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The False Claims Act –  
2017 Mid-Year Update  
Education Sector  
July 26, 2017

# Our Team



[\*\*Nicola Hanna\*\*](#) is a partner in the Orange County office and a member of the firm's White Collar Defense and Investigations, Class Action and Complex Litigation, and Health Care practice groups. He has represented numerous clients in FCA actions brought against educational institutions, government contractors, and health care providers.



[\*\*James Zelenay\*\*](#) is a partner in the Los Angeles office and a member of the firm's Litigation Department. He is experienced in federal and state FCA matters and whistleblower litigation, in which he has represented a breadth of industries and clients, including educational institutions.



[\*\*Christina Yang\*\*](#) is an associate in the Palo Alto office and a member of the firm's Litigation Department. She has extensive experience in a broad range of civil business litigation, with a focus on consumer class actions and complex commercial litigation.

# Agenda

- FCA Overview
- The FCA and the Education Sector
- Enforcement Developments
- Regulatory or Legislative Developments
- Notable Case Law Developments
- Best Practices
- Questions

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# FCA Overview

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# The False Claims Act (FCA)

- The FCA, 31 U.S.C. §§ 3729-3733, is the federal government's **primary weapon to redress fraud** against government agencies and programs.
- The FCA provides for recovery of **civil penalties** and **treble damages** from any person who knowingly submits or causes the submission of false or fraudulent claims to the United States for money or property.
- Under the FCA, the Attorney General, through DOJ attorneys, investigates and pursues FCA cases (except in declined *qui tam* cases).
- DOJ is devoting more and more resources to pursuing FCA cases—and considering whether *qui tam* cases merit parallel criminal investigations.



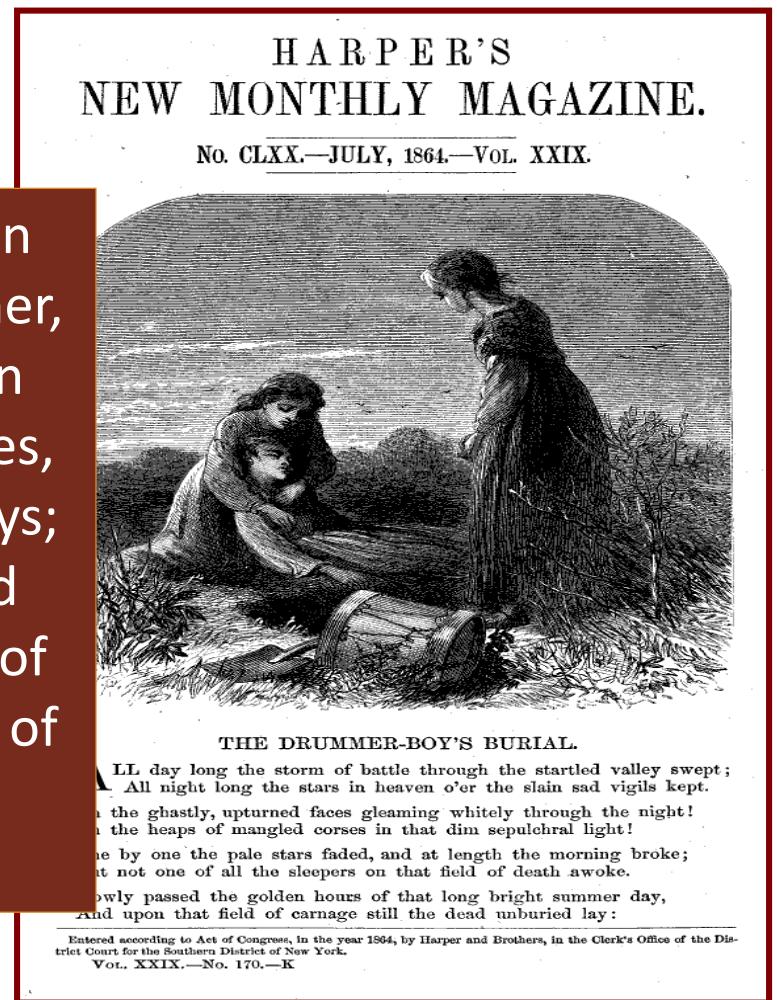
"It seems quite clear that the objective of Congress was broadly **to protect the funds and property of the Government from fraudulent claims ....**"

*Rainwater v. United States,*  
356 U.S. 590 (1958)

# FCA – History

- Civil War profiteering prompted enactment of the “Lincoln Law” in 1863.

For sugar [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols the experimental failures of sanguine inventors, or the refuse of shops and foreign armories.



R. Tomes, *The Fortunes of War*, Harper's New Monthly Magazine 228 (July 1864).

# FCA – Key Provisions

| 31 U.S.C.<br>§ 3729(a)(1) | Statutory Prohibition   | Summary                |
|---------------------------|---|------------------------|
| (A)                       | Knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval                                      | False/Fraudulent Claim |
| (B)                       | Knowingly makes, uses or causes to be made or used, a false record or statement material to a false or fraudulent claim                 | False Record/Statement |
| (C)                       | Knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government | “Reverse” False Claim  |
| (G)                       | Conspires to violate a liability provision of the FCA   | Conspiracy             |

# FCA – Scienter

- “Knowingly” requires scienter and is defined as:
    - Actual knowledge,
    - Deliberate ignorance, or
    - Reckless disregard.
  - Negligence is not actionable.
  - Specific intent to defraud is not required.



