

## False Claims Act Dispute Resolution

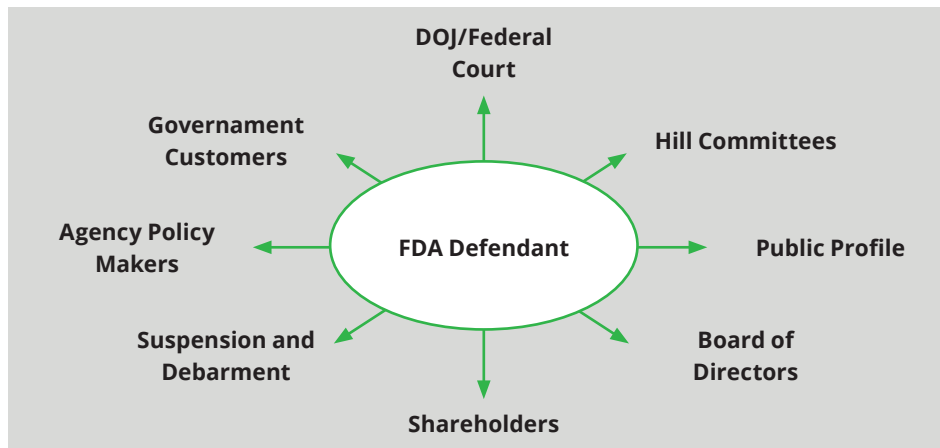
### A Multidisciplinary Approach to Resolving False Claims Act Litigation

Increasing enforcement and large financial incentives speak volumes about the importance of using a multi-faceted approach to respond to federal False Claims Act (FCA) investigations and litigation. In 2015 alone, settlements and judgments totaled \$3.6 billion, the fourth consecutive fiscal year in which the US government recovered more than \$3 billion. Health care cases continue to account for the majority of FCA recoveries. However, generally one-third of the recovery amount is related to procurement fraud cases, and 39 percent of new FCA cases in 2015 were outside of the health care context.

The FCA represents the fastest-growing area of federal litigation, and an increasing area of exposure for federal contractors. No small part of this growth is due to the FCA's qui tam provision, which enables private whistleblowers to file and pursue FCA litigation on behalf of the government, even without federal approval. Indeed, of the 737 new FCA cases filed in 2015, 86 percent were filed by qui tam relators. This growth is also attributable to the FCA having a low threshold of intent. There is no requirement for a specific intent to defraud, and so contractors can unwittingly expose themselves to FCA liability without actually intending to deceive or defraud the government.

Once engaged in FCA litigation, federal contractors are subject to increasingly punitive penalties and damages mandated by the statute. They also face a range of collateral consequences including negative publicity, stock price decline, shareholder derivative suits, additional audits and disallowances, suspension or termination of a contract award, negative past performance ratings, suspension and debarment proceedings, and even criminal fraud investigations and liability. These consequences can impact multiple stakeholders, not merely the single contract at issue in the litigation, and can extend outside the company to corporate affiliates. As a result, a company's FCA defense strategy should be multifaceted and multidisciplinary, taking into account all relevant constituencies (Figure 1):

Figure 1: Defense Strategy must take into account all relevant constituencies



FCA litigation is not simply a legal matter; collaboration among professionals with different areas of expertise—including law, accounting, and communications—is imperative to resolving FCA litigation efficiently and effectively. While legal counsel leads the team effort and focuses on the allegations and legal proceedings themselves, accountants and communications professionals provide valuable input and support that can minimize or eliminate liability and/or collateral consequences.

**Procurement fraud cases require legal counsel with government contracts expertise**

FCA suits alleging noncompliance with federal procurement requirements regularly involve complex procurement laws, heavily regulated, agency-specific procurement environments, and contractual provisions that may or may not be included in the underlying contract documents. As a result, effective counsel for these cases must involve not only FCA generalists, but also attorneys with a deep background in government contracts.

FCA defendants in government contract cases are not just large aerospace and defense contractors—virtually all types of commercial companies have been and can be defendants in FCA procurement cases. The federal government is the largest single customer of goods and services in the world. Thus, companies that focus on commercial sales have been the targets of FCA suits, such as IT manufacturers, resellers, integrators, healthcare providers, food distributors, office supply outlets,

service providers. Essentially, any company providing products or services to the government may well face an FCA lawsuit. FCA litigation is virtually a cost of doing business with the government.

