# False Claims Act in 2025: Staying Ahead of Changing Enforcement Priorities

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**Jason McElroy** | Partner and Washington, D.C. Office Managing Partner

Jason is a trial lawyer with nearly 20 years of experience representing clients in complex litigation in federal and state courts. He has obtained verdicts and judgments in jury trials, bench trials and arbitration proceedings throughout the country. Jason litigates a wide range of matters, including claims under the False Claims Act and the Program Fraud and Civil Remedies Act.

**Aloke Chakravarty** | Partner

Al has two decades of experience as a former state, federal and international prosecutor and trial lawyer, and is a nationally recognized investigations and white collar defense lawyer. His focus is on helping clients either avoid government entanglements – particularly in cases where they are not the target – or resolve them with the impact on both legal and business issues in mind.



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# FCA Overview

- Federal government uses the false claims act as a broad tool to combat fraud across many government programs and initiatives
- Civil War Era fraud – "Lincoln's Law" – 1863
- Energized in 1986 by congressional reform
- According to the DOJ as of January 15, 2025, in FY2024 the DOJ recovered $2.9B through the use of FCA in 558 settlements and a record number of 979 Qui Tam complaints were filed
- Qui Tam Relators received approximately $404M in 2024
- Can have parallel Civil and Criminal investigations



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# Also Similar False Claims Acts

- State FCAs – Have similar elements but some significant differences – State AGs enforce
- Some limit or broaden (i.e. CA, IL, NY) categories of fraud
- Some limit Qui Tam ability (i.e.MO, AK)
- Program Fraud Civil Remedies Act (PFCRA) – generally for smaller (<$150,000) specific federal program fraud where DOJ declines



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# Elements Of FCA Claim

1. False or Fraudulent Claim
   - Claim for payment that is based on false information or a false record used to obtain payment. Includes derivative federal payments. See Wisconsin Bell, Inc. v. United States ex rel. Heath.
2. Scienter (Knowledge)
   - The defendant must have acted "knowingly," which includes actual knowledge, deliberate ignorance of the truth, or reckless disregard of the truth.
3. Materiality
   - The false claim or statement must be material to or influenced the government's decision to pay the claim.
4. Causation
   - The alleged falsity in the claim must have caused the government to pay out money.
5. Reverse False Claims
   - A reverse false claim occurs when someone knowingly conceals, avoids, or decreases an obligation to pay the government.



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# FCA Claims

- Statute of Limitations
  - Not more than 6 years from false statement, ***or***
  - Not "more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances"
    - ***Whichever occurs last!***
- Statute of Repose – 10 years from the date of the violation



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# Origins of an FCA Claim

- Whistleblower – "Qui Tam" relator
  - Qui Tam actions permit individuals to stand in the shoes of the government and sue when they have direct knowledge of a false claim
  - Under seal until government makes its intervention decision
  - Government can intervene, not-intervene, or dismiss
  - CIDs
  - Numerous private and commercial incentives
  - Supermajority of Claims initiated
- Independent investigations and referrals from agencies (including state and local entities)



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# Significant FCA Enforcement Areas

- Medicare/Medicaid – DOJ/HHS Working Group
- Government Contracts
- Mortgage Insurance
- Universities
- Pandemic Fraud
- Civil Cyber Fraud Initiative
- Customs/Tariffs
  - *Island Industries, Inc. v. Sigma Corp.* 9th Circuit decision clarified that relators, acting on behalf of the government, may pursue "reverse false claims" actions based on the underpayment of customs duties



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# Theories Giving Rise to FCA

- Three theories of liability under the FCA based on false claim and false statements in connection with the claim (articulated in *Hendow* case):

  1. Factually false
     - Claim is untrue on its face
  2. Legally False/False Certification
     - Express False Certification
       - Claimant inaccurately represents that she complied with a contractual condition
     - Implied False Certification
       - Claimant submits a claim for payment which would otherwise imply that she complied with a contractual condition
  3. Promissory Fraud
     - Liability attaches to each claim submitted to the government under a contract when the contract or extension of government benefit was originally obtained through false statements or fraudulent conduct



