



The Whistleblower's Handbook

A GUIDE TO THE FALSE CLAIMS ACT

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Introduction.....	1
I. Common Questions	1
A. Possible Recovery.....	2
B. Whistleblower Confidentiality.....	3
C. Protections from Retaliation.....	4
D. Federal and State False Claims Acts.....	5
E. Hiring an Attorney.....	6
II. Stages of a Qui Tam Lawsuit.....	7
A. Initial Filings.....	7
1. The Complaint.....	7
2. The Disclosure Statement.....	8
B. The Relator Interview.....	9
C. Litigation with Government Intervention.....	10
D. Litigation without Government Intervention.....	11
III. Examples of Possible Fraud.....	12
A. Medicare and Medicaid Fraud.....	12
1. The Eight-Minute Rule.....	13
2. Fraudulent Coding and Billing.....	14
3. Kickbacks and Self-Referrals.....	15
4. Other Government Funded Healthcare Programs.....	15
B. Government Construction and Procurement Fraud.....	16
C. Grant Fraud	16
IV. Important Legal Doctrines.....	17
A. The Original Source Rule.....	18
B. The First-to-File Rule.....	18
C. Materiality.....	19
D. Scienter.....	20
Conclusion.....	21

Introduction

Each year, whistleblowers help the government recover approximately \$3 billion of public funds. Under the federal False Claims Act (FCA) and its state law counterparts, a whistleblower who uncovers fraud against the government can bring a civil action and receive a share of the recovery. Whistleblowers are an important weapon in combatting waste and abuse of government funds. Without individuals willing to speak out, these valuable public assets would be lost.

The FCA and many analogous state laws contain clauses known as *qui tam* provisions. *See, e.g.*, 31 U.S.C. § 3730(b). These provisions allow whistleblowers to assert the government's right to recover funds lost to fraud, by bringing civil lawsuits in the name of the government. *Id.* The whistleblower—known as the relator—files the lawsuit through a private attorney and informs the government of the case. § 3730(b)(2). Then the government decides whether it wants to intervene, pursuing the case alongside the whistleblower. § 3730(b)(4).

This Handbook is intended as a resource for those who have uncovered fraud and are considering becoming whistleblowers. Part I will address several questions common to potential whistleblowers, including the possible share of recovery and important protections afforded by the Act. Part II will describe the various stages in the litigation process. Part III will provide examples of fraud frequently combated by whistleblowers. Finally, Part IV will discuss several areas of law that are critical to filing a successful claim under the FCA.

I. Common Questions

The following subsections will address several common concerns held by potential whistleblowers. Other questions will inevitably arise during this process, and it is wise to consult an attorney to ensure your rights are fully protected at every stage of the whistleblower process.

A. Possible Recovery

Whistleblowers who file FCA actions on behalf of the government receive a share of any recovery or settlement. Under the Act, damages are calculated as three times the total amount of fraud—commonly referred to as treble damages—plus civil penalties of \$5,000 to \$10,000 for each instance of fraud. 31 U.S.C. § 3729(a). For example, if a defendant defrauded the government of \$3 million in one instance, the damages would be calculated as \$9 million plus a civil penalty ranging from \$5,000 to \$10,000. State false claims acts provide similar damages, although the exact amount set for civil penalties often varies. *See, e.g.*, N.C. Gen. Stat. §1-607(a) (setting civil penalties as \$5,500 to \$11,000 for each instance of fraud). If a claim settles before trial, defendants pay less, typically around double the total value of the fraud, rather than triple.

The whistleblower's share of these damages will vary. This depends on whether the government intervenes and the value of the information provided by the whistleblower. *See* 31 U.S.C. § 3730(d). If the government intervenes, the whistleblower is eligible to receive 15 to 25 percent of the recovery. § 3730(d)(1). Again, the exact amount will be influenced by the value of the whistleblower's information. *Id.* Similarly, if the court determines that the action is largely based on information *other than* that provided by the whistleblower, then the percentage will be decreased to 10 percent or less. *Id.* The whistleblower's recovery also includes costs and reasonable attorneys' fees. *Id.*

If the government does not intervene, whistleblowers may continue on their own. § 3730(d)(2). In that case, whistleblowers can receive a higher percent of the recovery, between 25 to 30 percent. Again, whistleblowers are entitled to reimbursement of costs and reasonable attorneys' fees. *Id.* While the potential recovery is higher when whistleblowers are on their own, government intervention is preferable as whistleblowers can rely on the government's resources to prosecute their cases. *See* Part II.C *infra*.

