The STATE of California ex rel. Kamala HARRIS, as District Attorney, etc., et al., Plaintiffs and Appellants,

v.

PRICEWATERHOUSECOOPERS LLP, Defendant and Appellant.

The State of California ex rel. Kamala Harris, as District Attorney, etc., et al., Plaintiffs and Appellants,

v.

Old Republic Title Company et al., Defendants and Appellants.

Nos. A095918, A097793.

Court of Appeal, First District, Division 4.

Jan. 20, 2005.

Review Granted May 11, 2005.

Background: City filed action on behalf of state against title company and its auditor for violation of False Claims Act (FCA) for failure of title company to escheat dormant funds from escrows to the state under the unclaimed property law (UPL), and for auditor's allegedly submitting false audit reports to Department of Insurance (DOI) that masked this liability; city also filed action under Unfair Competition Law (UCL) for failure of company to pay customers interest on escrow funds, which action was joined by consumer class. The San Francisco Superior Court, No. 993507, Stuart R. Pollak, J., entered judgments against company, but in favor of auditor in FCA action, and in favor of city and consumers in UCL action. Parties appealed.

Holdings: The Court of Appeal, Reardon, J., held that:

(1) city had standing to pursue its FCA claims as a qui tam plaintiff;

(2) damage to state from violation of UPL was measured by loss of use of unescheated funds;

(3) auditor's report violated the FCA;

(4) company violated UCL because it earned and unlawfully retained what amounted to interest received on escrow deposit funds, and

(5) class could not be certified beyond limitations period for UCL.

Affirmed in part and reversed in part.

1. States ⇐188

City, through its district attorney and city attorney, had standing, as a "person," to pursue its False Claims Act (FCA) claims as a qui tam plaintiff on behalf of the State of California against title company and its auditor for falsifying records to conceal from State Controller their escheat obligations. West's Ann.Cal.Gov.Code § 12650 et seq.

2. Statutes ⇐199

The word "includes" in a statute ordinarily is a term of enlargement, not limitation.

3. States ⇐188

Suits prosecuted by the prosecuting authority of a political subdivision are available under the False Claims Act (FCA) when local funds are at stake, in addition to suits that municipalities and other public entities can bring as a "person," whether or not local funds are involved. West's Ann.Cal.Gov.Code § 12650 et seq.

4. States ⇐188

When a political subdivision acts as prosecuting authority in cases under the False Claims Act (FCA) involving its own funds, it need not follow procedures required of qui tam plaintiffs, namely submitting the suit to the Attorney General for review; additionally, a political subdivision can intervene in actions brought by the Attorney General involving local funds.

West's Ann.Cal.Gov.Code § 12652(a)(2,3), (c)(3).

5. Statutes ⇐195

Where the Legislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded.

6. States ⇐188

Purpose of the public disclosure bar to actions under False Claims Act (FCA) is to eliminate parasitic suits by persons who merely echo allegations already in the public domain and play no role in exposing the fraud in the first instance; bar requires an affirmative *act* of disclosure. West's Ann. Cal.Gov.Code § 12652(d)(3)(A).

7. States ⇐188

Public disclosure bar to actions under False Claims Act (FCA) did not bar FCA claims brought by city as a qui tam plaintiff on behalf of the State of California against title company and its auditor for falsifying records to conceal from State Controller their escheat obligations; disclosure of false claims was made by former officer of company during criminal embezzlement investigation, but disclosure was not made to one who had managerial responsibility for the claims being made, and disclosure was not made in public. West's Ann.Cal.Gov.Code § 12652(d).

8. Escheat ⇐6

Measure of damages to state from loss of unclaimed funds which title company did not escheat under unclaimed property law (UPL), based on state's loss of use of the under-escheated funds during the time they were wrongfully withheld, was the 12 percent statutory interest that was the legislatively determined compensation for the loss of use of the funds. West's Ann. Cal.C.C.P. § 1577.

9. Escheat ⇐2

The unclaimed property law (UPL) has dual purposes; (1) to protect owners of unclaimed property by locating them and restoring their property to them, and (2) to afford the state, rather than the holder, the benefit of using the property. West's Ann.Cal.C.C.P., § 1501.

10. States ⇐188

Materiality of false statements under False Claims Act (FCA) is a mixed question of law and fact, and depends on whether the false statement has a natural, intrinsic tendency to influence agency action or is capable of influencing agency action. West's Ann.Cal.Gov.Code § 12652(d).

11. States ⇐188

Auditor for title company that failed to disclose in report to Department of Insurance (DOI) that company had wrongfully withheld unclaimed funds in the millions from escheat, violated the False Claims Act (FCA) by making false, material statement that audit was clean; although DOI is not the primary unclaimed property law (UPL) enforcer, it does have statutory authority and practices and procedures for enforcing laws, including the escheat laws, that impact insurance companies, and disclosure of company's escheat violations would have a natural tendency to influence DOI action. West's Ann.Cal. Gov.Code § 12652(d).

See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 674.

12. Trade Regulation ⇐862.1

Title company committed "unlawful" acts within the meaning of the unfair competition law (UCL) because the company earned and unlawfully retained what amounted to interest received on escrow deposit funds through its cost avoidance and arbitrage arrangements with depositary banks, in violation of the Insurance

Code, which mandates that any interest received on escrow deposits shall be paid to the depositing party to the escrow unless that party instructs otherwise. West's Ann.Cal.Bus. & Prof.Code §§ 17200, 17206; West's Ann.Cal.Ins. Code § 12413.5.

13. Deposits and Escrows ⇐13

Federal Reserve Regulation Q, prohibiting banks from paying interest on demand deposits, either directly or indirectly, does not control the interpretation of Insurance Code which mandates that any interest received on escrow deposits shall be paid to the depositing party to the escrow unless that party instructs otherwise. West's Ann.Cal.Ins.Code § 12413.5.

14. Statutes ⇐219(1)

The persuasive power of an agency's interpretation of a statute is circumstantial and depends on the presence or absence of factors supporting the merit of the interpretation, which include indications of careful consideration by senior agency officials, evidence that the agency has consistently maintained the particular interpretation, and indications that the agency's interpretation was contemporaneous with legislative enactment of the statute being interpreted.

15. Deposits and Escrows ⇐13

Insurance Code provision that any interest received on escrow deposits shall be paid to the depositing party to the escrow unless that party instructs otherwise, means any interest, whether directly or indirectly earned on escrow funds. West's Ann.Cal.Ins.Code § 12413.5.

16. Judgment ⇐651

Stipulated judgments in case similar to present case had no preclusive collateral estoppel effect because they were not entered until after judgment was entered in present case.

17. Judgment ⇐668(1), 720

Collateral estoppel bars subsequent relitigation of issues actually litigated and determined in a prior action involving one or more of the same parties.

18. Deposits and Escrows ⇐13

The term "depositing party to the escrow" as used in Insurance Code provision mandating that any interest received on escrow deposits shall be paid to the depositing party to the escrow, is not constrained by an overly technical notion of ownership or title to deposited funds; funds are placed in escrow by the lender on behalf of the borrower, who is a party to the escrow, and nothing in statute precludes the correct and equitable result that when the borrower has paid the lender for the use of lender funds as they remain in escrow prior to closing, that use includes the right to any interest accrued on those funds while in escrow and therefore the borrower, not the lender or title company, is entitled to it. West's Ann.Cal.Ins. Code § 12413.5.

19. Trade Regulation ⇐864

Unfair competition law (UCL) order for restitution properly compelled title company to return money to consumers who had paid interest on lender funds in escrow, and to those claiming through them, which money had been unlawfully retained by title company. West's Ann. Cal.Bus. & Prof.Code § 17203.

20. Parties ⇐35.17, 35.41

To obtain class certification of an action, a party must establish an ascertainable class and a well-defined community of interest among the class members, and proponent must show, among other matters, that questions of law or fact common to the class predominate over the questions affecting the individual members. West's Ann.Cal.C.C.P. § 382.

21. Parties ⇐35.9

Trial courts are afforded great discretion in granting or denying class certification. West's Ann.Cal.C.C.P. § 382.

22. Appeal and Error ⇐854(1), 1024.1

Court of Appeal will reverse an order granting or denying class certification if it is based on improper criteria or erroneous legal assumptions, even though substantial evidence may support the trial court's order; any pertinent, valid reason is sufficient to uphold the order. West's Ann.Cal. C.C.P. § 382.

23. Parties ⇐35.5

Trial courts must weigh the benefits and burdens of class actions and permit them only where substantial benefits accrue to litigants and the courts. West's Ann.Cal.C.C.P. § 382.

24. Parties ⇐35.85

In an action against title and escrow company filed by customers of company, alleging company violated unfair competition law (UCL) by not paying them interest on funds in escrow, which was certified as a class action, the trial court properly excluded from the class other customers who did not deal directly with company, but with independent escrow agents, who deposited funds they held with the company; class plaintiffs' complaints, and their proposed class definition, were grounded on a direct contractual escrow relationship with company, which relationship was lacking in the lender subescrow situation. West's Ann.Cal.C.C.P. § 382; West's Ann. Cal.Bus. & Prof.Code §§ 17200, 17206.

See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2003) 14:11.6.

25. Parties ⇐35.85

In an action against title and escrow company filed by customers of company, alleging company violated unfair competition law (UCL) by not paying them interest on funds in escrow, which was certified as a class action, trial court did not abuse its discretion in impliedly concluding that certification beyond the four-year limitation period of the UCL would unduly impact the community of interest requirement for maintaining the class; court engaged in the necessary weighing, determining that substantial benefits would not accrue from extending the class period, particularly since an extended class would be unmanageable, and the statute of limitations defenses would open the door to thousands of individual factual determinations. West's Ann.Cal.Bus. & Prof.Code §§ 17200, 17208.

26. Trade Regulation ⇐864

Violations of the unfair competition law (UCL) occurring outside the statutory limitations period may not be counted for purposes of imposing a per-violation penalty, but in assessing the amount of the penalty to be imposed for each violation, the court may consider the number of violations, the persistence of the defendant's conduct and the length of time over which the misconduct occurred. West's Ann.Cal.Bus. & Prof.Code § 17208, 17206(b).

27. Deposits and Escrows ⇐18.1, 20

An escrow opens with the deposit of initial instructions and is closed when the sale or refinancing is complete and the conditions satisfied; when the conditions of escrow have been performed fully, title and purchase money pass to the grantee and grantor respectively, as a matter of law, even though there has been no delivery.

See 3 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 6:1.

28. Deposits and Escrows ⇐13, 20

The escrow holder is a limited agent whose duties extend to the strict and faith-

ful performance of the principal's escrow instructions, and once the escrow holder receives instructions and the respective deposits of instruments and money from each party, the agent holds the money and instruments as agent of both parties to the escrow; the agent has no authority to deliver or dispose of the instruments and funds placed in escrow until the escrow conditions have transpired according to the terms of the instructions.

29. Appeal and Error ⇐954(1)

Court of Appeal reviews the trial court's exercise of its injunctive powers pursuant to the unfair competition law (UCL) under an abuse of discretion standard. West's Ann.Cal.Bus. & Prof.Code § 17203.