# FCA – Overview of Key FCA Theories

## **Factual Falsity**

- False billing (e.g., services not provided, phantom students)
- Overbilling (e.g., upcoding, inflated fees)

## **Legal Falsity / False Certification**

- Express certification of compliance with legal requirements
- Submission of claim with representations rendered misleading as to goods / services provided

## **Promissory Fraud / Fraud in the Inducement**

- Obtaining a contract through false statements or fraudulent conduct
- *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) (claims by contractors who colluded on bids)

## **Reverse False Claims**

- Improper avoidance of obligation to pay money to the government
- Retention of government overpayment

# FCA – Damages and Penalties

- **Simple Damages Calculation**

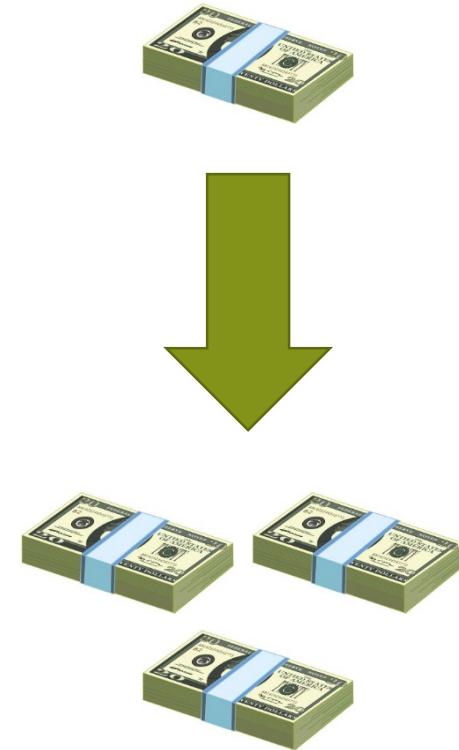
- Treble damages are traditionally calculated by multiplying the government's loss by three (e.g., if defendant charged government \$100 for goods not received, damages would be \$300).

- **Complex, Contested Damages Calculation**

- Calculations are more complicated (and less certain) when the government receives goods or services it considers deficient or when there is a "false certification" or "promissory fraud."

- **Civil Per Claim Penalty**

- Previously \$5,500 to \$11,000
- Nearly doubled effective 2017 (~\$10,957 to ~\$21,563)



## FCA – Statute of Limitations

- The statute of limitations is:
  - 6 years from the date of violation or
  - 3 years from when facts material to the violation are known or reasonably should have been known to the government
- ***But*** not more than 10 years from the violation



# Government Players

## DOJ



DOJ is devoting more and more resources to pursuing FCA cases—and considering whether *qui tam* cases merit criminal investigation.

## State Attorneys General

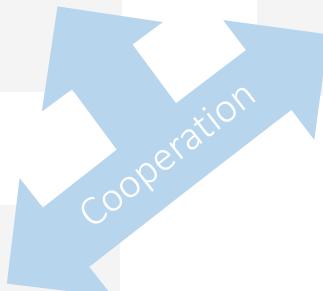


State AGs are increasingly conducting investigations and pursuing claims under state False Claims Acts.

## Inspector Generals



U.S. Department of Education:  
Office of Inspector General



## Government



# FCA – *Qui Tam* Provisions

- ***Qui Tam* Provisions**
  - Enable so-called “relators” to bring cases in the government’s name and recover **as much as 30%** of favorable judgment or recovery
  - Allow government to intervene
    - An increasing number of whistleblower cases are pursued **without government intervention** (but often with government statement of interest)
- **FCA Whistleblower Protections (31 U.S.C. § 3730(h))**
  - Protects employees and others (e.g., contract workers)
  - Relief may include:
    - Double back pay and interest on back pay;
    - Reinstatement (at seniority level); and
    - Costs and attorneys’ fees



“In short, sir, I have based the [*qui tam* provision] upon the old-fashioned idea of holding out a temptation and ‘**setting a rogue to catch a rogue**,’ which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.”

