



## Fox Rothschild Podcast

### The Presumption of Innocence

#### Episode 63: Enforcement Priorities of the Second Trump Administration: The False Claims Act

*Featuring Matt Adams, Jana Volante Walshak and Kevin Raphael of Fox Rothschild*

**Matt:** Welcome back to "The Presumption of Innocence," a podcast brought to you by the White-Collar Criminal Defense and Regulatory Compliance Practice at Fox Rothschild. I'm your host, Matt Adams. And today we're talking all things FCA, the False Claims Act. And it is a continuation of our ongoing multi-part series on predicting the priorities of the second iteration of the Trump presidency here in 2025.

And our guests today are at least one return guest, Jana Volante Walshak a partner based out of the Fox Rothschild Pittsburgh, Pennsylvania office. And a new guest to the program, but also a member of the White-Collar Criminal Defense and Regulatory Compliance Practice at Fox Rothschild. Kevin Raphael, who is based out of our Philadelphia, Pennsylvania office.

Jana and Kevin, welcome to the program. It's great to have you both.

**Kevin:** Thanks for having us.

**Matt:** Well as I alluded to at the outset, we're going to be talking about the investigative priorities of the second Trump administration. And in so doing, we are reading tea leaves. We don't have a crystal ball nor a pipeline into the administration to obtain those insights. But we really have been able to glean from a lot of the public pronouncements that have come about the types of things they are most interested in that the False Claims Act will be one of them and a primary one at that.

Just yesterday-- and for those listening at home, this is released after recording, but that was May 19, 2025 -- the Deputy Attorney General of the United States, Todd Blanche, wrote a memorandum to the Office of the Associate Attorney General for the Civil Rights Division, the Criminal Division, Executive Office of all the United States Attorneys and all the United States attorneys across the country, and made a very poignant and pronounced affirmative statement. The False Claims Act is the Justice Department's primary weapon against government, fraud, waste and abuse. We've been hearing that for, really, generations because this statute, Kevin, has been around forever. And your practice focuses almost exclusively on False Claims Act cases.

Give us a little bit of background on the FCA and why it is that the Justice Department can say it's the primary weapon against government fraud, waste and abuse? And then that's going to build up to a



discussion of why we can read certain tea leaves to support the premise that we're espousing here today that this is going to be a significant area of activity under the Trump administration.

**Kevin:** Certainly, Matt. Thank you. So, the old saw is that the False Claims Act has been around since the Civil War, when it gave the government the authority to pursue individuals that were engaging in military procurement fraud, selling mules instead of horses. But in 1986, the False Claims Act was amended to expand the government's authority to pursue fraud against the federal payers. It also included the qui tam provision, which allows whistleblowers to file claims on behalf of the government. And the reason it's a primary vehicle is it has been so successful. Since 1986 there have been \$78 billion in False Claims Act recoveries. And every year the recoveries get larger.

In 2024-- which is a good way to look at what priorities are going to be for 2025 -- \$2.9 billion were recovered in fiscal year 2024 in settlements and judgements under the False Claims Act. And while many people think about the False Claims Act as being primarily targeted towards the health care industry, only \$1.67 billion of that \$ 2.9 last year was from the health care industry. The other \$1.23 billion was from military procurement fraud, pandemic fraud-- including PPP loans-- cybersecurity initiatives and non-military procurement fraud.

So, the reason it's always been a large tool is because it's been very successful. And the whistleblower provision gives the government insight into where the fraud takes place. Because whistleblowers who have firsthand knowledge are the ones filing the complaint and providing the government with the kickoff to the investigation. And providing the behind-the-scenes information that allows the government to fashion their discovery under the civil investigative demands to get the information they need, documentation-wise, to really develop these kind of cases, which lead to these large settlements.

**Matt:** And Jana, I know that a good portion of your practice focuses on cases that are kicked off as Kevin just said, by a CID, or a civil investigative demand. Why don't you walk us through the ordinary paradigm that you've experienced in your practice up to this point. And then we can talk a little bit about what we expect that to mean as it becomes an expanded-use tool under the Trump DOJ.

