for failure to plead fraud with specificity…because the remedy would be to allow defendant to amend its affirmative defense and counterclaims"—a result the court viewed as unnecessary with respect to the remaining counterclaims.[76]

Discovery

The COFC, on a number of occasions, has permitted the Government additional discovery with respect to newly asserted counterclaims.[77] The more hotly contested question appears to be whether, and under what circumstances, the court should permit additional discovery *prior* to the Government's assertion of counterclaims. In that regard, there appear to be decisions on both sides of the issue.

In *Croman Corp. v. United States*, the Government—nearly four months after the close of discovery—sought to reopen discovery regarding possible fraud counterclaims based upon certain elements of plaintiff's damages claim that plaintiff elected not to pursue in the litigation.[78] The Government had not taken discovery regarding those abandoned claim elements. The court, however, "recognize[d] that this narrowed focus during [the initial] discovery [period] may have been an efficient litigation strategy, given the limited time and resources available to government counsel."[79] Accordingly, the court did "not agree that this choice on defendant's part warrants a reopening of fact discovery in this case" because, "[i]n the court's view, 'the party seeking discovery has had ample opportunity to obtain the information by discovery in the action.'"[80]

In so holding, the COFC, in *Croman*, applied *Wordtech Systems, Inc. v. Integrated Networks Solutions, Inc.*, a Federal Circuit decision in turn applying Ninth Circuit law, and concluding that the trial court did not abuse its discretion in denying defendants' motion to amend their answer and reopen discovery related to potential affirmative defenses.[81] Although the Government in *Croman* filed a motion to reopen fact discovery, and not a motion to amend its pleadings, the COFC found "the *Wordtech* case to be sufficiently analogous… to lend support to the court's determination."[82]

In *Wordtech*, as noted above, the Federal Circuit concluded that the trial court did not abuse its discretion in denying defendants' motion to amend their answer and reopen discovery related to potential affirmative defenses.[83] In that case, the defendants had filed their motion five months after the trial court's final scheduling order, three months after the close of discovery, and more than two years after they should have known of their defenses based on their expert's report.[84] The defendants could not explain their delay, and the plaintiff argued that it would suffer prejudice from additional discovery for the proffered defenses.[85] Considering these factors—i.e., the need for additional discovery and the resulting delay to the proceedings—the Federal Circuit concluded that the trial court did not abuse its discretion in denying the defendants' motion.[86]

In contrast, in *KBR*, the COFC granted the Government's motion, filed just days before the close of discovery, for "a 120–day extension of time for discovery in order to pursue a possible fraud counterclaim," although the court did "limit[ ] any new discovery to defendant's allegations of fraud."[87]

KBR and *Croman* arguably are of limited value, to the extent that, read together, they demonstrate only that the COFC's approach to the issues of counterclaim discovery likely is highly fact dependent and *ad hoc*.

At least one COFC judge, however, has ruled that the Government may not take discovery

regarding potential counterclaims that have not been actually asserted by the Government. In that case, *Hernandez, Kroone & Associates, Inc. v. United States*, plaintiff's counsel admitted that "the amounts claimed before this court are less than some of the claims presented to the [CO]."[88] The Government "pressed interest into discovery of claims that are not being pursued in this action, not necessarily to determine the extent of the claims that are being pursued, but for [fraud counterclaim] purposes."[89] Ruling on the Government's motion to compel, the COFC *sua sponte* rejected the Government's discovery strategy:[90]

> Defendant has not raised any counterclaim or affirmative defense of offset, nor sought leave to amend. Discovery into matters not before the court is not appropriate; defendant has not met its burden in this regard. "[T]he government 'must possess "concrete and positive evidence" before it initiates discovery into matters relevant only as to establishment of offsets.'"

Although the Government moved for reconsideration of that order, the COFC denied the request, concluding that "[d]iscovery is not a fishing expedition" and that "[a]ssertion of counterclaims or offsets requires an appropriate pleading(s) (and RCFC 9(b) requires circumstances constituting fraud be stated with particularity) prior to consideration of discovery with respect thereto."[91]

The COFC's conclusion in *Hernandez, Kroone & Associates* limiting the Government's discovery, relied heavily upon the trial court's reading of the Federal Circuit's decision in *American Airlines, Inc. v. United States*.[92] *American Airlines*, however, arguably is inapposite with respect to a case predicated upon a certified claim submitted to a CO pursuant to the CDA.

In *American Airlines*, an airline carrier sued the United States for recovery of immigration user fees and agricultural quarantine inspection user fees that the airline had voluntarily remitted to Government but had been unable to collect from passengers. The Government sought "broad discovery on damages, arguing that it should not be bound to its earlier audit results."[93] In particular, the "government contend[ed] that it was improper to limit the damages inquiry to the audit results upon which its unlawful exactions were actually based."[94] The trial court—far from wholly restricting the scope of the Government's discovery, as in *Hernandez, Kroone & Associates*—simply "limited it to three months."[95]

In granting the plaintiff's subsequent request for a protective order, however, the COFC in *American Airlines* held "that the government had filed an Answer, after repeated extensions, without pleading any setoff defense or counterclaim, and that *the time to seek discovery* to establish a minimum factual basis for pursuing such a setoff against American's damages *had long since passed, rendering any such defense or counterclaim waived.*"[96] It is that ruling that the Federal Circuit considered on appeal and affirmed. In so doing, the Federal Circuit rejected the Government's reliance upon "tax refund principles, wherein, although the taxpayer may have disputed only one specific aspect, the entire tax liability may be reopened by the government."[97]

In contrast to the type of broad discovery sought in *American Airlines*, the Government in *Hernandez, Kroone & Associates* did not seek to inquire about claims never submitted to the CO, or even about other Government contracts not at issue in the case. Rather, the Government sought only to determine whether the plaintiff properly and reasonably certified various CDA claims submitted to the CO (and upon which the plaintiff's case was based). Moreover, unlike in *American Airlines*, the Government in *Hernandez, Kroone & Associates* never had the opportunity to pursue the discovery sought because the Government had been precluded by the trial court from doing so.

Whether the COFC will follow the more restrictive approach of *Hernandez, Kroone & Associates*—and that decision's interpretation of *American Airlines*—remains to be seen. A plaintiff, however, would be wise to carefully police depositions and interrogatories—and seek a protective order where necessary—under the rationale of the *Hernandez, Kroone & Associates* decision to preclude the Government's discovery regarding CDA claim items that the plaintiff elects not to pursue.

Common Counterclaim Issues

This section of the BRIEFING PAPER outlines a number of specific procedural and substantive

issues related to the most common types of Government claims. This section, however, does not cover ground thoroughly addressed by previous BRIEFING PAPERS[98] and other publications.[99] For example, this section will not exhaustively address the basic structure of the False Claims Act or the myriad disputes surrounding that statute percolating in courts around the country. Rather, this section is devoted to exploring selected COFC and the Federal Circuit decisions involving Government counterclaims.

■ Types Of Fraud-Related Counterclaims

There are four primary types of fraud-related Government counterclaims: claims based upon (1) the FCA,[100] (2) the CDA's fraud provision,[101] (3) the Forfeiture of Fraudulent Claims Act, also known as the Special Plea in Fraud,[102] and (4) federal common law. This PAPER addresses a number of common issues related to each type of counterclaim regarding which litigants before the COFC must be aware.

■ General Principles

Fraud counterclaims all involve two common elements: (1) some form of misrepresentation of fact or false claim, and (2) some degree of knowledge of a falsity.[103] The Government, as the counterclaimant, bears the burden of proof with respect to such claims.[104] The most common type of alleged false or fraudulent claims involve (a) claims seeking "reimbursement for services or goods not provided or for goods provided in a manner different from that described in the claim," and (b) claims that "may be false in light of relevant law or contract terms."[105]

The Government must prove a contractor's violation of the FCA and the CDA's fraud provision statutes by a preponderance of the evidence.[106] To prevail on fraud claims under the Special Plea in Fraud, in contrast, the Government must prove its case by clear and convincing evidence.[107] All three statutes require the Government to demonstrate some sort of false or fraudulent statement.[108]

The COFC has cautioned, however, that because "evidence that would negate the level of intent under the FCA, as opposed to the forfeiture statute, involves different findings of fact," the court's analysis of the facts under each statute "should not be conflated, as the legal requirements of the statutes differ significantly."[109] That being said, the Federal Circuit clearly has held that where the Government demonstrates a violation of the CDA's fraud provision, the Government *a fortiori*, meets its burden under the FCA.[110] Similarly, the Federal Circuit implicitly has held that evidence sufficient to prove a CDA violation also is sufficient to sustain a forfeiture under the Special Plea in Fraud.[111] The court may consider circumstantial evidence in making its determination.[112]

In addition to any statutory penalties or damages available to the Government when it succeeds on a fraud counterclaim, smaller, closely held contractors need to be concerned about the possibility that the Government will seek to pierce the corporate veil. In *Alli v. United States*, the COFC, after finding that the Government carried its burden of proof on counterclaims, turned to the Government's assertion that plaintiff owners "should be 'jointly and severally' liable for these [counterclaim] damages" along with the plaintiff's company.[113] To resolve that argument, the court had to "decide whether the corporate veil…should be disregarded and liability imposed directly upon" the individual plaintiffs.[114]

Relying upon a Federal Circuit decision, the COFC first noted that "[t]he concept of 'piercing the corporate veil' is equitable in nature,'" and that "'courts will pierce the corporate veil 'to achieve justice, equity, to remedy or avoid fraud or wrongdoing, or to impose a just liability.'"[115] In that regard, "[w]hen a court considers disregarding the corporate entity, i.e., 'piercing the corporate veil,' the court applies the law of the state of incorporation."[116] Applying the laws of Michigan, the COFC concluded that "[e]very indication is that this corporation [at issue] was a mere instrumentality that the [individual plaintiffs] relied upon when it served their purposes and ignored when it did not."[117] In particular, the corporate owners "commingled their funds with those of the corporation" and "treated the assets of the corporation as if their own."[118]

In terms of the Government's counterclaims, the COFC also explained that the corporation

"certainly was wielded by [its owners] to commit a wrong—the failure to maintain [certain] buildings in question in safe, decent and sanitary condition, consistent with…contractual obligations."[119] Finally, the COFC noted that "every indication is that the failure to pierce the veil of this thinly-capitalized corporation would lead the United States to suffer an unjust loss" and therefore concluded "that the circumstances here are appropriate for allowing defendant to pierce the corporate veil and hold [the individuals] personally liable for any damages arising under the…counterclaim."[120]

Specific issues related to each type of fraud counterclaim are discussed in more detail below.

False Claims Act

■ FCA Basics

The FCA provides for liability in a variety of circumstances, including for any person who (1) "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval,"[121] (2) "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim,"[122] (3) "has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property,"[123] and (4) "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 Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government."[124]

"Knowing" and "knowingly" mean that "a person, with respect to information—(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information; and… require no proof of specific intent to defraud."[125]

The FCA provides for treble damages and civil penalties of $5,500 to $11,000 per violation.[126] A person found to be in violation of the FCA also will be liable to the Government for the costs of the civil action brought to recover any penalty or damages.[127]

■ Falsity

Whatever may be the rule in other circuits,[128] the Government's position is that, in the COFC, pursuant to the Federal Circuit's decision in *Commercial Contractors, Inc. v. United States*, a claim may be false—and a contractor thus held liable under both the FCA and CDA's fraud provision—based upon an erroneous contract interpretation.[129] In *Commercial Contractors*, the plaintiff contractor argued that it could not be held liable for certain allegedly false CDA claim elements, "because the effect of such a decision would be to expose any contractor who submits claims under an erroneous contract interpretation to liability under the FCA or the CDA, even if the contractor did not deliberately conceal or misstate any facts to the government."[130] The court, however, rejected plaintiff's concerns, explaining that "[t]he FCA…holds a contractor liable only if he knowingly submits false claims, and the CDA holds a contractor liable only if he acts with intent to deceive or mislead the government."[131]

According to the Federal Circuit, "[t]he question for the court in cases involving issues of contract interpretation is whether the contractor's asserted interpretation is so plainly lacking in merit that the requisite state of mind can be inferred."[132] The court summarized its view on the matter as follows:[133]

> If a contractor submits a claim based on a plausible but erroneous contract interpretation, the contractor will not be liable, absent some specific evidence of knowledge that the claim is false or of intent to deceive. Yet when a contractor adopts a contract interpretation that is *implausible in light of the unambiguous terms of the contract and other evidence* (such as *repeated warnings from a subcontractor or the fact that the interpretation is contrary to well-established industry practice*), the contractor may be liable under the FCA or the CDA *even in the absence of any deliberate concealment or misstatement of facts*. Under such circumstances, when the contractor's purported interpretation of the contract *borders on the frivolous*, the contractor *must* either raise the interpretation issue with the government contracting officials or risk liability under the FCA or the CDA.

