

The False Claims Act

Our Government's War Against Fraud

INTRODUCTION

No current whistleblower law currently matches the power and efficacy of the False Claims Act (FCA) when it comes to combating government fraud. What makes the FCA such a potent weapon for whistleblowers? Without a doubt, the strength of the FCA lies in the statute's *qui tam* and damages provisions.

The FCA allows private individuals to file lawsuits on behalf of the government when those individuals have knowledge of a person or company defrauding the government. Whistleblowers, also known as relators, are able to file under the *qui tam* provision of the FCA. Not only does the *qui tam* provision provide an avenue for individuals to file suit on behalf of the government, it also provides monetary incentives and protection for these whistleblowers, which include 15% to 30% of the damages recovered by the government and protection against retaliation from their employer.

The FCA is one of the government's greatest weapons in its war against fraud. The FCA not only aids the government in detecting fraud, through the act's *qui tam* provision, but the FCA also punishes and deters fraud. The FCA punishes those who defraud the government by imposing treble damages and large civil penalties. These damages and penalties, consequently, serve to deter other companies from committing

the same fraud. During the fiscal year ending September 30, 2016, the United States recovered more than \$4.7 billion through the FCA, which marks the third highest annual recovery in FCA history. Since 2009, whistleblowers have helped the United States recover a total of \$31.3 billion, averaging almost \$4 billion a year, under the FCA.¹ In fiscal year 2016 ("FY2016"), the government awarded whistleblowers \$519 million for their participation in uncovering fraud.²

HISTORY OF THE FCA

Congress enacted the FCA in 1863—during the midst of the American Civil War—to punish fraudsters profiteering off the federal government.³ Northern contractors were supplying the Union Army with useless supplies, including: shoddy uniforms that would "melt" after a rain; spoiled rations; and old or ill mules and horses.⁴ Congress acted by passing the original FCA, also known as "the Lincoln Law," to reward whistleblowers who sued on behalf of the government in order to recover the damages caused by false claims and statements for payment from deceitful contractors. When originally enacted, defendants defrauding the Government were liable for double the Government's damages, plus a \$2,000 penalty for each claim, and the relator (whistleblower) would earn a 50% share of the total recovery.⁵

Congress slaughtered the FCA in the 1940's despite its need during the Second World War and Korean War. However, in 1986 Congress "resurrected" the FCA by subjecting defendants to treble damages and raising civil penalties to a range of \$5,000 to \$10,000 after the exposure of defense contractor defrauding the government during the Cold War.⁶ As seen below, the civil penalty provision continues to adjust for inflation. Since the 1986 amendments, the FCA has become the federal government's primary tool in combatting waste, fraud, and abuse in government spending.⁷

FCA PENALTY INCREASE

Earlier this year, the Department of Justice ("DOJ") announced the penalties under the FCA would once again increase.⁸ These increases are pursuant to The Bipartisan Budget Act of 2015. The Act requires annual re-indexing of FCA penalties for inflation. On February 3, 2017, the minimum per-claim penalty increased from \$10,781 to \$10,957, and the maximum per claim penalty increased from \$21,563 to \$21,916.⁹ These adjusted civil penalty amounts are applicable only to civil penalties assessed after February 3, 2017, whose associated violations occurred after November 2, 2015.¹⁰

Increasing the FCA's civil penalties strengthens the government's negotiating

position in FCA cases. This strengthened position helps the government secure additional settlements and larger civil penalties. The penalty increase does more than keep up with inflation; it also serves as a vital tool, returning additional taxpayer money to the Treasury so the government can spend it as intended.

COMMON THEORIES OF LIABILITY

Two of the largest areas in the growing field of FCA litigation are health care and mortgage fraud. Since January 2009, the government has recovered \$19.3 billion from health care fraud actions and more than \$7 billion from claims concerning housing and mortgage fraud.¹¹ Health care and mortgage fraud are not the only opportunities for FCA claims. Any situation involving fraud being committed against the federal government could contain potential FCA violations. Some of the most common areas of FCA litigation include Medicare/healthcare, Anti-Kickback Statute violations, for-profit schools, and government contracting.

