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## FEATURE ARTICLE

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### Common Law Claims As Adjuncts To A False Claims Action

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When the Government files an action under the False Claims Act<sup>2</sup> or intervenes in a qui tam FCA action filed by a whistleblower, it frequently adds common law claims. Most often, these are claims for payment by mistake and unjust enrichment.<sup>3</sup> Because the focus of the action is the statutory FCA claim, these common law claims typically are treated as “tagalongs.” Despite the profusion of judicial decisions addressing the FCA, there are relatively few cases discussing these adjunct common law claims. This article reviews and analyzes these alternative claims for relief.

#### Standing

Initially, it should be noted that only the Government has standing to bring these common law claims. Although private relators (whistleblowers) have standing to file an FCA claim in the name of the Government, they lack standing to file the common law claims. The congressional grant of private standing to sue in FCA cases does not extend to common law causes of action. Accordingly, such common law claims are subject to dismissal if filed by a relator.<sup>4</sup>

#### Governing Law

A threshold issue in analyzing these claims is whether they are governed by state or federal law. In some cases, the common law claims are asserted by the Government, or treated by the court, as arising under state common law.<sup>5</sup> More often, however, they are asserted and treated as claims arising under federal common law. Some courts have suggested that the power of the U.S. to recover sums illegally or erroneously paid is part of the U.S.’ inherent authority, albeit asserted through a common law cause of action.<sup>6</sup> Other courts have reasoned that remedies involving the rights of the U.S. arising under a nationwide federal program are governed by federal, not state, law.<sup>7</sup> Nonetheless, state law still may be utilized in some circumstances as a reference for fashioning the federal remedy.<sup>8</sup>

#### Elements of the Claims

##### *Payment by Mistake*

The essence of the common law claim of payment by mistake, also known as payment under mistake of fact, is that the Government is entitled to recover payments made under an erroneous belief that was material to the decision to pay.<sup>9</sup> The elements of the claim are that (1) payments were made, (2) under the belief that they were properly owed, (3) the belief was erroneously formed, and (4) the mistaken belief was material to the decision to pay.<sup>10</sup> There is *no* requirement that the *defendant* know that the payments were mistaken.<sup>11</sup> Recovery may be had even if payments were received by the defendant without knowledge of their inappropriateness.<sup>12</sup>

Although not confined to situations involving Government contracts, this doctrine covers most

mistakes in contract performance, such as erroneous overcharges or delivery of non-conforming goods. But it may not reach certain mistakes that occur in the formation of a Government contract. For example, it does not apply to a contractor's mistakenly inflated bid for a fixed-price contract because that does not involve a mistaken belief by the Government that influenced payment of the contract price. The Government got the fixed price it bargained for, even if that price was higher than the contractor had intended.<sup>13</sup> In contrast, the doctrine should permit recovery if a contractor miscalculates its costs in bidding for a cost-reimbursable contract because the Government relies on the contractor's mistaken representation when it makes payment.

### ***Unjust Enrichment***

The elements of a federal common law claim for unjust enrichment are: (a) the Government had a reasonable expectation of payment, (b) the defendant should reasonably have expected to pay, or (c) society's reasonable expectations regarding person and property would be defeated by nonpayment.<sup>14</sup> An alternative formulation is that the Government must establish (1) that it conferred a benefit on the defendant, (2) an appreciation or knowledge by the defendant of the benefit, and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.<sup>15</sup> Restitution may be appropriate without regard to the recipient's innocence, provided he or she had knowledge of the circumstances giving rise to the unjust enrichment claim.<sup>16</sup>

The general rule is that an action for unjust enrichment will not lie if there is an express contract between the parties, although there are some exceptions to this rule.<sup>17</sup>

