Campbell Law Review

Volume 43 | Issue 3 Article 2

2021

Fraud in the Pandemic: How COVID-19 Affects *Qui Tam* Whistleblowers and The False Claims Act

Gavin A. Bell

W. Stacy Miller II

Fraud in the Pandemic: How COVID-19 Affects *Qui Tam* Whistleblowers and The False Claims Act

GAVIN A. BELL* AND W. STACY MILLER, II**

INTRODUCTION

The False Claims Act (FCA)[1] and its *qui tam* provision[2] allow whistleblowers who uncover fraud against the government to bring a civil action and assist in the recovery of assets.[3] This little-known law has become the government's most powerful tool to combat fraud and is responsible for the recovery of more than $59 billion since its amendment in 1986.[4] As with most things, the COVID-19 pandemic has impacted the FCA and its *qui tam* practice. As of April 1, 2021, the federal government allocated a total of $3.0 trillion to address the pandemic.[5] The public must rely on the FCA and its whistleblowers now more than ever to protect this public investment. The FCA's most avid proponent, Senator Chuck Grassley, noted:

> Today . . . we find ourselves in the midst of another crisis: the Covid-19 pandemic. And today, Congress and the American people depend on whistleblowers to tell us about wrongdoing, just as much as our founding fathers did. In fact[,] we depend on them more. Because as the government

---

* Gavin received his J.D. *cum laude* from Campbell University School of Law and is an associate attorney with Flannery | Georgalis, LLC in Charlotte, North Carolina. His practice focuses on government investigations, white collar criminal defense, and assisting clients in the healthcare industry maintain compliance. Before joining Flannery | Georgalis, LLC, Gavin represented whistleblowers assisting the federal and state governments combat fraud. While at Campbell, Gavin served on the Board of Editors for *Campbell Law Review*, and he extends his sincere thanks to the law review for their assistance in making this publication possible, with special thanks to Kelsey Myers.

** Stacy is the principal of Miller Law Group, PLLC and heads the firm's *qui tam* section. He brings his extensive trial experience to help whistleblowers fight fraud. Also a graduate of Campbell University School of Law, Stacy is committed to supporting the Campbell Law community and currently sits on the law school's Board of Visitors.

1. 31 U.S.C. § 3729 (2012).

2. 31 U.S.C. § 3730(b) (2012) ("A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government."). "*Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur,* which means 'who pursues this action on our Lord the King's behalf as well as his own.'" Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000); *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *160.

3. 31 U.S.C. §§ 3729–3730.

4. Letter from Sen. Charles E. Grassley, Chair, Senate Fin. Comm., to Att'y Gen. William Barr, Dep't of Just. (May 4, 2020) [hereinafter Letter from Sen. Chuck Grassley to Att'y Gen. William Barr].

5. *COVID-19 Spending*, USASPENDING.GOV, https://www.usaspending.gov/disaster/covid-19 [https://perma.cc/7PBX-DUK8].

> gets bigger, the potential for fraud and abuse gets bigger. So does the potential for cruel retaliation against the nation's brave truth-tellers.[6]

This Article provides an overview of the FCA, discusses the effect that the pandemic has on this area of law, and emphasizes the need for this critical partnership between whistleblowers and the government. Part I will provide an overview of *qui tam* practice and the history of the FCA. Part II will briefly outline some of the legal doctrines at issue during the pandemic. Part III will discuss some of the most common fraud schemes combated by this act. Finally, Part IV will discuss several developments during the pandemic that may implicate the FCA.

I. OVERVIEW OF THE FALSE CLAIMS ACT

A. Purpose of the False Claims Act

The FCA makes it illegal for individuals to submit "false or fraudulent claim[s]" for payment to the government.[7] Those who violate the Act are liable for three times the amount of fraud—commonly referred to as treble damages—and civil penalties between $5,000 and $10,000 for each violation.[8] While the Department of Justice (DOJ) may bring FCA actions of its own accord,[9] the FCA allows private individuals with knowledge of fraud to bring a suit on behalf of the government.[10] These whistleblowers are known as *qui tam* relators.

The purpose of the FCA is to prevent fraud against the government and encourage those with knowledge of fraud to come forward. The DOJ

---

6. Senator Chuck Grassley, Speech on National Whistleblower Appreciation Day (July 30, 2020), https://www.grassley.senate.gov/news/news-releases/grassley-celebrating-whistleblower-appreciation-day [https://perma.cc/8B5V-7JZP].

7. § 3729(a)(1)(A). While the submission of false claims is the primary act punishable under the FCA, the act also prohibits similar fraudulent conduct, including making false records or statements material to a false claim, § 3729(a)(1)(B), conspiring to violate the FCA, § 3729(a)(1)(C), and others, § 3729(a)(1)(D)–(G).

8. § 3729(a)(1). The exact amount of civil penalties actually increases over the years because they are subject to adjustment under the Federal Civil Penalties Inflation Adjustment Act of 1990. *Id.* (citing Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, § 5, 104 Stat. 890).

9. 31 U.S.C. § 3730(a) (2012) ("The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.").

10. § 3730(b)(1).

estimated that fraud drains between as much as 10% of the total federal budget.[11] However, "most fraud goes undetected."[12] Various provisions of the FCA are intended to encourage relators to bring allegations of fraud to light. Most notably, relators are entitled to a portion of any monetary recovery.[13] The relator's share typically ranges from 15–25% of the total recovery, with the precise amount determined by the relator's specific contributions to the action.[14] Given the large recoveries under the FCA's treble damages regime, the relator's share serves as a powerful incentive for would-be whistleblowers.[15] The Act also provides relators an individual cause of action if they suffer workplace retaliation as a result of their whistleblower activities.[16]

The FCA's relator's share and whistleblower protections work to encourage those who uncover fraud to come forward.[17] Whistleblower actions under the FCA account for 64% of all successful recoveries by the government.[18] Without the assistance of these whistleblowers, the majority of fraud against public assets would go unaddressed. Wherever there is a significant investment of public assets, whistleblower programs like the FCA are necessary to ensure that those assets are used efficiently.

---

11. S. REP. NO. 99-345, at 3 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5268.

12. *Id.*

13. § 3730(d)(1).

14. *Id.* ("If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action."). While this is the standard range for intervened cases, the relator can receive a larger share—between 25–30%—if the government declines to intervene. § 3730(d)(2). Additionally, if the court finds that the relator planned and initiated false claims they may be dismissed from the action and will receive no share of the recovery. § 3730(d)(3).

15. *See, e.g.*, Press Release, U.S. Att'y Off. for the E. Dist. of Wash., Bechtel & Aecom, U.S. Department of Energy (DOE) Contractors, Agree to Pay $57.75 Million to Resolve Claims of Time Charging Fraud at Doe's Hanford Waste Treatment Plant (Sept. 22, 2020), https://www.justice.gov/usao-edwa/pr/bechtel-aecom-us-department-energy-doe-contractors-agree-pay-5775-million-resolve-0 [https://perma.cc/Q2E8-M3L5] (announcing a $57.75 million recovery with a relator's share of $13.75 million).

16. § 3730(h).

17. S. REP. NO. 99-345, at 2, *as reprinted in* 1986 U.S.C.C.A.N. at 5266–67 (referencing the need to "encourage any individual knowing of Government fraud to bring that information forward").

18. U.S. GOV'T ACCOUNTABILITY OFF., INFORMATION ON FALSE CLAIMS ACT LITIGATION 5 (2006), https://www.gao.gov/new.items/d06320r.pdf [https://perma.cc/DTH2-5HDA].

B. History and Development of the False Claims Act

As the FCA has developed over the years, Congress has had to balance statutorily encouraging whistleblowers to come forward with avoiding opening the door to frivolous actions. The FCA first emerged during the Civil War as a response to the rampant fraud in wartime defense contracts.[19] In 1863, the Union Army was repeatedly hampered by shipments of inoperable or useless military supplies.[20] This fraud included "defense contractors who resold the same horses two and three times to the Union cavalry, and who were paid for muskets but provided boxes of sawdust."[21] The response was a statutory scheme of harsh criminal and civil penalties for defrauding the government.[22]

The original version of the FCA provided for double damages and a $2,000 forfeiture.[23] Relators under the early FCA were also entitled to one-half of the total recovery and had a vested right in that recovery regardless of any government action.[24] However, they bore the onus of paying for all costs and charges of the action.[25] This simplistic version of the FCA was poised for significant growing pains over its first century.

The FCA went through its first major development amid the copious defense expenditures of World War II. While many successful *qui tam* actions were brought during this period, the government was plagued by a new issue: parasitic lawsuits brought by opportunistic relators.[26] In one case, the Government claimed that the relator learned of the fraud from a criminal indictment and won the proverbial race to the courthouse ahead of the Government's civil attorneys.[27] In an amicus brief to the Supreme Court, the Government argued that opportunistic relators violated the spirit of the Act and hampered the Government's ability to recover assets.[28] Although there was no finding of fact on whether the relator copied a criminal indictment, the Court held that even if there was no independent discovery of fraud, the relator did contribute by successfully prosecuting the

19. United States *ex rel.* S. Prawer & Co. v. Fleet Banks of Me., 24 F.3d 320, 324 n.8 (1st Cir. 1994) (citing S. REP. NO. 99-345, at 8 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5273).

20. *See* 132 CONG. REC. 22,339 (1986) (statement of Rep. Howard Berman).

21. *Id.*

22. United States *ex rel.* Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1153 (3d Cir. 1991).

23. *Id.*

24. United States v. Griswold, 30 F. 762, 763 (D. Or. 1887).

25. S. REP. NO. 99-345, at 10–12, *as reprinted in* 1986 U.S.C.C.A.N. at 5275–77.

26. *Id.* at 10–11, *as reprinted in* 1986 U.S.C.C.A.N. at 5275–76.

27. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 545 (1943).

