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The False Claims Act and the Proposed Program Fraud Civil Remedies Act: Complementary Partners in the Prevention of Federal Program Fraud

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Notes

The False Claims Act and the Proposed Program Fraud Civil Remedies Act: Complementary Partners in the Prevention of Federal Program Fraud

INTRODUCTION

"'When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is communicated.' The will of Congress is no less subject to inevitable distortion by reason of the inadequate medium through which it must be communicated."

Although much attention has recently been given to the loss of federal funds due to fraud, the problem is not new to the United States Government. In fact, it was during the Civil War that Congress, reacting to reports of widespread fraud, corrup-

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2 In his Feb. 18, 1981 State of the Union Message on Economic Recovery, President Reagan cited an unnamed government study estimating that "fraud may account for anywhere from one to ten percent—as much as twenty-five billion dollars—of federal expenditures for social programs." See 47 VITAL SPEECHES 318, 321 (Mar. 15, 1981). But see Eagleton & Shapiro, Federal Fraud, Waste and Abuse: Causes and Responses, 1983 Gov't Acct. J. 1 where it is stated:
Ronald Reagan's 1980 pledge to balance the Federal Budget by eliminating fraud, waste and mismanagement is to be categorized as both "campaign oratory" and a pipe dream. There has never been a line item labeled "fraud, waste and abuse" in the Federal Budget, waiting to be red-penciled. Nor has there been any serious prospect that this complex problem could be eradicated overnight.
tion and abuse, enacted the False Claims Act. To date, the False Claims Act remains the Government's "principal civil fraud statute."

Unfortunately, while the False Claims Act has changed very little over the last century, the methods of defrauding the federal government and the costs to the taxpayer have increased dramatically. Responding to the challenge presented by federal program abuse, government lawyers have encountered obstacles in applying the False Claims Act. Early decisions, construing

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3 This bill has been prepared at the urgent solicitation of the officers who are connected with the administration of the War Department and the Treasury Department. The Country, as we know, has been full of complaints respecting the frauds and corruptions practiced in obtaining pay from the Government during the present War....


5 I REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE UNITED STATES, FRAUD IN GOVERNMENT PROGRAMS: HOW EXTENSIVE IS IT? HOW CAN IT BE CONTROLLED? 32 (1981) [hereinafter cited as REPORT TO THE CONGRESS]. Former Attorney General William Saxbe described the False Claims Act as "the most important tool" in the Justice Department's fight against fraud. See 1975 ATT'Y GEN. ANN. REP. 68.


6 See notes 26-29 infra and accompanying text discussing recent changes in the Act.

7 The Comptroller General has pointed out that measuring fraud only in terms of dollars lost fails to account for its significant nonmonetary effects. The perception, valid or not, that the public can deceive the Government without fear of being reprimanded undermines public confidence in the Government's ability to manage its programs effectively. See REPORT TO THE CONGRESS, supra note 5, at 15.

the Act narrowly as penal, now conflict with more modern needs for a remedial civil statute. Consequently, the Justice Department has been limited to pursuing only those instances of fraud in which the Government "has suffered substantial and identifiable monetary loss."

Application of established rules of statutory construction in a more consistent manner may remove some of the confusion, thereby offering a more certain judicial remedy. However, not all the confusion can be addressed in this fashion. Therefore, this Note will suggest possible amendments to the False Claims Act.

In addition, a recently introduced administrative mechanism allowing affected agencies to impose civil monetary penalties for fraud will be analyzed and strongly recommended. Enactment of this administrative remedy entitled the Program Fraud Civil Remedies Act of 1985, will launch a three-pronged attack including judicial, administrative and private remedies on dis-

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9 In United States v. McNinch, 356 U.S. 595, 598-99 (1958), the Court explained that in an action for civil penalties under former § 231 (now 31 U.S.C. § 3729), the term "claim" was to be strictly construed so as not to include an application for loan insurance because the statute providing the penalties incorporated criminal sanctions as tests for liability. Thus, such a statute must be carefully restricted to its literal terms. See note 47 infra for a definition of a "penal" statute.

10 In United States v. Neifert-White Co., 390 U.S. 228, 232-33 (1968), the Court held that the False Claims Act was "remedial" and therefore should not be read narrowly to include only a demand based on the Government's liability. In the Court's view, the Act should apply to all fraudulent attempts to cause the Government to pay out money. See also United States v. Alperstein, 183 F. Supp. 548, 550-52 (S.D. Fla. 1960) aff'd 291 F.2d 455 (5th Cir. 1961) (false claim not confined to a claim for money or property but comprehends a claim for valuable services). See note 58 infra for the definition of a remedial statute. See generally Note, The Federal False Claims Act: A "Remedial" Alternative for Protecting the Government from Fraudulent Practices, 52 S. Cal. L. Rev. 159 (1978-79) (providing an excellent discussion of the distinctions between "penal" and "remedial" statutes).


12 Recent commentators have suggested that reading the statute in light of its "remedial" purpose brings clarity to the sometimes confusing case law interpreting the statute. See, e.g., Note, supra note 10, at 178 ("The major flaw in the line of cases that has strictly construed 'claims' to include only 'demands for money or property' is that this interpretation frustrates the remedial purpose of the Act.").


14 One of the unique aspects of the False Claims Act is the qui tam action, defined as:

An action brought by an informer, under a statute which establishes a
honest dealings with the federal government. In this manner, Congress may not only recover lost dollars but also prevent a "loss of confidence in the government's ability to effectively and efficiently manage its programs."

I. THE FALSE CLAIMS ACT

A. Historical Background

As originally enacted in 1863, the False Claims Act imposed both criminal and civil penalties on any person, whether military personnel or civilian, who made false or fraudulent claims against the Government during times of war. As originally enacted in 1863, the False Claims Act imposed both criminal and civil penalties on any person, whether military personnel or civilian, who made false or fraudulent claims against the Government during times of war. The Revised Statutes of penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state.

BLACK'S LAW DICTIONARY 1126 (rev. 5th ed. 1979). Under the present statute, 31 U.S.C. § 3730(a), (b)(1)-(2) (1982), a plaintiff can proceed with a civil action only after submitting the evidence underlying the action to the Attorney General. If the Government fails to intervene or intervenes but fails to proceed with reasonable diligence, the plaintiff can then proceed with the qui tam action. Otherwise, the plaintiff's private action is barred and the Government will proceed with the action. 31 U.S.C. § 3730(b)(3).

Prior to 1943, plaintiffs could base civil actions against defendants solely on information obtained from government documents or even criminal indictments. In 1943 the Supreme Court in United States ex rel. Marcus v. Hess, 317 U.S. 537, 542 (1943), upheld the right to proceed with a qui tam action even though all the plaintiff's information was obtained directly from the Government. Congress quickly responded by amending the statute to its present form. See Act of Dec. 23, 1943, ch. 377, 57 Stat. 608. See note 31 infra for the text of the present statute granting private plaintiffs standing.

According to one commentator, this amendment was clearly aimed at restricting the qui tam provisions of the statute to allow for private actions only when the government had no prior knowledge of the fraud. As a result, the qui tam action may not be an ineffective tool for the private plaintiff. See Comment, Qui Tam Actions: The Role of the Private Citizen in Law Enforcement, 20 UCLA L. Rev. 778, 793-94 (1972-73) [hereinafter cited as Qui Tam Actions]. Cf. Comment, Qui Tam Suits Under the Federal False Claims Act: Tool of the Private Litigant in Public Actions, 67 Nw. U.L. Rev. 446 (1972) [hereinafter cited as Private Litigant] (qui tam actions are potentially an effective method for public interest groups to use in recovering abused or misapplied public funds. For a further discussion of the private suit under the False Claims Act see notes 30-35 infra and accompanying text."

" See REPORT TO THE CONGRESS, supra note 5, at 15.