Medicare/Healthcare

The simplest FCA claims arise when a medical provider bills for services that were not provided. This usually occurs when the provider performs one procedure, yet bills for other procedures that were not actually performed. Another potential FCA violation arises when the medical services were not medically necessary. Medical providers are routinely required to certify to the Government that services provided to a patient (e.g. tests, therapy, etc.) are medically necessary and that the patient met the requisite criteria for receiving the service. The certification to the government typically takes place when the provider submits a Certificate of Medical Necessity ("CMS") to the government.

Finally, potential FCA violations may occur when a medical provider misrepresents the qualifications of the person that provides medical services to patients. Often these FCA claims arise when a provider represents to the Government that someone eligible to receive Medicare reimbursement provided a service, when in reality someone not eligible to receive reimbursement provided the service. Examples of this behavior could be a Doctor instructing a nurse to provide a service but then insisting that the nurse bill Medicare using the Doctor's provider identification number (PIN).

Anti-Kickback Statute

Another situation that typically leads to FCA violations are Anti-Kickback Statute (AKS) violations. For example, this past October, Tenet Healthcare Corporation, and two of its subsidiaries, agreed to pay \$513 million to settle claims regarding FCA and AKS violations.¹² The alleged anti-kickback violations occurred when pre-natal care clinics referred pregnant woman to Tenet's hospitals.¹³ The pre-natal clinics were informing soon to be mothers that the childbirth would have to take place in a Tenet hospital if the mother wanted Medicaid to cover the cost accompanying childbirth.¹⁴

The AKS prohibits paying kickbacks to induce referrals for services paid by Federal health care programs. "The AKS arose out of Congressional concern that payoffs to those who can influence health care decisions corrupt professional health care decision-making. These actions could result in Federal funds being diverted to pay for goods and services that are medically unnecessary, of poor quality, or even harmful to a vulnerable patient population."¹⁵ These referrals to Tenet Hospitals were harmful to a vulnerable patient population, expectant mothers.

When the expectant mothers were informed that they had to deliver in a Tenet hospital, the expectant mothers no longer believed they were allowed to select the hospital of their choice. Consequently, the expectant mothers drove long distances to Tenet hospitals in order to deliver their child. These referrals not only placed the expectant mother's health and safety at risk, but it endangered the unborn child. The relator will receive \$84.43 million for his part in the case.¹⁶

For-Profit Schools

Another group becoming increasingly liable to the government under the FCA is for-profit schools. For example, this past year, the Eighth Circuit revived an FCA case for the second time.¹⁷ The complaint alleges that Heritage College, a for-profit health care training college, falsified their student records in order to receive federal money.¹⁸ The three-judge panel ruled the falsifications were material to the payment of financial aid by the government under *Escobar*.¹⁹

In *Universal Health Care Services v. U.S. ex rel. Escobar*, the Supreme Court found that false statements concerning records must be material to the payment of federal funds in order to establish FCA liability.²⁰ The government determines

materiality by the objective "reasonable person" standard.²¹ The question becomes whether a reasonable person would likely find the statement or records important in making a payment decision, or whether the defendant knew or should have known the statement or record would be important.²²

Concerning Heritage College, around 97% of their students receive federal aid, accounting for about \$32.8 million in disbursements.²³ In order to receive this financial aid, the college was required to sign a program participation agreement with the Department of Education ("DOE").²⁴ The agreement required Heritage to maintain procedures and records ensuring "proper and efficient" administration of the federal funds.²⁵ The complaint alleges that Heritage altered grade and attendance records of students to ensure the college remained eligible for federal funding, thereby fraudulently inducing the DOE to provide financial aid.²⁶ Heritage claims, and the district court agreed, that any false statements concerning the records are immaterial to the financial aid.²⁷

However, following *Escobar*, the Eighth Circuit found that Heritage was aware of the importance of the records and that a reasonable jury could find that Heritage was required to maintain accurate student records in order to receive the financial aid.²⁸ The panel further found that any false statements concerning the student records should be considered material to the government's payment decision.²⁹

Government Contracting

Another area prime for FCA litigation is government contracting. FCA violations occur when the government is defrauded through contractual violations—the government does not receive what it bargained for. For example, this past September the DOJ announced the government has intervened in a FCA case against Energy & Process Corporation ("E&P").³⁰ The complaint alleges that E&P knowingly supplied defective rebar for the construction of a Department of Energy nuclear waste treatment facility.³¹ This act of fraud not only steals from the American tax payers, but also, due to the nature of the project, places the entire public at a risk.

