

TOPIC:

THE FALSE CLAIMS ACT: RECENT AMENDMENTS AND THEIR IMPLICATIONS FOR HIGHER EDUCATION

INTRODUCTION:

The 2008 and 2009 economic turmoil that threatened America's entire financial system, caused the federal government to make enormous investments in the public and private sectors through programs such as the Troubled Asset Relief Program (TARP) and the American Recovery and Reinvestment Act of 2009 (ARRA). Wary that this new influx of government money could be diverted or misused by the unscrupulous, Congress strengthened the government's fraud-fighting powers by passing the Fraud Enforcement and Recovery Act of 2009 (FERA), which President Obama signed into law on May 20, 2009. A central piece of the FERA legislation includes revisions to the federal False Claims Act (FCA) [\[1\]](#), an enforcement tool frequently wielded against government contractors, grantees and other beneficiaries of federal funds, including many educational institutions. But Congress did not stop with FERA. In 2010, it made further changes to the FCA in the recently passed health reform legislation.

The FCA "prohibits false or fraudulent claims for payment to the United States, 31 U.S.C. § 3729(a), and authorizes civil actions for remedying such fraud to be brought by the Attorney General, § 3730(a), or by private individuals in the Government's name, § 3730(b)(1) [\[2\]](#)."

But fraudulent conduct under the False Claims Act extends well beyond billing for services not provided or billing for services different from those actually provided. Instead, False Claims Act litigation against educational and other entities is frequently based on theories of "false certification." Under this theory, billing claims that are literally true (*i.e.*, have no false statements on the face of the claim) may be rendered false or fraudulent by virtue of an implied or express certification. In particular, *qui tam* plaintiffs (*i.e.* whistleblowers) frequently seek to establish FCA liability by arguing that, when submitting claims for payment, defendants have certified compliance with a broad range of local, state and federal statutes, regulations, guidelines and policies, even if there is no connection between the purported violations of these statutes and the actual claim for payment.

If accepted by the courts, this broad interpretation of the FCA would permit private individuals to enforce laws and regulations for which there is no statutory private right of enforcement. For example, many FCA cases against educational institutions have been based on allegations that schools failed to comply with incentive compensation provisions of the Higher Education Act ("HEA"), which prohibits certain compensation arrangements with student recruiters and financial aid employees. Of late, however, these allegations have gone well beyond mere non-compliance with HEA, reaching instead to allegations of failure to provide quality education, failure to meet standards set forth by accrediting bodies, and grade inflation. Under this implied certification theory of FCA liability, a school that collects federal payments impliedly certifies that it has complied with regulatory requirements like these and failure to comply, therefore, renders its claim for payment

false or fraudulent. This implied certification theory has been accepted by many – but not all – federal circuit courts.

The Supreme Court in *Allison Engine Co. v. United States ex. rel. Sanders* recognized the expansive nature of this theory. In *Allison Engine*, however, the Supreme Court expressed concern that, unless limited, the false certification theory “would threaten to transform the FCA into an all-purpose anti-fraud statute [3].”

Historically, the FCA has been the government’s most powerful tool for reining in fraud, since it incentivizes whistleblowers (also known as *qui tam* relators) to bring suit on behalf of the government and exposes violators to treble damages, stiff civil penalties, and attorney’s fees. The statute has resulted in recoveries to the government’s coffers exceeding \$24 billion since 1986 [4]. While recent, headline-grabbing recoveries have featured the health care sector [5], colleges and universities have increasingly become targets of enforcement under the Act. In 2009, several noteworthy settlements in higher education included:

- The University of Phoenix settling a long-running false claims suit for \$67.5 million to resolve allegations that it improperly rewarded recruiters for enrolling students [6].
- Alta Colleges paying \$7 million to resolve allegations that its Texas schools submitted false claims for federal student aid funds by misrepresenting compliance with state job-placement reporting requirements and professional licensure obligations [7].
- Weill Medical College at Cornell University agreeing to a \$2.6 million settlement to resolve allegations it defrauded the government in connection with federal research grant applications for the National Institutes of Health and Department of Defense [8].
- The University of Medicine and Dentistry of New Jersey paying \$8.3 million to resolve allegations it illegally paid kickbacks to cardiologists and caused the submission of false claims to Medicare [9].