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# Escobar (2016) – USCR Holding

- *Universal Health Services, Inc. v. United States ex rel. Escobar* case
- Clarified that the implied false certification theory can be a basis for FCA liability if a claim makes specific representations that are misleading due to a failure to disclose noncompliance with material requirements
- Established a "rigorous" materiality standard. The focus shifted from whether a requirement was a "condition of payment" to whether noncompliance actually mattered to the government's decision to pay



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# Escobar (2016) – Implementation

- Cases since *Escobar* have focused on how to prove this materiality, often examining the government's actual knowledge and payment practices
- *United States ex rel. Rose v. Stephens Institute*
  - The court considered whether the government's recoupment of funds from other institutions for similar misconduct demonstrated materiality
- *United States ex rel. Lee v. Northern Adult Daily Health Care Center*
  - The court dismissed a case where the relators only alleged that the defendant violated conditions of payment without showing materiality to the government's payment decisions
- *United States ex rel. Petratos v. Genentech Inc.*
  - Evidence of government knowledge of the alleged fraud, particularly if the government continues to pay claims despite knowing of potential noncompliance, can be a strong factor in determining materiality



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# Escobar (2016) – Circuit Split

- Strict Approach to Materiality (Defendant-Favorable)
  - Third Circuit: *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 490 (3d Cir. 2017) (holding that information withheld by the defendant was not material because the government continued to reimburse claims with full knowledge of purported noncompliance).
  - D.C. Circuit: *United States ex rel. McBride v. Halliburton Co.*, 848 F.3d 1027, 1034 (D.C. Cir. 2017) (explaining that the government's continued payment after learning about fraud allegations was "very strong evidence" that requirements were not material)
- Lenient Approach to Materiality (Plaintiff-Favorable)
  - Second Circuit: *United States ex rel. Foreman v. AECOM*, 19 F.4th 85, 118 (2d Cir. 2021) (holding that materiality was sufficiently plead in complaint which alleged more than mere possibility that the government would be entitled to refuse payment if it were aware of labor billing violations)
  - Ninth Circuit: *United States ex rel. Campie v. Gilead Scis., Inc.*, 862 F.3d 890, 907 (9th Cir. 2017) (holding that relators sufficiently plead materiality at motion-to-dismiss stage when they alleged "more than the mere possibility" that the government would be entitled to refuse payment if it were aware of the violations)



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# SuperValu (2023) – USCR Holding

- *U.S. ex rel. Schutte v. SuperValu Inc.* clarifies that "knowingly" refers to a defendant's subjective belief, potentially setting a high bar for proving scienter
- However, this means that even if a company's interpretation of a complex regulation is deemed objectively reasonable, it can still be liable under the FCA if it knew the claim was false
- The decision eliminated a defense previously used to defeat FCA cases early in litigation, making it more difficult to get cases dismissed on summary judgment or at the pleading stage



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# SuperValu – Implementation

- Because of added emphasis on subjective intent, the SuperValu decision emphasizes the importance of a company's subjective understanding of its claims, making it crucial to have robust compliance programs and strong evidence of good faith efforts to avoid potential liability under the FCA
- Entities should consider that the there is an increased risk of litigation in order to test the evidence of intent, the need to have a good compliance program and extensive documentation including training, internal policies, and legal advice, to support their claims of good faith



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# FCA Enforcement

- Series of DOJ Memos
- Policy Priorities
- Observations
- Cases
- Supreme Court



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# Sessions Memo (November 2017)

- The "Sessions Memo," issued by then-Attorney General Jeff Sessions in November 2017, prohibited the Department of Justice (DOJ) from using non-binding guidance documents to establish legal obligations or prove violations of law in False Claims Act (FCA) enforcement actions. This policy aimed to reduce "regulation by guidance" and emphasized that only properly promulgated statutes and regulations could be used to determine compliance and establish liability.
- Resulted in limiting the use of agency guidance documents like Medicare manuals, advisory opinions, and guidance documents to build FCA cases.
- Strengthened defenses for parties: The memo provided a stronger basis for arguing that the DOJ should not initiate or pursue FCA cases that rely heavily on alleged non-compliance with guidance documents.
- Appeared to be a signal of less vigorous enforcement



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# Civil Fraud Chief Granston memo (January 2018)

- Articulated non-exclusive factors to consider for Government to dismiss:
  - (1) merit of the claim,
  - (2) duplicity of claims,
  - (3) interference with agency policies or programs,
  - (4) interference with ongoing litigation,
  - (5) disclosure of classified information,
  - (6) weighing the burden of the claim against the expected gain, and
  - (7) frustrating the investigation of the claim.



