

The False Claims Act

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False Claims Act

- 1863** FCA targets corruption by private contractors to the Union Army
 - » "Use a rogue to catch a rogue"
- 1986** Amendments lower burden of proof and relaxes prior knowledge bar
- 2009** Amendments expand liability and reach of FCA

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False Claims Act

- **Fraud Enforcement and Recovery Act of 2009 (FERA)**
 - Expands liability to indirect recipients of government funds
 - Expands liability for the retention of overpayments
 - Expands the "relation back" doctrine
 - Expands CID authority and government disclosure rights

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False Claims Act

- **The False Claims Act (31 U.S.C. § 3729)**
 - Imposes civil liability on a person or corporation who
 - Knowingly presents or causes to be presented a false or fraudulent claim for payment or approval [to the government];
 - Knowingly makes or uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim [paid by the government]; or
 - Conspires to commit a violation of the False Claims Act
 - And more . . .

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Question

If the Company does not submit any claims to the government for payment, can the Company be liable under the False Claims Act?

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Indirect Government Payments

Case Example

Allison Engine v. United States ex rel. Sanders

The U.S. Supreme Court found that it was insufficient to establish liability under the FCA where a prime contractor used government money to pay the third-party subcontractor's false or fraudulent claim.

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Indirect Government Payments

The False Claims Act

- Prior to FERA
 - Knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval
- Post FERA
 - Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval

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Indirect Government Payments

The False Claims Act

- Prior to FERA
 - Knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the government
- Post FERA
 - Knowingly makes or uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim

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Indirect Government Payments

The False Claims Act

- Prior to FERA
 - Conspires to defraud the Government by getting a false or fraudulent claim allowed or paid
- Post FERA
 - Conspires to commit a violation of [any provision of the FCA]

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Indirect Government Payments

Fraud Enforcement and Recovery Act

FERA changes the law to address the *Allison Engine* decision and make subcontractors liable under the False Claims Act

Amendment was retroactive to reverse the *Allison Engine* decision

Court recently ruled that retroactive amendment was unconstitutional

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Question

If the Company does not intentionally submit false claims to the government for payment, can the Company be liable under the False Claims Act for any overpayments?

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Reverse False Claims

The False Claims Act

- Prior to FERA
 - Knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government
- Post FERA
 - 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

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Reverse False Claims

- **The False Claims Act**
 - Obligation is defined
 - The term “obligation” means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.

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Reverse False Claims

Fraud Enforcement and Recovery Act

- Overpayments can create liability if not refunded
- No affirmative fraudulent act required
- Potential litigation issues
 - What does it mean to knowingly and improperly avoid an obligation?

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Intent

- **“Knowing” or “knowingly” means that the person**
 - has actual knowledge of the information;
 - acts in deliberate ignorance of the truth or falsity of the information; or
 - acts in reckless disregard of the truth or falsity of the information

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Intent

- **U.S. ex rel. MANA v. Allina (8th Cir. 2002)**
 - Knowingly filing a claim that is counter to CMS's interpretation of the regulation may constitute "intent"
- **In Re Cardiac Devices Qui Tam Litigation (D. Conn. 2004)**
 - Appears to effectively create a presumption that claims for payment that do not conform to CMS's interpretation of the Medicare statute or regulation, as set forth in a manual provision, constitute false claims under the FCA

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Damages

- **Violations**
 - \$5,500 to \$11,000 for each claim filed
 - Treble (3x) damages to the federal government
 - Program exclusion
 - Burden of proof
 - Preponderance of evidence notwithstanding the fact that damages are quasi criminal in nature

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Damages

\$100,000 Liability Example

Defense Contractor	(12 Claims/Yr.)	Provider	(2000 Claims/Yr.)
Triple Damages	\$300,000	Triple Damages	\$300,000
Penalty	\$132,000	Penalty (\$11,000 x 2000)	\$22,000,000
Total Recovery	\$432,000	Total Recovery	\$22,300,000

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Damages

- **U.S. v. Lorenzo (1991)**
 - Dentist billed Medicare for oral exams for nursing home patients during course of standard patient exam
 - Dentist mistakenly relied on advice of his employee that this service could be billed to Medicare as a limited consultation
 - Over a 5-yr period, the dentist submitted 3,683 claims to Medicare for reimbursement totaling \$130,719.10
 - Court ruled the government was entitled to treble damages, 3X the overpayment amount and \$5,000 per false claim
 - The damages in this case totaled \$18,807,157.30

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Whistleblower

- **Whistleblower or “qui tam” actions**
 - Actions brought on behalf of the federal government by a private party having direct knowledge of the fraud
 - Whistleblowers or *qui tam* “relators” typically receive 15% - 25% of recovery



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Procedure After Case is Filed

- **Under seal 60 days**
 - Government can ask for extensions
 - And almost always gets them – usually 1-2 years
 - During the time case is under seal
 - Government investigates
 - The government is building a case when the defendant does not even have notice that it has been sued
 - At least no formal notice