Statement of Senator Howard, Cong. Globe, 37<sup>th</sup> Cong. 955-56 (1863)

## By the Numbers: 2016



**\$4.7 billion**  
Civil Settlements  
and Judgments  
Under the FCA



**800**  
New FCA Cases  
Filed

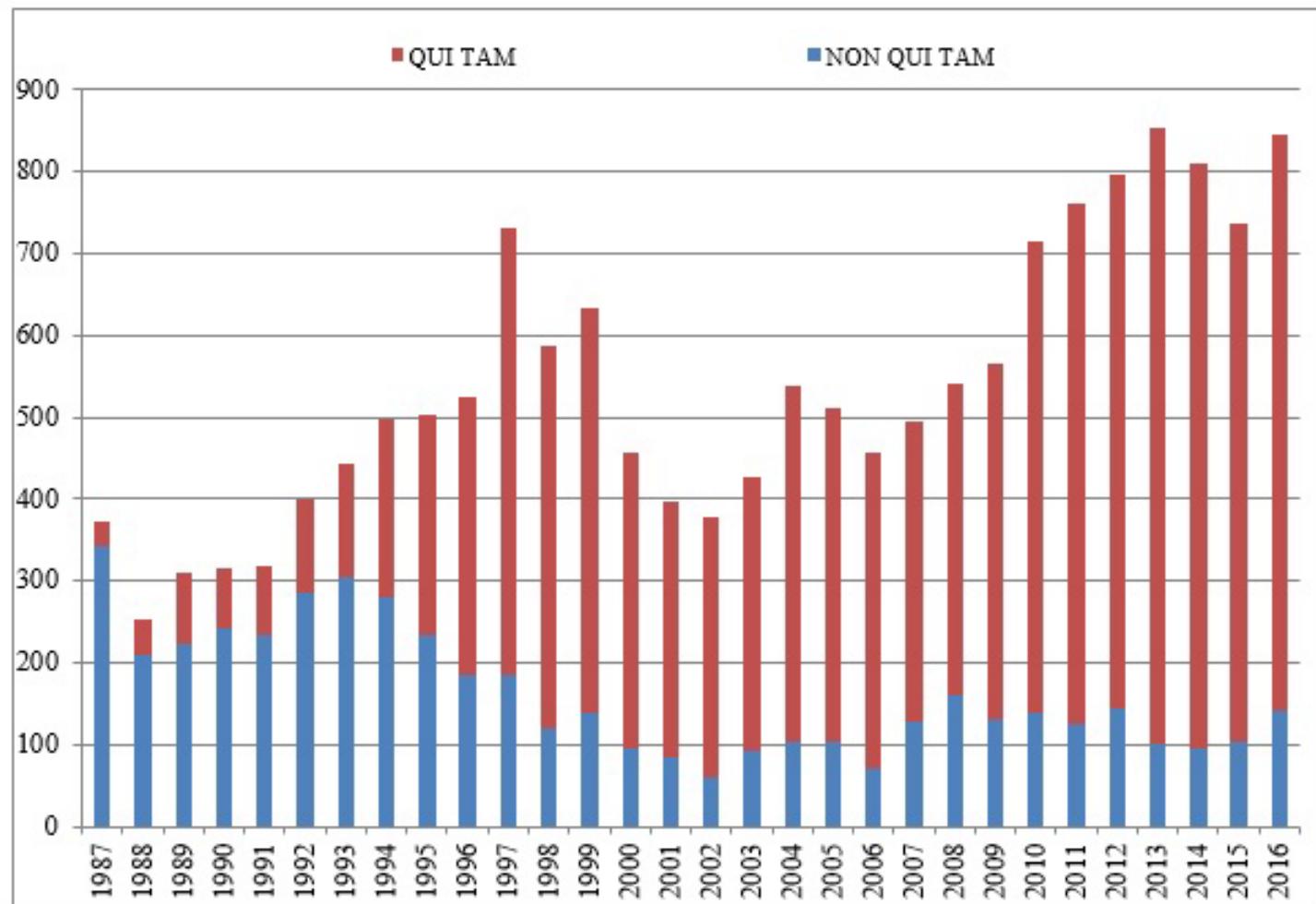


**83 percent**  
Percentage of  
New FCA Cases  
Initiated by a  
Whistleblower



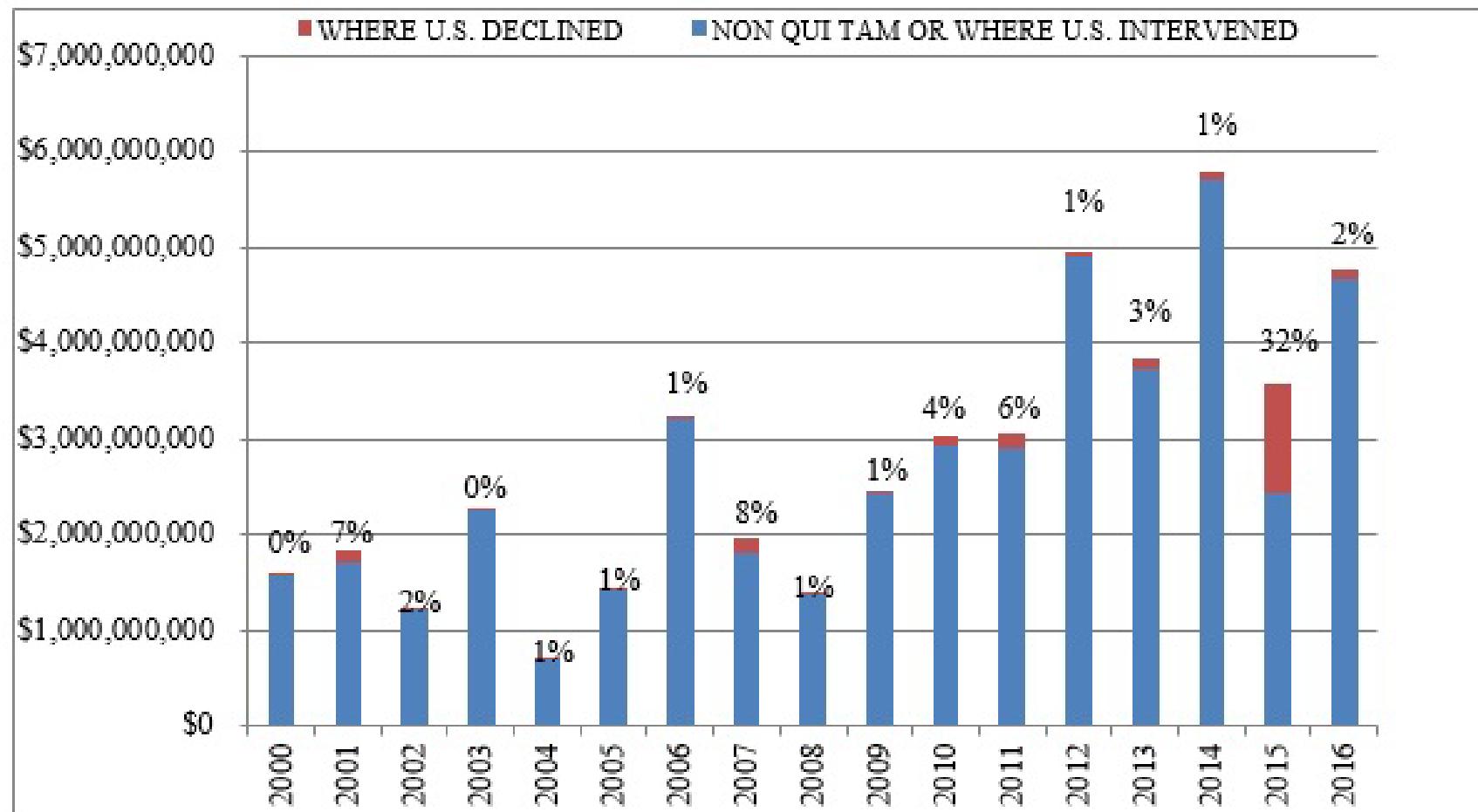
**98 percent**  
Percentage of  
Overall Federal  
Recovery from  
Cases in which the  
Government  
Intervened

# Number of New FCA Suits (1987-2016)



Source: DOJ "Fraud Statistics – Overview" (Dec. 13, 2016)

# Declined Cases in FCA Settlements / Judgments



Source: DOJ "Fraud Statistics – Overview" (Dec. 13, 2016)

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# The FCA and the Education Sector

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# How the FCA Applies to the Education Sector

- Financial Aid
  - Federal (Title IV)
  - State (grants/scholarships)
- Higher Education Act (HEA)
- Program Participation Agreements
- Accreditor Rules
- State Rules

PPA, OPE ID: 00297400, PPA Expiration Date: 03/31/2017

Page 1 of 16

  
FEDERAL STUDENT AID ~~START HERE. GO FURTHER.~~  
**UNITED STATES DEPARTMENT OF EDUCATION**  
**FEDERAL STUDENT AID**  
**SCHOOL ELIGIBILITY CHANNEL**

**PROGRAM PARTICIPATION AGREEMENT**

|                             |  |