What is not clear is whether a contractor successfully may argue (e.g., in a motion to dismiss)

that its CDA claim is based upon a reasonable interpretation of a contract, statute, or regulation, and thus defeat an FCA allegation, as a matter of law, on the grounds that the CDA claim at issue simply cannot be false.[134] As noted above, the Government's view is that the reasonableness of a contractor's interpretation is a scienter issue, and, accordingly, cannot ordinarily be resolved until summary judgment or, more likely, given the fact-intensive nature of the scienter issue, until after trial.[135]

At least one COFC decision, however, appears to have concluded that a contactor's reasonable interpretation of a contract (or reasonable approach to preparing a claim) renders a resulting claim not false (assuming, of course, the claim has no other infirmities).[136] That approach to the FCA is supported by a number of cases from other courts, including, arguably, the Supreme Court.[137]

■ Scienter

As indicated above by the FCA's plain language, to prove an FCA violation, the Government may, but need not, prove that a party specifically intended to deceive or to defraud the Government.[138] Instead, the FCA requires only that the Government prove that a party submitted a claim with reckless disregard as to the falsity of the information contained therein.[139]

Although a scienter inquiry is typically highly "fact specific,"[140] according to at least one COFC decision "[t]he case law stands for the proposition that a failure to make a minimal examination of records constitutes deliberate ignorance or reckless disregard, and a contractor that deliberately ignored false information submitted as part of a claim is liable under the False Claims Act."[141] To similar effect is the Federal Circuit's opinion in *Daewoo Engineering & Construction Co. v. United States*, discussed in more detail below, in which the court found relevant the fact that the contractor "apparently used no outside experts to make its certified claim calculation, and at trial made no real effort to justify the accuracy of the claim for future costs or even to explain how it was prepared."[142] On the other hand, "[i]nconsistencies, even if the discrepancy is large, do not rise to the level of fraud if there is a reasonable explanation for them."[143]

■ Damages

The Court of Claims long ago held that the Government is entitled to statutory penalties for violations of the FCA "whether or not defendant can prove actual damages."[144] A frequent controversy nevertheless seems to arise regarding whether that is truly the case, based upon unfortunately imprecise language in the Federal Circuit's decision in *Young-Montenay, Inc. v. United States*. In that case, the Federal Circuit affirmed the COFC's grant of summary judgment in favor of the Government, finding the contractor liable under the FCA, and explaining that "[i]t is immaterial whether" a contractor "believed [it] would *subsequently* owe" a subcontractor a particular sum, where "at the time of submission of the invoice to the government" the contractor knew it owed the subcontractor less than the sum claimed in the invoice.[145]

Young-Montenay often is cited for the proposition that the Government, "to recover damages for violation of the False Claims Act," must establish that "the United States suffered damages as a result of the false or fraudulent claim."[146] Indeed, a number of other courts have cited that language in *Young-Montenay* for that very proposition.[147] The Federal Circuit, however, clearly was addressing, not the availability of statutory penalties in the absence of actual damages, but rather only the standard for treble damages, which makes sense because the plaintiff did "not challenge the penalty…, but dispute[d] [only] the imposition of treble damages."[148]

Moreover, contractors should be cognizant that the Federal Circuit has not made proving actual damages under the FCA very difficult. In *Young-Montenay*, the Federal Circuit concluded "that the government was damaged by paying money before it was due to the contractor and that the trial court determined the proper amount of damages, which it lawfully trebled."[149] The plaintiff had contended that "the only damage, if any, suffered by the government would be for the loss of interest" on a sum of money paid too early, "limited to the period of time the government was deprived of the use of its funds due to early payment."[150] The Federal Circuit concurred with the more far-reaching argument of the Government "that it sustained actual damages as a result

of Young-Montenay's fraud" in the amount of the entire sum paid early because (1) "the government was denied the use of the overpaid money" and (2) "once Young-Montenay received an early payment, the contractor had less incentive to complete the project in a timely or satisfactory manner."[151]

On the other hand, where the Government suffers no actual damages whatsoever—e.g., a certified CDA claim denied by a CO in its entirety—the COFC "properly assesse[s] only the statutory penalty."[152]

In any event, at least one Federal Circuit decision following *Young-Montenay* confirms that the court did *not* hold that the Government must demonstrate actual damages to obtain statutory penalties.[153]

All of the news is not bad for contactors with respect to calculating FCA damages in the Federal Circuit. In *Commercial Contractors*, that court held that where goods or services delivered by a contractor "are of the same quality as the goods specified in the contract," the contractor "may be liable in that situation, [but]…only for FCA penalties, not damages."[154] The Federal Circuit thus agreed with the plaintiff "that the normal measure of damages is the difference in value between what the government was supposed to get and what it actually got from the contractor."[155]

The calculus is far from simple because the Federal Circuit also sided with the Government's position that where "it is not possible for an injured party to prove the loss in value caused by the contractor's deficient performance," the injured part may "recover damages computed on an alternative basis."[156] In particular, the court approved "the cost of remedying defects" as a measure of damages.[157] Even in such a situation, however, the Government is precluded "from recovering the cost of remedying defects if that cost is clearly disproportionate to the probable loss in value caused by the defects."[158]

Counting false claims violations also can be tricky. In *Brown v. United States*, the plaintiff argued that it should only pay a single penalty for each fraudulently obtained project, irrespective of the number of submitted invoices or purchase orders. The Court of Claims rejected the plaintiff's reasoning, holding that "each purchase order must be regarded as a separate claim for purposes of defendant's counterclaim."[159]

The CDA Fraud Provision

■ CDA Basics

The CDA provides that "[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted [in writing] to the contracting officer for a decision."[160] Although a "claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim," such time limits "do[ ] not apply to a claim by the Federal Government against a contractor that is based on a claim by the contractor involving fraud."[161] A contractor has "12 months from the date of receipt of a contracting officer's decision" to "bring an action directly on the claim in the United States Court of Federal Claims."[162]

A claim submitted to a CO for more than $100,000, the contractor must certify that: "(A) the claim is made in good faith; (B) the supporting data are accurate and complete to the best of the contractor's knowledge and belief; (C) the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable; and (D) the certifier is authorized to certify the claim on behalf of the contractor."[163]

The certification facilitates settlements based upon a truthful submission of the contractor's costs and discourages the submission of fraudulent or inflated claims by making contractors liable for fraudulent representations.[164] In that regard, the CDA incorporates a fraud provision:[165]

> If a contractor is unable to support any part of the contractor's claim and it is determined that the inability is attributable to a misrepresentation of fact or fraud by the contractor, then the contractor is liable to the Federal Government for an amount equal to the unsupported part of the claim plus all of the Federal Government' s costs attributable to reviewing the unsupported part of the claim. Liability under this paragraph shall be

> determined within 6 years of the commission of the misrepresentation of fact or fraud.

The CDA defines the term "misrepresentation of fact" to mean "a false statement of substantive fact, or conduct that leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead."[166]

■ Jurisdictional Pitfalls

In a CDA case, there is an added jurisdictional complication where fraud may be at issue—a CO has no power or jurisdiction to render a final decision on a CDA claim on the basis of a contractor's alleged fraudulent conduct.[167] For example, in *Medina Construction, Ltd. v. United States,* the COFC determined that a CO's final decision was unauthorized and invalid because the final decision was based upon an "unsubstantiated suspicion" that the contractor had submitted fraudulent invoices.[168] Although the CO in that case was "specifically precluded from determining claims involving fraud through administrative channels,"[169] he nevertheless "persisted in his belief that [the contractor] had committed fraud in the submission of certain payment invoices."[170] Because the CO "proceeded to deny [the contractor]'s claim based upon unproved allegations of fraud" and used fraud as the sole ground upon which to deny relief, the court concluded that the final decision was invalid.[171] In the absence of a final decision, the court lacked jurisdiction over the contractor's claim and dismissed the complaint.

The CO's final decision was invalid in *Medina Construction, Ltd.* because the CO failed to "incorporate[ ] a reason, separate and distinct from the fraud allegations" for denying the contractor relief.[172] Although perhaps a somewhat ironic outcome, that means that if a CO issues a final decision denying a contractor's CDA claim based upon allegations of fraud, and then the Government asserts fraud counterclaims in response to a contractor's suit based upon the final decision, the COFC may well lack jurisdiction over the entire case—including the counterclaims—because the final decision is invalid.

On the other hand, as *Medina Construction, Ltd.* suggests, a CO's final decision is not invalid, *per se*, just because the CO may have cited fraud as a ground upon which to terminate a contract or deny a contractor's claim.

In *Daff v. United States,* a contractor filed suit seeking the payment of convenience termination costs.[173] The Government, in response, alleged that the contractor's claims were barred by fraud and illegality, and then asserted a counterclaim for unliquidated progress payments under the contract and a second counterclaim under the FCA.[174] Following a trial on the merits, the COFC awarded damages to the Government and imposed a civil penalty and treble damages under the FCA.[175] On appeal, the contractor argued that the court lacked jurisdiction over both its claims and the Government's counterclaims because the CO lacked the authority to issue a termination decision based upon allegations of fraud. The Federal Circuit, however, concluded that the COFC, in fact, had jurisdiction, explaining that the CO "stated two separate and distinct reasons for the default termination."[176] Instead of simply justifying the contract termination based solely upon fraud grounds, the CO also had "set forth a ground for the termination that the contracting officer was authorized to assert, *i.e.,* failure to perform according to the terms of the contract."[177] In sum, "while the CO discussed fraud as a ground for default termination, the CO ultimately set forth a separate reason—based wholly upon the contract itself—for the default termination. As such, the contracting officer issued a valid termination decision."[178]

Accordingly, "[i]n instances where allegations of fraud are raised during contract performance, *Daff* and *Medina Construction, Ltd.* instruct that a contracting officer's final decision is valid if the decision is based upon a contractual ground."[179] The corollary to that rule, consistent with the foregoing discussion, is that a plaintiff cannot avoid Government fraud claims on the basis of a CO's not having rendered a final decision on such claims.[180] The rule is the same whether the Government claim is based upon the CDA's fraud provision, the FCA, or the Special Plea in Fraud.[181]

On the other hand, in *Joseph Morton Co. v. United States,* the Federal Circuit upheld the

grant of summary judgment by the Claims Court (now the COFC) to the Government, sustaining a termination for default, solely on the basis of the contractor's prior criminal convictions for false and fraudulent cost submissions during the performance of the contract in question.[182] The Federal Circuit "rejected arguments by the government to remove its claims from the CO's jurisdiction because the counterclaims were based on fraud" where the contractor's "fraud had already been determined in a prior criminal proceeding…, and liability for reprocurement costs and damages would not be an issue before the CO."[183] In such a case, the rule is "that the amount of money…owed the government should be treated as a separate claim, and should first be determined by the CO" because "[t]he damages issue…[is] sufficiently segregable from liability to place the claim within" the ordinary statutory requirement that the CO render a final decision on a claim.[184] To be clear, the holding of "*Joseph Morton* [is] clearly limited to situations where liability for fraud ha[s] already been established, and only the quantum issue remain[s]."[185]

■ Liability For Baseless CDA Claims

The leading Federal Circuit case analyzing and applying the CDA's fraud provision is *Daewoo Engineering & Construction Co. v. United States*.[186] At issue in *Daewoo* was an $88.6 million contract between the U.S. Army Corps of Engineers and Daewoo to construct a road in the Republic of Palau. The contract required completion of the road within 1,080 days, beginning in October 2000.[187] Construction of the road was subsequently delayed, and Daewoo attributed these delays to the humid and rainy weather and moist soils in Palau.[188]

On March 29, 2002, Daewoo submitted a request for equitable adjustment, in the form of a certified claim, to the Corps of Engineers.[189] In this certified claim, Daewoo sought adjustment of the contract price and the time to perform the contract, alleging that the contract used defective specifications, that the Government breached its duties to cooperate and to disclose superior knowledge, and that the contract was impossible to perform within the originally specified time period. [190] Daewoo sought nearly $13.5 million in "additional costs as of December 31, 2001" and, in the Government's view, also requested approximately $50.5 million in "costs January 1, 2002 [and] [f]orward," for a total of approximately "$64 million."[191] The CO denied Daewoo's claim.

Daewoo subsequently filed a complaint at the COFC, and the Government "counterclaimed for damages, seeking $64 million under the Contract Disputes Act and $10,000 under the False Claims Act. The government also entered a special plea in fraud and sought forfeiture of Daewoo's claims under 28 U.S.C. § 2514."[192] The COFC awarded the Government $10,000 under the FCA, roughly $50.6 million under the CDA, and forfeited Daewoo's claims under § 2514.[193] The COFC concluded that the Government "'showed by clear and convincing evidence that the contractor knowingly presented a false claim with the intention of being paid for it,' thus supporting the $50.6 million penalty under the [CDA], the $10,000 award under the [FCA], and forfeiture of Daewoo's claims."[194]

In affirming the COFC's decision, the Federal Circuit held that "the fact that not all of the costs recited in Daewoo's certified claim had been incurred does not prevent it from being construed as a claim for $64 million, including such projected costs," but while "'a contractor may claim future expenses…, projected costs should be in good faith."[195] In Daewoo's case, the Federal Circuit agreed that the CDA claim was false and not in good faith. In particular, the Federal Circuit pointed out that "Daewoo apparently used no outside experts to make its certified claim calculation, and at trial made no real effort to justify the accuracy of the claim for future costs or even to explain how it was prepared."[196] Moreover, "Daewoo's damages experts at trial treated the certified claim computation as essentially worthless, did not utilize it, and did not even bother to understand it." [197] The Government's position was aided by the COFC's finding "that Daewoo's claim preparation witnesses inconsistently referred to and interchanged actual, future, estimated, calculated and planned costs."[198]

The key part of the Federal Circuit's holding is two-fold. First, the court held that the unsupported part of Daewoo's claim—totaling approximately $50.6 million—rendered the entire $64 million claim false and fraudulent.[199] Second, and more

significantly, the court rejected Daewoo's argument "that a claim can be fraudulent only if it rests upon false facts rather than on a baseless calculation," instead agreeing with the Government that, "[b]y certifying a claim for damages in the amount of $64 million, Daewoo represented that the claim was made 'in good faith'" and that "[i]t is well established that a baseless certified claim is a fraudulent claim."[200]

In sum, *Daewoo* teaches that contractors must be prepared to defend before the COFC not only specific factual assertions contained in their CDA claims, but also the basis for any claimed monetary sums or calculations. In that regard, contractors must be careful to distinguish between actual costs already incurred and projected, unincurred future costs.[201] Characterizing claimed sums as "estimates" will not insulate contractors from Government counterclaims.[202]

Forfeiture Of Fraudulent Claims Act

Pursuant to the Forfeiture Of Fraudulent Claims Act, also known as the Special Plea in Fraud, 28 U.S.C.A. § 2514, "[a] claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof." Section 2514 further provides that "[i]n such cases the United States Court of Federal Claims shall specifically find such fraud or attempt and render judgment of forfeiture." As noted above, to prevail under 28 U.S.C.A. § 2514, the Government must "establish by clear and convincing evidence that the contractor knew that its submitted claims were false, and that it intended to defraud the government by submitting those claims."[203]

Unlike the antifraud provision of the CDA, under which a contractor may incur liability only for the unsupported part of a claim, forfeiture under 28 U.S.C.A. § 2514 requires only part of the claim to be fraudulent.[204] Where the Government succeeds on a counterclaim brought under the CDA's fraud provision, however, forfeiture of the entire CDA claim will be justified.[205]

There are at least two significant, and recurring, controversies regarding the FFCA. The first is the relationship of the FFCA to federal common law fraud, particularly with respect to fraud in the inducement (i.e., a contractor's factual misrepresentations made to obtain a contract). The second, but related, question is whether fraud in the performance of a contract may serve as the basis for a Government counterclaim pursuant to the FFCA. In terms of both issues, Judge Christine O.C. Miller recently has issued a series of notable decisions siding with contractors against a more expansive reading of the statute urged by the Government.

