

# Coverage Issues Relating To Claims Under The False Claims Act

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# Why bother?

## The FCA Matter\$\$\$

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Company

Notable Settlements/Judgments



**\$565 million, \$75 million**

***NORTHROP GRUMMAN***

**\$325 million, \$111.2 million**



**\$473 million, \$150 million**

# Why bother?

## The FCA Matter\$\$\$ *continued*

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Company

Notable Settlements/Judgments



GE Aviation

**\$59.5 million**



**\$45.5 million**



**LOCKHEED MARTIN**

**\$37.9 million**

# Background

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- The False Claims Act, 31 U.S.C. §§ 3729-33, imposes liability on individuals and entities that defraud U.S. government agencies and programs.
- The FCA provides for recovery of civil penalties and treble damages from any person who knowingly submits or causes the submission of a false or fraudulent claim to the United States for payment or approval.



# History

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**1943**

Congress amends the FCA to bar *qui tam* lawsuits based on evidence or information already known to the federal government.



**2009**

Fraud Enforcement and Recovery Act codifies common law “materiality” requirement.



**March 1863**

FCA—or “Lincoln’s Law”—enacted to combat fraud perpetrated by Union Army suppliers.

**1986**

False Claims Amendments Act of 1986 expands role of whistleblowers, increases financial incentives, and reduces barriers to bringing actions against fraudsters.

**2010**

Affordable Care and Dodd-Frank Acts modify the FCA’s public disclosure and original source and retaliation provisions.

# Relevant FCA Provisions

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- The FCA imposes civil liability on anyone who:
  - knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; 31 U.S.C. § 3729(a)(1)(A);
  - knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; 31 U.S.C. § 3729(a)(1)(B);
  - conspires to defraud the Government by getting a false or fraudulent claim allowed or paid. See 31 U.S.C. § 3729(a)(1)(C);
  - knowingly . . . conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government. 31 U.S.C. § 3729(a)(1)(G).

## Elements of a 31 U.S.C. § 3729(a)(1)(A) claim

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1. The person must present or cause another to present a claim for payment or approval by the United States;
2. The claim must be false or fraudulent;
3. The actor must know that the claim is false.

*United States ex rel. Stinson v. Provident Life & Accident Ins. Co.*,  
721 F. Supp. 1247, 1258-59 (S.D. Fla. 1989).

# Elements of a 31 U.S.C. § 3729(a)(1)(A) claim: A claim for payment

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- (A)** Any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that—
- (i)** is presented to an officer, employee, or agent of the United States;  
or
  - (ii)** is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government—
    - (I)** provides or has provided any portion of the money or property requested or demanded; or
    - (II)** will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded. 31 U.S.C. § 3729(b)(2)(A).
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# Elements of a 31 U.S.C. § 3729(a)(1)(A) claim: False or fraudulent

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- **Falsity is an objective inquiry that requires consideration of all facts and circumstances.**
  - An invoice generally isn't false on its face
- **Often intertwined with the issue of intent**
  - Decisions on this issue often revolve around the exact meaning of contract and regulatory terms
- **Ambiguity tends to negate intent and/or falsity**

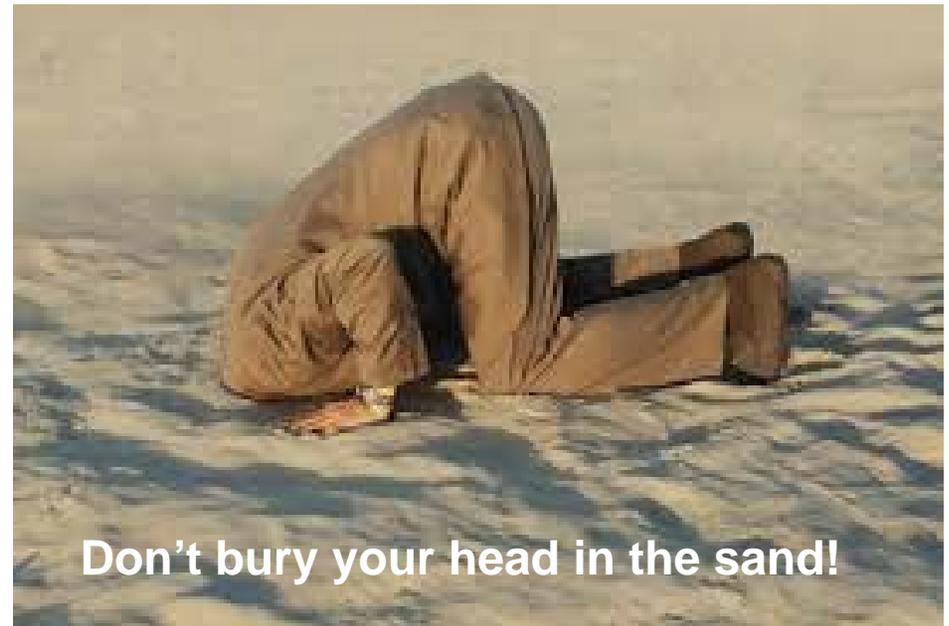
# Elements of a 31 U.S.C. § 3729(a)(1)(A) claim: Knowingly

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- “knowingly” means that a person, with respect to information—
  - 1) has actual knowledge 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.