Because the FCA requires that any damages be trebled—three times the amount of actual damages—FCA judgments and settlements can be significant. Recent FCA procurement case settlements range from \$2.25 million up to \$325 million. In addition to damages and penalties, there are other significant consequences to FCA liability, including suspension or debarment proceedings and mandated administrative compliance agreements. Thus, the legal counsel needed to address FCA suits dealing with procurement contracts usually does not end at the conclusion of the FCA litigation—counsel will be needed to address ongoing administrative consequences potentially well after the resolution of litigation.

There are also significant strategic considerations depending on the type of FCA case. While some FCA cases involve allegations of serious misconduct (what would traditionally be considered “fraud”), others involve fairly technical contractual noncompliance issues that, in the commercial world, would be handled as breach of contract matters and would not be considered fraud. Because of the perceived ease in proving noncompliance, the Department of Justice and qui tam whistleblowers often pursue allegations of “technical” noncompliance issues rather than egregious complex fraud schemes.

Latham & Watkins, Deloitte Advisory, and Ketchum recently hosted the webcast, “False Claims Act Dispute Resolution: A Multidisciplinary Approach to Resolving False Claims Act Litigation.” Moderated by David Hazelton, Partner, Latham & Watkins, speakers included Robert Cepielik, Partner, Deloitte Financial Advisory Services LLP; John Bradbury, Jr., Partner/Director, Issues & Crisis, Ketchum; and Anne Robinson, Counsel, Latham & Watkins. The three discussed how to more effectively navigate the FCA landscape by:

- Crafting a litigation strategy that takes into account each potential constituency involved
- Using accountants to analyze and critique the liability theory and/or damages model
- Devising an effective public relations strategy to address the litigation and potential fallout

To access the webcast, please [click here](#).

Examples of FCA cases based on technical noncompliance allegations abound. These include: 1) failure to disclose commercial discounts completely in Federal Supply Schedule contracts with the General Services Administration (“GSA”); 2) failure to comply with GSA’s Price Reduction Clause; 3) failure to properly complete certifications of compliance with the Buy American Act and Trade Agreements Act; and 4) inaccurate small business size certifications. The “technical” noncompliance arguments related to Federal Supply Schedule contracts are particularly emblematic of recent trends in FCA lawsuits. Federal Supply Schedule contracts are widely used government contract vehicles and are designed for use by companies that sell commercial products and services to the private sector and want to do business with the government as well. This type of contract involves a simplified procurement process to encourage companies that are

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not traditional government contractors to do business with the government. However, Federal Supply Schedule contracts often contain onerous and extremely complicated commercial price and discount disclosure requirements, as well as price reduction requirements that favor the government. Numerous well-known, large commercial companies have paid tens of millions of dollars in FCA settlements for failing to adequately track their commercial discounts and inform the government about these commercial discounts.

Fortunately, allegations of “technical” noncompliance mean that there are often government contract-specific defenses that can, in some cases, explain why a contractor actually did comply with a requirement, or why noncompliance with a certain provision does not amount to actual fraud. To mount such defenses, it is critical to educate the court about the applicable rules and regulations associated with government contracts. This approach can be particularly effective at the early motion to dismiss stage of the case—before entering the costly discovery phase of litigation.

For example, a defendant may benefit from explaining at the outset that a contractor’s reasonable reliance on well-established procedures for verifying subcontractor compliance with certain requirements sufficiently satisfy the contractor’s contractual and legal obligations, even where a “technical” violation slipped through the contractor’s system. Explaining to a court how complicated and inconsistent certain government contract rules actually are can help in establishing a defense that actual compliance with the rules would be difficult, if not impossible—and any non-compliance was not “knowing” or “material” to payment under the FCA. The fact that there are few bright lines in the area of government contracts can often work to a contractor’s advantage when defending against FCA allegations, particularly allegations that the contractor has made an objectively false representation.

### **Accountants’ role in FCA cases: time and expertise**

Accountants’ role in FCA cases can be summarized in two words: time and expertise. FCA matters may span multiple years, are intense and time-consuming, and

may distract from core business operations. Accounting consultants are fully dedicated resources who can provide a variety of advice and services to a company and its legal counsel throughout the FCA life cycle. Why is this support important?

Accounting is the language of business. Accountants bring their industry-focused, real-world experience working for companies to analyze and help solve complex business problems. Accountants can investigate and analyze an organization’s business, financial, and accounting records, including sales, procurement and vendor contracts, sales invoices, payroll arrangements, accounts payable disbursements, cost allocation methodologies, financing arrangement—the list goes on.

