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# THE FEDERAL AND MINNESOTA FALSE CLAIMS ACTS: AN OVERVIEW

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# What We Will Cover Today

**What is a False Claims Act?**

**History of the Federal and Minnesota False Claims Acts**

**False Claims Act Recoveries**

**Elements of an Actionable FCA Case**

**Qui Tam/Relator Provisions**

**Case Examples**

**Practice Pointers and Other Considerations**

# What is a False Claims Act?

- Federal and state False Claims Acts (FCAs) are the principal tools to combat fraud against the federal and state treasury.
- Liability for fraudulent attempts to cause the government to pay money.
- Provide for treble damages and steep penalties (currently \$11,804-\$23,607) for every false or fraudulent claim.
- Private citizens, also called relators, can file FCA suits on behalf of the government.

**FRAUD**

Criminal Felony Unfair Scam Securities Government Hoax Tax People Email Fraudulent Embezzlement Prison Cybercrime Credit Card Identity Phishing Defrauding Deception Insurance Business False Claims Whistleblowers Financial Cyber Unlawful Data Internet Guilt Money Theft Academic

# History of the Federal FCA

- **Federal FCA, or “Lincoln Law”, enacted in 1863 to address defense contractor fraud during the Civil War**
  - **Faulty rifles**
  - **Rotted ship hulls**
  - **Rancid rations**
  - **Decrepit horses**
  - **Lame mules**
- **Codified at 31 U.S.C. §§ 3721-3733**
- **Significant amendments in 1943 (WWII), 1986, 2009.**



# History of Minnesota's FCA

- Adopted in 2009, effective July 1, 2010.
- Codified at Minn. Stat. §§ 15C.01-15C.16.
- Modeled after the federal FCA; includes both *qui tam* and anti-retaliation provisions.
- Applies to a broad range of state and local programs.



# False Claims Act Recoveries

- Since 1986 amendments, nearly \$24 billion in federal FCA recoveries.
- Since 2010, over \$57.8 million in MN FCA recoveries.
- Recoveries primarily attributable to *qui tam* actions.
- In Minnesota, most recoveries are to state health care programs.



# Establishing Liability Under the False Claims Act

**Presenting, or causing to be presented, false or fraudulent claim**

**Making a false record or statement material to a false or fraudulent claim**

**Delivering less money or property than that owed**

**Certifying receipt of money or property without knowing whether information on the receipt is true**

**Unlawfully buying or receiving public debt from government official**

**Conspiring to commit a FCA violation**

**Making a false statement material to a false or fraudulent claim to avoid paying money or property to the government or knowingly conceal, avoid, or decrease an obligation to pay or transmit money or property to the government (reverse false claim)**

# Elements of Actionable FCA Case



## 1. Claim: Request or demand for money or property that is:

- Presented to an officer, employee or agent of the government or
- Made to a contractor, grantee or other recipient if government provides a portion of money or property and money or property is to be used or spent to advance government program or interest.
- **Examples:** grant or loan application, invoice, medical claim.



## 2. Falsity

- Factually false (literal falsity): misrepresentation of the type or amount of goods provided, or failure to provide goods or services
- Legally false
  - Express certification
  - Implied certification

In 2011, several courts began to use a functional test of whether the defendant, in submitting a claim for reimbursement, knowingly misrepresented compliance with a material precondition of payment. Led to *Escobar* decision discussed below.

**3. Knowledge:** With actual knowledge of the information or acting in deliberate ignorance or reckless disregard of the truth or falsity of the information.

- **Relevant Factors:**

- Is regulation clear or ambiguous
- Defendant's words and conduct
- Education, training, warnings to defendant.
- Conduct of peers.
- Magnitude of alleged fraud.
- Compliance attempts by defendant.