|-----------------------------|--|
| Effective Date of Approval: | The date on which this Agreement is signed on behalf of the Secretary of Education |
| Approval Expiration Date:   | <b>March 31, 2017</b>  |
| Reapplication Date:         | <b>December 31, 2016</b>   |

Name of Institution: University of North Carolina - Chapel Hill  
Address of Institution: 102 South Building  
Chapel Hill, NC 27599-9100

OPE ID Number: 00297400  
DUNS Number: 003203213  
Taxpayer Identification Number (TIN): 566001393

The execution of this Agreement by the Institution and the Secretary is a prerequisite to the Institution's initial or continued participation in any Title IV, HEA Program.

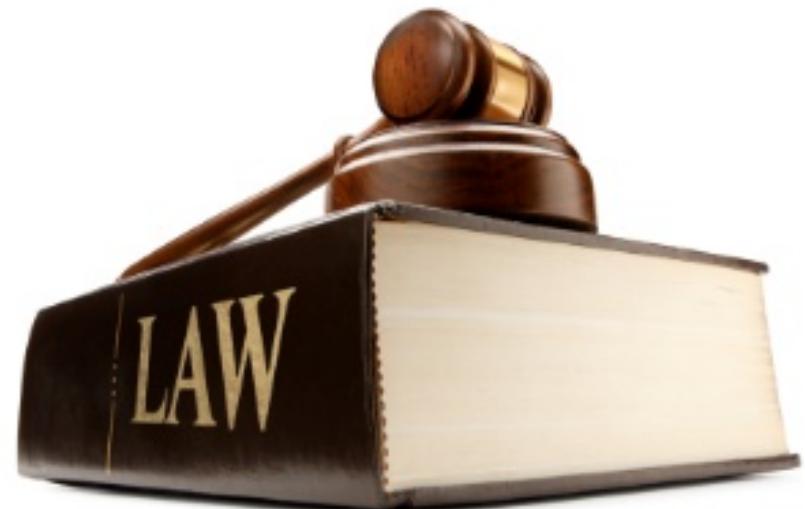
The postsecondary educational institution listed above, referred to hereafter as the "Institution," and the United States Secretary of Education, referred to hereafter as the "Secretary," agree that the Institution may participate in those student financial assistance programs authorized by Title IV of the Higher Education Act of 1965, as amended (Title IV, HEA Programs) indicated under this Agreement and further agrees that such participation is subject to the terms and conditions set forth in this Agreement. As used in this Agreement, the term "Department" refers to the U.S. Department of Education.