FCA cases typically require a company to collect electronic and hard copy documents spanning multiple years, locations, and systems. In addition, FCA allegations involve complex business transactions and require specialized knowledge and experience to investigate transactions—some of which may be disguised as to their true purpose. Also, damages theories in an FCA matter can be complex and may require the special skills of economists, statisticians, data analytics, and valuation specialists to formulate damages theories and quantify damages amounts. Accountants use text analytics, learning algorithms, and predictive coding and modeling techniques to expeditiously and thoroughly collect, analyze, and translate myriad data into information that counsel can use to defend the company.

After analysis, accountants can perform damages analyses, model alternative damages theories, and assist with settlement and mediation negotiations. They also can assist in addressing audit committee matters involving accounting and internal control issues and help the audit committee address questions of management integrity. In a litigation setting, accountants can serve as an expert witness, offering opinions as to damages and calculate potential penalties and critiquing the opposing side’s damages methodologies, assumptions, and calculations.


Attorneys work with accounting and other financial experts because they need quality advice when conducting internal investigations or litigation assignments. FCA matters are conducted under privilege, the accountants work under the direction of counsel, and their work product is prepared for counsel. Among examples of FCA issues addressed by accountants:

- A defense contractor allegedly overstated billings to the government. The accountant analyzed billing details and performed analyses to demonstrate that billings were not overstated and that the billings were not fraudulently accelerated. The accountant also served as a testifying expert.
- A multi-state integrated health system allegedly violated provisions of the Stark Law and Anti-Kickback regulations. Accountants performed an early case assessment; evaluated and quantified the populations to be analyzed; quantified amounts billed to and cash received from the Medicare fee-for-serve (FFS) program, deductibles and co-insurance collected, and remittances to physicians; compiled supporting documentation for business transactions; and performed a gap assessment of internal controls along with compliance policies and procedures.
- A multi-state home health agency allegedly submitted false claims to the government. Accountants performed an early case assessment; evaluated and quantified the populations to be analyzed; inspected medical and billing records; analyzed and provided rebuttal arguments to government experts; performed a gap assessment of internal controls; performed an assessment of compliance policies and procedures; and conducted Corporate Integrity Agreements/ Independent Review Organization (CIA/ IRO) readiness assessments and mock reviews.
- A systems integrator allegedly received certain benefits from alliance partners but failed to report these benefits. The accountant calculated potential damages as the difference between the value received by the government and the amounts paid to the defendant; calculated penalties based on Anti-Kickback requirements; and served as a testifying expert for the defendants.


## Communications considerations and strategies


Given the potentially significant nature of FCA cases—both in terms of legal and monetary outcomes—it should be no surprise that external communications are a key aspect to managing the potential reputational consequences and impact of an FCA case. History has shown that certain types of cases may generate considerable media coverage and stakeholder interest due to a variety of factors: these cases often have perceived victims and villains, as well as a perceived conflict of an individual whistleblower versus a big nameless/faceless corporation. Additionally, given the ongoing questions about the stability of the economy and debate about efficient use of government resources, a story about allegations of fraud at the expense of the taxpayer may be quite compelling. Finally, any situation with inherently negative outcomes—whether reputational, financial, or just generally creating negative perceptions among key stakeholders—will have communications and public relations implications.


During FCA investigations and the subsequent litigation, the primary roles for a company's communications/public relations (PR) professionals to consider are:

 **Develop a holistic perspective on overall communications and reputational risk.** Based on the circumstances, the communications professionals should assess the potential media interest. What does the current media landscape look like—are there other relevant variables in the communications or media environments that might make this a higher profile? What are the online/digital considerations? Also, it's not just the media that needs to be addressed or considered. Every organization has a wide variety of key stakeholders. Externally, these may be customers, the financial community, key opinion leaders, policymakers, consumers, etc. Additionally, it is important not to forget employees and how they might interpret this type of situation. For all these stakeholders, the assessment should include how the case may impact perceptions as well as actions stakeholders may take in response. Corporate reputation is an additional consideration. Reputation typically is influenced by drivers, which can

include elements related to emotional appeal, products and services, financial performance, workplace environment, social responsibility, and vision and leadership. The communications team generally will know what the core reputational drivers are for an organization and can assess if this matter may impact them directly.

 **Develop the communications objectives and strategy.** Based on the communications environment, as well as the assessment of key stakeholders and reputation risks, communications professionals can then help identify the primary communications objectives and the strategy to achieve them with a wide variety of audiences. This includes managing and mitigating identified potential reputational risks; having a strategy in place to (whenever possible) maintain desired stakeholder perceptions OR mitigate the negative impact to perceptions; and determining how communications can support and enhance the company's legal objectives.