**Jana:** First, let me say that another reason False Claims Act litigation has just sort of exploded is whistleblowers have a real incentive to file these claims. They can recover up to 30% of what the government recovers. And so they have a financial incentive to file these cases and to pursue them, to really move forward with them.

But False Claims Act cases can be criminal. They can also be civil. And they can involve up to treble damages as well as civil penalties for each infraction. So, these cases, you know, can sort of arise in a number of ways and can certainly cost defendants a great deal of money, not just to defend them, but potentially in damages and in penalties.

These cases are filed under seal. So sometimes we learn about them through a civil investigative demand, or through, um, other investigation that the U.S. Attorney's Office or the Department of Justice is doing. And, sometimes we don't find out about them until they're unsealed, until either the



government decides to intervene in the case, or until the government declines to intervene and the relator decides to move forward with the case on their own.

**Matt:** And so in that capacity, what have you seen the most? What have you seen as the primary target of the government in pursuing FCA cases to this point?

**Jana:** Well, health care. I know Kevin mentioned health care. Health care organizations are a huge target. And, you know, they do account for a large portion of False Claims Act cases. But again, as Kevin mentioned, they're certainly not the only ones. You know, any entity that is receiving federal funding can potentially be a target of False Claims Act litigation.

**Matt:** And Kevin, against that backdrop, you know, I guess the threshold inquiry then is you receive government funding, whether that's a subsidy through a COVID-era economic stimulus program, or it's government funding for your health care program.

We've seen the FCA become this tool to sort of claw back money that the government has paid out. But the administration is-- if we look at its recent policy pronouncements, including the one I mentioned from the Deputy Attorney General at the outset of this program-- it's being used in new ways as well. In fact, the government has essentially declared war on what it calls "illegal DEI" programs and DEIA discrimination and preferences. And it has essentially launched an initiative to use the False Claims Act in that context as well to claw back monies from educational institutions. Is this unprecedented in your experience in terms of the breadth and scope that the FCA is now being used well outside the traditional sense under this administration?

**Kevin:** Yeah. The, this current administration policy particularly focused on DEI as a way to use the False Claims Act to buttress policy decisions, rather than what it's normally been used for, which is to recover monies that were fraudulently billed, um, to the government. So, in the past it has been pursuing bad actors who have made false statements to the government to receive funds that they shouldn't have. Or to keep funds that they should have returned.

Now the Trump administration is using the False Claims Act as a way to not only enforce its policy determinations about the validity of DEI, but it's also using the False Claims Act as a way to incentivize people who want to blow the whistle on the existence of DEI programs either at the university level or in corporations. Because the policy doesn't apply just to universities. So it's a way to incentivize people to inform on universities or other corporations because of the existence of a DEI program, whether it's called DEI, whether it's renamed some other process, as long as the whistleblowers --who are actively encouraged by the policy, by the way-- to bring these cases.

You know, as long as the whistleblowers or the government consider the corporate or university activity to be somehow allegedly in violation of the Civil Rights Act because it discriminates against anyone, then the FCA is being used to enforce that policy determination.

**Matt:** Is it a bit of the tail wagging the dog, Jana? Because if the historic context in which the FCA is used is where there's literally a cash exchange, government paying money to a private actor and



then government saying, oh, you induced us to pay that money by virtue of some kind of fraud or abuse.

Now we're, talking about-- certainly, it's always been the policy of the government, for that matter, to go ahead and try to ferret out fraud and abuse for as long as the government has engaged in the ability to contract with private citizens since Reconstruction and the Civil War and the origin story of the FCA. But at the end of the day, this is different. It feels different in so much as the administration has a clear policy. It has a clear idea of something it wants to root out of our society. It ran on it. In everything it's doing, it's attacking this particular facet of society and it's using this reverse-engineered FCA compliance tool as a means to achieve it, like Kevin said. Is that uncharted territory?