28. *Id.*

case and obtaining a judgment on behalf of the Government.[29] The Court further found no statutory prohibition on opportunistic *qui tam* claims.[30]

This ruling so infuriated the Government that Attorney General Francis Biddle urged Congress to repeal the *qui tam* provision of the Act.[31] While the House did vote to repeal, the Senate instead moved to amend.[32] The Senate placed a jurisdictional bar that only allowed *qui tam* actions where the relator was the original source of the information.[33] The Amendment also limited the relator's share.[34] In a *qui tam* action where the Government intervened,[35] the relator could be awarded up to 10% by the court or up to 25% if the Government did not intervene and the relator proceeded on his own.[36] While this Amendment eliminated opportunistic lawsuits, the limit on relator's share weakened the incentive for well-meaning relators to disclose fraud.

As government spending dramatically expanded, Congress saw the need to increase whistleblower incentives. The 1943 amendments went too far and the FCA fell into disuse.[37] Congress reduced the possible recoveries for whistleblowers but had not yet codified protections for relators facing retaliation.[38] Whistleblowers who attempted to assist the government risked losing their jobs once employers learned of their actions.[39] Amid this risk, relators had to wait as the DOJ conducted its investigation and only stood to receive 10% of the recovery if the DOJ did intervene.[40] Addressing these

29. *Id.*

30. *Id.* at 547–48.

31. S. REP. NO. 99-345, at 11, *as reprinted in* 1986 U.S.C.C.A.N. at 5276.

32. *Id.*, *as reprinted in* 1986 U.S.C.C.A.N. at 5276.

33. Act of Dec. 23, 1943, ch. 377, 57 Stat. 608 (codified as amended at 31 U.S.C. § 232 (1976)).

34. *Id.* at 609.

35. *See* discussion *infra* Section I.C.2.

36. Act of Dec. 23, 1943, 57 Stat. at 609.

37. *See* Michael Lawrence Kolis, Comment, *Settling for Less: The Department of Justice's Command Performance Under the 1986 False Claims Amendments Act*, 7 ADMIN. L.J. AM. U. 409, 416 (1993).

38. *Id.*

39. *Id.* (citing *False Claims Reform Act: Hearing on S. 1562 Before the Subcomm. on Admin. Practice & Procedure of the S. Comm. on the Judiciary*, 99th Cong. 2, 49–51 (1985) [hereinafter *Hearing on S. 1562*] (statement of *qui tam* relator John M. Gravitt)). For a more thorough discussion of the hurdles faced by *qui tam* relators, like Mr. Gravitt, prior to the 1986 amendments, see James B. Helmer, Jr. & Robert Clark Neff, Jr., *War Stories: A History of the* Qui Tam *Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the* United States ex rel. Gravitt v. General Electric Co. *Litigation*, 18 OHIO N.U. L. REV. 35, 40–44 (1991).

40. Kolis, *supra* note 37, at 417–19.

flaws, Senator Chuck Grassley stated that the FCA was "rooted in the realization that we cannot guard against Government fraud without the aid of private citizen informers . . . [but] the act's incentive and utility for private citizens was removed," with the 1943 Amendment.[41]

Spearheaded by the efforts of Senator Grassley, Congress sought to rectify these issues.[42] The 1986 Amendment of the FCA increased the civil penalties to as much as $10,000 per claim,[43] which had been left at $2,000 since the Civil War.[44] It also increased the damages from double the fraud amount to triple.[45] The relator's share was also increased, bringing it to levels still in place today.[46] Additionally, the Amendment went beyond mere monetary incentives. It created important protections for would-be whistleblowers. First, the Amendment directed that all *qui tam* actions are filed under seal.[47] While this measure was intended to prevent *qui tam* filings from tipping off targets of criminal investigations,[48] it also provided relators with a period of anonymity. While the Government conducted its investigation, the defendant was not served with the lawsuit and, thus, would not know if an employee had become a whistleblower.[49] Perhaps the most important whistleblower protection added by the 1986 Amendment was 31 U.S.C. § 3730(h). This part of the Act created an individual cause of action—commonly referred to as an "h-claim"—allowing whistleblowers to recover for workplace retaliation that resulted from their efforts assisting the government.[50]

During debates over the 1986 amendment to the FCA, Representative Berman stated that despite the passage of time, the purpose of the FCA had remained the same since its inception: "The U.S. taxpayers are being billed, and we need all the resources we can obtain to address the problem."[51] The 1986 Amendment was a massive step toward ensuring that whistleblowers

41. *Hearing on S. 1562*, *supra* note 39, at 2 (alteration in original) (statement of Sen. Chuck Grassley).

42. *See id.* at 1–3 (statement of Sen. Chuck Grassley).

43. 31 U.S.C. § 3729(a) (2012).

44. *Hearing on S. 1562*, *supra* note 39, at 3 (statement of Sen. Chuck Grassley).

45. § 3729(a) (1988).

46. 31 U.S.C. § 3730(d) (2012).

47. § 3730(b)(2).

48. S. REP. NO. 99-345, at 16 (1986), *as reprinted in* 1986 U.S.C.C.A.N. 5266, 5281 ("First, in response to Justice Department concerns that qui tam complaints filed in open court might tip off targets of ongoing criminal investigations, the subcommittee adopted a 60-day seal provision for all qui tam complaints.").

49. *See* § 3730(b)(2) ("The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders.").

50. § 3730(h).

51. 132 CONG. REC. 22,339 (1986).

are properly incentivized to assist the government's efforts in combatting fraud. With the large increase in public spending brought on by the pandemic, it is more important than ever to foster the partnership between the government and *qui tam* whistleblowers. Despite the laudable efforts of the 1986 Congress, all FCA actors—including Congress, the DOJ, the courts, and the relators' bar—must continue to strive to ensure that this critical fraud fighting tool operates at peak efficacy.

C. How the Act Functions Today

Given the FCA's storied development, a brief overview of how this act functions today is warranted. Section I.C of this Article will outline (1) how modern-day whistleblowers initiate a *qui tam* action on behalf of the Government; (2) how the Government becomes involved—or declines involvement—in whistleblowers' suits; and (3) how the interplay between various whistleblower statutes across our federal and state governments.

1. Filing a qui tam Action

Like all lawsuits, *qui tam* actions are initiated with the filing of a complaint.[52] However, these complaints are unique. Under the FCA, the complaint is filed in camera and under seal.[53] It is not a public document and does not need to be served on the defendant.[54] The only parties that have access to these sealed documents are the relator, the court, and the DOJ.[55] The seal period lasts for sixty days and the Government may—and typically does—request the court to extend the seal during its investigation.[56] These successive seal periods mean that a *qui tam*

52. FED. R. CIV. P. 3.

53. § 3730(b)(2).

54. *Id.*

55. *Id.*

56. § 3730(b)(2)–(3). Congress envisioned the initial sixty-day seal period as a wholly sufficient timeframe for the Government to investigate the claim and make its intervention decision. *See* S. REP. NO. 99-345, at 24–25 (1986), *as reprinted in* 1986 U.S.C.C.A.N. at 5289–90. This vision is clear in the FCA's text, which notes that the seal period may only be extended on a motion by the Government and "for good cause shown." § 3730(b)(3). However, in practice, courts routinely extend the seal period for years on end as the Government investigates. *See, e.g.*, Joel D. Hesch, *It Takes Time: The Need to Extend the Seal Period for* Qui Tam *Complaints Filed Under the False Claims Act*, 38 SEATTLE U. L. REV. 901, 903 (2015) ("In reality, it often takes between three and six years for the Government to properly investigate and bring a complex fraud case that satisfies Rule 9(b) and fulfills the duty to conduct a parallel criminal investigation without prematurely or wrongfully accusing a company of defrauding the government.").

complaint can stay under seal for years before a defendant even becomes aware that it has been sued.

Qui tam actions also require a second, unique initiating document. Under the FCA, the relator is required to provide the Government with a "written disclosure of substantially all material evidence and information" in the relator's possession.[57] This is commonly referred to as the "disclosure statement." The disclosure statement provides the Government "with enough information on alleged fraud to be able to make a well-reasoned decision on whether it should participate in the filed lawsuit or allow the relator to proceed alone."[58] There is minimal case law on the specific requirements of this disclosure.[59] This is likely due to the confidential nature of the disclosure statement.[60] Some courts have held that the disclosure statement should only contain a recitation of facts,[61] while other courts have required more complex disclosures, including analysis, argument, and opinion.[62] Regardless of the complexity of a disclosure statement, this unique document highlights the important partnership

57. § 3730(b)(2).

58. United States *ex rel.* Woodard v. Country View Care Ctr., Inc., 797 F.2d 888, 892 (10th Cir. 1986) (alteration in original) (construing § 3730(b) prior to its amendment in 1986).

59. *See, e.g.*, United States *ex rel.* Bagley v. TRW Inc., 212 F.R.D. 554, 555 (C.D. Cal. 2003) ("Few reported decisions construe the nature and extent of the relator's disclosure obligation under section 3730(b)(2)."); United States *ex rel.* Made in the USA Found. v. Billington, 985 F. Supp. 604, 608 (D. Md. 1997) (noting that "scant authority exists delineating what constitutes" a legally sufficient disclosure statement).

60. *See Bagley*, 212 F.R.D. at 556. (ruling that the disclosure statement was protected as work product); *see also* Miller v. Holzmann, 240 F.R.D. 20, 22 (2007) (ruling that attorney–client privilege was not waived when the disclosure was submitted to the Government as required by statute).

61. *See, e.g.*, United States *ex rel.* O'Keefe v. McDonnell Douglas Corp., 918 F. Supp. 1338, 1346 (E.D. Mo. 1996) ("The written disclosure should simply contain all the relevant factual information in [the relator's] possession at the time he filed suit."); United States *ex rel.* Burns v. A.D. Roe Co., 904 F. Supp. 592, 594 (W.D. Ky. 1995) (stating that a disclosure statement "is simply a recitation of factual information"); United States *ex rel.* Robinson v. Northrop Corp., 824 F. Supp. 830, 838 (N.D. Ill. 1993) (stating that the disclosure obligation "requires only a statement of facts," and "should not contain opinions of an attorney"); United States *ex rel.* Stone v. Rockwell Int'l Corp., 144 F.R.D. 396, 399 (D. Colo. 1992) (stating that a written disclosure statement "contains nothing more than the evidence and information which must come to light in any event once the case proceeds").