## Additional Threshold Issues

- **Materiality:** Having the tendency to influence, or be capable of influencing, the payment or receipt of money or property. Minn. Stat. § 15C.01, subd. 3a.
- ***Universal Health Services, Inc. v. U.S. ex rel. Escobar* (2016)**
  - Relators, parents of woman treated at Universal, alleged that Universal, in violation of MassHealth (state Medicaid) regulations, allowed unlicensed counselors to provide mental health services and failed to provide proper supervision.
  - “Implied false certification theory” – by submitting claims, clinic implicitly certified that it was in compliance with regulations.



# Escobar Procedural History

District Court dismisses case, finding that provisions at issue were not material because they were not “express conditions of payment.”

First Circuit reverses in part, finding that materiality is satisfied as long as government would be entitled to refuse payment if it knew of alleged violation.

Supreme Court grants certiorari and holds:

- Implied certification theory can be basis for FCA liability if:
  - Claim does not merely request payment but makes specific representations about goods or services provided and
  - Defendant’s failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations misleading half-truths.

Evidence of materiality:

- Fact that provision is labeled a condition of payment is relevant but not dispositive.
- Not enough to show that government would be entitled to refuse payment.
- Materiality can be established by knowledge that the government consistently refused to pay claims based on defendant’s noncompliance.
- Government knowledge may rebut materiality.
- **Central question:** *Would government have paid claim had it known of violation?*

# Damages



Damages to government, benefit to defendant need not be shown.

Penalties are mandatory; most courts hold that each false statement or record that constitutes a violation of the FCA warrants a separate penalty.

Measure of damages is amount paid out by reason of the false statement over and above what would have been paid had claim been truthful.

# Qui Tam/Relator Provisions

*The effect of [the qui tam provision] is simply to hold out to a confederate a strong temptation to betray his coconspirator and bring him to justice. The bill offers, in short, a reward to the informer who comes into court and betrays his coconspirator, if he be such; but it is not confined to that class ... . In short, sir, I have based the [qui tam provisions] upon the old-fashioned idea of holding out a temptation and “setting a rogue to catch a rogue,” which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.*



# Filing Procedures

*Qui tam* complaints must be filed under seal.

Relator must provide government with written disclosures and copy of complaint.

Government intervenes or decline intervention within 60 days, may move for good cause extension

Complaint must be unsealed and served on defendant after intervention decision is made.

If prosecuting attorney choses to intervene, prosecuting attorney may file complaint or amend relator's complaint.

# Who can be a relator?

## Relator must be “original source” of information:

- A person who has voluntarily disclosed to the state or political subdivision the information on which allegations or transactions in a claim are based prior to a public disclosure or
- A person who has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and has voluntarily provided the information to the state or a political subdivision before filing an FCA action.

**Court must dismiss action or claim, unless opposed by the prosecuting attorney, if allegations or transactions alleged have already been publicly disclosed.**





# Relator Recovery

- Relator recovery varies based on significance of information and involvement in case.
  - If government intervenes in case, relator is entitled to 15-30% of proceeds.
  - If government declines to intervene, 25-30% of proceeds.
- Relators are also entitled to reasonable costs, expert fees, and attorneys' fees.
- *Rille v. PricewaterhouseCoopers* (8th Cir. 2008): Court, *en banc*, concluded that relator is entitled only to share of proceeds of claims brought by the relator, not unrelated claims brought by the government.
- FCA includes cause of action for employees who are retaliated against for FCA-related activities.

## Tips for Working with a Relator

- Prepare clients for realities of *qui tam* litigation
- Get the whole story from relator right away
- Thoroughly prepare relator for interview
- Consider request for “all” information related to a case versus relevant information; preserve evidence

# Protections Against Bad Faith Relators

- Government must consent to any settlement or dismissal.
- Courts may award costs to defendant if qui tam action is frivolous or brought primarily to harass.
- Government can dismiss or settle an action and can request that a court restrict a relator's participation under certain circumstances.
- If a relator is involved in fraudulent behavior, a court may reduce that individual's share of any reward and may not award share if individual is convicted of wrongdoing in connection with fraud.