**Jana:** I think it is. And I think it certainly shows how expansive the False Claims Act can be. I mean, many organizations, when they're accepting federal money, sign some sort of blanket certification that they are in compliance with all applicable federal statutes and regulations. And this memo that came out is explicitly referring to the Civil Rights Act and to Titles IV, VI and IX of the Civil Rights Act. So I think absolutely, you know, this shows how expansive the False Claims Act can be and how it can be used to enforce, you know, different policy priorities.

So if a university, for instance-- which is subject to Title IX-- accepts government funds they have agreed to abide by, and that they are in compliance with all of these federal statutes and regulations. And they may not even realize how many different federal statutes and regulations apply to them, but they've certified that they are in compliance. And so that the examples that the memo gives is, you know, a university that accepts federal funds could violate the False Claims Act when "it encourages antisemitism, refuses to protect Jewish students, allows men to intrude into women's bathrooms or requires women to compete against men in athletic competitions." So, you know, some of these things, may have already been occurring when the organization started accepting government funds or certainly may have been occurring before this memo came out. And now these organizations are subject to False Claims Act litigation, you know, involving those activities and those decisions.

**Matt:** Yeah, Kevin, before you jump in, where do we draw the line? Where do we draw the line on the FCA being used in such a way? Does the law prescribe any kind of limitations on this, or do we just literally face FCA liability every time we make a statement to the government and some money comes flowing in?

**Jana:** It revolves around materiality, you know, whether the statement and whether compliance with that particular law or regulation was material to the government awarding that money. So, you know, if you are in violation of some minor regulation that even if the government knew that you were in violation of that regulation it would've given the organization the money anyway, that's not material. However, if it's a law or regulation that is material to the government's decision to pay these funds to the organization, then it's absolutely subject to the False Claims Act.

**Matt:** I'm sorry, Kevin, I stepped on you. Go ahead.



**Kevin:** Not a problem. I was just going to, one, I was going to mention what Jana had just mentioned. But two, while the policy's use of the False Claims Act to enforce policy decisions by the administration is relatively novel, the actual legal theory that the policy espouses-- which is just a false certification theory-- is one that is commonly used in False Claims Act cases, particularly in the health care and military procurement industries. You know, for example, the military procurement, industry, they certify in their contracts every product they produce is going to comply with military specs. And if they don't produce products that comply with those military specs and that at affirmative certification that they were going to produce those products that way, then that's a false statement, which as Jana has said, is material to the decision to pay.

The question with this policy is, it will likely get challenged in court. And when it does, is the monies that the entity is receiving that the government seeks to claim was fraudulently given in violation of a certification, was that money really given and relying upon the certification about compliance with the Trump administration's DEI policies as they currently exist?

And I think that, that there can be a real distinction made if for these entities about whether the money they're receiving is tied at all to the certification about compliant not complying with DEI policies.

**Matt:** So, in other words, Kevin, there needs to be some level of relatedness between the actual statement and the money that's flowing from the government.

So if it's a cancer research grant at a higher education institution, can they claw it back because of a statement related to DEI? Or is that going to be the, the nature of the test that we might see of these policies?

**Kevin:** Well, that's certainly going to be the legal dispute. And it's more than just a claw back, you know, it, the FCA not only allows the government to recover what was paid, but allows it to recover up to treble damages.

**Matt:** And attorney's fees, yeah.

**Kevin:** And attorney fees, anywhere from \$5,500 to \$11,000 per claim. So those dollars add up fast. So, it's not just a claw back. But yes, I think I expect to see against this policy challenges about whether the certification the government's claiming was fraudulently given is material to the payment that was made.

**Matt:** And then where does that analysis take us, Jana, if we're going to be focused on litigating these issues with the prospect of new and expanded use of this sort of centuries-old tool. Um, where does the legal analysis take us? What types of things are we going to be looking at as advocates for purposes of trying to break the link in the chain between the ultimate funding that was received by the government and the statement on the basis of materiality?



**Jana:** I think, like Kevin said, you know, it's a question of whether the money being received is related to that particular statute or regulation and, you know, whether the government would've awarded the money anyway, essentially, even if it knew of that violation.