Any nefarious involvement in the alleged fraud by the whistleblower can seriously diminish recovery. If the court finds that the whistleblower “planned and initiated” the alleged fraud, then the court may reduce the whistleblower’s share as it sees fit. 31 U.S.C. § 3730(d)(3). Furthermore, if the whistleblower is convicted of a crime related to the alleged fraud, then the whistleblower will be dismissed from the action and recover nothing. *Id.*

B. Whistleblower Confidentiality

Unfortunately, whistleblowers are not afforded anonymity under the FCA. However, their identities can be protected while the initial investigation is underway. It is important to understand that the whistleblower’s identity will always be known to the government. Whistleblowers are required to disclose “substantially all material evidence and information” in their possession to the government. 31 U.S.C. § 3730(b)(2). The whistleblower’s identity is a critical aspect of this disclosure, as it allows the government to understand the whistleblower’s knowledge and credibility.

Despite this disclosure, the whistleblower’s identity need not be publicly disclosed, or disclosed to the Defendant, during the initial stages of the lawsuit. Uniquely, FCA actions are filed in camera and under seal. § 3730(b)(2). This means that court filings are not public documents and do not need to be served on the Defendant. The only parties that have access to these sealed documents are the whistleblower, his or her attorneys, the court, and the Department of Justice (DOJ). The seal period lasts for 60 days and the government may—and typically does—request the court extend the seal during their investigation. § 3730(b)(3). While under seal the Defendant is not made aware that there is a lawsuit, let alone the identity of the whistleblower. Also, if the government decides not to intervene during the seal period, the whistleblower may dismiss the case and it will remain under seal.

While there are methods to protect the whistleblower’s identity during the initial stages of litigation, they are not permanent. For the matter to continue to resolution, the whistleblower’s

identity will eventually need to come out. However, there are additional safeguards to protect the whistleblower from retaliation once their identity is known.

C. Protections from Retaliation

Whistleblowers often fear that they will be subject to retaliation, especially when the Defendant is their employer. Fortunately, Congress was cognizant of this concern and included important protections for whistleblowers in the FCA.

Under § 3730(h), whistleblowers are afforded several remedies if their disclosures are met with retaliation in the workplace. The Act states that the whistleblower “shall be entitled to all relief necessary to make [the whistleblower] whole.” § 3730(h)(1). These protections can remedy an array of retaliatory actions, including discharge, demotion, suspension, threats, harassment, or any other type of discrimination in the terms and conditions of employment. *Id.* Possible relief includes reinstatement, two times the amount of back pay, interest on back pay, attorneys’ fees, and court costs. § 3730(h)(2).

In a recent case, the Fourth Circuit Court of Appeals clarified the scope of these whistleblower protections. In *O’Hara v. NIKA Technologies, Inc.*, 979 F.3d 470 (4th Cir. 2017) the lower court ruled that these protections only applied where the whistleblower filed suit *against his own employer*. However, the Court of Appeals overruled the lower court, holding that these protections apply to claims against *any* person or company. This means that a whistleblower who uncovers fraud committed by another company is still protected from retaliation by their own employer.

These important protections are available throughout the whistleblowing process. For example, the protections are available before the actual FCA complaint is filed. *See, e.g., Hutchins v. Wilentz*, 253 F.3d 176 (3d Cir. 2001), cert. denied, 536 U.S. 906 (2002); *see also Childree v. UAP/GA AG Chem.*, 92 F.3d 1140 (11th Cir. 1996), cert. denied, 519 U.S. 1148 (1997). The protections are even

available if the whistleblower is ultimately unsuccessful in their claim. *See, e.g., United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996).

While there are always risks associated with whistleblowing, the FCA provides stringent protections to combat retaliation in the workplace.

D. Federal and State False Claims Acts

Prospective whistleblowers often start out by researching the law on their own. Many run into questions about which false claim act governs their situation. The federal government and several states have false claims acts that contain *qui tam* provisions. While many state laws are nearly identical to the federal law, and contain analogous procedural requirements, causes of action, damages, and whistleblower protections, some do vary from the federal FCA.