### **Relationship between Common Law Claims and the FCA**

Claims for payment by mistake and unjust enrichment are essentially alternatives to each other.<sup>18</sup> Payment by mistake usually involves payments made pursuant to a contract, whereas the doctrine of unjust enrichment applies to situations in which there

is no legal contract.<sup>19</sup> Thus, the theories appear to be mutually exclusive,<sup>20</sup> although some decisions do not acknowledge this limitation. Moreover, if recovery is obtained on an FCA claim, no relief can be obtained on these equitable claims because (a) an adequate remedy has been had at law and (b) any further recovery would be duplicative and unwarranted.<sup>21</sup> Nonetheless, because federal rules allow pleading in the alternative, courts have permitted the simultaneous pursuit of these common law claims along with FCA claims, and despite the existence of a contract.<sup>22</sup>

### **Use of Common Law Claims to Expand Liability**

From the Government's perspective, there are two principal reasons to assert claims for payment by mistake and unjust enrichment in addition to or in lieu of an FCA claim. First is a fallback theory of liability, permitting recovery in situations in which the evidence is insufficient to prove that the defendant had the culpable knowledge or intent necessary to sustain an FCA claim. Second, the Government sometimes uses common law claims to pursue recovery from individuals who did not participate in an FCA violation, but allegedly benefited from it.

Liability under the FCA turns on the defendant's state of mind. "[T]he False Claims Act condemns fraud but not negligent errors or omissions."<sup>23</sup> "The notion of presenting a claim known to be false does not mean the claim is incorrect as a matter of proper accounting, but rather means it is a lie."<sup>24</sup> Thus, "[w]here there are legitimate grounds for disagreement over the scope of a contractual or regulatory provision, and the claimant's actions are in good faith, the claimant cannot be said to have knowingly presented a false claim."<sup>25</sup> In contrast, the defendant's knowledge and intent are irrelevant to a claim for payment by mistake. The only issue is whether the Government had a mistaken belief that was material to the decision to make a contested payment.

Similarly, the FCA does not reach persons who did not participate in a violation of the Act, even though they may have known about the violation or benefited from it. Mere knowledge of a fraudulent claim with nothing more does not constitute an FCA

violation.<sup>26</sup> Indeed, an allegation that a defendant knew about and benefited financially from a fraud and did nothing to stop it is insufficient as a matter of law to state a claim under the FCA.<sup>27</sup> But the Government can cast a wider net with common law claims.

### **Third Parties**

Generally, the payment by mistake theory is used to recover money from the person or entity paid by the Government, not from a third party to the payment.<sup>28</sup> Some courts have held that a payment by mistake claim only lies against the party or parties to whom or for whom payments were made by the Government, and that such a claim cannot be brought against an agent of the contracting party or a third party.<sup>29</sup> But other courts have expanded the reach of this theory to allow the Government to pursue payment by mistake claims against third parties in some circumstances.

In the leading case of *U.S. v. Mead*,<sup>30</sup> the Government sought to recover alleged overpayments under an agricultural conservation program. The claims were prepared by Mead, who erroneously sought reimbursement for the (higher) value of the conservation projects rather than the actual cost. The claims were signed by the farmers, but all payments were made to Mead. The court found that there was no FCA violation because there was no intent to defraud nor any knowledge of falsity on defendant's part. But the defendant was held liable for payment by mistake. Mead was held liable for all of the mistaken overpayments "[a]s the one into whose hands the mistaken payments flowed."<sup>31</sup> The farmers were held jointly liable with Mead for that portion of the aid payments on their own projects which was obtained by mistake because they signed the applications, and because Mead acted on their behalf and they received the benefits of the transaction.<sup>32</sup>

Subsequently, in *LTV Educ. Sys., Inc. v. Bell*,<sup>33</sup> another circuit court cited *Mead* for the proposition that "the government is entitled to obtain repayment from a third party into whose hands the mistaken payments flowed where that party participated in and benefitted from the tainted transaction."<sup>34</sup> In that case, the court allowed recovery from the operator of private trade and business schools of payments made

on defaulted federally insured student loans had been used to pay tuition. The school operator was heavily involved in the loan applications and had violated applicable federal regulations.