16 Act of Mar. 2, 1863, ch. 67, 12 Stat. 696-99. Sections one and two subjected military personnel to fines, imprisonment and even court-martial for presenting false or fraudulent claims to the Government. Section three subjected civilians to a $2,000 forfeiture and double damages for committing any of the acts proscribed by sections one and two. In addition, the civilian could be fined and imprisoned.
1874 split the original False Claims Act into two sections. Revised Statutes section 5438 imposed criminal liability, including fines and imprisonment, on anyone presenting fraudulent claims to the Government in the manner proscribed by the original act. Revised Statutes section 3490 subjects civilians to the same $2,000 forfeitures and double damages found in the original Act for committing any of the acts punishable under criminal section 5438. Although section 5438 was later repealed, the tests of liability found in that provision continued to be incorporated by reference into the civil provisions of the

The Revised Statutes of 1874, approved by the Act of June 20, 1874, ch. 333, 18 Stat. 113, expressly overruled and repealed their original Statutes at Large texts. Thus, laws found in the Revised Statutes are the authoritative text and are considered legal evidence of the law (positive law) unless they are subsequently reenacted as one of the "positive law" titles of the United States Code. Until enactment as a positive law, United States Code provisions remain only prima facie evidence of the law. 1 U.S.C. § 204(a) (1982). See also COHEN & BERRY, How To FIND THE LAW 189-90 (West 1983).

REV. STAT. § 5438 (1874) provided in pertinent part:
Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States knowing such claim to be false ... or who ... causes to be made ... any false bill ... or who enters into agreement ... to defraud the Government ... or who, having charge ... of any money ... conceal[s] such money ... shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand dollars nor more than five thousand dollars.

REV. STAT. § 3490 (1874) provided in pertinent part:
Any person ... who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "Crimes," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained ... .

False Claims Act. It was this anomalous situation, where civil damages were imposed under section 3490 for conduct punishable as a crime under former section 5438, that led to the confusion in interpreting the False Claims Act.

B. The False Claims Act Today

In 1982, former sections 231-35 of the False Claims Act were recodified and reenacted in 31 U.S.C. sections 3729-3731. Though unchanged in substance from the prior codification,
the present version presents, in a more organized, readable fashion, the types of conduct punishable under the statute.\textsuperscript{29}

As did old section 232,\textsuperscript{30} section 3730 grants the United States Attorney General and private plaintiffs the right to bring civil actions against those who violate the provisions of section 3729.\textsuperscript{31} However, the right of the private plaintiff to proceed with the action is limited by requiring that all material evidence first be turned over to the Government,\textsuperscript{32} thereby permitting assurance

\begin{itemize}
\item \textsuperscript{29} 31 U.S.C. § 3729 (1982) provides:
\begin{enumerate}
\item A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of $2,000, an amount equal to 2 times the amount of damages the Government sustains, because of the act of that person, and costs of the civil action, if that person—
\begin{enumerate}
\item knowingly presents, or causes to be presented, to an officer or employee of the Government or a member of an armed force a false or fraudulent claim for payment or approval;
\item knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved;
\item conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;
\item has possession, custody, or control of public property or money used, or to be used, in an armed force and intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;
\item authorized to make or deliver a document certifying receipt of property used, or to be used, in an armed force and intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; or
\item knowingly buys, or receives as a pledge of an obligation or debt, public property from a member of an armed force who lawfully may not sell or pledge the property.
\end{enumerate}
\end{enumerate}


\item \textsuperscript{31} 31 U.S.C. § 3730(a)-(b)(1) (1982) provides in part:
\begin{enumerate}
\item The Attorney General diligently shall investigate a violation under section 3729 of this title. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person . . . .
\item A person may bring a civil action for a violation of section 3729 of this title for the person and for the United States Government. The action shall be brought in the name of the Government. The district courts of the United States have jurisdiction of the action. Trial is in the judicial district within whose jurisdictional limits the person charged with a violation is found or the violation occurs. An action may be dismissed only if the Court and the Attorney General give written consent and their reasons for consenting.
\item See 31 U.S.C. § 3730(b)(2),(3) (1982) which provides:
\begin{enumerate}
\item A copy of the complaint and written disclosure of substantially all
that the private plaintiff's information was not obtained from the Government. If the Government proceeds with the action, the informer may be awarded up to ten percent (10%) of the amount collected. If the Government fails to proceed, as much as twenty-five percent (25%) of any award may be retained by the private plaintiff. Section 3731 retains, with only minor revisions, the six year statute of limitations found in the earlier version.

II. JUDICIAL CONSTRUCTION AND LEGISLATIVE INTENT

Analysis of any statute must begin with a careful reading of the statutory language. Even where an act is clear and unambiguous on its face, it may be necessary to examine relevant legislative history to be certain that the measure accurately reflects the will of Congress. Unfortunately, courts have found

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material evidence and information the person possesses shall be served on the Government under rule 4 of the Federal Rules of Civil Procedure (28 App. U.S.C.). The Government may proceed with the action by entering an appearance by the 60th day after being notified. The person bringing the action may proceed with the action if the Government—

(a) by the end of the 60 day period does not enter, or gives written notice to the court of intent not to enter the action; or

(b) does not proceed with the action with reasonable diligence within 6 months after entering an appearance, or within additional time the court allows after notice.

If the Government proceeds with the action, the action is conducted only by the Government. The Government is not bound by an act of the person bringing the action.

Cf. 31 U.S.C. § 3730(b)(4) (1982) ("Unless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.").

For a discussion of the history of the qui tam action, see note 14 supra.

1 See 31 U.S.C. § 3731(b) (1982).


"As is true of every case involving construction of a statute, our starting point must be the language employed by Congress." Reiter v. Sonotone Corp., 442 U.S. 330, 337 (1979).

See, e.g., Pettis ex rel. United States v. Morrison-Knudson Co., 577 F.2d 668, 671 (9th Cir. 1978) ("It is always possible that Congress did not quite mean what it said and did not quite say what it meant."). See also Train v. Colorado Pub. Interest Research Group, 426 U.S. 1, 9-10 (1976) (always examine legislative history for the intent of Congress).
key substantive provisions of the False Claims Act both unclear and ambiguous. With less than adequate legislative history to rely upon, courts depend on other rules of statutory construction to aid them in divining legislative intent. What follows is an examination of the rules of statutory construction applied to various substantive and procedural aspects of the statute.

A. What Constitutes a "Claim" Within the Meaning of the Act?

The False Claims Act imposes liability on any person knowingly presenting a "false or fraudulent claim for payment or approval." Unfortunately, the term "claim" is undefined in the Act, leaving courts with little guidance as to how it should be construed. Historically, courts have focused on the character of the statute to determine whether to give the term "claim" either a strict or

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[Note: The text continues with further discussion and references.]
or a liberal\textsuperscript{46} construction.

Those courts focusing on the punitive or penal\textsuperscript{47} character of the Act tend to narrowly confine its purposes. In \textit{United States v. Cohn},\textsuperscript{48} the defendant made application for delivery of nondutiable merchandise which was merely in possession of a United States Customs official as bailee.\textsuperscript{49} Holding that the criminal provisions of the False Claims Act were not applicable to this situation,\textsuperscript{50} the Supreme Court stressed the need to strictly construe "claims" under the statute to include only those based on a demand "for money or property . . . based upon the Government's own liability to the claimant."\textsuperscript{51}

Applying this same strict construction in a civil context, the Supreme Court in \textit{United States v. McNinch},\textsuperscript{52} held that the submission of a fraudulent application for credit insurance from the Federal Housing Administration did not involve a demand for money or property owed by the Government to the claimant and, thus, did not constitute a "claim" within the meaning of the Act.\textsuperscript{53} The Court acknowledged that such an application could be regarded as a "claim" in the sense that the applicant

to its literal terms because the civil portions of the Act incorporate criminal tests for liability). See generally 82 C.J.S. Statutes § 311 at 530-31 (1953).

