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THE BUCK STOPS HERE: PREEMPTION OF THIRD-PARTY CLAIMS BY THE FALSE CLAIMS ACT

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During the past ten years, both the United States and individual whistleblowers have relied with increasing fervor on the False Claims Act ("FCA" or the "Act") to impose civil liability on those persons or entities who allegedly seek to raid federal coffers through the presentation of false or fraudulent claims for payments.¹ Since 1986, over 1,100 *qui tam*² cases have been filed, with a total civil fraud recovery of more than \$1 billion.³ With its provisions for treble damages and mandatory civil pen-

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1. 31 U.S.C. §§ 3729-3732 (1988).

2. *Qui tam* is the abbreviation for the phrase "*qui tam pro domino rege quam pro seipso*"—he who as much for the king as for himself. Under the FCA and other statutes which authorize *qui tam* actions, a private person, often referred to as a *qui tam* relator, is allowed to bring a civil action on behalf of the United States. As a reward for their assistance in the discovery and prosecution of fraudulent claims against the federal government, *qui tam* relators are offered a "bounty," e.g., a percentage of any monies recovered from the defendant in the *qui tam* action. See 31 U.S.C. § 3730 (1988); see also Note, *The History and Development of Qui Tam*, 1972 WASH. U. L.Q. 81, 83 (1972).

3. DEPARTMENT OF JUSTICE, *Justice Department Recovers Over \$1 Billion in Qui Tam Awards and Settlements*, Oct. 18, 1995, at 1, 4 (press release) [hereinafter D.O.J. PRESS

alties of between \$5,000 and \$10,000 for each false or fraudulent claim,⁴ the FCA has become a sword of Damocles over the heads of organizations and industries heavily dependent upon governmental purchases of, or payments for, their products. While *qui tam* litigation initially arose most frequently in cases involving United States Department of Defense contracts, recent exponential expansions in federal disbursements for health care services and products have sparked an explosion of *qui tam* litigation in that arena.⁵ In the six-month period ending March 31, 1995, the government recouped \$101 million in civil penalties for alleged health care fraud through actions brought under both the Civil Monetary Penalty Law ("CMPL")⁶ and the FCA.⁷

I. INTRODUCTION

In many health care-related lawsuits under the FCA, multiple parties in the distribution chain are potentially liable for causing a false claim to be presented to a federal agency. Consequently, practitioners are confronted with the common and complex threat that their client will be named as a third-party defendant and impleaded in an FCA action initially filed against another individual or entity. Mindful of this possibility, counsel must thoroughly evaluate the potential liability and litigation expenses when seeking to resolve threatened or asserted FCA claims. Because third-party claims often obstruct the execution of the congressional purposes and objectives in enacting the FCA, they may be barred by the doctrine of "conflict preemption." Moreover, even if a particular court

RELEASE]; see also Joann Gambale & Jeffrey E. Richardson, *Eighth Survey of White Collar Crime—Substantive Crimes, False Claims*, 30 AM. CRIM. L. REV. 643, 652-54 (1993).

4. 31 U.S.C. § 3729(a) (1988).

5. See generally David C. Hsia, *Application of Qui Tam to the Quality of Health Care*, 14 J. LEGAL MED. 301 (1993). More than 20% of the *qui tam* cases filed since the 1986 amendments have involved allegations of fraud perpetrated on the United States Department of Health and Human Services. See *Statistics Under the Qui Tam Provisions of the False Claims Act Amendments of 1986*, 62 FED. CONT. REP. 505-06, 515 (1994) [hereinafter *Statistics*].

6. 42 U.S.C. § 1320a-7a (1988). The CMPL authorizes administrative proceedings against persons who submit false or improper claims under Medicare and Medicaid programs.

7. See Semiannual Report of the Department of Health and Human Services Office of Inspector General (Oct. 1, 1994 - Mar. 31, 1995) [hereinafter *Semiannual Report*]. The health care field is only one of several industries where *qui tam* litigation poses a significant threat; *qui tam* recoveries in all sectors have increased dramatically in recent years. In fiscal year 1987, the government recouped approximately \$200,000 from actions filed by *qui tam* relators. By fiscal year 1995, annual government recoveries had increased to \$243 million. See D.O.J. PRESS RELEASE, *supra* note 3, at 4.

concludes that preemption is unavailable, other procedural avenues should be considered to protect a client's flanks.

A. Purposes and Elements of the FCA

The civil False Claims Act was enacted in 1863 to address rampant fraud perpetrated against the government by Civil War defense contractors.⁸ The purposes of the Act remain the same today: (1) to ensure the integrity of federal programs and the public fisc by deterring submissions to the government of false or fraudulent claims; (2) to provide restitution to the government of money taken from it by fraud; and (3) to punish those who defraud the United States.⁹

Despite its long history and several amendments, the Act was little more than a dusty lance in the government's armory until the past decade.¹⁰ In response to a perceived increase in fraud against the federal government in the early 1980s, as well as the recognition that the compliance and prevention measures then in place were inadequate, Congress enacted the False Claims Amendments Act of 1986.¹¹ These far-reaching revisions "made [the FCA] the weapon of first choice in combatting fraud in virtually every program involving federal funds."¹² Central to these amendments was the addition of monetary incentives for private individ-

8. False Claims Act, ch. 67, 12 Stat. 696 (1863); *see also* *Rainwater v. United States*, 356 U.S. 590, 592 (1958) (holding that the objective of Congress in passing the Act was to protect government funds and property from fraudulent claims); S. REP. NO. 345, 99th Cong., 2d Sess. 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. The Act was originally known as the "Informer's Act" and "Lincoln Law." JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS 1-3 (Supp. 1994).

9. *See, e.g.*, *United States v. Bornstein*, 423 U.S. 303, 315-17 (1976); *In re Commonwealth Cos. Inc.*, 913 F.2d 518, 525-26 (8th Cir. 1990); *United States v. O'Connell*, 890 F.2d 563, 568 (1st Cir. 1989); *United States v. McLeod*, 721 F.2d 282, 285 (9th Cir. 1983); *United States v. Warning*, No. Civ.A.93-4541, 1994 WL 396432, at *8 (E.D. Pa. July 26, 1994); *In re Selma Apparel Corp.*, 132 B.R. 968, 970 (S.D. Ala. 1991); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Ins. Co.*, 721 F. Supp. 1247, 1253 (S.D. Fla. 1989).

10. *See* Kent D. Strader, Note, *Counterclaims Against Whistleblowers: Should Counterclaims Against Qui Tam Plaintiffs be Allowed in False Claims Act Cases?*, 62 U. CIN. L. REV. 713, 727 (1993).

11. Pub. L. No. 99-562, 100 Stat. 3153 (1986) (codified as amended at 31 U.S.C. §§ 3729-3733 (1988)).

12. *See* BOESE, *supra* note 8, at 1-3; *see also* *United States v. Etrick Wood Prods.*, 683 F. Supp. 1262, 1265 (W.D. Wis. 1988) ("The increased penalties in the 1986 amendments . . . indicate that Congress sought both to deter the increasingly pervasive and severe problem of fraud and to enhance the government's ability to recover losses sustained as a result of fraud."); *United States v. Hill*, 676 F. Supp. 1158, 1166-68 (N.D. Fla. 1987) (providing a thorough review of the 1986 amendments and their legislative history).

uals—known as *qui tam* relators—to ferret out fraud and bring it to the attention of the federal government. Not surprisingly, the 1986 amendments to the FCA have proven to be a litigation tinderbox; the recent proliferation of *qui tam* actions is, in a word, staggering.¹³

B. Penalties under the FCA

The current version of the FCA imposes civil liability on any person or entity who, *inter alia*, “knowingly presents, or causes to be presented, to an officer or employee of the United States government . . . a false or fraudulent claim for payment or approval”¹⁴ or who “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government.”¹⁵ The Act imposes liability of three times the damages sustained by the government as a result of the presentation of false or fraudulent claims, as well as a mandatory civil penalty of between \$5,000 and \$10,000 for each claim.¹⁶ Generally, when more than one person has violated the FCA, each is jointly and severally liable for the penalties and damages imposed.¹⁷

C. The *Qui Tam* Mechanism

Section 3730 of the FCA allows a private person, often referred to as the *qui tam* relator, to bring a civil action on behalf of the United States for a violation of the FCA.¹⁸ The *qui tam* provisions are procedural only; they do not change the elements of, or damages and penalties for, an FCA claim.¹⁹ The legislative intent underlying the *qui tam* mechanism is

13. See *supra* note 7 and accompanying text.

14. 31 U.S.C. § 3729(a)(1) (1988).