The proper law to file under is determined by the government that was defrauded. If the federal government was defrauded, then the whistleblower must proceed under the federal FCA, located at 31 U.S.C. § 3729, *et seq.* If a state government was defrauded, the whistleblower will need to file under the false claims act of that state.

Actions may invoke multiple laws. For example, Medicaid is made up of both federal and state funds. Therefore, a Medicaid whistleblower would likely file under both the federal and state acts, naming both governments as plaintiffs. Furthermore, fraud may span multiple states, in which case a whistleblower may name multiple governments and invoke multiple acts in their complaint.

While most states have some kind of false claims act, not all have *qui tam* provisions. A whistleblower is only allowed to sue on behalf of a government that has expressly authorized it with a *qui tam* provision. Furthermore, some state laws are limited to specific types of fraud, such as Medicaid fraud. *See, e.g., The Tennessee Medicaid False Claims Act*, Tenn. Code Ann. § 71-5-181, *et seq.* To encourage enforcement and uniformity, the federal government offers states an additional 10

percent share of any joint recovery if their laws contain *qui tam* provisions and damages similar to the FCA. The federal Office of Inspector General (OIG) has approved 21 state laws as compliant. A chart of these states is listed below.

Not only can a whistleblower pursue actions under both state and federal law, these actions can generally be filed in either state or federal court. *See, e.g., Soni v. Boston Med. Ctr. Corp.*, 683 F. Supp. 2d 74 (D. Mass. 2009) (finding that state courts have concurrent jurisdiction with federal courts to hear actions under the federal FCA). Choice of venue is always an important litigation decision and should be carefully discussed with your attorney.

State Laws Approved by The Office of Inspector General

California	Illinois	New York	Vermont
Colorado	Indiana	North Carolina	Virginia
Connecticut	Iowa	Oklahoma	Washington
Delaware	Massachusetts	Rhode Island	
Georgia	Montana	Tennessee	
Hawaii	Nevada	Texas	

State Laws Considered Insufficient by The Office of Inspector General

Florida	Michigan	New Hampshire	New Mexico
Louisiana	Minnesota	New Jersey	Wisconsin

E. Hiring an Attorney

Federal courts have held that whistleblowers may not file FCA lawsuits without the assistance of an attorney. *See, e.g., United States ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 92–93 (2d Cir. 2008). This case law is based on the understanding that the government is the true party in interest under the FCA—not the whistleblower—as the government was the party defrauded. Although federal law permits individuals to represent themselves in civil matters, the statute only applies to “their *own* cases,” not the cases of others. 28 U.S.C. § 1654 (emphasis added).

Therefore, prospective whistleblowers must retain counsel in order to file a FCA lawsuit. However, this requirement should not be viewed as an impediment. Most whistleblower attorneys take cases on a contingency basis, meaning they are only paid if the claim succeeds. Also, there are multiple opportunities under the FCA for a defendant to be held liable for attorneys’ fees after a successful claim. *See, e.g.,* 31 U.S.C. § 3730(d)(1).

II. Stages of a Qui Tam Lawsuit

Litigation under the FCA can be a complex and lengthy process, potentially spanning years in the more complex cases. There are many critical stages, such as discovery and motion practice, that are beyond the purview of this Handbook. However, this section will provide a general overview of the most important steps in the FCA process. While some state laws may contain unique procedural requirements, most track the same processes as the federal FCA discussed below, particularly in their disclosure requirements.

A. Initial Filings

In order to initiate a lawsuit under the FCA, a whistleblower will need to submit two important documents: (1) the *qui tam* Complaint; and (2) the Disclosure Statement. While these documents can be amended—if done in a timely fashion—having well-crafted complaints and disclosure statements at the outset can set the tone for the entire action.

1. The Complaint

Every civil lawsuit begins with filing a complaint. This document is the first pleading submitted to the court and lays out the Plaintiff’s factual allegations, causes of action against the Defendant, and the relief requested. The complaint is the lawsuit. Thus, deficiencies in the complaint can cause serious issues for the case overall, including dismissal.

One important concern in FCA complaints is the effect of Rule 9 of the Federal Rules of Civil Procedure. Most complaints are only required to allege “a short and plain statement of the claim showing that the pleader is entitled to relief.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). However, Rule 9(b) requires that a complaint of fraud “state with particularity the circumstances constituting fraud.” Many federal courts have interpreted this as requiring the who, what, when, where, and how of the fraud. *United States of America ex rel. Smith v. Clark/Smoot/Russell, A JV*, 796 F.3d 424, 432 (4th Cir. 2015).