This trend will likely continue because the 2009 Amendments strengthen the FCA considerably and include the most significant changes to the statute in over 20 years. Consequently, entities that do any business with the federal government, directly or indirectly, must understand how the recent changes to the FCA may affect them. Colleges and universities fall directly within the scope of the FCA to the extent they (1) rely on federal student aid programs, (2) apply for and receive federal research grants, (3) use federal monies for capital projects and investments, or (4) operate medical centers that receive reimbursement through the Medicare and Medicaid programs.

This Note explores the major changes made by the 2009 Amendments and how they may impact institutions of higher education. It also briefly describes the changes that the recently enacted health reform legislation makes to the FCA.

DISCUSSION:

2009 AMENDMENTS TO THE FALSE CLAIMS ACT

The 2009 Amendments to the FCA were adopted to address certain perceived weaknesses of the Act. Notably, the official Senate Report accompanying the bill stated, “The effectiveness of the FCA has recently been undermined by court decisions limiting the scope of the law and allowing subcontractors and non-governmental entities to escape responsibility for proven frauds. In order to respond to these decisions, certain provisions of the FCA must be corrected and clarified in order to protect Federal assistance and relief funds expended in response to our current economic crisis [10].” Consequently, the 2009 Amendments expand liability under the FCA and change certain key procedural aspects of the Act.

Expanding Liability: § 3729(a)(1)(B) Actions and “Correcting” Allison Engine

One of the most sweeping changes to the FCA relates to actions brought under § 3729(a)(1)(B) [11]. Under the 1986 version of the FCA, liability accrued when a person “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government [12].” Historically, some United States Courts of Appeals had applied this provision broadly to mean FCA liability could attach when one private entity made a false statement to a separate private entity, which subsequently received payment from the government. Direct payment from the government was unnecessary. It made FCA liability possible for a wide array of scenarios where the Government was not making direct payment to the bad actor, but “a false statement resulted in the use of Government funds to pay a false or fraudulent claim” or “government money was used to pay the false or fraudulent claim [13].”

In 2008, the Supreme Court effectively ended this broad application of 31 U.S.C. § 3729(a)(1)(B) liability and narrowed the scope of the FCA in the *Allison Engine* [14] decision. In that opinion, Justice Alito, writing for a unanimous court, held “a plaintiff asserting [such a claim] must prove that the defendant intended that the false record or statement be material to the Government’s decision to pay or approve the false claim [15].” The Court concluded, in part, that fraud directed at private entities (not the Government as the intended target) should be outside the scope of the FCA, since the FCA is not “an all-purpose antifraud statute [16].”

The United States Department of Justice (DOJ) disapproved of the Supreme Court’s decision. It wrote Senate Judiciary Committee Chairman Patrick Leahy, stating, “in the limited time since *Allison Engine* was issued, defendants have asserted that the FCA no longer extends to a variety of government programs that have historically received FCA protection, including Medicaid, student loans, and federal highway funds [17].” The DOJ called the decision “erroneous” and recommended that the intent requirement be stripped out of § 3729(a)(1)(B) actions.

The 2009 Amendments removed the “intent to defraud the Government” requirement the Supreme Court had read into the FCA, thereby overturning the major holding in the *Allison Engine* decision and once again expanding liability under the Act. Section 3729(a)(1)(B) now places liability on any person who “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim [18].” Consequently, any entity which defrauds an intermediary entity that receives federal funds may be liable under the FCA. For example, a request for funds to a federal grant recipient may now be actionable under the FCA if the funds requested were provided to the grantee “to advance a Government program or interest.”