30. Trade Regulation ⇐862.1

The unfair competition law (UCL) broadly embraces anything properly identified as a business practice that simultaneously is forbidden by law; with its proscription of "any unlawful" business act or practice, the UCL transforms violations of other laws into independently actionable unlawful practices under its statutory umbrella, and it matters not whether the law violated is criminal, civil, federal, state, municipal, regulatory, statutory or court-made. West's Ann.Cal.Bus. & Prof.Code § 17200 et seq.

31. Trade Regulation ⇐862.1

Even if a business practice is not specifically forbidden by another law, it may be deemed unfair or fraudulent under the unfair competition law (UCL). West's Ann.Cal.Bus. & Prof.Code § 17200 et seq.

32. Trade Regulation ⇐864

To recover under the unfair competition law (UCL), individualized proof of deception, injury or reliance is not necessary, nor is it necessary to prove that the defendant intended to injure anyone. West's Ann.Cal.Bus. & Prof.Code § 17200 et seq.

33. Trade Regulation ⇐864

Complaint by People against auditor for title company stated cause of action under the unfair competition law (UCL) by alleging numerous violations of statute governing accounting standards in preparing and submitting "clean" audit reports for company, in view of auditor's alleged knowledge that (1) the company's inflated earnings from unescheated funds was material, (2) the company's escheat practices were possible "illegal acts" by the client as defined by statute, (3) the company had never escheated money to the state as it was required to do, (4) throughout the course of the engagement the company's total escheat obligation including penalties was growing, and (5) that the violations permeated the engagement, in that year after year auditor issued unqualified opinion letters for company. West's Ann.Cal. Bus. & Prof.Code § 5062.

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REARDON, J.

Under the rein of Donald Barr, who personally embezzled millions of dollars while serving as chief financial officer (CFO) of Old Republic Title Company (ORTC) and related entities,[1] the management of the company initiated a variety of illegal practices. The continuation of these practices ultimately led to an action by the District Attorney and City Attorney of the City and County of San Francisco (City) against Old Republic, as well as consumer class actions. Along the way these actions were consolidated and the governmental plaintiffs also sued PricewaterhouseCoopers LLP (PwC), the accounting firm that prepared the independent audit reports for ORTC that were submitted annually to the California Department of Insurance (DOI).

This consolidated litigation splits into two branches: One follows the False Claims Act (FCA),[2] the other follows the unfair competition law (UCL).[3]

The FCA actions against Old Republic and PwC focused on the systematic failure of ORTC to honor its obligation to escheat dormant funds to the state under the unclaimed property law (UPL).[4] The government sued Old Republic for not disclosing its escheat liability in filings with the DOI and pursued PwC for allegedly submitting false audit reports that also masked this liability.

As a threshold matter the trial court ruled that the City, through its district attorney and city attorney, had standing to pursue its FCA claims as a qui tam plaintiff on behalf of the State of California. Old Republic and PwC vigorously oppose this ruling on appeal. The ruling is correct. On the merits the government prevailed against Old Republic but met defeat at the hands of PwC, failing to convince the trial court that the allegedly false audit reports were material under the FCA. In

1. ORTC and Old Republic Title Information Concepts (ORTICON) are wholly owned subsidiaries of Old Republic Title Holding Company, which in turn is a wholly owned subsidiary of Old Republic International (ORI). For purposes of these consolidated appeals, we refer to these entities collectively as "Old Republic."

2. Government Code section 12650 et seq.

3. Business and Professions Code section 17200 et seq.

4. Code of Civil Procedure section 1500 et seq.

appeal No. A097793, the government and Old Republic both find fault with the trial court's measure of damages against Old Republic. Again, we conclude the trial court got it right. In appeal No. A095918, the government challenges the summary judgment in PwC's favor on its FCA claim. We conclude the trial court acted improvidently and therefore reverse.

In the UCL litigation, the trial court concluded that certain cost avoidance and arbitrage practices of ORTC generated millions of dollars in illegal interest that belonged to ORTC's escrow customers. The court entered orders for restitution as well as penalties for violations related to these and other practices, and granted injunctive relief. Old Republic challenges the arbitrage ruling as well as the trial court's decision awarding interest to class plaintiffs on certain lender funds. Class plaintiffs and the People challenge rulings related to the statute of limitations and class certification, as well as the disbursement float; class plaintiffs attack the order for injunctive relief as insufficient. All of these rulings were correct. Finally, the People contest the dismissal of its UCL claim following the sustaining of PwC's demurrer without leave to amend. This claim should proceed and therefore we reverse the judgment of dismissal.

I. FACTS

A. *The Company*

ORTC is an underwritten title company licensed by the DOI to conduct business as a title and escrow agent in California. (See, e.g., Ins.Code, § 12389.) It provides title and escrow services for real estate transactions in California. As a regulated entity, ORTC has disclosure and reporting obligations to the DOI. (*Id.*, § 12389, subd. (a)(4).)

Donald Barr was ORTC's CFO from approximately 1979 until July 1996, when he was fired for embezzlement in connection with the company's cost avoidance program, discussed below. ORTC referred these allegations to the San Francisco District Attorney (SFDA). The SFDA opened a criminal investigation leading to Barr's arrest and subsequently charged him with multiple counts of grand theft, perjury, embezzlement and tax evasion. Barr negotiated a disposition in exchange for information concerning certain alleged illegal business practices of ORTC (discussed below), and pleaded guilty to two counts of tax evasion.

B. *Business Practices Subject to Litigation*

1. *Failure to Escheat Unclaimed Funds*

As escrow agent, ORTC receives funds from purchasers, sellers, borrowers and lenders; prepares documents and closing account statements; and disburses escrow funds at the close of escrow. The company routinely aggregates its customers' escrow funds in demand deposit[5] accounts with various banks throughout California. At times, customers would fail to instruct ORTC to disburse all the funds on deposit. On other occasions a party to whom ORTC disbursed funds from the escrow account at the close of escrow would fail to cash the check. In both cases these dormant funds accumulated and remained in the accounts after the close of escrow. By the late 1980's, ORTC began sweeping some of the dormant funds from escrow accounts into its general fund and recognizing these funds as income. Under the UPL, holders of unclaimed funds such as ORTC are charged with submitting holder reports to the State Controller on an annual basis

5. A "demand deposit" is a deposit payable on demand. (12 C.F.R. § 204.2(b)(1) (2004).)

that disclose the nature, and last known owner, of the unclaimed funds. (See Code Civ. Proc., § 1530.) At the same time, the reporting holders are to deliver all escheated property identified in the reports to the State Controller. (*Id.*, § 1532, subd. (a).)

At relevant times, PwC or its predecessor Coopers & Lybrand was the independent public accountant for ORTC. PwC's scope of work included preparing the annual audit report for the Commissioner of Insurance (Commissioner), as required by Insurance Code section 12389, subdivision (a)(4).[6]

Gerard Fisher, PwC's audit manager on ORTC's account during 1990, indicated he understood that ORTC had a policy of clearing dormant funds out of trust accounts. He suspected that the company had been violating the "laws related to escheat." Fisher testified that the majority of dormant funds taken from the accounts did not belong to ORTC. In 1990, PwC recommended that ORTC evaluate the dormant escrow amounts which remained unclaimed and review its policies to ensure compliance with state law. ORTC indicated it would do so " 'insofar as practical.' " Between 1990 and 1994, PwC raised the issue of dormant funds with the company.

Karman Pejman, a former PwC auditor, testified that there was always a concern about ORTC's practice of purging funds from escrow accounts and rerouting them to the company's operating income. He noted that ORTC's liability for funds that should have been escheated accumulated year after year. For example, for the period 1989 and 1990, nearly $1.7 million was purged from ORTC escrow accounts, with $1.3 million taken in as income. According to Pejman, ORTC never, in recent history, complied with the UPL.

Richard Baker, PwC auditor partner on the Old Republic account, was also aware of the company's dormant funds practices and knew they were recurrent.

Nonetheless, PwC issued an unqualified, "clean" audit opinion letter, which ORTC submitted to the Commissioner along with its financial statements. PwC understood that its opinion was so submitted. E. John Larsen, a certified public accountant and professor of accounting, gave his expert opinion that once PwC learned of the escheat violations, minimum auditing standards required the firm to take steps to estimate ORTC's potential liability. It did not. Without an estimate, PwC should not have issued unqualified opinion letters.

Alfred Bottalico, bureau chief of DOI's Field Examination Division (FED), explained that his division conducts field audits at company offices, whereas the Financial Analysis Division of the DOI receives and monitors the audit reports and financial statements and determines when a field examination is in order. One trigger point for a field examination would be a qualified opinion letter from an independent auditor. One of the field examination protocols is to determine if the company has its own procedure "to set up an unclaimed property liability." If fraud were detected as part of the exam, it would be a "major finding" and would spur further inquiry.

DOI undertook an examination of Old Republic and issued its confidential report

6. Pursuant to this statute, each year underwritten title companies such as ORTC must submit to the Commissioner an audit certified by independent auditors. The purpose of this and related requirements is "to maintain the solvency of the companies subject to this section and to protect the public by preventing fraud and requiring fair dealing." (Ins.Code, § 12389, subd. (d).)

in February 1999. The special examiner found that since 1980, the company had swept funds left dormant in escrow accounts into its general fund. Further, in some years Old Republic actually *budgeted* for potentially escheatable income, thus demonstrating its "systematic approach to the movement of funds into their income accounts."

ORTC did not escheat any unclaimed escrow funds to the state until 1992. The company filed its first holder report in the early 1990's. The holder reports for 1992–1994 and 1997 understated the full amount of escheatable funds which ORTC held. After the City served Old Republic with the complaint in this lawsuit, the company escheated $9,551,527.89 in unclaimed funds and $7,710,118.18 in statutory interest on those funds to the State Controller.

2. *Cost Avoidance and Arbitrage Practices*

a. *Federal Regulatory Framework*

The Federal Reserve Act[7] prohibits member banks of the Federal Reserve System from directly or indirectly paying any interest on any demand deposit. (12 U.S.C. § 371a; see also 12 C.F.R. § 217.1 et seq. (2004) (Regulation Q).) Regulation Q defines interest as "any payment to or for the account of any depositor as compensation for the use of funds constituting a deposit. A member bank's absorption of expenses incident to providing a normal banking function or its forbearance from charging a fee in connection with such a service is not considered a payment of interest." (12 C.F.R. § 217.2(d) (2004).)

From time to time the Federal Reserve Board (Board) has issued rulings and opinion letters which spell out various arrangements by which banks can provide benefits to depositors without violating the Federal Reserve Act or Regulation Q. For example, a bank can withhold or impose a reduced charge for services or benefits reasonably regarded as normal banking functions or services, so long as the bank does not actually pay money to the demand deposit customer. Thus, under this rationale, the Board does not regard the provision of free checks, safety deposit boxes, night depository service, messenger and armored car services and the like as constituting the indirect payment of interest. (See 1957 Fed. Res. Interp. Ltr. (Jan. 23, 1957); 1974 Fed. Reserve Bd. Interpretive Letter, Fed. Reserve Reg. Service 2.540 (Jan. 3, 1974); 1964 Fed. Reserve Bd. Interpretive Letter, Fed. Reserve Reg. Service 2–439 (July 17, 1964).) Similarly, the Board regards automated escrow closing trust accounting and bank reconciliation, and monthly general ledger and financial statements pertaining to escrow accounting services as normal banking functions for which a bank may absorb the expenses. (1994 Fed. Reserve Bd. Interpretive Letter, Fed. Reserve Reg. Service (Apr. 26, 1994).)