\textsuperscript{46} A liberal construction gives statutory language its generally accepted meaning so that the most comprehensive application may be accomplished without doing violence to the language used. United States v. Peter Kiewit & Sons' Co., 235 F. Supp. 500, 502 (D. Alaska 1964). See, e.g., United States v. Neifert-White Co., 390 U.S. at 233 (quoting Rainwater v. United States, 356 U.S. at 592) ("[O]bjective of Congress . . . was broadly to protect the funds and property of the government, . . . and . . . 'by any ordinary standard the language of the Act is certainly comprehensive enough to achieve this purpose."'). See generally 82 C.J.S. Statutes § 387 (1953).

\textsuperscript{47} Penal statutes are those which impose punishment for committing a crime against the state. Those punishments may include penalties or forfeitures as well as imprisonment. United States v. Witherspoon, 211 F.2d 858, 861 (6th Cir. 1954). See generally 82 C.J.S. Statutes § 389 (1953); Note, supra note 10, at 173-78.

\textsuperscript{48} 270 U.S. 339 (1926).

\textsuperscript{49} Id. at 343-44.

\textsuperscript{50} See id. at 345-46. The defendant, Cohn, was being prosecuted under § 35 of the Criminal Code for fraudulently attempting to procure from customs house officials possession of foreign-made cigars without the proper bill of lading and attached draft. See note 18 supra for the Criminal Code. See note 23 supra for a discussion of the statutory history of the criminal provisions of the False Claims Act.

\textsuperscript{51} 270 U.S. at 345-46.

\textsuperscript{52} 356 U.S. 595 (1958).

\textsuperscript{53} Id. at 598-99 (citing United States v. Tieger, 234 F.2d 589, 591 (3d Cir.), cert. denied, 352 U.S. 941 (1956)); Accord United States v. Cohn, 270 U.S. 339, 345. Cohn was cited with approval by the McNinch court as relevant though Cohn did arise in a somewhat different context. See 356 U.S. at 600 n.10.
had a right or privilege to draw on the Government’s credit but opted for a stricter interpretation because:

[I]t must be kept in mind, as we explained in Rainwater[54] that in determining the meaning of the words “claim against the Government” we are actually construing the provisions of a criminal statute. Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions.55

The Court clearly applied the rule that all penal statutes should be strictly construed to insure that no individual is convicted without fair warning and prior notice regarding what conduct will be punishable.56

Thus, in cases where the character and objective of the statute are considered penal, courts restrict the statute to its literal terms.57 However, those courts focusing on the “remedial”58 or “restitutionary” character of the statute tend to interpret it more comprehensively.59

This broader view was first expounded in United States ex rel. Marcus v. Hess.60 In this 1943 opinion, the Supreme Court

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4 Rainwater v. United States, 356 U.S. 590 (1958), decided the same day as McNinch, held that because the civil provisions of the False Claims Act incorporated the criminal provisions of Rev. Stat. § 5438 (1874) as the test for civil liability, the statute was penal and therefore to be confined in scope to its literal terms. Id. at 592-93.

5 356 U.S. at 598.


8 A remedial statute is one which seeks to provide a remedy to redress an existing grievance and is generally interpreted liberally. In re Carlson, 292 F. Supp. 778, 784 (C.D. Cal. 1968).

9 See, e.g., United States v. Niefert-White Co., 390 U.S. at 233 (“This remedial statute reaches beyond ‘claims’ which might be legally enforced, to all fraudulent attempts to cause the Government to pay out sums of money.”). See generally 82 C.J.S. Statutes § 388 at 918-20 (1984); Note, supra note 10, at 173-78.

10 317 U.S. 537 (1943).
held that contracts fraudulently obtained by collusive bidding gave rise to "claims" within the meaning of the False Claims Act. Rejecting the lower court's determination that *qui tam* actions must be interpreted with utmost strictness, the Court found that the chief purpose of the False Claims Act was to provide restitution for the Government. As a "remedial" statute, it was entitled to a liberal interpretation, giving it "the fair meaning of its intendment."

*Marcus* was a significant step toward a more liberal interpretation of the statute. The issue before the Court was whether a *qui tam* action to recover the statutory forfeiture and double damages under the civil section of the False Claims Act violated the fifth amendment double jeopardy clause when the defendant had already pled *nolo contendere* in a prior criminal action for the same offenses. The Court rejected the double jeopardy defense citing a recent opinion in which they "emphasized the

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61 Id. at 542-44. But see United States *ex rel.* Brensilber v. Bausch & Lomb Optical Co., 131 F.2d 545 (2d Cir. 1942), aff'd, 320 U.S. 711 (1943) (per curiam by an equally divided Court). In *Brensilber*, decided only months after the *Marcus* decision, the Supreme Court affirmed the lower court's determination that collusive bidding was *not* a violation of the Act. Relying in part on the Third Circuit's opinion in United States *ex rel.* Marcus v. Hess, 127 F.2d 233, the Second Circuit considered the False Claims Act to be "not only penal, but drastically penal..." (citations omitted). For this reason it has been strictly construed... (citations omitted). Furthermore, so far as it perpetuates the odious and happily nearly obsolete *qui tam* action, it should be regarded with particular jealousy." 131 F.2d at 547. The affirmance of the Second Circuit opinion, albeit by an equally divided Court, remains an apparent contradiction in the mind of the Court.

In a later opinion, the Second Circuit reconciled the two holdings by pointing out that in *Marcus*, the defendants had created the false impression that bidding was competitive by submitting inflated bids. In *Brensilber*, according to the court, there was no implied representation that the bids were competitive in price. The defendants simply failed to bid. Thus, no fraud was ever proven and the action under the False Claims Act could not be maintained. United States *ex rel.* Weinstein v. Bressler, 160 F.2d 403 (2d Cir. 1947).

62 See 127 F.2d at 235.

63 "We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole." 317 U.S. at 551-52.

64 317 U.S. at 542 (citation omitted).

65 Another issue before the Court which sparked a great deal of controversy was the right of the informer to bring a *qui tam* action using only information acquired from the Government's indictment in the criminal action. The Court upheld the right of the private plaintiff. See note 14 *supra* for a discussion of Congress' response to this holding.
line between civil, 'remedial' actions brought primarily to protect the government from financial loss and actions intended to authorize criminal punishment to vindicate public justice. Only the latter subject the defendant to 'jeopardy' within the constitutional meaning.  

Concluding that double damages and a $2,000 forfeiture were remedial in nature, the Court pointed out that the civil remedies under the Act do not lose the quality of a civil action simply because more than a precise amount of actual damages is recovered.

However, the impact of Marcus on what constitutes a "claim" within the meaning of the False Claims Act is less than clear. While recognizing that the damages afforded the Government were "remedial," the Court maintained that the scope of section 3490 should still be strictly construed in determining liability because it incorporated a criminal statute by reference. Thus, according to Marcus, while the reach of the False Claims Act might be narrow, for those activities within its grasp the damage and forfeiture provisions are "remedial" and not "penal" and, therefore, should be broadly construed.