Recently, the Fourth Circuit rendered an important decision outlining the specific requirements of Rule 9(b) as it applies to whistleblower suits. In *United States ex rel. Grant v. United Airlines Inc.*, 912 F.3d 190 (4th Cir. 2018), the court stated that whistleblowers must “provide ‘some indicia of reliability’ to support the allegation that an actual false claim was presented to the government.” *Id.* at 194–95 (quoting *United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 457 (4th Cir. 2013)). This can be accomplished in two ways: by (1) alleging the specific false claims submitted to the

government or (2) alleging “a pattern of conduct that would ‘necessarily have led[] to submission of false claims’ to the government for payment.” *Id.* (quoting *Nathan*, 707 F.3d at 457).

This pleading requirement is critical to any whistleblower claim. If Rule 9(b) is not precisely followed, the entire complaint can be dismissed.

As previously discussed, complaints under the FCA are filed in camera and under seal. 31 U.S.C. § 3730(b)(2). This means that court filings are not served on the Defendant. The seal period lasts for 60 days and the government may—and typically does—request the court extend the seal during their investigation. § 3730(b)(3).

2. The Disclosure Statement

The second document necessary to initiate a FCA lawsuit is the Disclosure Statement. The whistleblower must provide the government with a “written disclosure of substantially all material evidence and information,” in the whistleblower’s possession. 31 U.S.C. § 3730(b)(2). This statement is provided to the local U.S. Attorney’s Office and the Department of Justice (DOJ). The disclosure statement is critical because it is the whistleblower’s first chance to convince the government to intervene.

The disclosure will contain additional information that was not part of the Complaint. Because the whistleblower is asserting the government’s right to recover, all information that is not covered by the attorney-client privilege must be divulged. Disclosure statements typically contain exhibits substantiating the whistleblower’s claims. These may include emails, recorded conversations, medical records, and billing statements. The disclosure also provides more background information on the defendant than the Complaint. This is especially true of corporate defendants. The purpose of this information is to convey to the government that damages are collectable and encourage their intervention.

Unlike the Complaint, the disclosure statement is not a court document, and is not filed with the court. Only government attorneys and investigators will have access to this document. The statement does not even become available to the Defendant once the case is unsealed, absent a showing of substantial need and undue hardship. *See, e.g., United States ex rel. Bagley v. TRW, Inc.*, 212 F.R.D. 554, (C.D. Cal. 2003) (ruling that the disclosure statement was protected as work product); *see also United States ex rel. Miller v. Holzmann*, 240 F.R.D. 20, 22 (D.D.C. 2007) (ruling that attorney-client privilege was not waived when the disclosure was submitted to the government as required by statute).

B. The Relator Interview

The second stage of note in the whistleblower process is the relator interview. There the whistleblower—known as the relator under the FCA—will meet with the local U.S. Attorney’s Office. In the interview an Assistant U.S. Attorney (AUSA) will ask the whistleblower questions to ascertain their knowledge and credibility. The allegations of the disclosure statement will be the focal point of the interview. The AUSA may also wish to discuss any exhibits that were provided along with the disclosure statement.

In addition to one or more AUSA’s, other government officials may be involved, including investigators and additional DOJ attorneys. If the complaint also names one or more states, then attorneys and investigators from those governments may also attend.

While an interview with government attorneys may seem menacing, the relator interview is typically amiable. The whistleblower and the government share a common interest, so it will not be an interrogation. It is intended to help the government understand the disclosure, build a stronger case, and determine if the government wishes to intervene. At all times the whistleblower will be accompanied by his or her private attorneys to answer any questions that may arise during the interview.

C. Litigation with Government Intervention

The third important stage is government intervention. When a whistleblower files a FCA action, the government may elect to intervene and take primary responsibility for prosecuting the action. 31 U.S.C. § 3730(b)(2) and (c)(1). As discussed in more detail below, government intervention provides significant advantages during the remainder of the litigation process. Over 95% of all FCA cases where the government intervenes are successful, while only 5% succeed if the government elects not to intervene.