62. *See, e.g.*, *Made in the USA Found.*, 985 F. Supp. at 608 (stating that a disclosure statement "should, at a minimum, 'comprise much of what [the relator] will rely upon to support the contentions in the case at bar'") (citation omitted); Grand *ex rel.* United States v. Northrop Corp., 811 F. Supp. 333, 337 (S.D. Ohio 1992) (acknowledging that a disclosure statement may contain legal analysis and opinion in addition to facts).

between the government and *qui tam* relators. Both need to work in tandem to build a strong claim and safeguard public assets from fraud.

2. Government Intervention

A watershed moment in all *qui tam* litigation is the Government's decision to intervene. When a whistleblower files an FCA action, the Government may elect to intervene and take primary responsibility for prosecuting the action.[63] Government intervention provides a relator significant advantages during the remainder of the litigation process. Over 95% of all FCA cases where the Government intervenes are successful, while only 5% succeed if the Government elects not to intervene.[64]

If the Government intervenes many litigation decisions—like whether to settle, dismiss, or litigate the case—are largely controlled by the Government.[65] This is because the whistleblower is asserting the Government's right to recover. This Government involvement is not a detriment to the whistleblower, and in fact, it is often beneficial. After intervention, the whistleblower has the full weight of the DOJ on their side. This is a valuable resource. For example, the cost of the litigation is largely shouldered by the Government, not the whistleblower.[66] Importantly, the DOJ can fund and carry out a pretrial investigation that far exceeds any that could be conducted by a whistleblower's private attorneys, building a stronger case and boosting the likelihood of recovery.

Unlike other civil actions, a whistleblower cannot unilaterally decide to accept a settlement offer from the defendant. The decision to settle is entirely up to the Government.[67] The Government may even agree to settle the case over the objection of the whistleblower.[68] However, whistleblowers are not wholly unprotected from insufficient settlement

63. 31 U.S.C. § 3730(b)(2), (c)(1) (2012).

64. Hesch, *supra* note 56, at 902.

65. § 3730(c)(1) ("If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action."); § 3730(c)(2)(A) ("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."); § 3730(c)(2)(B) ("The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances.").

66. *But see* § 3730(f) (stating that the Government is not liable for the whistleblower's expenses).

67. § 3730(c)(2)(B).

68. *Id.*

amounts. The amount of the settlement must be deemed by the court as "fair, adequate, and reasonable under all the circumstances."[69]

If the Government declines to intervene, a whistleblower may elect to continue the action on their own with private counsel.[70] Even so, the whistleblower may be required to keep the Government in the loop. If the Government requests, the whistleblower must provide copies of all court documents.[71] As litigation continues, the Government has the right to intervene at any time.[72] While relators may continue litigation without intervention, they lack the resources afforded in an intervened case.

Government intervention is often critical to a successful *qui tam* action. While relators may still prevail if they proceed with litigation on their own, the Government–whistleblower partnership is the best path to combat fraud. The government needs whistleblowers to reveal otherwise undiscovered fraud, and whistleblowers benefit greatly from an alliance during complex litigation. For these reasons, the government—including Congress, the courts, and the DOJ—should be cautious of policies that hinder this critical partnership between whistleblowers and government prosecutors. Strengthening this partnership is even more important in eras of increased public spending, as we are experiencing today.

3. State and Federal Laws

While this Article is primarily focused on the federal FCA, many states also have false claims acts with *qui tam* provisions.[73] Identifying all applicable statutes is critical for whistleblowers seeking to maximize their recovery of public assets. In practice, a whistleblower may file under multiple acts depending on how many governments were defrauded.[74] If the federal government was defrauded, then the whistleblower must proceed under the federal FCA.[75] If a state government was defrauded, the whistleblower will need to file under the false claims act of that state.

69. *Id.*

70. § 3730(c)(3).

71. *Id.*

72. *Id.*

73. *See, e.g.*, N.C. GEN. STAT. § 1-605 (2019).

74. *Compare* 31 U.S.C. § 3729(a) (2012) (stating that a defendant is liable to the federal government for fraud against the United States), *with* N.C. GEN. STAT. § 1-605(b) (stating that the purpose of the North Carolina False Claims Act is "to deter persons from knowingly causing or assisting in causing the State to pay claims that are false or fraudulent and to provide remedies in the form of treble damages and civil penalties when money is obtained from the State by reason of a false or fraudulent claim").

75. § 3729.

Many fraud schemes impact multiple levels of government. For example, Medicaid is made up of both federal and state funds.[76] Therefore, Medicaid whistleblowers can file under both the federal and state acts, naming both governments as plaintiffs. Furthermore, fraud may span multiple states, in which case a whistleblower may name multiple governments and invoke multiple state acts in their complaint.

While many states have some kind of false claims act, not all have *qui tam* provisions.[77] A whistleblower is only allowed to sue on behalf of a government that has expressly authorized it with a *qui tam* provision.[78] Furthermore, some state laws are limited to specific types of fraud, such as Medicaid fraud.[79] To encourage enforcement and uniformity, the federal government offers states an additional 10% share of any joint recovery if their laws contain *qui tam* provisions and calculate damages similarly to the federal FCA.[80] The Office of Inspector General (OIG) has approved twenty-one such state laws.[81] A chart of these states is listed below.[82] Not only can a whistleblower pursue actions under both state and federal law, these actions can generally be filed in either state or federal court.[83] In addition to state false claims acts, some municipalities have even passed

76. The Medicaid program was established by Title XIX of the Social Security Act, Social Security Amendment Act of 1965, Pub. L. No. 89-97, sec. 121, 79 Stat. 286, 343 (codified as amended at 42 U.S.C. §§ 1396–1396v), as a cooperative program where the federal government pays a percentage of the costs a state incurs for the medical care of individuals who cannot afford to pay their own costs. Although states are not required to provide Medicaid assistance, all fifty states currently do. For example, North Carolina participates in the federal Medicaid program, and the North Carolina Department of Health and Human Services (NC DHHS) administers the program throughout the state in accordance with Title XIX of the Social Security Act. N.C. GEN. STAT. § 108A-54 (2019).

77. *See* chart *infra* p. 285.

78. As the Government is the party actually harmed by the fraud, a relator only has standing to bring an FCA action because the Government has assigned the relator its right to sue under the *qui tam* provision. Vt. Agency of Nat. Res v. United Stated *ex rel.* Stevens, 529 U.S. 765, 773–74 (2000).

79. *See, e.g.*, Tennessee Medicaid False Claims Act, TENN. CODE ANN. § 71-5-181 (2019).

80. *See* Deficit Reduction Act of 2005, Pub. L. No. 109–171, sec. 6031, 120 Stat. 72 (codified as amended at 42 U.S.C. § 1396h); Publication of OIG's Guidelines for Evaluating State False Claims Acts, 71 Fed. Reg. 48,552 (Aug. 21, 2006).

81. *State False Claims Act Reviews*, U.S. DEP'T OF HEALTH & HUM. SERVS., OFF. OF INSPECTOR GEN. https://oig.hhs.gov/fraud/state-false-claims-act-reviews/ [https://perma.cc/G4MJ-RBXR].

82. *Id.*

83. *See, e.g.*, Soni v. Boston Med. Ctr. Corp., 683 F. Supp. 2d 74, 87–91 (D. Mass. 2009) (finding that state courts have concurrent jurisdiction with federal courts to hear actions under the federal FCA).

their own acts.[84] This proliferation of false claims acts shows the need for whistleblowers to assist in protecting public investments across all levels of government. As government spending increases across all levels of government to address the public health crisis of the pandemic, governments with false claims acts should look to strengthen these laws. Moreover, states and municipalities without these laws should make every effort to enact meaningful legislation to avert fraud on public assets.

State Laws Approved by the Office of Inspector General

California	Indiana	Oklahoma
Colorado	Iowa	Rhode Island
Connecticut	Massachusetts	Tennessee
Delaware	Montana	Texas
Georgia	Nevada	Vermont
Hawaii	New York	Virginia
Illinois	North Carolina	Washington

State Laws Considered Insufficient by the Office of Inspector General

Florida	Michigan	New Hampshire	New Mexico
Louisiana	Minnesota	New Jersey	Wisconsin

II. IMPORTANT LEGAL DOCTRINES

The FCA's *qui tam* practice is a complex area of federal litigation. Many of the doctrines in this area of law are well beyond the purview of this Article. Therefore, this Part will merely address areas ripe for change and those that are likely to have a direct impact on whistleblowers working to combat fraud in this pandemic, including (1) the FCA's materiality requirement; (2) the Government's dismissal authority; (3) the FCA's original source rule; and (4) the FCA's scienter requirement.

84. *See, e.g.*, N.Y.C. ADMIN. CODE § 7-801 to -810 (2012); S. F. ADMIN. CODE. § 6.80–.83 (1999); CHI., ILL., MUN. CODE § 1-21-010 (2005).

A. Materiality

The FCA requires that the alleged fraud was material to the government's payment decision.[85] That materiality requirement asks whether the government's decision to pay was actually affected by the fraud. The Act defines material as "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property."[86] While this definition offers little clarity, the Supreme Court recently rendered a decision that dealt extensively with materiality.[87]

In *Escobar*, the Supreme Court warns that materiality does not exist where noncompliance is minor.[88] Therefore, potential whistleblowers should be wary if the fraud is based on a mere technicality. "[M]ateriality 'looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'"[89] The mere fact that the government identifies a regulation as a condition for payment does not necessarily make a misrepresentation material, nor does the fact that the government has the option of refusing payment.[90] "What matters is not the label the Government attaches to a requirement, but whether the defendant knowingly violated a requirement that the defendant knows is material to the Government's payment decision."[91] Materiality can be shown with evidence that the government often refuses to pay claims involving similar non-compliance.[92] Contrarily, if the government often pays similar claims with full knowledge that a requirement is lacking, those claims likely are not material.[93]

The Supreme Court ends its discussion in *Escobar* with a final warning: "The standard for materiality that we have outlined is a familiar and rigorous one."[94] Despite the Court's proclamation that materiality is a

85. United States *ex rel.* Harrison v. Westinghouse Savannah River Co. (*Harrison II*), 352 F.3d 908, 913 (4th Cir. 2003) (listing the elements of an FCA claim as "(1) that the defendant made a false statement or engaged in a fraudulent course of conduct; (2) such statement or conduct was made or carried out with the requisite scienter; (3) the statement or conduct was material; and (4) the statement or conduct caused the government to pay out money or to forfeit money due").

