



# A False Claims Act Timeline: From Qui Tam Filed to Trial with the Government

Presented by Brandon C. Helms and Caroline Burgunder

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The False Claims Act “imposes significant penalties on those who defraud the Government.”  
It is not a “vehicle for punishing garden-variety  
... regulatory violations.”

*Universal Health Servs., Inc. v. United States ex rel. Escobar*, 579 U.S. 176, 180, 194 (2016)

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“Congress wrote [the FCA] expansively, meaning ‘to reach all types of fraud, without qualification, that might result in financial loss to the Government.’”

*Cook Cnty. v. United States ex rel. Chandler*; 538 U.S. 119, 129 (2003)

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## Agenda



- The seal period for qui tams
- Investigatory techniques
- Civil Investigative Demands
- Settlement negotiations
- Litigation after government intervention or declination



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## Sixty days goes fast

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- Relators (whistleblowers) file qui tam lawsuits under seal
- Government initially has 60 days to investigate and decide whether to intervene
  - 31 U.S.C. § 3730(b)(2)



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## Extending the seal and election period

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- Government may extend seal and election period after showing good cause
  - 31 U.S.C. <3730(b)(2)-(4)
- Judges vary widely on details DOJ must disclose in motions to extend
- Motions to extend the seal usually remain sealed, even after case is unsealed post-intervention or declination



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## What is “good cause”?



The “good cause” standard “is neither a burdensome nor unfamiliar obligation,” rather “[i]t is a uniquely flexible and capacious concept, meaning simply a legally sufficient reason.”

*United States ex rel. Polansky v. Exec. Health Res. Inc.*, 17 F.4th 376, 387 (3d Cir. 2021) (cleaned up), *aff’d* 599 U.S. 419 (2023)

## Purposes of the seal



- To permit the Government sufficient time to investigate the allegations
- To prevent alerting alleged wrongdoers or putative defendants to possible investigations
- To guard against premature disclosure of sensitive criminal investigations often conducted in tandem with civil investigations

*See, e.g., State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 580 U.S. 26, 35 (2016); *United States ex rel. Grupp v. DHL Express (USA), Inc.*, 742 F.3d 51, 54 (2d Cir. 2014); *United States ex rel. Summers v. LHC Grp., Inc.*, 623 F.3d 287, 292 (6th Cir. 2010), *abrogated on other grounds by Rigsby*, 580 U.S. at 33

## Denying motions for further extensions



*United States ex rel. LaCorte v. Smithkline Beecham Clinical Labs., Inc.*, No. 97-0942, 1998 WL 840012, at \*2 (E.D. La. Nov. 12, 1998)

- Court previously extended the seal four times, for roughly 18 months
- Court warned government in September that its most recent extension would be its last, yet the government filed another motion to extend the seal
- “The court has already been more than generous to the government in allowing extensions, and the government has had ample time to consider whether it will intervene in the case.”

## Denying motions for further extensions



*United States ex rel. Costa v. Baker & Taylor, Inc.*, 955 F. Supp. 1188 (N.D. Cal. 1997)

- Court previously extended the seal three times, for roughly 18 months
- “Defendants have a legitimate interest in building their defense while the evidence is still fresh. The public has a right to monitor the activities of government agencies and the courts.”
- “The court has already been more than generous to the government in allowing extensions, and the government has had ample time to consider whether it will intervene in the case.”

See also *United States ex rel. Brasher v. Pentec Health, Inc.*, 338 F. Supp. 3d 396, 401 (E.D. Pa. 2018); *United States ex rel. Martin v. Life Care Ctrs. of Am., Inc.*, 912 F. Supp. 2d 618, 623 (E.D. Tenn. 2012); *United States ex rel. Smith v. Serenity Hospice Care, LLC*, No. CV 313-001, 2014 WL 4269063 (S.D. Ga. Aug. 28, 2014)

