False Claims Act

Be Forewarned.
Be Forearmed.
Instructors

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First:

Be Forewarned
Background

- Passed in 1863 during the Civil War to address fraud in military procurement contracts
- Also known as “Lincoln’s Law”
- Has undergone substantial amendments by Congress in 1943, 1986, and 2009
- Allows for triple damages
“For sugar it [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories.”

Harper’s Monthly Magazine (1864)
FCA Prohibits

• Knowingly presenting, or causing to be presented, to the U.S. Government a false or fraudulent claim for payment or approval

• Knowingly making, using, or causing to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government
FCA Prohibits (continued)

Conspiring to defraud the Government by getting a false or fraudulent claim allowed or paid

31 USC § 3729(a)
Qui Tam Provisions of FCA

- FCA includes “Qui Tam” provisions that allow private citizens (relators) to sue violators on behalf of the government.
- Relator receives a percentage of the recovery
  - 15% to 25% if government intervenes
  - 25% to 30% if government does not intervene, as well as attorneys fees and costs
Qui tam pro domino rege quam pro se ipso in hac parte sequitur

“He who brings an action for the king as well as himself”
FCA - Powerful Government Weapon

• Over $31.3B in settlements & judgments since January 2009
• In FY 2016, total settlements & judgments of $4.7B
• In FY 2016, qui tam recoveries were $2.9M
Wells Fargo agreed to pay $1.2 billion for improper mortgage practices. Involved Wells Fargo’s Federal Housing Administration (FHA) Direct Endorsement Lender Program.
Top Health Care Settlements

GlaxoSmithKline*
July 2012: Resolved allegations that it promoted drugs including the antidepressant Paxil for unauthorized uses and made false and misleading claims about the safety of the diabetes drug Avandia

Total Settlement
$2.0B

$131.2M

To Whistleblower†

Johnson & Johnson*
Nov. 2013: Resolved allegations of marketing drugs including the antipsychotic Risperdal for unapproved uses

Total Settlement
$1.7B

$167.7M

Pfizer*
Sept. 2009: Resolved allegations of marketing drugs including the painkiller Bextra for unapproved uses

Total Settlement
$1.0B

$102.0M
Meet Dr. William LaCorte

Dr. LaCorte has received $38M as a *qui tam* relator.
Common types of *qui tam* actions

- “Mis Charging” for goods and services (*i.e.* charging employee labor to a government contract even though the employee did not work on the project)
- Submitting false cost and pricing data to the government during negotiations of a contract (“false negotiation”)
Common Types of Qui Tam Actions

• Providing an inferior product or falsely certifying that the product met the specifications or that reliability testing was performed
• False certifications
• Sham quality control – not quality control required by contract
Elements of a FCA Violation

1. A “claim” must be submitted to the Government for payment or approval;

2. The claim must be “false or fraudulent”; and

3. The person must “know” the claim is false.
Element #1: What is a Claim?

Any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the U.S. provides or reimburses any portion of the money or property
Element #1: What is a Claim?

Examples:

- Direct requests for payment
- Indirect requests for payment
- Obligations owed to the Government
- Proposals
- Loan applications
<table>
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<th>Common Scenario</th>
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<td>• Government contract to do particular work (<em>e.g.</em>, R&amp;D)</td>
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<td>• Money is spent on something else</td>
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<td>• Misrepresentations are made in the documents regarding what work is done (Presentment)</td>
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<td>• Contractor is paid on the claim</td>
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<td>• Employee knows about the misspent money and files suit and reports it to the Government (<em>Relator</em>)</td>
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Element #2: False or Fraudulent?

- Expressly
- By omission
- Implicit
  - Regarding the quality of goods or services
  - Regarding the process used to produce goods
  - Regarding representations to form contract
  - Violating laws and regulations
Element #3: What Is Knowingly?