Moreover, the Board has deemed that banks do not pay interest by offering loans at favorable rates for the purchase of investment instruments pledged as security for the loans to customers who maintain large demand deposit balances. In this situation, the amount of credit a bank is willing to extend is tied to the historical average demand deposit account balances. (1988 Fed. Reserve Bd. Interpretive Letter, Fed. Reserve Reg. Service 2–545.1 (June 28, 1988).)

7. Act of December 23, 1913, 38 Statutes at Large 251, chapter 6; see also title 12 United States Code section 226.

b. *Cost Avoidance Arrangements*

ORTC provides direct escrow services in Northern California; it serves as a subescrow in Southern California. In both instances, ORTC deposits aggregated escrow trust funds in demand deposit accounts in various banks.

Starting in the early 1980's, ORTC entered into various "cost avoidance" arrangements with approximately 10 different banks which maintained the escrow accounts. Through these arrangements, a participating bank would make a certain dollar amount of "earnings" credits available to ORTC on a monthly basis. This is the way it worked: First, the bank would establish an "earnings credit rate" expressed as a percentage, and determined by reference to a market index for the bank's cost of funds. Next, it would calculate the average daily balance of funds held in ORTC non-interest-bearing demand deposit accounts for the previous month. From that balance the bank would deduct the "float" (checks deposited which were not yet "good funds"), as well as reserves and premiums imposed by federal regulators, resulting in an average net balance. This net balance would be multiplied by the earnings credit rate, to generate the actual earnings or vendor credit.

Fees for services provided directly by the bank such as check processing, wire services and stop payments were netted out, and the net credit was multiplied by an agreed upon percentage rate, the product being the "available earnings credit." At the end of the month, the bank would pay "vendors" on invoices submitted for "normal banking services" in an amount up to the available earnings credit determined for the previous month.

Through the mid–1990's, Barr used the cost avoidance program to embezzle approximately $2 million. Barr would submit phony invoices to the banks under a shell corporation he created and controlled, and skim some of the remitted funds before transferring the remainder to ORTC.

Since July 1994, most of the earnings credit payments were paid against invoices from ORTICON. ORTC officers responsible for the ORTICON invoices never consulted with ORTICON prior to preparing them. In fact, the operations manager for ORTICON was unaware that these invoices were being submitted to banks until he was deposed in connection with this litigation. Through at least 1997, checks paid on the ORTICON invoices were deposited directly into ORTC's account.

ORTICON invoices reflected charges for computer equipment, software support and maintenance, training, escrow data accounting, and data processing. Invoices were prepared by determining the amount of available earning credits. The amount billed and entered on any given invoice generally was based on the earnings credit available at the time, not the actual cost or value of services rendered by ORTICON to ORTC. These amounts were generally slightly less than the available earnings credit. Unused earnings credits were carried forward to the next month and ORTC would bill down to zero at the end of the year.

For the period 1987–1994, ORTC collected over $19.2 million through the cost avoidance scheme. From July 1994 through February 2001, it collected $13,760,901.

c. *Arbitrage Scheme*

Beginning around 1997, ORTC and its banking partners largely replaced the cost avoidance arrangements with an "arbitrage" scheme. The arbitrage relationship typically worked this way: ORTC would receive a rock-bottom interest loan (.25

percent to 1 percent) from the bank for an amount equal to approximately 90 percent of the total average daily balances maintained at that bank. Under agreement with the bank, ORTC was required to use the loan proceeds to purchase interest-bearing instruments from the same bank. These instruments secured the loan. ORTC retained the "arbitrage yield" or "spread" constituting the excess interest earned by the instrument over the life of the loan. For the period July 1994 through February 2001, the arbitrage yield totaled $18,377,222.

William Sarsfield, a former bank president, national bank examiner with the Office of the Comptroller of the Currency, and adjunct faculty member at Golden Gate University, testified by declaration that in his opinion "there was no business purpose for the 'arbitrage' loan other than pay net interest to Old Republic . . . on the escrow demand deposits."

3. *Fees Charged for Services Not Rendered*

ORTC also engaged in charging fees for services it did not perform. In some Southern California counties, it collected reconveyance fees from its escrow customers—typically from $65 to $75—even though neither the beneficiary nor the trustee had demanded the fee. ORTC transferred the fees to an "advance account" and paid out the fee if requested by the trustee or beneficiary. However, in many instances neither demanded a reconveyance fee and periodically ORTC would transfer the accumulated fees into company income.

After the complaint in this case was unsealed, the State Controller's Office (SCO) audited ORTC. Both parties agreed that ORTC was not able to document adequately that it was entitled to take $5,621,657 in fees into income. ORTC tendered this amount together with $1,322,844.13 in interest to the SCO. Of these amounts, $2,009,623.70 in fees and $154,727.51 in interest were attributable to fees charged on or after January 1, 1994. This translates into unearned reconveyance fees collected from approximately 80,309 customers.

In approximately 10 percent of its escrow transactions, ORTC also charged its customers $25 on average for each outgoing wire transfer. In most cases Old Republic did not actually incur the expense except insofar as the bank absorbed the fee as part of the cost avoidance and arbitrage programs.

4. *Customer Practices with Respect to Escrow Accounts*

Old Republic's written escrow instructions did not inform customers that they could place funds in an interest-bearing account. If a customer nonetheless made such a request, Old Republic honored the instruction.

Further, its form escrow instructions directed that all disbursements from the escrow account be made by check. Indeed, most disbursements were made by check rather than by wire transfer. Whereas wire transfer funds are withdrawn immediately from an account, disbursement checks take some time to clear, resulting in a disbursement float.

C. *Procedural History*

1. *The City and Class Plaintiffs Sue Old Republic*

The SFDA and San Francisco City Attorney filed the complaint [8] in this lawsuit

8. Pursuant to the FCA, San Francisco filed the complaint under seal. (Gov.Code, § 12652, subd. (c)(2).)

in March 1998. They sued (1) on behalf of the City as a qui tam plaintiff under the FCA on allegations of falsifying records to conceal escheat obligations; and (2) in the name of the People on other causes of action, including a civil enforcement action under the UCL for (a) collecting disguised interest under cost avoidance and arbitrage schemes, but not paying the benefits to consumers per Insurance Code section 12413.5;[9] and (b) improper retention of reconveyance fees. (Collectively, we sometimes refer to these plaintiffs as the government or governmental plaintiffs.)

Barr filed his own FCA complaint in April 1998, but because the governmental plaintiffs filed first, Barr's suit has been preempted. (Gov.Code, § 12652, subd. (c)(10).) As well, several class actions were filed against Old Republic mirroring the government's action,[10] but not the FCA allegations. The trial court (1) certified a class consisting of "ALL PERSONS AND ENTITIES IN CALIFORNIA WHO, DURING THE PERIOD OF JULY 24, 1994 THROUGH FEBRUARY 7, 2001, WERE PARTIES TO ESCROWS DIRECTLY WITH OLD REPUBLIC TITLE COMPANY, WHO DID NOT RECEIVE INTEREST EARNED ON FUNDS DEPOSITED IN ESCROW"; and (2) consolidated the class and government actions for all purposes. Excluded from the class were those consumers, primarily in Southern California, who were indirectly affected by Old Republic's conduct as a subescrow.

a. *FCA Cause of Action*

Old Republic demurred without success to the FCA cause of action on grounds the governmental plaintiffs lacked standing to sue as qui tam plaintiffs, and also unsuccessfully renewed this challenge on summary adjudication. As well, the City moved for summary adjudication on this cause. Based on Barr's submission of false holder reports to the State Controller which concealed ORTC's failure to escheat dormant funds to the state, ORTC conceded liability. Accordingly, the trial court granted the City's motion, determining that the damages were the stipulated statutory interest amount of $7,568.079, trebled to $22,704,237 and offset by interest already paid, for a net award of $15,136,158. The trial court awarded the City one-third of the trebled damages, or $7,568,079.

b. *UCL Cause of Action*

i. *Pretrial Phase*

Pretrial, Old Republic sought to exclude from any restitution award to consumers the cost avoidance and arbitrage benefits forthcoming from lender funds held in escrow, arguing that consumers have no right to them. The trial court disagreed, ruling that when a borrower is charged interest *prior to* close of escrow on funds deposited by the lender, the borrower is entitled to any interest earned on those deposits.

ii. *Trial: Liability Phase*

The matter proceeded to a bench trial on the Business and Professions Code section 17200 allegations that ORTC committed unfair, unlawful or fraudulent business practices by failing to remit to the depositing parties the benefits collected on escrow deposits under the cost avoidance and ar-

9. Insurance Code section 12413.5 states in part: "Any interest received on funds deposited in connection with any escrow which are deposited in a bank ... shall be paid over by the escrow to the depositing party to the escrow...."

10. Class plaintiffs have alleged additional causes of action not germane to this appeal.

bitrage schemes. The trial court made three significant rulings.

First, it held that although the proper interpretation of "interest" within the meaning of Insurance Code section 12413.5 is not governed by Regulation Q, there were sound reasons for construing "the California statute much like the federal provisions have been interpreted." Accordingly, the court limited the term "interest" in Insurance Code section 12413.5 to money paid for the use or deposit of money, excluding from that definition other benefits that could be given in exchange for the deposit of funds. On this point the court concluded that in determining whether a particular transaction involved interest for purposes of section 12413.5, Regulation Q and federal interpretations thereof should be looked to for guidance, but were not conclusive.

Second, the court ruled that although cost avoidance benefits sanctioned by Regulation Q do not constitute interest, the benefits paid by banks to ORTC on ORTICON invoices did because the practices in question did not comply with Regulation Q. Old Republic has not appealed this ruling.

Third, the court drew the line at equating "interest" under Insurance Code section 12413.5 with "interest" as interpreted under Regulation Q when it came to analyzing benefits conferred to Old Republic under arbitrage arrangements. Specifically, it concluded that while the Board sanctions the extension of arbitrage benefits by banking institutions for purposes of banking regulation, the extension of those benefits to ORTC are nothing but interest for purposes of Insurance Code section 12413.5: "The arbitrage benefits ... serve no function other than to permit the payment of an ascertainable sum of money to ORTC. ... The arbitrage arrangements are, purely and simply, means of circumventing the restrictions that apply to the payment of interest on demand deposits by doing in two steps what cannot be done in one. While permitting this practice may not undermine the objectives of the bank regulations, permitting ORTC to retain these monetary benefits—i.e., interest—cannot be squared with the explicit directive of section 12413.5." (Fn.omitted.)

iii. *Remedies Phase*

The parties stipulated that ORTC received $13,760,901 and $18,377,222, respectively, during the class period from its cost avoidance and arbitrage programs. In its decision on remedies, the trial court ordered restitution to class members of interest received by ORTC through its cost avoidance and arbitrage programs during the class period,[11] but only for amounts earned prior to close of escrow. The court allowed interest on the consumer float ($6,700,799) and most of the interest earned on the "lender float" ($4,853,113), but disallowed interest on the disbursement float. "Consumer float" refers to funds deposited in escrow by the buyer or refinancing party, while "lender float" refers to funds deposited in escrow by a financial institution that is lending funds to a party to the escrow. The court also awarded class plaintiffs prejudgment interest in the stipulated amount of $2,210,640. Additionally, the court imposed civil penalties of (1) $3.57 for each of the 207,324 stipulated transactions under the cost avoidance scheme, for a total of $741,850;

11. The court refused to add to the stipulated totals $1,165,000 in cost avoidance benefits illegally obtained through C.E.B., Inc. (CEB)—a shell corporation created and controlled by Barr for which Barr made restitution to ORTC in 1998. The court reasoned that although the payment was made in 1998, the funds were earned *prior to* the class period.