First, in *Veridyne Corp. v. United States*, the Government asserted that a contract modification extending the term of a contract was void *ab initio* because it was obtained by fraud.[206] Judge Miller, however, believed that the court's "[a]nalysis of the affirmative defense and counterclaim [of forfeiture], however, [was] complicated by defendant's conflation of contracts that [were] void *ab initio* with the forfeiture statute."[207] According to Judge Miller, "[t]he law on contracts void *ab initio* implicates the doctrine of federal common law fraud" and thus required the court "to analyze each [type of claim] separately."[208]

Ultimately, Judge Miller concluded that "[f]orfeiture is an inappropriate remedy for common-law fraud except when a conflict of interest is perpetuated by a contractor involved in facilitating and maintaining a Government agent's conflict of interest or where an agent of the contractor obtains a contract through a conflict of interest."[209] Although Judge Miller acknowledged that "[t]he statutory forfeiture contemplated by 28 U.S.C. § 2514 is broad," she held that "[t]he statutory language has been construed as proscribing fraud in the prosecution of claims against the United States, not fraud in the performance of the contract."[210]

Similarly, in *KBR*, the Government contended that the FFCA "requires forfeiture when plaintiff engages in any fraudulent activity in the performance of a contract, regardless of its relationship to the presentation of a claim."[211] Specifically, the issue in *KBR* was whether "the concept of [fraud in the] 'course of performance'" included the acceptance of a kickback.[212] Judge Miller rejected the Government's view that such conduct could

support a forfeiture of claims where the "the [kickback] acceptance had no bearing on the award of the contract or performance of the claim that plaintiff seeks to recover."[213] Indeed, she characterized the Government's position as one "capitalizing upon an overly broad articulation of the law in an effort to fashion a new cause of action under the forfeiture statute."[214]

Judge Miller not only rejected an "interpretation of the statute [that] divorces fraud in the performance of a contract from the submission of claim and [that] consequently…would not require the Government to prove that the alleged fraud relates in any way to the submitted claim," but also went further to reject the notion "that fraud in the practice of a contract alone constitutes a valid cause of action under the forfeiture."[215] In so holding, Judge Miller undertook an extensive review of the jurisprudence related to the FFCA, discussing and cataloging a number of COFC decisions favorable to the Government, all of which, in her view, "represent[ ] a departure from the law based on incorrect citation to precedent."[216] In sum, according to Judge Miller, "[t]he forfeiture statute is aimed at proscribing fraud in the prosecution of claims against the United States, not any and all fraud in the performance of the contract."[217]

What remains unclear, however, is how far Judge Miller's holding extends. That is, according to her decision in *KBR*, the Government "ha[d] not alleged that the kickbacks were in any way related to the required performance under the contract or to the proof of that performance submitted with plaintiff's claim."[218] But what about a case (e.g., *Veridyne*) in which the Government alleges that it was induced fraudulently to contract with the plaintiff? Arguably, there is a distinction between fraud in the performance of a contract entirely unrelated to a claim for payment under that contract, and a contract whose very existence is itself the result of fraud. In the latter case, the Government likely would argue that the claim for payment is fraudulent because, at a minimum, there is an implied assertion from the contractor that the contact is valid (and was not obtained via misrepresentation or fraud).

Although Judge Miller, in *KBR*, viewed a binding Court of Claims decision, *O'Brien Gear & Machine Co. v. United States*, as supporting her view of the forfeiture statute,[219] that case may support the Government's position regarding claims based upon contracts that the Government fraudulently was induced to enter. In *O'Brien*, the court held the forfeiture statute applicable where a plaintiff used false information in the course of trying to prove its claims in a judicial proceeding. In particular, the court held the plaintiff's claim forfeited where:[220]

> The object of the frauds was to deceive the Internal Revenue Service as to the amount of plaintiff's taxable income and to deceive the Renegotiation Board as to the reasonableness of plaintiff's profits. When these records, shot through with fraud, were presented by plaintiff in support of its case in this court, a further, specific object was added—the proof by fraud of the claim here made. The fraud practiced here was an attempt by false and fraudulent records to prove that plaintiff's profits were lower than they actually were, and thereby to obtain a favorable determination that plaintiff's profits were reasonable and not excessive.

In so holding, the court explained that "Congress's purpose to prevent and punish fraud in the Court of Claims was aimed at all who committed fraud and thus at all plaintiffs in the court. No intention can be surmised that some who committed fraud in the proof of their demand would be exempt from the forfeiture…by reason of some narrow definition of the word 'claim.'"[221]

By analogy, the Government may argue that a fraudulently obtained contract is akin to—or should be treated no differently than—the fraudulent records at issue in *O'Brien*, i.e., records used to deceive the IRS and then the court. In other words, in such a case, the Government's contention would be that connection between the fraud and the claim is not unrelated or even attenuated, but is direct and fatally infectious.[222] Indeed, even Judge Miller acknowledged that in "[f]raud-in-the-inducement cases"—including cases involving collusive bidding, bid-rigging, contracts obtained due to false information, fraudulent pricing or inflated cost estimates, or false representations about the ability to perform—the Supreme Court has "held that each claim submitted under the contracts constituted a false or fraudulent claim" because that is "the effect of contracts tainted with fraud."[223]

Finally, where the Government succeeds on its counterclaim (or affirmative defense) for forfeiture under the Special Plea in Fraud and where the Government also is awarded actual damages (subject to trebling) pursuant to the FCA, "the government is precluded from further recovery under the Contract Disputes Act, for its two counterclaims merge."[224]

Common Law Fraud

The Federal Circuit, in *J.P. Stevens & Co. v. Lex Tex, Ltd.*,[225] noted the elements of common law fraud as follows: "(1) misrepresentation of a material fact; (2) intent to deceive; (3) justifiable reliance on the misrepresentation by the party deceived; and (4) injury to the party deceived, resulting from reliance on the misrepresentation."[226] One line of cases applies all four elements of common law fraud as a prerequisite to establishing a Special Plea in Fraud under 28 U.S.C.A. § 2514, such that the elements of common law fraud would be coextensive with the elements of the Special Plea.[227]

Another line of Federal Circuit cases requires only the first two elements of common law fraud—knowledge that a claim is false and the intent to deceive the Government by submitting the claim—for liability under the Special Plea in Fraud statute.[228] Under these latter cases, common law fraud is more difficult to prove than a Special Plea in Fraud. Accordingly, where the Government pursues counterclaims both for common law fraud and under the FFCA, the Government's failure to prevail under the latter means "the defendant logically also would not make out a case of fraud under the more difficult standard required for common law fraud."[229]

Adding yet a further wrinkle, the Federal Circuit, in *Long Island Savings Bank, FSB v. United States*—applying federal common law principles—held that, to void a contract *ab initio* because it is "'tainted from its inception by fraud…,' the government must prove [only] that the contractor (a) obtained the contract by (b) knowingly (c) making a false statement."[230]

Despite all of this confusion in the precedent, "arguments over these issues are unlikely to have any real consequence if the Government can establish that a contract was procured by fraud or is otherwise tainted by misconduct surrounding its formation" because, "[u]nder well-established case law independent of [the FFCA], the Government may cancel contracts procured by fraud or other misconduct, and thereby avoid most if not all claims under those contracts."[231]

A Brief Note On Corporate Scienter

In *Long Island Savings Bank*, the Federal Circuit addressed what it characterized as the Government's common law fraud claim and, in particular, whether the knowledge of a contractor's agent could be imputed to the company itself.[232] The Federal Circuit, following "the general common law of agency," held that "'[e]xcept where the agent is acting adversely to the principal..., the principal is affected by the knowledge which an agent has a duty to disclose to the principal...to the same extent as if the principal had the information.'"[233] In other words, "the general rule…imput[es] the agent's knowledge to the principal."[234]

But what about where the facts constituting the Government's scienter case reside with, and must be aggregated from, different corporate agents? On that point, the U.S. Court of Appeals for the District of Columbia Circuit held that "under the FCA, 'collective knowledge' provides an inappropriate basis for proof of scienter because it effectively imposes liability, complete with treble damages and substantial civil penalties, for a type of loose constructive knowledge that is inconsistent with the Act's language, structure, and purpose."[235] In particular, the court criticized the "collective knowledge" approach to scienter as permitting "the fact-finder [to] determine that the corporation violated the FCA "even absent proof that corporate officials acted with deliberate ignorance or reckless disregard for the truth by submitting a false claim as the result of, for instance, a communication failure."[236] The D.C. Circuit did not "know of [any] circuit that has applied the 'collective knowledge' theory to the FCA."[237]

The Federal Circuit has not addressed the "collective knowledge" theory, and at least one COFC decision, *Alcatec, LLC v. United States*, explicitly declined to address the Government's assertion of that theory, despite the fact that the parties "digress[ed] extensively in briefing this issue."[238] The COFC in *Alcatec* concluded that it "need not reach defendant's theory of collective knowledge on the part of corporate entities, as [plaintiff] is bound by the knowledge and actions of its Managing Member…and Chief Operating Officer…, both acting in the interest of [plaintiff]."[239] In so holding, however, the COFC relied upon the Federal Circuit's decision in *Long Island Savings Bank*. To what extent, then, will *Long Island Savings Bank* permit the Government effectively to impute all knowledge held by corporate employees to a plaintiff contractor remains to be seen, although the weight of authority appears to favor the higher scienter bar set by the D.C. Circuit.

Other Counterclaims

■ Liquidated Damages

Even where a CO "never issued a written final decision under the CDA on the government's claim, this deficiency does not preclude the government from litigating its liquidated damages counterclaim in the Court of Federal Claims."[240] The Federal Circuit stated this exception to the normal rule that a CO must issue a final decision on a Government claim in *Placeway Construction Corp. v. United States*.[241]

In *Placeway*, the plaintiff contractor entered into a contract with the U.S. Coast Guard to construct residential housing. Following the completion of construction, Placeway submitted a voucher for the contract's unpaid balance. The CO denied Placeway's request to release the unpaid balance because Placeway had failed to complete the contract in a timely manner. Thus, in essence, "the government set off its delay damages claim against the unpaid balance claimed by Placeway because Placeway's alleged delays exposed the government to liability to other contractors who might later submit delay claims against the government."[242] Placeway subsequently sued the Government in the COFC, which held that because the CO failed to assert a sum certain of delay damages against Placeway, the CO had not issued a final decision necessary to invoke the court's jurisdiction for review of the Government's assessment of such damages.[243]

Relying on *Teller Environmental Systems, Inc. v. United States*,[244] which held that a CO's decision is final if it resolves issues of liability and damage, the Federal Circuit reversed the trial court's decision in *Placeway*. The Federal Circuit "reasoned that the [CO's] actions constituted a CDA final decision because the [CO] had, with respect to the government's set-off claim, determined both liability against Placeway and damages in the amount of the unpaid contract balance."[245] The quantum determination was certain due to the CO's complete rejection of Placeway's claim to the unpaid balance, and this was so even though the CO had reserved the right to revise the delay damages incurred by the Government at some future time.[246]

Accordingly, *Placeway* "stands for the proposition that a Government set-off claim will be deemed to have received a final CO decision, and thus be satisfactory for CDA jurisdictional purposes, if the CO states in writing the subject of the Government's claim and the specific amount claimed for the Government in the context of assessing a CDA claim made by a contractor."[247]

In contrast, the Federal Circuit has held that *Placeway* does not stand "for the proposition that a valid CDA claim is not required prior to raising excusable delay as a defense to the government's liquidated damages claim."[248] In *M. Maropakis Carpentry, Inc. v. United States*, there was no dispute that the COFC "had jurisdiction over [the contractor's] claim relating to liquidated damages and the government's corresponding counterclaim."[249] Moreover, "[t]he parties also agree[d] that the claim for liquidated damages was a Government claim that did not require certification and that the contracting officer properly made a final decision on the issue."[250] On appeal, the Federal Circuit concluded that the COFC "correctly found that *Placeway* had no bearing on the CDA's requirements for contractor claims."[251]

The Federal Circuit explained that "[t]he statutory language of the CDA is explicit in requiring a contractor to make a valid claim to the contracting officer prior to litigating that claim," but that the plaintiff contractor failed to "point to any authority that provides an exception to the CDA claim requirements when a contractor's claim for contract modification is made in defense to a government claim."[252] In sum, the Federal Circuit held "that a contractor seeking an adjustment of contract terms must meet the jurisdictional requirements and procedural prerequisites of the CDA, whether asserting the claim against the government as an affirmative claim or as a defense to a government action."[253]

Liquidated damages are used "to allocate the consequences of a breach before it occurs,"[254] and "save the time and expense of litigating the issue of damages."[255] Indeed, the Supreme Court has explained that liquidated damages "serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts."[256] Accordingly, "[w]here parties have by their contract agreed upon a liquidated damages clause as a reasonable forecast of just compensation for breach of contract and damages are difficult to estimate accurately, such provision should be enforced."[257]

On the other hand, liquidated damages clauses should not be enforced when the amount of damages is "plainly without reasonable relation to any probable damage which may follow a breach,"[258] or is "so extravagant, or so disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention, or oppression."[259] In such circumstances, liquidated damages amount to a penalty.[260]

In a case involving a challenge to a liquidated damages clause, a court must evaluate the clause "as of the time of making the contract" and without regard to the amount of damages, if any, actually incurred by the nonbreaching party.[261] The party challenging a liquidated damages clause—typically, the contractor in Government procurement cases—carries the burden of demonstrating that the clause should not be enforced.[262] The burden is a heavy one "because when damages are uncertain or hard to measure, it naturally follows that it is difficult to conclude that a particular liquidated damages amount or rate is an unreasonable projection of what those damages might be."[263] In that regard, a court generally will not "inquire into the process that the contracting officer followed in arriving at the liquidated damages figure that was put forth in the solicitation and agreed to in the contract."[264]

The Federal Circuit has explained that as long as a liquidated damages rate is reasonable, a court should not "inquire into the process that the contracting officer followed in arriving at the liquidated damages figure that was put forth in the solicitation and agreed to in the contract."[265] Accordingly, "to the extent that a particular component of a liquidated damages rate can be challenged, so long as the component amount is reasonable, the court should not examine how that amount was determined."[266]

There appears to be some disagreement regarding whether a plaintiff contractor may challenge the "the reasonableness of the liquidated damages rate set forth in the [liquidated damages] clause" after contract formation.[267]

■ Reprocurement Costs

"[W]here a contractor's breach results in the necessity for reprocurement of substantially similar goods or services, the burden of proving the effects of changes in the reprocurement contract terms on the contract price is properly placed on the breaching contractor."[268] Damages are measured by the difference between the reasonable reprocurement price and the defaulted contract price.[269] Excess reprocurement costs may be imposed, however, only when the Government meets its burden of persuasion that the following conditions are met: "(1) the reprocured supplies are the same as or similar to those involved in the termination; (2) the Government actually incurred excess costs; and (3) the Government acted reasonably to minimize the excess costs resulting from the default."[270] If the Government sustains its burden, the burden then shifts to the plaintiff for rebuttal.[271]

For the first prong of the test for reprocurement costs, that "the reprocured supplies are the same or similar to those involved in the termination," the court compares "the item reprocured with the item specified in the original contract."[272] "Similarity," however, does not require that the reprocured item be identical to the original contract specifications.[273]

The second prong of the test for reprocurement costs requires the Government to show that it actually incurred costs and "what it spent in reprocurement."[274] In calculating excess reprocurement costs, "[t]he measure of the Government's damage is the difference between what it cost it to do the work and what it would have cost it to do the work had the appellant not been terminated for default."[275]

The third prong of the test to reclaim reprocurement costs "requires that the Government act within a reasonable time of the default, use the most efficient method of reprocurement, obtain a reasonable price, and mitigate its losses."[276]