If the government intervenes, many litigation decisions, like whether to settle, dismiss, or litigate the case, are largely controlled by the government—not the whistleblower—because the whistleblower is asserting the government’s right to recover. This government involvement is not a negative for the whistleblower, and in fact, it is often quite beneficial. After intervention, the whistleblower has the full weight of the DOJ on their side. This firepower helps in many ways. For example, the cost of the litigation is largely shouldered by the government, not the whistleblower. *But see* § 3730(f) (stating that the government is not liable for the whistleblower’s expenses). Importantly, the DOJ can fund and carry out a pretrial investigation that far exceeds any that could be conducted by the whistleblower, building a stronger case and boosting the likelihood of recovery.

Unlike other civil actions, a whistleblower cannot unilaterally decide to accept a settlement offer from the Defendant. The decision to settle is entirely up to the government. § 3730(c)(2)(B). The government may even agree to settle the case over the objection of the whistleblower. *Id.* However, whistleblowers are not wholly unprotected from insufficient settlement amounts. The amount of the settlement must be deemed by the court as “fair, adequate, and reasonable under all the circumstances.” *Id.*

Similarly, the government has the authority to dismiss the action after intervention, over the objections of the whistleblower. § 3730(c)(2)(A). However, the whistleblower is entitled to a hearing

prior to dismissal. *Id.* Such a dismissal is rare and likely the result of a serious flaw in the case as a whole.

If the matter eventually goes to trial, the whistleblower may call and cross-examine witnesses, despite the fact that the government is primarily responsible for the case. *See* § 3730(c)(2)(C). However, this right is also subject to restrictions. If the government shows that the whistleblower's involvement would interfere or delay the proceedings, the court may limit the scope of the whistleblower's involvement at trial. *Id.* While intervention divests the whistleblower of control, it is still the ideal route through litigation and provides significantly more benefit than burden.

D. Litigation without Government Intervention

If the government declines to intervene, a whistleblower may elect to continue the action on their own with private counsel. § 3730(c)(3). Even so, the whistleblower may be required to keep the government in the loop. If the government requests, the whistleblower will be required to provide copies of all court documents. *Id.* As litigation continues, the government has the right to intervene at any time. *Id.*

Although a whistleblower may proceed with litigation on their own, there are important factors to consider. First, all of the benefits of government intervention are off the table. The whistleblower will need to shoulder the cost of litigation and investigate the matter on their own through standard civil discovery procedures. Second, there is likely a good reason that the government decided not to intervene. Frankly, the government is not in the practice of walking away from easy cases that are worth a lot of money. There may be significant legal deficiencies affecting the overall likelihood of success. There may be a collectability issue, meaning that even if successful, the defendant cannot actually pay a court judgement. The case may even be so burdensome that the government lacks the

resources to prosecute the matter effectively. Third, if the whistleblower elects to dismiss the case while it is still under seal, the whistleblower will avoid the risk of retaliation.

While a whistleblower is well within their rights to continue the litigation on their own if the government declines to intervene, that is an important decision that ought to be discussed seriously with counsel.

III. Examples of Possible Fraud

The following sections provide common examples of fraud prosecuted under the FCA. While these examples make up a significant percent of FCA cases, this does not represent every scheme that could give rise to a lawsuit.

A. Medicare and Medicaid Fraud

Medicare and Medicaid fraud is the largest source of fraud combatted by the FCA. According to the Centers for Medicare and Medicaid Services (CMS), \$45.8 billion was improperly billed between July 2012 and June 2013. CMS, *Medicare Fee-For-Service 2014 Improper Payments Report*, 1–2 (2014). This represents nearly 13 percent of all billing during that timeframe. Here are a few common forms of Medicare and Medicaid fraud:

1. The Eight-Minute Rule

Many Medicare and Medicaid services are billed in specific units of time. As individual healthcare providers generally track their own time, this is a significant source of fraudulent billing. One common issue is the eight-minute rule.

Many services are billed in 15-minute increments called “units.” CMS, *Medicare Claims Processing Manual*, 5 § 20.2. To increase flexibility, CMS allows providers to bill within specified time ranges that

are intended to average out to 15-minute unites. *See id.* For example, services lasting between 8 and 22 minutes may be billed as one 15-minute unite. *Id.* at 5 § 20.2C. Manipulation of these ranges to inflate billing is a violation of the 8-minute rule.