86. 31 U.S.C. § 3729(b)(4) (2012).

87. *See* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989 (2016).

88. *Id.* at 2003 (citing United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 543 (1943)).

89. *Id.* at 2002 (alterations omitted).

90. *Id.* at 2003.

91. *Id.* at 1996.

92. *Id.*

93. *Id.* at 2003–04.

94. *Id.* at 2004 n.6.

"familiar" standard, many observers have noted that *Escobar* did little to clarify the standard.[95] In fact, Senator Grassley recently hinted that proposed legislation may be in the works to clarify this standard.[96]

Congress has long struggled with codifying ideal incentives to ensure whistleblowers are willing to bringing evidence of fraud to light.[97] At the onset, the FCA's materiality requirement appeared straightforward, merely requiring that the defendant's conduct had the ability to influence the government's payment decision.[98] As with many things, this apparently clear statutory definition has resulted in mired case law. In order to ensure that whistleblowers are incentivized by the FCA, Congress must clarify this requirement. When whistleblowers weigh the risk of reporting fraud, they should have the assurance of clear statutory requirements in evaluating their cases.

B. The Government's Authority to Dismiss: The Granston Memo

As previously noted, the government has wide latitude under the FCA to control actions brought by *qui tam* relators.[99] The DOJ's control over *qui tam* matters even includes the ability to dismiss an action over the objections of the relator.[100] In January 2018, Michael D. Granston, Director of the Commercial Litigation Branch at the DOJ, sent a letter to all DOJ attorneys working on FCA cases.[101] The so called "Granston Memo" urged the Government's attorneys to more aggressively employ their dismissal power in FCA cases.[102] The memo cited the need to conserve government resources, noting an exponential rise in *qui tam* filings.[103]

---

95. *See* Jacob J. Stephens, *Dicta Me This: Implied False Certification to Materiality Under the False Claims Act Post-Escobar*, 44 U. DAYTON L. REV. 273, 291 (2019) ("Legal scholars and professionals alike view the *Escobar* decision as a definitive endorsement of implied false certification. These same individuals, however, have expressed concerns that the Supreme Court has left the materiality standard at least as clouded as it was before the landmark decision.").

96. *See generally* Grassley, *supra* note 6.

97. *See* discussion *supra* Section I.B.

98. *See* 31 U.S.C. § 3729(b)(4) (2012) (defining materiality).

99. *See* discussion *supra* Section I.C.2.

100. 31 U.S.C. § 3730(c)(2)(A) (2012) ("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.").

101. Memorandum from Michael D. Granston, Dir., Com. Litig. Branch, Fraud Section, to Att'ys in the Com. Litig. Branch, Fraud Section (Jan. 10, 2018) (on file with author).

102. *Id.* at 1.

103. *Id.*

Prior to the Granston Memo, the DOJ's dismissal power was rarely exercised.[104] However, within two years of this directive, the DOJ moved to dismiss as many as forty-five *qui tam* actions.[105] Moreover, courts began to allow these dismissals with great deference to the DOJ.[106] While the circuits have established two divergent tests for the DOJ's dismissal authority, neither offers *qui tam* relators much protection. The FCA states that the DOJ may dismiss an action over the objections of a relator, as long as the relator is notified of the Government's motion to dismiss and afforded a hearing.[107] Under one approach, the *Swift* standard, the Government is given "an unfettered right to dismiss an action."[108] This highly deferential test may lead some to ask: Why would Congress require a hearing on dismissal if a court cannot overrule the government's motion?[109] While the second approach employed by the circuits is less deferential to the DOJ, it also does little to protect relators from overzealous dismissals. The *Sequoia* test allows for dismissal as long as there is a "rational relation" between the Government's dismissal decision and a government interest.[110]

Since the issuance of the Granston Memo, the DOJ has continued to argue in favor of an unfettered right to dismiss under *Swift*.[111] This push has been met with backlash. Notably, among the dissenters is Senator Grassley, who wrote a letter to United States Attorney General Barr imploring the DOJ to change its stance.[112] Senator Grassley argues that the DOJ's interpretation ignores the plain meaning of the hearing requirement

104. Letter from Sen. Chuck Grassley to Att'y Gen. William Barr, *supra* note 4, at 2.

105. *Id.* While forty-five dismissed actions over two years may not seem substantial, this is a meaningful number of actions. For illustration, the DOJ reports that only 633 *qui tam* actions were filed in 2019. Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Justice Department Recovers over $3 Billion from False Claims Act Cases in Fiscal Year 2019 (Jan. 9, 2020), https://www.justice.gov/opa/pr/justice-department-recovers-over-3-billion-false-claims-act-cases-fiscal-year-2019 [https://perma.cc/79CH-LXEM].

106. *See infra* notes 108–10 and accompanying text.

107. 31 U.S.C. § 3730(c)(2)(A) (2012).

108. Swift v. United States, 318 F.3d 250, 252 (D.C. Cir. 2003).

109. The D.C. Circuit answers this question, characterizing the purpose of this statutorily required hearing as "simply to give the relator a formal opportunity to convince the government not to end the case." *Id.* at 253.

110. United States *ex rel.* Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1145 (9th Cir. 1998).

111. *See, e.g.*, Letter from Sen. Chuck Grassley to Att'y Gen. William Barr, *supra* note 4, at 1 (noting a brief to the Supreme Court filed by the United States Solicitor General Noel J. Francisco, arguing that the Court adopt the *Swift* test).

112. *Id.*

and is contrary to Congressional intent.[113] Rebutting the Granston Memo's focus on preserving government resources as a justification for dismissals, Senator Grassley warns that "unfettered dismissal authority will create a chilling effect on future whistleblowers that will ultimately end up costing the taxpayers a lot more."[114]

The recent rise in DOJ dismissals, bolstered by deferential courts, poses a true threat to the success of the FCA. Again, the success of this partnership between the government and private whistleblowers is proven, having recovered nearly $60 billion since its 1986 amendment.[115] While the DOJ certainly must expend resources in the process, the FCA's benefit to the American taxpayer clearly outweighs the cost. If the DOJ wishes to protect government resources, it should focus on strengthening the FCA, rather than hampering it. Even in cases where DOJ attorneys fear expending more resources than may be recovered, they have the option of allowing the relators to proceed with their actions without Government intervention.[116] Erring on the side of non-intervention, rather than overzealous dismissal, leaves open the potential for a Government recovery while still conserving DOJ resources.[117] As with any period of increased government spending, amid the current pandemic, the government should focus its efforts on encouraging whistleblowers to assist in protecting public resources.

C. The Original Source Rule

A whistleblower must be the original source of the information in order to bring a lawsuit under the FCA.[118] To qualify as the original source, the whistleblower's information must not have been publicly disclosed.[119] Information is deemed publicly disclosed if it is the subject matter of a civil

113. *Id.* at 2–3. In arguing that the *Swift* test contradicts Congressional intent, Senator Grassley also notes that he was the author of the 1986 amendment to the FCA. *Id.* at 1.

114. *Id.* at 6. It is notable that Senator Grassley felt the need to hand underline this point, before ending the letter with a handwritten note to Attorney General Barr. *Id.*

115. *Id.* at 1.

116. 31 U.S.C. § 3730(b)(4)(B) (2012).

117. *Cf.* United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 545 (1943) (noting that even opportunistic *qui tam* suits can benefit the government where the relator expends his own resources to obtain a recovery for the government). The argument that the DOJ should allow relators to proceed on their own, rather than dismissing the case, should not be taken as an argument against Government intervention. Ideally, the Government should intervene in any meritorious *qui tam* action where the Government stands to net a recovery, due to the increased likelihood of success in intervened cases. *See* Hesch, *supra* note 56, at 902.

118. § 3730(e)(4)(A).

119. *Id.*

or criminal trial; a congressional report, hearing, audit, or investigation; or in the news.[120]

In some instances, a whistleblower may still be the original source even if there has been a public disclosure. For example, if the whistleblower brought an FCA suit and disclosed the information to the government *before* the public disclosure, he is still the original source.[121] A whistleblower may also become the original source if their information "is independent of and materially adds to the publicly disclosed allegations."[122]

During the pandemic, the original source rule will likely become an issue in areas where the government has already initiated investigations into possible fraud, and such allegations become public.[123] While the original source rule was intended to prevent opportunistic *qui tam* actions,[124] it should not be used to hamper the efforts of well-meaning whistleblowers who bring necessary support to a government investigation. As the government continues its efforts to prevent fraud during the COVID-19 recovery, it must rely on whistleblowers to uncover fraud.

D. Scienter

Lawsuits under the FCA require that the defendant have sufficient culpability. This is known as the scienter requirement. Simply put, there must be evidence that the defendant "knowingly" defrauded the government.[125] The Act's scienter requirement is clarified in § 3729, which provides three definitions of "knowingly."[126] Scienter is met if the defendant "(i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information."[127]

While the Act does require some knowledge of the fraudulent nature of the defendant's actions, there is no intent requirement. In fact, the definition of "knowingly" expressly states that the term "require[s] no proof of specific intent to defraud."[128] "The purpose of the FCA's scienter

120. *Id.*
121. § 3730(e)(4)(B).
122. *Id.*
123. *See* discussion *infra* Section IV.A.
124. *See supra* text accompanying notes 26–36.
125. 31 U.S.C. § 3729(a) (2012).
126. § 3729(b)(1)(A).
127. *Id.*
128. § 3729(b)(1)(B).

requirement is to avoid punishing 'honest mistakes or incorrect claims submitted through mere negligence.'"[129]

Scienter can be proven in many ways. In many of the cases brought by the authors of this Article, scienter is shown when the relator raises concerns of possible fraud to the defendant or one of its officers, and those concerns are ignored or dismissed, and the defendant continues with its wrongful conduct. Even better proof has been found in emails or recorded conversations in which the defendant or one of its officers admits actual knowledge of the fraud. Often, scienter is one of the most difficult hurdles in the FCA and largely depends on the documentation collected and disclosed by the whistleblower.