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# AAG Brand Memo (January 2018)

- Elaborated on the Sessions Memo regarding the limited utility of "Guidance documents" as setting legal standards that would prove an FCA violation
- Permitted use of such documents for other lawful purposes, such as for proving knowledge
- Rescinded in 2021 by AG Merrick Garland
  - While the memo was rescinded by AG Garland, the logic of the argument still stands – and may be bolstered by recent SCOTUS opinions limiting the requirement of courts to defer to agency interpretations



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# Trump DOJ Priorities

- AG Bondi's positions:
  - Support for Whistleblowers and Qui Tam Provisions: Importance of the FCA and the critical role whistleblowers play in uncovering fraud and recovering taxpayer dollars
  - Emphasis on FCA Enforcement
  - Focus on Specific Areas of Fraud: interest in using the FCA to address fraudulent activities related to diversity/equity, gender transition treatments, particularly involving false claims submitted to federal healthcare programs.
  - Commitment to Defending FCA Constitutionality
- Civil Rights Fraud Task Force Announcement
- Observations of Enforcement



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# Observed Enforcement Areas

- Medicare/Medicaid – CMS reimbursement, regulator requirements
  - Expansive theories of potential loss
  - Largest FCA takedown in history 324 defendants, $14.6 billion intended loss
- Government Contracts – certifications
  - SBA Eligibility - MBE
- Universities – PPA certifications
  - Discrimination/Diversity/Equity/Inclusion
  - Other regulatory requirements
- Pandemic Fraud – PPP
- Civil Cyber Fraud Initiative – DFARs and reporting requirements
  - NIST Special Publication 800-171
  - Written Plan, Noncompliant vendors
  - *Morsecorp, Georgia Tech, Raytheon* cases
- Customs/Tariffs
  - *Island Industries, Inc. v. Sigma Corp.* 9th Circuit decision clarified that relators, acting on behalf of the government, may pursue "reverse false claims" actions based on the underpayment of customs duties



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# Civil Rights Fraud Task Force (May 2025)

- On May 19, 2025, the U.S. Department of Justice ("DOJ") announced a new initiative that will utilize the False Claims Act ("FCA") to enforce the President's civil rights agenda, with significant implications for **universities, government contractors**, and other recipients of federal funds
- The initiative aims to increase coordination within DOJ and to provide additional resources to bring these actions
- And, as always, these suits incentivize so-called Relators (whistleblowers) to collaborate with DOJ in order to share in any potential recovery
- Under the initiative, DOJ intends to target entities who receive federal funds and have prioritized those that they believe implement **discriminatory Diversity, Equity, and Inclusion practices, and permit anti-Semitism**



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# DOJ-HHS False Claims Act Working Group (July 2025)

- HHS shall make referrals to DOJ of potential violations of the FCA that reflect Working Group priorities. In addition to priority FCA matters previously announced by the Assistant Attorney General of the Civil Division, the Working Group is announcing the following priority enforcement areas:
  - Medicare Advantage
  - Drug, device or biologics pricing, including arrangements for discounts, rebates, service fees, and formulary placement and price reporting
  - Barriers to patient access to care, including violations of network adequacy requirements
  - Kickbacks related to drugs, medical devices, durable medical equipment, and other products paid for by federal healthcare programs
  - Materially defective medical devices that impact patient safety
  - Manipulation of Electronic Health Records systems to drive inappropriate utilization of Medicare covered products and services



