

DENTONS DENTONS GOVERNMENT
CONTRACTS ACADEMY
VIRTUAL | 2021

TRENDS AND DEVELOPMENTS UNDER THE FALSE CLAIMS ACT

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Presentation Agenda

- Welcome & Course Overview
- False Claims Act (“FCA”)
 - Overview
 - Whistleblower/Retaliation Claims
- Summary of Notable 2021 Cases and Recent Enforcement Activity
- Investigation False Claims Allegations
- Future Changes/Predictions

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The slide features a background image of the United States Capitol building and an American flag waving. The text "The False Claims Act" is centered in white. The Dentons logo and event information are in the top left corner.

The False Claims Act

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The False Claims Act, 31 U.S.C. 3729 – 3733

FCA Liability

- Imposes liability on any person that “knowingly”:
 - submits or causes another to submit a false or fraudulent claim for reimbursement to the federal government
 - makes a false record or statement in support of a false claim
 - avoids or decreases an obligation to pay the government (reverse FCA)
- Knowingly means:
 - Actual knowledge
 - Deliberate ignorance
 - Reckless disregard
 - No specific intent to defraud is necessary

Whistleblowers

Qui Tam Actions

- The FCA allows private persons (aka relators) to file civil suits for violations of the FCA on behalf of the government
 - Qui tam complaints must be filed with the court under seal while the government conducts and investigation
 - If government intervenes, it has the primary responsibility for prosecution the action.
- Award
 - Relator is entitled to receive a significant percentage of any recoveries (up to 30%)
 - Significant financial incentive to report and for plaintiffs lawyers to bring these cases
 - Successful action: Relator also is entitled to legal fees and other expenses

The False Claims Act, 31 U.S.C. 3729 – 3733

Mandatory Disclosure Requirements

- Contractors are required to timely disclose, in writing, credible evidence that a principal, employee, agent or subcontractor:
 - Violated federal criminal law involving fraud, conflict of interest, bribery or gratuity
 - Is in possession of a significant overpayment
 - Violated the Civil False Claims Act or is in possession of a significant overpayment
- Contractors must
 - Understand the FCA
 - Investigate allegations
 - Determine whether credible evidence exists and must be disclosed

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CARES Act: Paycheck Protection Program Cases

March 27, 2020: The Coronavirus Aid, Relief, and Economic Security (CARES) Act enacted

- Section 1102(a)(2) amended Section 7(a) of the Small Business Act to establish the PPP.
 - PPP provides relief to small businesses that experience economic hardship due to the pandemic.
 - The PPP application requires certification of eligibility.
- False certifications, submission of false information, and failure to make reasonable effort to ensure accuracy can result in liability under the FCA.

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PPP Fraud: First Civil Settlement

January 12, 2021

- SlideBelts, Inc., the company's president and CEO, paid \$100,000 in damages and penalties.
 - SlideBelts made false statements to several banks that it was not involved in a bankruptcy proceeding.
 - SlideBelts received a PPP loan for \$350,000.
 - SlideBelts repaid the funds to the lender after a bankruptcy hearing.
- Takeaway:
 - Risk of liability for officers, directors, or board members who may have signed off on untrue or incomplete certifications;
 - No longer a safe-harbor for unqualified loan repayment;
 - Government Contractor disclosure required;
 - TARP as an example suggests enforcement actions can continue for the next decade.
 - Similar actions are ongoing around the world, not just in the U.S.

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DOJ Outlines False Claims Act Enforcement Priorities

February 17, 2021: Acting Assistant Attorney General Brian M. Boynton outlined the Civil Division's key enforcement priorities at the Federal Bar Association Qui Tam Conference.

- Highlighted the 6 main enforcement areas and the number 1 focus was pandemic related fraud.
- Discussed the valuable source of whistleblowers and how whistleblower complaints have been on the rise during the pandemic

May 17, 2021: Attorney General Merrick B. Garland announced that the Department of Justice established a COVID-19 Fraud Enforcement Task Force to enhance enforcement efforts against COVID-19 related fraud.

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Small Business Fraud

- **February 25, 2021:** R&W Builders, Inc. Settlement
 - Allegation: R&W Builders, Inc. fraudulently obtained construction contracts reserved for disadvantaged small businesses by representing it would abide by the 8(a) Program requirements for joint ventures.
 - Settlement amount: \$400,000
 - Takeaway: Contractors must ensure they are complying with the requirements under the 8(a) Business Development Program and cannot divert opportunities to themselves.
- **June 30, 2021:** Sage Consulting Group, Inc. and its president agreed to pay \$4.8 million to resolve allegation that they paid kickbacks to companies certified by the SBA as 8(a) small businesses.
- **September 23, 2021:** Virginia-based Companies Settlement
 - Allegation: Index and Capital Consulting Group, Inc. (CCG) agreed that Index would use its 8(a) certification to bid on government contracts. Index would subcontract the work to CCG in exchange for a fee for each hour of work. CCG paid Index a kickback upon subcontract.
 - Settlement amount: \$1,174, 584

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Alternative Remedy

United States v. Novo A/S, 5 F.4th 47 (D.C. Cir. 2021)

- Issue: Whether a private plaintiff who filed a FCA case is also entitled to a share of the monetary relief that the government obtains in its own separate action when the underlying facts are similar to those in the earlier-filed *qui tam* suit.
- Qui tam relator argued that she was entitled to a settlement amount under the FCA claim and the FDCA claim because the FDCA claim was an “alternate remedy.”
- Takeaway: Relators are only entitled to a share of relief if it is the same type of false or fraudulent claim that a relator could have initiated and continued under the FCA.