Relying on these precedents, one court has held that the Government could pursue a payment by mistake claim against a subcontractor for allegedly false certifications, even though the U.S. made no direct payments to the subcontractor.<sup>35</sup> Another court reached a similar result on general equitable principles, ruling that the Government could pursue a payment by mistake claim against a pharmacy company that allegedly submitted false claims and certifications to a federally funded health plan, even though federal funds were not paid directly to the defendant.<sup>36</sup>

A claim for unjust enrichment against a Government subcontractor who did not receive direct payments from the U.S. has also been upheld.<sup>37</sup> This result accords with the principles governing restitution. The Restatement (Third) of Restitution And Unjust Enrichment notes that "[r]estitution for wrongs frequently seeks the disgorgement of gains that were not derived from any transaction between the defendant and the claimant," and that "mechanical adherence to the formula ... whereby unjust enrichment requires 'a benefit conferred by the plaintiff on the defendant' would mistakenly exclude from the law of restitution some of its most significant elements."<sup>38</sup> The Restatement enunciates a broader rule that "[t]he recipient of a payment to which the claimant has a superior legal or equitable entitlement is liable to the claimant for the amount of the payment so received."<sup>39</sup>

### **Officers and Shareholders**

Common law claims have been applied not only to companies that deal with the Government through intermediaries, but also to individuals who are officers or shareholders of a Government contractor or program participant that received overpayments. Recently, a district court, citing *Bell*, ruled that the chief financial officer of a health services provider was individually liable—under theories of both payment by mistake and unjust enrichment—for improper Medicare payments made to the company because he personally signed false cost

certifications, and he was a 50-percent shareholder and officer of the company. The court ruled that he was unjustly enriched by his salary and his interest in the company.<sup>40</sup> Significantly, the court also found him personally liable under the FCA.<sup>41</sup>

In another recent case, a court dealt with a chief executive officer who caused a hospital to submit fraudulent Medicare and Medicaid claims for patients. The court found a violation of the FCA and held that claims for common law fraud, payment by mistake and unjust enrichment were established. The court noted that the Government could recover from the hospital on the claims for common law fraud and payment by mistake, and could recover from the CEO personally the benefits that had accrued to him from his direct financial interest in the hospital's receipts, which totaled at least \$10 million.<sup>42</sup> The court set aside damages for the common law claims in favor of the FCA award.

Courts have taken a more limited view of the reach of common law claims in circumstances in which an individual defendant is not alleged to be a participant in the tainted transaction. A number of courts have ruled that unjust enrichment claims cannot be brought against shareholders of a corporation who benefit from Government overpayments unless the Government can successfully pierce the corporate veil.<sup>43</sup>

Following these authorities, courts have distinguished between different shareholders in the same case, depending on whether an individual allegedly participated in the tainted transaction. A shareholder who participated in and benefited from a tainted transaction can be liable on claims for payment by mistake and unjust enrichment even if the corporate veil has not been pierced. But no recovery can be had from a shareholder who received benefits from the tainted transaction but was not alleged to have participated in it, unless the Government can pierce the veil.<sup>44</sup>

## Measure of Recovery

Although the common law claims may expand the number of persons from whom the Government can obtain a recovery for a mistaken or improper payment, the amount of the recovery that can be

obtained under these theories is considerably less than under the FCA. The common law claims, of course, do not carry the potential for treble damages and civil penalties that are available under the FCA. Further, the measure of damages that can be recovered on the common law claims may well be less than the measure (before trebling) under the FCA. Recovery on a claim for payment by mistake is limited to that portion of the payment in excess of the actual amount owed.<sup>45</sup> And recovery on a claim for unjust enrichment is limited to the amount of the enrichment obtained by the defendant, which may be less than the amount that was improperly paid out by the Government.<sup>46</sup> In contrast, although the ordinary measure of damages under the FCA is the amount that the Government paid out by reason of the false claims over and above what it would have paid if the claims had been truthful, courts have used alternative and more generous measures in particular cases to ensure that the Government receives complete indemnity.<sup>47</sup>

