

**False Claims Act  
(FCA):  
Mitigating Your  
Company's Potential  
For Liability**

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**SMITHCURRIE**



# Looking Ahead

- Why is there a False Claims Act?
- What sort of conduct does it prohibit?
- How do these cases come about?
- What actions result in liability?
- What are some new priorities for enforcement?
- What can you do to minimize the likelihood of these violations?

# False Claims Act History

- Original statute dates back to Civil War – Signed by Lincoln
- Enacted to prevent fraudulent war profiteering (e.g. decrepit horses, sick mules, faulty rifles and ammunition)
- Multiple amendments since that time.
- Codified at 31 U.S.C. §§ 3729 *et. seq.*

# What Conduct is Prohibited?

- The statute prohibits seven types of conduct (the most frequently litigated issues in red):
  1. Submitting or causing someone to submit false or fraudulent payment or approval claims
  2. Creating or causing someone to create or use false records or statements in support of fraudulent claims
  3. Conspiring to violate the FCA
  4. Delivering or causing someone to deliver less property or money than is owed to the Government
  5. Creating and submitting a false receipt of property used (& to be used) by the government;
  6. Knowingly receiving property from an official not authorized to pledge such property
  7. Falsifying records or causing someone to falsify records to avoid or decrease an obligation to pay or provide money or property to the Government

# What Conduct is Prohibited? (cont.)

- Some common violations include:
  - certifying compliance with an unfulfilled contract requirement
  - overbilling the Government
  - misrepresenting company as a small business or allowing pass-throughs for a large company

# What Conduct is Prohibited? (cont.)

- A few ways that this may come up in the DoE context include:
  - Contractor Agrees to Pay \$5.275 Million to Settle False Overtime and Premium Pay Allegations
  - Environmental Remediation Firm Agrees to Pay \$2.72 Million to Settle Claims of Alleged Bid-Rigging and Kickbacks
  - Subcontractor Agrees to Pay \$2.0 Million to Settle Allegations related to its Role in a Small Business Fraud
  - Multiple Contractors Agree to Pay a Combined \$57.75 Million and Use Independent Corporate Monitors for Three Years to Resolve Claims of Overcharging the DoE for a Decade by Billing Time Not Worked

# The Basics

- Government can bring an FCA action itself
- But, an action can also be brought by a private party, referred to as a “relator”, via a “qui tam” action.
- Potentially very lucrative for these whistleblower private parties.
  - 15-25% of proceeds if the Government intervenes
  - 25-30% of proceeds if the Government does not.
- After relator files suit in federal court, Government has 60 days to investigate the allegations.
- *Then, the Government informs the relator of its choice. If the Government intervenes, the DOJ takes over the case. If they do not, the relator can continue.*
  - Much of the qui tam process and the Government’s investigation happens under seal.

# The Basics (cont.)

- These charges are very expensive and very painful as a defendant.
  - Civil Penalties (currently \$11,665 to \$23,331 per claim)
  - Treble Damages (i.e., three times the amount of damages from the fraudulent act)
  - If successful, also owe the whistleblower their legal fees (in addition to your own)
  - Terminations, Suspension, and Debarment.
  - \$2.2 Billion in judgments & settlements in FY 2020 (about a Billion less than last year's numbers)
  - Most of the judgments & settlements were still in Healthcare (\$1.8 Billion in FY 2020), but DOJ specifically highlighted its efforts to combat procurement fraud in the DoE in its annual report on FCA for FY 2020.
  - DOJ's new actions against non-defense federal contractors up significantly in FY 2020, *i.e.*, 33% more non-qui tam actions (104 in FY 2020) and 22% more qui tam actions (181 in FY 2020)
- Government applies the False Claims Act broadly.
- But a significant majority of cases are still brought by qui tam relators.

# What Makes Someone Liable?

1. Direct False Claim – liability for knowingly making an affirmative false claim to the U.S. Government or concealing or avoiding an obligation to pay.
2. Express False Certification – liability for expressly certifying compliance with a required contract provision, statute, regulation, or governmental program in connection with a false claim.
3. Implied False Certification – liability by implication, but without any express certification of compliance with a required contract provision, statute, regulation, or governmental program in connection with a false claim.

# Do All False Claims Become Violations?

- **No.** The False Claims Act prohibits actions of submitting or causing a submission of false claims (statements, records, etc.) that are done ***with the knowledge of falsity***.
- But, of course, knowledge is interpreted broadly.
  - actual knowledge;
  - deliberate ignorance of the truth or falsity of the information; or
  - reckless disregard of the truth or falsity of the information.