These time ranges are highly susceptible to fraud. Referencing the table below, two separate 8-minute sessions can be billed as two unites, while a single 16-minute session can only be billed as one unite. Similarly, providers may manipulate their service time to move into a higher unit range, maximize billing. After all, a 22-minute session can be billed as just one unite, while an extra minute of service increases the bill to two unites. While these ranges were intended to encompass average service times of 15-minutes, they can easily be abused.

Units	Minutes
1	8 to 22 minutes
2	23 to 37 minutes
3	38 to 52 minutes
4	53 to 67 minutes
5	68 to 82 minutes
6	83 to 97 minutes
7	98 to 112 minutes
8	113 to 127 minutes

The pattern continues for treatment times in excess of 2 hours.

2. **Fraudulent Coding and Billing**

CMS has flagged inaccurate billing as a central cause of Medicare and Medicare overpayments. *See CMS, Medicare Fee-For-Service 2014 Improper Payments Report*, 15 (2014).¹ In addition to the time-based violations discussed above, fraudulent coding can occur in a variety of ways. Some common examples of coding fraud include (1) billing for services that are not covered under that code; (2) billing for services that are not provided; (3) billing for services that are not medically necessary; (4) billing for the services of another provider; (5) upcoding to inflate reimbursement rates; and (6) unbundling codes, meaning billing under multiple codes instead of under a single code as a package of services. *Id.* Coding can be complex and affords wrongdoers ample opportunity to perpetrate fraud.

3. **Kickbacks and Self-Referrals**

It is a violation of federal law to offer, pay, or receive kickbacks for referrals in federally funded healthcare programs. 42 U.S.C. § 1320a-7b(b). This is known as the Anti-Kickback Act. Kickbacks can include a wide array of remuneration beyond simple cash bribes exchanged for referrals. They encompass the purchase, lease, or provision of any goods or services exchanged for referrals. Under another federal law, the Stark law, it is also a violation for a physician to refer a patient to a facility if the referring physician has a financial relationship with that facility. 42 U.S.C. § 1395nn (a)(1), (h)(6).

Compliance with these laws is an express condition of payment under Medicare and Medicaid programs. While violations of federal law do not automatically render a claim false for FCA purposes, when certified compliance with those laws is a prerequisite to obtaining a government benefit a false

¹ Available at <https://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/CERT/Downloads/MedicareFeeforService2014ImproperPaymentsReport.pdf>.

certification is a false claim. *See United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 125 F.3d 899, 902 (5th Cir. 1997); *see also United States ex rel. Hopper v. Anton*, 91 F.3d 1261, 1266 (9th Cir. 1996).

In their enrolment application to federally funded programs, providers certify that they will comply with all relevant laws, including the Anti-Kickback Act and the Stark Law.² Thus, healthcare providers who violate this law can be liable under the FCA to whistleblowers and the federal government if those kickbacks or self-referrals resulted in payments from the government. The theory is that federally funded healthcare programs would not have paid those claims if the violations were known.

4. Other Government Funded Healthcare Programs

While the vast majority of healthcare fraud comes from Medicare and Medicaid funding, other healthcare programs can be the basis of a FCA lawsuit. The FCA can be used to combat fraud against any federally funded healthcare programs. This includes Tricare and programs through the Department of Veterans Affairs (VA). Often, when there is Medicare and Medicaid fraud there is also fraud against these programs as well. Generally speaking, if false claims were submitted to a department of the federal government to fraudulently obtain reimbursement, it likely can be pursued under the FCA.

B. Government Construction and Procurement Fraud

False claims submitted under construction and procurement contracts with the government can also serve as the basis for a FCA claim. In this context, false claims can include (1) false statements

² “I understand that payment of a claim by Medicare is conditioned upon the claim and the underlying transaction complying with such laws, regulations, and program instructions (including, but not limited to, the Federal anti-kickback statute and the Stark law), and on the provider’s compliance with all applicable conditions of participation in Medicare.” CMS, *Medicare Enrollment Application*, Form 885A, available at www.cms.hhs.gov/cmsforms/downloads/cms855a.pdf.

and certifications of work performed; (2) false statements of product quantity or quality; (3) billing for nonexistent, worthless, or defective goods; (4) charging exorbitant prices for goods or services; (5) bid-rigging; and (6) misrepresentations of contract eligibility. These claims can span industries including construction, manufacturing, energy, technology, aerospace, and shipping.