15. 31 U.S.C. § 3729(a)(1)-(2) (1988).

16. 31 U.S.C. § 3729(a) (1988). This penalty is mandatory and cannot be decreased even if the false claim in question was for a minimal sum. See, e.g., *United States v. Hughes*, 585 F.2d 284, 286 n.1 (7th Cir. 1978). If imposition of the statutory penalties follows a conviction under the criminal False Claims Act, 18 U.S.C. § 287, however, those penalties may violate the Eighth Amendment Double Jeopardy Clause. See *United States v. Halper*, 490 U.S. 435, 449-51 (1989).

17. 31 U.S.C. § 3729(a) (1988); see also *United States v. CFW Constr. Co.*, 649 F. Supp. 616, 618 (D. S.C. 1986); BOESE, *supra* note 8, at 2-94.

18. 31 U.S.C. § 3730(b)(1) (1988).

19. Because the relator institutes suit on behalf of the United States, he cannot assert any claims on his own behalf or other claims on behalf of the United States alleging, for example, common law fraud, unjust enrichment, or violations of other federal statutes. BOESE, *supra* note 8, at 1-29, 1-30. The one exception to this rule is an allegation of employment retaliation based on lawful actions committed by the relator that, *inter alia*, further the investigation or initiation of an FCA action. Relief available for a retaliation

to provide incentives for “whistleblowers” to assist the federal government in the discovery and prosecution of fraudulent claims by offering them a “bounty,” *i.e.*, a percentage of any monies recovered from the defendant in the FCA suit.²⁰ By empowering individuals to act as “private attorneys general,” Congress hoped to punish and deter fraud and abuse in industries dependent upon United States government programs.

To initiate a *qui tam* action, the relator must file, *in camera*, the complaint alleging a violation of the FCA and then serve the government with a copy of the complaint as well as a written disclosure of substantially all of the material evidence and information the relator possesses regarding his or her allegations.²¹ The complaint remains under seal for at least sixty days,²² while the government reviews the bases for the action and determines whether to intervene²³ and assume primary responsibility for prosecuting the case or to notify the court of its decision not to intervene, thereby leaving the relator with the right to pursue his claims.²⁴

If the government intervenes in a *qui tam* action, the relator typically is entitled to receive between fifteen and twenty-five percent of the proceeds of the action or settlement of the claim.²⁵ If the government decides not to intervene, the relator who successfully prosecutes or settles

claim includes reinstatement, two times the back pay to which the relator is entitled, compensation for special damages, and litigation costs, including attorneys' fees. See 31 U.S.C. § 3730(h) (1988).

20. [The FCA] was passed upon the theory, based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting . . . under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel.

United States v. Griswold, 24 F. 361, 366 (D. Or. 1885), *quoted in* False Claim Amendments Act of 1986, S. REP. NO. 345, 99th Cong., 2d Sess. 11 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5276.

21. 31 U.S.C. § 3730(b)(2) (1988).

22. *Id.*

23. *Id.* The FCA specifically prohibits persons other than the government from intervening in a *qui tam* lawsuit or bringing a related action based on the facts underlying the pending litigation. *Id.* § 3730(b)(5) (1988).

24. *Id.* § 3730(b)(4)(A)-(c)(1). Prior to the 1986 amendments, *qui tam* relators were not guaranteed any continued role in an FCA litigation once the government intervened in the case. Moreover, determination of their portion of any award obtained was subject to the discretion of the court, which often awarded the relators only a “tiny fraction” of the proceeds of the FCA action. See BOESE, *supra* note 8, at 1-22, 1-23.

25. *Id.* § 3730(d)(1) (1988). Where, however, the court finds that the action is “based primarily on disclosures of specific information” from sources other than the relator, the court, in its discretion, may award any sum which it considers “appropriate, but in no case more than 10 percent of the proceeds . . .” *Id.*

the action is entitled to "an amount which the court decides is reasonable," but not less than twenty-five percent nor more than thirty percent of the proceeds of the action.²⁶ These reward provisions create the potential for significant monetary gain.²⁷

The detailed restitution, penalty, and *qui tam* provisions of the FCA as described above, evidence a congressional intent to enact a comprehensive federal scheme to deter and punish perpetrators of fraud on the government. In the hands of government and private litigants, however, this precise statutory blueprint for combating fraud is often overlaid with a multitude of superficially similar, yet fundamentally extraneous, state law claims.²⁸ First, *qui tam* defendants often file state law counterclaims against relators in an attempt to deflect a portion of their FCA exposure. Most cases examining the FCA's preemptive scope have arisen in this context. Second, defendants in FCA actions frequently assert state law

26. *Id.* § 3730(d)(2).

27. See S. REP. NO. 345, 99th Cong., 2d Sess. 2 (1986), reprinted in 1986 U.S.C.C.A.N. at 5266-67 ("The . . . legislation seeks . . . to encourage any individual knowing of Government fraud to bring that information forward."). Relators have received more than \$187 million in recoveries; the largest *qui tam* recovery by a relator is \$22.5 million by a former vice-president of finance at United Technologies Corporation. D.O.J. PRESS RELEASE, *supra* note 3, at 3.

28. Additionally, because of the evidentiary burden posed by the scienter element of FCA claims, the United States often pairs them with federal common law causes of action that permit single damages; see, e.g., *United States v. Rockwell Int'l Corp.*, 795 F. Supp. 1131 (N.D. Ga. 1992) (recognizing additional claims such as unjust enrichment, payment after mistake of fact, and breach of contract); *United States v. Incorporated Village of Island Park*, 791 F. Supp. 354, 357 (E.D.N.Y. 1992) (recognizing claims such as fraud, breach of fiduciary duty, unjust enrichment, and erroneous payment of funds, as well as FCA claims); *United States v. Kensington Hosp.*, 760 F. Supp. 1120, 1123 (E.D. Pa. 1991) (recognizing claims such as fraud, breach of fiduciary duty, unjust enrichment, mistake of fact, negligent misrepresentation, and fraudulent misrepresentation, as well as FCA claims); see also UNITED STATES DEPT. OF JUSTICE, CIVIL DIVISION, CIVIL FRAUD MONOGRAPH 226-34 (Nov. 1988), 3 DEPARTMENT OF JUSTICE MANUAL 4-4.700A (1994 Supp.) [hereinafter CIVIL FRAUD MONOGRAPH] (summarizing potentially applicable federal common law causes of action). Under such circumstances, counsel should consider arguing that the FCA abrogated such federal common law causes of action. See *Milwaukee v. Illinois*, 451 U.S. 304, 316-17 (1981) (noting that the courts presume that congressional enactments displace preexisting federal common law); *Mortgages, Inc. v. United States Dist. Court*, 934 F.2d 209, 213 (1991) ("Where . . . Congress has enacted a comprehensive legislative scheme, including integrated procedures for enforcement, there is a strong presumption that Congress did not intend the courts to supplement the remedies enacted."); cf. *In re Moffit, Zwering & Kemler, P.C.*, 864 F. Supp. 527, 542-43 (E.D. Va. 1994) (holding that the United States' state law claims for conversion and detinue were preempted by the federal forfeiture statutes). But see CIVIL FRAUD MONOGRAPH, *supra*, at 224-26 (arguing that the United States' federal common law remedies for false claims survive enactment of the FCA).

third-party claims against others potentially responsible for the fraud. Given the rise in governmental use of the FCA to combat fraud, these claims undoubtedly will increase in the future.

The institution of state law causes of action does not further the FCA's goals of deterrence and punishment of fraud on the government. Rather, by focusing the attention of the courts away from the central elements of the purported FCA violation, companion state law causes of action interfere directly with the methods by which the FCA was designed to reach its ideas. In particular, the third-party practice involving new claims and parties is simply a mechanism used by those accused of fraud under the FCA to circumvent the statute's implicit prohibition against shifting the financial burden of FCA liability to others. Accordingly, these third-party claims run afoul of Congress' intent in enacting the FCA and should be preempted.

