

THE FALSE CLAIMS ACT (31 U.S.C. §§ 3729-3733) AND HOUSING ASSISTANCE FRAUD

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FALSE CLAIMS ACT HISTORY

- Enacted in 1863 at President Lincoln's request to combat fraud against the Union Army by unscrupulous contractors and ruthless profiteers



FALSE CLAIMS ACT HISTORY

- Rampant profiteering against the Union Army supplied the troops with bullets filled with sawdust, rifle barrels caked with rust and other poor quality supplies.
- “For sugar [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories.” *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 722 F. Supp. 607, 609 (N.D. Cal. 1989) (quoting Tomes, *Fortunes of War*, 29 Harper’s Monthly Mag. 228 (1864)).

FALSE CLAIMS ACT HISTORY

- Since 1860s, False Claims Act has been the principal tool used by the United States to fight fraud against the federal fisc. *United States v. Niefert-White*, 360 U.S. 228 (1968).
- The False Claims Act has been updated and amended periodically to ensure that it remains an effective and modern tool against fraud.
 - Increased use of government contracts and contractors
 - Healthcare fraud – Medicare, Medicaid, TRICARE
 - Insurance and Loan guarantees: FHA Mortgage Insurance, FCIC, SBA, Student Loans, Crop Insurance
 - Grants (US AID, Education, Science and Research)

FALSE CLAIMS ACT HISTORY

- Given the significant federal interest and investment in housing programs, the False Claims Act has been a major enforcement tool in the housing area:
 - FHA residential mortgage insurance
 - VA mortgage assistance
 - USDA's rural development housing program
 - HUD's Section 8
 - FHA's residential nursing home and apartment programs
 - VA Supportive Housing (VASH) (equivalent to Section 8 for veterans)
 - Government-backed purchase of mortgages and mortgage-backed securities



FALSE CLAIMS ACT HISTORY

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- Congress overhauled the False Claims Act in 1986 to strengthen the public-private partnership that is at its core.
 - Increased awards to whistleblowers, known as “relators”
 - Increased ability of relators to recover
 - Increased damages and penalties
 - Further strengthened in 2009 and 2010 through Fraud Enforcement and Recovery Act and Affordable Care Act
 - Long-running tension between providing adequate incentives for individuals with information to come forward and discouraging “parasitic” recoveries

FALSE CLAIMS ACT HISTORY

- False Claims Act has been extraordinarily successful:
 - Since FY 2000: average annual recoveries exceed \$1 billion
 - FY 2015 recoveries were over \$3.5 billion
 - \$2.8 billion of that was related to whistleblower lawsuits (“qui tams”)
 - Over \$30 billion in recoveries since 2009
 - Between January 2009 and the end of FY 2015, relators received over \$3 billion in whistleblower awards

FALSE CLAIMS ACT IN THE EDWA

- The False Claims Act has been a particular focus for the EDWA, with outstanding results, restoring nearly \$250 million to the taxpayers in the last 5 years:
 - 2020: Over \$66 million
 - 2019: Over \$16 million
 - 2018: Approximately \$20 million
 - 2017: Over \$8 million
 - 2016: \$130 million
- Qui tam disclosures have also resulted in dozens of criminal prosecutions and forfeitures



FALSE CLAIMS ACT IN THE EDWA RECENT PAST SETTLEMENTS

- Time charging fraud, overbilling, small business fraud, and quality violations on nuclear cleanup contracts at the Department of Energy Hanford Nuclear Site
- False billing for medically unnecessary cardiac surgical procedures
- Falsification of SNAP (food stamp) quality control data by state agencies
- Fraudulent mortgage origination and reckless underwriting by FHA mortgage lenders
- Fraudulent billing and overcharging of VA under the GI Bill by a for-profit school
- Payment of kickbacks to purchasers on federal supply contracts
- False overbilling for fire protection services at military bases and facilities
- False billing for dental services not performed