- Actual knowledge.
- Acts in deliberate ignorance of the truth or falsity of the information.
- Acts in reckless disregard of the truth or falsity of the information.
Proof Of Specific Intent to Defraud not Required!
Reverse FCA – 2009 Amendment

- “Obligation” defined as “retention of any overpayment.”
- “knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government”
Case Study #1: False Proposal


Alleged misrepresentations regarding Zylon rate of deterioration in body armor.
False Proposal (continued)

(5th Cir. 2009)

Laid off employee bring action stating fraudulent statements in the SBIR proposals:

- same work on BMDO & AF SBIRs
- misrepresented facilities
- misrepresented “cooperative arrangements” with existing laboratories
- claimed corporation had more experience

Held: Numerous False Claims Act violations
Case Study #2: False Small Business Status

Cadillac Asphalt 2014

Cadillac Asphalt agreed to pay $3.8M to resolve allegations they falsely claimed Disadvantaged Business Enterprise credits on transportation projects, including a runway project for Detroit.
False Small Business Status (cont’d)

_Frazier Masonry Corp. (2014)_

Five California-based masonry subcontractors agreed to pay $1.9M to resolve allegations of misrepresenting disadvantaged small business status for military construction contracts.
Case Study #3: False Cost Estimate

*United States ex rel. Hooper v. Lockheed Martin Corp.*, (9th Cir. 2012)

- Contractors can incur FCA liability by making “false estimates.”
- “Fraudulently underbidding” occurs if the bid is not what the contractor intends to actually charge.
Case Study #3: False Cost Estimate


False statements that persuaded the Government to agree that certain work should be subcontracted could support False Claims Act liability.
Case Study #4: Bid Rigging


$47 million settlement for alleged bid rigging of USAID-funded construction contract.
Case Study #5: GSA Schedule Obtained By Deception

Axway Inc. - $6.2 million settlement (Oct. 2013)

RPM Int’l - $60.9 million settlement (Aug. 2013)
Case Study #6: TINA

CyTerra Corporation - $1.9 million settlement (July 2013)

Truth-In-Negotiations-Act violations for sales of mine detectors
Case Study #7: Defective Product


Alleged failure to comply with quality assurance requirements in F-22 contracts or to flow down applicable quality standards to tooling vendors
Case Study #8: Unapproved Source

Sanborn Map Company - $2.1 million settlement (Feb. 2014)

Unapproved foreign and domestic subcontractors were used to produce maps for U.S. convoy routes in Iraq
Case Study #9: Davis Bacon


Systematic misclassification of employees at a lower rate than required such as electricians classified as “laborers” and “groundsmen”
Submission of false payroll certifications can form the basis of an FCA violation.
Case Study # 10: Overcharging


Allegations of inflating headcount of soldiers using facilities in Iraq.
Case Study #11: Allocation Fraud

Vector Planning and Services Inc. - $6.5M Settlement (Feb. 2014)

Intentionally double-billing cost as both direct and indirect on Navy contract. Amount of overbilling was $3.7M.
Case Study #12: Unallowable Costs

Northwestern University - $2.9M settlement (July 2013)

Spending of NIH grant funds on unallowable costs

Macalan Group, Inc. - $2.1 M settlement (Sept. 2013)

Unallowable costs to deploy personnel
Case Study #13: Not Refunding


Allegation that hospital failed to timely refund overpayments to the government
Case Study #14: GSA Price Reduction Clause

EMC Corporation settlement $87.5M

Mass. based IT company misrepresented its commercial pricing practices
Case Study #15: OCI


SAIC's non-compliance with a COI clause. Invoice held to be an implied certification that SAIC was complying with its COI obligations.
Case Study #16: False Certification

_U.S. v. ex rel Harrison v. Westinghouse Savannah River_ (4th Cir. 2004)

Contractor knew false when certified no COI
Case Study #17: Withholding Info


A LOGCAP III “contractor withheld information about its noncompliance with material contractual requirements”
Case Study #18: Work Not Done

United States ex rel. Daniel Feldman v. van Gorp (2d. Cir. 2012)

Grant recipient can be liable under FCA for not delivering what the Government bargained for.
Case Study #19: Indirect Rates

Calnet Inc. settlement $18.1M, June 2012

Intelligence analysis and language services company overstated its provisional indirect on invoices
Case Study #20: Trade Agreements Act

ADC Telecommunications settlement $1M

ADC submitted false claims to federal agencies when it sold telecommunications goods manufactured in countries prohibited by TAA
Case Study #21: Lobbying

*U.S. ex rel. Rambo v. Fluor Hanford LLC*, (Wash. 2011)

The Government joined a FCA case against Fluor alleging violations of the Byrd Amendment, which prohibits use of appropriated funds for lobbying to influence officials.
You Have Been Forewarned!
Be Forearmed.
What Is At Stake?