Ultimately, an assessment of reprocurement damages is a fact-intensive inquiry, and "the facts of the individual case control."[277] As part of any reprocurement for which the Government is entitled to compensation, the Government may seek its administrative costs as well.[278]

Parallel Proceeding Considerations

In cases before the COFC, particularly in those with fraud counterclaims, both the Government and plaintiff contractors not infrequently must deal with the prospect of parallel criminal proceedings that arguably involve factual and legal issues similar, or related, to those in the COFC case. Indeed, a conviction under a criminal fraud statute "has been held to establish civil liability for violations" of the FCA.[279]

Where the Government is concerned about a contractor gaining discovery in the COFC matter that the contractor normally would not be able to obtain in a criminal case,[280] the Government often will seek to stay the civil matter until the criminal matter is complete. In *Ampetrol, Inc. v. United States*, for example, the Government moved to stay that case because plaintiff's "civil case [would have] interfere[d] with an ongoing criminal investigation."[281] The court explained that "[t]he primary reason that courts attempt to avoid concurrent civil and criminal proceedings is that "'the broader discovery possible in a civil case should not be used to compromise a parallel criminal proceeding.'"[282]

Alternatively, a contractor may seek to stay the civil matter because of the possibility of self-incrimination (of the witnesses),[283] to focus on more severe criminal charges,[284] or to prevent the Government from obtaining additional discovery.[285]

For example, in *Waldbaum v. Worldvision Enterprises, Inc.*, the district court considered whether a plaintiff who already had been indicted was entitled to a stay of discovery in a civil case.[286] The district court, relying upon a decision of the U.S. Court of Appeals for the Second Circuit, concluded that "[a]s long as the criminal defendant's preparation for criminal trial was not hampered, 'the fact that additional testimony becomes available to the Government is merely the natural byproduct of another judicial proceeding.'"[287] Indeed, the Second Circuit explained that, whether a witness is under investigation or indictment, "'[s]uch a witness must either invoke his privilege against self-incrimination, or assume the general duty to give what testimony one is capable of giving.'"[288] Finally, the district court in *Waldbaum* observed that the nature of the movant seeking to avoid a deposition (i.e., plaintiff or defendant) is a critical issue that a court must consider:[289]

> Plaintiffs have cited a number of cases in which courts have chosen to stay discovery; each of the cases is readily distinguishable from the case at hand.… The fact that these cases involved defendants, not plaintiffs, in civil proceedings is critical. As defendant Worldvision discusses at length in its brief, the distinction is between the use of the fifth amendment privilege as a sword and as a shield. To allow a plaintiff in a civil action to avoid a deposition on the basis of a criminal indictment against him would have the effect of allowing the plaintiff to use his fifth amendment right to the detriment of the defendant.

Similarly, the district court in *Jones v. B.C. Christopher & Co.* explained the distinction between

when a defendant versus "[w]hen a Plaintiff brings suit and then refuses to submit discovery."[290] In the latter case, "an arguably different situation is presented" in that "[t]he party asserting the privilege is no longer an involuntary litigant."[291]

Pursuant to the *Ampetrol* decision, the party seeking a stay first must make a "clear showing" that the issues in the civil action are "related" and "substantially similar" to the issues in the criminal investigation.[292] Second, the movant must "'make a clear showing of hardship or inequity if required to go forward with the civil case while the criminal investigation is pending.'"[293] Third, the movant must establish "'that the duration of the requested stay is not immoderate or unreasonable.'"[294]

At least one Federal Circuit decision suggests that the court is highly sympathetic to contractors ensnared in parallel criminal proceedings and may well disagree with the cases favoring the Government discussed above. In *Afro-Lecon, Inc. v. United States*,[295] the Federal Circuit dealt with an action brought by a Government contractor in the General Services Administration Board of Contract Appeals. The contractor moved to stay proceedings during the pendency of parallel criminal proceedings brought against it. The board denied the contractor's motion. On appeal to the Federal Circuit, the court held that although the Constitution does not require a stay of civil proceedings pending the outcome of criminal proceedings, a court has discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions when interests of justice so require.[296] Circumstances that weigh in favor of granting a stay of civil proceeding, according to the Federal Circuit, include malicious prosecution, absence of counsel for defendant during depositions, agency bad faith, malicious Government tactics, and "'other special circumstances.'"[297]

Although the Federal Circuit "agree[d] that a party may not claim a fifth amendment privilege and proceed with his suit," where a plaintiff asks only for a stay of civil proceedings, the plaintiff "does not raise the problem of placing the defendant in the position of maintaining a defense without necessary discovery."[298] Ultimately, the Federal Circuit held that "a balancing must occur of the interest of the appellant [contractor] in postponement, which is strong, against the possible prejudice to the [Government] by way of important evidence that will be lost over time."[299] In so holding, the court rejected flatly any contention that the trial court's decision to issue a stay should depend upon whether the moving party is the plaintiff contractor or the Government.[300]

Settlement Negotiations

As noted above, the Government's assertion of counterclaims necessarily changes its settlement calculus. That is because, for the DOJ trial attorney to have obtained authority to assert counterclaims—particularly fraud counterclaims—the attorney would have been required to demonstrate the meritorious nature of the proposed counterclaims to DOJ authorizing officials. Put differently, having obtained authority to assert counterclaims, the DOJ trial attorney cannot very well turn around and, with ease, suggest to the same authorizing officials that the Government should value its counterclaims at zero.

Accordingly, in assessing the Government's litigation risk, the DOJ trial attorney ordinarily will have to assign some value to asserted counterclaims. And because litigation risk typically is the only consideration in the DOJ settlement calculus, the assertion of a counterclaim means that the relative positions of the Government and plaintiff almost certainly will be farther apart after counterclaims are asserted.[301] Thus, for contractors hoping to settle a COFC matter, that possibility is far greater before counterclaims are asserted (or threatened).

Contractors must specifically consider the possibility—particularly with respect to cases potentially involving a forfeiture counterclaim—that, once the DOJ believes it has a basis for such a counterclaim, the Government will be reluctant to settle at all.

Conclusion

In Government contract cases before the COFC, not knowing how to avoid counterclaims—or to litigate them effectively, if

necessary—can yield costly, if not disastrous, results for contractors (e.g., as in *Daewoo*[302] or *Commercial Contactors*[303]). Too often, plaintiff contractors do not consider the possibility of Government counterclaims until after they are asserted by the DOJ, or until the contractors learn that the Government is investigating the possibility of asserting counterclaims. Given what appears to be the DOJ's increasing willingness to pursue counterclaims, contractors would be well advised to assess the likelihood of counterclaims significantly in advance of filing suit in the COFC and to become familiar with both the court's procedural rules and the substantive law governing the most common types of Government counterclaims.

GUIDELINES

These *Guidelines* are intended to assist you in understanding the issues involved in the litigation of fraud and other Government counterclaims at the COFC. They are not, however, a substitute for professional representation in any specific situation.

1. Contractors should assess the risk of the Government filing counterclaims before filing suit in the COFC.

2. Contractors must understand not only how the DOJ decides when to pursue counterclaims, but also how counterclaims might affect the Government's settlement posture.

3. Plaintiffs should attempt to limit the Government's ability to pursue counterclaims via scheduling orders (i.e., by asking the court to set a deadline by which the Government must file counterclaims or forgo them).

4. Where the Government seeks leave to amend its answer to assert counterclaims, a plaintiff must determine when the Government first learned that it may have grounds to pursue counterclaims; plaintiffs should emphasize the Government's delay in pursuing counterclaims where appropriate.

5. Whenever the Government files counterclaims, plaintiffs should consider responding with a motion to dismiss pursuant to RCFC 9(b) or RCFC 12(b)(6).

6. Even where the Government successfully persuades the COFC to allow counterclaims in an amended answer, plaintiffs should focus on limiting the time for, or scope of, any additional discovery.

7. In CDA cases, in particular, plaintiffs must be intimately familiar with the Federal Circuit's decision in *Daewoo*, and understand the types of fraud for which the Government is on the lookout.

8. Consider whether seeking a stay in a COFC matter makes sense where there are related, parallel criminal proceedings.

★ REFERENCES ★

1/ Blake Constr. Co. v. United States, 585 F.2d 998, 1005 (Ct. Cl. 1978) (noting that "in this court[,]…the Government is always the defendant").

2/ See also 28 U.S.C.A. § 2508 ("Upon the trial of any suit in the United States Court of Federal Claims in which any setoff, counterclaim, claim for damages, or other demand is set up on the part of the United States against any plaintiff making claim against the United States in said court, the court shall hear and determine such claim or demand both for and against the United States and plaintiff. If upon the whole case it finds that the plaintiff is indebted to the United States it shall render judgment to that effect, and such judgment shall be final and reviewable.").

3/ Blake Constr. Co. v. United States, 585 F.2d 998, 1005 (Ct. Cl. 1978) (citing United States v. Munsey Trust Co., 332 U.S. 234, 67 S. Ct. 1599 (1947)).

4/ Tatelbaum ex rel. Creditors of A. Hoen & Co. v. United States, 10 Cl. Ct. 207, 210–11 (1986) (citing Barry v. United States, 229 U.S. 47, 33 S. Ct. 681 (1913); McKnight v. United States, 98 U.S. 179 (1878); Gratiot v. United States, 40 U.S. 336 (1841)).

5/ Tatelbaum ex rel. Creditors of A. Hoen & Co. v. United States, 10 Cl. Ct. 207, 210–11 (1986) (citing United States v. Munsey Trust Co., 332 U.S. 234, 239–40, 67 S. Ct. 1599, 1601–02 (1947); Centron Corp. v. United States, 218 Ct. Cl. 1, 7, 585 F.2d 982, 985 (1978); Project Map, Inc. v. United States, 203 Ct. Cl. 52, 54–55, 486 F.2d 1375, 1376 (1973); 59 Comp. Gen. 143 (1979); 2 Comp. Gen. 479 (1923)).

6/ Cherry Cotton Mills v. United States, 327 U.S. 536, 539, 66 S. Ct. 729, 730 (1946); see also U.S. Attorneys' Manual, Civil Resource Manual § 204 ("Offset is the general right of one party to recover a debt owed by another through a deduc-

tion from monies owed by the first party to the second. Basically, there are two types of offsets: setoffs and recoupments. A setoff is an equitable right of offset where the mutually offsetting debts arise out of separate transactions. In contrast, a recoupment is the right of offset when the claim and the debt arise out of the same transaction."), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title4/civ00204.htm.

7/ Frantz Equip. Co. v. United States, 105 F. Supp. 490 (Ct. Cl. 1952) ("The civil action brought by the United States in the District Court is not transferred to this court by the filing by the Government of a counterclaim in the instant case based upon the same claim. The District Court still retains jurisdiction to proceed with the trial of that case. In the circumstances and under the terms of the statutes both the District Court and this court have jurisdiction of claim made by the United States.").

8/ Joseph Morton Co. v. United States, 3 Cl. Ct. 780, 785 n.2 (1983) (citing Universal Fiberglass Corp. v. United States, 210 Ct. Cl. 206, 218, 537 F.2d 393, 399 (1976)); U.S. v. Tohono O'Odham Nation, 131 S. Ct. 1723 (2011), 53 GC ¶ 154 (discussing 28 U.S.C.A. § 1500).

9/ 3 Cl. Ct. at 785 n.2; McElrath v. United States, 102 U.S. 426, 430–40 (1880) (holding, with respect to the exercise of jurisdiction by an Article I court under the provisions now codified as 28 U.S.C.A. §§ 1503, 2508, that "[t]here is nothing in these provisions which violates either the letter or spirit of the Seventh Amendment. Suits against the government in the Court of Claims, whether reference be had to the claimant's demand, or to the defence, or to any set-off, or counterclaim which the government may assert, are not controlled by the Seventh Amendment…. The government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. Congress, by the act in question, informs the claimant that if he avails himself of the privilege of suing the government in the special court organized for that purpose, he may be met with a set-off, counterclaim, or other demand of the government, upon which judgment may go against him without the intervention of a jury, if the court, upon the whole case, is of opinion that the government is entitled to such judgment. If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the government to the exercise of the privilege.").

10/ Continental Mgmt., Inc. v. United States, 527 F.2d 613, 616 (Ct. Cl. 1975) (citing Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536, 66 S. Ct. 729 (1946); Frantz Equip. Co. v. United States, 105 F. Supp. 490, 494–96, 122 Ct. Cl. 622, 628–31 (1952)).

11/ Joseph Morton Co, 3 Cl. Ct. at 783 (citing Mulholland v. United States, 175 Ct. Cl. 832, 846, 361 F.2d 237, 245 (1966)).

12/ 3 Cl. Ct. at 783 (citing Mulholland, 175 Ct. Cl. at 846, 361 F.2d at 245; Somali Dev. Bank v. United States, 205 Ct. Cl. 741, 751–52, 508 F.2d 817, 822 (1974)).

13/ 3 Cl. Ct. at 783.

14/ 3 Cl. Ct. at 783 (citing Astro-Space Laboratories, Inc. v. United States, 200 Ct. Cl. 282, 312–13, 470 F.2d 1003, 1020 (1972)).

15/ Shippen v. United States, 654 F.2d 45, 46–49 (Ct. Cl. 1981).

16/ 654 F.2d at 46–49.

17/ 654 F.2d at 46–49 (discussing United States v. King, 395 U.S. 1, 5 89 S. Ct. 1501, 1503 (1969) ("In the absence of an express grant of jurisdiction from Congress, we decline to assume that the Court of Claims has been given the authority to issue declaratory judgments.")); see also SCM Corp. v. United States, 219 Ct. Cl. 459, 465, 595 F.2d 595, 599 (1979) ("defendant seeks a declaratory judgment which is not within the jurisdiction of the court in this case").

18/ 654 F.2d at 49.

19/ http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html.

20/ U.S. Attorneys' Manual § 9-42.010, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/42mcrm.htm#9-42.010.

21/ http://www.justice.gov/civil/commercial/national-courts/c-natcourts.html; see also U.S. Attorneys' Manual § 4-4.210, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title4/4mciv.htm#4-4.210 (Court of Federal Claims).

22/ U.S. Attorneys' Manual § 9-42.010, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/42mcrm.htm#9-42.010.

23/ U.S. Attorneys' Manual § 9-42.010, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/42mcrm.htm#9-42.010 (citing Peterson v. Weinberger, 508 F.2d 45 (5th Cir. 1975); Brown v. United States, 524 F.2d 693 (Ct. Cl. 1975), as amended (1976); Continental Mgmt., Inc. v. United States, 527 F.2d 613 (Ct. Cl. 1975)).

24/ U.S. Attorneys' Manual § 9-42.010, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/42mcrm.htm#9-42.010.

25/ U.S. Attorneys' Manual § 4-4.100, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title4/4mciv.htm#4-4.100.