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Relation Back

Case Example

U.S. v. The Baylor University Medical Center et al

U.S. cannot keep FCA actions under seal indefinitely

- Qui tam action kept under seal for 8 years while the government investigated
- On appeal, the 2nd Circuit dismissed the case holding that the 3 and 6-year FCA statute of limitations had expired by the time the U.S. intervened in the case

22 U.S. v. The Baylor University Medical Center, 469 F.3d 263 (2d Cir. 2006)

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Relation Back

Fraud Enforcement and Recovery Act

FERA allows for the relation back rule to apply to the original complaint

Effectively and arguably expands statute of limitation

Issues with stale information and the loss/destruction of evidence

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Procedure After Case is Filed

• **Investigations usually include**

- Witness statements
- Civil investigative demands

• **Fraud Enforcement and Recovery Act**

- Allows the government to share information with relator counsel and state enforcement agency
- Makes the use of CIDs easier

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Types of FCA Cases

- **Mischarges**
 - Cases involving upcoding or billing for services or items that were not provided as explained in the claim

- **False certification**
 - Cases where the hospital or other defendant certifies compliance with certain regulations or requirements when the claim for payment is submitted

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Types of FCA Cases

- **Standard of care**
 - In defense procurement industry
 - This is where the products are made with inferior products or with parts that vary from what was specified in the contract
 - In healthcare industry
 - These cases focus on an alleged failure to meet the "quality of care" standards required by federal healthcare programs

- **Reverse false claim**
 - Cases where defendant owes the government money and makes a false statement to avoid paying what the defendant owes – such as misstating the amount or value of natural resources taken from government lands. Also can include failure to refund instances.

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Mischarges

- **U.S. ex rel. Semtner v. McKean and Medical Consultants d/b/a Emergency Physicians Billing Services, Inc.**
 - Billing consultant discouraged coders from using Level 1 and 2 billing codes which have a lower level of reimbursement
 - Court found that "the knowing submission of claims not supported by documentation is a False Claims Act violation"

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False Certification

- **U.S. ex rel. Mikes v. Straus**
 - Relator action by a pulmonologist against former employer (an oncology group)
 - Allegations
 - Failure to calibrate and perform spirometer tests in accordance with the standards and frequency recommended by the American Thoracic Society resulted in inherently unreliable data that made the tests “worthless”
 - Claims submitted for payment on CMS-1500 made both express and implied certifications to Medicare that the tests were in compliance with the relevant standard of care

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Grants

- **Settlements**
 - Yale University (\$7.6 M)
 - Time and effort certifications were not accurate
 - Improper charges to grants
 - Cornell University (\$2.6 M)
 - St. Louis University (\$1 M)
 - University of Connecticut (\$2.5 M)
 - University of Alabama at Birmingham (\$3.3 M)

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Anti-Kickback

- **Settlement: McAllen Hospital d/b/a South Texas Health System (\$27.5 M)**
 - Allegations include financial relationships with physicians to induce referrals
 - “Improper financial relationships between health care providers and their referral sources can corrupt a physician’s judgment about the patient’s true healthcare needs.” DOJ Press Release
- **Accusation: Amgen accused of illegal kickbacks by New York**
 - Free sample to physicians which were billed to insurance companies

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Medical Necessity

- **Settlement**

- Hospitals in Indiana and Alabama agree to settle with government for more than \$8 M
- Allegations involve the furnishing of Kyphoplasty on an inpatient basis when the service should have been furnished on an outpatient basis

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Standard of Care

- **U.S. v. NHC Health Care Corp.**

- Government FCA action against LTC facility
- Allegations
 - Standard of care was so insufficient and negligent that claims submitted to Medicare and Medicaid amounted to fraud
- District Court holding
 - *"At some very blurry point, a provider of care can cease to maintain this standard by failing to perform the minimum necessary care activities required to promote the patient's quality of life."*
 - *"When the provider reaches that point, and still presents claims for reimbursement to Medicare, the provider has simply committed fraud against the United States."*

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Standard of Care

- **Settlements**

- Redding Medical Center (\$54 M)
 - Allegations include unnecessary angioplasties, coronary bypasses, heart catheterizations
 - Facility had to be sold to avoid exclusion
- Vencor (\$20 M)
 - Allegations include insufficient staff, substandard care and failure to meet dietary needs of residents

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Question

If the Company is part of the State, does this provide any protection to the Company under the False Claims Act?

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Common Defenses

- **Some common defenses**
 - Failure to plead fraud with particularity
 - Public disclosure
 - Original source
 - Sovereign immunity for State entities

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Question

The False Claims Act covers federal funds so does the Company need to worry about non-federal funds?

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Ongoing Scrutiny and Compliance

Who is looking for misconduct

- Department of Justice
- Office of Inspector General
- Office of Audit Services
- NIH and other granting agencies
- TrailBlazer
- Recovery Audit Contractors
- Zone Program Integrity Contractors
- Texas Attorney General Office
- Texas Health and Human Services Commission - OIG
- Private whistleblowers
- Others . . .

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Ongoing Scrutiny and Compliance

Moving forward . . .

- Maintain compliance program
- Report perceived misconduct
- Take appropriate corrective action
- Document action
- Audit and monitor / data outliers

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