31 U.S.C. § 3729(b)(1)(A).

- **FCA liability does not require proof of specific intent to defraud.**



## Elements of a 31 U.S.C. § 3729(a)(1)(A) claim: Materiality

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“‘[M]aterial’ means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” 31 U.S.C. § 3729(b)(4).

The materiality standard is “demanding” and “rigorous.” *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016)

# Elements of a 31 U.S.C. § 3729(a)(1)(A) claim: Causation

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- No FCA liability unless the knowing submission of a false claim to the government actually *caused* the government to make payment. 31 U.S.C. § 3729(a)(1)(A).
- **Specific theories of liability**
  - **Fraud in the inducement**—Knowingly making false statements to obtain a government contract
  - **Reverse false claims**—Avoiding an obligation to deliver payment or property to the government
  - **False certification claims**—Explicitly or implicitly certifying compliance with contract or regulatory requirements

# Implied Certification Liability

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***Universal Health Services, Inc. v.  
United States ex rel. Escobar,  
136 S. Ct. 1989 (2016)***

# *Universal Health Services, Inc. v. United States ex rel. Escobar – Facts*

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- Relators brought suit under the FCA and its state counterpart after the seizure-related death of their teenage daughter who had been treated at defendant's mental health clinic by personnel who were neither licensed nor properly supervised, in violation of several state health regulations.
- Relators alleged that defendant's invoices for Medicaid reimbursement of the mental health services provided to Relators' daughter and others were fraudulent in that defendant misrepresented its compliance with these regulations.
- Notably, the invoices contained no express certification of regulatory compliance; rather, Relators claimed that (false) certification was implied.

# *Universal Health Services, Inc. v. United States ex rel. Escobar—Holding*

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## On materiality:

- The materiality standard is both “demanding” and “rigorous.” The FCA was not intended as an “all-purpose anti-fraud statute.”
- Designating a requirement as a condition of payment is relevant to, but not dispositive of, materiality.
- Proof of materiality can include evidence of the government’s payment history—paying despite its awareness of noncompliance or refusing to pay absent compliance.
- The element of materiality is not too fact intensive to permit decision on motion to dismiss or for summary judgment.

# Causation: Contractor Liability

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- The FCA imposes liability even if a company does not directly submit a claim to the government
- Subcontractor who knowingly submits a false statement of charges to the general contractor who incorporates that into the bill submitted to the government violates the FCA
- Absence of contractual privity does not affect liability

# Damages and Penalties

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- A company that violates the FCA is liable for:
  - A civil penalty of \$10,781 to a maximum of \$21,563 per false claim, plus three times the amount of damages the government sustains. 31 U.S.C. § 3729(a)(1).
  - Costs and attorney's fees in connection with bringing a civil action to recover penalties and damages. 31 U.S.C. § 3729(a)(3).



# Calculating Damages

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- Damages when the government is charged incorrectly for services or products provided:
  - Damages = amount paid — what would have been paid had the claim been truthful
- More difficult to calculate in other cases:
  - **Fraud in the inducement**
    - Damages can extend to all claims submitted
  - **Reverse false claims**
    - Usually the amount withheld from the government.
    - More difficult to calculate when the underlying obligation is unclear or contingent.
  - **Substandard products or services**
    - “Benefit of the bargain” formula: the difference between the FMV of the product received and the FMV of the product contracted for.



# Qui Tam Provisions

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- The FCA's *qui tam* provision lets a private individual sue on behalf of the United States. 31 U.S.C. § 3730(b).
- The individual filing suit is known as the “relator.”
- *Qui tam* plaintiffs filing an FCA lawsuit must:
  - File the complaint under seal.
  - Give the government a copy of substantially all material evidence and information they possess.
    - Government has at least 60 days to investigate the claim.



# Government intervention in a *qui tam* action

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- **At the end of the investigation period, the government must do one of the following:**
  - **Intervene in the action and take it over**
    - Government assumes primary responsibility for the case
    - The *qui tam* plaintiff still remains a party to the action
  - **Decline to intervene**
    - If the relator successfully recovers against the defendant, the government still shares in at least 70% of the recovery without expending any resources
  - **Seek dismissal**
    - Government dismissal is beyond judicial review
  - **Attempt to settle the claim**

# Qui tam Plaintiff's Recovery

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- The *qui tam* plaintiff can collect:
  - 25% to 30% of any judgment or settlement if the government fails to intervene;
  - 15% to 25% of any judgment if the government intervenes.
- The court can reduce the relator's share of the recovery upon finding the relator was involved in perpetrating the fraud. 31 U.S.C. § 3730 (d)(3).
- *Qui tam* plaintiffs are also entitled to reasonable expenses and attorneys' fees *even in the event of settlement.*



# Relator standing in event of prior disclosure

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- Anyone who is an “**original source**” of the information. 31 U.S.C. § 3730(e)(4).
- To be an “original source,” the relator must have either:
  - Voluntarily disclosed the information to the government prior to any public disclosures.
  - Had independent knowledge
    - that materially adds to the publicly disclosed allegation and
    - voluntarily provided that information to the government before filing the FCA action.