## SCOPE OF COVERAGE

This Agreement applies to all locations of the Institution as stated on the most current ELIGIBILITY AND CERTIFICATION APPROVAL REPORT issued by the Department. This Agreement covers the Institution's eligibility to participate in each of the following listed Title IV, HEA programs, and

# Sources of FCA Enforcement

- Federal: DOJ; ED
- State: Attorneys General
  - Working group of 19 AGs investigation sector
- Local: city and county attorneys
- Plaintiffs' attorneys
  - *Qui tam* lawsuits



# A (Very) Short History

- Pre-Obama Administration
  - Multiple FCA cases brought against schools
    - DOJ did not intervene
    - Cases dismissed at pleadings (e.g., *Graves v. ITT*)
    - Almost all incentive comp cases
    - ED provided helpful guidance – safe harbors, Hansen memo
    - *But see* DOJ investigation of ITT
  - Law changed in mid-late 2000s
    - *Main & Hendow* decisions
    - Increased scrutiny (Harkin, GAO, Obama Administration)
    - Settlements
    - Market crashed
  - Plaintiffs' lawyers came out of the woodwork

# A (Very) Short History

- Until *Escobar* (and new Administration):
  - FCA liability based upon traditional false claims
  - General theory of false certification accepted
    - Sometimes stretched to far limits
      - Misrepresentation to students
      - Accreditor misrepresentations
      - Rehabilitation Act (*Gillespie v. Kaplan*)
  - But cases still subject to dismissal for failure to plead underlying violation
    - *Bott v. Silicon Valley College; Diaz v. Kaplan*
  - Cases still subject to dismissal on jurisdictional grounds
    - *Lee v. Corinthian*
  - Cases still defeated at summary judgment

## A (Very) Short History

- But courts were more skeptical
  - 7<sup>th</sup> Circuit *Leveski* decision
- Government began to intervene in lawsuits
  - EDMC
- More settlements
  - March 2012: Westwood College (\$4.5 million)
  - December 2012: NYIT & Cardean (\$4 million)
  - August 2013: ATI (\$3.7 million)
  - August 2013: Career Education Corp. (\$10.25 million)
  - July 2014: Corinthian Colleges
  - November 2015: EDMC (\$95.5 million)

# Case Law and Scrutiny Left its Mark

**“Corinthian Colleges Files For Bankruptcy”**

HuffPost (May 4, 2015)

**EDMC to “gradually shutter 15 of its 52 Art Institute campuses.”**

Fortune (May 7, 2015)

**“Le Cordon Bleu to close US schools”**

Fox News (December 17, 2015)

**“Brown Mackie Will Close Most of its Colleges”**

Inside Higher Ed (June 13, 2016)



**“ITT Tech Shuts Down All Campuses”**

Inside Higher Ed (September 7, 2016)

# So Where Are We Now?

**“Donald Trump is Elected President in Stunning Repudiation of the Establishment”**

The New York Times (November 9, 2016)



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# Enforcement Developments

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# Recent Statements from the New Administration



“We cannot afford to lose a single dollar to corruption, and you can be sure that if I am confirmed, I will make it a high priority of the department to root out and prosecute fraud in federal programs and to recover monies lost due to fraud or **false claims.**”

- Attorney General Jeff Sessions III

(Senate Judiciary Committee Hearing on Nomination of Sen. Jeff Sessions to be Attorney General (Jan. 10, 2017))

“We certainly will continue to enforce [the FCA]” and the DOJ will ensure that “whistleblowers receive any protection they are entitled to by law or regulation.”

– Deputy Attorney General Rod Rosenstein

(Senate Judiciary Committee Hearing on Nominations of Rod Rosenstein (Mar. 7, 2017))



# Recent Statements from the Administration

“Nobody supports care being billed for [w]hat isn’t needed or . . . hasn’t been provided. And [the FCA] is one of those areas that I think we need to be **very, very focused**. I’m . . . certain that there are some bad actors out there.”

- Secretary Tom Price, Department of Health and Human Services

(Senate Finance Committee Hearing on Nomination of Rep. Price to be HHS Secretary (Jan. 24, 2017))



# Recent Statements from the Administration

“My first priority is to protect students. Fraud, ***especially fraud committed by a school***, is simply unacceptable.”