26/ 28 C.F.R. § 0.45(d) (authorizing Assistant Attorney General to handle fraud matters); 28 C.F.R. § 0.168(a) (authorizing AAG to delegate authority); 28 C.F.R. ch. I, pt. 0, subpt. Y, app. § 1(c). The current Directors of the National Courts and Frauds Sections are, respectively, Jeanne E. Davidson and Joyce R. Branda. See 76 Fed. Reg. 56471–81 (Sept. 13, 2011).

27/ 28 C.F.R. ch. I, pt. 0, subpt. Y, app. § 1(a). The current Commercial Litigation Branch DAAG is Michael F. Hertz. See 76 Fed. Reg. 56471–81 (Sept. 13, 2011).

28/ Williams v. United States, 86 Fed. Cl. 594, 604 n.7 (2009).

29/ Non-Ferrous Metals, Inc. v. Saramar Aluminum Co. 25 F.R.D. 102, 105 (N.D. 1960).

30/ Crown Laundry & Dry Cleaners, Inc. v. United States, 29 Fed. Cl. 506, 523 n.11 (1993) (noting that plaintiff "cite[d] no case law in support of its position" that "the government, since it did not file a counterclaim [with its answer], should not at this late date be allowed any recovery"); see also United Cent. Bank v. Maple Court LLC, No. 10C0464, 2010 WL 5345570, at *1 (E.D. Wis. Dec. 21, 2010) (rejecting plaintiff's contention that "defendants

waived their counterclaims" because "compulsory counterclaims under Fed. R. Civ. P. 13(a) must be exclusively pled in the original answer or be forever barred" and explaining that "[d]efendants may request leave to amend their answer just as plaintiffs may request leave to amend their complaint"); Fed. R. Civ. P. 13 Advisory Committee's Note (2009) ("An amendment to add a counterclaim will be governed by Rule 15.").

31/ Williams v. United States, 86 Fed. Cl. 594, 604 n.8 (2009) (citing and quoting Horn & Hardart Co. v. National Rail Passenger Corp., 843 F.2d 546, 549 (D.C. Cir. 1988), for the propositions that "a motion to dismiss…under Fed. R. Civ. P. 12(b)(6) is not…a responsive pleading" and that "[w]here a defendant neither asserts, nor is required to assert, a counterclaim, Restatement (Second) of Judgments § 22 explains that the previously unlitigated issues will not later be estopped by the earlier action").

32/ Te-Moak Bands of Western Shoshone Indians of Nev. v. United States, 948 F.2d 1258, 1260 (Fed. Cir. 1991); Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330, (1971) (determining "when justice so requires" that amendments under Rule 15(a) be granted rests within the sound discretion of the trial court); Mitsui Foods, Inc. v. United States, 867 F.2d 1401, 1403 (Fed. Cir. 1989) ("It is well established that the grant or denial of an opportunity to amend pleadings is within the discretion of the trial court."); Veridyne Corp. v. United States, 86 Fed. Cl. 668, 676 (2009) ("A grant or denial of a motion to amend under RCFC 15 is within this court's discretion.").

33/ Foman v. Davis, 371 U.S. 178, 182 (1962); Bradley v. Chiron Corp., 136 F.3d 1317, 1327 (Fed. Cir. 1998) (citing Foman for the proposition that "[t]he liberal pleading requirements of the Federal Rules encourage the grant of leave to amend").

34/ Veridyne Corp., 86 Fed. Cl. at 677 (citing Mitsui Foods, 867 F.2d at 1403, and Te-Moak, 948 F.2d at 1262–63).

35/ Tyger Constr. Co. Inc. v. United States, 28 Fed. Cl. 35, 54 (1993), 35 GC ¶ 250 (citing Tenneco Resins, Inc. v. Reeves Bros., Inc., 752 F.2d 630, 634 (Fed. Cir. 1985)).

36/ Black v. United States, 24 Cl. Ct. 471, 475 (1991) (citing State of Alaska v. United States, 15 Cl. Ct. 276, 280 (1988), for the proposition that "a showing of undue or substantial prejudice is an imperative to warrant the denial of a motion to amend a complaint"); St. Paul Fire & Marine Ins. Co. v. United States, 31 Fed. Cl. 151, 153 (1994) ("In order to successfully assert undue prejudice as a justification for denying a Rule 15 motion, the non-movant must demonstrate that one of the following circumstances will result: severe disadvantage or inability to present facts or evidence; necessity of conducting extensive research shortly before trial due to the introduction of new evidence or legal theories; or excessive delay that is unduly burdensome.… Mere annoyance and inconvenience, as here, however, are insufficient bases to warrant a denial of a motion to amend.").

37/ Chinook Research Laboratories, Inc. v. United States, 22 Cl. Ct. 853 (1991).

38/ 22 Cl. Ct. at 855.

39/ 22 Cl. Ct. at 855.

40/ 22 Cl. Ct. at 855.

41/ 22 Cl. Ct. at 856.

42/ 22 Cl. Ct. at 856; see also Rockwell Automation, Inc. v. United States, 70 Fed. Cl. 114, 121–24 (2006) (denying Government's request to file an amended answer to add affirmative defenses and explaining that "the government has failed to satisfy its burden of justifying why it took eight years…before it sought to add affirmative defenses").

43/ Veridyne Corp. v. United States, 86 Fed. Cl. 668 (2009).

44/ 86 Fed. Cl. at 680.

45/ 86 Fed. Cl. at 681; see also Normandy Apartments, Ltd. v. United States, No. 10–51C, 2011 WL 3438449 (Fed. Cl. Aug. 2, 2011), 53 GC ¶ 316 ("While [the defendant] asserts that it would be prejudiced by the filing of an amended complaint, it is hard to see how this can be true as there has been no discovery yet in this case.").

46/ Te-Moak Bands of Western Shoshone Indians of Nev. v. United States, 948 F.2d 1258, 1262 (Fed. Cir. 1991); see also Brunner v. United States, No. 98-554C, 2007 WL 5177408 (Fed. Cl. Apr. 5, 2007) ("[U]nder applicable Federal Circuit precedent, the 'burden of demonstrating prejudice is light' when, as here, a litigant failed to assert its defense at the earliest opportunity." (quoting Tenneco Resins, Inc. v. Reeves Bros., Inc., 752 F.2d 630, 634 (Fed. Cir. 1985)).

47/ Cupey Bajo Nursing Home, Inc. v. United States, 36 Fed. Cl. 122, 132 (1996) (citing Te-Moak Bands, 948 F.2d at 1263).

48/ St. Paul Fire & Marine Ins. Co. v. United States, 31 Fed. Cl. 151, 154 (1994) (concluding that, "[a]t best, all that appears, in substance, are naked allegations of annoyance and inconvenience"); see also Hernandez, Kroone & Assocs., Inc. v. United States, 95 Fed. Cl. 395 (2010) (striking affirmative defense of laches asserted by plaintiff in response to the Government's fraud counterclaims, noting that "[d]efendant gave considerable prior notice of its intentions in this regard and has met the pleadings standards required").

49/ Normandy Apartments, Ltd. v. United States, No. 10–51C, 2011 WL 3438449 (Fed. Cl. Aug. 2, 2011), 53 GC ¶ 316 (quoting Kermin Foods, L.C. v. Pigmentos Vegetables Del Centro S.A. de C. V., 464 F.3d 1339, 1354–55 (Fed. Cir. 2007), and citing Fernandez de Iglesias v. United States, 96 Fed. Cl. 352, 362 (2010)).

50/ Merck & Co. v. Apotex, Inc., 287 Fed. Appx. 884, 888 (Fed. Cir. 2008) (citing In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997)).

51/ Americold Corp. v. United States, 28 Fed. Cl. 747, 751–55 (1993).

52/ 28 Fed. Cl. at 751–55.

53/ 28 Fed. Cl. at 751–52 (explaining that "the latter [statute] mandat[es] ("shall")—as a condition of the government's waiver of sovereign immunity…that this court decide all claims or demands asserted by the government against a plaintiff in this court" and that "[a]s limitations on this court's statutory jurisdiction, these statutes must be strictly construed in the government's favor").

54/ 28 Fed. Cl. at 752–53 (citing Price v. United States, 121 Ct. Cl. 664, 104 F. Supp. 99, cert. denied, 344 U.S. 911 (1952), for the proposition that the "government [is] entitled to offset even though not asserted until just prior to judgment"; and Chicago B. & Q. R.R. v. United States, 73

Ct. Cl. 250 (1931), cert. denied, 287 U.S. 599 (1932), for the proposition that the "government [is] entitled to overpayment without asserting formal court claim").

55/ Cf. Principal Life Ins. Co. & Subsidiaries v. United States, 75 Fed. Cl. 32, 33–34 (2007) (denying defendant's motion for leave to amend its answer to assert a counterclaim where "defendant has provided no explanation whatsoever as to why it waited more than four years—until after trial and an opinion on the merits in this case—to first raise these issues" and distinguishing Americold).

56/ Kellogg Brown & Root Servs., Inc. v. United States, 99 Fed. Cl. 488 (2011); Barrett Ref. Corp. v. United States, 242 F.3d 1055, 1063 (Fed. Cir. 2001) ("We turn now to whether those counterclaims stated a claim upon which relief could be granted.").

57/ Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).

58/ Iqbal, 129 S. Ct. at 1940.

59/ Todd Constr., L.P. v. United States, 656 F.3d 1306, 1316 (Fed. Cir. 2011), 53 GC ¶ 299 (applying Iqbal) (emphasis added).

60/ Todd Constr., 656 F.3d at 1316 (citing Iqbal, 129 S. Ct. at 1949–50); see also Acceptance Ins. Cos. v. United States, 583 F.3d 849, 853 (Fed. Cir. 2009) (quoting Twombly, 550 U.S. at 555).

61/ Juniper Networks, Inc. v. Shipley, 643 F.3d 1346, 1350 (Fed. Cir. 2011).

62/ In re BP Lubricants USA Inc., 637 F.3d 1307, 1310 (Fed. Cir. 2011).

63/ RCFC 9(b).

64/ 637 F.3d at 1310–11.

65/ Exergen Corp. v. Wal–Mart Stores, Inc., 575 F.3d 1312, 1327 (Fed. Cir. 2009).

66/ 575 F.3d at 1326–27; see also 575 F.3d at 1329 n. 5 ("A reasonable inference is one that is plausible and that flows logically from the facts alleged, including any objective indications of candor and good faith."); King Auto., Inc. v. Speedy Muffler King, Inc., 667 F.2d 1008, 1010 (C.C.P.A. 1981) ("Rule 9(b) requires that the pleadings contain explicit rather than implied expression of the circumstances constituting fraud.").

67/ Exergen, 575 F.3d at 1328; BP Lubricants, 637 F.3d at 1311 ("Exergen's pleading requirements apply to all claims under Rule 9(b)….").

68/ Jana, Inc. v. United States, 41 Fed. Cl. 735, 741 (1998).

69/ 41 Fed. Cl. at 741.

70/ BMY-Combat Sys. Div. of Harsco Corp. v. United States, 26 Cl. Ct. 846, 850 (1992).

71/ 26 Cl. Ct. at 850.

72/ 26 Cl. Ct. at 850.

73/ 26 Cl. Ct. at 850.

74/ Kellogg Brown & Root Servs., Inc. v. United States, 99 Fed. Cl. 488 (2011).

75/ 99 Fed. Cl. at 513.

76/ 99 Fed. Cl. at 517.

77/ BMY-Combat Sys. Div. of Harsco Corp. v. United States, 26 Cl. Ct. 846, 850 (1992) ("The court, however, sees no reason why defendant should be required to prove the exact amount of its damages without the benefit of discovery and trial. As long as the type of damage suffered is alleged in the counterclaim, the precise quantum is a question of fact to be determined later in the proceedings."); Hernandez, Kroone & Assocs., Inc. v. United States, 95 Fed. Cl. 395 (2010); Veridyne Corp. v. United States, 86 Fed. Cl. 668, 681 (2009) ("The cost, even to plaintiff as a small business, and burden of undertaking additional discovery do not substantiate the level of prejudice needed to overcome the liberal standard of RCFC 15(a)(2).").

78/ Croman Corp. v. United States, 94 Fed. Cl. 157, 161–62 (2010).

79/ 94 Fed. Cl. at 161–62.

80/ 94 Fed. Cl. at 161–62 (quoting RCFC 26(b)(2)(C)(ii)).

81/ Wordtech Sys., Inc. v. Integrated Networks Solutions, Inc., 609 F.3d 1308, 1322–23 (Fed. Cir. 2010).

82/ 94 Fed. Cl. at 160 n.3.

83/ 609 F.3d at 1322–23.

84/ 609 F.3d at 1322–23.

85/ 609 F.3d at 1322–23.

86/ 609 F.3d at 1322–23.

87/ Kellogg Brown & Root Servs., Inc. v. United States, 99 Fed. Cl. 488, 493 (2011).

88/ Hernandez, Kroone & Assocs., Inc. v. United States, 85 Fed. Cl. 662, 665 (2009).

89/ 85 Fed. Cl. at 665.

90/ 85 Fed. Cl. at 665 (quoting American Airlines, Inc. v. United States, 551 F.3d 1294, 1306 (Fed. Cir. 2008) (citing Mahoney v. United States, 223 Ct. Cl. 713, 718 (1980))).

91/ 85 Fed. Cl. at 666 (citing American Airlines, 551 F.3d at 1307, for the proposition that "[d]iscovery requires a showing of concrete and positive evidence" and concluding that "[n]either has occurred to date").

92/ American Airlines, Inc., 551 F.3d at 1294.

93/ 551 F.3d at 1304.

94/ 551 F.3d at 1304.

95/ 551 F.3d at 1304.

96/ 551 F.3d at 1304–05 (emphasis added).

97/ 551 F.3d at 1305.

98/ See Huffman, Madsen & Hamrick, "The Civil False Claims Act," Briefing Papers No. 01-10 (Sept. 2001); Silberman, "False

Claims Issues in Subcontracting," Briefing Papers No. 06-8 (July 2006); Brackney & Solomson, "Current Issues in False Claims Litigation," Briefing Papers No. 06-10 (Sept. 2006); Stouck & Caplen, "The Forfeiture of Claims Act Today," Briefing Papers 07-9 (Aug. 2007); Ifrah, "Board Procedures Involving Fraud Counterclaims Against Contractors," Briefing Papers 07-10 (Sept. 2007); Wimberly, Plunkett & Settlemyer, "The Presentment Requirement Under the False Claims Act: The Impact of Allison Engine & The Fraud Enforcement & Recovery Act of 2009," Briefing Papers No. 09-9 (Aug. 2009); Mitchell, Abbott & Orozco, "Implied Certification Liability Under the False Claims Act," Briefing Papers No. 11-4 (Mar. 2011).