Despite the Supreme Court's characterization of the False Claims Act as both "penal" and "remedial" in character, Marcus has been interpreted as an expansion of "false claims" beyond the narrow "demand for money or property" test set forth in Cohn. In United States ex rel. Rodriguez v. Weekly Publications, Inc., the district court expanded the Cohn test to include fraudulent representations which resulted in lower mailing rates to post office officials. Prior to this holding, courts

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67 See id. at 549.  
68 See id. at 550. See also United States v. Ridglea State Bank, 357 F.2d 495, 497 (5th Cir. 1966); United States v. Rohleder, 157 F.2d 126, 129 (3d Cir. 1946); United States v. Cherokee Implement Co., 212 F. Supp. 347, 375 (N.D. Iowa 1963).  
69 See 317 U.S. at 542. See note 24 supra and accompanying text discussing the relationship of sections 5438 and 3490.  
70 Id. "[I]n interpreting so much of [§ 5438's] language as it shares in common with § 3490 we must give it careful scrutiny lest those be brought within its reach who are not clearly included; but after such scrutiny we must give it the fair meaning of its intention." Id. (citation omitted).  
71 See Note, supra note 10, at 166-68; Qui Tam Actions, supra note 14, at 789-91.  
73 See id. at 770.
had uniformly held that fraudulent reductions in obligations owed to the Government were not "false claims." Focusing on the "remedial" nature of the statute, the court, in Rodriguez, did not require that there be a strict demand for money or property.

Returning to the narrower "demand for money or property" test, more recent court rulings have failed to find a "claim" against the Government under facts substantially the same as those found in Rodriguez. Apparently, the inconsistencies in the law have left the courts confused as to how Marcus is to be applied.

Perhaps the strongest and most liberal construction given Marcus was in United States v. Neifert-White Co. The issue for the Court in Neifert-White was whether the False Claims Act reached "claims for favorable action by the Government upon application for loans or [was] . . . confined to 'claims' for payments due and owing from the government." The Supreme Court held that a "claim" should not be construed narrowly to include only demands for money or property based on the Government's liability. While expressly declining to overrule United States v. McNinch, the Court expanded prior notions of the Act by describing it as "intend[ing] to reach all types of fraud, without qualification, that might result in financial loss to the government."
Government." Thus, where the dealer furnished falsely inflated invoices which were then used to support applications for loans from the Commodity Credit Corporation, such action constituted a false claim.

Drawing on language found in Marcus, the Court refused to give the statute a narrow reading saying, "This remedial statute reaches beyond 'claims' which might be legally enforceable, to all fraudulent attempts to cause the Government to pay out sums of money." Despite this ruling, several courts still consider the False Claims Act "penal" and narrowly interpret what constitutes a "claim."

This "narrow" view has been applied with particular consistency to contingent "claims" such as applications for loan insurance and loan guarantees when there has been no default

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82 390 U.S. at 232.
83 Both lower court United States v. Neifert-White decisions held that the Government had failed to make a case against the Neifert-White Co. because no "claim" had been made against the Government based on the Government's liability to the claimant. See 247 F. Supp. 878, 881-83 (D. Mont. 1965); 372 F.2d 372, 378 (9th Cir. 1967). Both opinions relied heavily upon United States v. McNinch. In Neifert-White the Supreme Court distinguished McNinch from the case before it, stating:

The Court [in McNinch] emphasized the distinction between contracts of insurance against loss ... and transactions in which the United States pays or lends money. For purposes of the present case, we need not reconsider the validity of this distinction. It is sufficient to note that the instant case involves a false statement made with the purpose and effect of inducing the Government immediately to part with money.

390 U.S. at 232.

84 See 390 U.S. at 232.
85 Id. at 233.

87 See notes 52-56 supra and accompanying text for a discussion of the "narrow" approach to a "claim" in the context of an application for loan insurance.
88 See United States v. Cochran, 235 F.2d 131, 134 (5th Cir.), cert. denied, 352 U.S. 941 (1956) (statute has the effect of dealing only with persons who falsely claim money or property from the Government and a guarantee is not such a claim). United States v. Tieger, 234 F.2d 589, 590-92 (3d Cir.), cert. denied, 352 U.S. 941 (1956) (guarantee obligation itself does not give rise to "claim" under statute until the Government is required to pay). But see United States v. DeWitt, 265 F.2d 393 (5th Cir.), cert. denied, 361 U.S. 866 (1959) (loan guarantee applicant submitting false application and receiving $160 gratuity payable out of public funds held to have made a "claim" within the meaning of the Act).
forcing the Government to pay. \(^8\) Here, courts have been reluctant to accept what one commentator termed the "full mandate of Marcus." \(^9\) No doubt because it so clearly excludes contingent claims from the scope of the False Claims Act, \(^9\) McNinch has made courts hesitant to extend the "remedial" function of the statute to encompass guarantees.

Nevertheless, it has been argued that although a fraudulent loan application is not literally within the meaning of "claim" upon the Government, "a liberal interpretation of the term 'claim' would seem proper, if a strict construction tended to contravene the purpose of the statute." \(^9\) Apparently in partial agreement with this broader construction, several courts, relying on Marcus, have allowed recovery under the False Claims Act when there has been default and a resultant demand for money but before there has been payment on the guarantee by the Government. \(^9\)

\(^8\) See United States v. Neifert-White Co., 390 U.S. at 232 (fraudulent loan application caused Government to part with money immediately); United States v. Veneziale, 268 F.2d 504 (3d Cir. 1959) (fraudulent representation inducing FHA to guarantee loan constituted a "claim" under the Act when innocent third party was paid after default out of public money—action sustainable even though money was paid to bank and not to defendant).

\(^9\) See United States ex rel. Marcus v. Hess, 317 U.S. at 537, stands for the proposition that the objective of the False Claims Act is remedial and restitutionary, and therefore should be given a fair construction. This interpretation may not be reflective of the total opinion. See notes 69-70 supra and accompanying text for a discussion of the dual nature of the False Claims Act.
One final area of confusion concerns fraudulent demands for government services.\(^9\) Courts are almost equally divided on the question of whether fraudulent applications to a Veterans Administration hospital for free hospitalization violate the Act.\(^9\)

Similarly, there is a dispute about whether fraudulent applications for feed or grain from the Commodity Credit Corporation give rise to a "claim."\(^9\)

As before, each case is marked by confusion concerning the proper construction of the False Claims Act.

The confusion surrounding the proper construction of the term "claim", outside the "strict demand for money or property" context, limits the usefulness of the False Claims Act, claim. Without any expense on the part of the Government and absent default on the loan guaranteed, it is doubtful that the false statement alone would have been considered a false claim. See Rex Trailer Co. v. United States, 350 U.S. 148, 153 n.5 (1956) ("[F]ailure to show actual damages [where Government discovered fraud before payments made] would not preclude recovery under the statute." (citing Marcus)); United States v. Hughes, 585 F.2d 284, 286 n.1 (7th Cir. 1978) ("A false claim is actionable under the Act even though the United States has suffered no measurable damages from the claim." (citations omitted)). See also Topeleman v. United States, 263 F.2d 697 (4th Cir.), cert. denied 359 U.S. 989 (1959).

\(^9\) Some of this confusion has been addressed by the passage of the Civil Monetary Penalties Law of 1981 which imposes civil monetary penalties for the filing of false or otherwise improper claims in the Medicare, Medicaid or Maternal and Child Health Services Block Grant programs. See 42 U.S.C. § 1320a-7a (1982). This Act imposes a penalty of not more than $2,000 and damages equal to not more than twice the amount falsely or fraudulently claimed. Unlike the False Claims Act, however, this Act includes within its prohibitions a claim for an item or service that the person knew or had reason to know was false. See 42 U.S.C. § 1320a-7a(a) (1982). See generally Kusserow, supra note 5.

\(^9\) Compare United States v. Alperstein, 183 F. Supp. 548, 550-52 (D. Fla. 1960), aff'd, 291 F.2d 545 (5th Cir. 1961) (false claims under Act not limited to a claim for money or property but includes a claim for valuable services) and United States v. Petrik, 154 F. Supp. 598, 599 (D. Kan. 1956) (defendant who fraudulently applied for free hospitalization from Veterans' hospital made a false claim) with United States v. Borth, 266 F.2d 521, 522-23 (10th Cir. 1959) (medical services are not the equivalent of money or property) and United States v. Schmidt, 204 F. Supp. 540, 544 (E.D. Wis. 1962) (false statement as to applicant's ability to pay not a false claim where applicant made full and complete disclosure of his assets). See also United States v. Shanks, 263 F. Supp. 1012, 1013 (D. Colo. 1966), rev'd on other grounds, 384 F.2d 721 (10th Cir. 1967) (implication that services are not the equivalent of a claim).