# Case Examples

## PROCUREMENT

Manufacturers and distributors misrepresenting products' characteristics or qualities to induce government to purchase them

## HEALTHCARE/SOCIAL SERVICES

Overbilling government-funded programs for more services than provided or higher level of services than provided (medical, waiver, childcare, housing, etc)

## GRANT AND LOAN

Businesses and research institutions falsifying information on applications or progress reports to qualify for grants or contracts reserved for small or minority-owned businesses; PPP loans

## EMPLOYMENT

Contractors failing to pay workers prevailing wages on government-funded projects

## HOUSING

Collecting excess rent and impermissible utility payments from Section 8 tenants; unlicensed lenders collecting Section 8 and other government housing funds

## EDUCATION

Colleges falsely certifying compliance with Higher Education Act and parallel state statutes; child tutoring company billing for tutoring services not provided to low-income children

# Practice Pointers

- Develop a case that government will want to intervene in (egregious conduct and/or \$\$)
  - Meritorious
  - Personal knowledge of relator
  - Thorough investigation
  - Persuasive complaint
  - Organized presentation of evidence
  - Credible damages model
- Consider pros and cons of engaging with the government early
- Consider FCA claims as another way to address clients' issues (Al Capone and tax evasion)

# Other Considerations

- **Statute of limitations:** 3 years after date of discovery of prosecuting attorney or 6 years after fraud, whichever is later, but no more than 10 years after date of violation.
- **Prosecuting attorney:** Attorney General, county or city attorney depending on type of money, property or services.
- **Person:** does not include federal government, state or political subdivision.
- **Tax Fraud Exclusion:** FCA does not apply to claims records or statements made under portions of Minnesota statutes related to taxation.
- **Rule 9(b):** fraud or mistake must be pled with particularity.
  - Representative examples of false claims or particular details of scheme to submit false claims paired with reliable indicia that lead to strong inference that claims were actually submitted. *U.S. ex rel. Thayer v. Planned Parenthood* (8<sup>th</sup> Cir. 2014)

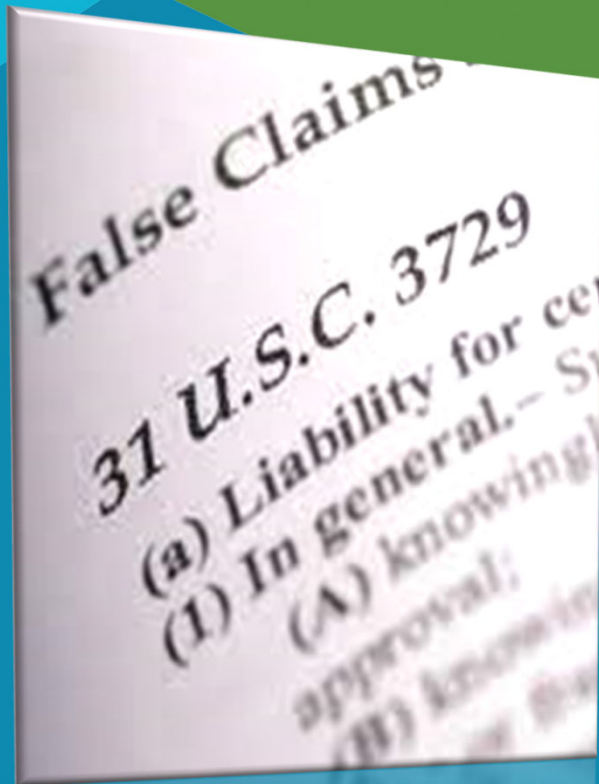
# Takeaways

The FCA is a powerful tool to combat fraud in cases in which federal or state dollars, property, or services are involved.

FCA provides strong incentives for relators with insider knowledge to report fraud.

## **Liability standard under FCA is demanding:**

- The FCA is not concerned with regulatory non-compliance or garden-variety breaches of contract.
- Fraud must be knowing as does not punish negligence, inadvertence, or mistake.
- Falsehood of the claim must be material to government's payment decision.
- Government knowledge may rebut materiality.



**QUESTIONS?**

**Thank you!**