D. Third-Party Claims in Federal Court

Rule 14(a) of the Federal Rules of Civil Procedure governs third-party practice in federal court. Under that provision, a defendant in a civil action may file a third-party complaint against "a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff."²⁹ It is not sufficient that the defendant's claim against the third party "arises from the same transaction or set of facts as the original claim."³⁰ Rather, the third-party

29. FED. R. CIV. P. 14(a). Leave of court to serve the third-party complaint is required unless it is filed within 10 days after the third-party plaintiff serves its original answer to the complaint. *Id.* This requirement, however, is intended for the benefit of the parties to the initial action, not the putative third-party defendant. *See, e.g., Nelson v. Quimby Island Reclamation Dist. Facilities Corp.*, 491 F. Supp. 1364, 1387 n.48 (N.D. Cal. 1980); *Hensley v. United States*, 45 F.R.D. 352, 353 (D. Mont. 1968). Moreover, local district court rules often impose further time limits on the filing of third-party complaints, though the district court typically retains discretion to waive such restrictions. *See, e.g., Insurance Co. of N. Am. v. Morrison*, 148 F.R.D. 295, 296 (M.D. Fla. 1993) (applying a local rule requiring that a motion for leave to join a third-party be filed within six months of service of the movant's answer or at least 60 days before the scheduled trial date, whichever is earlier); *Frankenfield v. Guardian Life Ins. Co.*, No. Civ.A.90-6928, 1991 WL 257084, at *1 (E.D. Pa. Nov. 25, 1991) (applying a local rule that provides that a motion to join a third-party "will ordinarily be denied as untimely unless filed not more than ninety days after the service of the moving party's answer").

30. 6 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1446, at 378-79 (1990); *see, e.g., Ez-Tixz, Inc. v. Hit-Tix, Inc.*, No. Civ.A.93-3791, 1995 WL 77589, at *4 (S.D.N.Y. Feb. 27, 1995) (noting that "third-party plaintiffs' reliance on common transactions or operative facts arising from the two complaints, as being dispositive under Rule 14, is simply misplaced"); *Federal Home Loan Mortgage Corp. v. Portnoy*, No. Civ.A.92-

complaint must attempt to transfer to the third-party the liability asserted against the third-party plaintiff in the main action.³¹ Since Rule 14 itself is merely a procedural device and does not “abridge, enlarge, nor modify the substantive rights of any litigant,”³² the third-party plaintiff must assert a substantive legal basis for maintaining the claim.³³ Once a derivative claim is successfully pleaded, however, Rule 18 of the Federal Rules of Civil Procedure permits the third-party plaintiff to assert any other claim against the third-party defendant that arises out of the same transaction or occurrence as the initial claim.³⁴ After a third-party defendant has been properly impleaded, it may participate fully in the litigation of the primary claims asserted by the plaintiff. This includes assertion of any defenses that the third-party plaintiff has to the plaintiff’s claim³⁵ and obtaining discovery in the main action.³⁶

0474, 1994 WL 584692, at *2 (S.D.N.Y. Oct. 24, 1994) (stating that “the mere fact that the alleged third-party claim arises from the same transaction or set of facts as the original claim is not enough”); *International Paving Sys. v. Van-Tulco, Inc.*, 866 F. Supp. 682, 687 (E.D.N.Y. 1994) (quoting *WRIGHT ET AL.*, *supra*, § 1446, at 378-79); *United States v. Berk & Berk*, 767 F. Supp. 593, 604 (D.N.J. 1991) (“A third-party claim is not proper where it is separate and independent from the claim alleged in the complaint, even where it arises out of the same facts as the plaintiff’s action.”).

31. *See, e.g.*, *Stewart v. American Int’l Oil & Gas Co.*, 845 F.2d 196, 200 (9th Cir. 1988) (“The crucial characteristic of a Rule 14 claim is that defendant is attempting to transfer to the third-part defendant the liability asserted against him by the original plaintiff”); *Kenneth Leventhal & Co. v. Joyner Wholesale Co.*, 736 F.2d 29, 31 (2d Cir. 1984) (providing that third-party liability must be “dependent upon the outcome of the main claim” or “secondary liable as a contributor to the defendant”); *Ez-Tixz*, 1995 WL 77589, at *2 (“In order to implead a third party the defendant must show that he is found liable to the plaintiff, then the third party will be liable to the defendant.”); *International Paving* 866 F. Supp. at 686 (stating that “for impleader to be available, the third party defendant must be liable to the original defendant, or that the third party must necessarily be liable over to the defendant for all or part of the plaintiff’s recovery, or that the defendant must attempt to pass on to the third party all or part of the liability asserted against the defendant”) (internal quotation marks omitted).

32. *Ez-Tixz*, 1995 WL 77589, at *4; *see also Heizer Corp. v. Ross*, 601 F.2d 330, 333 (7th Cir. 1979); *EEOC v. Ferris State College*, 493 F. Supp. 707, 718 (W.D. Mich. 1980); *Brennan v. Emerald Renovators, Inc.*, 410 F. Supp. 1057, 1063 (S.D.N.Y. 1975).

33. *See, e.g.*, *Ez-Tixz*, 1995 WL 77589, at *4; *Stratton Group, Ltd. v. Sprayregen*, 466 F. Supp. 1180, 1185-86 (S.D.N.Y. 1979).

34. *FED. R. CIV. P.* 18; *see, e.g.*, *First Golden Bancorp. v. Weiszmann*, 942 F.2d 726, 730 (10th Cir. 1991); *United States v. City of Twin Falls*, 806 F.2d 862, 866-68 (9th Cir. 1986); *In re Citisource, Inc. Sec. Litig.*, 694 F. Supp. 1069, 1084 (S.D.N.Y. 1988); *see also* 6 *WRIGHT ET AL.*, *supra* note 30, § 1452, at 414. Additional claims that do not arise out of the same transaction or occurrence as the derivative third-party claim may be asserted if they independently satisfy the tests for jurisdiction and venue. *Id.* at 414-15.

35. *FED. R. CIV. P.* 14(a); *see also* 6 *WRIGHT ET AL.*, *supra* note 30, § 1457, at 440-41.

36. *See, e.g.*, *United States v. Kramer*, 770 F. Supp. 954, 961 (D.N.J. 1991) (discussing third-party defendants’ participation in discovery process).

E. Preemption Doctrine and the FCA

The Supremacy Clause³⁷ bestows on Congress broad authority to preempt state statutory and common law. Since the advent of the modern preemption doctrine,³⁸ the central question in preemption cases has been whether Congress intended to exercise this “well established” power.³⁹ Because the decision to preempt state law is a matter of congressional discretion, the role of the courts in reviewing the preemptive scope of a particular statute is limited to ascertaining legislative intent, be it express or implied.⁴⁰ To that end, courts “examine the explicit statutory language and the structure and purpose of the [particular federal] statute”⁴¹ at issue.

The Supreme Court has acknowledged three versions of the preemption doctrine: express preemption, field preemption, and conflict preemption. Express preemption, as its name suggests, is found where Congress states in the text of a statute its intention to displace state authority in a particular area.⁴² Field preemption is a form of implied preemption wherein “Congress’ intent to supersede state law may be inferred because ‘[t]he scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.’”⁴³ When “the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,” the courts apply

37. U.S. CONST., art. VI, cl. 2.

38. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *Hines v. Davidowitz*, 312 U.S. 52 (1941).

39. *Pacific Gas & Elec. Co. v. State Energy Comm’n*, 461 U.S. 190, 203 (1983).

40. “[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. ‘The purpose of Congress is the ultimate touchstone.’” *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

41. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990).

42. See, e.g., *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483, 1488 (1995); *Ingersoll-Rand*, 498 U.S. at 138; see also Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 808 (1994). For example, the Employee Retirement Income Security Act (“ERISA”), 29 U.S.C. §§ 1001-1461 (1988), explicitly provides that “any and all State laws . . . relat[ing] to any employee benefit plan” are superseded by ERISA. 29 U.S.C. § 1144(a) (1988).

43. *Fidelity Fed. Sav. & Loan Ass’n v. De La Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); see, e.g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (federal law occupies the field of nuclear safety regulation).

field preemption to prevent the application of state law.⁴⁴

Even when Congress has chosen not to occupy an entire regulatory field, a court may find the conflict preemption doctrine applicable to the extent that state law is in "actual conflict" with federal law.⁴⁵ Such a conflict may arise either (1) when "compliance with both federal and state regulations is a physical impossibility,"⁴⁶ or (2) when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁴⁷ Under any of these theories, the court's ultimate task "is to determine whether state regulation is consistent with the structure and purpose of the [federal statute,] . . . [l]ooking to 'the provisions of the whole law, and to its object and policy . . .'"⁴⁸

The FCA does not contain an express preemption clause. Moreover, in enacting the FCA, Congress did not draft a scheme of federal regulation sufficiently pervasive to support the conclusion that there was no further "room in the field" for state tort and contract law. Therefore, only conflict preemption can possibly result in the dismissal of state causes of action that impede the attainment of Congress' objectives in enacting the FCA.