The Materiality Requirement

The 2009 Amendments also explicitly include a “materiality” requirement in § 3729(a)(1)(B) actions (discussed above) and conspiracy actions brought under § 3729(a)(1)(C) [19]. This codifies what had been recognized by the courts: not all false statements or records give rise to FCA liability, just those that are “material” to the Government’s decision to pay or approve a claim [20]. The 2009 Amendments define materiality as “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property [21].” Given this rather vague definition, look for litigation to continue over how courts should interpret the materiality requirement in § 3729(a)(1)(B) and (C) actions.

The New Reverse False Claim

Proponents of the 2009 Amendments believed the previous version of the FCA suffered from a “gaping liability loophole” that permitted recipients of government overpayments to retain them without threat of FCA liability [22]. Looking to put an end to the supposed “finders’ keepers regime [23],” Congress modified the reverse FCA provision, 31 U.S.C. § 3729(a)(1)(F), to hold liable a person who

knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly

avoids or decreases an obligation to pay or transmit money or property to the Government.

Congress defined the term “obligation” – which was not used in the previous version of the FCA – as “an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from retention of overpayment [24].” These new provisions place recipients of government aid in the FCA’s cross-hairs, to the extent they “knowingly” retain an overpayment, even if the party has taken no affirmative act to conceal the money owed. Mere possession of an overpayment can now trigger FCA liability.

OTHER NOTEWORTHY CHANGES

Stronger Enforcement Tools and Expanded Retaliation Protection

Congress has strengthened the government’s enforcement tools under FERA by expanding the potential use of Civil Investigative Demands (CIDs). CIDs are a separate FCA procedural mechanism under the FCA designed to facilitate government investigations into fraudulent conduct [25]. While CIDs have been around since the 1986 Amendments, they have rarely been used by the government because the FCA previously required that the Attorney General personally approve a CID. The 2009 Amendments now allow the Attorney General to delegate CID authority to his designees, making approval of CIDs more likely. The 2009 Amendments also now permit the government to share CID information with *qui tam* relators.

The FCA’s retaliation provision, which permits a separate cause of action against persons who retaliate against whistleblowers, has also been amended. Previously, the FCA limited retaliation actions to “employees [26].” The law has now been expanded to forbid retaliation against “contractors or agents”, as well [27].

These amendments (and several others not discussed here) represent the most comprehensive changes to the FCA since the 1986 Amendments radically increased the scope of the Act. It is beyond dispute that they will affect any entity that does business with the federal government.

2010 Amendments to the FCA’s Qui Tam Provisions

The recently passed Patient Protection and Affordable Care Act (“PPACA”) includes revisions to the FCA targeted primarily at limiting fraud in the health care sector [28]. But the Act contains one revision to the FCA that will affect any entity (including those in higher education) receiving federal monies (directly or indirectly) that is named a defendant in a *qui tam* FCA suit because it eliminates what was known as the “public disclosure bar”.

Prior to PPACA’s enactment, the FCA included a jurisdictional bar requiring dismissal of *qui tam* or whistleblower suits that were based upon publicly disclosed information, unless the *qui tam* relator could establish that it was an original source of that information. PPACA deletes this jurisdictional bar in its entirety, replacing it with a provision much more favorable to relators. The new provision still requires dismissal of *qui tam* claims that are based on publicly disclosed information but the law now gives the Department of Justice the power, without intervening in the action, to object and, thereby, save a whistleblower’s claim from dismissal. Further, by altering the definitions of the terms “public disclosure” and “original source,” the new law seriously limits the likelihood of dismissal on public disclosure grounds. Under the new definitions state reports, audits and investigations will no longer be considered public disclosures. And whistleblowers seeking to establish themselves as original sources will no longer be required to show that they have direct knowledge of the purportedly fraudulent conduct.