- Secretary Betsy DeVos, Department of Education

(Secretary DeVos Announces Regulatory Reset to Protect Students, Taxpayers, Higher Ed Institutions (June 14, 2017))



## Mid-Year Check-In: July 2017



\$1.3 billion

FCA recoveries from  
**settlements** in the first  
half of 2017



\$370 million

**Judgments** from FCA  
cases in the first half of  
2017



8th

DOJ remains on pace  
for **8<sup>th</sup> consecutive year**  
exceeding \$3 billion in  
total FCA recoveries

## The Settlement Trend Continues in 2017

- CECO / AIU: alleged false certification that AIU was properly accredited; \$22 million in attorneys' fees to relators' counsel, and \$10 million to the United States
- Trump University: alleged misrepresentations regarding the qualifications of the instructors and other aspects of the program; \$25 million
- DeVry University: alleged deceptive claims about job placements; settled with the FTC; \$49.4 million in partial refunds to eligible students; \$50.6 million in debt relief
- Corinthian Colleges Inc.: alleged misrepresentations to investors re purported fraudulent business model between 2007 and 2010; \$2.25 million
- ITT: alleged hiding of student loan defaults from investors; settled with SEC; no monetary damages and no admission of liability

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# Legislative & Regulatory Developments

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# Federal Developments

- **Health Care Reform**
  - Patient Protection and Affordable Care Act changed key provisions of FCA, including public disclosure bar
  - House and Senate bills left these changes in place
  - Complete repeal, however, could undo changes to FCA
- **Per Claim Penalties**
  - In October 2015, Congress passed legislation requiring agencies to increase FCA penalties to account for inflation
  - On February 3, 2017, the DOJ issued a final rule increasing the per violation FCA penalty range of \$10,781 to \$21,563 to a range of \$10,957 to \$21,563
- **Potential Eighth Amendment challenges to per claim penalties**



# Federal Developments

- Promise of regulatory reset, fulfilled?
  - Pause button on gainful employment regulations
  - Stay of borrower defense to repayment rule
- Jerry L. Falwell, president of Liberty University, joins White House task force focused on reform of regulations related to higher education
- States stepping up scrutiny of education sector
  - 19 States Attorneys General sue Secretary DeVos over decision to suspend borrower defense rules
  - California Assembly has proposed eliminating Cal Grants for all for-profit schools



“It’s time to take a step back and make sure these rules achieve their purpose: helping harmed students. It’s time for a regulatory reset.”

- Secretary DeVos  
(June 2017)

# State Developments

- State Per Claim Penalties
  - States are amending their false claims acts to match federal per claim penalties
  - States have until December 31, 2018 to make amendments
  - States that do not amend their false claims acts to comply may be deemed less effective than the federal FCA and lose increased share of Medicaid recoveries



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# Case Law Developments

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# *Universal Health Services, Inc. v. U.S. ex rel. Escobar*

136 S. Ct. 1989 (2016)

- Relator brought FCA suit against leading nation-wide provider of mental health services, alleging that hospital provided inadequate care to a teenage patient by using underqualified personnel to deliver counseling services.
- The Court held that the implied certification theory can provide a basis for FCA liability where:
  1. “the claim does not merely request payment, but also makes **specific representations about the goods or services provided**,” and
  2. “the defendant’s failure to disclose noncompliance with material statutory, regulatory, or contractual requirements makes those representations **misleading half-truths**.  
The Court declined to decide “whether **all** claims for payment **implicitly** represent that the billing party is legally entitled to payment.”



## *Universal Health Services, Inc. v. U.S. ex rel. Escobar*

136 S. Ct. 1989 (2016)

- The Court also concluded that “[a] misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be **material** to the Government’s payment decision.”
- The Court characterized the materiality requirement as “rigorous” and “demanding,” and confirmed that materiality can be a basis for dismissing a case on a MTD.
- The relevant question is not whether the alleged underlying legal violation was “capable” of affecting payment, **but whether the government actually “would not have reimbursed the claims had it known that it was billed for . . . services that were performed [in violation of the statute or regulation at issue].”**
- Government knowledge of violations paired with continued payment can be “very strong evidence” that requirements are not material.

# What does *Escobar* mean for schools?

- Implied certification
  - “Claims” for financial aid say little
- Materiality
  - Government uses all sorts of regulatory mechanisms (short of outright termination) to handle violations of items alleged by relators (e.g., incentive compensation ban)



# *U.S. ex rel. Nelson v. Sanford Brown Ltd.*

840 F.3d 445 (7th Cir. 2016); rehearing en banc denied (Nov. 30, 2016)



"Here, [the relator] has offered *no evidence* that the government's decision to pay SBC would *likely or actually have been different* had it known of SBC's alleged noncompliance[.]"

- Alleged violations of various Title IV requirements, including incentive compensation provision and rules relating to accreditation
- In 2015, the Seventh Circuit rejected relator's implied certification theory, calling it "unreasonable"
- Post-*Escobar*, upon reconsideration, the Seventh Circuit found that the case before it still did not fit the narrow circumstances for a viable implied certification claim as the relator offered no evidence that Sanford-Brown "made any representations *at all* in connection with its claims for payment, much less false or misleading representations."