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# Challenges and Defenses

- The expansion of FCA to enforce civil rights compliance may raise complex legal questions, especially concerning the interpretation of "illegal" DEI programs and the materiality of various certifications. Various injunctions have been implemented
  - Materiality and Scienter will be key defenses here, based on past government positions
  - Discovery-intensive defenses that will require demonstrating previous administrations' positions, including prior certifications
- Proactive Compliance: Federal fund recipients, particularly in education and government contracting, may reevaluate DEI programs, review contracts and grants, and strengthen internal compliance systems to mitigate potential FCA risks



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# Challenges and Defenses

- No scienter (lack of knowledge/intent)
- Materiality not met (Escobar standard)
- Public disclosure bar
- First-to-file bar
- Government knowledge (and didn't do much about it)
- Statute of limitations (6 years or 3+7 rule)
- Effective Compliance Program
- Trials are not common
  - FY2024, the vast majority of FCA recoveries (83%) were attributable to Qui Tam suits, and 91% of those were cases where the government intervened, and fewer where cases went to trial



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# Major FCA Caselaw Timeline

| Year | Case Name | Key Holding |
|---|---|---|
| 2008 | *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008) | Held that liability under § 3729(a)(2) required proof that a false claim was intended to be paid by the government<br>Note: overruled in-part by the Fraud Enforcement and Recovery Act (FERA) of 2009 |
| 2016 | *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016) | Endorsed implied false certification theory<br>Established materiality standard |
| 2023 | *United States ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419 (2023) | Justice Thomas, joined by Justices Kavanaugh and Barrett, issue a dissent suggesting that the FCA's Qui Tam provisions might violate Article II of the Constitution. |
| 2023 | *United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739 (2023) | Clarified that scienter is based on the defendant's subjective belief, not an objectively reasonable interpretation |
| 2024 | *United States ex rel. Zafirov v. Florida Medical Associates, LLC*, 751 F.Supp.3d 1293 (M.D. Fla. 2024) | Judge Mizelle dismissed a declined Qui Tam action under the FCA, finding that Qui Tam provision is unconstitutional under Article II. |
| 2025 | *Wisconsin Bell Inc. v. United States ex rel. Heath*, 601 U.S. ---- (2025) | Justice Kavanaugh, joined by Justice Thomas, reiterates that the FCA's Qui Tam provisions "raise substantial constitutional questions under Article II." |



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# Constitutional Concerns re: Qui Tam Provision

- Polansky (2023): Three SCOTUS Justices Question Constitutionality of Qui Tam Provisions in case about Government's right to move to dismiss a case
  - Thomas (dissent), Barrett and Kavanaugh (concur)
  - "I join the Court's opinion in full. I add only that I agree with Justice THOMAS that "[t]here are substantial arguments that the Qui Tam device is inconsistent with Article II and that private relators may not represent the interests of the United States in litigation." In my view, the Court should consider the competing arguments on the Article II issue in an appropriate case. Id. at 442 (J. Kavanaugh concurring) (citation omitted)."
- Wisconsin Bell (2025): Same three justices invite appropriate case to test Constitutionality of Qui Tam provision



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# Major Case Coming Up

- *United States ex rel. Zafirov v. Florida Medical Associates, LLC*, 751 F.Supp.3d 1293 (M.D. Fla. 2024)
  - Finding that the relator provision of the FCA violates the Appointments Clause contained in Article II of the United States Constitution
  - Because relators exercise significant government authority and occupy a permanent government position, relators are required, under the Appointments Clause, to be formally appointed by the Executive Office to a position within the Executive Office, with the advice and consent of the Senate
  - District Court Judge Trump appointee is married to current DOJ Chief of Staff
- Currently on appeal to 11th Circuit



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# General Recommendations

- Top-down culture of compliance
- Maintaining effective Compliance System tailored to industry and current risks
- Offering effective internal Complaint/Whistleblower channels and protections
- Conducting appropriate auditing of government funding streams and derivative streams
- Third-party/vendor management – ensure same standards
- Extra attention on common FCA scrutiny areas: i.e. overbilling, kickbacks, inflating costs, non-service, in/eligibility criteria



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## Questions? Contact Today's Presenters

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