(2) $2.55 for each of the stipulated 259,155 violations under the arbitrage scheme, for a total of $660,824; and (3) $17.50 for each of 28,709 reconveyance fee violations and $6.25 per each wire transfer fee violation, totaling $778,640.

Finally, the court ordered ORTC to (1) develop a plan for court approval for crediting the account of its escrow customers with interest earned on deposits through cost avoidance and arbitrage programs; (2) draft statements disclosing the consumer's right to have escrow funds deposited in an interest-bearing account; (3) draft disclosures concerning availability and cost of wire transfers; and (4) refrain from charging escrow customers for bank services, the costs of which are not actually incurred by ORTC. Thereafter Old Republic moved for approval of interim compliance plans, which the court approved, along with the disclosures set forth in the plans.

Subsequently, the governmental plaintiffs moved for civil penalties based on ORTC's dormant fund practices. Finding 10,000 incidents had occurred, the trial court imposed a *conditional* penalty of $173.18 per violation [12] under Business and Professions Code section 17206, for a total penalty of $1,731,800, to kick in only if we reversed the treble damages award under the FCA. With an affirmance, the penalty imposed is $1.

2. *The City Names PwC as a Defendant*

Meanwhile, with the fourth amended complaint filed in August 2000, the City named PwC as a defendant, asserting violations under the FCA and UCL for failure to disclose ORTC's escheat liability in audit reports filed with the DOI. PwC demurred to both causes. Sustaining the demurrer without leave to amend as to the UCL claim, the court concluded that the DOI does not have responsibility for policing escheat laws. In any event, since the funds had been returned, affected consumers could put in a claim and thus there was no additional remedy to impose.

PwC also moved for judgment on the pleadings on the FCA claim, contending that the City lacked standing to pursue the action as a qui tam plaintiff. The trial court denied the motion, declining to revisit its previous ruling. Thereafter, PwC obtained summary judgment on the FCA count. The trial court reasoned that even if PwC had disclosed the escheat irregularities, in the normal course of events and under normal procedures such information would not have been forwarded to the State Controller for enforcement action and hence the alleged misrepresentations were immaterial.

3. *Judgment and Postjudgment Matters*

The trial court entered judgment accordingly and thereafter denied motions for new trial brought by Old Republic and the class plaintiffs. Multiple appeals and cross-appeals followed. In No. A097793, Old Republic has appealed and the governmental plaintiffs and class plaintiffs have separately cross-appealed. In No. A095918, the governmental plaintiffs have appealed and PwC has cross-appealed.[13]

In August 2002, Old Republic abandoned its challenge to certain aspects of the judgment which it satisfied by paying penalties,

12. This amount represented the average size of swept escrow accounts.

13. The Attorney General has filed an amicus curiae brief in support of the governmental plaintiffs. California Land Title Association has submitted its brief in support of Old Republic.

restitution, prejudgment interest, post-judgment interest and litigation costs. In November 2002, Old Republic further partially satisfied the conditional judgment awarding penalties under Business and Professions Code section 17206 for dormant fund practices.

II. FCA LITIGATION

A. *Threshold Issues*

In the FCA litigation, the City sued Old Republic and PwC [14] as a qui tam plaintiff. The FCA authorizes lawsuits to recover misappropriated government funds by three types of plaintiffs: (1) the Attorney General, with respect to claims involving state funds or both state and local funds (Gov.Code, § 12652, subd. (a)(1), (2)); (2) the prosecuting authority of a "political subdivision" for claims involving local funds or both local and state funds [15] (*id.*, subd. (b)(2)); and (3) "a person" for claims involving state or local funds (*id.*, subd. (c)). The FCA refers to the "person" bringing such an action "as the qui tam [16] plaintiff." (*Ibid.*) These actions commonly are called "whistleblower" actions.

[1] Defendants insist that (1) the City is not a "person" within the FCA and therefore lacks standing to bring a qui tam action; and (2) the allegations upon which the FCA action is based were publicly disclosed prior to commencement of this action, thus triggering a statutory bar to jurisdiction. We disagree with both points.

1. *The City Has Standing to Bring a Qui Tam Action*

According to defendants, the plain language, legislative history, structure and purpose of the FCA all converge to support their position that the term "person" refers only to private actors.

a. *Statutory Language*

[2] We start with the statutory language, which does not contain the word "private." Rather, it states that " '[p]erson' includes any natural person, corporation, firm, association, organization, partnership, limited liability company, business, or trust." (Gov.Code, § 12650, subd. (b)(5).) The word "includes" ordinarily is a term of enlargement, not limitation. (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1101, 17 Cal.Rptr.2d 594, 847 P.2d 560.) Indeed, courts have long accepted that government entities are statutory "persons." For example, in *City of Pasadena v. Stimson* (1891) 91 Cal. 238, 248, 27 P. 604, our Supreme Court recognized a city's standing as a "person" under a provision of the Civil Code permitting "any person" to bring a condemnation action. The court reasoned that under the general provisions of the Civil Code, a corporation is a person and thus, any public or private corporation could exercise the statutory condemnation rights.

Later, in *State of California v. Marin Mun. W. Dist.* (1941) 17 Cal.2d 699, 111 P.2d 651, our state's high court construed section 680 of the Streets and Highways

14. In this section entitled "FCA Litigation," we refer to Old Republic and PwC collectively as defendants.

15. The City does not contend that local funds are at stake.

16. "Qui tam" is short for qui tam pro domino rege quam pro se ipso in hac parte sequitur, meaning " ' "who pursues this action on our Lord the King's behalf as well as his own." ' " (*City of Pomona v. Superior Court* (2001) 89 Cal.App.4th 793, 797, 107 Cal.Rptr.2d 710, quoting *Vermont Agency of Natural Resources v. United States ex rel. Stevens* (2000) 529 U.S. 765, 768, fn. 1, 120 S.Ct. 1858, 146 L.Ed.2d 836.)

Code, providing that any "person" maintaining a pipeline could be required to move it upon written demand when necessary for safety or public improvement purposes. The issue was whether section 680 encompassed municipal water districts. Another provision of the code defined "person" as "any person, firm, partnership, association, corporation, organization, or business trust." (*State of California v. Marin Mun. W. Dist., supra,* at p. 704, 111 P.2d 651; see former Sts. & Hy.Code, § 19.) Explaining that the application of section 680 to municipal water districts would not limit their otherwise valid power but would only operate to prevent them from exercising their franchises in a manner contrary to law, the court concluded that the Legislature intended to embrace municipal water districts within the statute's application thereby affording a method of enforcement. (*State of California v. Marin Mun. W. Dist., supra,* at pp. 704–705, 111 P.2d 651.)

More recently, the court ruled that a statute precluding prescription of property of public entities by "any person, firm or corporation" was *not* limited to private parties, but rather included governmental agencies. (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199, 276–277, 123 Cal.Rptr. 1, 537 P.2d 1250, disapproved on another point in *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1248, 99 Cal.Rptr.2d 294, 5 P.3d 853.)

Defendants' argument that in the absence of express words to the contrary, states and political subdivisions are not encompassed within the general words of a statute (citing *Estate of Miller* (1936) 5 Cal.2d 588, 597, 55 P.2d 491) misses the mark. As explained in *City of Los Angeles v. City of San Fernando, supra,* 14 Cal.3d 199, 123 Cal.Rptr. 1, 537 P.2d 1250, the rule *excluding* governmental agencies from the operation of general statutory provisions pertains "only if their inclusion would result in an infringement upon sovereign governmental powers. 'Where ... no impairment of sovereign powers would result, the reason underlying this rule of construction ceases to exist and the Legislature may properly be held to have intended that the statute apply to governmental bodies even though it used general statutory language only.' [Citations.]" (*Id.* at pp. 276–277, 123 Cal.Rptr. 1, 537 P.2d 1250.)

Not surprisingly, defendants argue that if local governments were "persons" under the FCA, they would also be subject to liability thereunder. FCA liability, in turn, would infringe on their sovereignty by interfering with provision of public services.[17] This argument was put to rest in *LeVine v. Weis* (1998) 68 Cal.App.4th 758, 80 Cal.Rptr.2d 439. There, a school district contended it was not a "person" within the FCA and thus could not be sued for wrongful termination under the employee whistleblower provisions of the act. The reviewing court held that the definition of "person" must be read in light of the context and purpose of the statute—namely, to protect the public fisc. Thus a broad interpretation should be given to the person or entity allegedly raiding the public treasury and there was no reason to deny protection when the raider was a govern-

17. Apparently, the City has contended in another case that imposition of liability under the federal FCA would infringe on its governmental obligations. (See brief of amici curiae City of New York, City of Los Angeles, City and County of San Francisco, and Cook County, Illinois at p. 23, in *Vermont Agency of Natural Resources v. United States ex rel. Stevens, supra,* 529 U.S. 765, 120 S.Ct. 1858 [concerning federal FCA].) The California FCA is patterned on a similar federal act. (*Laraway v. Sutro & Co.* (2002) 96 Cal.App.4th 266, 274, 116 Cal.Rptr.2d 823.)

mental entity. So construed, the definition of person was broad enough to encompass the school district within the terms "association" and "organization." (*Id.* at pp. 764–765, 80 Cal.Rptr.2d 439.) The court dispatched the sovereign powers argument with these words: "[N]o governmental agency has the power, sovereign or otherwise, knowingly to present a false claim. The very notion is repugnant to how government should operate by and for the people. [The district] is subject to the False Claims Act." (*Id.* at p. 765, 80 Cal. Rptr.2d 439.)

Defendants are also adamant that including public entities within the definition of "person" for purpose of qui tam standing is not sound public policy. For example, PwC casts the City's prosecution of this lawsuit as opportunistic, arguing that the qui tam provisions are designed to provide financial incentives for whistleblowers, and that the FCA reflects an effort to " 'walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior.' " (Quoting *U.S. ex rel. Springfield Terminal Ry. v. Quinn* (D.C.Cir.1994) 14 F.3d 645, 651.) Surely the prosecution of this action by public officials poses substantially less risk of being parasitic than actions by purely private actors. Moreover, depriving public entities standing would disserve the remedial purposes of the act. A liberal construction of the term "person" encourages competent prosecution of false claims by public qui tam plaintiffs for the public good.