When construction suppliers are paid premiums from government contracts to meet higher safety standards, those construction suppliers must ensure their goods meet those standards. When the supplier represents their goods as being compliant with applicable safety standards, knowing the goods fail to meet those standards, that

is called fraud. Moreover, it is defrauding the government, which violates the FCA.

The lawsuit against E&P alleges the Department of Energy paid E&P a premium to supply rebar that met strict safety standards and that E&P failed to execute the test required to ensure their rebar met those standards—even though E&P certified the rebar as being compliant.³² The complaint further alleges, because of the fraud, one-third of the rebar supplied by E&P and used in the construction of the nuclear waste treatment facility was defective.³³ When contractors cut corners, they not only cheat American taxpayers, but they also can put public safety at risk.

FCA ELEMENTS

After addressing some of the common areas of FCA litigation, it is paramount to understand the elements of an FCA claim. Each type of FCA violations comprises of slightly different elements. The types of FCA violations include presentment violations,³⁴ make-or-use violations,³⁵ false certification violations, conspiracy violations,³⁶ and reverse false claims violations.³⁷

Presentment Violation

The most common FCA claim is a presentment violation. A presentment violation occurs when a person “knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval.”³⁸ The elements of a presentment claim under the FCA are the following: “(1) a false or fraudulent claim; (2) which was presented, or caused to be presented, by the defendant to the government for payment or approval; (3) with the knowledge that the claim was false.”³⁹ Numerous district courts within the Eleventh Circuit apply the forgoing elements; even though they were developed by courts before the Fraud Enforcement and Recovery Act of 2009 (“FERA”) was enacted.⁴⁰

Under the first element, a claim⁴¹ is considered false if the claim is “either factually or legally false.”⁴² A claim is factually false where the claimant “misrepresents what goods or services” it provided the Government.⁴³ A claim is legally false where the claimant falsely certifies compliance with a statute or regulation and government payment is conditional on such compliance.⁴⁴ False certification can be express or implied.⁴⁵ Implied false certification occurs where submitting “without disclosing that it violated regulations that affected its eligibility for payment.”⁴⁶

As to the third element, the term “knowingly” means the person “(1) has

actual knowledge of the truth or falsity of the information, (2) acts in deliberate ignorance of the truth or falsity of the information, or (3) acts in reckless disregard of the truth or falsity of the information.”⁴⁷ When satisfying the elements for a presentment violation, the FCA does not require the specific intent to defraud.⁴⁸

Make-or-Use Violation

A “make-or-use” violation of the FCA occurs when a person “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.”⁴⁹ FERA changed the language in the make-or-use provision of the FCA by deleting “to get” and “paid or approved by the government” language and adding a materiality requirement.⁵⁰ The Eleventh Circuit stated, “[a]t a minimum, the new version [of the FCA] requires [the relator] to show that the Defendants made ‘a false record or statement’ that was ‘material to a false or fraudulent claim.’”⁵¹

False Certification Violation

The Eleventh Circuit has stated that the false certification theory is allowed under both the pre- and post-FERA FCA, in which the court finds FCA liability where contractor falsely certifies it “will comply with federal law and regulations.”⁵² Under the false certification theory, relators must prove “(1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due.”⁵³

Conspiracy Violation

A conspiracy violation occurs when a person “conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G)” of the FCA.⁵⁴ Congress, through FERA, made a conspiracy claim a standalone provision, which can be violated independent of other FCA violations.

