



## A- **False Claims Act Enforcement: A Self-Fulfilling Prophecy?**

Since the amendments to the Fraud Enforcement and Recovery Act (FERA), the ~~government~~ Department of Justice (DOJ) has ramped up its enforcement ~~through~~ ~~with more an~~ ~~increased number of~~ qui tam suits and ~~great money gains~~ ~~significant monetary gains~~ (Department of Justice DOJ, 2011). —In 2011, ~~realtors~~ ~~relators~~ filed 638 qui tam suits, ~~which~~ ~~represented~~ ~~representing~~ a 10% increase over the ~~73~~ qui tam suits filed in 2010 and roughly a 50% increase over the 433 qui tam suits ~~sued~~ ~~filed~~ in 2009 (Federal Acquisition Regulations, 2016). ~~The~~ DOJ has recovered more than \$8.7 billion in settlements and judgments since ~~FERA~~ ~~arrived~~ ~~the FERA amendments~~, including \$3 billion in fiscal year 2011 alone (DOJ, 2011).

In ~~the past few~~ ~~recent~~ years, the legislative and executive branches ~~have~~ ~~passed~~ legislation and ~~introduced~~ task force objectives that make it easy for the governments to pursue ~~False Claims Act (FCA)~~ cases ~~at the~~ ~~on~~ state and ~~national~~ ~~federal~~ levels. In 2007, Congress added § 1909 to the Social Security Act ~~to~~ ~~create~~ a financial incentive for States to enact legislation that establishes liability to the State for individuals or entities that submit false or fraudulent claims to the State Medicaid program ~~””””~~ (Publication of OIG’s Guidelines for Evaluating State False Claims Acts, 2006).

For states with a qualifying FCA, § 1909 of the Act provides that the state’s share in any recovery ~~would~~ ~~will~~ grow ~~by 10~~ ~~ten~~ percentage points (Publication of OIG’s Guidelines for Evaluating State False Claims Acts, 2006). —In 2009, Attorney General Eric Holder and ~~Secretary of Health and Human Services Kathleen Sebelius~~ ~~HHS Secretary Kathleen Sebelius~~ announced the creation of the ~~Health Care Fraud Prevention Enforcement Action Team (HEAT)~~ ~~HEAT~~ to prevent fraud in federal health-care programmes and strengthen local, ~~state~~, and federal partnering (DOJ, 2016).

**Commented [CP1]:** Second-level headings in the seventh version of the American Psychological Association (APA) are in the same Times New Roman font as the body, flush left, bold and in title case. For additional guidance concerning the APA style for headings, please see: <https://apastyle.apa.org/style-grammar-guidelines/paper-format/headings>

**Commented [CP2]:** Please check that you have the correct value here. If 638 is a 10% increase, then the original value should be 580, not 73.

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In 2011, the Senate passed the Small Business Contracting Fraud Prevention Act, which ~~that~~ increased penalties for misrepresenting small business status. Under § 3, a person ~~would be~~ subject to civil ~~penalty~~ penalties under the ~~False Claims Act~~ FCA for misrepresenting the status of any business or person

as a small business concern, a qualified HUBZone small business concern, a small business concern owned and controlled by socially and economically disadvantaged individuals, a small business concern owned and controlled by women, or a small business concern owned and controlled by service-disabled veterans

<sup>2</sup> in order to obtain federal contracts (Small Business Contracting Fraud Prevention Act of 2011).<sup>2</sup> That same year, Senators Chuck Grassley (R-IA) and Patrick Leahey (D-VT) introduced the Fighting Fraud to Protect Taxpayers Act of 2011, which ~~among other things~~ seeks ing to reimburse ~~money costs~~ awarded related to FCA prosecutions and requires the attorney general to submit an an annual report to the House and Senate Judiciary Committees on DOJ settlements (see Fighting Fraud to Protect Taxpayers Act of 2011, Senator Patrick Leahey, 2011; S. 890, 112th Cong. (2011)).