Defendants attempt to modify "persons" with "private" by hearkening the doctrines that (1) words are known by the company they keep;[18] and (2) the meaning of each item in a list should be determined by reference to the others, with preference given to an interpretation that uniformly treats items similar in scope and nature.[19] They argue that the entities identified as "persons" do not include any governmental bodies and thus "person" should be interpreted narrowly as embracing only private actors. We disagree. The catalog of actors randomly contains some specific terms associated with private parties—namely "natural person," "partnership" and "business," but other specific terms such as "trust" can be public (charitable) or private, as can a corporation. Finally, the terms "association" and "organization" are general enough to embrace either. Thus, these doctrines do not aid defendants.

b. *Structure of the FCA*

[3, 4] Defendants also maintain that the structure of the FCA supports their interpretation, relying on the rule that the statutory expression of some things necessarily means other things not expressed are excluded. (See *Lake v. Reed* (1997) 16 Cal.4th 448, 466, 65 Cal.Rptr.2d 860, 940 P.2d 311.) They reason that since the FCA allows for actions by the Attorney General and qui tam plaintiffs and expressly and separately allows for actions by political subdivisions but only to recover local funds, the Legislature has implicitly accorded political subdivisions a limited place in the statutory scheme that forecloses standing in other instances, namely when local funds are not involved. We are more persuaded by the City's argument that rather than reflecting an intent to exclude municipalities from suing as qui tam plaintiffs, in light of the FCA's broad remedial purpose, the Legislature meant

18. See *Heller v. Norcal Mutual Ins. Co.* (1994) 8 Cal.4th 30, 49–50, 32 Cal.Rptr.2d 200, 876 P.2d 999.

19. See *Kelly v. Methodist Hospital of So. California* (2000) 22 Cal.4th 1108, 1121, 95 Cal. Rptr.2d 514, 997 P.2d 1169.

to enlarge the universe of remedies available to municipalities. Suits prosecuted by the prosecuting authority of a political subdivision are available when local funds are at stake, *in addition to* suits that municipalities and other public entities can bring as a "person," whether or not local funds are involved. Nor does this interpretation render the separate provision for political subdivision suits superfluous. That provision is necessary to make it clear that when a political subdivision acts as prosecuting authority in cases involving its *own* funds, it need not follow procedures required of qui tam plaintiffs, namely submitting the suit to the Attorney General for review. (Gov.Code, § 12652, subd. (c)(3).) Additionally, a political subdivision can *intervene* in actions brought by the Attorney General involving local funds. (*Id.*, § 12652, subd. (a)(2), (3).)

[5] Defendants attempt to bolster their position by alluding to certain procedural requirements for qui tam complaints "filed by a private person." (Gov.Code, § 12652, subd. (c)(2).)[20] But of course the prior subdivision, which creates the qui tam right of action, does not contain the "private" qualifier. (*Id.*, § 12652, subd. (c)(1).) "Where the Legislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded." (*Phillips v. San Luis Obispo County Dept. etc. Regulation* (1986) 183 Cal.App.3d 372, 379, 228 Cal. Rptr. 101.) Nor must we infer an intent to restrict qui tam actions to private persons in order to "harmonize" the two subdivisions. While the reference to "private" person in Government Code section 12652, subdivision (c)(2) may detract from the statute's precision, it does not cancel out the broader meaning, nor does it compel the conclusion that the Legislature intended to single out political subdivisions for a less favored status than private individuals or entities.

c. *Legislative History*

Defendants also champion the legislative history of the FCA as supporting a narrow reading of the term "person." First, they point out that the original version of Assembly Bill No. 1441 (1987–1988 Reg. Sess.) as introduced on March 4, 1987, enumerated various governmental entities in the definition of "person." That version also provided only for civil actions brought by the Attorney General or by "any person" on behalf of the person and the people of the State of California. Thereafter, the specific enumeration of governmental entities was removed from the definition of "person." Concurrently, a new definition for "political subdivision" and a new right of intervention and action by the prosecuting authority of a political subdivision with respect to local funds was created.

Defendants point us to *Wilson v. City of Laguna Beach* (1992) 6 Cal.App.4th 543, 555, 7 Cal.Rptr.2d 848, holding that an enactment should not be interpreted to include a provision contained in the bill as originally introduced, but later rejected. They draw an overly simplistic conclusion from this general proposition.

Here, the proposed amendment eliminating language from the definition of "person" simultaneously created a definition and distinct action for political subdivisions. The Legislative Counsel's Digest for the original bill simply stated that the bill "would authorize the Attorney General and any other person to bring a civil action for the people of the state." (Assem. Bill

20. This provision reads: "A complaint filed by a private person under this subdivision shall be filed in superior court in camera and may remain under seal for up to 60 days. No service shall be made on the defendant until after the complaint is unsealed."

No. 1441, introduced Mar. 4, 1987 (1987–1988 Reg. Sess.) p. 1.) The digest to the proposed amendment, and each digest thereafter including the digest to the chaptered bill, advised the legislators: "The bill would authorize the Attorney General, the prosecuting authority of a political subdivision and any other person to bring a civil action for the people of the state or of the political subdivision...." (Legis. Counsel's Dig., Assem. Bill No. 1441 (1987–1988 Reg. Sess.) 4 Stats.1987, Summary Dig., p. 523.) There is no reference to "private" persons in any of the Legislative Counsel's Digests for Assembly Bill No. 1441.

Courts frequently rely on the Legislative Counsel's Digest to discern evidence of legislative intent. (See *Rockwell v. Superior Court* (1976) 18 Cal.3d 420, 443, 134 Cal.Rptr. 650, 556 P.2d 1101; *People v. Tanner* (1979) 24 Cal.3d 514, 520, 156 Cal. Rptr. 450, 596 P.2d 328; *Maben v. Superior Court* (1967) 255 Cal.App.2d 708, 713, 63 Cal.Rptr. 439.) Indeed, it is reasonable to presume the Legislature adopted an act with the intent and meaning expressed in the Legislative Counsel's Digest. (*Maben v. Superior Court, supra,* at p. 713, 63 Cal.Rptr. 439.) We conclude from this slice of legislative history that rather than demonstrating an intent to deprive political subdivisions of standing as qui tam plaintiffs, this history suggests the Legislature contemplated a broad definition of "person" in the role of qui tam plaintiff, one which gave all plaintiffs standing to redress harm to either state or political subdivisions. While the Legislature probably did not anticipate that political subdivisions would be typical qui tam plaintiffs, neither does the history suggest it intended to *eliminate* them as potential qui tam plaintiffs. In light of the inclusive language of the definition of person and the statute's remedial purpose, we find defendants' reading of the legislative history unduly narrow.

Defendants also call our attention to several references tying qui tam plaintiffs to "private" persons or parties scattered in a few legislative committee reports and an analysis of Assembly Bill No. 1441 prepared by the public interest organization that proposed the legislation. These references are not convincing. We are persuaded that the definition of "person," broadly interpreted in a manner that supports the beneficial goals of the statute, in a manner consistent with prior Supreme Court interpretations of the term "person" and with the Legislative Counsel Digests for Assembly Bill No. 1441, includes municipalities and other political subdivisions.

Finally, defendants refer us to comments in a committee report to the effect that enactment of the FCA would not result in any increased government personnel costs or bureaucracy. They maintain this could only be true if "person" meant "private" actor. But of course the FCA contemplates that the Attorney General and local prosecuting authorities will pursue false claims on their own behalf; when they do, without doubt public resources will be redirected to those efforts.

2. *There Was No Public Disclosure*

[6] Beyond requiring standing as a statutory person, the FCA further limits a court's jurisdiction over such claims, as follows: "No court shall have jurisdiction over an action under this article based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in an investigation, report, hearing, or audit conducted by or at the request of the Senate, Assembly, auditor, or governing body of a political subdivision, or by the news media, unless the action is brought by the Attorney General or the prosecuting authority of a political

subdivision, or the person bringing the action is an original source [21] of the information." (Gov.Code, § 12652, subd. (d)(3)(A).) The purpose of the public disclosure bar is to eliminate parasitic suits by persons who merely echo allegations already in the public domain and play no role in exposing the fraud in the first instance. (See *U.S. ex rel. Findley v. FPC–Boron Employees' Club* (D.C.Cir. 1997) 105 F.3d 675, 678, 688 [discussing virtually identical federal counterpart].)

Here, Donald Barr disclosed information to the SFDA about ORTC's escheat practices as part of the negotiated disposition of the charges pending against him. The disclosures were made during confidential interviews. Barr waived the right to a preliminary hearing and, as a condition of providing the information, the SFDA guaranteed confidentiality until the negotiated disposition was reached. The criminal information filed against Barr, as well as his plea agreement (which was sealed) are devoid of factual allegations which gave rise to the qui tam suit against Old Republic.

[7] Defendants take the position that the disclosures were "publicly" made during a "criminal hearing" within the meaning of Government Code section 12651, subdivision (d). We disagree.

Although the Third Circuit has held that "disclosure of discovery material to a party who is not under any court imposed limitation as to its use is a public disclosure under the [federal] FCA" (*U.S. ex rel. Stinson v. Prudential Ins.* (3d Cir.1991) 944 F.2d 1149, 1158, fn. omitted), other courts have rejected that view, for good reason. "[T]he reasoning of the Third Circuit is unsound. The interpretation of 'public disclosure' adopted there runs contrary to the plain meaning of the words.... [¶] ... [T]he language of the statute itself is 'public disclosure,' not 'potentially accessible to the public.' A plain and ordinary meaning of 'public' is 'open to general observation, sight, or cognition, ... manifest, not concealed' [citation]." (*U.S. v. Bank of Farmington* (7th Cir. 1999) 166 F.3d 853, 860; see also *U.S. ex rel. Ramseyer v. Century Healthcare Corp.* (10th Cir.1996) 90 F.3d 1514, 1519 [" 'public disclosure' signifies more than the mere theoretical or potential availability of information.... [I]n order to be publicly disclosed, the allegations or transactions upon which a *qui tam* suit is based must have been made known to the public through some affirmative act of disclosure"]; *U.S. ex rel. I.B.E.W. v. G.E. Chen Const., Inc.* (N.D.Cal.1997) 954 F.Supp. 195, 198 ["public disclosure require[s] actual rather than merely theoretical disclosure"].)

California adheres to the "plain meaning" rule. We concur that "public" disclosure requires an *affirmative act* of disclosure.

Defendants also contend that the relevant information was publicly disclosed because Barr divulged Old Republic's secrets to a competent official authorized to act for the public. Defendants cite *U.S. v. Bank of Farmington, supra*, 166 F.3d 853, but fail to emphasize the key point. There, the court held: "Disclosure of information to a competent public official about an alleged false claim against the government we hold to be public disclosure ... [cita-

21. The FCA defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based, who voluntarily provided the information to the state or political subdivision before filing an action based on that information, and whose information provided the basis or catalyst for the investigation, hearing, audit, or report that led to the public disclosure as described in subparagraph (A)." (Gov.Code, § 12652, subd. (d)(3)(B).)

tion] *when the disclosure is made to one who has managerial responsibility for the very claims being made.* ... [¶] ... [¶] Disclosure to officials with less direct responsibility might still be public disclosure if the disclosure is public in the commonsense meaning of the term as 'open' or 'manifest' to all." (*U.S. v. Bank of Farmington, supra,* 166 F.3d at p. 861, italics added.) The SFDA is not the public entity that has any direct managerial responsibility over the escheat provisions at issue here. Rather, the State Controller is responsible for administering and enforcing the UPL. (See Code Civ. Proc., §§ 1540–1542, 1560–1567, 1571–1572, 1580.) That the SFDA and city attorney are empowered to seek penalties for unlawful acts under Business and Professions Code section 17200 et seq. does not give them "direct responsibility" for the claims at hand.