## *U.S. ex rel. Nelson v. Sanford Brown Ltd.*

840 F.3d 445 (7th Cir. 2016); rehearing en banc denied (Nov. 30, 2016)

- The Seventh Circuit also explained that after *Escobar* the school is “entitled to summary judgment because [the relator] failed to establish the [separate,] independent element of materiality.” The relator again offered no evidence that the government’s decision to pay Sanford-Brown “would likely or actually have been different had it known of SBC’s alleged noncompliance with Title IV regulations.”
- In fact, the “subsidizing agency and other federal agencies in this case ‘have already examined SBC **multiple times** over and concluded that neither administrative penalties nor termination was warranted.’”

“At bottom, even assuming [the relator’s] allegations are true, the most he has shown is that SBC’s supposed noncompliance and misrepresentations would have entitled the government to **decline** payment.”



## ***U.S. ex rel. Miller v. Weston Educational, Inc.***

840 F.3d 494 (8th Cir. 2016)

- The Eighth Circuit arguably took the opposite approach to the Seventh Circuit, largely ignoring *Escobar*.
- In 2015, the Eighth Circuit allowed the case to proceed premised on an alleged violation of a school's record keeping requirement, reasoning that the requirement was "material" because it was included in:
  - (1) the PPA that all schools must sign, (2) the statute governing participation in federal financial aid program (20 U.S.C. § 1094), and (3) the applicable regulation (34 CFR § 668.14)
- Post-*Escobar*, the Eighth Circuit double-downed on its prior decision.
  - Again, pointing to the three ways the government imposed the record keeping requirement, and concluding "[a] reasonable person would attach importance to" it.
  - The court further concluded that "the government's acts confirm that it cares about the promise at issue" because ED "relies on school-maintained records to monitor regulatory compliance."

## ***U.S. ex rel. Rose v. Stephens Institute***

No. 09-cv-05966 (N.D. Cal. 2016); interlocutory appeal granted,  
No. 17-15111 (9th Cir.)



ACADEMY *of* ART

- Trial court found “two-part” test from *Escobar* was not required.
- Trial court found alleged requests for Title IV funds implicitly represented compliance with the incentive compensation ban.
- Trial court found that there is a triable issue of fact regarding whether alleged violations of incentive compensation provision were material.
  - Despite:
    - Hansen Memo
    - History of DOE enforcement
  - DOJ statement of interest
  - Ninth Circuit has granted interlocutory review; US Chambers has made amicus submission

## *U.S. ex rel. Christiansen v. Everglades College, Inc.*

855 F.3d 1279 (11th Cir. 2017)



"[T]he United States is not required to satisfy the good-cause intervention standard in § 3730(c)(3) when settling a *qui tam* action brought under the FCA."

- Perhaps the only case involving a school that has gone to trial
- The government originally declined to intervene
- Alleged violations of the incentive compensation ban
- 4-day trial, in which the judge found in favor of the relators, but awarded no damages (in part based on concepts found in the Hansen Memo) and only \$11,000 in penalties
- Relator appealed, but the government then intervened and settled with the school for \$335,000
- Relator then appealed the government's intervention, which the Eleventh Circuit rejected and affirmed the district court's ruling finding the settlement to be fair, adequate, and reasonable

## Case Study: *Kaplan, Inc.*

- In 2008, Kaplan and its schools were sued in multiple qui tam FCA lawsuits
  - Geographically diverse, diverse as to issues, diverse as to controlling authority
- Analyzed individually and collectively
  - Motion to dismiss on pleadings
  - Motion to dismiss on first to file
  - Motion for summary judgment
  - Motion for dismissal on public disclosure grounds
- By 2017, all dismissed voluntarily, at motion to dismiss, or at summary judgment

# Post-Escobar: Impact of Government Intervention

***U.S. ex rel. Badr v. Triple Canopy, Inc.*, 857 F.3d 174 (4th Cir. 2017)**

- FCA suit premised on allegations that defendant falsified marksmanship scores of guards providing security for facilities in Iraq
- In effect, the Fourth Circuit held that both of *Escobar's* “two conditions” are ***not required*** to allege a valid implied false certification claim.
  - While Defendant was not required to certify compliance or make a “specific representation” with regard to marksmanship qualifications, omissions regarding those issues fell “squarely within the rule that half-truths [and] can be actionable misrepresentations.”
- In analyzing materiality, the Fourth Circuit concluded that evidence that the “Government did not renew its contract for base security with Triple Canopy and ***immediately intervened in the litigation*** . . . are evidence that Triple Canopy’s falsehood affected the Government’s decision to pay.”



## **Post-Escobar: Impact of Government Intervention**

***U.S. ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481 (3d Cir. 2017)**

- FCA suit based on assertions that pharmaceutical company failed to disclose data showing certain common and severe side effects.
- Third Circuit affirmed dismissal on pleadings based on lack of materiality.
- Third Circuit noted that the relator “not only fails to plead that [the government] consistently refuses to pay’ claims like those alleged . . . but essentially concedes that [the government] would **consistently reimburse** these claims with full knowledge of the purported noncompliance.”
- In rejecting materiality, the Third Circuit found persuasive that the Government took **no action** after relator disclosed the allegations forming the basis of the complaint: “And in those six years, the Department of Justice has taken no action against Genentech and **declined to intervene** in this suit.”