## Limitations Period

The FCA contains its own limitations provision, which requires that an action be brought within (1) six years after the violation occurred or (2) three years after the date when facts material to the right of action are (or should be) known, but (3) in no event more than 10 years after the date of the violation.<sup>48</sup> The limitations period for common law claims brought by the U.S. is established by 28 USCA § 2415, which sets a six-year period for contract claims and a three-year period for tort claims.<sup>49</sup> A tolling provision excludes from these time limits all periods during which facts material to the right of action are not known and reasonably could not be known.<sup>50</sup> Although a few decisions hold that the three-year tort limitations period applies to claims for unjust enrichment, the great weight of authority is that the six-year limit for contract claims applies.<sup>51</sup> Claims for payment by mistake also are subject to this six-year limit.<sup>52</sup> In contrast, a common law fraud claim is subject to the three-year limit.<sup>53</sup>

Generally, causes of action for unjust enrichment and payment by mistake accrue upon the occurrence of the wrongful act giving rise to the duty of restitution.<sup>54</sup> Accordingly, some courts have held that the

cause of action accrues when the defendant submits the claim for payment,<sup>55</sup> although others have held that a new cause of action accrues with each payment actually made by the Government.<sup>56</sup> In any event, in applying the appropriate time limit, courts have been willing to invoke the tolling provision. For example, they have excluded the period until completion of a Government audit that disclosed alleged overcharges on a Government contract.<sup>57</sup> Because of the operation of this tolling provision, the limitations period for common law claims could be even longer than the period for an FCA claim arising from the same nucleus of facts.

A final limitations issue, in circumstances in which the Government intervenes in a *qui tam* case and adds common law claims, is whether those claims “relate back” to the filing date of the relator’s original complaint for purposes of determining whether they are time-barred. Previously, there was a split in authority as to whether such common law claims should relate back.<sup>58</sup> But the amendments to the FCA enacted as part of the Fraud Enforcement and Recovery Act of 2009 resolve this issue. Congress provided that if the Government intervenes and files its own complaint or amends a relator’s complaint, the Government pleading shall relate back to the filing date of the original complaint to the extent that the claims therein arise out of the conduct, transactions or occurrences set forth, or attempted to be set forth, in the original complaint.<sup>59</sup>

## Pleading Issues

Federal Rule of Civil Procedure 9(b) requires that, in alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. This rule applies to claims of payment by mistake.<sup>60</sup> It is less clear whether it also applies to claims for unjust enrichment that are premised on fraud or mistake.<sup>61</sup> One court has held that a claim for unjust enrichment must allege that (a) the plaintiff conferred a benefit upon the defendant, (b) the defendant accepted and retained the benefit, and (c) it would be unjust for the defendant not to pay the plaintiff the value of the benefit. The court went on to rule that the third element of unjustness is sufficiently established for pleading purposes by the companion FCA claim.<sup>62</sup> Certainly, as a practical

matter, a complaint that adequately alleges an FCA claim should also sufficiently set forth adjunct common law claims of payment by mistake and unjust enrichment.<sup>63</sup>

## Conclusion

As a practical matter, in most cases the importance of these common law claims will be inversely proportional to the strength of the FCA claim. In cases in which the FCA claim is strong, the common law claims are likely to be treated as surplus. But in those cases in which the FCA claim is weak or non-existent, the common law claims assume a central role. Familiarity with the law governing these claims then is at a premium.

