

FCA Basics: Elements of a Claim

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by Alex Hontos, Chris DeLong, Matthew Gillespie, Annie Boeckers, and Joe Coffey

This is the second post in the Dorsey FCANow Blog's FCA Basics Series covering the fundamentals of the False Claims Act ("FCA"), outlining FCA procedure, and highlighting key facets of FCA practice. Today's post introduces the elements of an FCA Claim.

The Basic Elements of an FCA Claim

There are several theories of liability under the FCA and the elements of each can vary based on the conduct targeted. But five elements are generally applicable. First—presentment. Generally, there must be a claim for payment submitted to the federal government or its agents. A claim can include invoices, requests for reimbursement, or any demand for government funds. An obligation could be royalties due on leases or an overpayment by the government which the contractor has retained. Second—falsity, a claim, a record, or a statement must be false or fraudulent, which can include claims for services not provided or even misrepresentations about compliance with applicable statutes, regulations, or contractual provisions. Third—scienter, the person or entity must have acted "knowingly." Under the FCA, "knowingly" means actual knowledge, deliberate ignorance, or reckless disregard of the truth or falsity of the information. Fourth—materiality, the falsity must be "material," meaning it has a natural tendency to influence, or is capable of influencing, the payment or approval of the claim. Fifth, the government must have been damaged.

Falsity, scienter, and materiality all deserve a closer look.

Falsity—there are two basic kinds of falsity, factual and legal. A claim is factually false when it asserts incorrect information. For example, a claim for payment for five hundred sheets of metal when only five sheets were delivered is factually false. A claim is legally false where a required condition of payment under a statute, a regulation, or contract is not met. For example, a healthcare provider submits a claim for services that must be provided by a licensed professional, but the service was done by a non-licensed

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professional.

Scienter—an individual must *knowingly* submit, or cause to be submitted, a claim that is false or misleading. The text of the FCA defines knowing and knowingly as “actual knowledge,” “deliberate ignorance,” or “reckless disregard,” and no specific intent to defraud is required. 31 U.S.C. § 3729. Actual knowledge is direct or explicit awareness of a particular fact or situation. Deliberate ignorance is purposeful avoidance of learning the truth despite a risk of falsity. And reckless disregard is acting despite knowing there is a substantial risk of falsity. In *United States ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739 (2023), the United States Supreme Court recently explained that scienter under the FCA refers to an individual’s subjective beliefs—i.e. whether the defendant actually knew the claim was false—not what an objectively reasonable person should have known or believed.

Materiality—a crucial component of liability, a false statement or claim must be “material” to the government’s decision to pay or approve a claim. The falsehood must have a natural tendency to influence, or be capable of influencing, the government’s payment decision. In *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016), the United States Supreme Court explained that materiality is a “rigorous” and “demanding” standard. Materiality cannot be found where noncompliance with federal requirements is minor or insubstantial. Moreover, the government cannot simply create materiality by making compliance with a requirement a condition of payment, especially if the government routinely pays a claim despite knowledge of violations. For example, if the government contracts for health services and adds a requirement that contractors buy American-made staplers, but routinely pays claims on the same contracts fulfilled by contractors using foreign staplers, in all likelihood noncompliance with the stapler provision is not material under the FCA.

Elements of an FCA Conspiracy Claim

A conspiracy to commit a violation of the FCA can also give rise to liability. Conspiracy requires an agreement between two or more persons to commit a violation of the FCA, such as agreeing to submit or cause the submission of false or fraudulent claims to the government. Moreover, the conspirators must have the intent to achieve the objective of the conspiracy, meaning they knowingly agreed to engage in conduct that would defraud the government. Courts diverge on whether damages are required to demonstrate an FCA conspiracy.

Elements of an FCA Retaliation Claim

The FCA creates a private right of action for whistleblowers who experience retaliation. Unlike other FCA claims, these retaliation claims attach directly to the whistleblower and are not brought on behalf of the United States. To qualify, the whistleblower must first engage in protected activity, such as investigating, reporting, or taking action in furtherance of a potential or actual FCA violation. Second, the whistleblower’s employer must know the whistleblower engaged in protected activity. Third, the whistleblower must suffer an adverse employment action, such as termination, demotion, harassment, or

some other form of discrimination. Fourth, there must be a causal connection between the protected activity and the adverse action, meaning the adverse employment decision is taken because of the individual's involvement in protected FCA-related conduct.