**Genentech**

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# Best Practices

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# Best Practices: How to Avoid and Defend Against Lawsuits

- Adopt, implement, and monitor a formal business ethics awareness and compliance program and internal control system.
  - Standards and procedures
  - Tone at the top
  - Internal audits
  - External audits
  - Compliance hotline
- Take complaints seriously / investigate. Most whistleblowers attempt to first resolve complaints internally.
- Be mindful of retaliation provisions in FCA



# Best Practices: How to Avoid and Defend Against Lawsuits

- Inform and train employees, including on compliance and how to report purported misconduct.
  - Consistently inform employees of outlets for grievances
  - Have strong HR system in place.
  - Most whistleblowers are aggrieved / disgruntled former employees
  - Documentation and transparency with government are key.
  - Implement procedures to determine the credibility of evidence of alleged misconduct under the FCA, PPA, Title IV, or any other regulations to minimize exposure to liability and the possibility of suspension or debarment.

# Best Practices: How to Avoid and Defend Against Lawsuits

- **Reasonable** measures, not perfection: A strong internal program may not prevent mistakes nor stop a rogue employee from committing fraud, but it may defeat scienter.
  - SA/C: Collective knowledge doctrine.



# Best Practices: How to Avoid and Defend Against Lawsuits

- Consider whether self-disclosure is required / appropriate.
  - Consideration should be made in consultation with counsel
  - Consider potential debarment implications.



## FCA: Warning Signs

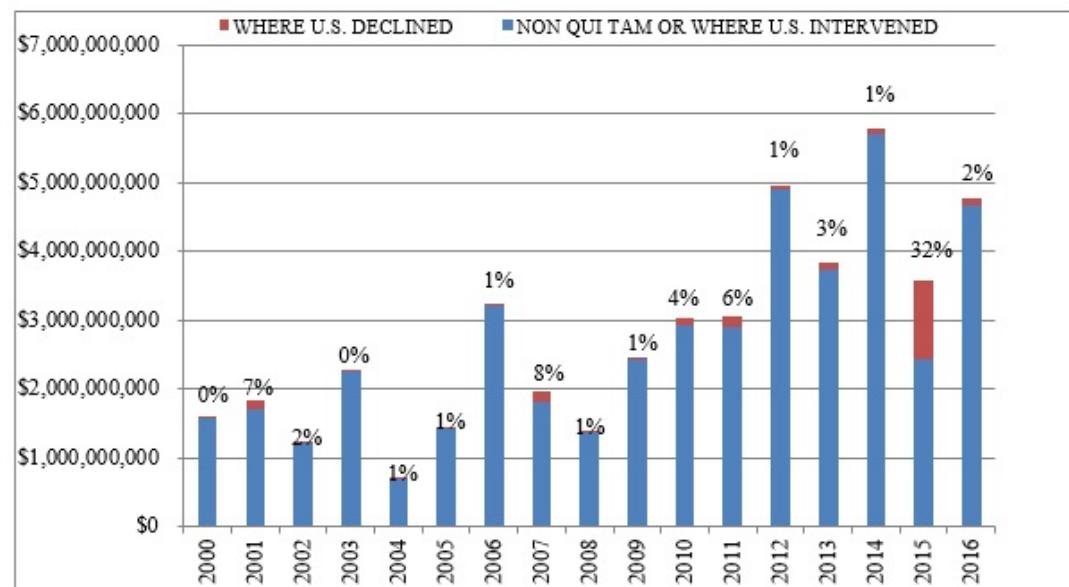
- FCA *qui tam* complaints filed under seal.
- Important to know early on if there is an FCA complaint.
- Some other warning signs:
  - HR issues; scuttlebutt; statements in exit interviews
  - Unexpected audit / request for information
  - Increased web activity
  - Former employees being contacted; keep lines of communication open with former employees



# FCA: What to Do Next

- Contact DOJ / AUSA
- Most **critical juncture** in FCA cases are often the decision whether the government will intervene.
- Develop and present case to the government – facts and law

**Settlement or Judgments in Cases where the Government Declined Intervention as a Percentage of Total FCA Recoveries**



*Source: DOJ "Fraud Statistics – Overview" (Dec. 13, 2016)*

# FCA: What to Do Next

- In litigation:
  - File a motion to dismiss
  - Rule 12(b)(6) – theories of liability
  - Rule 12(b)(1) – jurisdictional arguments (public disclosure, first-to-file, etc.)
  - Rule 9(b)



## FCA: What to Do Next

- Consider issues of privilege and potential waiver early on in case
- Identify “sources of corporate knowledge”—whose scienter will you say matters?
- Conduct damages analysis
- If government has declined intervention, keep open lines of communication
  - The ability to settle often depends upon the government

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Questions?

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