 **Be prepared.** One benefit of an FCA case is that there is a procedural roadmap for the litigation process so some events can be anticipated (Figure 2). The communications team, in conjunction with the legal team, can work to identify all the known key moments—everything from the initial filing all the way to resolution—in time to determine in advance how the company may handle any communications associated with those moments in time. Communications professionals also need to be futurists and think about the unanticipated developments that might have communications implications. The PR team can also help determine what communications content—holding statements, key messages, etc.—and scenario plans with specific tactical elements can be developed in advance so that execution becomes more turn-key.

 **Ensure internal alignment.** It is important for a company involved in an FCA action to maintain a consistent, disciplined approach to communicating with all audiences. The more internal parties can agree to planned communications strategy/tactics in advance, the faster they can be activated and the better the outcomes.

## FCA focus areas: Procurement and health care fraud

A third of the FCA money the federal government recovered in 2015 (\$1.1 billion) was in procurement fraud cases. Accountants can help identify procurement fraud issues such as:

- Bid rigging. Competing bidders collude during the procurement process to drive up the bid price.
- Bribes and kickbacks to obtain a bid. Bidders bribe a procurement officer either with cash or gifts in kind.
- Submitting false information in a bid package. Bidders use related parties to artificially increase expenses.
- Direct and indirect labor issues. Labor rates included in government billings are not in accordance with the contract or indirect labor and overhead rates are overstated.
- Performance issues. Submission of inaccurate performance-related information to obtain payment or higher performance ratings.
- Improper acceleration of invoices to speed cash flow. Submitted claims are outside the contract terms.


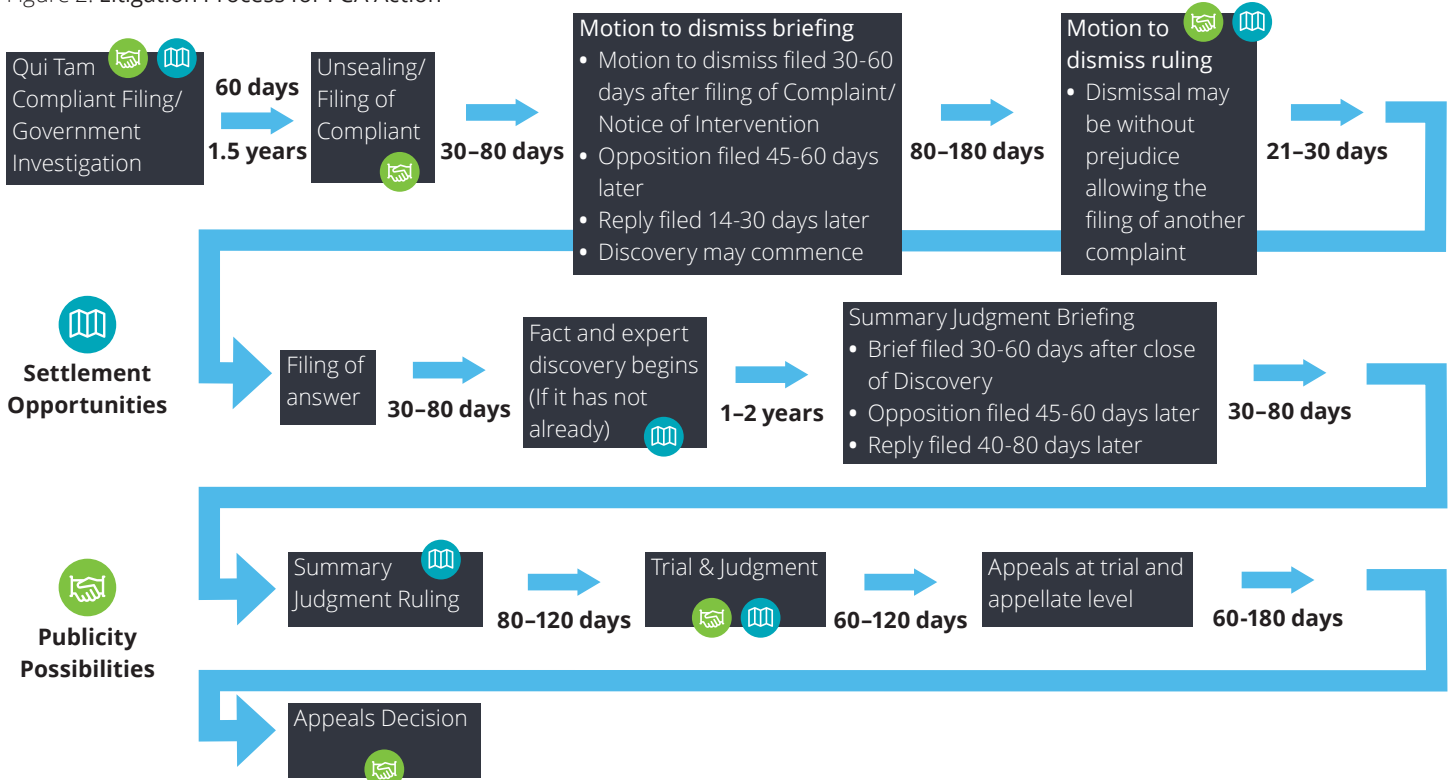
 **Condition the environment.** In addition to defensive tactics, certain proactive communications activities might be appropriate in specific circumstances and should be considered as a way to help mitigate the impact of a negative FCA outcome. This is an area where PR can be helpful. For example, PR can help identify ways to push out positive news about an organization over time in advance of known potential negatives. This can help build up a reservoir of good will with certain stakeholders and take the sting out of a negative outcome. PR can also initiate certain online activities, like Search Engine Optimization (SEO), as a way to mitigate the impact and lasting effect of negative news in the online space.