In the context of pandemic fraud, scienter evidence will be critical to show that that fraudsters were not simply making "honest mistakes"[130] when submitting their false claims. Many defendants may claim that they incorrectly, but honestly, believed they qualified for COVID-19 relief plans, which were being rushed into action with ever-changing regulatory guidance.[131] Also, the often-critical nature of scienter evidence may provide pandemic whistleblowers an opportunity to overcome an original source hurdle. Even if the Government has initiated an investigation and the allegations are public, an inside whistleblower with significant scienter evidence may materially add to the Government's investigation.[132]

III. COMMON FRAUD SCHEMES

A. Medicare and Medicaid Fraud

Medicare and Medicaid fraud are the largest types of fraud combatted by the FCA. Each year, the government spends nearly $1 trillion on these government healthcare programs.[133] According to the Centers for Medicare

129. United States *ex rel.* Drakeford v. Tuomey, 792 F.3d 364, 380 (4th Cir. 2015) (quoting United States *ex rel.* Owens v. First Kuwaiti Gen. Trading & Contracting Co., 612 F.3d 724, 728 (4th Cir. 2010)).

130. *Id.*

131. *See* discussion *infra* Section IV.A.

132. 31 U.S.C. § 3730(e)(4)(B) (2012).

133. Thomas Reilly, *The Extrapolation Conundrum: Finding a Unified Theory for the Use of Statistical Sampling in Medicare Fraud Cases Brought Under the False Claims Act*, 47 SETON HALL L. REV. 1103 (2017). While this Article will refer to government healthcare fraud in terms of Medicare and Medicaid, other programs are often also implicated in FCA cases. *See, e.g.*, 10 U.S.C. §§ 1071–1110b (2012) (establishing the TRICARE program, which provides healthcare to uniform service members, their families, and their survivors, functioning similarly to Medicare).

and Medicaid Services (CMS), $45.8 billion was improperly billed between July 2012 and June 2013.[134] This represents nearly 13% of all billing during that timeframe.[135] Given the sheer size of these programs and the breadth of the healthcare industry as a whole, Medicare and Medicaid fraud can take many forms. The various fraud schemes discussed below are just some of the more common schemes combated by the FCA and its whistleblowers.

Much of the fraud perpetrated on government healthcare is in the form of improper coding and services billing. CMS is a United States agency responsible for administering the Medicare and Medicaid programs, under which healthcare facilities and providers may be reimbursed with federal funds for services provided to eligible patients.[136] In addition to regulations, CMS issues sub-regulatory guidance to address policy issues as well as operational updates and technical clarifications of existing guidance. Bills are submitted to government healthcare programs as medical codes, designating the specific service rendered.[137] Specifically, healthcare providers submit Current Procedural Terminology (CPT) codes, as promulgated by the American Medical Association.[138] Unfortunately, due to the size of these government programs, fee-for-service providers are able to submit claims to the government with little oversight.[139] For the most part, if a provider submits a reimbursable code with documentation that appears to support that code, they will receive payment from the government.[140] Given the minimal oversight and relative ease of receiving payment, fraudulent billing is rampant.

134. CTRS. FOR MEDICARE & MEDICAID SERVS., MEDICARE FEE-FOR-SERVICE 2014 IMPROPER PAYMENTS REPORT 1–2 (2014) https://www.cms.gov/Research-Statistics-Data-and-Systems/Monitoring-Programs/Medicare-FFS-Compliance-Programs/CERT/Downloads/MedicareFeeforService2014ImproperPaymentsReport.pdf [https://perma.cc/6ZGN-44UN].

135. *Id.*

136. *See* 42 U.S.C. § 1395 (2012).

137. *See Medicare Billing: Form CMS-1450 and the 837 Institutional*, CTRS. FOR MEDICARE & MEDICAID SERVS. 4 (June 2018), https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/Downloads/837I-FormCMS-1450-ICN006926.pdf [https://perma.cc/A2S5-P4DM].

138. *Id.* at 5.

139. Reilly, *supra* note 133 at 1104 (noting that codes are submitted on "an honor system" with no "built-in checks and balances or due diligence" to guard against fraud) (citations omitted).

140. Brooke Benzio, *Fee-for-Disservice: Medicare Fraud in the Home Healthcare Industry*, 19 ANNALS HEALTH L. 229, 231 (2009).

One way to fraudulently boost billing is a practice known as "upcoding."[141] This means that the provider submitted a code to the government claiming the service provided was more complex than the service that was actually provided.[142] The most clear cut examples of upcoding occur in the context of Evaluation and Management (E/M) codes.[143] E/M codes provide five distinct codes for office visits for established patients, escalated depending upon the complexity of service rendered.[144] At the low end, code 99211 provides reimbursement for services where problems are "minimal" and typically only require five minutes of care.[145] On the high end, code 99215 requires at least two of the following (1) a comprehensive history; (2) a comprehensive examination; and (3) medical decision making of high complexity.[146] Each one of these elements requires various sub-elements to be properly billed.[147] Given the government's reliance on the documents submitted by providers, less scrupulous providers can easily submit inflated codes to receive higher reimbursements than warranted.

A similar fraud scheme occurs in time-based billing. Many services are billed in fifteen-minute increments called "units."[148] To increase flexibility, CMS allows providers to bill within specified time ranges that are intended to average out to fifteen-minute units.[149] For example, services lasting between eight and twenty-two minutes may be billed as one fifteen-minute unit.[150] These time ranges can be manipulated to defraud the government. For example, two separate eight-minute sessions can be billed

141. *See, e.g.*, United States v. Janati, 237 Fed. App'x 843, 846–47 (4th Cir. 2007) (discussing a criminal conviction for healthcare fraud arising out of an upcoding scheme perpetrated against Medicare and private insurance).

142. *Id.* at 845.

143. *See id.*; *see also Medicare Billing: Form CMS-1450 and the 837 Institutional*, *supra* note 137, at 5.

144. *See* AMA, CPT 2020 PROFESSIONAL EDITION 12 (2019) [hereinafter CPT 2020]; *see also Janati*, 237 Fed. App'x at 845.

145. CPT 2020, *supra* note 144, at 12–13; *see also Janati*, 237 Fed. App'x at 845.

146. CPT 2020, *supra* note 144, at 13; *see also Janati,* 237 Fed. App'x at 845.

147. *See CPT® Evaluation and Management (E/M) Office or Other Outpatient (99202-99215) and Prolonged Services (99354, 99355, 99356, 99XXX) Code and Guideline Changes*, AMA 7–8 (2019), https://www.ama-assn.org/system/files/2019-06/cpt-office-prolonged-svs-code-changes.pdf [https://perma.cc/77QW-KVZC].

148. *Medicare Claims Processing Manual: Chapter 5 - Part B Outpatient Rehabilitation and CORF/OPT Services*, CTRS. FOR MEDICARE & MEDICAID SERVS. § 20.2(C), https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Downloads/clm104c05.pdf [https://perma.cc/VCY4-Y3Y2].

149. *Id.*

150. *Id.*

as two units, while a single sixteen-minute session can only be billed as one unit. Similarly, providers may manipulate their service time to move into a higher unit range and maximize billing. After all, a twenty-two-minute session can be billed as just one unit, while just one extra minute of service increases the bill to two units. While these ranges were intended to encompass average service times of fifteen-minutes, they can easily be abused.

Yet another potential source of fraud are claims submitted for services that were not medically necessary. Medical necessity of a procedure is a condition of payment under government healthcare programs.[151] Therefore, every time a provider submits a claim to the government for reimbursement, there is an express or implied certification that the service was medically necessary.[152] If a service is rendered needlessly and billed to the government, it is a false claim.

Other FCA enforcement actions in the healthcare field are related to kickbacks and self-referrals. It is a violation of federal law to offer, pay, or receive kickbacks for referrals in federally funded healthcare programs.[153] This is known as the Anti-Kickback Statute. Kickbacks can include a wide array of remuneration beyond simple cash bribes exchanged for referrals. They encompass the purchase, lease, or provision of any goods or services exchanged for referrals.[154] Under another federal law, the Stark Law, it is also a violation for a physician to refer a patient to a facility if the referring physician has a financial relationship with that facility.[155]

Compliance with these laws is an express condition of payment under Medicare and Medicaid programs.[156] In their enrollment application to federally funded programs, providers certify that they will comply with all relevant laws, including the Anti-Kickback Statute and the Stark Law.[157]

---

151. Winter *ex rel*. United States v. Gardens Reg'l Hosp. & Med. Ctr., Inc. 953 F.3d 1108, 1114 (9th Cir. 2020).

152. *Id.*

153. 42 U.S.C. § 1320a-7b(b) (2019).

154. *Id.*

155. 42 U.S.C. § 1395nn(a)(1), (h)(6) (2012).

156. *See* United States *ex rel.* Thompson v. Columbia/HCA Healthcare Corp., 125 F.3d 899, 902 (5th Cir. 1997); *see also* United States *ex rel.* Hopper v. Anton, 91 F.3d 1261, 1266 (9th Cir. 1996).

157. *Medicare Enrollment Application*, CTRS. FOR MEDICARE & MEDICAID SERVS. (July 2011), https://www.cms.gov/Medicare/CMS-Forms/CMS-Forms/downloads/cms855a.pdf [https://perma.cc/VA8B-N2ZK] ("I understand that payment of a claim by Medicare is conditioned upon the claim and the underlying transaction complying with such laws, regulations, and program instructions (including, but not limited to, the Federal anti-kickback statute and the Stark law), and on the provider's compliance with all applicable conditions of participation in Medicare.").