\(^9\) Compare Fleming v. United States, 336 F.2d 475, 480 (10th Cir. 1964), cert. denied, 380 U.S. 907 (1965) (fraudulent purchase orders held to be "claims") and Sell v. United States, 336 F.2d 467, 474 (10th Cir. 1964) (false application held to be a claim) with United States v. Robbins, 207 F. Supp. 799, 806-07 (D. Kan. 1962) (court equated an application for grain with the application for credit insurance in United States v. McNinch and found application not a claim).
inhibiting Justice Department officials in their attempts to pursue the remedies made available to the Government under the Act.\textsuperscript{97} It has been suggested that a more consistent application of liberal construction rules, focusing solely on the "remedial" objective of the Act, could remove this confusion.\textsuperscript{98} However, congressional intent is arguably both penal and remedial,\textsuperscript{99} and such a use of statutory construction would go beyond interpretation and become legislation.\textsuperscript{100} Rather than rely solely on judicial construction of the Act to reach fraud in all its modern forms, Congress must consider implementing additional deterrents to government program fraud.\textsuperscript{101}

B. What Constitutes the Requisite State of Mind for Imposing Liability Under the Act?

Historically, courts have also disagreed about the state of mind required before liability will be imposed under the False Claims Act.\textsuperscript{102} The conflict derives again from confusion about statutory construction.\textsuperscript{103} Some, emphasizing the "penal" nature of the statute, define the Act's "knowing" requirement in the criminal sense, requiring specific intent to defraud the Govern-

\textsuperscript{97} 129 CONG. REC. S9491-92 (daily ed. June 29, 1983) (statement of Sen. Roth addressing inadequacy of present remedies which limit legal action "to instances where the Government has suffered a substantial and identifiable monetary loss").

\textsuperscript{98} See Note, supra note 10, at 184-86.

\textsuperscript{99} See notes 69-70 supra and accompanying text.

\textsuperscript{100} See notes 37-42 supra and accompanying text discussing the intent of Congress as the goal of statutory construction. See also Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (not the Court's function to "sit as a super-legislature").

\textsuperscript{101} See notes 122-78 infra and accompanying text discussing legislative alternatives.

\textsuperscript{102} This discussion is limited to 31 U.S.C. § 3729(1), (2), (6) (1982). Violations of subsections (3), (4) and (5) of the Act, and similarly, claims under subsections (1) and (2) which are alleged to be "fraudulent" as opposed to being merely "false," are not included in this discussion since there is no question but that "intent to defraud" is an element of such offenses. See note 29 supra for the text of the statute.

\textsuperscript{103} Compare United States v. Cooperative Grain & Supply Co., 476 F.2d 47, 58 (8th Cir. 1973) ("The Act is remedial and in plain language covers the submission of a claim known to be false.") (footnote omitted) with United States v. Shapleigh, 54 F. 126, 134 (8th Cir. 1893) (though civil on its face, the False Claims Act is actually a criminal statute requiring criminal mens rea before its provisions are violated), and United States v. Park Motors, Inc., 107 F. Supp. 168, 176-77 (E.D. Tenn. 1952) (intent to defraud is a necessary prerequisite to liability under the False Claims Act). See Annot., 26 A.L.R. Fed. 307, 311-12 (1976).
ment. Others, focusing on the "remedial" purpose of the statute, demand only "knowledge of falsity" and reject a requirement of mens rea. One court has even held that negligent misrepresentation may be sufficient to constitute the necessary "knowledge" required by the Act. In contrast, courts emphasizing specific intent require a showing of intentional fraud or misrepresentation.

In United States ex rel. Hughes v. Cook, the court set out what it believed to be the threshold requirement for liability under the False Claims Act. Giving the statute a "penal" construction, the court required that each "claim" be knowingly grounded in fraud. The court defined the essential element of

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106 See United States v. Cooperative Grain & Supply Co., 476 F.2d at 60. See also Miller v. U.S., 550 F.2d 17, 23 (Ct. Cl. 1977) (extreme negligence on the part of one who submits a false bill to the Government is within the scope of the proscribed conduct under former section 31 U.S.C. § 231 (1976)).

107 See 476 F.2d at 60. The court likened the knowledge requirement to that applied in a civil suit for misrepresentation. Noting that Prosser classified misrepresentation into intent, negligence, and strict responsibility, the court reasoned: "'[A] representation made with honest belief in its truth may still be negligent, because of lack of reasonable care in ascertaining the facts . . .'" Id. (citing W. Prosser, Torts 719 (2d ed. 1964)).


110 See id. at 787 ("[I]ts object was to provide protection against those who would 'cheat the United States.'") (citing United States ex rel. Marcus v. Hess, 317 U.S. at 544).
the False Claims Act—scienter—as "personal knowledge of and personal participation in an attempt to cheat the government."\textsuperscript{111}

While there are several states of mind a False Claims Act defendant might have,\textsuperscript{112} courts have focused their attention on distinguishing intent to defraud from actual knowledge. Scienter, as evidenced by the \textit{Hughes} opinion, involves a specific intent to "'cheat' the government;" it is willful and deliberate, not inadvertent or accidental.\textsuperscript{113} Courts understanding the character of the False Claims Act to be "remedial" and thus civil in nature do not ask whether there was "ill will" or "specific intent," but only whether the claimant knew or reasonably should have known a false claim was being submitted.\textsuperscript{114}

\footnotesize{
\textsuperscript{111} 498 F. Supp. at 787. For a lengthy and technical discussion of the concept of "knowing" as distinct from intent, see United States v. Cooperative Grain & Supply Co., 476 F.2d at 58-61.

\textsuperscript{112} Dean Keeton and other commentators have described five possible states of mind in a misrepresentation case:

(1) Innocent, non-negligent misrepresentation. An example would be a misrepresentation based on a reasonable belief that the representation was true.

(2) Negligent misrepresentation. An example would be a representation based on information that the representor reasonably should have known was insufficient to be relied upon.

(3) Reckless misrepresentation. An example would be a representation about a belief without any information that would cause him to have a genuine belief.

(4) Actual knowledge. An example would be a representation for which there was some likelihood of its truthfulness, but with the knowledge that it was probably false.

(5) Intent to defraud. An example would be a representation which was known to be false \textit{and} was made with the intent to induce action by another in reliance.

\textit{Adapted from Keeton, Fraud: The Necessity for an Intent to Deceive, 5 UCLA L. REV. 583, 589 (1958) and Campbell, Elements of Recovery under Rule 10B-5: Scienter, Reliance, and Plaintiff's Reasonable Conduct Requirement, 26 S.C.L. REV. 653, 655-56 (1975).}

\textsuperscript{113} 476 F.2d at 58.

\textsuperscript{114} \textit{Id.} at 59. The \textit{Cooperative Grain} case provides an excellent illustration of the subtle distinction between the two views. In that case, defendant grain producers were being tried under the False Claims Act for submitting false claims for government price supports to the Commodity Credit Cooperation (CCC). While the purpose of the price support system is to help \textit{producers} of commodities, the defendants were \textit{purchasing} their grain from another defendant grain elevator rather than delivering grain which they had produced themselves. They claimed this was done to save time and transport costs. \textit{Id.} at 54. However, no purchaser-defendant ever read the government regulations or the loan contracts informing them of the requirement that only produced grain was eligible for CCC benefits. Rather, they relied on the advice given them by the manager
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As before, resolution of the conflict turns upon a consistent interpretation of the purpose and character of the statute. It has been argued forcefully that the statute is "remedial" and therefore should be given a liberal construction, basing liability on the lower "knowing" state of mind. Similarly, it has also been argued that in light of the wording of the statute, which bases liability solely on "knowingly" presenting false or fraudulent claims, proving "intent to defraud" is extreme. However, the Ninth Circuit has rejected both the "remedial" approach and the related semantical approach, opting instead for the "intent to defraud" standard because common law crimes of fraud require specific intent. Requiring proof of the highly subjective "intent to defraud" state of mind places obvious hurdles in front of any government lawyer trying to build a case under the

of the elevator selling the grain that such a practice was legal. *Id.*

The district court held that while the defendant's actions were "careless and foolish in the extreme," they lacked the actual knowledge and intent to deceive required to impose liability because the defendants failed to understand the government regulations. *Id.* at 55.

