



HCCA Healthcare Enforcement Compliance Conference  
**False Claims Act Developments**

6 November 2023

1

## The Federal False Claims Act - 31 U.S.C. § 3729(a)(1)

“[A]ny person who:

(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

(C) conspires to commit a violation of subparagraph (A), (B), . . . or (G);

\* \* \*

(G) 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,

is liable . . . for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person.”

Penalties adjust annually for inflation for violations after 11/2/15 - now \$13,508 to \$27,018

| 2

2

## Statute Defines Some Key Terms, But Not Others

---

- **Knowingly** - § 3729(b)(1)
  - Actual knowledge, deliberate ignorance or reckless disregard; no proof of specific intent required.
- **Claim** - § 3729(b)(2)
  - Any request for government money or property even, if the government doesn't hold title.
- **Obligation** - § 3729(b)(3)
  - “[E]stablished duty, whether or not fixed, arising from an express or implied... relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.”
- **Material** - § 3729(b)(4)
  - “[A] natural tendency to influence or be capable of influencing.”
- **False or Fraudulent** – No statutory definition; courts turn to common law

| 3

3

## *Qui Tam* Provisions

---

- Whistleblowers file a civil action for violation of FCA on behalf of themselves and the U.S. Government
- Incentive is potential for significant rewards
  - 15-25 percent of the proceeds if Government intervenes
  - 25-30 percent of the proceeds if the Government declines and relator's attorney litigates
  - Relator's attorney recovers fees and costs
- Filed under seal and Government has at least 60 days to decide whether to intervene

| 4

4

## State False Claims Acts

---

- More than 40 states, territories and municipalities have enacted their own false claims statutes.
  - Territories and Municipalities: Miami-Dade County, Florida (1999); Chicago (2004); Philadelphia (2010); Allegheny County, Pennsylvania (2011); Puerto Rico (2018)
- HHS OIG provides incentives for states to enact Medicaid false claims statutes in keeping with the federal FCA
  - 22 Approved States
- Most state courts apply federal case law under state statutes.
  - Those states include Colorado, Connecticut, Louisiana, Michigan, New Hampshire, Texas and Washington

| 5

5

## False Claims Act in the Supreme Court

---

- Two Health Care False Claims Act cases decided in 2023
- *U.S. ex rel. Schutte et al. v. SuperValu Inc.*
  - Proving “knowing” submission of false claims when falsity turns on the application of an arguably ambiguous rule or regulation
- *U.S. ex rel. Polansky v. Executive Health Resources, Inc.*
  - Whether the government has authority to dismiss an FCA suit after initially declining to proceed with the action, and what standard applies if the government has that authority.

| 6

6

## *U.S. ex rel. Schutte et al. v. SuperValu Inc.*

---

- Relator alleged retail pharmacy chains overcharged FHCPs for prescription drugs by reporting full retail as their *usual and customary* price notwithstanding significant discounts applied to prices charged many patients.
- Issue: Whether and when a defendant's contemporaneous subjective understanding or beliefs about the lawfulness of its conduct are relevant to whether it "knowingly" violated the False Claims Act.
- Court of Appeals held when defendant whose conduct is consistent with an objectively reasonable interpretation of an ambiguous standard, the defendant's subjective intent is irrelevant to establishing the scienter requirement.

| 7

7

## *U.S. ex rel. Schutte et al. v. SuperValu Inc.*

---

- Supreme Court rejected Court of Appeals standard
- Held defendant's liability turns on its actual, subjective understanding of a requirement material to the government's reimbursement decision
- Issues in the decision's wake:
  - Is there a test?
  - Role of collective/corporate knowledge
  - Practical implications

| 8

8

## *U.S. ex rel. Polansky v. Executive Health Resources, Inc.*

---

- Relator filed a *qui tam* suit alleging that former employer caused hospitals across the country to overbill Medicare for various services.
- DOJ declined to intervene; Relator proceeded to litigate on his own.
- After five years of discovery, DOJ concluded suit imposed substantial burden on the government from a discovery perspective and that the suit was not likely to succeed.
- “The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.” 31 USC § 3730(c)(2)(A).
- S. Ct. held DOJ could intervene for good cause and dismiss under Rule 41(a).

| 9

9

## Next Up: FCA Liability for Antikickback Violations

---

- 2010 Amendment to the Anti-Kickback Statute
- Provides that “a claim that includes items or services **resulting from** a violation of this section **constitutes a false or fraudulent claim.**”  
42 U.S.C. § 1320a-7b(g).
- Circuit Courts are split on the meaning of “resulting from”
  - DOJ and two Circuits hold “**proximate cause**” standard applicable under the FCA is sufficient – evidence of “intended consequence” can show connection to false claims
  - Two other Circuits hold statute requires “**but-for**” causation
  - Practical implications

| 10

10

## DOJ Guidelines - Credit for Cooperation

---

- Department of Justice, Justice Manual, 4-4.112 – *Guidelines for Taking Disclosure, Cooperation, and Remediation Into Account in False Claims Act Matters*
- Voluntary Disclosure: disclosing previously unknown false claims and fraud, including disclosing additional misconduct during an ongoing investigation
- Cooperation:
  - Identify culpable individuals
  - Disclose relevant facts and direct government to other sources of evidence
  - Preserve, collect, and disclose relevant documents and information
  - Identify individuals who were aware of relevant information/conduct
  - Make individuals with knowledge available for meetings, interviews, examinations, or depositions

| 11

11

## DOJ Guidelines - Credit for Cooperation

---

- Cooperation (cont'd):
  - Disclose *facts* gathered through company's internal investigation (does not require production of privileged/work product information)
  - Provide information regarding potential misconduct of third parties
  - Provide information in native format and facilitate review of that information
  - Admit liability or accept responsibility
  - Assist in determination or recovery of government's losses
- Remedial Measures
  - Demonstrate an analysis of cause of the misconduct and remediate
  - Make changes to the compliance program
  - Discipline responsible individuals including supervisors who failed to oversee

| 12

12

## DOJ Guidelines - Credit for Cooperation

---

- What Does Not Count?
  - Responding to a subpoena, CID, etc.
  - Disclosure where such disclosure was already required by law, e.g., mandatory disclosure under the Federal Acquisition Regulation
  - Any cooperation if the entity/individual: (1) conceals the involvement by senior management or the board; or (2) demonstrates lack of good faith