Defendants further complain that availing public prosecutors of the financial inducements afforded to qui tam plaintiffs generally creates a "dangerous conflict." As they see it, a public prosecutor could use his or her criminal investigatory powers to obtain information and then "parasitically" file a claim based on that information. Further, rewarding a district attorney with bounty for exposing false claims takes away incentives for whistleblowers to come forward, and could implicate the due process rights of persons allegedly perpetrating fraud.

We fail to perceive the conflicts or other evils that defendants see. First, public prosecutors routinely cut deals with defendants for information implicating a wider web of wrongdoers. Here, in the course of the criminal investigation of Donald Barr, former Old Republic insider, the SFDA obtained information concerning significant illegal practices engaged in by the company. Barr pleaded guilty to two counts of tax fraud and thereafter the City filed suit against Old Republic under the FCA. What is the evil in permitting the City to reap the "bounty" as opposed to Barr, a convicted felon? In any event, Barr was not dissuaded from blowing the whistle. He filed his own qui tam complaint, three months after the City filed its complaint. Being the source of the information, nothing prevented him from filing it earlier, and beating the City to the courthouse.

Second, there is no conflict as was the case in *Tumey v. Ohio* (1927) 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, cited by PwC. There, a village court was set up to try persons accused of violating the Prohibition Act. Fines received from conviction were divided between the state and village and thus the court made money for the village. The mayor tried the cases, set the fines (within a minimum-maximum range) and received a fee, but only upon a conviction. The high court did not hesitate to rule that the defendant's due process rights had been violated. Not only was the mayor personally and financially interested in the outcome of the case, but, as executive head of the village, he had an interest in and responsibility for its financial condition. (*Id.* at pp. 520, 523, 47 S.Ct. 437.) There are no such conflicts here.

B. *The Trial Court Correctly Determined the Measure of Damages Against Old Republic*

1. *Trial Court Events*

Once the FCA standing issues were resolved in the trial court, Old Republic conceded liability based on Donald Barr's submission of false holder reports to the State Controller which concealed the company's failure to deliver unclaimed funds to the state. Under the FCA, a defendant who knowingly makes or uses a false record "to conceal, avoid or decrease an obligation to

Republic's contention, this is not a penalty; rather, it is *in addition to* any penalties, damages or fines for which a person may be liable. (*Id.*, § 1577.) The 12 percent rate is the earnings the Legislature has determined the state should earn on late-escheated property, calculated on the amount of such property as of the date the holder should have reported or transmitted the same to the State Controller. In other words, this is the rate the Legislature has deemed adequate to compensate the state for loss of use of unclaimed property that holders fail to escheat under the UPL. (See *Bank of America v. Cory, supra,* 164 Cal.App.3d at p. 81, 210 Cal.Rptr. 351["[t]he Controller and owners of the funds escheatable ... can only be adequately compensated for their loss of use by the award of [section 1577] prejudgment interest"].) Since the Legislature has declared a statutory rate of interest as compensation for loss of use, the decision is removed from the hands of the litigants and the courts. Accordingly, the trial court correctly ruled that damages under the FCA for loss of use is the Code of Civil Procedure section 1577 interest, trebled, minus a set off for interest already paid.

C. *The Trial Court Improvidently Granted Summary Judgment in PwC's Favor on the FCA Cause of Action*

1. *The Trial Court Ruling*

For purposes of this appeal, we assume that PwC submitted false reports to the government when it issued unqualified audit reports on Old Republic's financial statements for annual submission to the DOI. Although disturbed about the gravity of the alleged false submissions, the trial court concluded that full disclosure of Old Republic's escheat violations *to the DOI* would not have had a tendency to influence *the SCO*, the public entity in charge of enforcing California's escheat laws. Instead, the court found that any omissions from the audit reports were not material because the DOI would not have forwarded the information to the SCO for enforcement. The City is convinced this decision is wrong; so are we.

2. *The Materiality Standard for FCA Action*

Under the FCA, a person who knowingly submits a false report to the state or a political subdivision in order to conceal, avoid or decrease an obligation to that entity is liable for treble the damages that the entity sustained "because of the act." (Gov.Code, § 12651, subd. (a)(7).) Thus, the false claim must be material in order to qualify for FCA action.

[10] "Materiality, a mixed question of law and fact, depends on ' "whether the false statement has a natural tendency to influence agency action or is capable of influencing agency action." ' " (*City of Pomona v. Superior Court, supra,* 89 Cal.App.4th at p. 802, 107 Cal.Rptr.2d 710, quoting *U.S. ex rel. Berge v. Trustees of Univ. of Ala.* (4th Cir.1997) 104 F.3d 1453, 1459.) [24] Reviewing precedent concerning the concept of materiality embodied in a variety of federal statutes, the high court in *Kungys v. United States* (1988) 485 U.S. 759, 771, 108 S.Ct. 1537, 99 L.Ed.2d 839 explained: "It has never been the test of materiality that the misrepresentation or concealment would *more likely than not* have produced an erroneous decision, or even that it would *more likely than not* have triggered an investigation.... [T]he

24. Because California's FCA is very similar to the federal act, it is appropriate to consider federal precedents in interpreting our act. (*City of Pomona v. Superior Court, supra,* 89 Cal.App.4th at pp. 801–802, 107 Cal.Rptr.2d 710.)

central object of the inquiry [is] whether the misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision."

Under this objective standard, the focus is on the "intrinsic capability" of the false claim or report to influence or affect the governmental entity. Assessing "intrinsic capability," the court's job is to "consider whether a statement could, under some set of foreseeable circumstances, significantly affect an action by a [governmental] department or agency." (*U.S. v. Facchini* (9th Cir.1989) 874 F.2d 638, 643 [construing 18 U.S.C. § 1001].)

3. *Factual Showing*

a. *DOI Operations and Practice*

In part I.B.1, *ante*, we outlined evidence showing the magnitude of Old Republic's escheat fraud, PwC's knowledge that Old Republic was violating the escheat laws and inflating its earnings, and the auditor's issuance of clean audit opinion letters for submission to the DOI despite this knowledge. Marshalling facts to defeat the issue of materiality, PwC proffered evidence that in the past DOI analysts and field examiners *did not* communicate with the SCO, and had not done so in years;[25] there was no documentary evidence that the DOI had cooperated with the State Controller in an investigation or referred a UPL matter to the State Controller; nor was there documentary evidence that the DOI itself had initiated disciplinary action based on the UPL or taken an enforcement interest in the UPL.

Additionally, David Lee, a supervisor in the DOI's Financial Analysis Division (FAD), testified that independent audit reports are reviewed for the purpose of assuring the company's financial solvency. If an analyst spotted a financial problem, he or she would bring it to Lee's attention. Although no escheat violation had ever been brought to his attention, if a FAD analyst "caught" one of a magnitude that would affect the financial viability of a company, the FAD analyst would notify him and his department would follow up. For example, FAD would probably write a letter to the company to ascertain what it intended to do about the problem. Lee also explained that he would receive a copy of the final report prepared by the FED after conducting a field examination. If the report confirmed a potential problem, FAD and FED would "probably jointly work ... to find out what the company is gonna do about the problem that they have."

Lee stated that he never conducted or requested an examination of an underwritten title company such as ORTC on the basis of failure to comply with the UPL. The discovery process in this litigation uncovered several independent auditor statements submitted since 1990 that noted the respective companies were not fulfilling their obligations under the UCL. However, these matters had not been brought to Lee's attention and he was not aware of any action taken by FAD with respect to the auditors' notes.

The FED has a set of field examination protocols which, among other things, direct the examiners to pay attention to a company's handling of escheatable funds, and call for reviewing and determining procedures for escheatable funds and stale dated checks, as well as reviewing escheat

25. Charles DePalma, supervising insurance examiner with the Field Examination Division (FED), testified that the FED used to have a working relationship with the SCO, and he personally met with representatives from the SCO about an insurer, but that was maybe 20 to 25 years ago.

listings and regulatory filings. FED supervisor DePalma explained that when the field audit procedures reveal a company is not in compliance with escheat laws, the examiner will disclose this fact in the examination report. The examiner might also suggest to the company that it change its procedures. However, examiners do not have the authority to order a company to change procedures, or to impose a penalty or institute an enforcement action if it does not. DePalma speculated that "[m]aybe we should have a procedural report directly to the State Controller, but we don't."[26] FED does not routinely contact SCO, but "[w]e would hope that our legal department did when they followed up on the report." If the report shows "a lot of compliance issues," DePalma would direct that "Legal" get a copy of it.

Bottalico testified that a qualified audit opinion letter would "certainly" be a "trigger point[ ]" that could prompt a request for a field audit. Further, detection of fraud in the course of a field examination would be a major finding that would prompt an investigation into whether management was involved, and at what level.

Bottalico supervised a 1993 periodic field examination of a title insurance company (not an underwritten title company),[27] in which the report indicated that a review of the insurer's procedures relating to uncashed checks showed that numerous checks were outstanding for a considerable time. It further noted the company in question had written procedures to appropriately identify such checks to ensure compliance with escheat laws. Bottalico stated that beyond a comment in a report, further procedures or recommendations might be warranted if, for example, the company were taking uncashed checks back into income. If the outcome were material, FED would set up a liability on the company's financial statements for those uncashed checks.

b. *Action in the Old Republic Matter*

In the fall of 1998, after the City's complaint in this case was unsealed, the SCO undertook a UPL audit of ORTC. In 1999, the DOI commenced action relating to UPL compliance in connection with ORTC. Darrel Woo, custodian of records for the DOI, stated that the DOI action "was taken as part of a larger investigation and at the behest of another agency."

Not only did the DOI investigate, it also took enforcement action against Old Republic. The special examiner for DOI issued a report in February 1999 which related, among other matters, that the SCO estimated the company's total escheat obligations, with interest and penalties, could reach $19 to $20 million. The report, which treated the panoply of ORTC's suspect practices, also noted that the company recently paid $10 million to the SCO. Responding to the report, the Commissioner issued a notice of hearing regarding a cease and desist order, again addressing the panoply of Old Republic's practices, including willful failure to escheat "several millions of dollars" to the state. The notice stated that the Commissioner "has reasonable cause to believe that [ORTC] is in a hazardous condition and is conducting

26. Alfred Bottalico, a bureau chief with FED, stated he believed there was a time—probably in the late 1980's and early 1990's—when field examination reports were referred to the SCO as a follow-up measure when the report recommended that the company subject to examination establish an UPL procedure. He probably learned about this practice at an FED management meeting or discussions with management.