99/ Fabrikant & Solomon, "Application of the Federal False Claims Act to Regulatory Compliance Issues in the Health Care Industry," 51 Ala. L. Rev. 105 (Fall 1999); Brooker, "The False Claims Act: Congress Giveth and the Courts Taketh Away," 25 Hamline L. Rev. 373 (2002); Solomson & Brackney, "What Would Scalia Do?—A Textualist Approach to the Qui Tam Settlement Provision of the False Claims Act," 36 Pub. Cont. L.J. 39 (2006); Handwerker, Solomson, Davar & Harne, "Congress Declares Checkmate: How the Fraud Enforcement and Recovery Act of 2009 Strengthens the Civil False Claims Act and Counters the Courts," 5 J. Bus. & Tech. L. 295, 323 (2010).

100/ 31 U.S.C.A. § 3729.

101/ 41 U.S.C.A. § 7103(c)(2).

102/ 28 U.S.C.A. § 2514.

103/ Crane Helicopter Servs., Inc. v. United States,45 Fed. Cl. 410, 435 (1999).

104/ 45 Fed. Cl. at 444.

105/ Fabrikant & Solomon, "Application of the Federal False Claims Act to Regulatory Compliance Issues in the Health Care Industry," 51 Ala. L. Rev. 105, 111–12 (Fall 1999).

106/ 45 Fed. Cl. at 444 (citing Commercial Contractors, Inc. v. United States, 154 F.3d 1357, 1362 (Fed. Cir. 1998), 40 GC ¶ 471); UMC Elecs. Co. v. United States, 249 F.3d 1337, 1338–39 (Fed. Cir. 2001), 43 GC ¶ 220.

107/ 45 Fed. Cl. at 444 (citing Young-Montenay, Inc. v. United States, 15 F.3d 1040, 1042 (Fed. Cir. 1994), 36 GC ¶ 200).

108/ 45 Fed. Cl. at 444 (1999) (citing Young-Montenay, 15 F.3d at 1043; 41 U.S.C.A. §§ 601(7), 604; 28 U.S.C.A. § 2514; J.P. Stevens & Co. v. Lex Tex Ltd., 747 F.2d 1553, 1559 (Fed. Cir. 1984)).

109/ Liquidating Tr. Ester DuVal of KI Liquidation, Inc. v. United States, 89 Fed. Cl. 29, 41–42 (2009) (explaining that the FFCA "requires an elevated burden of proof, i.e., clear and convincing evidence,…not a preponderance of the evidence standard as required by the FCA" and that the FFCA "requires proof of the intent to deceive, whereas the FCA requires knowledge, a general-intent standard, and explicitly stipulates that proof of specific intent is not required").

110/ Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332, 1340–41 (Fed. Cir. 2009), 51 GC ¶ 84 (explaining that the COFC appropriately "cited the findings underlying Daewoo's liability under the [CDA]" fraud provision in order "[t]o support its conclusion that Daewoo violated the [FCA]" because "[a] certified claim may be a source of liability under both the [CDA] and the [FCA]").

111/ Daewoo, 557 F.3d at 1341 ("Daewoo itself concedes that if the $50.6 million [CDA] penalty is correct, then the forfeiture of its $13 million is also correct. Since we have upheld the $50.6 million award, we also uphold the forfeiture under [28 U.S.C.A.] § 2514.").

112/ Alcatec, LLC v. United States, No. 08–113C, 2011 WL 3691679, at *15–16 (Fed. Cl. Aug. 24, 2011) ("About the only way a just conclusion can be reached is by placing the questioned documents and statements alongside well-known and established facts." (quoting Kamen Soap Prods. Co. v. United States, 129 Ct. Cl. 619, 124 F. Supp. 608, 620 (1954)).

113/ Alli v. United States, 83 Fed. Cl. 250, 276–78 (2008).

114/ 83 Fed. Cl. at 276–78.

115/ 83 Fed. Cl. at 276–78 (quoting In re Cambridge Biotech Corp., 186 F.3d 1356, 1376 (Fed. Cir. 1999) (internal quotes omitted)).

116/ In re Cambridge Biotech Corp., 186 F.3d at 1376 n.11.

117/ 83 Fed. Cl. at 278.

118/ 83 Fed. Cl. at 278.

119/ 83 Fed. Cl. at 278.

120/ 83 Fed. Cl. at 278.

121/ 31 U.S.C.A. § 3729(a)(1)(A).

122/ 31 U.S.C.A. § 3729(a)(1)(B); see also Wimberly, Plunkett & Settlemyer, "The Presentment Requirement Under the False Claims Act: The Impact of Allison Engine & The Fraud Enforcement & Recovery Act of 2009," Briefing Papers No. 09-9 (Aug. 2009) (explaining that the phrase "material to a false or fraudulent claim" was added in order to eliminate an intent requirement—"that a person must intend for the Government itself to pay the claim"—established by the Supreme Court interpreting the prior version of the statute); Handwerker, Solomson, Davar & Harne, "Congress Declares Checkmate: How the Fraud Enforcement and Recovery Act of 2009 Strengthens the Civil False Claims Act and Counters the Courts," 5 J. Bus. & Tech. L. 295, 323 (2010); 31 U.S.C.A. § 3729(b)(2), (a "claim" is "any request or demand, whether under a contract or otherwise, for money or property" and includes any such request or demand made to "a contractor, grantee, or other recipient, if the [Government]...provides... any portion of the money").

123/ 31 U.S.C.A. § 3729(a)(1)(D).

124/ 31 U.S.C.A. § 3729(a)(1)(G).

125/ 31 U.S.C.A. § 3729(b)(1)(B).

126/ 31 U.S.C.A. § 3729(a)(1); 28 C.F.R. § 85.3(9).

127/ 31 U.S.C.A. § 3729(a)(3).

128/ Brackney & Solomson, "Current Issues in False Claims Litigation," Briefing Papers No. 06-10 (Sept. 2006).

129/ Commercial Contractors, Inc. v. United States, 154 F.3d 1357, 1366 (Fed. Cir. 1998), 40 GC ¶ 471.

130/ 154 F.3d at 1366.

131/ 154 F.3d at 1366.

132/ 154 F.3d at 1366.

133/ 154 F.3d at 1366 (emphasis added) (quoting United States v. Aerodex, Inc., 469 F.2d 1003, 1008 (5th Cir. 1972), for the proposition that a "contractor's failure to disclose the manner in which it thought it could comply with the contract 'indicates nothing less than an intention to deceive'").

134/ 154 F.3d at 1366 ("If a contractor submits a claim based on a plausible but erroneous contract interpretation, the contractor will not be liable, absent some specific evidence of knowledge that the claim is false or of intent to deceive.").

135/ Nevada ex rel. Steinke v. Merck & Co., 432 F. Supp. 2d 1082, 1088 (D. Nev. 2006) ("A reasonable interpretation does not render a statement "not false," but rather the good faith nature of the action 'forecloses the possibility that the scienter requirement is met.'" (quoting United States ex rel. Oliver v. Parsons Co., 195 F.3d 457, 464 (9th Cir. 1999), 41 GC ¶ 484)); U.S. v. Bourseau 531 F.3d 1159, 1165 n.2 (9th Cir. 2008) (explicitly "reject[ing]" the appellants' argument "that their statements were not false under a reasonable interpretation of the applicable regulations" because "the reasonableness of an interpretation may be relevant to the knowledge requirement but not the falsity requirement").

136/ Trafalgar House Constr., Inc. v. United States, 77 Fed. Cl. 48, 56 (2007) (discussing Commercial Contractors Inc., 154 F.3d at 1368, and concluding that "[a]lthough hindsight has shown that Plaintiff's estimate was not accurate, it was not in direct contravention of clear contract specifications" and that "[p]laintiff's assumption was not so unreasonable, given the information in the contract documents, as to rise to the level of a false claim").

137/ U.S. v. Sodexho, Inc., Civ. A. No. 03-6003, 2009 WL 579380, at *17 (E.D. Pa. Mar. 6, 2009) ("The lack of clarity regarding the proper interpretation of the regulations indicates that no basis exists for imposing FCA liability on Defendants, who merely adopted a reasonable interpretation of regulatory requirements which favored their interests."); see also United States v. Medica Rents Co., Ltd., No. 03-11297 et al., 2008 WL 3876307, at *3 (5th Cir. Aug. 19, 2008) (when authorities responsible for advising as to Medicare coding determinations created "substantial confusion" by giving defendant contradictory advice as to the proper Medicare code for defendant's product, summary judgment was warranted on FCA claim); United States ex rel. Lamers v. City of Green Bay, 168 F.3d 1013, 1018 (7th Cir. 1999) ("[I]mprecise statements or differences in interpretation growing out of a disputed legal question are similarly not false under the FCA."); United States v. Adler, 623 F.2d 1287, 1289 (8th Cir. 1980) ("Assuming arguendo that the claims made by appellant…were ambiguous, it is true that the government had the burden to allege and prove that the statements were false under any reasonable interpretation."); United States. v. Bryant, 556 F. Supp. 2d 378, 446 (D.N.J. 2008) ("[T]o the extent that a fraudulent misrepresentation turns on the Government's interpretation of a legal standard, the government must negative any reasonable interpretation of the legal standard under which the alleged 'misrepresentation' is not false or misleading."); United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc., 297 F. Supp. 2d 272, 291 & n.30 (D.D.C. 2004), 46 GC ¶ 91 ("Disputed legal issues do not constitute fraud.") (discussing Commercial Contractors), aff'd, 393 F.3d 1321, 1329 (D.C. Cir. 2005); cf. Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 127 S. Ct. 2201, 2216 n. 20 (2007) (noting, in the context of the Fair Credit Reporting Act, that "[w]here ... the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation, it would defy history and current thinking to treat a defendant who merely adopts one such interpretation as a knowing or reckless violator").

138/ Crane Helicopter Servs., Inc. v. United States, 45 Fed. Cl. 410, 433–34 (1999) (citing United States v. TDC Mgmt. Corp., 24 F.3d 292, 298 (D.C. Cir. 1994)).

139/ 45 Fed. Cl. at 433–34 (citing TDC Mgmt. Corp., 24 F.3d at 298, and Wang ex rel. United States v. FMC Corp., 975 F.2d 1412, 1420 (9th Cir. 1992)).

140/ SEC v. Solv–Ex Corp., 101 Fed. Appx. 271, 272–73 (10th Cir. 2004) ("Whether Mr. Curshen made material misrepresentations and whether he did so with the requisite scienter are both "'fact-specific issues.'"); Miss. Public Employees' Retirement Sys. v. Boston Scientific Corp., 523 F.3d 75, 91 (1st Cir. 2008) (noting that, in analyzing a claim for fraud, "this court has insisted on a 'fact-specific inquiry' regarding scienter").

141/ Crane Helicopter Servs., Inc., 45 Fed. Cl. at 433–34 (citing TDC Mgmt. Corp., 24 F.3d at 298).

142/ Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332, 1338 (Fed. Cir. 2009), 51 GC ¶ 84; UMC Elecs. Co. v. United States, 249 F.3d 1337, 1339–40 (Fed. Cir. 2001), 43 GC ¶ 220; Larry D. Barnes, Inc. v. United States, 45 Fed. Appx. 907, 913 (Fed. Cir. 2002) ("A contractor will not be liable if it certifies a claim in the face of a court order to do so, or if it takes reasonable steps to verify the claim, thus showing that it did not intend to defraud the government."); 45 Fed. Appx. at 915 ("Tri-Ad failed to verify its claim after being put on notice by the [Defense Contract Audit Agency] that several items were unfounded…. In failing to verify and document its claim and continuing to press those portions found to be unrecoverable, the evidence of Tri-Ad's conduct, at the very least, shows reckless disregard of the truth…."); UMC Elecs. Co., 43 Fed. Cl. 776, 793–94 (1999), 41 GC ¶ 340 (discussing United States v. Krizek, 111 F.3d 934 (D.C. Cir. 1997), and concluding that "[i]t is apparent that this reckless disregard standard prevents defendants from simply pointing to confusion over invoices and billing records as a complete defense"), aff'd, 249 F.3d 1337 (Fed. Cir. 2001).

143/ Larry D. Barnes, Inc., 45 Fed. Appx. at 912 (citing McCarthy v. United States, 229 Ct. Cl. 361, 670 F.2d 996, 1004 (1982)); 45 Fed. Appx. at 913 (claim properly forfeited under the Special Plea in Fraud where plaintiff's "certified claim included amounts for knowingly unrecoverable lost profits, a non-existent work stoppage, and 'added costs' for which no reasonable explanation has been provided").

144/ Brown v. United States, 524 F.2d 693, 705–06 (Ct. Cl. 1975), as amended (1976).

145/ Young-Montenay, Inc. v. United States, 15 F.3d 1040, 1042 (Fed. Cir. 1994), 36 GC ¶ 200 (emphasis in original).

146/ 15 F.3d at 1043.

147/ United States v. Medica-Rents Co., 285 F. Supp. 2d 742, 769 n.60 (N.D. Tex. 2003) (citing Young-Montenay for the proposition that "[s]ome courts have also held that there is a damage element: that the United States suffered damages as a result of the false or fraudulent claim"); United States v. Deloitte Consulting LLP, 512 F. Supp. 2d 920, 930 (S.D. Tex. 2007); United States v. American Healthcorp, Inc., 914 F. Supp. 1507, 1508–09 (M.D. Tenn. 1996) ("The test set out in Young–Montenay clearly states that actual damages must be alleged in order to pursue a cause of action under the False Claims Act.").

148/ 15 F.3d at 1043 n.3.

149/ 15 F.3d at 1043.

150/ 15 F.3d at 1043 n.3.

151/ 15 F.3d at 1043 n.3 (holding "the government's interest in retaining financial incentives to assure timely completion was compromised and harmed by the fraud").

152/ Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332, 1341 (Fed. Cir. 2009), 51 GC ¶ 84.

153/ Commercial Contractors, Inc. v. United States, 154 F.3d 1357, 1371 (Fed. Cir. 1998), 40 GC ¶ 471 (citing Young-Montenay for the proposition "that the government is entitled to recover treble damages under the [FCA] only if it can demonstrate that it suffered actual damages"); see also Liquidating Tr. Ester DuVal of KI Liquidation, Inc. v. United States, 89 Fed. Cl. 29, 39 (2009) (characterizing Young-Montenay as "noting that absent proof of harm Government can recover penalties, but not damages" under the FCA).

154/ 154 F.3d at 1371 (citing cases).

155/ 154 F.3d. at 1372.

156/ 154 F.3d. at 1372 (citing Restatement (Second) of Contracts §§ 347 cmt. b, 348 cmt. a (1981)).

157/ 154 F.3d at 1372 (relying upon the Restatement and Daff v. United States, 78 F.3d 1566, 1574–75 (Fed. Cir. 1996), 38 GC ¶ 176).

158/ 154 F.3d at 1372 (citing Restatement (Second) of Contracts § 348(2)(b) (1981), and 3 E. Allan Farnsworth, Farnsworth on Contracts § 12.13); 154 F.3d at 1373 ("An injured party is not entitled to recover full replacement cost for any deviation from the exact terms of the contract, however minor.").