Thus, healthcare providers who violate these laws can be liable under the FCA to whistleblowers and the federal government if those kickbacks or self-referrals resulted in payments from the government.

Despite the wide array of potential fraud schemes, all share one common element—the government must rely on the submissions of providers when making their payment decision. If fraudsters submit claims that appear valid on their face, they will be successful in obtaining public resources. Therefore, whistleblowers with inside knowledge of false claims are critical to uncover fraud. Government spending on medical services is a trillion-dollar annual endeavor, and that figure will only rise amid the nationwide health crisis of the pandemic. Whistleblowers are more necessary than ever to combat this widespread fraud.

B. Government Procurement and Contract Fraud

The FCA was originally aimed at curtailing fraud in government contracts;[158] that need is even more evident today as government spending has grown exponentially since the initial passage of the FCA. The federal government is one of the largest purchasers of goods and services in our economy. For example, in 2017 the federal government obligated $507 billion for contracts.[159] The pandemic has significantly increased that expenditure. As of April 2021, the federal government incurred $39 billion in new contracts specifically related to the pandemic.[160] Given the vast number of resources at issue, cases concerning fraud in government contracts are some of the highest value cases under the FCA.[161]

The purchase of products by the federal government and its various agencies are governed by a complex statutory scheme outlined in the Federal Acquisition Regulations System, found in Title 48 of the Code of Federal Regulations.[162] This overarching regulatory regime is augmented

158. *See* discussion *supra* Section I.B.

159. MOSHE SCHWARTZ, ET AL., DEFENSE ACQUISITIONS: HOW AND WHERE DOD SPENDS ITS CONTRACTING DOLLARS 2 (2018), https://fas.org/sgp/crs/natsec/R44010.pdf [https://perma.cc/MXQ2-SE5H].

160. *COVID-19 Spending*, *supra* note 5.

161. *See*, *e.g.*, Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Three South Korean Companies Agree to Plead Guilty and to Enter into Civil Settlements for Rigging Bids on United States Department of Defense Fuel Supply Contracts (Nov. 14, 2018), https://www.justice.gov/opa/pr/three-south-korean-companies-agree-plead-guilty-and-enter-civil-settlements-rigging-bids [https://perma.cc/4F8Y-G34N] (announcing a $154 million civil settlement involving the government's purchase of gasoline abroad, which also included criminal penalties bringing the total recovery to $236 million).

162. 48 C.F.R. § 1.000 (2016).

by various agency supplements, including the Defense Federal Acquisition Regulatory Supplement.[163]

Not only are sellers to the government prohibited from selling the government worthless products,[164] but these regulations ensure that the government, as a market participant, receives a "fair and reasonable" price.[165] While no federal regulation mandates that private sellers give the government their best price, "[t]he Government will seek to obtain the offeror's best price (the best price given to the most favored customer)."[166] Based on this mandate for government employees to seek out the best price, the contract officers rely on data provided by private sellers "necessary to establish a fair and reasonable price."[167]

"[A]t a minimum, the contracting officer shall obtain appropriate data, without certification, on the prices at which the same or similar items have previously been sold and determine if the data is adequate for evaluating the reasonableness of the price."[168] "The Government may use various price analysis techniques and procedures to ensure a fair and reasonable price."[169] These include (1) comparison of prices from multiple sellers, relying on competition to ensure a fair and reasonable price;[170] or (2) comparison of prices previously paid by the government or private purchasers.[171] While relevant market conditions or the specific needs of a given transaction may justify the government paying a higher price,[172] the government requires sufficient data to understand the disparity between its price and the best commercially available price.[173]

Price representations by private sellers are critical in allowing contract officers to do their due diligence, confirming that the government receives

163. 48 C.F.R. § 201.101 (1997).

164. *See supra* text accompanying notes 19–21.

165. *See* 48 C.F.R. § 15.402(a) (2012) ("Contracting officers shall . . . [p]urchase supplies and services from responsible sources at fair and reasonable prices.").

166. 48 C.F.R. § 538.270-1(c) (2002).

167. 48 C.F.R. § 15.402(a)(1).

168. 48 C.F.R. § 15.404-1(b)(1) (2020).

169. 48 C.F.R. § 15.404-1(b)(2).

170. *Id.* ("Comparison of proposed prices received in response to the solicitation. Normally, adequate price competition establishes a fair and reasonable price . . . .")

171. 48 C.F.R. § 15.404-1(b)(2)(ii) (2020) ("Comparison of the proposed prices to historical prices paid, whether by the Government or other than the Government, for the same or similar items. This method may be used for commercial items including those 'of a type' or requiring minor modifications.").

172. 48 C.F.R. § 538.270-1(e) (2002).

173. 48 C.F.R. § 538.270-1(e)(7) (2002) ("If the best price is not offered to the Government, you should ask the offeror to identify and explain the reason for any differences.").

a fair and reasonable price and justifying the government's payment decisions. As with other instances of fraud on government resources, whistleblowers are often needed to uncover wrongdoing. With the immense proliferation of government contracts during the pandemic, these whistleblowers are more necessary than ever.

C. Grant and Loan Fraud

Fraud on government grants and loans are also combatted by the FCA. As of April 2021, the federal government has become obligated to $245.2 billion in grants directly related to COVID-19.[174] These grants are wide ranging and include support for research, education, healthcare, and transportation.[175] The government has also dramatically increased its loan programs amid the pandemic. As of April 2021, the government has incurred $719.3 billion in loan obligations directly aimed at the pandemic.[176] Like other areas of government spending addressed above, such large outlays of public assets will lead to fraud.

Grant fraud, like all fraud schemes addressed by the FCA, involves the submission of false claims to the government for payment.[177] False statements can come in many forms, including misleading grant applications, the submission of false data in connection with an ongoing grant, or false statement of grant eligibility.[178] While enforcement actions against the most overt fraudsters have already begun,[179] the government will

174. *COVID-19 Spending*, *supra* note 5.

175. *Id.* (listing various recipients of COVID-19 related grants).

176. *Id.* (discussing total loan award obligations to various recipients).

177. *See* 31 U.S.C. § 3729(a) (2012).

178. *See, e.g.*, Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Duke University Agrees to Pay U.S. $112.5 Million to Settle False Claims Act Allegations Related to Scientific Research Misconduct (Mar. 25, 2019), https://www.justice.gov/opa/pr/duke-university-agrees-pay-us-1125-million-settle-false-claims-act-allegations-related [https://perma.cc/H36X-RW5L] (discussing a settlement where Duke University was alleged to have "fabricated data or statements in thirty (30) grants," inducing payment from the National Institutes of Health and the Environmental Protection Agency); Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Lakeway Regional Medical Center LLC and Co-Defendants Agree to Pay Over $15.3 Million to Resolve Allegations They Fraudulently Obtained Government-Insured Loan and Misused Loan Funds (Sept. 28, 2020), https://www.justice.gov/opa/pr/lakeway-regional-medical-center-llc-and-co-defendants-agree-pay-over-153-million-resolve [https://perma.cc/UY5S-NJ3Y] (discussing a settlement where a hospital allegedly obtained a loan intended to build hospitals in underserved areas from the Federal Housing Administration and Department of Housing and Urban Development by making false statements on the loan application).

179. *See* discussion *infra* Section IV.A.

need to rely on whistleblowers and the FCA to uncover more covert fraud schemes if it wishes to preserve its public investment.

IV. IMPACT OF THE PANDEMIC

A. The Paycheck Protection Program

One of the largest COVID-19 recovery efforts by the federal government came in the form of the CARES Act and its Paycheck Protection Program (PPP). In response to the massive economic impact of the virus and related shutdowns, Congress authorized $659 billion in forgivable loans to small businesses.[180] The loans given to struggling businesses were intended to cover expenses like payroll, health benefits, salaries, mortgage payments, rent, and utilities.[181] Loan payments were deferred,[182] and borrowers are allowed to apply for loan forgiveness if the funds are used for the intended purposes.[183]

In applying for the loans, borrowers make certain certifications of eligibility.[184] These certifications include (1) that economic uncertainty makes the loan request necessary; (2) that the funds will be used for the intended purposes listed above; (3) that the applicant does not have duplicative loan applications; and (4) that the applicant has not already received duplicative loans under the program.[185]

Abuse of this program quickly arose. First were reports of big businesses obtaining PPP loans, including the Los Angeles Lakers and the Ruth's Chris Steak House chain.[186] Next came reports that private banks—

180. CARES Act, Pub. L. No. 116–136, § 1102(b)(1), 134 Stat. 281, 286–93 (2020) (providing initial funding of $349 billion); Paycheck Protection Program and Health Care Enhancement Act ("CARES Act II"), Pub. L. No. 116–139, sec. 101(a)(1), 134 Stat. 620 (2020) (increasing funding to $659 billion).