F. *The FCA Prohibits Claims for Contribution and Indemnification*

Since the 1986 amendments, defendants have repeatedly attempted to shift to others a portion of the financial burden imposed by the FCA (as well as associated expenses and attorneys' fees) by asserting claims for indemnification or contribution against *qui tam* relators or alleged third-party joint tortfeasors.⁴⁹ While the text of the Act is silent on the availa-

44. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991) (quoting *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

45. *See, e.g., Freightliner Corp.*, 115 S. Ct. at 1487; *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989).

46. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

47. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (citation omitted). Similar to this second form of conflict preemption, there is also "frustration preemption," sometimes viewed as a distinct, fourth type of preemption. *See Gardbaum, supra* note 42, at 808 n.206.

48. *Gade v. National Solid Waste Management Ass'n*, 112 S. Ct. 2374, 2383 (1992) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)).

49. *See, e.g., United States v. Nardone*, 782 F. Supp. 996, 999 (M.D. Pa. 1990). Contribution is a right by which a defendant who has paid more than his just portion of a liability shared with several persons is entitled to recovery against those others to obtain payment of their respective shares. 18 AM. JUR. 2D *Contribution* § 1 (1985). Indemnification is "a right which inures to a person who has discharged a duty which is owed by him but which, as between himself and another, should have been discharged by the other." 41 AM. JUR. 2D *Indemnity* § 1 (1968). While the two terms are often used interchangeably, they do not mean the same thing. Indemnity involves complete reimbursement for what another

bility of contribution and indemnification,⁵⁰ federal courts have consistently refused to recognize a right to contribution or indemnification under the FCA or federal common law.⁵¹ As explained by the Ninth Circuit, given its purpose "to deter future fraudulent claims, as well as recoup the government's losses due to fraud[,] . . . [t]he FCA is in no way intended to ameliorate the liability of wrongdoers by providing defendants with a remedy against a *qui tam* plaintiff with 'unclean hands.'"⁵²

II. ANALYSIS

A. Cases Addressing Preemptive Scope of the FCA

In addition to using claims for contribution and indemnification under federal law, *qui tam* defendants have also sought to shift FCA liability pursuant to third-party claims asserting state law causes of action. These tactics raise the question whether such claims are preempted by the FCA.⁵³ The first case to examine the preemptive scope of the FCA was

should have paid. By contrast, contribution involves a proportionate reimbursement by the defendant for his ratable share of the total amount of the liability. *Id.* § 3.

50. *Mortgages, Inc. v. United States Dist. Court*, 934 F.2d 209, 213 (9th Cir. 1991) ("The FCA does not speak to the right of contribution or indemnification.").

51. *See, e.g., Mortgages*, 934 F.2d at 214 (providing that no basis in the FCA or federal common law for a right to contribution or indemnity in FCA actions); *Nardone*, 782 F. Supp. at 999 (FCA defendant in a non-*qui tam* suit precluded as a matter of law from seeking indemnification from a third-party defendant); *United States ex rel. Stephens v. Prabhu*, No. CV-S-92-653-LDG, 1994 WL 761237, at *1 (D. Nev. Dec. 14, 1994) (holding that "[n]either the FCA nor federal common law provides a right to contribution or indemnification in a FCA action"); *see also Israel Discount Bank Ltd. v. Entin*, 951 F.2d 311, 314 n.9 (11th Cir. 1992) (acknowledging, in dicta, the FCA's prohibition against claims for contribution or indemnification); *United States v. Kennedy*, 431 F. Supp. 877, 878 (C.D. Cal. 1977) (stating that if found liable under FCA, defendant/third party plaintiffs are not entitled to indemnification from the third party defendant, "even if it can be proven that he too would have been jointly and severally liable").

52. *Mortgages*, 934 F.2d at 213. The courts have similarly held that contribution or indemnification are unavailable under many federal statutes. *See, e.g., Texas Indus., Inc. v. Radcliffe Materials*, 451 U.S. 630, 646 (1981) (holding that there is no right to contribution under the antitrust laws); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94-95 (1981) (holding that there is no right to contribution under Title VII or the Equal Pay Act); *Eichenholtz v. Brennan*, 52 F.3d 478, 483-84 (3d Cir. 1995) (providing that although contribution is available under the federal securities laws, there is no right to indemnification).

53. Many of the cases addressed in this section do not specifically discuss the preemption doctrine or explain their holdings in these terms. However, the courts' rationale that state law claims would undermine the FCA amounts to the application of the doctrine *sub silentio*. These cases are therefore distinguishable from those decided under 26 U.S.C. § 6672, which allows the Internal Revenue Service to assess penalties for unpaid taxes. Courts have long prohibited defendants in § 6672 actions from filing third-party state law

*Mortgages, Inc. v. United States District Court.*⁵⁴ Mortgages was a mortgage lending company that accepted applications for loans insured by the Department of Housing and Urban Development (“HUD”). The defendants, debtors under the HUD program, filed loan applications with Mortgages that allegedly contained false and misleading statements.⁵⁵ After the debtors defaulted on the HUD-backed loans, Mortgages entered into a settlement with the government to indemnify it for the losses sustained as a result of the loans, and thereafter it filed a *qui tam* action under the FCA to recover against the debtors.⁵⁶ In response, the debtor defendants filed state law third-party claims against Mortgages and its president, the *qui tam* relators, alleging breach of contract, breach of covenant of good faith and fair dealing, breach of fiduciary duty, fraud, negligence, negligent misrepresentation, and conspiracy.⁵⁷ The relators moved to dismiss, arguing that the defendants impermissibly sought a form of contribution or indemnification through their counterclaims.⁵⁸ After the district court rejected these arguments and denied the motion, the Court of Appeals for the Ninth Circuit granted a petition for mandamus and ordered the counterclaims dismissed.⁵⁹ Concluding that a right to contribution or indemnification did not exist under the FCA or the federal common law, the Ninth Circuit determined that “there can be no right to assert state law counterclaims that, if prevailed on, would end in the same result” as contribution or indemnification.⁶⁰ The court therefore directed the district court to dismiss all of the defendants’ counterclaims.⁶¹

claims for contribution on the grounds that such claims would complicate and prolong the efficient collection of taxes. *See, e.g.,* *Carlucci v. United States*, 793 F. Supp. 482, 485-86 (S.D.N.Y. 1992); *Cook v. United States*, 765 F. Supp. 217, 220 (M.D. Pa. 1991). Such claims can, however, be asserted in independent lawsuits. In the FCA context, by contrast, the courts’ rationale—that the availability of contribution or indemnity would undermine Congress’ objectives in enacting the FCA—applies with equal vigor whether or not such claims are asserted in the FCA action or an independent lawsuit. *But cf. United States ex rel. Rodriguez v. Weekly Publications, Inc.*, 74 F. Supp. 763, 769-70 (S.D.N.Y. 1947) (holding that notwithstanding their status as compulsory under Federal Rule of Civil Procedure 13, an FCA defendant must bring all counterclaims in a separate action).

54. 934 F.2d 209 (9th Cir. 1991).

55. *Id.* at 210.

56. *Id.* at 210-11.

57. *Id.* at 211 n.1.

58. *Id.* at 211.

59. *Id.* at 211, 214.

60. *Id.* at 214. Although in this passage the *Mortgages* court referred to the allegations as counterclaims, it recognized earlier in its opinion that they were, in fact, third-party claims, albeit ones filed against the relators. *Id.* at 211 n.2.

61. *Id.* at 214.

While not labeling its analysis as an application of the preemption doctrine, the Ninth Circuit's holding in *Mortgages* was clearly based on conflict preemption principles. The court explicitly found that state law claims that would allow FCA violators to reduce the financial burden of their fraud would frustrate the object and policy of the Act: to punish past fraudulent conduct without allowing contribution even from joint tortfeasors who participated in the fraud.⁶²

This reading was confirmed in *United States v. Warning*,⁶³ which followed *Mortgages* and held that state law claims for contribution are preempted by the FCA.⁶⁴ *Warning* involved claims of Medicare and Medicaid fraud in the sale of medical supplies against three individuals and seven corporations.⁶⁵ The government alleged, *inter alia*, violations of the FCA and state law.⁶⁶ Several of the defendants filed third-party claims asserting various state law causes of action as well as a claim for contribution against their lawyers.⁶⁷ Ruling that "any right the [defendants] might have to contribution under state law is pre-empted by the [FCA]," the court dismissed the third-party complaint.⁶⁸ In support of its holding, the *Warning* court explicitly stated what was implicit in the *Mortgages* opinion: there is an actual conflict between state law contribution claims and the FCA because such state law claims would undermine the FCA's goal of deterring future misconduct and compensating the government.⁶⁹

In *Israel Discount Bank Ltd. v. Entin*,⁷⁰ the Court of Appeals for the Eleventh Circuit also agreed with the *Mortgages* preemption analysis, albeit in *dicta*. In holding that a suit filed by a former FCA defendant against another defendant was barred by the principles of *res judicata*, the *Entin* court noted that the defendant's claims for violations of the Racketeer Influenced and Corrupt Organizations Act⁷¹ ("RICO"), fraudulent concealment, and conspiracy to defraud were "nothing more than a poorly disguised attempt to evade" the FCA's prohibition against contri-

62. *Id.*

63. 1994 WL 396432, at *8 (E.D. Pa. July 26, 1994).

