

# False Claims Act Developments

University of Texas School of Law Continuing Legal Education

*10<sup>th</sup> Annual Government Enforcement Institute*

September 19, 2024

## Panelists

Danny S. Ashby, Partner  
O'Melveny | Dallas

Holly Clarke, Head of Legal - Defense  
GKN Aerospace | Westlake

Laura Kidd Cordova, Partner  
Jackson Walker | Houston

Scott Hogan  
U.S. Attorney's Office | Dallas

## Moderator

Jay Dewald, Partner  
Norton Rose Fulbright | Dallas, San Antonio

1

## False Claims Act: The Basics

- Government's primary fraud enforcement tool
- FCA litigation can be commenced by relators (Qui Tam)
  - Receive a portion of recovery
- Every Case Presents Potentially Huge Damages Model
  - Penalties for violation of the FCA (\$13,508 to \$27,018 per claim)
  - Treble damages
  - Attorney's Fees
- Many States have their own FCA statutes

2

2

# False Claims Act: 2023 Statistics

	<u>2023</u>	<u>2022</u>
# of FCA Cases Filed	1212	948
# of QT	712 (59% of cases)	652 (69% of cases)
Total Recovery	\$2.68B	\$2.2B
Healthcare	\$1.8B (67% of total)	\$1.7B (77% of total)
Qui Tams	\$2.3B (86% of total)	\$1.9B (86% of total)

3

3

# False Claims Act: Scienter

- **Negligence is not enough, but ...**
  - “Knowing” or “knowingly”
    - Actual knowledge, Deliberate ignorance, Reckless disregard
  - No specific intent to defraud required
- **U.S. *ex rel.* Schutte et al. v. SuperValu Inc. et al.**
  - “The FCA’s scienter element refers to respondents’ knowledge and subjective beliefs—not to what an objectively reasonable person may have known or believed.”
  - “If a defendant knows that he ‘lack[s an] honest belief’ in the statement’s truth, that is often enough to establish scienter for fraud.”
  - Subjective Intent is the Focus ... Not Post-Hoc Objectively Reasonable Explanations
- **Scienter element must be “rigorously” applied**

4

4

# False Claims Act: The Evolution of *Escobar*

## Implied false certification theory

- Where claim does not merely request payment, but also makes specific representations about goods or services provided, failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes representations **misleading half-truths**

## Materiality standard

- Liability attaches if omission of noncompliance with statutory, regulatory, or contractual requirements is **material** to the government's decision to pay
- Not enough to show "Government would be entitled to refuse payment were it aware of the violation"
- "[I]f the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is **very strong evidence** that those requirements are **not** material"

## Current State of the Case Law

5

5

# False Claims Act: Dismissals

- **"(c)(2)(A) or "Granston" Dismissals**
  - "The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." 31 USC § 3730(c)(2)(A)
- ***U.S. ex rel. Polansky v. Executive Health Resources (June 2023)***
  - Qui Tam Relators vs. Government
  - SCOTUS held that government can move to dismiss later in a case over relator's objection even if it did not initially intervene
- ***Practical Considerations for Requesting Government Dismissal***

6

6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

## Title search: False Claims Act Developments

First appeared as part of the conference materials for the  
10<sup>th</sup> Annual Government Enforcement Institute session  
"False Claims Act Developments"