• Triple damages
• Penalty of > $5,000 and < $11,000 per claim
• Pay Relator’s costs & attorney fees
• Damage to corporate reputation
• Unhappy shareholders
• Possible exit of concerned employees
• Possible suspension & debarment
What Is At Stake?

Retaliatory Provision

“Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys’ fees.”

[31 USC § 3730(h)]
Some States Have Own FCAs

- California
- Colorado
- Connecticut
- Delaware
- Florida
- Georgia
- Hawaii
- Illinois
- Indiana
- Iowa
- Louisiana
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Montana
- Nevada
- New Hampshire
- New Jersey
- New Mexico
- New York
- North Carolina
- Oklahoma
- Rhode Island
- Tennessee
- Texas
- Virginia
- Washington
- Wisconsin
Qui Tam Road Map

• Relator files complaint under seal
• Department of Justice has 60 days to investigate and decide whether to intervene or not
  • Typically, DOJ asks for extension
• DOJ often uses Civil Investigation Demands (CID) to investigate
• DOJ goal is to decision in nine months
Qui Tam Road Map (continued)

• If DOJ declines
  • Can intervene at later time
  • DOJ declination rate is ~ 75%
  • Relator free to pursue law suit unless DOJ moves to dismiss

• If DOJ intervenes
  • DOJ runs the litigation
  • DOJ often files new FCA allegations
The Qui Tam Dynamics

I. DOJ or U.S. Attorney’s Office

Limited resources – “cherry picks” cases to intervene based on:

• Dollars involved and likelihood of a substantial recovery
• Egregiousness of alleged misconduct
• Quality of vendor’s compliance program
II. The Procuring Government Agency

- Concern for operation impact on being prohibited from using vendor
- Concern over reduced competition if vendor suspended or debarred
- The agency IG typically seeks harsh treatment of vendors
- Suspension & Debarment officials are under pressure to debar
The Qui Tam Dynamics (continued)

III. The Relator

• Typically have strong personal interest
• Often only have limited resources to finance protracted litigation
How To Be Forearmed

I. Prevent

II. Prepare

III. Reaction
I. Prevent

The most likely person to bring a *qui tam* law suit is a disgruntled employee.

• Screen candidate employees thoroughly for history of being troublemaker

• Give employees opportunities to air complaints without fear of retaliation.

• Strong NDAs, releases & severance agreements
I. Prevent

Implement an effective compliance program.
I. Prevent

A compliance program is a management system for preventing inappropriate conduct within an organization. It provides guidance and support across the organization for employees to make appropriate decisions regarding business practices, decisions, and behaviors.
I. Prevent

Why an effective compliance program?
- Creates environment where misconduct less likely
- Whistleblowers’ energies channeled in manner where less “downside” to company
- Hedge against suspension & debarment
- Federal sentencing guidelines benefit
- Possible reduction in criminal & civil penalties
- Protect senior management
I. Prevent

What Makes A Compliance Program Effect?

- BOD & management buy-in
- Company-wide commitment & support
- Enforcement with vigor & visibility
- Each employee understanding expectations and role
I. Prevent

What Makes A Compliance Program Effect?  
• Resources
  o Keep current with changing laws/regs/trends
  o Diligent enforcement/monitoring/evaluation
  o Anonymous reporting capabilities
  o Thorough education and training at all levels
  o Employee understanding & accountability
  o Timely, thorough investigations and follow-up
I. Prevent

FAR Subpart 3.10 – Contractor Code of Business Ethics & Conduct

Expects all contractors to have a written code business ethics and conduct as well as an internal control system to timely disclose improper conduct and take corrective measures.
I. Prevent