The Eighth Circuit reversed the lower court on this issue stating that defendants never even attempted to ask the CCC whether purchased grain was eligible for the price support. *Id.* at 60. While the court felt that negligent misrepresentation was sufficient to meet the "knowing" requirement, here, they noted, defendants had gone beyond negligence to extreme carelessness. Such a "reckless disregard for the truth or falsity of a belief" approaches intentional misrepresentation. *Id.*

"See *id.* at 58.


"See *United States v. Mead*, 426 F.2d 118, 122-23 (9th Cir. 1970) (court felt heavy penalties and similarities with common law crimes of fraud required a specific intent to defraud). *But see United States v. Milton*, 602 F.2d 231, 233 & n.4 (9th Cir. 1979) (court undermined validity of *Mead* by holding that intent to defraud was not an element of criminal fraud).

"In addition to proving specific intent, some courts place yet another barrier before the Government by requiring that the standard of proof be the higher than the normal "clear and convincing evidence" standard. *See United States v. Ekelman & Assocs., Inc.*, 532 F.2d at 548 (gravemen of the action is intentional fraud which the Government must establish by clear and convincing evidence); *United States v. Ueber*, 299 F.2d at 314-15 (fraud need not be established beyond a reasonable doubt but more is required than a mere preponderance.); *United States v. Klein*, 230 F. Supp. 426, 432 (W.D. Pa. 1964) *aff'd* 356 F.2d 983 (3d Cir. 1966) (action based on fraud must be proven by clear and convincing evidence). *See also 9 WIGMORE, EVIDENCE § 2498, at 424 (Chadbourn rev. ed. 1981).*
False Claims Act.\textsuperscript{119} This is not an action at common law but a statutorily created right of action which plainly covers the submission of claims "known" to be false.\textsuperscript{120} Any requirement that "intent to defraud" be proven only limits the effectiveness of the Act. However, absent a clear and unequivocal statement by Congress that the False Claims Act is a civil "remedial" statute, this confusion will continue.\textsuperscript{121}

III. LEGISLATIVE ALTERNATIVES

A. The False Claims Act

At present, the False Claims Act is a less-than-perfect remedy for the many kinds of fraud visited upon the United States Government. Yet, it has served the Nation for over 120 years and should be amended only after careful consideration. While private contractors and others who provide the Government with goods and services should always be assured of due process of law, the overall purpose of these amendments must be to make it more feasible for Justice Department officials to pursue future fraud cases.\textsuperscript{122} With these considerations in mind, two amendments are offered.

One way to improve the effectiveness of the Act would be to ensure that the Government is reimbursed not only for money or property lost but also for the expense of monitoring and

\textsuperscript{119} See Program Fraud Civil Penalties Act of 1983: Hearing Before the Comm. on Governmental Affairs United States Senate on S. 1566, 98th Cong., 1st Sess. 43 (1983) [hereinafter cited as Hearing] (Prepared statement of J. Paul McGrath, Assistant Attorney Gen., Civil Div., Dept. of Justice: "In our experience, intent requirements in the civil area lead to confusion and impose an overly-stringent burden upon the Government.").

\textsuperscript{120} As the Cooperative Grain case correctly states, "[t]he real issue is what does it mean 'to know' in order to impose liability." See 476 F.2d at 59.

\textsuperscript{121} See notes 123-78 infra and accompanying text for a discussion of legislative solutions to the problem.

\textsuperscript{122} A Government Accounting Office [hereinafter GAO] study has pointed out that of the 393 fraud cases referred to the Justice Department, only 28 civil cases were filed. This prompted the Comptroller General to remark: "[T]he [Justice] Department ha[s] not emphasized the civil aspects of fraud cases." REPORT TO THE CONGRESS, supra note 5, at 32.
litigating fraud cases. Toward this end, the forfeiture provision should be amended, raising the penalty from $2,000 to at least $10,000. Since the present amount was set in 1863, this increase is only reasonable.

A second amendment, proposed in the final days of the Ninety-eighth Congress, would give the Government the right to equitable relief in addition to civil penalties and damages. The offered amendment reads:

A court exercising jurisdiction in a civil action brought under section 3730 of this title for an act described in subsection (a) may order appropriate equitable relief for the Government, including restitution of money or property, in addition to a civil penalty and any damages for which a person is liable under such subsection.

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123 One of the primary impediments to the usefulness of the False Claims Act today is the relative expense of litigating a fraud case. As the Assistant Attorney General has explained:

Many of the Government's false claims and false statements cases involve relatively small amounts of money compared to matters normally subject to litigation. In these cases, litigation in the Federal courts may be economically unfeasible because both the actual dollar loss to the Government and the potential recovery in a civil suit may be exceeded by the Government's cost of litigation.

Hearing, supra note 119, at 40 (prepared statement of Mr. J. Paul McGrath, Assistant Attorney Gen., Civil Div., Dept of Justice). According to GAO estimates, at least 14% of all fraud cases referred to the Justice Department are declined due to lack of significant dollar loss. Report to the Congress, supra note 5, at 29. The same study indicates that 24% of the cases are declined due to a lack of sufficient evidence for prosecution, 16% because the cases lack merit or "jury appeal," 8% because the Justice Department believes administrative action would be more appropriate, 17% for other miscellaneous reasons and 20% of the cases are not prosecuted because of "unknown" reasons. See id.


126 The Justice Department strongly endorses this needed amendment though with some modifications. See Hearing, supra note 119, at 34-35 (testimony of Mr. J. Paul McGrath, Assistant Attorney Gen., Civil Div., Dept. of Justice).


According to Senator Percy, the sponsor of this amendment, such equitable relief would allow the Government to give back unsatisfactory products and get a refund of money paid.\textsuperscript{129} This "restitution" remedy is especially necessary in the Defense Department's procurement process.\textsuperscript{130} Perhaps, most importantly, by linking remedies to "restitution," the amendment may be seen as an expression by Congress that the statute is, in fact, "remedial," permitting a more comprehensive construction of the statute.\textsuperscript{131}

Other amendments, including expansion of the definition of a "claim" to encompass false statements, might be offered. This would clearly extend the civil provisions of the Act to cover contingent liabilities such as false statements made on loan insurance applications,\textsuperscript{132} but it would also overwhelm the Justice Department with civil cases more expensive to prosecute than potential recovery would merit. Justice Department officials make no secret of the fact that, given the Department's limited resources, only "big-dollar" civil claims can be pursued.\textsuperscript{133} During a two and one-half year study undertaken by the General Accounting Office [hereinafter GAO], it was discovered that the Justice Department pursued only sixty-one percent (61\%) of all fraud cases referred to it by federal agencies.\textsuperscript{134} Its record in

\textsuperscript{130} See id. The major portion of S. 3044 is an attempt to address the specific kinds of defense contract fraud. It provides a streamlined administrative remedy for false claims and statements made in connection with procurement of property and services by the Department of Defense.

In his statement explaining why the Department of Defense needed its own version of the False Claims Act, Senator Percy made reference to a prior Senate hearing where it was uncovered that the Air Force was prepared to pay $9,600 for one allen wrench, $4,700 for a special piece of wire, and over $10,000 for other small hand held tools. 130 CONG. REC. S12749 (daily ed. Oct. 3, 1984).