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Government Intervenes

United States ex rel. Ross v. Indep. Health Corp., 12-CV-299S, 2021 WL 3492917 (W.D.N.Y. Aug. 9, 2021)

- The government requested and received fifteen 180-day extensions to determine whether it wanted to intervene in the action brought by private individual.
 - Government filed its notice of election not to intervene but noted it was continuing to investigate
- After electing not to intervene, the government filed a motion to intervene under good cause and was allowed to intervene.

Takeaway: Courts are willing to give the government wide latitude in deciding whether to intervene. Contractors should be aware it may still be possible that the government intervenes

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Public Disclosure Bar

- *United States ex rel. Rahimi v. Rite Aid Corp.*, 3 F.4th 813, 2021 WL 2660331 (6th Cir. 2021)
 - Sixth Circuit denied relator’s claim that Rite Aid overbilled by overcharging for generic prescription drugs.
 - The state of Connecticut previously issued a press release that referenced Rite Aid’s Rx Savings Program, the relator’s claim was sufficiently close to transaction in the public domain, and the relator’s knowledge was not “direct and independent.”
- *United States ex rel. Schweizer v. Canon, Inc.*, 9 F.4th 269, 2021 WL 3560911 (5th Cir. 2021)
 - Relator brought a qui tam action against a government vendor which was settled. Relator brought a second qui tam action against vendor’s successor.
 - Fifth Circuit held that the allegations in the current action were based upon the relator’s first action against vendor and barred by FCA’s public-disclosure bar.

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“Knowingly”

United States v. Supervalu Inc., 9 F.4th 455 (7th Cir. 2021)

- Relators alleged that for 10 years, SuperValu knowingly submitted false reports to Medicare Part D and Medicaid.
- Takeaway: Seventh Circuit joins Third, Eighth, Ninth, and DC Circuits requiring the objective reasonableness standard under the FCA. A defendant does not knowingly submit a false claim if:
 1. It has an objectively reasonable reading of the statute or regulation, and
 2. There was no authoritative guidance warning against its erroneous view.

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Other Settlements

January 12, 2021: Insitu Inc. agreed to pay \$25 million to settle allegations that it knowingly submitted materially false cost and pricing data by proposing costs and pricing for new materials but using less expensive recycled, refurbished, reconditions, or reconfigured parts to perform the contracts. The qui tam relator will receive \$4,625,000.

May 27, 2021: Navistar Defense LLC agreed to pay \$50 million to resolve allegation that it fraudulently induced the U.S. Marine Corps to enter contract modifications at inflated prices by creating fraudulent commercial sales invoices to justify the prices.

June 30, 2021: Armed Forces Services Corporation d/b/a Magellan Federal agreed to pay \$4.3 million to resolve allegations that three of their former executives accepted kickbacks in exchange for awarding subcontracts.

October 6, 2021: Crane Company agreed to pay over \$4.5 million to resolve allegations that it failed to comply with Military Specification Mil-V 24624 for high performance butterfly valves and failed to disclose the modifications to the valves on the Qualified Products List Program.

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Establish a Plan for the Investigation

Before you ever get started – establish a plan.

1. Consider whether the investigation should be privileged, and how to protect that privilege
2. Consider conflicts
3. Are there employment law, local law, or other data protection/privacy considerations?
4. Have cultural sensitivities been considered (especially if outside of the U.S.)?
5. Do you have a crisis response plan in place?
6. How will you address employee conflicts in an individual accountability world?

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Investigations Standard Procedure

1. Clearly define the allegation
 - Can come from many sources and in many forms
 - Substance matters more than form
 - Look below the surface of the complain
 - Watch for higher risk allegations or behavior that should raise a flag
 - May include scoping interviews for context, or interviewing the complainant
2. Look for evidence to substantiate or refute the allegation
 - Always treat allegations seriously
 - There are many sources of possible evidence: documents, including paper, electronic (shared drives), emails, texts Skype chats, Teams messages, ephemeral messages (e.g. What's App, Viber, Wechat, etc.), voicemail, key card data, trash, prior complaints on similar topics, and many more
 - Conduct interviews
 - Create a record of the investigation steps conducted (e.g. collection memos, interview summaries, etc.)