Reverse False Claim Violation

A reverse false claim violation occurs when a person “knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.”⁵⁵

PROCEDURE

Filing a FCA complaint is unique from other civil claims.⁵⁶ For example, the complaint must be filed with the court under seal, and it must remain sealed for sixty

days.⁵⁷ However, the relator must not serve the complaint on the defendant.⁵⁸ Instead, the relator must serve a written disclosure and the filed complaint on the U.S. Attorney, for the judicial district where the *qui tam* was filed, and on the Attorney General of the United States.⁵⁹ Once served with the filed complaint, the DOJ has sixty days to investigate the claim while the complaint remains under seal.⁶⁰ After sixty days, the DOJ has the option to file a motion with the district judge showing good cause why the case should remain under seal for further investigation.⁶¹ Typically, most *qui tam* suits see their seals extended at least once, if not multiple times, as the government conducts an investigation.⁶² The government’s investigation will typically last at least four months, but can also last several years under seal.⁶³ Throughout the time the case is under seal, the relator and relator’s counsel are not permitted to disclose even the existence of their *qui tam* to anyone. Failure to comply with the seal requirements can result in sanctions, the government declining to intervene, or dismissal of the action entirely.⁶⁴

CONCLUSION

The war on fraud is not fought with soldiers but with ordinary citizens, and the FCA provides the opportunity accompanied with incentives and protection for these citizens. The FCA offers the opportunity as an avenue for courageous men and women to do the right thing and blow the whistle on fraud. The investigation of a *qui tam* lawsuit must be done both efficiently and quickly. Plaintiff’s counsel will serve their clients well if they ask and have answered the following questions in determining whether the relator has a viable *qui tam* lawsuit:

1. Who made a false statement to the government for the purposes of getting a claim paid, or for purposes of avoiding paying money owed to the government? To whom? When, where and how?
2. How does your potential client know this (i.e. is he or she an “original source” as defined by the FCA or is his knowledge based on publicly disclosed information)?
3. Who else has knowledge of the information your client possesses?
4. Are there any documents that refer to or support the alleged fraudulent conduct? If so, where are these documents?
5. What government funds are in-

- volved?
6. Are there any government regulations related to the disbursement of these funds?
 7. Did the defendant violate these regulations?
 8. What is the client's motivation or rationale for being a whistleblower in this instance and has the client ever been a whistleblower before?
 9. Was the client involved in presenting the false claims and/or the fraudulent conduct at issue?
 10. How was the government harmed by the false claims? Did the government experience a small loss, large loss or no actual loss at all?
 11. If the client is an employee of the defendant, what is the client's background and history with this or any other employers? Has the client signed any contracts or agreements while employed or contracted with the defendant that may affect his or her ability to bring the qui tam suit?
 12. Does the client allege that he or she has been retaliated against because of acts done in furtherance of the FCA?

- 1 See, Press Release, Office of Pub. Affairs, U.S. Dept. of Justice, Justice Department recovered over \$4.7 Billion from False Claims Act Cases in fiscal year 2016 (December 14, 2016).
- 2 *Id.*
- 3 UNITED STATES DEPT. OF JUSTICE, THE FALSE CLAIMS ACT: A PRIMER, at *1, available at: http://www.justice.gov/civil/docs/forms/C-FRAUDS_FCA_Primer.pdf.
- 4 Larry D. Lahman, *Bad Mules: A Primer on the Federal False Claims Act*, 76 OKLA. B. J. 901, 901 (2005).
- 5 FALSE CLAIMS ACT: A PRIMER, *supra* note 4 at *1.
- 6 31 U.S.C. § 3729(a)(1).
- 7 See *United States ex rel. Marcy v. Rowan Co., Inc.*, 520 F.3d 384, 388 (5th Cir. 2008) ("The False Claims Act is the government's primary litigation tool for recovering losses sustained as the result of fraud.").
- 8 <https://www.federalregister.gov/documents/2017/02/03/2017-01306/civil-monetary-penalties-inflation-adjustment-for-2017#print>
- 9 *Id.*
- 10 *Id.*
- 11 *Id.*
- 12 <https://www.justice.gov/opa/pr/hospital-chain-will-pay-over-513-million-defrauding-united-states-and-making-illegal-payments>
- 13 *Id.*
- 14 *Id.*
- 15 Gould, C. Lance. *Whistleblowers: A Brief History and a Guide to Getting Started*. 2016.
- 16 *Id.*
- 17 http://www.law360.com/governmentcontracts/articles/853362/8th-circ-invokes-escobar-to-revive-fca-fake-grades-suit?nl_pk=84f4bb32-ddd6-4581-abad-8bab065e09b8&utm_source=newsletter&utm_medium=email&utm_campaign=governmentcontracts
- 18 *Id.*
- 19 *Id.*
- 20 *Universal Health Care Services v. U.S. ex rel. Escobar*, 579 F.3d 1111 (5th Cir. 2016).