FALSE CLAIMS ACT IN THE EDWA SIGNIFICANT ONGOING MATTERS

- Off-label marketing and payment of kickbacks by worldwide pharmaceutical company
- Failure to provide adequate care to Medicare residents of skilled nursing facilities
- Medically-unnecessary surgical procedures by hospital system
- Falsification of Paycheck Protection Program (PPP) loan applications for COVID relief
- Fraudulent crop insurance claims by grain producer to USDA
- Improper use of federal funds for lobbying and political influence activities

FALSE CLAIMS ACT KEY FEATURES

- Public-private partnership – authorizes private parties to file suit on behalf of the United States
- Redresses fraud involving **federal** funds
- Does not require proof of intentional wrongdoing
- Provides for the recovery of treble damages and penalties for each false claim
 - Penalty amounts recently increased significantly
- Civil statute (proof by preponderance of the evidence)

FALSE CLAIMS ACT QUI TAM CASES

- Whistleblower (sometimes called a “Relator”) files a complaint under seal pursuant to 31 U.S.C. § 3730
- Whistleblower provides the DOJ (not the Court) with a disclosure of “all material evidence and information” bearing on the matter
- Initial 60-day investigation period can be extended by the court upon application “for good cause shown”

FALSE CLAIMS ACT QUI TAM CASES

- If the United States intervenes in the action, it takes over and works with the relator in prosecuting the action.
- If the United States declines to intervene in the action, the relator can pursue it on her own or dismiss it voluntarily
 - United States can intervene later “for good cause”
- Relator is entitled to between 15-25% of the proceeds of the action if the United States intervenes and reaches a settlement or judgment (25-30% if the United States declines to intervene)
- Relator is also entitled to reasonable attorney fees, costs, and expenses if action is successful

FALSE CLAIMS ACT QUI TAM CASES

Jurisdictional Exclusions

- Action barred if already in litigation in which government is a party
- Public disclosure – if the fraud has been publicly disclosed, relator is dismissed (but the U.S. can still continue), unless relator:
 - Is an original source; and
 - Disclosed to the U.S. before filing suit
- Actions based on tax code
- Actions against federal agencies or employees
- Actions against states, state agencies, or “arms of the state”

FALSE CLAIMS ACT ELEMENTS

- Claim
- False or fraudulent
- Material to gov't decision to pay
- Knowledge of defendant
- Causation

FALSE CLAIMS ACT “PERSON”

- Individuals
- Corporations (including municipal corporations)
- Localities and local government entities BUT
 - Relators cannot sue states or state instrumentalities under *U.S. ex rel. Stevens v. Vermont Agency of Natural Resources*, 529 U.S. 765 (2000).

CLAIM

- Any request for Government money or property
 - Bills and Invoices
 - Claims by healthcare providers
 - Grant applications/drawdowns
 - Loan applications
 - Claims for insurance benefits/guaranty (e.g. FHA mortgage insurance, crop insurance, SBA guaranteed loans, student loans)
 - Claim for reimbursement of federal funding (e.g. Section 8 Housing Vouchers)
- Claim may be submitted to a third party (grantee, contractor) if the United States has provided money to, or will reimburse, the third party
 - E.g. Section 8 funding is federal but typically provided through a local housing authority

FALSE CLAIM, SECTION 8 PROGRAM

- Improper acceptance of Section 8 “side payments” constitutes a violation of the FCA. (*Coleman v. Hernandez*, 490 F.Supp.2d 278 (D. Conn. 2007)). In *Coleman*, a tenant who was eligible for a Section 8 rent subsidy entered into a rental agreement with a landlord, fixing the tenant’s total rent at \$1,550 per month. The housing authority approved the rental agreement, which provided that the housing authority would pay the landlord \$1,530 per month, and the tenant would pay \$20 per month. Pursuant to Section 8 rules, the landlord was prohibited from charging the tenant any additional payment.
- In *Coleman*, the landlord charged the tenant an additional rent payment of \$60 on six separate occasions. The court held that these requests for “side payments” constituted six separate false claims under the FCA. (490 F.Supp.2d at 281.)