159/ Brown v. United States, 524 F.2d 693, 706 (Ct. Cl. 1975), as amended (1976) (citing cases); see also BMY-Combat Sys. Div. of Harsco Corp. v. United States, 44 Fed. Cl. 141, 150–51 (1998) (discussing number of penalties).

160/ 41 U.S.C.A. § 7103(a)(1)–(2). Effective January 4, 2011, Congress amended certain provisions of the CDA, and recodified the Act, as amended, at 41 U.S.C.A. §§ 7101–7109. See Public Contracts Act of Jan. 4, 2011, Pub. L. No. 111–350, § 3, 124 Stat. 3677, 3816–26 (2011). Although the Public Contracts Act repealed 41 U.S.C.A. §§ 601–13, any "rights and duties that matured, penalties that were incurred, and proceedings that were begun before the date of enactment of this Act" are still governed by these sections of the U.S. Code. Pub. L. No. 111–350, § 7, 124 Stat. at 3855.

161/ 41 U.S.C.A. § 7103(a)(1)–(2).

162/ 41 U.S.C.A. § 7104(b)(1), (3).

163/ 41 U.S.C.A. § 7103(b)(1).

164/ Ingalls Shipbuilding, Inc. v. O'Keefe, 986 F.2d 486, 491–93 (Fed. Cir. 1993) (detailing legislative history behind certification requirement); J & E Salvage Co. v. United States, 37 Fed. Cl. 256, 263 (1997), aff'd, 152 F.3d 945 (Fed. Cir.), cert. denied, 525 U.S. 827 (1998); Fischbach & Moore Int'l Corp. v. Christopher, 987 F.2d 759, 763 (Fed. Cir. 1993) (determining that certification requirement "trigger[s] a contractor's potential liability for a fraudulent claim under section 604 of the [CDA]") (citation omitted); Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 547 (1999), 41 GC ¶ 282.

165/ 41 U.S.C.A. § 7103(c)(2).

166/ 41 U.S.C.A. § 7101(9).

167/ Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540 (Fed. Cir. 1988).

168/ Medina Constr., Ltd., 43 Fed. Cl. at 555–56.

169/ 43 Fed. Cl. at 556.

170/ 43 Fed. Cl. at 555 (noting that the "language in paragraph two of the final decision makes clear that the [CO] impermissibly based his determination that [the contractor] had breached the contract upon his concerns surrounding the 'apparently fraudulent invoices'").

171/ 43 Fed. Cl. at 556.

172/ 43 Fed. Cl. at 556; see also Newtech Research Sys. LLC v. United States, 99 Fed. Cl. 193, 206–07 (2011) (discussing Medina Constr., Ltd.).

173/ Daff v. United States, 78 F.3d 1566, 1570 (Fed. Cir. 1996), 38 GC ¶ 176.

174/ 78 F.3d at 1570.

175/ 78 F.3d at 1570–71.

176/ 78 F.3d at 1572.

177/ 78 F.3d at 1572.

178/ Newtech Research Sys. LLC v. United States, 99 Fed. Cl. 193, 206–07 (2011).

179/ 99 Fed. Cl. at 207 .

180/ Martin J. Simko Constr., Inc. v. United States, 852 F.2d 540, 545–47 (Fed. Cir. 1988).

181/ 852 F.2d at 548 ("The exception for fraud claims is not limited to counterclaims, but is equally applicable to the Special Plea in Fraud under 28 U.S.C.A. § 2514. Just as the Claims Court did not distinguish between this defense and the False Claims Act counterclaim, for purposes of exercising jurisdiction, we discern no difference."); 852 F.2d at 542 n.1 ("It is irrelevant, in our opinion, whether the government raises the Special Plea as a separate defense or as a counterclaim. As we explain, infra, because the Special Plea is based on fraud, it need not be the subject of a contracting officer's decision before the Claims Court may consider it.").

182/ 852 F.2d at 546 (discussing Joseph Morton Co. v. United States, 757 F.2d 1273, 1275 (Fed. Cir. 1985)).

183/ 852 F.2d at 546 (discussing Joseph Morton Co., 757 F.2d at 1275).

184/ 852 F.2d at 546 (discussing Joseph Morton Co., 757 F.2d at 1281).

185/ 852 F.2d at 546 ("Because such a determination did not require the CO to make a decision as to liability for the fraud claims themselves, the court found it consistent with the overall purposes of the CDA to require the CO's decision on damages before the Claims Court could assert jurisdiction over the government's counterclaims.").

186/ Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332 (Fed. Cir. 2009), 51 GC ¶ 84.

187/ 557 F.3d at 1334–1335.

188/ 557 F.3d at 1334.

189/ 557 F.3d at 1334–1335.

190/ 557 F.3d at 1334–1335.

191/ 557 F.3d at 1334–1335.

192/ 557 F.3d at 1334–1335.

193/ 557 F.3d at 1335 (discussing Daewoo, 73 Fed. Cl. 547, 597 (2006)).

194/ 557 F.3d at 1335 (discussing Daewoo, 73 Fed. Cl. at 584).

195/ 557 F.3d at 1336 (quoting UMC Elecs. Co. v. United States, 43 Fed. Cl. 776, 803 (1999), 41 GC ¶ 340, aff'd, 249 F.3d 1337 (Fed. Cir. 2001), 43 GC ¶ 220).

196/ 557 F.3d at 1338 (citing Daewoo, 73 Fed. Cl. at 573, 582).

197/ 557 F.3d at 1338 (citing Daewoo, 73 Fed. Cl. at 573).

198/ 557 F.3d at 1338 (citing Daewoo, 73 Fed. Cl. at 572, 574–76).

199/ 557 F.3d at 1339.

200/ 557 F.3d at 1339–40 (citing Itek Corp. v. First Nat'l Bank of Boston, 730 F.2d 19, 25 (1st Cir. 1984); Ward Petroleum Corp. v. Fed. Deposit Ins. Corp., 903 F.2d 1297, 1301 (10th Cir. 1990)).

201/ See also UMC Elecs. Co. v. United States, 43 Fed. Cl. 776, 801–03 (1999), 41 GC ¶ 340, aff'd, 249 F.3d 1337 (Fed. Cir. 2001), 43 GC ¶ 220 ("This court finds that UMC eliminated the government's opportunity to negotiate a fair resolution of UMC's claim by misrepresenting that its claim was based on actual costs; by concealing that its claim included future costs, estimates, judgmental factors, and contingencies; and by withholding its invoice costs, and other cost or pricing data."); 43 Fed. Cl. at 809 ("UMC's false and misleading statements were all designed to hide the simple fact that UMC has claimed in submissions to the contracting officer, and continues to claim in the complaint filed in this court, over $223,500.00 in material costs (including burden) that its vendors never invoiced and UMC never paid.").

202/ See also UMC Electronics Co., 43 Fed. Cl. at 816–17 (discussing United States v. White, 765 F.2d 1469, 1481 (11th Cir. 1985), and holding that contractors have a "duty to make sure that estimates reflect reasonably incurred costs in a claim in which actual cost data is available").

203/ Commercial Contractors, Inc. v. United States, 154 F.3d 1357, 1362 (Fed. Cir. 1998), 40 GC ¶ 471.

204/ Daewoo, 557 F.3d at 1340–41 (discussing Young-Montenay, Inc. v. United States, 15 F.3d 1040, 1042–43 (Fed. Cir. 1994), 36 GC ¶ 200); Liquidating Tr. Ester DuVal of KI Liquidation, Inc. v. United States, 89 Fed. Cl. 29, 41–42 (2009) ("the consequences of each [fraud counterclaim]—forfeiture of plaintiff's entire claim versus comparatively minimal penalties under the FCA—exemplify the perceived gravitas of the fraud under each statute").

205/ Daewoo, 557 F.3d at 1341 n.10.

206/ Veridyne Corp. v. United States, 83 Fed. Cl. 575, 577 (2008) ("Because Mod 0023 should be declared void ab initio, defendant sought forfeiture of all monies that it had paid to plaintiff on invoices for services performed pursuant to work orders issued under Mod 0023."); 83 Fed. Cl. at 586 ("Indeed, defendant's counterclaim reads less like the claim contemplated by 28 U.S.C. § 2514 and more like a claim that plaintiff committed fraud in the inducement of Mod 0023. This distinction is evident in the phrasing of defendant's assertion of fraud as an affirmative defense to plaintiff's claims.").

207/ 83 Fed. Cl. at 581.

208/ 83 Fed. Cl. at 581 (discussing Long Island Sav. Bank, FSB v. United States, 503 F.3d 1234 (Fed. Cir. 2007), 49 GC ¶ 72).

209/ 83 Fed. Cl. at 586 ("The case law, properly read, does not support defendant's argument that the appropriate remedy for any contract that is void ab initio is forfeiture of monies already paid or the denial of recovery in quantum meruit or quantum valebat.").

210/ 83 Fed. Cl. at 586 (citing Baird v. United States, 76 Ct. Cl. 599, 610–13 (1933)); see also Liquidating Trustee Ester DuVal of KI Liquidation, Inc. v. United States, 89 Fed. Cl.29, 39 (2009) (same).

211/ Kellogg Brown & Root Servs., Inc. v. United States, 99 Fed. Cl. 488, 496 (2011).

212/ 99 Fed. Cl. at 496.

213/ 99 Fed. Cl. at 496.

214/ 99 Fed. Cl. at 496.

215/ 99 Fed. Cl. at 497.

216/ 99 Fed. Cl. at 500; see also 99 Fed. Cl. at 501 ("Not only does this expansion depart from Court of Claims precedent, it does not comport with the Federal Circuit's articulation of the legal requirement of the forfeiture statute[.]").

217/ 99 Fed. Cl. at 501; see 99 Fed. Cl. at 502 ("More fundamental, however, is the problem that several of the Court of Federal Claims decisions received summary affirmance or were affirmed on other grounds. Although not precedential, loose language can be adopted inadvertently on review. This is detrimental to the integrity of precedent, and plaintiff justifiably is concerned that the Court of Federal Claims could become a preferred forum for government fraud claims.").

218/ 99 Fed. Cl. at 501.

219/ 99 Fed. Cl. at 499 (discussing O'Brien Gear & Mach. Co. v. United States, 219 Ct. Cl. 187, 591 F.2d 666 (1979)).

220/ O'Brien, 591 F.2d at 672–73 (holding that "[t]he fraud was practiced with a deliberate, knowing intent to deceive the court into making a decision favorable to the plaintiff" and rejecting plaintiff's contention its claim before the court was not "a claim for money").

221/ 591 F.2d at 678.

222/ Crane Helicopter Servs., Inc. v. United States, 45 Fed. Cl. 410, 431 (1999) ("There is no suggestion in the statute that a contract can be divided up into performance sectors to allow payment of some claims on a corrupted contract while other claims on the same contract are forfeited. The effects of a fraudulent act, therefore, have an impact on every aspect of contract performance and the entirety of the claim, making it impossible to distinguish between tainted and untainted claims, for which reason the contractor may not recover on any claims under the contract."); Ab-Tech Constr., Inc. v. United States, 31 Fed. Cl. 429, 434–35 (1994).

223/ 99 Fed. Cl. at 511 (discussing United States ex rel. Marcus v. Hess, 317 U.S. 537, 543–45 (1943)).

224/ Young-Montenay, Inc. v. United States, 15 F.3d 1040, 1043 (Fed. Cir. 1994), 36 GC ¶ 200.

225/ J.P. Stevens & Co. v. Lex Tex, Ltd., 747 F.2d 1553, 1559 (Fed. Cir. 1984), cert. denied, 474 U.S. 822 (1985).

226/ Crane Helicopter Servs., Inc., 45 Fed. Cl. at 430 n.25 (citing 747 F.2d at 1559).

227/ Crane Helicopter Servs., Inc., 45 Fed. Cl. at 430 n.25 (citing BMY-Combat Sys. Div. of Harsco Corp. v. United States, 38 Fed. Cl. 109, 128 (1997); Colorado State Bank of Walsh v. United States, 18 Cl. Ct. 611, 628–29 (1989), aff'd, 904 F.2d 45, 1990 WL 62180 (Fed. Cir. 1990) (table)); see also Kellogg Brown & Root Servs., Inc. v. United States, 99 Fed. Cl. 488, 514 (2011).

228/ Crane Helicopter Servs., Inc., 45 Fed. Cl. at 430 n.25 (citing Young-Montenay, Inc., 15 F.3d at 1042, and Commercial Contractors, Inc. v. United States, 154 F.3d 1357, 1362 (Fed. Cir. 1998), 40 GC ¶ 471).

229/ Crane Helicopter Servs., Inc., 45 Fed. Cl. at 430 n.25.

230/ Long Island Sav. Bank, FSB v. United States, 503 F.3d 1234, 1246 (Fed. Cir. 2007), 49 GC ¶ 72 (discussing J.E.T.S., Inc. v. United States, 838 F.2d 1196, 1200 (Fed. Cir. 1988)).

231/ Stouck & Caplen, "The Forfeiture of Claims Act Today," Briefing Papers No. 07-9 (Aug. 2007) ("Fraud At Contract Formation"); cf. KBR, 99 Fed. Cl. at 515; Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332, 1341 n.10 (Fed. Cir. 2009), 51 GC ¶ 84 (concluding that the court "need not address the finding of the [COFC] that Daewoo fraudulently induced the government to award the road construction contract, since, as the court correctly concluded, fraudulent inducement in this case" results in no additional monetary damages); but see Veridyne Corp. v. United States, 83 Fed. Cl. 575, 582 (2008) ("Although the court held that the contract in question in Long Island was 'tainted at its inception by fraud and void ab initio,' [the court] did not rule on forfeiture of claims or the forfeiture of any monies already paid to or benefit conferred upon plaintiff." (internal citation omitted)).

232/ 503 F.3d at 1248–50.

233/ 503 F.3d at 1249 (quoting Restatement (Second) of Agency § 275 (1958)).

234/ 503 F.3d at 1250.

235/ U.S. v. Science Applications Int'l Corp., 626 F.3d 1257, 1274–75 (D.C. Cir. 2010) (explaining that the "collective knowledge" theory allows "a plaintiff to prove scienter by piecing together scraps of 'innocent' knowledge held by various corporate officials, even if those officials never had contact with each other or knew what others were doing in connection with a claim seeking government funds" (United States ex rel. Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 918 n. 9 (4th Cir. 2003), 46 GC ¶ 24).

236/ 626 F.3d at 1275.

237/ 626 F.3d at 1275.

238/ Alcatec, LLC v. United States, No. 08–113C, 2011 WL 3691679, at * 21 (Fed. Cl. Aug. 24, 2011).

239/ 2011 WL 3691679, at * 21 (citing Long Island Sav. Bank, FSB, 503 F.3d at 1249).

240/ Kit-San-Azusa v. United States, 86 F.3d 1175, 1996 WL 232647, at *2 (Fed. Cir. 1996) (table).