- 21 *Id.*
- 22 *Id.*
- 23 http://www.law360.com/governmentcontracts/articles/853362/8th-circ-invokes-escobar-to-revive-fca-fake-grades-suit?nl_pk=84f4bb32-ddd6-4581-abad-8bab065e09b8&utm_source=newsletter&utm_medium=email&utm_campaign=governmentcontracts
- 24 *Id.*
- 25 *Id.*
- 26 *Id.*
- 27 *Id.*
- 28 *Id.*
- 29 http://www.law360.com/governmentcontracts/articles/853362/8th-circ-invokes-escobar-to-revive-fca-fake-grades-suit?nl_pk=84f4bb32-ddd6-4581-abad-8bab065e09b8&utm_source=newsletter&utm_medium=email&utm_campaign=governmentcontracts
- 30 <https://www.justice.gov/opa/pr/government-intervenes-suit-against-energy-process-corporation-alleging-use-defective-steel>
- 31 *Id.*
- 32 *Id.*
- 33 *Id.*
- 34 31 U.S.C. § 3729(a)(1)(A).
- 35 31 U.S.C. § 3729(a)(1)(B).
- 36 31 U.S.C. § 3729(a)(1)(C).
- 37 31 U.S.C. § 3729(a)(1)(G).
- 38 31 U.S.C. § 3729(a)(1)(A).
- 39 *United States v. Marder*, No. 1:13-CV-24503-KMM, 2016 WL 5404303, at *9 (S.D. Fla. Sept. 23, 2016) (citing *McNutt ex rel. United States v. Haleyville Med. Supplies, Inc.*, 423 F.3d 1256, 1259 (11th Cir. 2005)); *United States ex rel. Creighton v. Beauty Basics Inc.*, No. 2:13-CV-1989-VEH, 2016 WL 2642740, at *2 (N.D. Ala. May 10, 2016) (citing *United States ex rel. Walker v. R&F Props. of Lake Cnty., Inc.*, 433 F.3d 1349, 1355 (11th Cir. 2005)); *United States v. Space Coast Med. Assocs., L.L.P.*, 94 F. Supp. 3d 1250, 1256 (M.D. Fla. 2015); *United States ex rel. Gates v. Austral USA, LLC*, No. CV 14-0261-CG-MJ, 2015 WL 5782284, at *3 (S.D. Ala. Aug. 10, 2015); *United States ex rel. St. Joseph's Hosp., Inc. v. United Distributors, Inc.*, 918 F. Supp. 2d 1306, 1313 (S.D. Ga. 2013) (citing *R&F Props. of Lake Cnty., Inc.*, 433 F.3d at 1355); *United States ex rel. Saldívar v. Fresenius Med. Care Holdings, Inc.*, 972 F. Supp. 2d 1317, 1332 (N.D. Ga. 2013).
- 40 E.g., *A1 Procurement, LLC v. Hendry Corp.*, No. 11-23582-CIV, 2013 WL 12065531, at *4 (S.D. Fla. June 26, 2013) (citing *United States ex rel. Nowak v. Medtronic, Inc.*, 806 F. Supp. 2d 310, 342 n.19 (D. Mass. 2011)).
- 41 Claim is defined in 31 U.S.C. § 3729(b)(2).
- 42 *United States v. Marder*, No. 1:13-CV-24503-KMM, 2016 WL 5404303, at *10 (S.D. Fla. Sept. 23, 2016); *United States v. Crumb*, No. CV 15-0655-WS-N, 2016 WL 4480690, at *12 (S.D. Ala. Aug. 24, 2016); *United States v. Space Coast Med. Assocs., L.L.P.*, 94 F. Supp. 3d 1250, 1259 (M.D. Fla. 2015); *Prime v. Post, Buckley, Schuh & Jernigan, Inc.*, No. 6:10-CV-1950-ORL-36, 2013 WL 4506357, at *8 (M.D. Fla. Aug. 23, 2013).
- 43 *United States v. Space Coast Med. Assocs., L.L.P.*, 94 F. Supp. 3d 1250, 1259 (M.D. Fla. 2015) (quoting *United States ex rel. Wilkins v. United Health Grp., Inc.*, 659 F.3d 295, 305 (3d Cir. 2011)).
- 44 *Id.*
- 45 *Id.*
- 46 *United States v. Crumb*, No. CV 15-0655-WS-N, 2016 WL 4480690, at *13 (S.D. Ala. Aug. 24, 2016) (quoting *Wilkins*, 659 F.3d at 305).
- 47 *Marder*, 2016 WL 5404303, at *10 (citing 31 U.S.C. § 3729(b)(1)); *United State ex rel. Temple v. Sigmatech, Inc.*, No. 2:12-CV-1119-MHH, 2015 WL 1486986, at *5 (N.D. Ala. Mar. 30, 2015).
- 48 *United States v. Anghaie*, 633 F. App'x 514, 516 (11th Cir. 2015) (citing 31 U.S.C. § 3729(b)(1)).