FALSE CLAIM, SECTION 8 PROGRAM

- Courts have consistently concluded that liability arises under the False Claims Act when a Section 8 landlord charges a Section 8 tenant more than the agreed-upon amount of rent, or charges a tenant side payments not included in the Section 8 housing agreement. See, e.g., *U.S. ex rel. Holmes v. Win-Win Real Estate*, 2015 WL 6150594 (D. Nev. Oct. 19, 2015) (collecting cases); see also *United States ex rel. Richards v. R&T Investments LLC*, 29 F. Supp.3d 553 (W.D. Pa. 2014).
- Accepting Section 8 funds under the false premise that a landlord will make utility payments can similarly give rise to liability under the False Claims Act. *U.S. ex rel. Abea v. Odiye*, 2019 WL 2009287 (N.D. Cal. May 7, 2019).
- Falsely certifying the eligibility or suitability of the rental unit can also give rise to liability under the False Claims Act. *Kelly v. Denault*, 374 F. Supp. 3d 884 (N.D. Cal. 2018).

CASE STUDY – U.S. EX REL. AVILA V. SUNRHYS LLC

- Case filed in 2/2021 by NW Justice Project
- Complaint alleged that a Tacoma landlord that owned a property in Walla Walla overcharged a tenant in violation of the requirements of the HUD-VASH subsidized housing program.
- VASH (VA Subsidized Housing) is a Section 8/VA joint program in which the VA assists homeless veterans in finding housing and using HUD Section 8 vouchers to subsidize their rent expenses.
 - Similar to Section 8, the landlord may only charge the tenant a portion of their monthly income as specified in the Housing Assistance Payment agreement with the local housing authority. The U.S. then pays the rest

CASE STUDY – U.S. EX REL. AVILA V. SUNRHYS LLC

- The tenant alleged that the landlord overcharged him by approximately \$105/month.
- The landlord argued that this amount was separately for internet service, which was not covered by the HAP agreement.
 - Note: for a period of time, the landlord did provide internet service
 - However, the HAP agreement indicated that the landlord was responsible for “all utilities” and made no mention of this additional payment
- Once VA and the housing authority learned that the landlord was overcharging, they sent a letter informing the landlord that the landlord was in violation of the rules
- The landlord then promptly evicted the tenant, falsely indicating that she was intending to occupy the property in order to get around COVID-19 eviction moratorium

CASE STUDY – U.S. EX REL. AVILA V. SUNRHYS LLC

- We promptly issued subpoenas to the landlord and began our investigation.
- In state court, the tenant would have only been able to recover the \$105/month (total \$1050) that he was overcharged.
- Through the FCA action, we were able to recover \$16,618 – two times the total amount of the housing subsidy provided by HUD – because HUD would not have provided any subsidy if it had known that the landlord was overcharging.
- We were then able to provide the veteran with a “relator share” of \$4,155, the maximum allowable amount, more than 4 times what he was overcharged
- NW Justice project was also separately able to recover their attorney fees
- The \$16k penalty is a powerful deterrent to this kind of conduct by landlords