This category of FCA actions can offer exceptionally high damages due to the value of government contracts for construction and procurements. For example, in November 2018, the Department of Justice announced that three South-Korean based companies had settled a civil matter related to allegations of bid-rigging in the energy sector for \$154 million. Press Release, Off. of Pub. Aff., U.S. Dep't of Justice, *Three South Korean Companies Agree to Plead Guilty and to Enter into Civil Settlements for Rigging Bids on United States Department of Defense Fuel Supply Contracts* (2018).³ When combined with criminal penalties, the three companies agreed to pay a total of \$236 million to settle these allegations.

C. Research Grant Fraud

Misrepresentations in grant applications can also serve as the basis for a FCA lawsuit. These misrepresentations can take many forms. For example, an application may (1) include fabricated data; (2) misrepresent those involved in the research; or (3) misrepresent the source of the research. Similar misrepresentations may be found in status reports and deliverables, attempting to obtain approval for the next phase in a grant. In addition to outright fabrications, omissions are actionable “where the defendant has an obligation to disclose omitted information.” *United States ex rel. Berge v. Bd. of Trustees*, 104 F.3d 1453, 1461 (4th Cir. 1997) (citing *United States ex rel. Milam v. Regents of the Univ. of Calif.*, 912 F. Supp. 868, 883 (D. Md. 1995)).

³ Available at <https://www.justice.gov/opa/pr/three-south-korean-companies-agree-plead-guilty-and-enter-civil-settlements-rigging-bids>.

The total fraud value in grant cases is easily calculated. The fraud is generally deemed to be the entire amount of the grant. See, e.g., *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 48 (4th Cir. 1992) (“[Defendant] obtained over \$ 3 million in grants from NIH that would not have been awarded save for the false data.”). Because grants are competitive, many courts reason that the government would not have awarded the Defendant anything had it known of the false statements, even if some value was attained through the research.

Importantly, states are not immune from suite in FCA cases. This is critical in grant fraud cases, given the potential for state universities to submit false grant applications. Although the Eleventh Amendment of the Constitution generally protects states from suits by individuals, under the FCA, the United States is the real party in interest and it is capable of suing state governments. *Id.* (citing *Minotti v. Lensink*, 895 F.2d 100, 104 (2nd Cir. 1990)). State institutions often make ideal FCA defendants, as judgements are collectable, and they often are motivated to settle the matter to avoid negative publicity.

IV. Important Legal Doctrines

The FCA pervades with complex legal doctrines that can make or break a case. Below are brief discussions of some of the most critical areas of law. Court precedent on the FCA is constantly developing, and rules vary across federal circuits. Therefore, it is always critical to seek the counsel of an attorney experienced in this area of law.

A. The Original Source Rule

A whistleblower must be the original source of the information in order to bring a lawsuit under the FCA. 31 U.S.C. § 3730(e)(4). To qualify as the original source, the whistleblower’s information

must not have been publicly disclosed. § 3730(e)(4)(A). Information is deemed publicly disclosed if it is the subject matter of a civil or criminal trial; a congressional report, hearing, audit, or investigation; or in the news. *Id.*

In exceedingly limited circumstances a whistleblower may still be the original source even if there has been a public disclosure. For example, if the whistleblower brought a FCA suit and disclosed the information to the government *before* the public disclosure, he is still the original source. § 3730(e)(4)(B). A whistleblower may also become the original source if their information “is independent of and materially adds to . . . publicly disclosed allegations.” § 3730(e)(4)(B).

Failure to qualify as the original source is fatal to a whistleblower suit. As such, it is critical that anyone contemplating a whistleblower suit remain cautious of any disclosure.

B. The First-to-File Rule

Under 31 U.S.C. § 3730(b)(5), when a whistleblower files a FCA lawsuit, no other person may bring a related action based on the same underlying facts. This first-to-file rule functions much like the original source rule, barring subsequent attempts to file suits based on information already available to the government. However, unlike the original source rule, there are no exceptions. *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181 (9th Cir.), cert. denied, 534 U.S. 1040 (2001).

The rigidity of this rule makes it an important point of emphasis during the initiation of a FCA lawsuit. If the whistleblower is concerned that others will win the foot race to file, he may consider expediting the complaint and disclosure statement to ensure compliance with this rule. After all, Rule 15 of the Federal Rules of Civil Procedure allow a party 21 days to amend their Complaint as a matter of course. This means a bare-bones Complaint can be filed to ensure the whistleblower is the first-to-file, then amended to beef up the pleading as necessary.

