

# The False Claims Act: Does the Road (to Liability) Go On Forever?

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The graphic features a boxing ring with a red glove on the left and a blue glove on the right. The red glove has a circular inset showing the U.S. Capitol building, and the blue glove has a circular inset showing the White House. Above the gloves is a white archway with stars. The background is a blue gradient with a white dotted border at the bottom.

**CONGRESS  
VS.  
WHITE HOUSE**

31st Annual Ounce of  
Prevention Seminar

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# FCA Enforcement Trends

- Increased Criminal Prosecution
  - Jan. 2012 – AG Holder Memo re “Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings”
    - “deterrence of future misconduct”
    - “secure the full range of the government’s remedies”
  - Sept. 2014 – AAG Caldwell tells relator’s counsel gathering that the Criminal Division will “redouble our efforts to work alongside you. Qui tam cases are a vital part of the Criminal Division’s future efforts.”

# FCA Enforcement Trends

- Increased Prosecution of Individuals
  - AG Holder (and others): Focus on individuals provides accountability, fairness and deterrence

## Fraud on Tap at the High Court

- Implications of the Supreme Court’s “Pending” Decision in *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*
  - Argued Jan. 13, 2015
  - Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 – Does the WSLA apply to toll the civil FCA’s 6-year statute of limitations?
    - Court appears ready to rule “no”
  - First-to-File Bar, 31 U.S.C. 3730(b)(5) – Does the bar apply only while the earlier action remains “pending”?
    - Court appears ready to rule “yes” (if it reaches the question)

# FCA Liability Trends

- Failure to state a claim
  - Rule 9(b): How much detail must complaint contain?
    - *U.S. ex rel. Escobar v. Universal Health* (1<sup>st</sup> Cir.)
    - *U.S. ex rel. Reiber v. Basic Contract Services Inc.* (9<sup>th</sup> Cir.)
  - Rule 8(a): Is the alleged fraud “plausible?”
    - *Gonzales v. Planned Parenthood of L.A.*, (9<sup>th</sup> Cir.)
    - *Urquilla-Diaz v. Kaplan University* (11<sup>th</sup> Cir.)
    - *U.S. ex rel. Pecht v. Ducommun* (C.D. Cal.)

## FCA Liability Trends

- Implied Certification Gains Ground
  - *U.S. ex rel. Badr v. Triple Canopy, Inc.*, 775 F.3d 628 (4<sup>th</sup> Cir. 2015)
  - Where is the line between fraud and breach of contract/regulatory non-compliance?
    - *WMATA* – failure to openly compete subcontracts
    - *Sanborn Map* – use of unapproved subcontractors

# FCA Liability Trends

- *Qui Tam* Developments
  - Public Disclosure Bar: actual vs. legal notice to the gov't
    - *U.S. ex rel. Wilson v. Graham Cnty. Soil & Water Conserv. Dist.*, 777 F.3d 691 (4<sup>th</sup> Cir. 2015)
    - *U.S. ex rel. Whipple v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, --- F.3d --- (6<sup>th</sup> Cir. Feb. 25, 2015)
  - Original Source: hardening the knowledge requirement?
    - *U.S. ex rel. Schumann v. AstraZeneca Pharm. L.P.*, 769 F.3d 837 (3d Cir. 2014)
    - *U.S. ex rel Osheroff v. Humana, Inc.*, 776 F.3d 805 (11<sup>th</sup> Cir. 2015)

## FCA Damages

- The Continuing Struggle Among the Courts to Calculate Damages
  - Government continues to assert that damages for some false certifications – those which are pre-conditions to the award of the contract – are the entire contract value.
  - Sampling and extrapolation can substitute for proof of actual damages – *U.S. ex rel. Martin v. Life Care Ctrs.* (E.D. Tenn.)
  - Estimates of how much was improperly paid were calculated by expert witnesses – *U.S. ex rel. Wall v. Circle C Constr.* (M.D. Tenn.)



# Questions?

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