\textsuperscript{131} See notes 43-101 supra and accompanying text discussing the effects of a comprehensive "remedial" construction of the False Claims Act as compared with a more restricted "penal" construction.

\textsuperscript{132} See notes 87-93 supra and accompanying text for a discussion of contingent liabilities.

\textsuperscript{133} See REPORT TO THE CONGRESS, supra note 5, at 30. The Department of Justice has determined that they will now emphasize prosecuting only those instances of white collar crime which result in losses of $25,000 or more. See id.

\textsuperscript{134} See id. at 28. The GAO pointed out that 25\% of those claims prosecuted during the study were under $25,000. Given the new emphasis of the Justice Department, an even greater percentage of civil cases will be declined. Id. at 30.
pursuing purely civil remedies was much worse, not because of a lack of Justice Department prosecutions, but because "smaller cases . . . [those] under $100,000 . . . are more difficult and less cost effective to prosecute." The GAO concluded that Congress should supplement the False Claims Act with legislation granting federal agencies the power — when the Justice Department declines to initiate criminal or civil actions — to bypass the court system and assess civil penalties against those who defraud their respective programs. In this manner, agencies can join the fight against fraud by reaching the small-time operator who has heretofore escaped prosecution. The Program Fraud Civil Remedies Act of 1985 [hereinafter PFCRA], recently reintroduced in the 99th Congress, is a response to the GAO recommendation. Together, the False Claims Act, amended as suggested above, and the PFCRA as set forth below, could achieve substantial progress toward the recovery of lost dollars and the deterrence of future program fraud.

B. Program Fraud Civil Remedies Act of 1985

This administrative remedy for false, fictitious, or fraudulent claims and statements made to the United States Government has much to commend it. It is clearly written and comprehensive in scope. The stated purpose of the Act, "to provide Federal agencies . . . with an administrative remedy to recompense . . . agencies for losses resulting from [fraudulent] claims and statements," is clearly remedial. This statement is an important signal to administrative law judges and reviewing courts to broadly construe the statute.

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115 See id. at 32. See also note 122 supra.
116 Hearing, supra note 119, at 2 (prepared statement of Senator Roth).
117 See id. at 46-47.
119 Chairman Roth, in his remarks introducing S. 1566 (the predecessor to S. 1134) into the 98th Congress, referred to the conclusions and recommendations of the 1981 GAO report as the general impetus behind the bill. See 129 CONG. REC. S9491 (daily ed. June 29, 1983).
120 S. 1134, 99th Cong., 1st Sess. § 2(b)(1).
121 See notes 57-101 supra and accompanying text discussing the effect of a comprehensive "remedial" construction of the False Claims Act.
In addition, the bill provides due process protections for all who are subject to an administrative adjudication.142 Hearings at which allegations of false, fictitious, or fraudulent claims or statements will be reviewed are to be conducted in an impartial manner consistent with fundamental fairness.143 Proceedings are to be conducted in accordance with provisions promulgated by the agency head144 including a detailed record of the hearing officer’s findings and conclusions.145 Should a convicted party not be satisfied with the determination made by the agency head, he may still take the matter to court for judicial review.146

The bill itself can be divided into three general categories: (1) definitions; (2) remedies; and (3) administrative procedure.

142 S. 1134, 99th Cong., 1st Sess. § 2(b)(2).
143 S. 1134, 99th Cong., 1st Sess. § 803(f)(2)(G). Fundamental fairness does not mean that a jury trial must be granted in an administrative proceeding. The United States Supreme Court most recently addressed the issue of jury trial rights in administrative proceedings in Atlas Roofing Co. v. Occupational Safety and Health Review Comm’n, 430 U.S. 442 (1977). There, the Court rejected a seventh amendment attack on the administrative proceedings to prosecute violations of the Occupational Health and Safety Act (OSHA). The Act allowed OSHA to determine whether an employer had violated the Act and assess a civil penalty if a violation was found. The Court held that the seventh amendment merely preserves the right to a jury trial in suits at common law; it does not prevent Congress from creating new statutory “public” rights which did not exist in 1789. id. at 455. In such public rights cases, the Court found that Congress could constitutionally assign the fact finding function to an administrative agency “with which a jury trial would be incompatible.” id. Since the PFCRA involves civil fines and is not tied to a pre-constitutional common law cause of action, the bill does not appear to be in violation of the seventh amendment. Furthermore, the Court in Atlas recognized that administrative proceedings were useful and often necessary alternatives to an already overburdened court system, id. at 455, and emphasized that “the Seventh Amendment was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases.” Id. at 460.
145 S. 1566, 98th Cong., 1st Sess., § 803(g). But see Hearing, supra note 119, at 69 (statement of Jed L. Babbin, V. Pres. & Gen. Counsel, Shipbuilders Council of America). Babbin complained that § 803(b)(3) merely required that the agency’s decision be in writing and include “findings and determinations.” He argued that such decisions do not guarantee an adequate record for judicial review. Id.
146 See S. 1566, 98th Cong., 1st Sess., § 805. Under Section 805, any person held liable may obtain review by petitioning the appropriate federal circuit court of appeals within 60 days after notification of liability. § 805(b)(1). The scope of judicial review by the court with respect to questions of fact shall be one of substantial evidence on the record considered as a whole. § 805(c). Absent extraordinary circumstances, objections not raised at the hearing will not be heard by the court, and if any party shows that material evidence exists which could not reasonably have been presented at the hearing but is now available, the court will not hear the evidence but will instead remand the matter back to the administrative tribunal for further consideration. § 805(d). See also note 165 infra.
What follows is a brief analysis of each category, relating its provisions to the False Claims Act.

1. **Definitions.** Definitions of key words used in the PFCRA are found in section 801. Two definitions found in that section are particularly crucial. The first is the definition of a "claim." Included in that definition, notably, is any request, demand, or submission for property or services. Unlike the False Claims Act, this proposed legislation clearly includes services within its definition of a claim. Also included is a broad range of government benefits such as grants, loans and reimbursements.

Unlike the False Claims Act, the PFCRA also includes false statements within its liability section. Statements are defined to include any representation made with respect to claims, contracts, bids, proposals, applications for insurance or even applications for employment. The inclusion of false statements within the liability section of the Act renders moot the question whether a contingent liability induced by a misrepresentation made in the application process is actionable. Clearly, such statements violate the Act and are subject to the forfeiture provisions.

To be held liable under the PFCRA, as with the False Claims Act, a party must know or have reason to know that a false

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147 See S. 1134, 99th Cong., 1st Sess. at § 801.
149 See notes 94-96 supra and accompanying text for a discussion concerning services under the False Claims Act.
150 See S. 1134, 99th Cong., 1st Sess., § 801(a)(3)(B)(ii). The PFCRA would also extend liability to include the submission of false applications for feed and grain. § 801(a)(3)(A). See note 96 supra and accompanying text.
151 S. 1134, 99th Cong., 1st Sess., § 801(a)(4) provides in part:
(4) 'statement' means any written representation, certification, document, record, or accounting or bookkeeping entry—
(A) with respect to a claim; or
(B) with respect to—
(i) a contract with, or a bid or proposal for a contract with,
(ii) a grant, loan, or benefit from
(iii) an application for insurance from, or
(iv) an application for employment with, an authority.
153 See notes 87-93 supra. At present, such statements are covered by 18 U.S.C. § 1001 (1982), the Criminal False Statements Act; but, as is the case under the civil provisions of the False Claims Act, such smaller cases are often more difficult and less cost effective to prosecute. See note 136 supra and accompanying text.
claim or statement has been made. The PFCRA states unequivocally that for purposes of assessing liability, the claim or statement need only be shown to be false, fictitious, or fraudulent. By choosing the disjunctive "or," the PFCPA evidences a clear choice to reach acts done "knowingly" but without requiring "intent to defraud."