Furthermore, according to some circuit precedent, this bare-bones Complaint need not pass Rule 9(b)'s heightened pleading standards to qualify as the first-in-time filing. *See United States ex rel. Heineman-Guta v. Guidant Corp.*, 718 F.3d 28 (1st Cir. 2013). As previously discussed, Rule 9(b) requires plaintiffs to plead fraud with particularity, generally requiring the who, what, when, where, and how of the fraud. *Smith*, 796 F.3d at 432. While the heightened pleading standard is mandatory, that requirement can be met in the amended pleading. *See Heineman-Guta*, 718 F.3d at 35. The first-filed complaint need only “provide the government with sufficient notice of potential fraud.” *Id.*

While such a strategy might be necessary to pass the first-to-file test, it is not without risk and should only be pursued if absolutely necessary.

C. Materiality

The False Claims Act requires that the alleged fraud was material to the government's payment decision. This materiality requirement asks whether the government's decision to pay was actually affected by the fraud. The Act defines “material” as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.” 31 U.S.C. § 3729(b)(4). While this definition offers little clarity, the Supreme Court recently rendered a decision that dealt extensively with materiality: *Universal Health Servs. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

In *Escobar*, the Court warns that materiality does not exist where noncompliance is minor. *Id.* at 2003 (citing *United States ex rel. Marcus v. Hess*, 317 U. S. 537, 543 (1943)). Therefore, potential whistleblowers should be wary if the fraud is based on a mere technicality. Materiality can be shown with evidence that the government often refuses to pay claims involving similar non-compliance. *Id.* Contrarily, if the government often pays similar claims with full knowledge that a requirement is lacking, those claims likely are not material. *Id.* at 2003–04.

The Court ends its discussion in *Escobar* with a final warning: “The standard for materiality that we have outlined is a familiar and rigorous one.” *Id.* at 2004 n.6. Courts will not hesitate to dismiss a whistleblower lawsuit for lack of materiality. Thus, this requirement is one of the most important criteria for any potential suit under the FCA.

D. Scienter

Lawsuits under the FCA require that the defendant had a culpable mental state. This is known as the scienter requirement. Simply put, there must be evidence that the defendant “knowingly” defrauded the government. 31 U.S.C. § 3729(a). The Act’s scienter requirement is clarified in § 3729 which provides three definitions of “knowingly.” Scienter is met if the defendant “(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information.” § 3729(b)(1)(A).

While the Act does require some knowledge of the fraudulent nature of defendant’s actions this is not a requirement of intent. In fact, the definition of “knowingly” expressly states that term “require[s] no proof of specific intent to defraud.” § 3729(b)(1)(B).

Scienter can be proven in many ways. Probably the most common way to prove scienter is when the relator raises concerns of possible fraud to the defendant or one of its officers, and those concerns are ignored or dismissed. Even better proof can be found in emails or recorded conversations where the defendant or one of its officers admits actual knowledge of the fraud. Often, scienter is one of the most difficult hurdles in the FCA and largely depends on the documentation collected and disclosed by the whistleblower.

Conclusion

The False Claims Act allows whistleblowers to combat the pervasive and ongoing abuse of public funds. While whistleblowers will always face a certain amount of risk, they are critical in bringing fraud to light. The FCA seeks to encourage whistleblowers by offering protections and a share of any recovery. This area of law is rapidly developing and complex. Whistleblowers should always seek the advice of qualified legal counsel when contemplating a suit under the False Claims Act.

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Miller Law Group's whistleblower section has filed numerous *qui tam* actions in federal courts across the Southeast. To date, they have helped the federal government, eight individual states governments, and numerous whistleblowers combat waste and abuse of public funds.



W. Stacy Miller

Stacy is the founder and managing partner of Miller Law Group. As the head of the firm's whistleblower section, he brings his extensive federal litigation experience to bear on behalf of whistleblowers. Among other awards, Stacy is ranked Preeminent by his peers and was inducted into the National Trial Lawyers Top 100 Trial Lawyers.



Gavin Adams Bell

Gavin began his legal career defending clients facing government investigations. He has represented the North Carolina branch of a major political party, a federal executive branch official, and a bank president. Now, Gavin uses that experience to help whistleblowers investigate and combat fraud against the government.