

**Testimony of
Zachary Kitts
K&G LAW GROUP, PLLC
3554 Chain Bridge Road
Suite 400
Fairfax, Virginia 22030
703-649-5500**

www.kglawpllc.com
www.vaquitamlaw.com

**House of Delegates Special Session
The Maryland False Claims Act of 2013
November 13, 2013**

The logo for K&G Law Group, PLLC. It features a stylized 'K' and 'G' in a serif font, with a red ampersand between them. To the right of this graphic, the words 'LAW GROUP, PLLC' are written in a clean, sans-serif font.

Introduction

My name is Zachary Kitts and I submit this written testimony to the November 2013 Special Session of the Maryland House of Delegates in support of the Maryland False Claims Act.

I am not a paid lobbyist and I have not been paid to be here today. I previously testified before both houses of the Maryland General Assembly in 2010 and in 2013, so I will also skip the rest of my bio information.

I am here because of my experience with state false claims act legislation. My law practice focuses on *qui tam* litigation under the federal False Claims Act as well as under various state false claims acts, such as the Virginia Fraud Against Taxpayers Act. I have also litigated cases under the false claims statutes of California, Florida, Illinois, Wisconsin, Indiana, North Carolina, the District of Columbia, and others. I am often asked by proponents of state false claims act legislation to testify and spread the word about Virginia's experience with the Virginia Fraud Against Taxpayers Act.

I find myself in an unusual situation today, because the majority of my testimony is aimed at preempting the arguments I anticipate will be made against the Maryland False Claims Act. I do not know for certain what arguments will be raised, and I will be happy to respond to any other arguments and answer any other questions that the Committee may have.

I also wanted to emphasize the importance of the wording of the bill to be considered next year in the 2014 legislative session. In my view, the only thing that makes sense for Maryland is to copy the language of the federal False Claims Act, allowing for the obvious substitution of "Maryland" for "United States" where appropriate and a few other wording changes.

My testimony today is based on the assumption that the current bill will be amended to mirror the language of the federal False Claims Act. All of the results I discuss in this testimony are based on the language of the federal False Claims Act.

FALLACY NUMBER 1: IF MARYLAND PASSES A STATE FALSE CLAIMS ACT, IT WILL BE BAD FOR BUSINESS.

This is easily shown to be false, and there is no evidence whatsoever to support this notion. In fact, if we compare the listings of business friendly states compiled by Forbes, Pollina, and the U.S. Chamber of Commerce we see that virtually all of the so-called "business friendly states" have state FCAs.

Virginia is just one example. Virginia is always near the top of every pro-business ranking you can find, and we were one of the first states to have a state false claims act.

If a state False Claims Act drove away business or put legitimate firms out of business, the Virginia Fraud Against Taxpayers Act wouldn't have lasted ten years; I bet it wouldn't have lasted ten months.

Besides Virginia, lists of business-friendly states almost always include Colorado, North Carolina, Texas, New Hampshire and Georgia. Not only do all of those states have false claims acts, but Virginia and Texas have led the entire country in aggressive state FCA prosecutions.

For this Committee to believe that the Maryland False Claims Act is bad for business, they would have to believe that anti-business interests hijacked the legislative process in all of those states just long enough to get false claims act laws passed. That didn't happen, of course, and there is not one shred of evidence to support the idea that false claims statutes are bad for business.

FALLACY NUMBER 2: A FALSE CLAIMS ACT WILL ENCOURAGE THE FILING OF "FRIVOLOUS LAWSUITS" BY "DISGRUNTLED FORMER EMPLOYEES."

This answer needs to be divided into two parts. First, I will deal with the "frivolous lawsuit" part of the argument. The fact is that qui tam lawsuits under the FCA are subjected to a more rigorous level of screening and review than any other type of civil litigation.

For starters, an individual must have a lawyer in order to file a qui tam case – a pro se person cannot be a qui tam relator, for the same reason a pro se person cannot represent a corporation in court. So that is the first level of protection.

Second, an individual must meet a rigorous standard in order to qualify as a qui tam relator. An individual must have first-hand, non-public information about false claims made to the government. These are not cases filed upon a hunch and a whim or on speculation. The words "upon information and belief" have no place in qui tam complaints.

Lawyers like me who make their living this way are going to want detailed knowledge of wrongdoing before we even consider filing a case.

After a potential relator finds a lawyer, the lawsuit is again scrutinized before the Complaint is ever filed. That is because the relator has to disclose all known evidence and facts to the government in advance of filing the case. Then, the relator files the case under seal, and serves it again on the government but not on the defendant. This is to allow the government to conduct its own investigation.

If a case is non-meritorious, then government lawyers have three different opportunities to convince the relator and his or her lawyer of that, and all of them are before the case even becomes public knowledge.

But, for the sake of argument, let's say the government is unable to convince the relator and his or her lawyers that a case lacks merit. Courts have universally imposed a heightened pleading standard for false claims act cases. A relator and his or her lawyer essentially have to plead evidence to be able to survive a motion to dismiss, and there is usually no reason why the relator can't plead evidence, because he or she will know where all of the bodies are buried.

There is not much to say about the "disgruntled former employees" part of the argument, because I view that as an exercise in pure rhetoric. If a current or former employee tries to stop an employer from committing fraud on the government and they get fired, they may well be disgruntled, but they have a good reason to be disgruntled.

Viewing this argument as a rhetorical exercise, I think calling someone a "disgruntled former employee" implies that the person was originally an enthusiastic participant in the wrongdoing by their former employer, and now hopes to profit from their own wrongdoing. The false claims act specifically provides that if the court determines that the relator "planned and initiated" the false claims act scheme at question the share that person is entitled to can be reduced or eliminated. The federal FCA also provides that if a person is convicted of criminal activity arising out of the false claims act scheme, he or she shall be dismissed from the action and is not entitled to receive a share at all.

FALLACY NUMBER 3: IF MARYLAND PASSES A STATE FALSE CLAIMS ACT, INNOCENT BUSINESS OWNERS WILL BE FORCED TO PAY EXHORBITANT AMOUNTS OF MONEY TO AVOID THE COSTS AND EXPENSES OF GOING TO TRIAL.

This is another argument often made by lobbyists; often, they will point to the enormous amounts of money nationwide that companies have paid to settle cases as proof that defendants accept unreasonable settlement demands in order to avoid the costs and expenses of litigation.

I will again divide my answer into two parts. First off, as explained above, these cases involve very little civil discovery because most or all of the relevant facts are known to the relator and his or her lawyer before the case is even filed. In most cases, the matter is ready for summary judgment before it is even filed.

The corollary to that is if a relator does not have substantial evidence and knowledge of the wrongdoing prior to filing the case, the person is almost certainly going to be dismissed either by the government or by the Court on a Motion to Dismiss.

I will be happy to answer any questions the Committee may have.