# Universal Health Services, Inc. v. US ex rel. Escobar (2016)

- A teenage girl dies after being diagnosed with bipolar disorder and prescribed a certain medication during treatment at a mental health facility in Massachusetts.
- The practitioners treating the teenager turn out to be unlicensed medical professionals without the authority to prescribe medications. One practitioner had a degree from an unaccredited internet institution.
- Parents file a qui tam FCA suit against Universal Health (owner of the facility) for submitting reimbursement claims to Medicaid for services they were not licensed to provide.

# Universal Health Services, Inc. v. US ex rel. Escobar (2016)

- Unanimous Decision (by eight justices)
- The Supreme Court held that an implied false certification can create liability under the FCA, at least in some circumstances.
- Though two conditions need to be satisfied:
  1. The claim must not merely request payment, but must also make specific representations about the goods or services provided.
  2. Defendant's failure to disclose noncompliance with **material** statutory, regulatory, or contractual requirements makes those representations misleading half-truths.

# Universal Health Services, Inc. v. US ex rel. Escobar (2016)

- Established that the standard for materiality is rigorous.
- The Supreme Court provided some guidance:
  - The alleged misrepresentation must be “material to the Government’s payment decision.”
  - The FCA is not an “all purpose antifraud statute” or a vehicle to punish “garden-variety breaches of contract or regulatory violations.”
  - “We reject [the] assertion that materiality is too fact intensive for courts to dismiss a False Claims Act case on a motion to dismiss or at summary judgment.”
  - The fact that the provision is labeled as a condition of payment is relevant, but not dispositive.
  - “Nor is it sufficient for a finding of materiality that the Government would have the option to decline pay if it knew of the defendant’s noncompliance.” What matters is what the Government did or would have done.

# Universal Health Services, Inc. v. US ex rel. Escobar (2016)

- The decision even referenced some potential examples of materiality proof:
  - “[E]vidence that the Government consistently refuses to pay claims in the mine run of cases based on noncompliance with the particular statutory, regulatory or contractual requirement.”
  - “[I]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material.”
  - “Or if the Government regularly pays a particular type of claim in full despite actual knowledge that certain requirements were violated, and has signaled no change in position, that is strong evidence that requirements are not material.”
- Note that the examples suggest a focus on the customary practices of the Government. They are not limited to the defendant alone. Treatment of other contractors matters.
- The Supreme Court views materiality standard in FCA as similar to the standards they employ for other federal fraud statutes.

# Recent Priorities for Enforcement

- COVID-19 Relief (e.g., Paycheck Protection Program) Fraud
- Antitrust Crimes
  - In 2019, DoJ formed a Procurement Collusion Strike Force (PCSF) to address antitrust crimes (e.g., bid-rigging, collusion, price-fixing) in federal procurement.
- GAO's High Risk List: DOE's contract and project management for National Nuclear Security Administration (NNSA) and Office of Environmental Management (EM)

# FAR 52.203-13 Mandatory Disclosure Rule

- This clause applies when contract value is above \$6 million and period of performance extends beyond 120 days. It imposes **several MAJOR requirements:**
- **Contractors have to establish a written code of business ethics and conduct within 30 days after contract award and make a copy available to all employees.**
- **Contractors have to exercise due diligence to prevent and detect criminal conduct.**
- **Contractors have to otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.**
- **Each Contractor “shall timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed-**
  - **A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or a violation of the civil False Claims Act.”**
- **Contractors have to flow down this clause in subcontracts that have a value in excess of \$6 million and a performance period of more than 120 days.**
- Contractors have to establish an ongoing business ethics awareness and compliance program
- Contractors have to implement an internal control system that will establish standards and procedures to facilitate timely discovery of improper conduct in connection with government contracts and ensure corrective measures are promptly instituted and carried out.

# FAR 52.203-13 Mandatory Disclosure Rule (cont.)

**Failure to meet any of these requirements is itself a violation of the contract.**

**Failure to meet any of these requirements is also likely to result in a false claim itself.**

# An ounce of prevention...

- Compliance with these obligations is key. But there are things that you can do to protect your company:
  - Be selective in choosing your employees, subcontractors, vendors, suppliers, etc.
  - Always make sure that you understand what it is that you are certifying.
  - Set up a compliance program.
  - Don't retaliate if someone reports misconduct.
  - Ensure that your invoices, claims, and other submissions undergo more than one level of internal review.
  - Have employees certify their own compliance with the policies.
  - Review your policies and procedures periodically to confirm that the compliance is ongoing.
  - Don't let issues fester.



# Questions?

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