64. *Id.*

65. *Id.* at *1.

66. *Id.*

67. *Id.* at *1, *7.

68. *Id.* at *8.

69. *Id.*

70. 951 F.2d 311 (11th Cir. 1992).

71. 18 U.S.C. §§ 1961-1968 (1988).

bution and indemnification and therefore were preempted.⁷²

The same issue arose in *Burch ex rel. United States v. Piqua Engineering, Inc.*⁷³ There, the *qui tam* defendant filed counterclaims against the relators alleging breach of contract, breach of the duty of loyalty, breach of fiduciary duty, breach of the duty of fair representation, and defamation.⁷⁴ The district court denied the relators' motion to dismiss the counterclaims.⁷⁵ Framing the question as involving the "availability of counterclaims in a False Claims Act case,"⁷⁶ the court rejected the relators' arguments for two, apparently independent, reasons. First, the counterclaims did not allege that the relators "were participants in the substantive FCA violations" set forth in the *qui tam* complaint.⁷⁷ Instead, the breach of contract counterclaim was based on the allegation that the relators improperly performed their jobs, and the remaining counterclaims were based on allegedly false and damaging statements to the media made by the relators.⁷⁸ Second, because the counterclaims were compulsory under the Federal Rules of Civil Procedure and therefore could not be asserted in an independent action, the court concluded that dismissing them would violate the *qui tam* defendant's procedural due process rights.⁷⁹ To avoid "chilling" the initiation of *qui tam* suits, the court ordered that the counterclaims be tried separately from the FCA claims.⁸⁰

The Ninth Circuit refined its preemption analysis in *United States ex rel. Madden v. General Dynamics Corp.*⁸¹ *Madden* involved allegations by *qui tam* relators, who were former and current employees of General Dynamics, that General Dynamics made misrepresentations to the United States Navy concerning the testing and development of a missile sys-

72. *Entin*, 951 F.2d at 314 n.6, 315 n.9.

73. 145 F.R.D. 452 (S.D. Ohio 1992).

74. *Id.* at 455-56.

75. *Id.* at 456.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 457. For this reason, the district court explicitly disagreed with the Ninth Circuit's decision in *Mortgages* and the district court opinion in *United States ex rel. Madden v. General Dynamics Corp.*, No. CV-88-5352 WMB (C.D. Cal. Feb. 13, 1992), *rev'd*, 4 F.3d 827 (9th Cir. 1993). Despite *Burch's* criticism of *Mortgages*, the Ninth Circuit's subsequent decision in *Madden*, discussed *infra* note 81 and accompanying text, appears consistent with *Burch*.

80. *Burch*, 145 F.R.D. at 457-58.

81. 4 F.3d 827 (9th Cir. 1993).

tem.⁸² General Dynamics filed eight state law counterclaims against the relators, alleging, *inter alia*, breach of the duty of loyalty, breach of fiduciary duty, libel, fraud, and misappropriation of trade secrets.⁸³ The district court granted the relators' motion to dismiss all of the corporation's counterclaims under the analysis applied in *Mortgages*, despite acknowledging that the counterclaims were compulsory and that some of them did not seek indemnification or contribution, but rather "independent damages."⁸⁴ Specifically, the district court concluded that counterclaims for so-called independent damages presented no significant difference from other state law claims and were impermissible "because they [would] have the practical effect of providing a defendant the opportunity to offset its liability by recovering damages from *qui tam* plaintiffs."⁸⁵

The Ninth Circuit disagreed with the district court and reversed the dismissal of counterclaims for independent damages. The court explained that, while "[c]ounterclaims for contribution or indemnification by definition *only* have the effect of offsetting liability[,] [c]ounterclaims for independent damages . . . are not dependent on a *qui tam* defendant's liability."⁸⁶ Because a *qui tam* defendant's counterclaims often will be compulsory under Rule 13 of the Federal Rules of Civil Procedure and consequently could not be asserted in a separate action, the *Madden* court concluded that a prohibition on counterclaims seeking independent damages would violate procedural due process.⁸⁷

While holding that *qui tam* defendants can bring such counterclaims, the court attempted to minimize the risk that this holding would result in an "end run around *Mortgages*."⁸⁸ Thus, the *Madden* court indicated that the proper course in FCA litigation was to determine the *qui tam* defendant's liability *before* addressing the counterclaims. If the *qui tam* defendant is found liable under the FCA, then all counterclaims—even those for independent damages—should be dismissed "on the ground that they will have the effect of providing for indemnification or contribution."⁸⁹ By contrast, if the court finds the *qui tam* defendant not liable under the

82. *Id.* at 829.

83. *Id.*

84. See Strader, *supra* note 10, at 741-46.

85. *Madden*, 4 F.3d at 830.

86. *Id.* at 830-31.

87. *Id.* at 831 (citing Burch *ex rel.* United States v. Piqua Engineering, Inc. 145 F.R.D. 452, 457 (S.D. Ohio 1992)). *Madden* recognized that other courts had dismissed counterclaims brought by *qui tam* defendants to recover independent damages. *Id.* at 830 n.1.

88. *Id.* at 831.

89. *Id.*

FCA, it may pursue its counterclaims.⁹⁰

The *Madden* analysis was applied to third-party claims in *United States ex rel. Stephens v. Prabhu*.⁹¹ In *Stephens*, which involved false Medicare reimbursement claims, the *qui tam* defendants filed counterclaims against several of the relators for libel, trade libel, abuse of process, malicious prosecution, and third-party claims for, *inter alia*, breach of contract and negligent misrepresentation against the persons who owned the defendant health care entity at the time that the allegedly false claims were submitted.⁹² The district court granted the United States' and the relators' motions to dismiss all third-party claims.⁹³ Because each of the defendants' third-party claims sought "to hold the Third-Party Defendants liable to the extent that any false claims are proven at trial," the *Stephens* court concluded they did *not* seek damages "independent" of the *qui tam* defendants' FCA liability and were, therefore, preempted.⁹⁴ The district court also held that the counterclaims were for independent damages and therefore could be pursued should the *qui tam* defendants prevail in the FCA action.⁹⁵ Following *Madden*, however, the court held that if the *qui tam* defendants are found liable under the FCA, the counterclaims would be dismissed as providing contribution or indemnification.⁹⁶

B. Implications of the Preemption Analysis

The series of cases summarized above provides strong support for counsel attempting to extricate a client who has been impleaded into a pending *qui tam* action. While it is well-settled that neither contribution nor indemnity for FCA liability are available under federal law,⁹⁷ *Mortgages* and its progeny have expanded this principle to prohibit *qui tam* defendants from asserting *any* claim, even one based on state law, that, by permitting the *qui tam* defendant to transfer at least some of its FCA liability to another party, would be the functional equivalent of contribution or indemnification. As a consequence, claims for breach of contract, breach of warranty, and negligent misrepresentation—to name just some of the theories most likely to be invoked—all fall within the rubric of

90. *Id.*

91. 1994 WL 761237 (D. Nev. Dec. 14, 1994).

92. *Id.* at *1.