# The FCA's Anti-Retaliation Provision

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- The FCA prohibits retaliatory actions against employees, contractors or agents who report or act to stop an FCA violation. 31 U.S.C. § 3730(h)(1).
- To receive the FCA's retaliation protection, the relator
  - must be engaged in conduct protected under the FCA, not merely in the assigned duties of employment, and
  - there must be a causal nexus between the relator's conduct, and the adverse employment action.

# Defenses to an FCA Claim



- Failure to plead fraud with particularity – FRCP 9(b)
  - Who, what, where, when and how of the alleged fraudulent scheme.
  - Evidence of actual submission of a claim for payment vs. circumstantial evidence of submission of a false claim.
- Public disclosure bar
  - Is relator an “original source”
- First-to-file bar
  - Precludes *qui tam* actions based on the same facts that gave rise to the first-filed action
- Statute of limitations
  - 6 years after the date on which the violation is committed.
  - 3 years after the date when the US official responsible to act knew of or reasonably should have known the facts material to the right of action, but not more than ten years after the date on which the violation is committed.

# Defenses to an FCA Action

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- Lack of Knowledge
- Lack of falsity
  - Government knowledge negates fraud
- Lack of materiality
  - Conditions of payment/participation
  - History of government's treatment of the regulatory/contractual/statutory violation

# Insurance Coverage for FCA Claims

## – Issues

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- Source of insurance coverage
- Exclusions for fraud/intentional wrongdoing
- Nature of the alleged fraud
- Policy terms
- Notice/timing



# Insurance Coverage for FCA Claims – Source of Insurance Coverage

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Insureds typically look to three sources for coverage:

- **Employment practices liability insurance**
  - Employment claims often joined with FCA claims
- **Directors and officers insurance**
  - *Carolina Cas. Ins. Co. v. Omeros Corp*, No. C12–287RAJ, 2013 WL 5530588 (W.D. Wash. Mar. 11, 2013) (employment practices and D&O coverage for FCA and retaliation claims)
- **Professional liability (E&O) insurance**
  - *Zurich Am. Ins. Co. v. O’Hara Reg’l Ctr. For Rehab.*, 529 F.3d 916, 922 (10<sup>th</sup> Cir. 2008) (no coverage for FCA suit where services were allegedly not provided)

# Insurance Coverage for FCA Claims – Fraud Exclusions

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- Usually effective in avoiding coverage for indemnity losses
- May not be effective in avoiding liability for defense costs



# Insurance Coverage for FCA Claims – Policy Terms

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- How is “claim” defined?
  - A written demand, for money or services, on account of insured’s wrongful act
  - Is complaint filed under seal a “claim”
- How is “loss” defined?
  - Exclusion for penalties and fines, treble damages, disgorgement
- How are “professional services” defined?
  - Loss resulting from a “professional activity” rendered for “another” for a fee



# Insurance Coverage for FCA Claims – Timing/Notice

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- When was the Claim first made
  - Suits can be filed up to 13 years after the wrongful acts
- Was timely notice of the claim provided
  - Complaints are filed under seal and may remain sealed for years
- Did relevant conduct precede the retroactive date
  - Even if it continued past the retroactive date, likely no coverage

**January 2014**

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# Insurance Coverage for FCA Claims – Timing/Notice

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- Was there a prior or pending proceeding related to the Claim
  - Precludes coverage where there was a prior administrative or regulatory investigation or proceeding
  - Lack of notice of sealed complaint not relevant
- Did the insured have “prior knowledge” of the facts or circumstances giving rise to the claim?
  - Notice to company compliance officials of violations
  - Inquiries from state or federal regulatory officials
- Usually a factual commonality between the prior proceeding or circumstances and FCA claim

# Insurance Coverage for FCA Claims

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## Illustrative cases:

- *United States ex rel. Schweizer v. Oce, N.V.*, 577 F. Supp. 2d 169 (D.D.C. 2008)
- *Health Care Ind. Liab. Ins. Program v. Momen Meadows Nursing Ctr., Inc.*, 566 F.3d 689 (7th Cir. 2009)
- *Horizon West, Inc. v. St. Paul Fire & Marine Ins. Co.*, 214 F. Supp. 2d 1074 (E.D. Cal. 2002)
- *AmerisourceBergen Corp. v. ACE American Ins. Co.*, 100 A.3d 283 (Pa. Super. 2014)

# Questions?

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