## ❖ Endnotes

- 1 Steven D. Gordon is a partner in the Washington D.C. office of Holland & Knight LLP. He practices in the areas of white collar crime and complex civil litigation, including appeals.
- 2 31 USCA § 3729 et seq.
- 3 Other common law claims that have been joined with FCA claims include common law fraud and negligence. See, e.g., *Zurich Am. Ins. Co. v. O’Hara Reg’l Ctr. for Rehab.*, 529 F.3d 916, 919 (10th Cir. 2008) (common law fraud); *U.S. ex rel. Becker v. Tools & Metals, Inc.*, 2009 WL 577604 at \*5 (N.D. Tex. 2009) (negligence).
- 4 E.g., *U.S. ex rel. Gonzalez v. Fresenius Med. Care N. Am.*, 2008 WL 4277150 at \*8 (W.D. Tex. 2008); *Haas v. Gutierrez*, 2008 WL 2566634 at \*3 (S.D.N.Y. 2008); *U.S. ex rel. Walsh v. Eastman Kodak Co.*, 98 F.Supp.2d 141, 149 (D. Mass. 2000).
- 5 E.g., *Zurich Am. Ins. Co. v. O’Hara Reg’l Ctr. for Rehab.*, 529 F.3d at 919; *U.S. ex rel. Told v. Interwest Constr. Co., Inc.*, 267 Fed.Appx. 807 (10th Cir. 2008); *U.S. v. Hawley*, 544 F.Supp.2d 787, 816 (N.D. Iowa 2008).
- 6 *U.S. v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 15–16 & n.16 (1st Cir. 2005).
- 7 *U.S. v. Applied Pharmacy Consultants, Inc.*, 182 F.3d 603, 606 (8th Cir. 1999); *U.S. ex rel. Roberts v. Aging Care Home Health, Inc.*, 474 F.Supp.2d 810, 820 (W.D. La. 2007).
- 8 *U.S. v. Applied Pharmacy Consultants, Inc.*, 182 F.3d at 606; see also *U.S. v. Bellecci*, 2008 WL 802367 at \*6 (E.D. Cal. 2008).
- 9 *U.S. v. Mead*, 426 F.2d 118, 123 (9th Cir. 1970).
- 10 *U.S. ex rel. Trim v. McKean*, 31 F.Supp.2d 1308, 1316 (W.D. Okla. 1998); accord *U.S. v. Medica-Rents Co.*, 285 F.Supp.2d 742, 776 (N.D. Tex. 2003).
- 11 *U.S. v. Mead*, 426 F.2d at 125 n.6; *U.S. v. Medica-Rents Co.*, 285 F.Supp.2d at 776.
- 12 *U.S. v. Bellecci*, 2008 WL 802367 at \*5 (E.D. Cal. 2008).
- 13 *U.S. v. Systron-Donner Corp.*, 486 F.2d 249, 252 (9th Cir. 1973).
- 14 *U.S. ex rel. Roberts v. Aging Care Home Health, Inc.*, 2008 WL 2945946 at \*7 (W.D. La. 2008); *U.S. v. Rogan*, 459 F.Supp.2d 692, 728 (N.D. Ill. 2006), *aff’d* 517 F.3d 449 (7th Cir. 2008).