Finally, it should be noted that the PFCRA assesses penalties only where there have been material violations of a contract. While earlier versions of the PFCRA considered a claim to be false when in violation of any applicable federal or state statute or regulation, this language has been deleted from the most recent version of the Act in order to avoid holding defendants liable for technical, immaterial violations. Similarly, included in the liability section related to false statements are those assertions or omissions of a material fact which are false, fictitious, or fraudulent. Hence, it can no longer be argued, as some have, that the PFCRA eliminates the element of materiality.

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154 S. 1134, 99th Cong., 1st Sess. § 802(a)(1), (2).
156 S. 1134, 99th Cong., 1st Sess., § 802(a)(2).
157 It is apparently the opinion of the Government Affairs Committee that the adoption of the "intent to defraud" standard "would substantially dilute the effectiveness of the statute. It is closely akin to a criminal mens rea that is inappropriate for an administrative tribunal . . . the Committee believes that the knowing or knowledge standard is preferred." Knowledge v. Specific Intent, 3-4 (unpublished draft language for committee report, Senate Governmental Affairs Committee). See notes 102-21 supra and accompanying text for a complete discussion of the knowledge v. intent debate.
158 S. 1566, 98th Cong., 1st Sess., § 802(a)(1)(B). The language "or as provided in violation of any applicable federal or state statute or regulation" has been deleted from the bill. See § 802(a)(1)(B).
159 Status of Amendments Adopted, at 1 (unpublished committee report) ("This amendment deletes language that would cause this legislation to apply to cases involving technical violations of non-material parts of a contract.").
161 Responding to an earlier version of the PFCRA, one contractor presented an excellent example of an immaterial misrepresentation. Noting that former § 802(a)(1)(B) considered claims for payment in violation of state or federal regulations to be within the definition of a false claim, the contractor posed the situation where a manufacturer under contract with the government who is in violation of some OSHA regulation might be held liable under the PPACPA even though compliance with that regulation was immaterial to the transaction. See Hearing, supra note 119, at 65-67 (statement of Jed L. Babin, V. Pres. & Gen. Counsel, Shipbuilders Council of America). Apparently, in response to that argument, a materiality element has now been read into the PFCRA by § 802(a)(3) when it is stated that no person shall be held liable for a claim or statement made mistakenly or inadvertently. See note 159 supra.
2. Remedies. The remedies provisions of the PFCRA provide that in addition to any remedy at law, there shall be a $10,000 forfeiture for each false claim or statement made. Additionally, if there is a false claim made, then there can be awarded double damages calculated with respect to either the value of property or services delivered or the amount of damages suffered. As a former United States Assistant Attorney General has pointed out, these provisions make clear the restitutionary goal of the statute, clarifying the purpose of the bill as "remedial" and necessary to "facilitate the recovery of public funds lost through fraudulent conduct." As a result, administrative law judges and reviewing courts can be confident that Congress intends that the PFCRA be given a broad construction. At the same time, the substantial civil penalties provide a formidable deterrent to future program fraud.

3. Administrative Procedure. Section 803 of the bill provides for a hearing to be conducted on the record regarding liability under the PFCPA. For purposes of the hearing, the agency official bringing the allegations need only prove the liability of the defendant by a preponderance of the evidence. Here is yet another substantial departure from the common law requirements that plague the False Claims Act. The higher "clear and convincing" standard which has been judicially imposed on the False Claims Act requires more evidence from the plaintiff than does a normal civil action. The lower "preponderance" standard more accurately reflects the "remedial" and civil nature of the agency proceeding.

Prior to proceeding under the PFCRA, the agency head must submit to the United States Attorney General a notice of inten-

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162 S. 1134, 99th Cong., 1st Sess., § 802(a)(1), (2). If no damages result before the false statement or claim is discovered then the agency is entitled to a $10,000 statutory forfeiture for each violation in the same manner as allowed by the False Claims Act. See note 93 supra.


164 Hearing, supra note 119, at 47 (prepared statement by J. Paul McGrath, Assistant Attorney Gen., Civil Div., Dept. of Justice).

165 S. 1134, 99th Cong., 1st Sess., § 803(e).

166 S. 1134, 99th Cong., 1st Sess., § 803(e).

167 See note 118 supra for a discussion of the clear and convincing standard of proof often applied under the False Claims Act.

168 Qui Tam Actions, supra note 14, at 792.
tion to proceed.\textsuperscript{169} If the United States Attorney General approves of the action or takes no action within ninety (90) days, then the agency is allowed to proceed.\textsuperscript{170} However, at no time will an agency be allowed to commence an action under the provisions of the PFCRA if the amount fraudulently taken from the Government exceeds $100,000.\textsuperscript{171} This provision underscores the need for an expeditious administrative alternative.\textsuperscript{172} Once claims approach the jurisdictional limit of the PFCRA, it is more likely that the False Claims Act will provide adequate relief and hence more likely that the Justice Department will commence its own action.\textsuperscript{173}

Finally,\textsuperscript{174} the United States Attorney General is responsible for the enforcement of any penalty or assessment imposed under the PFCRA.\textsuperscript{175} To do so, the Justice Department is required to bring a civil action in federal district court,\textsuperscript{176} but the defendant will be disallowed from raising as a defense any matters that were raised or could have been raised in the section 803 hearing.\textsuperscript{177} After either enforcement action or judicial review has been initiated, only the United States Attorney General may settle or compromise any penalty.\textsuperscript{178}

\textbf{CONCLUSION}

Fraud is an indisputable reality which results in the loss of millions of tax dollars each year while also eroding the public's confidence in the Government's ability to efficiently carry out its programs. At present, the False Claims Act is the primary weapon against fraud, providing civil penalties to restore lost

\textsuperscript{169} S. 1134, 99th Cong., 1st Sess., § 803(b)(1). Such written notice must also outline the reasons behind the agency's decision to proceed. See § 803(b)(1).

\textsuperscript{170} S. 1134, 99th Cong., 1st Sess., § 803(a)(2)(1), (2).

\textsuperscript{171} S. 1134, 99th Cong., 1st Sess., § 803(c)(1), (2).


\textsuperscript{173} REPORT TO THE CONGRESS, supra note 5, at 30. (Justice Department priorities favor actions involving amounts over $25,000).

\textsuperscript{174} The PFCRA also contains several technical sections governing subpoena power, the right to set off, agencies regulations, and reports but these provisions and the issues presented by them are beyond the scope of this Note.

\textsuperscript{175} S. 1134, 99th Cong., 1st Sess., § 806(a).

\textsuperscript{176} S. 1134, 99th Cong., 1st Sess., § 806(b)-(c).

\textsuperscript{177} S. 1134, 99th Cong., 1st Sess., § 806(b). Nor may the defendant raise these issues as a defense in a review pursuant to § 805. § 806(b). See also note 146 supra.

\textsuperscript{178} S. 1134, 99th Cong., 1st Sess., § 806(f).
funds and to deter future illegal activity. Unfortunately, courts have been baffled by this civil statute which assesses penalties for acts also punishable as crimes. Even though the Act has now been separated from its criminal counterparts, courts continue to be confused about how to interpret its provisions.

Some of the confusion may be solved by a more consistent focus on the "remedial" character of the Act, but judicial statutory construction is a limited device that should never exceed the limits placed upon it by congressional intent. What is needed is a new expression of the will of Congress. The Act itself must be amended. In addition, administrative remedies for smaller instances of fraud must be adopted through the passage of the Program Fraud Civil Remedies Act. Together, the False Claims Act and the Program Fraud Civil Remedies Act could be a powerful sword in the hands of administrative agencies and the Justice Department. Perhaps with these two mechanisms for combatting fraud firmly in place, Congress could get on with the real test—restoring the public’s faith in its ability to manage its programs.

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