93. *Id.*

94. *Id.*

95. *Id.* It appears that neither the *qui tam* relators nor the United States moved to dismiss the counterclaims on grounds of preemption. *See id.*

96. *Id.*

97. *See supra* note 49-52 and accompanying text.

state law causes of action preempted by the FCA.⁹⁸

In response to these arguments, particularly in the circuits that have not yet addressed directly the FCA's preemptive scope, *qui tam* defendants likely will argue that third-party claims actually further the goals of the FCA by holding another wrongdoer—the third-party defendant—responsible for the false claims submitted to the government. This argument is flawed in a number of respects. Most significantly, it ignores the Supreme Court's articulation of preemption principles. As the Court has explained, in determining whether state law hinders the implementation of a federal law,⁹⁹ "it is not enough to say that the ultimate goal of both federal and state law' is the same."¹⁰⁰ State law will be "preempted if it interferes with the methods by which the federal statute was designed to reach th[at] goal."¹⁰¹ In enacting the FCA, Congress specified the precise amounts to be exacted from those adjudged liable for filing false or fraudulent claims—treble damages and a civil penalty of between \$5,000 and \$10,000 per diem.¹⁰² State law remedies that reduce this amount by shifting liability to other parties interfere with the congressional judgment regarding the magnitude of the liability necessary to deter the filing of false or fraudulent claims and to punish those who violate the FCA. Moreover, these state law claims undermine Congress' intent to prevent wrongdoers from shifting the consequences of their FCA violations by permitting remedies among co-defendants and other parties with "unclean hands."¹⁰³

The preemption arguments are, if anything, stronger in circumstances in which the putative third-party defendant's FCA liability arising from the transactions at issue in the pending *qui tam* action has already been

98. *Mortgages* and its progeny have correctly applied the preemption principle to state law causes of action that, if allowed, would have the practical effect of providing "contribution" or "indemnification." In similar contexts, courts have examined how a particular cause of action would function, not the label placed on it. See, e.g., *In re United States Oil & Gas Litig.*, 967 F.2d 489, 496 (11th Cir. 1992) (providing that "a rose by any other name is still a rose," and the fraud and negligence claims asserted "are nothing more than claims for contribution or indemnification with a slight change in wording"); *International Paving Sys., Inc. v. Van-Tulco, Inc.*, 866 F. Supp. 682, 687 (E.D.N.Y. 1994) (looking to "the substance of the claim" rather than "the form of the . . . claim" in determining whether a third-party claim complaint states a claim derivative of the main claim under Rule 14(a)).

99. *Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88, 103 (1992) (citation omitted).

100. *Id.* (quoting *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)).

101. *Id.*

102. 31 U.S.C. § 3729(a) (1988).

103. *Mortgages, Inc. v. United States Dist. Court for the Dist. of Nev.*, 934 F.2d 209, 213 (9th Cir. 1991).

determined, either through prior litigation or settlement with the United States or because the government decided not to institute an FCA action at all. First, in such circumstances, third-party claims based on state law can impose liability in excess of that dictated by Congress, particularly if the third-party claims seek compensation for the expenses and attorneys' fees incurred by the third-party plaintiff in defending against the government's FCA action. Just as significantly, in the context of a previous settlement or a government decision not to institute FCA claims against the third-party defendant, permitting such claims to proceed undermines "the primacy of the Executive Branch in prosecuting false-claims actions."¹⁰⁴ By settling with or not proceeding against the putative third-party defendant, the government made a judgment regarding the proper liability that party should incur as a result of its actions, and such a judgment falls squarely within the power to "investigate and litigate offenses against the United States,"¹⁰⁵ which the Constitution assigns to the Executive Branch, not a self-interested litigant.¹⁰⁶ Therefore, third-party claims that undermine that judgment raise separation of powers concerns.¹⁰⁷

Moreover, preemption principles can be applied readily in the context of third-party claims lodged in an FCA action.¹⁰⁸ As explained above, a

104. *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994).

105. *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084, 1088 (C.D. Cal. 1989).

106. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *United States ex rel. Taxpayers Against Fraud*, 41 F.3d at 1041.

107. The constitutional question whether permitting the shifting of FCA liability to a party with whom the government has resolved its claims impermissibly interferes with the Executive Branch's enforcement of the FCA is distinct from the broader question whether permitting a *qui tam* relator to file an action on behalf of the United States violates the separation of powers doctrine. The federal courts that have addressed the latter issue and related constitutional challenges to the *qui tam* provisions of the FCA have uniformly rejected them. *See, e.g., United States ex rel. Taxpayers Against Fraud*, 41 F.3d at 1040-42 (rejecting arguments that the *qui tam* provisions violate the separation of powers doctrine and the Appointments Clause); *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 747-60 (9th Cir. 1993) (rejecting arguments that the *qui tam* provisions violate Article III's standing requirement, the separation of powers doctrine, the Appointments Clause, and due process). However, some commentators have forcefully argued that the *qui tam* provisions are, in fact, unconstitutional on several grounds. *See, e.g., James T. Blanch, Note, The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 HARV. J.L. & PUB. POL'Y 701, 767 (1993).

108. Indeed, the preemption argument is stronger when addressed to third-party claims than to the counterclaims at issue in *Mortgages, Madden*, and *Burch*. In permitting state law counterclaims to proceed, the *Madden* and *Burch* courts were motivated in part by a belief that dismissing compulsory counterclaims would deprive the *qui tam* defendant of procedural due process. *Madden*, 4 F.3d at 831; *Burch*, 145 F.R.D. at 457. Since third-

third-party action properly lies only when the third-party plaintiff asserts a derivative claim that seeks to hold the third-party defendant liable for at least part of the claim asserted by the plaintiff in the main action.¹⁰⁹ By definition, therefore, such third-party claims must seek contribution or indemnification in substance, if not in name,¹¹⁰ and *Mortgages* and its progeny squarely preempt such claims. In the language of *Madden* and *Prabhu*, those claims permitted by Rule 14(a) are not “independent” of the plaintiff’s FCA claims and therefore are preempted. Once such claims are dismissed, the third-party complaint will not satisfy Rule 14(a)’s requirement that at least one claim in the complaint seeks to hold the third-party defendant derivatively liable for the third-party plaintiff’s liability to the plaintiff. Failing to satisfy this mandatory requirement, the surviving claims in the third-party complaint must be dismissed.¹¹¹

More difficult issues arise if—as is frequently the case—the United States pairs its FCA claims with federal common law causes of action.¹¹² To the extent that any third-party complaint seeks to hold the third-party defendant liable for the *qui tam* defendant’s FCA liability, those claims are preempted for the reasons explained above. Even after these claims are dismissed, however, the third-party complaint would still include viable derivative claims by which the third-party plaintiff seeks to shift liability under the federal common law causes of action to the third-party defendant. Consequently, the third-party complaint could not be dismissed in its entirety under Rule 14(a). While escaping the FCA’s treble damages and statutory penalties provisions, the third-party defendant

party claims are never compulsory under the Federal Rules of Civil Procedure, this concern is simply absent from an analysis of third-party practice under the FCA. See 6 WRIGHT ET AL., *supra* note 30, § 1446, at 355. Counsel should be cautious, however, in relying too heavily on the absence of due process considerations in the context of third-party claims. By suggesting that barring compulsory counterclaims would violate due process, the *Madden* and *Burch* courts appeared to believe that the only bar to raising such claims in another action is their status as compulsory under Rule 13. If such claims are preempted, however, they are eliminated completely by operation of the Supremacy Clause. Preemption of state law claims, even where federal law provides no analogous cause of action, has never been held to pose a due process problem.

109. See *supra* notes 29-36 and accompanying text.

110. See *International Paving Sys., Inc. v. Van-Tulco, Inc.*, 866 F. Supp. 682, 686-87 (E.D.N.Y. 1994) (noting that a third-party complaint stating a claim for breach of contract, although not contribution or indemnification in those terms, is sufficiently derivative of the main claim to be properly asserted under Rule 14(a)).

111. See, e.g., *United States v. Olavarrieta*, 812 F.2d 640, 643 (11th Cir.), *cert. denied*, 484 U.S. 851 (1987); *Kenneth Leventhal & Co. v. Joyner Wholesale Co.*, 736 F.2d 29, 31-32 (2d Cir. 1984); *United States v. Berk & Berk*, 767 F. Supp. 593, 604-05 (D.N.J. 1991).

112. See *supra* note 28.

might still be forced to participate in the FCA litigation and to face potential single damages exposure derivative of the defendant's federal common law liability.