- 15 *Int'l Air Response v. U.S.*, 75 Fed. Cl. 604, 612 (2007). In one case involving a "reverse" false claim, the elements of quantum meruit were used to define the unjust enrichment claim. *U.S. v. Raymond & Whitcomb Co.*, 53 F.Supp.2d 436, 444 (S.D.N.Y. 1999).
- 16 *U.S. v. Bellecci*, 2008 WL 802367 at \*7.
- 17 See *U.S. v. Applied Pharmacy Consultants, Inc.*, 182 F.3d at 606–609.
- 18 *U.S. ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 505 F.Supp.2d 20, 24 (D.D.C. 2007).
- 19 *U.S. ex rel. Trim v. McKean*, 31 F.Supp.2d at 1316; *U.S. v. Medica-Rents Co.*, 285 F.Supp.2d at 777.
- 20 *U.S. ex rel. Trim v. McKean*, 31 F.Supp.2d at 1316.
- 21 *U.S. ex rel. Miller v. Bill Harbert Int'l Constr., Inc.*, 505 F.Supp.2d at 24 (and cases therein cited).
- 22 See, e.g., *U.S. v. Merck-Medco Managed Care, L.L.C.*, 336 F.Supp.2d 430, 450–452 (E.D. Pa. 2004).
- 23 *U.S. ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 376 (7th Cir. 2003).
- 24 *Mikes v. Straus*, 274 F.3d 687, 703 (2d Cir. 2001).
- 25 *U.S. v. Southland Mgmt. Corp.*, 326 F.3d 669, 684 (5th Cir. 2003)(en banc)(Jones, J., concurring); see also *U.S. v. Basin Elec. Power Coop.*, 248 F.3d 781, 805 (8th Cir. 2001).
- 26 *U.S. ex rel. Camillo v. Ancilla Sys., Inc.*, 2005 WL 1669833 (S.D. Ill. 2005).
- 27 *U.S. ex rel. Grynberg v. Ernst & Young LLP*, 323 F.Supp.2d 1152, 1155 (D. Wyo. 2004).
- 28 *U.S. v. Vector Corp.*, 1994 U.S. Dist LEXIS 21330 at \*14 (N.D. Iowa 1994).
- 29 *Id.*; *U.S. v. Hawley*, 544 F.Supp.2d 787, 816 (N.D. Iowa 2008); *U.S. ex rel. Purcell v. MWI Corp.*, 520 F.Supp.2d 158, 173 (D.D.C. 2007).
- 30 426 F.2d 118 (9th Cir. 1970).
- 31 *Id.* at 124.
- 32 *Id.* at 124–125.
- 33 862 F.2d 1168 (5th Cir. 1989).
- 34 *Id.* at 1175.
- 35 *U.S. ex rel. Klump v. Dynamics Corp. of Am.*, 1998 WL 34194886 at \*3 (S.D. Ohio 1998).
- 36 *U.S. v. Merck-Medco Managed Care, L.L.C.*, 336 F.Supp.2d 430, 451–452 (E.D. Pa. 2004).
- 37 *U.S. ex rel. Klump v. Dynamics Corp. of Am.*, 1998 WL 34194886 at \*4.
- 38 Restatement (Third) of Restitution & Unjust Enrichment, intro. n.6 to Part II, Chap. 5, Topic 1 (T.D. No. 4, 2005).
- 39 Restatement (Third) of Restitution & Unjust Enrichment, § 48 (T.D. No. 5, 2007).
- 40 *U.S. ex rel. Roberts v. Aging Care Home Health, Inc.*, 2008 WL 2945946 at \*7–8 (W.D. La. 2008).
- 41 The court did not consider whether payment by mistake and unjust enrichment are mutually exclusive theories of recovery, but it did decline to award damages on the common law claims in light of its FCA award.
- 42 *U.S. v. Rogan*, 459 F.Supp.2d 692, 727–728 (N.D. Ill. 2006).
- 43 *U.S. ex rel. Purcell v. MWI Corp.*, 520 F.Supp.2d at 173; *U.S. ex rel. Becker v. Tools & Metals, Inc.*, 2009 WL 577604 at \*4–5 (N.D. Tex. 2009); *U.S. ex rel. Piacentile v. Wolk*, 1995 WL 20833 at \*4–5 (E.D. Pa. 1995). Cases in which courts have pierced the corporate veil in an FCA case are relatively rare, even where a violation of the FCA is found. In perhaps the leading case, the court refused to pierce the corporate veil and hold a majority shareholder and corporate officer personally liable for the corporation's acts where the evidence established that the corporation was an intact, going concern, separate from the individual and so was not his alter ego or a "mere façade" for his personal activities. *U.S. ex rel. Siewick v. Jamieson Sci. & Eng'g, Inc.*, 191 F.Supp.2d 17 (D.D.C. 2002).