27. FED typically examines title insurance companies every three years. Underwritten title companies are examined when a specific issue arises that needs to be addressed.

ts business and affairs in a manner which s hazardous to its policyholders, creditors and the public."[28] The notice identified three areas of illegal conduct, including "willful failure to escheat several millions of dollars to the State of California in violation of California Code of Civil Procedure Section 1511." The notice warned that if the Commissioner found against Old Republic, the Commissioner would order that the company "immediately cease and desist from engaging in any acts, practices or transactions" which endangered policyholders, creditors or the public.

c. *Impact of Escheat Violations on Old Republic's Solvency*

Opposing PwC's summary judgment motion, the government submitted, among other things, an evidentiary stipulation entered in the City's action against Old Republic. Pursuant thereto, the parties agreed for purposes of trial that it was undisputed ORTC had tendered $9,551,527.89 in dormant funds and $7,710,118.18 in statutory interest in satisfaction of the SCO's unclaimed property audit of the company, with a credit. The company was credited with $513,637.13 in previously escheated amounts and $966,524.10 in interest on those payments, and for a $10 million payment in December 1998. Broken down, the figures show that by December 1989, Old Republic owed the state nearly $7 million in dormant escrow funds and millions more dollars in interest. Through 1997, with continuing violation of the escheat laws, the debt mushroomed to almost $17 million, including interest. As noted above, by 1999 the SCO had estimated that total escheat liability could reach $19 to $20 million. In terms of PwC's work for ORTC, for the fiscal year 1993 audit, PwC's strategy work papers indicated that income statement materiality was estimated at $750,000 and balance sheet materiality at $4.2 million. With respect to the income figure, the PwC partner on the ORTC audit engagement testified that if the aggregation of all adjustments was "close or greater than $750,000, then we would ... consider whether that had a material impact on the financial statements."

28. PwC has objected to the notice as well as the examination report because the government submitted this evidence the day before the summary judgment hearing. It further claims that the "facts" set forth in these documents *do not exist* for purposes of appeal because they were not noted in the separate statement, citing *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337, 282 Cal.Rptr. 368. This absolute prohibition against considering evidence not referenced in the separate statement has been soundly rejected because it ignores the *discretion* of the trial court to deny a motion for summary judgment for failure to comply with Code of Civil Procedure section 437(c), subdivision (b). (*San Diego Watercrafts, Inc. v. Wells Fargo Bank* (2002) 102 Cal.App.4th 308, 315, 125 Cal.Rptr.2d 499.) Moreover, what *United Community Church* also explains, and PwC fails to acknowledge, is that the purpose of the separate statement requirement is to inform the court *and the opposing party* of all the facts upon which the moving party bases its motion. This is a due process protection *for the opposing party*. Further, it is clear from the record that PwC did *not* object to the late submission of these documents at the hearing, and that the court considered *all* the papers submitted. (Code Civ. Proc., § 437c, subd. (c) [referring to all papers submitted and calling on court to "consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court"].) We defer to the trial court's implied exercise of its discretion to review late submitted papers. (See *Hobson v. Raychem Corp.* (1999) 73 Cal.App.4th 614, 625, 86 Cal.Rptr.2d 497, disapproved on another point in *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1031 & fn. 6, 130 Cal.Rptr.2d 662, 63 P.3d 220.) Finally, the documents do not raise theories or any new category of facts that were not already before the court as part of the government's response to PwC's separate statement.

PwC is adamant that the stipulation referenced above is not competent evidence, arguing that a stipulation is not binding against someone not a party to the stipulation. The question is not one of the binding power of the stipulation. Certainly PwC could offer opposing evidence. Rather, the question is whether the court could consider the evidentiary stipulation on the question of the amount of Old Republic's escheat indebtedness to the state. Certainly the lower court, as well as this court, could take judicial notice of the evidentiary stipulation as a record of a court of this state relevant to the current dispute. (Evid.Code, § 452, subd. (d)(1).) PwC did not object on this basis. Moreover, its assertion that the *evidentiary* stipulation is not evidence is absurd. Evidence includes "writings ... presented to the senses that are offered to prove the existence or nonexistence of a fact." (*Id.*, § 140.) Here, the City offered the stipulation to prove the extent of Old Republic's escheat liability. The evidence is what it is—an agreement in related litigation between a party to the instant litigation and the client of the other party to this litigation that the amounts disclosed were undisputed for that particular lawsuit.

4. *Analysis*

In this reverse false claim scenario, our job is to determine whether auditor statements which disclosed management's inflation of earnings by millions of dollars based on systematic violation of the UPL would have had a natural tendency to influence—or the intrinsic capability to significantly affect—agency action. Without question the SCO is the primary enforcer of our escheat laws, and without question such disclosures would not, in the natural course of DOI business, be relayed to that office. Also without question, in the past no insurer or underwritten title company had ever been denied a license or subjected to disciplinary or investigative action or examination for failure to comply with the UPL. However, notwithstanding PwC's arguments to the contrary, although DOI is not the primary UPL enforcer, it *does* have statutory authority and practices and procedures for enforcing laws, including the escheat laws, that impact insurance companies. Moreover, with the wheels of its internal procedures and practices humming properly, disclosure of Old Republic's escheat violations would have a natural tendency to influence DOI action.

Underwritten title companies are required to furnish an annual audit prepared in accordance with generally accepted auditing standards by an independent certified public accountant or independent licensed public accountant. (Ins.Code, § 12389, subd. (a)(4)(B).) The purpose of this and other provisions governing the conduct of underwritten title companies ... is "to maintain the solvency of [underwritten title] companies and to protect the public by preventing fraud and requiring fair dealing." (*Id.*, § 12389, subd. (d).) In carrying out these purposes, the DOI can enact reasonable rules and regulations to govern the conduct of these companies. (*Ibid.*) Further, whenever it appears necessary, the Commissioner shall "examine the business and affairs of [underwritten title companies]." (*Id.*, § 12389, subd. (c).) The Commissioner also has stop order and corrective and remedial powers which the Commissioner can exercise upon a reasonable cause to believe and a determination after public hearing, that a company subject to examination is "in a hazardous condition, or is conducting its business and affairs in a manner which is hazardous to its policyholders, creditors or the public...." (*Id.*, § 1065.1.) If a company violates or fails to comply with a stop order, the commissioner can exact monetary penalties and commence proceedings to re-

voke or suspend its license. (*Id.*, § 1065.5, subds. (a), (b).)

The DOI's FAD reviews the audit reports of underwritten title companies to evaluate their financial solvency. If an audit report revealed escheat violations that affected a company's financial viability, FAD would follow up. A qualified audit opinion letter would also be a trigger point that might prompt referral to the FED for a field audit. Field audit procedures include protocols for reviewing a company's escheat practices. In the past, examination reports have identified UPL compliance issues. Follow-up recommendations might include setting up a liability on the company's books if the company were realizing material income from stale checks. If the examination report raised significant compliance issues, the legal Department would receive a copy of the report and if fraud were uncovered, further investigation would ensue.

Here, the People introduced evidence on the magnitude of Old Republic's escheat liability and the corresponding inflation of the company's earnings, and PwC's knowledge of the same. By PwC's own audit guideposts, the debt exceeded the cutoff for income statement materiality in 1993, many times over. Moreover, when the true facts were made known, the DOI *did* take investigative and enforcement action against Old Republic, in part because of its sizable escheat obligation to the state. True, it was not the catalyst, but the DOI did act. PwC urges that we ignore DOI's enforcement action, arguing that consideration of it would be "bootstrapping." This is not bootstrapping. PwC has trumpeted the SCO's escheat enforcement powers. This evidence shows that DOI also has such powers, although it is not the primary enforcer. The evidence also contributes to a reasonable inference that earlier discovery of the true facts concerning the magnitude of the escheat violations would have a natural tendency to influence, or would be capable of influencing, DOI action.

[11] The trial court and PwC focused almost exclusively on the actual historical practices, procedures and outcomes within the DOI and the actions of individual government analysts and examiners. But the purpose of the FCA is "to supplement governmental efforts to identify and prosecute fraudulent claims made against state and local governmental entities." (*Rothschild v. Tyco Internat. (US), Inc.* (2000) 83 Cal.App.4th 488, 494, 99 Cal.Rptr.2d 721.) Thus, our focus is primarily on the intrinsic qualities of the statements themselves and the extant structures and authority that would support ferreting out the financial wrongdoing and taking action to stop it. With this lens we conclude that the totality of evidence submitted in opposition to the summary judgment motion, from the audit requirement and purpose, to DOI's statutory and regulatory powers, to its internal procedures, to the magnitude of the escheat violation and DOI's ultimate action, defeated summary judgment in PwC's favor. PwC did not overcome the materiality element of the FCA cause of action and therefore was not entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).)

III. UCL LITIGATION

A. *Old Republic's Issues on Appeal*

1. *Trial Court Correctly Ruled that Arbitrage Benefits Are Interest*

[12] The UCL authorizes civil penalties for acts of unfair competition, defined as "any unlawful, unfair or fraudulent business act or practice...." (Bus. & Prof. Code, §§ 17200, 17206.) The trial court determined that ORTC committed "unlawful" acts within the meaning of the UCL because the company earned and unlawful-

12413.5. To reiterate, that statute provides that any interest received on escrow deposits shall be paid to the depositing party "unless the escrow is otherwise instructed by the depositing party, and shall not be transferred to the account of the title insurance company, controlled escrow company, or underwritten title company." (Ins.Code, § 12413.5.) Class plaintiffs highlight the "shall not be transferred" phrase, but ignore the language allowing an alternative disposition upon instruction of the parties. That is what the revised escrow instructions accomplished.

Next, they disparage the basis of the court's order, namely that the cost of calculating and reporting each individual escrow depositor's share of arbitrage benefits on a pooled demand deposit account would be a logistical nightmare and cost-prohibitive. Although class plaintiffs submitted evidence that existing technology permitted tracking of the investability of funds deposited in a common general escrow account, the trial court also weighed Old Republic's argument that this procedure was untested, no one else was using it and Old Republic did not know if it was "doable." Plaintiffs are merely disagreeing with the court's assessment of the evidence. (See *Brockey v. Moore, supra*, 107 Cal.App.4th at p. 103, 131 Cal.Rptr.2d 746.) But more fundamentally, the court correctly saw its role as fashioning injunctive relief to ensure that defendants were complying with existing law. Beyond that, even if plaintiffs' approach were feasible, the court had no authority to prohibit Old Republic from carrying out a proposed plan that was lawful.

C. *The People's Issues Against PwC*

1. *Introduction*

In the fourth amended complaint, the People alleged that PwC was legally required to, but did not, comply with generally accepted auditing standards (GAAS) in preparing the audit reports for ORTC. The trial court was not convinced that the alleged violations of auditing standards were actionable under the UCL, and therefore aborted the People's UCL claim against PwC on demurrer. Further, the court ruled that the People lacked a remedy because Old Republic had already escheated the unclaimed escrow funds to the State. The People object to these rulings.