Figure 2: Litigation Process for FCA Action



**Provide perspective and advice.** The communications team should counsel company leaders about the communications implications of actions the organization may take in the wake of an FCA case. These may include actions to prevent the situation from recurring, actions taken in response, any training initiatives that may need to be developed, etc. PR can also work to ensure that there is a process in place to measure the impact of a negative resolution to certain key stakeholder perceptions about the company, as well as any impact to overall corporate reputation. Without a formalized measurement program, a company cannot truly know the impact a case may have and ensure actions are taken to address any impact moving forward.

**Team goal: Successful resolution, minimal fallout**

It is crucial to resolving FCA cases that contractors not go on “auto-pilot” during what often are years-long investigations and litigations. A combined team of FCA / government contracts counsel, accountants and public relations firms can provide substantive expertise to help resolve an

**The significance of government intervention**

Ninety-five percent of the \$42 billion recovered in FCA cases since FY 2000 was obtained in cases where DOJ joined, or intervened, in the lawsuit. If DOJ does not intervene, the chances of a qui tam whistleblower prevailing in the suit decrease dramatically. The fact that the intervention decision is so crucial presents both a challenge and an opportunity. The challenge is that, during this phase, the matter is still under seal. Often a company does not know what allegations, information, or evidence have been provided to the government. Thus, the company has to take a “best guess” at what type of arguments to make and what evidence DOJ will actually consider in making its decision. The opportunity is that DOJ is still in fact-gathering mode and, depending on the nature of the case, the DOJ attorney may be looking for a path forward to explain why the case does not merit DOJ involvement. In this situation, the company’s legal counsel has the opportunity to educate DOJ on the facts and highlight the legal problems with the case.

FCA case as early as possible in the process and with minimal fallout. For example, all team members may play a role in settlement negotiations: government contracts attorneys can encourage settlement by explaining the allegations’ legal and contractual weaknesses, accountants can help drive down settlement amounts by providing rational damage calculations, and PR experts can help manage resulting publicity. This team can also assist with collateral consequences of a settlement, such as managing a suspension or debarment proceeding, a shareholder suit, or a criminal proceeding. A collaborative team of legal, accounting, and communications specialists can consider all the angles and ramifications, and strike the right balance in a company’s defense.

## Contact us:

### **Dean W. Baxtresser**

#### **Associate**

Latham & Watkins LLP  
+1 202 637 2110  
Dean.Baxtresser@lw.com

### **David R. Hazelton**

#### **Partner**

Latham & Watkins LLP  
+1 202 637 2254  
David.Hazelton@lw.com

### **John R. Bradbury, Jr.**

#### **Partner/Director, Issues & Crisis**

Ketchum, Inc.  
+1 646 935 4023  
John.Bradbury@ketchum.com

### **Anne W. Robinson**

#### **Counsel**

Latham & Watkins LLP  
+1 202 637 2161  
Anne.Robinson@lw.com

### **Robert J. Cepielik, CPA**

#### **Partner, Forensic & Investigations**

Deloitte Financial Advisory Services LLP  
+1 215 299 5212  
rcepielik@deloitte.com

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