- 49 31 U.S.C. § 3729(a)(1)(B).
- 50 *United States ex rel. Heesch v. Diagnostic Physicians Grp., P.C.*, No. CIV.A. 11-0364-KD-B, 2014 WL 2154241, at *8 (S.D. Ala. May 22, 2014).
- 51 *United States ex rel. Mastej v. Health Mgmt. Assocs., Inc.*, 591 F. App'x 693, 710-11 (11th Cir. 2014) (applying pre-FERA version of the FCA because the relator did not plead the post-FERA provisions).
- 52 *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1045 (11th Cir. 2015).
- 53 *Id.* (quoting *United States ex rel. Hendow v. Univ. of Phx.*, 461 F.3d 1166, 1174 (9th Cir. 2006)).
- 54 31 U.S.C. § 3729(a)(1)(C).
- 55 31 U.S.C. § 3729(a)(1)(G).
- 56 See U.S. DEPT. OF JUSTICE, FALSE CLAIMS ACT CASES: GOVERNMENT INTERVENTION IN QUI TAM (WHISTLEBLOWER) SUITS, at *1-2, available at: http://www.justice.gov/usao/pae/Civil_Division/InternetWhistleblower%20update.pdf.
- 57 *Id.*
- 58 31 U.S.C. § 3730(b)(2).
- 59 31 U.S.C. § 3730(b)(2); See also FALSE CLAIMS ACT: A PRIMER, *supra* note 5, at *2.
- 60 FALSE CLAIMS ACT CASES, *supra* note 27, at *1.
- 61 *Id.* at *1.
- 62 *Id.* at *1-2.
- 63 *Id.*
- 64 See, e.g., *U.S. ex rel. Summers v. LHC Group*, 623 F.3d 287 (6th Cir. 2010) (relator's case dismissed with prejudice for failure to follow seal requirements); *U.S. ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995 (2nd Cir. 1995) (same).



Lance Gould began his legal career with **Beasley Allen** in 1997. Currently, Lance's practice is focused on whistleblower litigation, wage & hour litigation, and class actions. In 2016, Lance published a book on the topic of whistleblower law titled *Whistleblowers: A Brief History & A Guide to Getting Started*. Lance initially focused his practice in the area of consumer fraud litigation. He handled actions brought by individuals who were victims of predatory lending practices. Some of these deceptive practices included mortgage fraud, equity theft, loan flipping and insurance packing.