Faced with this situation, the third-party defendant should aggressively argue that the factual nexus for the government's FCA claims is identical to that for the federal common law claims and that conflict preemption still governs. After all, the *qui tam* defendant would be attempting to impose upon the third-party defendant liability arising from precisely the same conduct that is at issue in the FCA claims. By providing a form of contribution or indemnification, such claims would potentially have the same effect of "ameliorat[ing] the liability of wrongdoers" that the courts have held is inconsistent with the FCA.¹¹³

Such an approach has support in related areas of the law. In *In re United States Oil & Gas Litigation*,¹¹⁴ the United States Court of Appeals for the Eleventh Circuit addressed the common problem of determining the proper scope to be accorded to settlement bar orders.¹¹⁵ In that case, a settling defendant sought to assert an allegedly "independent" cross-claim for fraud and negligence. The court rejected this effort, concluding that "the propriety of the settlement bar order should turn upon the interrelatedness of the claims that it precludes, not upon the labels which parties attach to those claims."¹¹⁶ Thus, the Eleventh Circuit determined that claims are not truly independent if they "arise out of the same facts as those underlying the litigation." The same standard should apply in the FCA preemption context.¹¹⁷

C. *Alternative Strategies*

Several additional strategic avenues may be pursued to defeat third-party claims. Perhaps the most promising of these strategies is to move the court to strike third-party claims on discretionary grounds.¹¹⁸ Under

113. See, e.g., *Mortgages*, 934 F.2d at 213 (citing *Texas Indus., Inc. v. Radcliff Materials*, 451 U.S. 630, 639 (1981)).

114. 967 F.2d 489 (11th Cir. 1992).

115. Settlement bar orders, common in the context of partial settlements in federal securities litigation, function to encourage settlements by finally discharging all obligations of settling defendants and barring any further litigation of claims by nonsettling defendants against settling defendants. *Eichenholtz v. Brennan*, 52 F.3d 478, 486 (3d Cir. 1995). The nonsettling defendants are entitled to a set-off, which may be computed in various ways, against any judgment entered against them. *Id.*

116. *In re United States Oil & Gas Litig.*, 967 F.2d at 496.

117. *Id.*

118. See FED. R. CIV. P. 14(a) ("Any party may move to strike the third-party claim . . .").

Rule 14(a), the district court retains broad discretion to dismiss a third-party complaint if the complaint (a) prejudices the plaintiff or the third-party defendant,¹¹⁹ (b) introduces unrelated legal or factual issues into the litigation,¹²⁰ (c) unduly complicates the litigation,¹²¹ or (d) appears to lack substance.¹²² Third-party claims asserted in FCA actions likely will necessitate factual inquiries that are substantially different from those in the main action (*e.g.*, what representations were made by the third-party defendant to the *qui tam* defendant, what was the contractual relationship and course of dealings between those two parties, etc.) and will force both the court and the jury to apply state law governing several different causes of action. By contrast, the FCA action itself may involve only the narrow question of the *qui tam* defendant's knowledge and intent regarding the claims submitted to the government. Application of these issues will necessarily be case-specific and the district court has broad discretion in ruling on a motion to strike on these grounds.¹²³

Similarly, a third-party defendant could seek to have the district court decline to exercise supplemental jurisdiction over the third-party claims. In 1990, Congress adopted the Judicial Improvements Act of 1990,¹²⁴ which codified the doctrines of pendant and ancillary jurisdiction by adding Section 1367 to the Judicial Code. Under Section 1367(c), the district court may dismiss a third-party claim, even one over which it otherwise has jurisdiction, if, *inter alia*, "the claim raises a novel or complex issue of State law," "the claim substantially predominates over the claim or claims over which the district court has original jurisdiction," or "in exceptional circumstances, there are other compelling reasons for declining jurisdiction."¹²⁵ The circuits disagree about the extent to which enactment of Section 1367 narrowed the courts' traditional case law on

119. See, *e.g.*, *Ez-Tix, Inc. v. Hit-Tix, Inc.*, No. Civ.A.93-3791, 1995 WL 77589, at *7 (S.D.N.Y. Feb. 27, 1995); *International Paving Sys., Inc. v. Van-Tulco, Inc.*, 866 F. Supp. 682, 687 (E.D.N.Y. 1994); *Consolidated Rail Corp. v. Metz*, 115 F.R.D. 216, 218 (S.D.N.Y. 1987).

120. See, *e.g.*, *Fischer v. Presbyterian-Univ. of Pa. Medical Ctr.*, No. Civ.A.91-2884, 1991 WL 231590, at *2 (E.D. Pa. Oct. 30, 1991); *Blais Constr. Co. v. Hanover Square Assocs.-I*, 733 F. Supp. 149, 159 (N.D.N.Y. 1990).

121. See, *e.g.*, *Fischer*, 1991 WL 231590, at *2; *Blais Constr.*, 733 F. Supp. at 159; *Valdez v. City of Farmington*, 580 F. Supp. 19, 21 (D.N.M. 1984).

122. See, *e.g.*, *Blais Constr.*, 733 F. Supp. at 159.

123. See, *e.g.*, *International Paving Sys.*, 866 F. Supp. at 687; *Blais Constr.*, 733 F. Supp. at 158; *E.F. Hutton & Co. v. Jupiter Dev. Corp.*, 91 F.R.D. 110, 113 (S.D.N.Y. 1981).

124. Pub. L. No. 101-650, 104 Stat. 5113 (codified at 28 U.S.C. § 1367 (1988 & Supp. V 1993)). The Act expressly overruled *Finley v. United States*, 490 U.S. 545 (1989), which rejected the doctrine of pendant party jurisdiction.

125. 28 U.S.C. § 1367(c)(1)-(2), (4) (1988 & Supp. V 1993).

discretionary dismissal,¹²⁶ which permitted dismissal based on “considerations of judicial economy, convenience and fairness to litigants.”¹²⁷ Nonetheless, it is clear that the district courts retain substantial discretion to decline to exercise supplemental jurisdiction on these grounds.¹²⁸ Even if the third-party claims are not preempted, the district court could determine that, given the absence of a right to contribution or indemnification under the FCA and in light of the potential complications and interference with the FCA litigation caused by third-party claims, compelling circumstances require dismissal and pursuit of these claims in a separate action.¹²⁹ In *United States ex rel. Public Integrity, Inc. v. Therapeutic Technology, Inc.*,¹³⁰ a federal district court in Alabama recently dismissed third-party claims in an FCA action on the basis of Section 1367.¹³¹

Counsel should carefully consider the risks of extricating a client from a third-party claim in this manner. Unlike the preemption ground discussed above, discretionary dismissal under either Rule 14(a) or Section 1367(c) does not extinguish the claims asserted in the third-party

126. *Diven v. Amalgamated Transit Union Int'l*, 38 F.3d 598, 601 (D.C. Cir. 1994). Compare *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1181-82 (7th Cir. 1993) (“the new statute is intended to codify rather than to alter the judge-made principles of pendant and pendant party jurisdiction”) with *Executive Software N. Am., Inc. v. United States Dist. Court*, 24 F.3d 1545, 1556-60 (9th Cir. 1994) (Section 1367 has narrowed the discretionary basis on which dismissal is proper).

127. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

128. See, e.g., *Timm v. Mead Corp.*, 32 F.3d 273, 276-77 (7th Cir. 1994); *Executive Software*, 24 F.3d at 1557; *Growth Horizons, Inc. v. Delaware County*, 983 F.2d 1277, 1284-85 (3d Cir. 1993); see also *Denis McLaughlin, The Federal Supplemental Jurisdiction Statute*, 24 ARIZ. ST. L.J. 849, 975-77 (1992).

129. For example, in *Carlucci v. United States*, 793 F. Supp. 482 (S.D.N.Y. 1992), the government instituted an action to collect penalties arising from the nonpayment of taxes pursuant to 26 U.S.C. § 6672. *Id.* at 483-84. Although courts have repeatedly disallowed state claims for contribution from being asserted in such actions, the defendant filed a third-party claim seeking contribution from the successors of his business. *Id.* The district court declined to exercise supplemental jurisdiction under § 1367(c)(4), concluding that the third-party claims would unduly complicate and prolong matters and violate “the long-standing rule . . . that contribution actions should not be heard during the pendency of . . . § 6672 [actions].” *Id.* at 486; see also *Ringer v. United States*, 153 F.R.D. 594, 596 (N.D. Tex. 1993).

130. 895 F. Supp. 294 (S.D. Ala. 1995).