OBSERVATIONS: THE FCA AND HIGHER EDUCATION

So what do the 2009 Amendments to the FCA mean for higher education? As the settlements referenced in the introduction indicate, colleges and universities are no longer strangers to FCA investigation, litigation, and settlement. Furthermore, given the flow of federal aid to colleges and universities, through grants, student aid, capital development funds, and Medicare and Medicaid reimbursement, it is not surprising these institutions have become targets of whistleblowers and governmental enforcement [\[29\]](#).

The risks to colleges and universities will only increase for those who seek out federal dollars available through new government spending programs. The ARRA stimulus legislation contains increased funding for college and university projects and initiatives. For example, the stimulus legislation includes \$15.64 billion in Pell Grants to provide need-based scholarships for undergraduate students, \$8.8 billion to states for modernization, renovation, and repairs of public school facilities and institutions of higher education, and \$1.3 billion in grants and contracts to renovate or repair existing non-federal university research facilities for institutions competing for biomedical grants, equipment, construction and renovation of facilities and laboratories [\[30\]](#).

While this enormous increase in potential funding may be a boon to colleges and universities in these tough economic times, institutions must be mindful of its source and the associated rules and regulations governing its use. Since the funding comes from the federal government, non-compliance with the conditions placed upon these funds may expose recipient colleges and universities to FCA liability. Special attention must be paid to the ARRA reporting requirements. Furthermore, the 2009 Amendments to the FCA have created a more robust tool for whistleblowers and the government alike to disincentivize fraudulent actors. Colleges and universities who receive federal funds would be well advised to adopt strict institutional controls.

The first line of defense against potential FCA liability is an effective compliance program designed to prevent, detect and correct violations of laws and regulations. To be effective, a compliance program for an institution of higher education must focus on key risk areas like Title IV compliance, ARRA reporting requirements, conflicts of interest, research compliance, effort reporting and privacy. Institutions with an academic medical center component face heightened risk and must focus compliance efforts on federal health program regulatory and billing requirements. Compliance programs should include monitoring and audit components focused on these risk areas and must also ensure swift and appropriate corrective action when violations are detected.

Yet, compliance programs, though unquestionably important, cannot shield institutions from FCA cases. Even the most compliance-conscious institution may find itself the target of a whistleblower or government-initiated action. In such cases, there are several important considerations for university counsel. First, because FCA cases sound in fraud, they are usually uninsured. And, because stakes can be extremely high (e.g., in an implied certification case, claimed damages are likely to be three times the total amount of federal funds received by the defendant), defense costs are generally very expensive. Second, the ability of private individuals to bring cases on behalf of the government frequently makes pre-litigation settlement difficult, even in cases where government officials are not enthusiastic about the merits of the allegations. Finally, schools and universities that choose to litigate whistleblower claims frequently face an uphill battle, with courts and juries alike giving whistleblowers the same type of latitude commonly available to *pro se* litigants – despite the fact that, with increasing frequency, whistleblowers are represented by sophisticated and experienced counsel.

CONCLUSION:

Recent amendments to the FCA, including enhanced enforcement tools and removal of certain procedural obstacles, mean that colleges and universities receiving federal government funds should not only institute appropriate compliance measures, but plan for the increased risk of whistleblower litigation brought pursuant to the FCA.

FOOTNOTES:

FN1. 31 U.S.C. §§ 3729-33.

FN2. [Rockwell Intern. Corp. v. United States](#), 549 U.S. 457, 463 (2007) (Scalia, J.).

FN3. [Allison Engine Co. v. United States ex rel. Sanders](#), 128 S. Ct. 2123, 2126 (2008) (Alito, J.)

FN4. See [Justice Department Recovers \\$2.4 Billion in False Claims Cases in Fiscal Year 2009; More Than \\$24 Billion Since 1986](#).

FN5. For instance, in 2009, Pfizer and Eli Lilly settled False Claims Act suits for improper pharmaceutical marketing practices for \$1 billion and \$438 million respectively.