181. CARES Act § 1102(a)(2)(F)(i)(I)–(VII).

182. CARES Act § 1102(a)(2)(M).

183. CARES Act § 1102(a)(2)(H).

184. CARES Act § 1102(a)(2)(G)(i)(I)–(IV).

185. *Id.*

186. Jim Zarroli, *Even the Los Angeles Lakers Got a PPP Small Business Loan*, NPR (Apr. 27, 2020, 3:47 PM), https://www.npr.org/sections/coronavirus-live-updates/2020/04/27/846024717/even-the-la-lakers-got-a-ppp-small-business-loan [https://perma.cc/YTC9-AA33]; Zachary Warmbrodt, *SBA Presses Big Businesses to Justify Aid, Sparking Uproar,* POLITICO (Oct. 30, 2020, 7:00 PM), https://www.politico.com/news/2020/10/30/sba-big-businesses-ppp-loans-433736 [https://perma.cc/F2BP-FASW].

who were used to process PPP loans—were prioritizing wealthy, existing clients over small businesses that were truly in need.[187]

Then came the fraud. The DOJ announced its first criminal charges related to fraudulent PPP applications on May 5, 2020.[188] Since those initial charges, the DOJ has charged sixty-five defendants in fifty separate cases for allegedly defrauding the PPP.[189] These initial cases represent the most overt instances of PPP fraud. For instance, many of the charged PPP recipients allegedly used loan proceeds on lavish expenditures, including multiple instances where separate recipients purchased Lamborghinis.[190] Also, many of these early cases involve purely fictitious businesses, where recipients allegedly claimed payroll expenses for nonexistent companies.[191]

These cases show that the DOJ is currently focusing its enforcement efforts on the most overt and egregious instances of fraud. When PPP recipients use government funds for lavish expenses or use wholly fictitious entities and documents, the fraud is easier to observe and prosecute. However, going forward, the government will need to rely on whistleblowers to uncover more covert schemes. Given the scope of the PPP, these cases will take center stage in *qui tam* litigation for years to come. Based on initial figures, the potential fraud could be in the tens of

187. Jonathan Ponciano, *Big Banks Prioritized Billions in PPP Funds for Wealthy Clients at the Expense of Struggling Small Businesses, House Report Finds*, FORBES (Oct. 16, 2020, 4:36 PM), https://www.forbes.com/sites/jonathanponciano/2020/10/16/trump-admin-big-banks-billions-ppp-funds-wealthy-clients-at-expense-of-struggling-small-businesses-house-report/?sh=52e45f1c730b [https://perma.cc/Y6QM-5LJK].

188. Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Two Charged in Rhode Island with Stimulus Fraud (May 5, 2020), https://www.justice.gov/opa/pr/two-charged-rhode-island-stimulus-fraud [https://perma.cc/L5HW-RV55].

189. Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Department of Justice Is Combatting COVID-19 Fraud but Reminds the Public to Remain Vigilant (Oct. 15, 2020), https://www.justice.gov/opa/pr/department-justice-combatting-covid-19-fraud-reminds-public-remain-vigilant [https://perma.cc/UCC9-3E8S].

190. *See* Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Florida Man Who Used COVID-Relief Funds to Purchase Lamborghini Sports Car Charged in Miami Federal Court (July 27, 2020), https://www.justice.gov/opa/pr/florida-man-who-used-covid-relief-funds-purchase-lamborghini-sports-car-charged-miami-federal [https://perma.cc/9HRC-9AGS]; Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Texas Entrepreneur Charged with Spending COVID Relief Funds on Improper Expenses Including Lamborghini and Strip Club (Aug. 4, 2020), https://www.justice.gov/opa/pr/texas-entrepreneur-charged-spending-covid-relief-funds-improper-expenses-including [https://perma.cc/V2NZ-GP24].

191. *See, e.g.*, Press Release, Off. of Pub. Affs., U.S. Dep't of Just., North Carolina Man Charged with Fraudulently Seeking Over $6 Million in COVID Relief Funds (Sept. 29, 2020), https://www.justice.gov/opa/pr/north-carolina-man-charged-fraudulently-seeking-over-6-million-covid-relief-funds [https://perma.cc/7MYG-8ED8] (alleging that the defendant used fictitious businesses with Game of Thrones themed businesses names to obtain loans, including "White Walker, Khaleesi, and The Night's Watch").

billions. A recent report by the Inspector General of the Small Business Administration (SBA) estimates that the agency approved $78 billion in loans to potentially fraudulent or otherwise ineligible borrowers.[192]

The government has already hinted at its willingness to extend its enforcement actions beyond the initial criminal cases noted above. The SBA, which administers the PPP, recently began circulating "loan necessity" questionnaires to entities who received loans of $2 million or more.[193] Recall that all PPP applicants were required to certify their need for the loans during the application process.[194] Larger companies that took PPP loans may find themselves in the FCA's crosshairs if they are unable to convince the SBA that their certifications were made in good faith.

Potential whistleblowers in these areas may encounter original source challenges. A potential *qui tam* case arising after these loan-necessity questionnaires may need to show that the relator can materially add to the government's existing investigation, if such investigations have become public. Given the difficulty of proving scienter—especially in the case of corporate defendants—a whistleblower with inside information showing that a company knew its PPP certifications were false at the time of submission would be invaluable to the government's investigation.

B. Waivers of Medicare and Medicaid Regulations

Whistleblowers currently bringing Medicare and Medicaid FCA cases will need to navigate a changing landscape of government regulation. It may come as no surprise that the COVID-19 pandemic necessitated changes to the government's regulation of its healthcare programs. As a defendant's adherence—or lack thereof—to these complex regulatory regimes is the backbone of Medicare and Medicaid FCA cases, whistleblowers and their attorneys will need to stay abreast of these changes, both to identify new areas of potential fraud and ensure that changes in the law have not negated their fraud theory.

One of the most notable changes to Medicare and Medicaid regulations are various waivers that the government implemented to ensure greater access to healthcare amid the pandemic. Under section 1135 of the Social Security Act, the government may temporarily waive or modify certain Medicare and Medicaid requirements to ensure that healthcare services are

192. Jim Zarroli, *Billions in COVID-19 Relief Loans May Have Been Handed out to Scammers, Report Says*, NPR (Oct. 28, 2020, 6:55 PM), https://www.npr.org/2020/10/28/928792199/billions-in-covid-19-relief-loans-may-have-been-handed-out-to-scammers-report-sa [https://perma.cc/2JN3-28M6].

193. Warmbrodt, *supra* note 186.

194. *See supra* note 184–85 and accompanying text.

available.[195] CMS has exercised that authority in a number of ways.[196] For example, it waived many requirements for telehealth services, including the requirement for a video component, and expanded the types of practitioners that can provide telehealth services.[197]

CMS also gave a blanket waiver to provisions of the Stark Law,[198] which prohibits a physician from referring patients to a facility if the referring physician has a financial relationship with that facility.[199] A self-referral may be temporarily permissible, if the referral itself is related to COVID-19 and is within the disaster area.[200] Moreover, CMS specified eighteen types of referrals and remunerations that fell under the blanket exception.[201] While this blanket waiver is extensive, it does not nullify all prohibitions of the Stark Law. Consequently, whistleblowers will need to consult the exceptions closely when bringing Stark-based FCA claims.

Whether it is a telehealth waiver, a Stark waiver, or otherwise, whistleblowers will need to be cautious when bringing FCA cases based on actions that occurred during the pandemic. These waivers could have significant impacts on a relator's case. For example, it could influence the damages calculation in a case. If a physician was improperly billing for telehealth services, that wrongful conduct could have been temporarily condoned by a waiver, excluding from the Government's damages conduct that would have been fraudulent on either end of the waiver period.

These waivers may also raise materiality issues for potential whistleblowers. If the government overtly waived otherwise impermissible billing practices, then violations of those regulations are not material to their payment decision during the waiver period. That means fraudulent billing could be material one day and immaterial the next. Carefully identifying when the alleged fraud occurred is critical. To those unaware of the waivers, innocent conduct during the waiver period may appear to be blatant

195. 42 U.S.C. § 1320b–5(b).

196. *See, e.g.*, *COVID-19 Emergency Declaration Blanket Waivers for Health Care Providers,* CTRS. FOR MEDICARE & MEDICAID SERVS. (Dec. 1, 2020), https://www.cms.gov/files/document/summary-covid-19-emergency-declaration-waivers.pdf [https://perma.cc/6CRC-KNHE].

197. *Id.* at 1.

198. *Blanket Waivers of Section 1877(g) of the Social Security Act Due to Declaration of COVID-19 Outbreak in the United States as a National Emergency*, CTRS. FOR MEDICARE & MEDICAID SERVS. (2020), https://www.cms.gov/files/document/covid-19-blanket-waivers-section-1877g.pdf [https://perma.cc/Q6CV-BAZX] [hereinafter *Blanket Waivers of Section 1877(g)*].

199. 42 U.S.C. § 1395nn (a)(1)(A).

200. *Blanket Waivers of Section 1877(g)*, *supra* note 198, at 2.

201. *Id.* at 3–5.

fraud. If a whistleblower does not carefully identify applicable waivers, then the entirety of their allegations may be immaterial to the government's payment decision.

C. Government Procurement

As with any emergency, the federal government made substantial purchases of supplies to address the pandemic. However, the level of government purchases in response to the COVID-19 pandemic is unprecedented. For example, the Department of Defense awarded a $104 million contract for 500 million safety syringes for the Department of Health and Human Services' Strategic National Stockpile as part of its efforts to prepare for mass vaccinations.[202] The government also made significant investments in medical equipment and personal protective equipment (PPE). In fact, the government has spent billions on ventilators alone.[203] The government also signed large contracts for vaccines, including one with Johnson & Johnson for $1 billion.[204] While early indications of vaccine viability appear positive, many nations have hedged their bets, placing massive orders on numerous unproven vaccines.[205] With such large expenditures, unscrupulous vendors will likely seek to profit off the emergency.

One possible area of enforcement is in defective or worthless products. Fighting this sort of emergency profiteering was the initial aim of the FCA[206] and remains relevant today. Amid the initial scramble to acquire

202. Press Release, Dep't of Def., DOD Awards $104 Million for Procurement of Syringes in Support of U.S. COVID-19 Vaccination Campaign (Aug. 5, 2020), https://www.defense.gov/Newsroom/Releases/Release/Article/2302139/dod-awards-104-million-for-procurement-of-syringes-in-support-of-us-covid-19-va/ [https://perma.cc/QU6D-PXSR].

203. *HHS Announces New Ventilator Contracts, Orders Now Totaling Over 130,000 Ventilators*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Apr. 13, 2020), https://www.hhs.gov/about/news/2020/04/13/hhs-announces-new-ventilator-contracts-orders-now-totaling-over-130000-ventilators.html [https://perma.cc/ZRV3-TTPV] (announcing various government contracts for ventilators including contracts for $552 million, $407.9 million, and $350.1 million).

204. Sydney Lupkin, *HHS Released More Coronavirus Vaccine Contracts as Election Results Unfolded*, NPR (Nov. 8, 2020, 2:16 PM), https://www.npr.org/sections/health-shots/2020/11/08/932793698/hhs-released-more-coronavirus-vaccine-contracts-as-election-results-unfolded [https://perma.cc/9QCY-6LND].