131. In *Therapeutic Technology*, the *qui tam* defendant filed state law third-party claims for breach of contract, breach of warranty, and fraud. *Id.* at 295. Relying on *Mortgages and Stephens*, among other cases, the court found that “[t]he fact that *qui tam* defendants lack a right to bring claims that will have the effect of offsetting FCA liability” constituted a compelling reason to dismiss the third-party claims under 28 U.S.C. § 1367(c)(4) (1988 & Supp. V 1993). *Id.* at 296.

complaint, but merely requires that they be asserted in an action independent of the FCA lawsuit.¹³² As a result of such dismissal, however, the third-party defendant loses the right to participate in the *qui tam* defendant's defense of the FCA claims asserted against it. Should the *qui tam* defendant lose in the FCA action, he will no doubt argue that that judgment binds the entities to whom he seeks to shift responsibility for the liability.¹³³ If the putative third-party defendant believes that the *qui tam* defendant will not adequately present meritorious defenses against the FCA claims, it may be prudent as a matter of strategy to incur the immediate litigation expenses and remain a party to the FCA action.¹³⁴

A final alternative that avoids the problem identified in the previous paragraph is a motion for a separate trial of the FCA and third-party claims. Such a motion is authorized both by Rule 14(a)¹³⁵ and by Rule 42(b), which permits the separate trial of third-party claims "in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy."¹³⁶ Collectively, these provisions vest district courts with substantial discretion in determining whether to order that the third-party complaint be tried separately from the *qui tam* action.¹³⁷ The presence of any of the factors mentioned in Rule 42(b) is by itself sufficient grounds for a district court to order a

132. See 6 WRIGHT ET AL., *supra* note 30, § 1463, at 470.

133. The general rule, of course, is that only a person who was a party to a prior action, or who is in privity with such a party, may be bound by the prior judgment. See, e.g., *Martin v. Wilks*, 490 U.S. 755, 763 (1989); *Gilbert v. Ben-Asher*, 900 F.2d 1407, 1410 (9th Cir.), *cert. denied*, 498 U.S. 865 (1990); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 457-58 (D.N.J. 1992). Even a party required to indemnify the defendant in the prior action traditionally would be bound by the judgment only if the defendant vouched in the indemnitor—a process by which it would provide notice of the action and tender an opportunity to control the defense. 18 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4452, at 440 (1981). These rules, of course, are not without exceptions. The *qui tam* defendant may argue, for example, that it adequately represented the putative third-party defendant's interest on the question whether the claims submitted were in fact false, and that the third-party defendant, rather than attempt to extricate itself from the FCA action, had a duty to participate. See *id.* §§ 4452, 4457; cf. *Lynch v. Merrell-National Labs.*, 646 F. Supp. 856, 859-62 (D. Mass. 1986).

134. Of course, the putative third-party defendant could seek to participate as *amicus* after dismissal, though *amicus* filings would be ineffective at presenting a defense at trial and could be filed only with the district court's permission.

135. See FED. R. CIV. P. 14(a) (any party may move for "severance or separate trial" of third-party claims).

136. FED. R. CIV. P. 42(b).

137. See, e.g., *Grayson v. K-Mart Corp.*, 849 F. Supp. 785, 790 (N.D. Ga. 1994); *Ismail v. Cohen*, 706 F. Supp. 243, 251 (S.D.N.Y. 1989), *aff'd in part, rev'd and vacated in part on other grounds*, 899 F.2d 183 (2d Cir. 1990).

separate trial.¹³⁸

The principal factors relevant in exercising a court's discretion to order separate trials are "whether continued joinder will serve to complicate the litigation unduly or will prejudice the other parties in any substantial way."¹³⁹ Severance is appropriate to protect the third-party defendant from the "contamination" that may result by being associated in the jurors' minds with the *qui tam* defendant.¹⁴⁰ Courts have also repeatedly recognized that bifurcation is appropriate where the first trial may obviate the necessity for, or narrow the scope of, a second one.¹⁴¹ Separate trial may also be appropriate when the legal theories at issue in the original and third-party actions differ,¹⁴² or when jury confusion might result from the presentation in one trial of divergent standards and factual evidence related to the two sets of claims.¹⁴³ When the district court orders the third-party claims to be tried separately from, and after conclusion of the litigation regarding, the main claims, it has discretion to order that discovery related to the third-party claims be stayed pending disposition of the claims in the main action.¹⁴⁴

138. See, e.g., *Ricciuti v. New York City Transit Auth.*, 796 F. Supp. 84, 86 (S.D.N.Y. 1992); *Willemijn Houdstermaatschaap BV v. Apollo Computer, Inc.*, 707 F. Supp. 1429, 1433 (D. Del. 1989); see also 5 J. W. MOORE, *MOORE'S FEDERAL PRACTICE* ¶ 42.03[1], at 42-43 (2d ed. 1995) ("Only one of Rule 42(b)'s conditions need be met for the court to order a separate trial.").

139. 6 WRIGHT ET AL., *supra* note 30, § 1460, at 457; see, e.g., *Dewald v. Minster Press Co.*, 494 F.2d 795, 798 (6th Cir. 1974); *SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 801 F. Supp. 517, 528 (D. Utah 1992); *C & G Constr. Co. v. Morrison Assurance Co.*, 96 F.R.D. 670, 672 (S.D. Ga. 1983); FED. R. CIV. P. 14, advisory committee's note to 1963 Amendment to Rule 14 ("the court has discretion . . . to sever the third-party claim or accord it separate trial if confusion or prejudice would otherwise result").

140. See, e.g., *Monaghan v. SZS 33 Assocs., L.P.*, 827 F. Supp. 233, 244 (S.D.N.Y. 1993); *In re New York Asbestos Litig.*, 149 F.R.D. 490, 500-01 (S.D.N.Y. 1993); *Ismail*, 706 F. Supp. at 251. This may be an important factor if, for example, the government has alleged conduct by the *qui tam* defendant that is unrelated to the third-party defendant and that, if proved, clearly constitutes intentional fraud.

141. See, e.g., *O'Malley v. United States Fidelity & Guar. Co.*, 776 F.2d 494, 500-01 (5th Cir. 1985); *SCFC ILC*, 801 F. Supp. at 528; *United States v. Kramer*, 770 F. Supp. 954, 959-60 (D.N.J. 1991); *Deagle v. City of N.Y.*, No.Civ.A.90-8203, 1991 WL 267765, at *1 (S.D.N.Y. Dec. 4, 1991); *Carlisle Corp. v. Hayes*, 635 F. Supp. 962, 967-68 (S.D. Cal. 1986); see also 5 MOORE, *supra* note 138, ¶ 42.03[1], at 42-51.

142. See *Hal Leonard Publishing Corp. v. Future Generations, Inc.*, No. Civ.A.93-5290, 1994 WL 163987, at *2 (S.D.N.Y. Apr. 22, 1994); *Whitted v. United States*, No. Civ.A.83-1169, 1986 WL 5098, at *2 (S.D.N.Y. Apr. 25, 1986).

143. *Ismail*, 706 F. Supp. at 251; see, e.g., *Katsaros v. Cody*, 744 F.2d 270, 278 (2d Cir.), *cert. denied*, 469 U.S. 1072 (1984); *Lagudi v. Long Island R.R.*, 775 F. Supp. 73, 74-75 (E.D.N.Y. 1991); 5 MOORE, *supra* note 138, ¶ 42.03[1], at 42-61.

144. See, e.g., *Hal Leonard Publishing Corp.*, 1994 WL 163987, at *5; *Simpson v. Stand 21, S.A.*, No. IP93 428C., 1994 WL 735936, at *1-2 (S.D. Ind. Sept. 1, 1994); *Baxter Int'l*,

Finally, *United States ex rel. Madden v. General Dynamics Corp.*,¹⁴⁵ provides strong support for a motion for a separate trial. As explained above,¹⁴⁶ in *Madden* the Ninth Circuit held that the *qui tam* defendant's liability under the FCA should be determined *before* the district court addresses state law claims asserted by that party.¹⁴⁷ If the *qui tam* defendant ultimately is found liable under the FCA, *Madden* requires that the district court then dismiss the state law claims "on the ground that they will have the effect of providing for indemnification or contribution."¹⁴⁸ On the other hand, if the *qui tam* defendant prevails in the FCA action, litigation of the state law claims—to the extent that they survive the determination of nonliability under the FCA—could proceed.¹⁴⁹

III. CONCLUSION

The increasing frequency of *qui tam* litigation, particularly after the 1986 amendments, coupled with zealous reliance on the FCA by the government, make it ever more likely that a company depending on federal payments for its products will be named as a third-party defendant in an FCA action filed against another person or entity. Prudent use of the preemption analysis described above can be an effective weapon in extricating a client from such litigation.

Inc. v. Cobe Lab., Inc., No. 89C9460, 1992 WL 77665, at *1 (N.D. Ill. Apr. 7, 1992); see also 5 MOORE, *supra* note 138, ¶ 42.03[1], at 42-61.

145. 4 F.3d 827 (9th Cir. 1993).

146. See *supra* notes 81-90 and accompanying text.

147. *Madden*, 4 F.3d at 831.

148. *Id.*

149. *Id.*; see also *Burch ex rel. United States v. Piqua Engineering, Inc.*, 145 F.R.D. 452, 457-58 (S.D. Ohio 1992).