FN6. See [University of Phoenix Settles False Claims Act Lawsuit for \\$67.5 Million](#).

FN7. See [Alta Colleges to Pay U.S. \\$7 Million to Resolve False Claims Act Allegations](#).

FN8. See [Weill Medical College of Cornell University to Pay Over \\$2.6 Million to Settle Federal Civil Fraud Charges](#).

FN9. See [UMDNJ to Pay More Than \\$8 Million to Settle Kickback Case Related to Cardiology Program](#).

FN10. [Senate Judiciary Report, S. 386, Report 111-10, at 10](#).

FN11. The 2009 Amendments renumbered some of the statutory provisions in the FCA, including the types of FCA actions available under § 3729(a). For simplicity's sake, this article will reference the newly implemented numbering scheme when possible.

FN12. 31 U.S.C. § 3729(a)(2) (1986).

FN13. [Allison Engine](#) *supra*, (quoting *United States ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610, 622-23 (6th Cir. 2006)).

FN14. 128 S. Ct. 2123. (2008).

FN15. *Id.* at 2126.

FN16. *Id.* at 2130.

FN17. See [Letter to the Honorable Patrick J. Leahy: Department's Views on Section 4 of S. 386 of the Fraud Enforcement and Recovery Act of 2009.](#)

FN18. 31 U.S.C. § 3729(a)(1)(b) (2009).

FN19. The 1986 version of the FCA imposed liability for conspiring to submit false claims. The conspiracy provision was expanded by FERA to include conspiring to commit any act prohibited by the FCA, including conspiring to make false records or retain overpayments.

FN20. [Allison Engine](#) *supra* note 13, at 2126.

FN21. 31 U.S.C. § 3729(b)(4).

FN22. [Testimony of Jeb White, Committee on the Judiciary, U.S. House of Rep. Apr. 1, 2009, at 8.](#)

FN23. *Id.*

FN24. 31 U.S.C. § 3729(b)(3).

FN25. 31 U.S.C. § 3733.

FN26. 31 U.S.C. § 3730(h) (1986).

FN27. 31 U.S.C. § 3730(h) (2009).

FN28. [PPACA Revisions to the FCA](#)

FN29. For discussions of particular FCA theories of liability asserted against colleges and universities, see Perkins, "[Federal Funding and Fraud: The False Claims Act in Higher Education after Main v. Oakland City University](#)," J. COL. & UNIV. LAW (2009), Braceras & Bell, "The False Claims Act and Universities: From Fraud to Compliance," COLLEGE & UNIVERSITY LAW MANUAL, Ch. 8 (2009).

FN30. [Excerpted from Arent Fox Analysis of ARRA Stimulus Legislation.](#)

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RESOURCES:

Statutes and Regulations:

- [False Claims Act \(FCA\)](#)
- [2009 False Claims Act Amendments \(S. 386\)](#)
- [Patient Protection and Affordable Care Act \(PPACA\), H.R. 3590, Sec. 10104\(j\)](#) (906 pages)
 - [PPACA Amendments to the FCA](#)

NACUA Resources:

Outlines

- [Whistleblowers, Hotlines and the False Claims Act](#). Charles Beckenhauer. Fall CLE, 2009.
- [The Federal False Claims Act, as Amended 2009](#). Peter Chatfield and David Koenig. Fall CLE, 2009.

Journal of College and University Law

- [Federal Funding and Fraud: The False Claims Act in Higher Education After *Main v. Oakland City University*](#). Rachel Perkins. 35 JCUL 747 (2009).

Other Resources:

- [The Civil False Claims Act: A Primer for Career and Other Proprietary Colleges](#)
- [Civil Frauds Division of the United States Department of Justice Web Page](#)
- John T. Boese, *Civil False Claims and Qui Tam Actions*, 3rd Ed. Aspen (2009)

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