CASE STUDY – U.S. EX REL. AVILA V. SUNRHYS LLC

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- “Under the False Claims Act, landlords that overcharge tenants under this program are liable not just to repay the amount that they overcharged their tenants, but for three times the total amount of federal funding that the landlord received in rent support payments plus additional penalties for each month, providing a powerful deterrent to fraud,” added Acting U.S. Attorney Harrington. “I want to especially commend the exceptional investigative work performed by the VA’s Office of Inspector General, Spokane Resident Agency, as well as the excellent work done by the Northwest Justice Project, which represented the whistleblower. Our office will continue to work together with our law enforcement partners, with whistleblowers, and with public interest groups like Northwest Justice Project to hold accountable landlords that abuse critical housing programs.”
 - Jason Root, Special Agent in Charge at the VA Office of Inspector General, stated, “VA OIG’s joint oversight of HUD-VASH is one of the agency’s highest priorities because of the importance of safeguarding grant programs designed to end veteran homelessness. VA OIG thanks the U.S. Attorney’s Office for the Eastern District of Washington and the HUD Office of General Counsel for their partnership and commitment to protecting at-risk homeless veterans.”
 - <https://www.justice.gov/usao-edwa/pr/tacoma-landlord-agrees-pay-16618-overcharging-homeless-veteran-tenant-and-fraudulently>

MATERIALITY

- “Material” under the False Claims Act is defined as having the tendency to influence, or being capable of influencing, the payment of money or property. 31 U.S.C. 3729(b)(4); *U.S. ex rel. Escobar v. United Health Services*, 136 S. Ct. 1989 (2016).
- Courts have consistently concluded that overcharging Section 8 tenants and charging improper side payments can satisfy the materiality requirement. See, e.g., *United States ex rel. Sutton v. Reynolds*, 564 F. Supp.2d 1183 (D. Or. 2007) (mag.); see also *Kelly v. Denault*, 374 F. Supp. 3d 884 (N.D. Cal. 2018).
- Falsely certifying the eligibility and suitability of the rental unit can similarly be material under the False Claims Act. *Kelly v. Denault*, 374 F. Supp. 3d 884 (N.D. Cal. 2018).
- Accepting Section 8 funds under the false premise that a landlord will make utility payments can similarly give rise to liability under the False Claims Act. *U.S. ex rel. Abea v. Odiye*, 2019 WL 2009287 (N.D. Cal. May 7, 2019).

SCIENTER

- Knowledge under the False Claims Act is defined as:
 - Actual knowledge
 - Reckless disregard
 - Deliberate ignorance
- Specific intent is explicitly not required.
 - 31 U.S.C. 3729(b)

DAMAGES AND PENALTIES

- False Claims Act provides for treble damages
- Treble damages are mandatory - court has no discretion to reduce them and they are outside the presence/knowledge of the jury.
- Government's damages under the False Claims Act are the amount it would have paid if statements or claims had been truthful.
- Damages are not required - can have liability (and collect penalties) even if no damages

DAMAGES AND PENALTIES

- Legal issue: in a Section 8 side payment case, are the damages the amount of impermissible rent collected from the tenant, or the entire amount of federal funding paid?
- Courts have most often held that because all federal funding was conditioned on not abusing the program by accepting improper side payments, damages are appropriately measured by the full amount of Section 8 funding, rather than merely the amount of the additional side payments.
 - *United States ex rel. Harrison v. Baran*, 2015 WL 5446833 (C.D. Cal. Aug. 28, 2015); *United States ex rel. Cummings v. Hale*, 2017 U.S. Dist. LEXIS 142481 (N.D. Cal. May 17, 2017) (mag.); see also *U.S. ex rel. Carmichael v. Gregory*, 270 F. Supp. 3d 67 (D.D.C. 2017); *Coleman v. Hernandez*, 490 F. Supp. 2d 278 (D. Conn. 2007);
 - But see *United States ex rel. Wade v. DBS Investments, LLC*, 2012 WL 3759015 (S.D. Fla. Aug. 29, 2012) (where a landlord charged a tenant more than permitted under the Section 8 subsidy program, the Government's damages were the additional rent charged to the tenant); *United States ex rel. Stearns v. Lane*, 2010 WL 3702538 (D.Vt. Sept. 15, 2010) (where landlord in Section 8 program got additional rent from his tenant which under Section 8 he was not allowed to collect, FCA damages were the amount collected from the tenant).