205. Sarah Boseley, *The Covid-19 Vaccine Gamble: Where Bets Have Been Placed and Why*, GUARDIAN (Sept. 11, 2020), https://www.theguardian.com/world/2020/sep/11/the-covid-19-vaccine-gamble-where-bets-have-been-placed-and-why [https://perma.cc/6EQ4-GQ82].

206. *See* discussion *supra* Section I.B.

necessary medical equipment and PPE, reports began of defective or substandard products. In one instance, the Federal Emergency Management Agency (FEMA) sent $134 million in supplies to 15,000 nonprofit nursing care facilities, which were struggling to address the health emergency amid budgetary shortfalls and product shortages.[207] These shipments included loose gloves in unmarked Ziploc bags, surgical masks made from underwear fabric, and isolation gowns without openings in the sleeves.[208] While FEMA responded to these complaints and tried to rectify the issue on its own, this incident shows the potential for widespread FCA procurement cases. Given the high demand for these products and the inevitable shortage caused by that demand, some contractors will undoubtedly supply defective or useless products to the government.

Issues of price gouging may also arise in these large procurement contracts. In the early days of the pandemic, price gouging of consumer products appeared repeatedly in news headlines.[209] However, these opportunistic tactics were aimed at government purchasers as well as the general public. For example, during the height of the pandemic, New York State reportedly paid fifteen times the normal price for medical equipment.[210] As the state languished under staggering death tolls, profiteering sellers charged the state exorbitant prices, including "20 cents for gloves that normally cost less than a nickel . . . . And $248,841 for a portable X-ray machine that typically sells for $30,000 to $80,000."[211] Governments were desperate to pay these price gougers as shortages arose. Houston's mayor even submitted a bid of $4 per N95 mask and was nonetheless outbid.[212] These issues also impacted the federal government.[213] The United States Coast Guard ordered 1 million N95 face

207. Andrew Jacobs, *FEMA Sends Faulty Protective Gear to Nursing Homes Battling Virus*, N.Y. TIMES (July 28, 2020), https://www.nytimes.com/2020/07/24/health/coronavirus-nursing-homes-PPE.html [https://perma.cc/B4YN-HFJ7].

208. *Id.*

209. *See, e.g.*, Richard Stradling, *Company Agrees to Pay $150,000 to Settle Claims of N95 Mask Price Gouging in NC*, NEWS & OBSERVER (Oct. 30, 2020, 12:22 PM), https://www.newsobserver.com/news/coronavirus/article246831437.html [https://perma.cc/CMZ6-VM4L]; Michael Levenson, *Price Gouging Complaints Surge Amid Coronavirus Pandemic*, N.Y. TIMES (Mar. 27, 2020), https://www.nytimes.com/2020/03/27/us/coronavirus-price-gouging-hand-sanitizer-masks-wipes.html [https://perma.cc/8C6Z-CAR9].

210. Lydia DePillis & Lisa Song, *In Desperation, New York State Pays up to 15 Times the Normal Prices for Medical Equipment*, PROPUBLICA (Apr. 2, 2020, 1:20 PM), https://www.propublica.org/article/in-desperation-new-york-state-pays-up-to-15-times-the-normal-price-for-medical-equipment [https://perma.cc/9EDD-YUWR].

211. *Id.*

212. *Id.*

213. *Id.*

masks for $5 apiece, downgraded the order to 200,000 masks, then eventually cancelled the order entirely.[214]

These stories highlight the reality that even the government can be held hostage by profiteering price gougers in an emergency where supplies dwindle and the need for emergency supplies remains high. The sheer volume of government purchases during the pandemic will likely ensure that these issues remain at the forefront of FCA litigation for years to come.

Whistleblowers seeking to combat these issues should be prepared for a materiality fight. Sellers who provided substandard goods may argue that the government's extreme need for medical equipment and its repeated acceptance of such goods indicate a lack of materiality.[215] However, the proper analysis is whether the defendant knowingly provided defective goods to the government with knowledge that the state of the goods was material, which would establish materiality.[216] Price gouging defendants may attempt to argue that the government was willing to pay exorbitant prices due to high demand and inadequate supply. However, this does not exempt sellers from offering most-favored-customer pricing.[217] For example, if a seller offered a higher price to a hard-hit government, like New York State, demand may well be high and the state may be forced to accept; however, if that seller provided others with a more typical price, they may be liable under a state FCA.[218] Moreover, historical pricing and prices offered by other sellers may serve as a basis for FCA liability.[219] Prospective relators seeking to bring pandemic procurement cases should prepare for these defense arguments.

D. The American Rescue Plan Act of 2021

These initial relief efforts are just the tip of the iceberg when it comes to the government's unprecedented spending to address the pandemic. In March 2021, Congress passed the American Rescue Plan Act of 2021.[220] This newest round of spending dwarfed the CARES Act, with a total

214. *Id.*

215. *See* Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 136 S. Ct. 1989, 1994 (2016).

216. *See id.*; *see also* United States v. Triple Canopy, Inc., 857 F.3d 174, 177 (4th Cir. 2017) (discussing *Escobar*'s materiality standards).

217. *See* discussion *supra* Section III.B.

218. *Id.*

219. *Id.*

220. American Rescue Plan Act of 2021, Pub. L. No. 117-2.

taxpayer price tag of $1.9 *trillion*.[221] While some are calling the law an overreach—with only 9% of funds directly aimed at COVID-19—and others are defending it as a holistic economic recovery plan,[222] one thing is clear: continued government expenditures ensure the need for the FCA and its whistleblowers.

The law contains divergent efforts running the gamut of government spending. In addition to high-profile expenditures, like direct stimulus payments,[223] the law includes an additional $7.25 billion in PPP funding.[224] It also includes significant expenditures on medical supplies and services, like the law's $7.5 billion appropriation for COVID-19 vaccines.[225] The law's spending goes on to include a host of grants, including those for mental health services,[226] substance abuse,[227] rural health care,[228] and childcare and development,[229] just to name a few. And the law makes numerous changes to Medicare and Medicaid policies.[230] With such massive payments and regulatory changes, fraud is sure to occur. In fact, the law itself recognizes this reality with multiple appropriations for various OIG offices for their oversight activities, many in the millions of dollars.[231]

While the wide-ranging expenditures of the American Rescue Plan Act are far too numerous to be discussed fully here, the implication is clear. We will need decades—at least—to understand how much of taxpayer funds were diverted to fraudsters, rather than put to their intended use. Along the way, we will need the assistance of whistleblowers and clarity in the FCA to recoup as much waste as possible.

---

221. Barbara Sprunt, *Here's What's in the American Rescue Plan*, NPR (Mar. 11, 2021, 2:39 PM), https://www.npr.org/sections/coronavirus-live-updates/2021/03/09/974841565/heres-whats-in-the-american-rescue-plan-as-it-heads-toward-final-passage [https://perma.cc/BMA5-TC22].

222. *Id.*

223. American Rescue Plan Act of 2021 § 6428B.

224. *Id.* § 5001.

225. *Id.* § 2301.

226. *Id.* § 2701.

227. *Id.* § 2706.

228. *Id.* § 5001.

229. *Id.* § 2201.

230. *See id.* §§ 9811–9819, 9831–9833.

231. *See, e.g.*, *id.* § 9833 (providing a $5 million appropriation for OIG of the Department of Health and Human Services); § 2012 (providing a $5 million appropriation to OIG of the Department of Education); § 1004 (providing a $2.5 million dollar appropriation for OIG of the Department of Agriculture); § 2904 (providing a $500,000 appropriation for OIG for the Railroad Retirement Board).

CONCLUSION

The massive expanse of government spending, and the resultant fraud that is sure to follow, highlights the need for the FCA and its whistleblowers throughout this pandemic. Since its inception, this law has been the government's most effective tool to combat fraud, waste, and abuse of government assets. Much of the fraud perpetrated against the government would go undetected without whistleblowers who are willing to take the risk to speak out. The FCA has proven its effectiveness time and time again, recouping nearly $60 billion in public funds since its 1986 amendment. As we move into an era of increased government spending to address the pandemic, this law is more critical than ever.

In response to this need, all FCA players need to focus on making this law the most effective fraud fighting tool possible. Critical to this endeavor is clarifying existing law. Congress should work to statutorily clarify the materiality standard, giving potential whistleblowers greater clarity in assessing their claims when making a decision on whether to risk speaking out. All government actors should also seek to rein in unnecessary dismissals of meritorious *qui tam* actions. The Granston Memo and the *Swift* court's deference to the DOJ's dismissal authority threaten the success of the FCA as a whole. This issue can be addressed on multiple fronts. Congress can seek to clarify its initial intent in requiring a hearing before dismissal. The DOJ itself can rein in its use of dismissal, trusting in the ability of the FCA to net the government more resources, rather than viewing it as a drain on resources. At the very least, the DOJ should allow whistleblowers to continue to litigate cases without intervention, trusting the relator's bar to fight vigorously to protect government resources. Finally, courts should take a less deferential approach to the DOJ's dismissal authority, allowing whistleblowers to have their day in court.

The massive spending efforts of the government in response to the pandemic require the aid of *qui tam* whistleblowers to protect this investment. The CARES Act and the American Rescue Plan Act were unprecedented stimulus efforts. However, that investment to protect small businesses will be squandered if resources are diverted to otherwise secure businesses and fraudsters seeking to enrich themselves. While the government must often rely on the submissions of those seeking payment, whistleblowers with inside knowledge can help uncover otherwise undiscoverable fraud. Whistleblowers must also continue their important work in limiting fraud against government healthcare programs while remaining vigilant of a changing regulatory landscape. Finally, the government must rely on whistleblowers and the FCA to uncover issues in its procurement contracts. With this level of purchasing, there are undoubtedly significant sums that have been diverted either through price

gouging, substandard products, or otherwise. As always, whistleblowers are necessary in bringing undiscovered fraud to light and protecting the public from fraud.