## Sample investigative techniques



- Analyze the complaint and material evidence for legal accuracy and potential deficiencies
- Research relevant CMS and OIG guidance and case law
- Obtain and analyze Medicare, Medicaid, and other federal payor data
- Interview the relator
- Work with expert consultants
- Interview former and/or current employees or other relevant witnesses who are cooperative with the government
- In parallel criminal and civil investigations, AUSAs may coordinate, including sharing evidence obtained through CIDs, HHS-OIG subpoenas and other means—but depending on jurisdiction, may not be able to access and rely on evidence obtained through grand jury subpoenas and grand jury testimony

## Sample investigative techniques



- Civil Investigative Demands (CIDs) to third-party businesses and/or individuals associated with target
  - 31 U.S.C. § 3733
- CID(s) to target:
  - Document requests
  - Interrogatories
  - Sworn testimony
- Medical record reviews/statistical sampling for upcoding allegations or medical necessity allegations
- Expert opinions
- Voluntary interviews

## Process for issuing a CID



- Issued when DOJ has reason to believe a person has evidence relevant to an FCA investigation
  - 31 U.S.C. § 3733(a)(1)
- CID authorization has been delegated from AG and AAG for the Civil Division to U.S. Attorneys in monitored and delegated cases
  - 28 C.F.R. Ch. 1, Pt. 0, App. Subpt. Y
- Formal approval process for CID authorization
- Service and representation issues
- Initial response time is 20 days
  - § 3733(a)(2)(E)
- DOJ may petition a district court to enforce a CID
  - § 3733(j)(1)

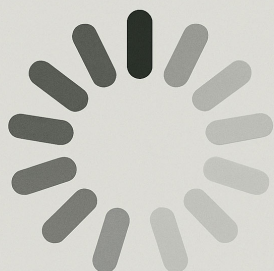
## Defending a CID



- Legal hold
- Attempt to negotiate:
  - Scope
  - ESI
  - Delays in producing certain information
  - Early resolutions
- Internal investigation, craft narrative
- Follow through on commitments
- Keep communication open







**PLEASE STAND BY**

## CID period usually most time-consuming

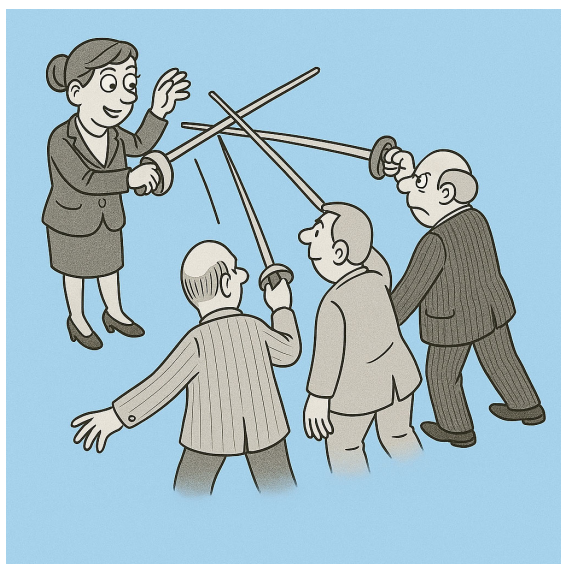
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- Negotiation process can be ongoing: timing, scope, etc.
- Collection and production of documents is laborious
- Government review can take time
- Target waits: clients dislike this stage the most

## DOJ discussions with defense counsel

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- Target tries to tell their narrative, usually to explain their belief that evidence does not support a False Claims Act violation
- Government may offer, or defense counsel may request, a reverse proffer
- Eventually the parties begin settlement negotiations (unless DOJ closes its investigation first)
- If settlement negotiations fail, DOJ must then decide whether to intervene or decline





## Intervention/Declination analysis

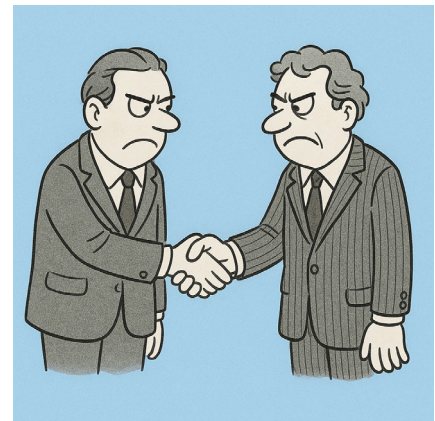


- “Civil remedies against fraud should be vigorously enforced .... to make the government whole, if possible, and to provide a strong deterrent ....”
  - DOJ Justice Manual § 4-4.110
- Individual accountability
  - DOJ Justice Manual §§ 1-18.500 & 4-3.110
- Declination (and possible dismissal):
  - Curbing meritless qui tams
  - Preventing parasitic or opportunistic qui tam actions
  - Preserving government resources
    - DOJ Justice Manual § 4-4.111