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Investigations Standard Procedure Continued

3. Determine whether the evidence in fact substantiates or refutes the allegation
 - Determine findings of the investigation as an investigation team
 - Where appropriate, create a written record of findings.
4. If the allegation is substantiated:
 - Do you have disclosure obligations?
 - Will the investigation team be asked to draw legal conclusions from those facts under existing contracts/laws?



Proposed Amendment

The False Claims Act Amendments Act of 2021 (S.B. 2428)

July 26, 2021: Senator Chuck Grassley (R-IA) introduced a bill to amend the FCA and “beef up the government’s most potent tool to fight fraud.”

- Key Takeaways:
 - Clarify the burden of establishing the materiality element of an FCA claim by narrowing *Escobar* (e.g. shift the burden to defendants to disprove materiality);
 - Shift discovery costs to defendants seeking to disprove materiality;
 - Resolve the circuit split regarding the standard of review that applies to government dismissals of FCA actions (making it more difficult); and
 - Expand FCA’s whistleblower retaliation protections to cover former employees (to address splits on whether the FCA covers post-employment retaliation)

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Policy on Dismissal of Non-Intervened Cases

- **January 2018:** The “Granston” memo (incorporated into DOJ Justice Manual at Section 4-4.111) listed seven non-exhaustive factors to consider when deciding whether to seek dismissal in cases when the government has declined to intervene.
- The 9th Circuit requires “rational relation” to a valid government purpose for dismissal under the FCA. *See United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp.*, 151 F.3d 1139 (9th Cir. 1998).
- The D.C. Circuit has held the government has an “unfettered right” to dismiss a *qui tam* action under the FCA. *See Swift v. United States*, 318 F.3d 250 (D.C. Cir. 2003).
- The 3rd and 7th Circuits require the government to comply with Fed. R. Civ. Proc. 41(a) (requiring good cause) in seeking dismissal. *See United States v. UCB, Inc.*, 970 F.3d 835 (7th Cir. 2020); *Polansky v. Executive Health Resources Inc.*, No. 19-3810 (3d Cir. Oct. 28, 2021).
- The 3rd Circuit also joined with the 6th and 7th Circuits in requiring the government to intervene before moving to dismiss. *See Polansky v. Executive Health Resources Inc.*, No. 19-3810 (3d Cir. Oct. 28, 2021). The D.C., 9th and 10th Circuits do not require intervention prior to dismissal.
- Has not yet been eliminated by the new administration, but is used only in a limited fashion

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Brand Memo on Use of Informal Guidance Rescinded

- Jan. 2018 memo by then-Associate Attorney General Rachel Brand said DOJ “may not use compliance with guidance documents as a basis for proving violations of applicable law” in affirmative civil enforcement cases;
 - Added to Justice Manual section 1-20.000
 - Followed by an Executive Order that agency guidance documents are not binding unless incorporated into a contract (EO 13891, Oct. 9, 2019)
 - Promoted regulation and rulemaking over guidance
- Executive Order 13992 (Jan. 20, 2021) revoked the prior EO
 - Interim Final Rule July 1, 2021 rescinded DOJ regulations limiting use of Guidance Documents
 - Garland Memo adjusted to say guidance alone cannot be the basis for an enforcement action, but attorneys are free to cite to rely on those documents as appropriate to provide deference or persuasive weight to the meaning of an applicable legal requirement

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COVID-19 Workplace Safety Protocols

Executive Order 14042, Ensuring Adequate COVID Safety Protocols for Federal Contractors

- **September 9, 2021:** President Biden issued EO 14042 to implement COVID-19 safeguards for government contractors.
- **September 24, 2021:** The Safer Federal Workforce Task Force issued guidance
 - Vaccine mandate
 - Other safeguards (masking and social distancing)
- **October 1, 2021:** FAR Counsel publishes memo with FAR Clause
 - GSA and DoD publish class deviations for implementing EO 14042

Other agencies: CAAC, DOJ, DHS, and NASA

Potential Implication: Covered contractors that knowingly make a false representation of compliance with the COVID-19 workplace safety protocols could face FCA liability.

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Cybersecurity

October 6, 2021: Deputy Attorney General Lisa O. Monaco announced the DOJ's Civil Cyber-Fraud Initiative.

- The Civil Cyber-Fraud Initiative will use the FCA to pursue government contractors who receive federal funds when they fail to follow required cybersecurity standards.
 - “knowingly providing deficient cybersecurity products or services, knowingly misrepresenting their cybersecurity practices or protocols, or knowingly violating obligations to monitor and report cybersecurity incidents and breaches.”

November 3, 2021: The Cybersecurity and Infrastructure Security Agency issued Binding Operational Directive (BOD) 22-01, Reducing the Significant Risk of Known Exploited Vulnerabilities

- CISA-managed catalog of known exploited vulnerabilities that federal agencies must remediate within specific timeframes.

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Thank you



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