- 44 *U.S. v. Gericare Med. Supply Inc.*, 2000 WL 33156443 at \*11 (S.D. Ala. 2000); *U.S. ex rel. Piacentile v. Wolk*, 1995 WL 20833 at \*5.
- 45 *U.S. v. Mead*, 426 F.2d at 124; *U.S. ex rel. Trim v. McKean*, 31 F.Supp.2d at 1316.
- 46 See *U.S. v. Rogan*, 459 F.Supp.2d at 728. While the focus of restitution is on the benefit received by the defendant, the appropriate amount of recovery in cases involving restitution may vary depending on the culpability of the defendant. See *Land Grantors in Henderson, Union, & Webster Counties v. U.S.*, 86 Fed. Cl. 35, 78–79 (2009).
- 47 *BMV-Combat Sys. Div. of Harsco Corp. v. U.S.*, 44 Fed. Cl. 141, 147–150 (1998); see also *U.S. ex rel. Roby v. Boeing Co.*, 302 F.3d 637, 646–649 (6th Cir. 2002); *U.S. v. Killough*, 848 F.2d 1523, 1532 (11th Cir. 1988).
- 48 31 USCA § 3731.
- 49 This provision establishes the limitations period even for common law claims brought under state, rather than federal, law. See *U.S. v. Slaey*, 2007 WL 2142361 at \*4 (E.D. Pa. 2007).
- 50 28 USCA § 2416(c).
- 51 E.g., *U.S. v. First Nat'l Bank of Cicero*, 957 F.2d 1362, 1371–1372 (7th Cir. 1992); *U.S. v. Intrados/Int'l Mgmt. Group*, 265 F.Supp.2d 1, 12–13 (D.D.C. 2002).
- 52 *U.S. v. Intrados/Int'l Mgmt. Group*, 265 F.Supp.2d at 13; *Miller v. Holzmann*, 2007 WL 710134 at \*7 (D.D.C. 2007). One court has suggested that no statute of limitations may apply to claims for payment by mistake. See *U.S. v. Domino Sugar Corp.*, 349 F.3d 84, 90 (2d Cir. 2003).
- 53 *U.S. v. Intrados/Int'l Mgmt. Group*, 265 F.Supp.2d at 14.
- 54 *In re Cardiac Devices Qui Tam Litig.*, 221 F.R.D. 318, 360 (D. Conn. 2004).
- 55 *Id.*
- 56 *U.S. v. Inc. Village of Island Park*, 888 F.Supp. 419, 451 (E.D.N.Y. 1995); see also *U.S. v. Kensington Hosp.*, 1993 WL 21446 at \*14 (E.D. Pa. 1993).
- 57 *U.S. v. Intrados/Int'l Mgmt. Group*, 265 F.Supp.2d at 13.
- 58 Compare *In re Pharm. Indus. Average Wholesale Price Litig.*, 498 F.Supp.2d 389, 401 (D. Mass. 2007) (common law claims do not relate back) with *In re Cardiac Devices Qui Tam Litig.*, 221 F.R.D. at 359 (discussing divided authority and concluding common law claims do relate back).
- 59 P.L. 111-21, 123 Stat. 1617.
- 60 *U.S. v. Henderson*, 2004 WL 540278 at \*2 (D. Minn. 2004); *U.S. v. Gericare Med. Supply Inc.*, 2000 WL 33156443 at \*10.
- 61 *Id.*
- 62 *Miller v. Holzmann*, 2007 WL 710134 at \*7.
- 63 In at least one case, a court found that a payment-by-mistake claim had been adequately alleged although it found that the companion FCA claim failed to satisfy the particularity requirement of Rule 9(b). It is unclear, however, whether the court recognized that Rule 9(b) also applied to the payment by mistake claim. *U.S. ex rel. Serrano v. Oaks Diagnostics, Inc.*, 568 F.Supp.2d 1136, 1143 (C.D. Cal. 2008).