~~As things presently stand~~ At present, contractors, businesses, and individuals, such as those reimbursed by third~~3rd~~ parties with government money, are all ~~on the hook~~ liable for costs, regardless ~~if of whether~~ they intended that the government ~~relies on~~ should rely on the statement in making ~~their~~ its payment. The ~~American Hospital Association (AHA)~~ appropriate described the tense situation for contractors, businesses, and individuals when it expressed the concerns ““that aggressive FCA investigations are being initiated upon the discovery of evidence of a mistake or overutilization, making FCA enforcement through negotiated ““settlement<sup>2</sup>”” a self-fulfilling prophecy<sup>2</sup>”” (American Hospital Association AHA, 2011). ~~The health-care industry is~~

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not the only target, as federal prosecutors have expanded FCA investigations and prosecutions to include defence, financial services, and other industries (Department of Justice DOJ, 2013).

Congress should further revise the FCA to define ““false”” and ““fraudulent”” and thereby clarify the boundaries of implied false certification theory. -The revisions could even include ““implied false certification”” and define the boundaries of the theory that way in that manner accordingly. While Although amendments from the 1986 amendments have expanded FCA liability, Congress must remember that it originally enacted the FCA to help the federal government in recovering recover cash monies from private contractors who sold non-working munitions, equipment, and supplies to the union Union army Army (DOJ, 2012).

Although While the qui tam provision was intended to help the government “root out” fraud, the intended its reach of the statute was intentionally limited (Erickson ex rel. United States v. American Inst. of Biological Sciences, 1989 Erickson, 716 F.Supp at 915).

## **B- Scaling Back Implied False Certification Theory**

On 2 May 2012, six6 members of the Senate Finance Committee, including Senator-Grassley, published an open letter to the health-care community, asking for ““the collective wisdom and accumulated insights of thousands of professionals and individual experiences [which] could offer a fresh perspective and potentially identify solutions that may have been overlooked or underutilized”” by the federal government (U.S. Senate CommCommittee -on Finance, 2012). The -AHA (2011) responded with several recommendations, but cautioned that “mistakes are made by hospital staff, the Centers for Medicare & Medicaid Services and program contractors alike-....” Such mistakes are not fraud, and the powerful weapon of the *False Claims Act* (FCA) should not be wielded in a misguided attempt to correct or prevent mistakes (American Hospital Association, 2011).

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Please see this page for further information if you wish:  
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The AHA emphasised that defendants are forced to settle FCA claims Rather than face the potential negative consequences of an adverse jury verdict, which include—treble damages (31 U.S.C. § 3729(a)(1)), civil penalties (31 U.S.C. § 3729(a)(1)), attorney fees (31 U.S.C. § 3730(d)(2)), and, potential debarment or suspension (Federal Acquisition Regulations, 2016). ~~—AHA emphasized that defendants are forced to settle FCA claims.~~ As the AHA noted in its letter, ~~““[t]he FCA imposes stiff penalties—... The threat of an allegation of fraud is no small matter for any hospital””~~ (AHA (American Hospital Association, 2011)). ~~—The same can be said about any other business or individual, large or small (Doan, 2011, p. 69).~~

This raises A number of certain practical concerns ~~are raised~~ for companies, y such as whether they may be exposed to ~~False Claim Act~~ FCA liability for conduct typically challenged by ~~actions by~~ private party actions. For ~~instance~~ example, the ~~First~~ 1st Circuit’s construction of the FCA in US Ex Rel. Hutcheson v. Blackstone Medica ~~Hutcheson~~ permits a relator to claim FCA violations for a party’s alleged failure to comply with a contract provision even when that provision is not ~~n’t~~ an express condition of payment. Ignoring such ~~practical~~ concerns, the ~~First~~ 1st Circuit ~~assured~~ opined that ~~““o’er~~ other means exist to cabin the breadth of the phrase ~~““false or fraudulent””~~ as used in the FCA”” ~~—(US Ex Rel. Hutcheson v. Blackstone Medica, 2011, p. 388~~ Hutcheson, 647 F.3d at 388). ~~After all, the~~ The court reasons, that FCA liability requires that the defendant acted knowingly and that the false claim was material to the government’s decision to pay (p. 388 ~~Hutcheson, 647 F.3d at 388)~~.

Policy reasons call into question the correctness of applying the FCA so liberally. ~~The~~ Westmoreland court observed that while the

~~““provider agreements speak to the compliance of the providers rather than third parties—... this is of no moment as to whether they rendered the relevant claims false or~~

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fraudulent.- The agreements amount to a representation of compliance with the relevant anti-kickback\_