FAR Subpart 3.10 – Contractor Code of Business Ethics & Conduct

“a contractor may be suspended and/or debarred for knowing failure by a principal to timely disclose to the Government, in connection with the award, performance, or closeout of a Government contract … credible evidence of a violation of … a violation of the civil False Claims Act.”
I. Prevent

FAR 52.203-13 – Contractor Code of Business Ethics and Conduct

- Requires periodic review to evaluate effectiveness if internal control system
- Requires confidential hot line
- Requires disciplinary action for failure to prevent or detect improper conduct
- Requires reasonable efforts not to employ individuals who have engaged in conduct that conflicts with code of conduct
## I. Prevent

### Compliance Plan Content

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<th>Federal Corrupt Practice Act Guidance</th>
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I. Prevent

Gabig’s Recommendation

To assure the compliance program has the resources and visibility necessary to protect the corporation, any company that derives the majority of its revenue from government contracts should have a Compliance Committee (not unlike it has an Audit Committee and a Compensation Committee).
II. Prepare

• Make an off-site discussion topic how company will re-act if the FBI shows up with search warrant
• Evolve into contingency plan
II. Prepare

Contingency Plan Topics

- No Comment v. Press Release
- Denial v. Admissions
- Commit to full cooperation v. Do not cooperate
- Call an “All-Hands” meeting; answers for Q&A
- Offer to pay legal fees for any employee whom Government wishes to interview
II. Prepare

- For documents vital to carry on operation of the company, have “cloud” backup
- Make sure privileged documents are marked
II. Prepare

• Review insurance coverage and decide what is appropriate
• Review indemnity in employment contracts and bylaws
III. React

Be vigilant for signs of trouble
• Exit interviews of employees
• Rumors about a disgruntled employee
• Activity by DOJ, IG or investigative entities (FBI, CID, AFOSI, NIS etc)
  • CIDs, subpoenas, search warrants, interviews etc.
• Compliance program feedback (e.g., hot line)
III. React

Internal Investigation

- Essential for management to make an informed decision on how to proceed
- Must be impartial and inaccurate
- Unless under attorney-client privilege, govt likely to acquire copy
- Must be promptly done to be proactive (not reactive) to Govt decisions
III. React

Immediate goal – dissuade DOJ from intervening

Long term goal – unless allegations meritless, global settlement with DOJ & agency
III. React

Significance On No Govt Intervention

• If Govt intervenes, most verdicts favor the Govt
• If Govt does not intervene, most verdicts favor Defendant
• Indicative of not being in Govt “cross-hairs”
• Relator likely to have less litigation resources
III. React

Make A Disclosure Statement?  *Pro:*

- Protection against suspended/debarred under FAR Subpart 3.10
- Subsequent qui tam law suits barred
- Proactive strategic of showing good corporate character to avoid S&D
- Govt may reduce FCA damages
- Help persuade Govt not to intervene
III. React

Make A Disclosure Statement? *Con:*

• Gamble that Govt will not learn facts or not make its case
• Negative publicity
• Govt can use admission against vendor
• Concern for shareholder reaction
III. React

Prohibited Qui Tam Lawsuits

• “Parasitic” suits – action already pending on allegations
• “First-to-file” -- another relator has already filed a lawsuit
• Defendant has already disclosed misconduct to the Govt
III. React

Common Defensive Strategies

• Motion to dismiss for failure to pled fraud with specificity as required by Rules of Civil Procedure

• Motion to dismiss for failure to state a claim

• Mere breach of contract, not fraud

• Government complicity
III. React

Common Defensive Strategies (continued)

• Reasonable ambiguity in contract or regulation
• Amount of damages reduced based on benefit received by Govt
• Statute of limitations (six years)
• Severity of penalties violates 8\textsuperscript{th} Amendment
Summary

High Level Of Complexity

• Defendant is battling three different parties with different interests: DOJ, the Agency, and the Relator

• The goal is to prevent a large judgment in FCA damages while avoiding suspension & debarment

• The law is complex and occasionally unsettled

• The dynamics depend on the underlying facts and the aggressiveness/competence of the three adverse parties
Dynamics Of A Qui Tam Lawsuit

Relator – DOJ - Agency
Closing Thought

“How much worse would fraud be without the FCA?”

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