## Settlement factors (FCA multiplier)



- Non-exhaustive factors:
  - Nature and seriousness of the violation and the risk of harm,
  - Scope of the violation,
  - Extent of damages,
  - Ability of a wrongdoer to satisfy an eventual judgment,
  - Litigation risks presented if the matter proceeds to trial,
  - Defendants' level of cooperation.
    - DOJ Justice Manual § 4-4.112
- Corporate Integrity Agreements (HHS-OIG)
  - <https://www.oig.hhs.gov/compliance/corporate-integrity-agreements/index.asp>



## More on settlement



- Cooperation credit
  - Voluntary disclosure—something beyond the CID
  - Disclosing facts or opportunities for evidence that are not in the entity’s possession
  - Identifying individuals—those responsible or witnesses
  - Providing information about third parties
  - Assisting in the determination or recovery of the losses
    - DOJ Justice Manual § 4-4.112
- Ability to Pay Analysis
  - DOJ can settle based on the target’s ability to pay
    - DOJ Justice Manual §§ 4-3.110; 4-3.200
  - Requesting party must complete Financial Disclosure Form

## Litigation tactics



- Rule 12(b)(6) motions to dismiss
- Rule 12(b)(1) motions to dismiss relator-led claims
  - *See, e.g., United States ex rel. Zafirov v. Fla. Med. Assocs. LLC*, 751 F. Supp. 3d 1293, 1321 (M.D. Fla. 2024)
- Discovery motions (to compel or for protective orders)
- *Daubert* motions
- Summary judgment motions
- Motions *in limine*



## What to expect in discovery



- Protective orders
- Voluminous data reviews
- Multiple expert reports: falsity (e.g., medical necessity), statistical sampling, materiality, damages
- Attacks on experts: methodology and/or credentials



## What to expect in trial



- Multi-week trials
- Sophisticated counsel
- Battle of experts
- Government themes: pursuit of justice, protecting the public fisc, holding fraudsters accountable
- Defense themes: government overreach, emphasis on steps not taken to show “all-powerful” government cut corners, evidence not black and white



## Case example of FCA trial after lengthy seal period

*United States ex rel. Aldridge v. Corp. Mgmt.*, 78 F.4th 727 (5th Cir. 2023)



- Government intervened in 2015 after 18 seal extensions (qui tam filed in 2007)
- Nine-week trial in early 2020
- Jury found defendants liable for \$10M, trebled to \$32M
- Fifth Circuit found that some allegations in the government's complaint did not relate back to original qui tam, and FCA's tolling provision did not save the government
- Effect: damages cut in half by application of the statute of limitations



## FCA trends 2015 – 2024: New FCA actions

Things are (generally) looking up



Non qui tams in 2024	Qui tams in 2024	HHS non qui tams in 2024	HHS qui tams in 2024
423	979	85	370
↑	↑	↑	↓
Non qui tams in 2015	Qui tams in 2015	HHS non qui tams in 2015	HHS qui tams in 2015
129	639	27	426

## FCA trends 2015 – 2024: FCA actions

Things are (generally) looking up



Non qui tams in 2024	Qui tams in 2024	HHS non qui tams in 2024	HHS qui tams in 2024
\$502,887,566	\$2,417,851,046	\$224,465,398	\$1,451,487,310
↓	↑	↑	↓
Non qui tams in 2015	Qui tams in 2015	HHS non qui tams in 2015	HHS qui tams in 2015
\$738,442,487	\$2,414,916,993	\$160,758,915	\$1,969,226,070

## Questions



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