241/ Placeway Constr. Corp. v. United States, 920 F.2d 903 (Fed. Cir. 1990), 32 GC ¶ 320.

242/ Kit-San-Azusa, 1996 WL 232647, at *2 (discussing Placeway Constr. Corp., 920 F.2d 903).

243/ See Placeway Constr. Corp. v. United States, 18 Cl. Ct. 159, 164–65 (1989), aff'd in part and vacated in part, 920 F.2d 903 (Fed. Cir. 1990).

244/ Teller Envtl. Sys., Inc. v. United States, 802 F.2d 1385, 1388–89 (Fed. Cir. 1986),

245/ Kit-San-Azusa, 1996 WL 232647, at *2 (discussing Placeway Constr. Corp., 920 F.2d 903).

246/ See Placeway Constr. Corp. v. United States, 920 F.2d 903, 907 (Fed. Cir. 1990), 32 GC ¶ 320.

247/ Kit-San-Azusa, 1996 WL 232647, at *2.

248/ M. Maropakis Carpentry, Inc. v. United States, 609 F.3d 1323, 1330 (Fed. Cir. 2010), 52 GC ¶ 225.

249/ 609 F.3d at 1330.

250/ 609 F.3d at 1330.

251/ 609 F.3d at 1330–31.

252/ 609 F.3d at 1331.

253/ 609 F.3d at 1331. But see Nash, "Defense to a Government Claim Is a Contractor Claim: A Weird Thought," 24 Nash & Cibinic Rep. ¶ 42 (Sept. 2010) ("It is difficult to conceive of a more bizarre holding than

this rule that if a defense looks like an affirmative claim, it can only be asserted if it meets the standard of being a proper CDA claim.").

254/ Jennie–O Foods, Inc. v. United States, 217 Ct. Cl. 314, 580 F.2d 400, 412 (1978).

255/ DJ Mfg. Corp. v. United States, 86 F.3d 1130, 1133 (Fed. Cir. 1996), 38 GC ¶ 344.

256/ Priebe & Sons, Inc. v. United States, 332 U.S. 407, 411, 68 S. Ct. 123, 126 (1947).

257/ Jennie–O Foods, Inc., 580 F.2d at 413–14; see also FAR 11.501 (noting that use of a liquidated damages clause is proper if damages "would be difficult or impossible to estimate accurately or prove" and that the "rate must be a reasonable forecast" of the anticipated damages).

258/ Kothe v. R.C. Taylor Trust, 280 U.S. 224, 226 (1930).

259/ Wise v. United States, 249 U.S. 361, 365 (1919).

260/ Priebe & Sons, Inc., 332 U.S. at 413; United States v. Bethlehem Steel Co., 205 U.S. 105, 118–21 (1907).

261/ Priebe & Sons, Inc., 332 U.S. at 412; accord Bethlehem Steel Co., 205 U.S. at 119 (noting that courts will enforce liquidated damages clauses "without proof of the damages actually sustained"); Steve Kirchdorfer, Inc. v. United States, 229 Ct. Cl. 560, 565–67 (1981) (upholding an award of liquidated damages although no actual damages were sustained); Young Assocs., Inc. v. United States, 200 Ct. Cl. 438, 471 F.2d 618, 622 (Ct. Cl. 1973) ("It is enough if the amount stipulated is reasonable for the particular agreement at the time it is made.").

262/ DJ Mfg. Corp. v. United States, 86 F.3d 1130, 1134 (Fed. Cir. 1996), 38 GC ¶ 344; Jennie–O Foods, Inc., 580 F.2d at 414.

263/ DJ Mfg. Corp., 86 F.3d at 1134.

264/ 86 F.3d at 1137; see also 86 F.3d at 1136 (noting that courts will enforce a liquidated damages clause, "regardless of how the liquidated damage figure was arrived at," if the amount of liquidated damages is reasonable).

265/ 86 F.3d at 1137.

266/ K-Con Bldg. Sys., Inc. v. United States, No. 05–1054C, 2011 WL 3634164, at *18 (Fed. Cl. Aug. 19, 2011).

267/ Compare P & D Contractors, Inc. v. United States, 25 Cl. Ct. 237, 241, aff'd mem., 985 F.2d 583 (Fed. Cir. 1992) ("Reasonableness [of the liquidated damages] ... is to be determined at the time of [contract] execution. [The contractor] failed to argue the reasonableness of the liquidated damages at the time it executed the contract. Therefore, [the contractor] is foreclosed from doing so now."), with K-Con Bldg. Sys., Inc., 2011 WL 3634164, at *12–13 ("Thus, to the extent that certain nonbinding decisions of the Claims Court might be construed to suggest that a liquidated damages clause may only be challenged at the time of contract formation, this court declines to follow that reasoning.").

268/ Seaboard Lumber Co. v. United States, 308 F.3d 1283, 1300–01 (Fed. Cir. 2002), 44 GC ¶ 427.

269/ See Cascade Pac. Int'l v. United States, 773 F.2d 287, 293 (Fed. Cir. 1985) (citing Marley v. United States, 191 Ct. Cl. 205, 423 F.2d 324, 333 (1970); Rumley v. United States, 152 Ct. Cl. 166, 285 F.2d 773, 777 (1961); see also Calimari & Perillo, Contracts 547 (2d ed. 1977)).

270/ Armour of Am. v. United States, 96 Fed. Cl. 726, 760 (2011) (citing cases).

271/ 96 Fed. Cl. at 760 (citing Seaboard Lumber Co. 308 F.3d at 1300–01 ("Thus, in this circuit [the Federal Circuit], where a contractor's breach results in the necessity for reprocurement of substantially similar goods or services, the burden of proving the effects of changes in the reprocurement contract terms on the contract price is properly placed on the breaching contractor.")).

272/ Cascade Pac. Int'l, 773 F.2d at 294; see also United States v. Axman, 234 U.S. 36, 45 (1914) (concluding that the work done under the reprocurement contract "was not the work which the first contractor had agreed to perform," and "in a material manner was different from the contract first entered upon").

273/ See Associated Traders, Inc. v. United States, 144 Ct. Cl. 744, 751, 169 F. Supp. 502, 506 (1959) (finding that adhesive sought under the reprocurement contract met the specifications of the original contract).

274/ Cascade Pac. Int'l v. United States, 773 F.2d at 294 (citing Fairfield Scientific Corp. v. United States, 222 Ct. Cl. 167, 611 F.2d 854, 863–66 (1979)); see also FAR 49.402–6(c) ("If repurchase is made at a price over the price of the supplies or services terminated, the contracting officer shall, after completion and final payment of the repurchase contract, make a written demand on the contractor for the total amount of the excess, giving consideration to any increases or decreases in other costs such as transportation, discounts, etc.").

275/ Armour of Am., 96 Fed. Cl. at 762 (citing Romeo P. Yusi & Co., ASBCA No. 19810, 76–1 BCA ¶ 11835, at 56,595; Gen. Dynamics Corp. v. United States, 229 Ct. Cl. 399, 410, 412, 671 F.2d 474, 480, 481 (1982); Spectrum Gov't Healthcare Servs., ASBCA No. 48149 et al., 96–2 BCA ¶ 28526, at 142,455–56.

276/ Armour of Am., 96 Fed. Cl. at 762 (citing Cascade Pac. Int'l v. United States, 773 F.2d at 294).

277/ 96 Fed. Cl. at 763.

278/ 96 Fed. Cl. at 769–70; see also Southeastern Airways Corp. v. United States, 230 Ct. Cl. 47, 65–66, 673 F.2d 368, 379–80 (1982) (permitting award of administrative costs in a default termination); Tester Corp. v. United States, 1 Cl. Ct. 370, 376 (1982) ("[T]he government has the right to seek common law damages for breach of contract following a termination for default," including administrative costs, if those costs are the "foreseeable, direct, natural and proximate results of the breach." (citing William Cramp & Sons v. United States, 50 Ct. Cl. 179, 191 (1915)), judgment entered, 1 Cl. Ct. 368 (1983) (other citations omitted)); see also Cibinic, Nash & Nagle, Administration of Government Contracts 1022 (4th ed. 2006) (noting that the COFC permitted collection of administrative costs incurred by the Government in connection with a reprocurement).

279/ Brown v. United States, 524 F.2d 693, 705 (Ct. Cl. 1975), as amended (1976) ("plaintiff is estopped from denying in this civil litigation those facts regarding his activities established by the jury

verdict against him in the earlier criminal proceeding"); see also O'Brien Gear & Mach. Co. v. United States, 591 F.2d 666, 672 (Ct. Cl. 1979) (holding, with respect to the FFCA, that "the former conviction is by collateral estoppel binding on the plaintiff in this court").

280/ Afro-Lecon, Inc. v. United States, 820 F.2d 1198, 1203 (Fed. Cir. 1987) ("The scope of civil discovery is broad and requires nearly total mutual disclosure of each party's evidence prior to trial.").

281/ Ampetrol, Inc. v. United States, 30 Fed. Cl. 320, 321 (1994).

282/ 30 Fed. Cl. at 322 (quoting Litton Sys., Inc. v. United States, 215 Ct. Cl. 1056, 1058 (1978)); see also St. Paul Fire & Marine Ins. Co. v. United States, 24 Cl. Ct. 513, 516 (1991) (where Government sought stay, court recognized that "the reason why courts attempt to avoid concurrent civil and criminal suits is that 'the broader discovery permissible in civil cases should not be used to compromise parallel criminal proceedings'" (quoting 215 Ct. Cl. at 1058)).

283/ Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 284 (1989) (citing Wilson v. United States, 221 U.S. 361 (1911), for the proposition that "a corporation has no Fifth Amendment privilege against self-incrimination"); United States v. Payment Processing Center, LLC, 443 F. Supp. 2d 728, 734 (E.D. Pa. 2006) ("The PPC defendants must live with the consequences of their choice. If questioned [in the civil action], they may assert their Fifth Amendment right not to incriminate themselves, but if they do, the factfinder…is entitled to draw an adverse inference from the assertion…. PPC has no Fifth Amendment rights,…but the individual defendants may assert a Fifth Amendment right in their personal capacity. However difficult the dilemma defendants face, it is one Congress envisioned and the Constitution allows." (internal citations omitted)).

284/ Ulysses, Inc. v. United States, No. 06-436C, 2008 WL 4222156 (Fed. Cl. Sept. 8, 2008) (noting that "[t]his action has been stayed pending an ongoing criminal investigation…because it appeared that such investigation may have involved matters at issue in the instant action").

285/ Afro-Lecon, Inc., 820 F.2d at 1203 ("The broad scope of civil discovery may present to both the prosecution, and at times the criminal defendant, an irresistible temptation to use that discovery to one's advantage in the criminal case.").

286/ Waldbaum v. Worldvision Enters., Inc., 84 F.R.D. 95 (S.D.N.Y. 1979).

287/ 84 F.R.D. at 96 (quoting United States v. Simon, 373 F.2d 649, 652 (2d Cir.), vacated as moot, 389 U.S. 425 (1967)); Hearne v. United States, 7 Cl. Ct. 362, 370 (1985) (citing United States v. Kordel, 397 U.S. 1, 11–13 (1970), for the proposition that "the Constitution of the United States does not require a stay of civil or administrative proceeding[s] pending the outcome of criminal proceedings").

288/ 84 F.R.D. at 96 (quoting Simon, 373 F.2d at 653 (internal quotes omitted)).

289/ 84 F.R.D. at 96–97 (internal citations omitted); see also Medlin v. Andrew, 113 F.R.D. 650, 652–53 (M.D.N.C. 1987) (citing Waldbaum with approval, rejecting "plaintiff's request for a protective order prohibiting her deposition," and noting that "[n]ot only are protective orders prohibiting depositions rarely granted, but plaintiff has a heavy burden of demonstrating good cause for such an order"); United States v. United Bhd. of Carpenters & Joiners of Am., 782 F. Supp. 920, 925 (S.D.N.Y. 1992) (citing Waldbaum with approval); United States v. Int'l Bhd. of Teamsters, 247 F.3d 370, 388 (2d Cir. 2001) (quoting Simon, 373 F.2d at 653, with approval).

290/ Jones v. B.C. Christopher & Co., 466 F. Supp. 213, 224 (D.C. Kan. 1979).

291/ 466 F. Supp. at 224 ("Although he does not waive his recourse to Fifth Amendment protections by filing suit, we question whether he should be privileged to prosecute an action with the hope of recovering damages while maintaining his role in the underlying transactions in a shroud of secrecy."); see also United States v. Ianniello, No. 86 Civ. 1552–CSH, 1986 WL 7006, at *2–3 (S.D.N.Y. June 17, 1986) (citing Waldbaum with approval, and commenting that "the Supreme Court in [United States v. Kordel, 397 U.S. 1, 11 (1970)] explicitly…rejected the [n]otion that civil proceedings should routinely be deferred pending final resolution of criminal proceedings").

292/ Ampetrol, Inc. v. United States, 30 Fed. Cl. 320, 321 (1994).

293/ 30 Fed. Cl. at 321 (quoting St. Paul Fire & Marine Ins. Co. v. United States, 24 Cl. Ct. 513, 515 (1991)).

294/ 30 Fed. Cl. at 321 (quoting St. Paul, 24 Cl. Ct. at 515).

295/ Afro-Lecon, Inc. v. United States, 820 F.2d 1198 (Fed. Cir. 1987).

296/ 820 F.2d at 1202 (citing Secs. & Exch. Comm'n v. Dresser Indus., Inc., 628 F.2d 1368, 1375 (D.C. Cir.), cert. denied, 449 U.S. 993(1980); United States v. Kordel, 397 U.S. 1, 12 n. 27 (1970); Landis v. North Am. Co., 299 U.S. 248, 254–55 (1936)).

297/ 820 F.2d at 1202 (quoting Dresser, 628 F.2d at 1375).

298/ 820 F.2d at 1205.

299/ 820 F.2d at 1206.

300/ 820 F.2d at 1206 ("We agree with the Fifth Circuit and decline to accept the wooden plaintiff-defendant distinction.").

301/ Dorn, "Settlements in the United States Court of International Trade: Practices and Policies," 19 Tul. J. Int'l & Comp. L. 433, 445 (Spring 2011) ("Settlement of cases in which the U.S. government is a party involves special considerations. First, when the DOJ is determining the appropriateness of compromise, it weighs not only the litigation risk but also policy considerations…. Second, while cost is often a major consideration when private parties involved in litigation are considering settlement, it is not as significant a factor in litigation in which the U.S. government is a party. For private parties, settlement is often much less costly than litigation. For the DOJ, however, cost is not a driving factor, because the costs of litigation are considered to be overhead.").

302/ Daewoo Eng'g & Constr. Co. v. United States, 557 F.3d 1332 (Fed. Cir. 2009), 51 GC ¶ 84.

303/ Commercial Contractors, Inc. v. United States, 154 F.3d 1357 (Fed. Cir. 1998), 40 GC ¶ 471.