[30–32] The UCL broadly embraces anything properly identified as a business practice that simultaneously is forbidden by law. (*Cel–Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 180, 83 Cal.Rptr.2d 548, 973 P.2d 527 (*Cel–Tech*).) With its proscription of "any unlawful" business act or practice, the UCL transforms violations of other laws into independently actionable unlawful practices under its statutory umbrella. (*Ibid.*) It matters not whether the law violated is criminal, civil, federal, state, municipal, regulatory, statutory or court-made. (*South Bay Chevrolet v. General Motors Acceptance Corp.* (1999) 72 Cal. App.4th 861, 880, 85 Cal.Rptr.2d 301.) And even if a practice is not specifically forbidden by another law, it may be deemed unfair or fraudulent under the UCL. (*Cel–Tech, supra*, 20 Cal.4th at p. 180, 83 Cal.Rptr.2d 548, 973 P.2d 527.) To recover under this act, individualized proof of deception, injury or reliance is not necessary, nor is it necessary to prove that the defendant intended to injure anyone. (*Prata v. Superior Court, supra*, 91 Cal. App.4th at p. 1137, 111 Cal.Rptr.2d 296.)

2. *Analysis*

[33] The People's best argument is that PwC's alleged failure to comply with GAAS violated Business and Professions Code section 5062, which provides that accountants "shall issue a report which

conforms to professional standards upon completion of a compilation, review or audit of financial statements." The California Board of Accountancy has issued regulations requiring accountants to "comply with all applicable professional standards, *including but not limited to* generally accepted accounting principles and *generally accepted auditing standards.*" (Cal.Code Regs., tit. 16, § 58, italics added.) The complaint alleged numerous violations of GAAS in preparing and submitting "clean" audit reports for ORTC, based on PwC's alleged knowledge that (1) the company's inflated earnings from unescheated funds was material under GAAS; (2) the company's escheat practices were possible "illegal acts" by the client as defined by GAAS; (3) the company had never escheated money to the state as it was required to do; and (4) throughout the course of the engagement the company's total escheat obligation including penalties was growing. The complaint further alleged that the violations permeated the engagement in that year after year PwC issued unqualified opinion letters for ORTC. These allegations were sufficient to state a cause of action under the UCL.

Nonetheless, PwC is adamant that limitations on accountants' liability articulated by our Supreme Court in *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 11 Cal.Rptr.2d 51, 834 P.2d 745 (*Bily*) are dispositive in this case and protect the company from suit under the UCL. We disagree.

The *Bily* court held that "an auditor's liability for general negligence in the conduct of an audit of its client financial statements is confined to the client, i.e., the person who contracts for or engages the audit services. Other persons may not recover on a pure negligence theory." (*Bily, supra,* 3 Cal.4th at p. 406, 11 Cal.Rptr.2d 51, 834 P.2d 745, fn. omitted.) Despite the reality that economic injury to investors and others who might read and rely on audit reports is foreseeable (*id.* at pp. 398–401, 11 Cal.Rptr.2d 51, 834 P.2d 745), the court deemed it necessary to curtail the pool of potential plaintiffs in order to avert "the spectre of multibillion-dollar professional liability that is distinctly out of proportion to" (1) the auditor's fault; and (2) the strength of the correlation between the defective report and a third party's injury (*id.* at p. 402, 11 Cal.Rptr.2d 51, 834 P.2d 745). Additionally, the court was convinced that "the generally more sophisticated class of plaintiffs in auditor liability cases ... permits the effective use of contract rather than tort liability to control and adjust the relevant risks through 'private ordering.' " (*Id.* at p. 398, 11 Cal.Rptr.2d 51, 834 P.2d 745.) Furthermore, the court was not persuaded that a pure foreseeability approach would result in more accurate auditing and more efficient spreading of loss. (*Ibid.*) However, the court held that persons who are "specifically intended beneficiaries of the audit report who are known to the auditor and for whose benefit it renders the audit report," could recover on a theory of negligent misrepresentation. (*Id.* at p. 407, 11 Cal.Rptr.2d 51, 834 P.2d 745.) Finally, auditors enjoy no protection against third party suits for intentional misrepresentation. (*Id.* at p. 415, 11 Cal.Rptr.2d 51, 834 P.2d 745.)

Bily does not pertain. First, this is not a professional negligence action for damages; it is an action under the UCL for civil penalties, restitution and injunctive relief[39] based on violations of GAAS. Con-

39. We agree with PwC that the People's UCL recovery is limited to civil penalties in the amount of $2,500 per violation. (Bus. & Prof.Code, § 17206, subd. (a).) The People did not assert ongoing misconduct, and thus injunctive relief is not available. Nor did the

rary to PwC's assertions, allowing this awsuit to proceed would *not* be "in flat contradiction of the *Bily* Court's refusal to endors[e] a broad and amorphous rule of potentially unlimited liability' for accountants." (Citing *Bily, supra*, 3 Cal.4th at p. 406, 11 Cal.Rptr.2d 51, 834 P.2d 745.) Without the financial incentive of damages (including punitive damages) and attorney fees, and again contrary to PwC's assertions, it is unlikely that "*anyone*" would "sue *any* accountant for alleged failure to comply with GAAS in *any* audit." Injunctive relief and restitution are the only remedies available to individuals. (Bus. & Prof.Code, §§ 17203, 17206.) If an auditor engages in *ongoing* misconduct, injunctive relief would be appropriate; *Bily* would be no bar. (Bus. & Prof.Code, § 17203.) Likewise if the conduct results in acquisition by the auditor of "money or property, real or personal," by means of unfair competition, then restoration of the same to the person harmed is appropriate and again *Bily* would be no bar. (Bus. & Prof.Code, § 17203.)

PwC argues nonetheless that just as private plaintiffs cannot "plead around" the bar to the judicially implied private action against insurers who commit certain statutory unfair practices, as announced in *Moradi–Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 292, 250 Cal.Rptr. 116, 758 P.2d 58, so too the People cannot "plead around" *Bily* by casting their claim as a UCL cause of action based on violations of GAAS. (See *Safeco Ins. Co. v. Superior Court* (1990) 216 Cal.App.3d 1491, 1493–1494, 265 Cal.Rptr. 585 [holding that to permit plaintiff to prosecute UCL action would render *Moradi–Shalal v. Fireman's Fund Ins. Companies, supra*, 46 Cal.3d 287, 250 Cal.Rptr. 116, 758 P.2d 58 meaningless].) There is no analogy here. *No* private party can sue for damages for the commission of unfair claims settlement practices set forth in Insurance Code section 790.03, subdivision (h). (*Moradi–Shalal v. Fireman's Fund Ins. Companies, supra*, 46 Cal.3d at pp. 292, 304, 250 Cal.Rptr. 116, 758 P.2d 58.) On the other hand, *Bily* does not obliterate any private right of action, but instead creates rules restricting who has standing to sue auditors for professional negligence. At most *Safeco* stands for the proposition that "the UCL cannot be used to state a cause of action the gist of which is absolutely barred under some other principle of law." (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 566, 71 Cal.Rptr.2d 731, 950 P.2d 1086.) There is no similar bar to the instant action.

Citing *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1299, 22 Cal.Rptr.2d 20, PwC also complains that enlisting the UCL to police compliance with GAAS is tantamount to invading the powers entrusted by the Legislature to the Board of Accountancy, the entity with general power to regulate and discipline accountants in California. (Bus. & Prof.Code, § 5000 et seq.) *Samura* does not help PwC. First, our Supreme Court has held that despite the existence of a distinct statutory enforcement scheme, parallel action for unfair competition is appropriate under the UCL. (*People v. McKale* (1979) 25 Cal.3d 626, 632–633, 159 Cal.Rptr. 811, 602 P.2d 731.) Second, the reviewing court in *Samura* held that the operative statutory provisions upon which the trial court relied in authorizing a

People allege that PwC benefited from ORTC's failure to escheat, and thus restitution is not available. (See *id.*, § 17203 [allowing for orders "as may be necessary to restore to any person in interest any money or property . . . which may have been acquired by means of such unfair competition"].)

UCL action *did not* define an unlawful act that could be enjoined as unfair competition. Rather, they served to govern the pertinent regulatory agency in the exercise of its regulatory powers. Thus, the lower court erroneously "assumed [a] regulatory power" that belonged exclusively[40] to a state agency. (*Samura v. Kaiser Foundation Health Plan, Inc., supra,* 17 Cal.App.4th at pp. 1301–1302, 22 Cal.Rptr.2d 20.)

Here, the statutory and regulatory provisions requiring accountants to comply with professional standards are not laws which serve to govern the Board of Accountancy in its regulatory powers. They are general mandates setting the baseline standards for the conduct of the profession. Further, as suggested in *People v. McKale, supra,* 25 Cal.3d 626, 159 Cal.Rptr. 811, 602 P.2d 731, the Board of Accountancy does not have exclusive authority to enforce provisions of the Business and Professions Code governing accountants: "The Accountancy Act (Bus. & Prof.Code, §§ 5000–5157) establishes the Board of Accountancy with authority to seek injunctive relief against violators of the act. (Bus. & Prof.Code, § 5122.) ... [T]he district attorney is not expressly authorized to enforce the statute. While the issue has not been directly faced, it appears a concerned district attorney may prosecute an action for unfair competition predicated on violations of the Accountancy Act notwithstanding provisions for a special enforcement agency." (*People v. McKale, supra,* 25 Cal.3d at p. 633, 159 Cal.Rptr. 811, 602 P.2d 731.)

Finally, even if *Bily* applied, here the People alleged that the DOI was the intended recipient of the auditor opinion letters. As a matter of law, when a company retains an outside auditor to satisfy its statutory requirement to file an audit report with the Commissioner under the Insurance Code, the Commissioner is within the universe of potential plaintiffs defined by *Bily.* (See *Arthur Andersen v. Superior Court* (1998) 67 Cal.App.4th 1481, 1501, 1507, 79 Cal.Rptr.2d 879 [concerning Ins. Code, § 900.2, which requires insurers to file an annual audit report with the Commissioner].)

The Commissioner, duly elected by the People, also has regulatory and enforcement powers vis-à-vis underwritten title companies such as ORTC. (Ins.Code, §§ 12389 et seq., 12900, subd. (a).) PwC argues that " 'The People is not the Department of Insurance.' " This purported difference is meaningless. This UCL action was brought by public prosecutors authorized pursuant to Business and Professions Code section 17204 to sue "in the name of the People of the State of California." A suit in the name of the People represents the "sovereignty" of the state. (Gov.Code, § 100, subd.(a).) The Commissioner receives audit reports from underwritten title companies such as ORTC in the course of its enforcement and regulatory duties, which he or she performs for the benefit of the public, i.e., the People. Thus, for all practical purposes the People's suit is indistinguishable from a suit by the Commissioner, an intended recipient of the allegedly offending reports.

IV. DISPOSITION

We affirm the trial court's rulings that the City is a person within the meaning of the FCA and the government's claims did not come within the public disclosure bar

40. At issue in *Samura* were provisions of the Knox–Keene Act. The court noted that the power to enforce that act "has been entrusted exclusively to the Department of Corporations, *preempting even the common law powers of the Attorney General.*" (*Samura, supra,* 17 Cal.App.4th at p. 1299, 22 Cal.Rptr.2d 20, italics added.)

of that act. (Nos.A095918, A097793.) We also affirm the comprehensive judgment against Old Republic in its entirety. (No. A097793.) Parties to bear their own costs on that appeal. We reverse the summary judgment in favor of PwC on the government's FCA cause of action, as well as the dismissal of the People's UCL claim following the sustaining of PwC's demurer without leave to amend. (No. A095918.) PwC to pay costs of appeal.

KAY, P.J., and SEPULVEDA, J., concur.