DAMAGES AND PENALTIES

- Additionally, courts have consistently concluded that mandatory penalties of between \$11,665 to \$23,331 (as of 2020) attach to **each month** for which rent was overcharged.
 - *U.S. ex rel. Carmichael v. Gregory*, 270 F. Supp. 3d 67 (D.D.C. 2017).
- The relator's share of 15%-25% (for intervened cases) and 25-30% (for declined cases) is apportioned based on the full amount of the recovery (treble damages plus penalties).

DAMAGES AND PENALTIES

- The False Claims Act is an incredibly powerful enforcement and remedial tool in Section 8 overpayment cases.
- E.g. Landlord improperly collects \$50 utility “fee” side payment in addition per month beyond agreed upon Section 8 rent on a \$1,000/month apartment for 12 months.
 - Tenant was overcharged \$600 in total ($\$50 \times 12 \text{ months}$)
 - BUT False Claims Act single damages (i.e. amount of ineligible federal funding) is **\$12,000**
 - Total False Claims Act judgment would be up to **\$315,972** (\$36,000 in treble damages and appx. \$300k in penalties, of which relator would be entitled to up to \$78,993 (assuming 25 percent share), plus the full amount of reasonable attorney fees.

STATUTE OF LIMITATIONS

- Statute of limitations is typically 6 years from payment of the claim for federal funding
- In some cases, can go back 10 years so long as suit is filed within 3 years of knowledge of facts material to the right of action.

TACTICAL CONSIDERATIONS, QUI TAM CLAIMS

- Where to file:
 - Case can be filed anywhere a violation occurred or where a defendant can be found or transacts business
 - False Claims Act provides for nationwide service of process for trial subpoenas
 - United States has broad investigative authority to investigate case regardless of where suit is filed or where conduct occurred
 - Discussion with U.S. Attorney's Office prior to filing is strongly encouraged
 - Research case law in various jurisdictions in which you are contemplating filing

TACTICAL CONSIDERATIONS, QUITAM CLAIMS

- The Qui Tam Complaint:
 - False Claims Act complaints sound in fraud and therefore must meet the special particularity requirements of Fed. R. Civ. P. 9(b)
 - Additional detail will assist the government's investigation
 - Qui tam complaint often disclosed to defendant during investigation pursuant to limited lift of seal
 - Relator is required by law to provide the United States Attorney's Office with all material information (documents, names of witnesses, etc.) in relator's possession.
 - The more information the relator is able to provide, the higher the relator share is likely to be.

SELECTED RECENT DOJ SECTION 8/HOUSING ENFORCEMENT

- United States ex rel. Willis v. Mae Ava Carse Properties, LLC (E.D. Mich.) (12/4/20)
 - \$150,000 settlement for collecting excess rent from Section 8 tenants
 - <https://www.justice.gov/usao-edmi/pr/us-attorneys-office-reaches-settlement-under-false-claims-act-over-allegations>
 - Univ. of Michigan Law School Clinic represented relator, the section 8 tenant
- U.S. v. Goodfish (D. Del.) (12/18/20)
 - U.S. files suit under FCA against landlord for charging higher rents for Section 8 rental units
 - <https://www.justice.gov/usao-de/pr/united-states-brings-federal-false-claims-act-suit-against-newark-landlord>
- U.S. ex rel. Ling v. City of Los Angeles (C.D. Cal.) (2/6/20)
 - \$3.1 million FCA settlement against City housing authority for violating accessibility in development of affordable housing
 - <https://www.justice.gov/opa/pr/crala-agrees-pay-31-million-resolve-alleged-misuse-federal-funds-inaccessible-housing>
 - Fair Housing Council of San Fernando Valley represented relator, a disabled tenant
- U.S. v. Ortiz; U.S. v. 44 Hawthorne LLC (D. Mass.) (3/6/2020) (9/24/2020)
 - <https://www.justice.gov/usao-ma/pr/roxbury-landlord-agrees-settle-false-claims-act-allegations>
 - \$15,500 in 2 FCA settlements against landlord for charging improper water utility payments and other fees to Section 8 tenant

QUESTIONS

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