**Matt:** Kevin, I want to push it back to you. And at this point we have a fairly expansive idea of where this Department of Justice will go when it comes to the FCA. I think the policy pronouncements are signaling that it's taking a very wide view of this. Where are some other areas that you might predict that the Department of Justice will hone in using the FCA as a tool to achieve some of its policy mission?

**Kevin:** Well, under the same theory that if the Trump administration is tying federal dollars to this certification, they can use that same theory with other policies that they may promulgate and require that corporations or universities certify that they're going to abide by that executive order premised on the civil rights law or some other law. And if, the institution does not, that alleged false certification can be the basis for a False Claims Act.

So this theory can be really applied to any federal dollars in any industry across any lines, as long as it's tied to federal payment. So it really is limited only by the creativity of the Trump administration at this point.

**Matt:** Jana, can you think of an example of a Trump administration policy where the FCA and, and this sort of cookie-cutter, reverse-engineered use of the FCA might be able to be creatively deployed as a means by which to achieve one of those policy ends?

**Jana:** I think, you know, the Trump administration is explicitly telling us, uh, you know, in this memo that was put out by the Deputy Attorney General Todd Blanche, that they are targeting DEI programs. That they are targeting college athletics. That they're targeting the use of restrooms and who's using those restrooms. So I think this memo gives, you know, some clear examples of areas where the administration is planning to use the False Claims Act.

I think this memo is also indicating that there's going to be sort of a shift. I feel like in recent years, so many False Claims Act cases have been driven by relators. They've been filed by relators under seal as qui tam actions. And even if the government wasn't interested in intervening in those cases, relators have really continued to pursue them on their own. And I think this memo's really indicating that the Justice Department is going to take a more active role with regard to the False Claims Act in pushing those cases forward.

**Matt:** So, Kevin, what is a party that does business with the federal government to do with virtually limitless types of exposure based on this expanded use of the False Claims Act? And what are the best practices that anyone doing business with the federal government needs to employ to make sure their house continues to be in order as we endure what is now an unprecedented enforcement onslaught using the FCA?

**Kevin:** Well, I think businesses and entities are going to have to, depending on the policy pronouncement, make a decision about whether they want to challenge the legality of the



underlying policy determination or whether they want to do what they can to be compliant with the policy pronouncements while still respecting their own particular internal cultures.

I think that particularly applies to universities who have to answer to various stakeholders. You know, one of the-- just to go back to a question you asked earlier about where we could see the FCA being used to further Trump administration policies during the second administration-- it's certainly going to be used to pursue entities that the government alleges, or whistleblowers allege, are trying to avoid tariffs. It's a classic spot for that to be used to enforce tariff priority, assuming the tariffs continue in effect.

Uh, you know, there's three different ways that an entity can avoid tariffs, right? You can misclassify the goods. You can undervalue the goods you're bringing in. Or you can falsely declare where the goods originated, which would either limit or exclude tariffs altogether.

**Matt:** Because it's all self-reporting to the government and thereby can constitute a false claim.

**Kevin:** Exactly. And I think rather than just being an affirmative false claim, I think there's another provision of the False Claims Act, which is what we colloquially call a reverse false claim, which prohibits an entity from withholding money they know rightfully should be paid to the government and making false statements to do so. So I think that in the tariff context, you'll see both affirmative False Claims Act as well as reverse False Claim Act provisions being added to the complaints. And I think that's ripe for whistleblower claims as well. Because it's self-reporting, that source of information is going to come internally.

So to follow up on your question about what entities can do. Most whistleblower claims-- you know, the last report I read was around 60%-- most whistleblower claims are brought by employees who first raised their concerns directly with their supervisors. So entities in this day and age-- although they have always had to do so-- I think in this day and age, given some of the hostility around certain of these policy decisions, really need to make sure that they have a strong compliance program, that they have hotlines in place and that when employees raise concerns that not only does the company address them, but they communicate back to the employee what their investigation has been-- to the extent it's permitted by the privileges that protect that investigation-- report back to the employee what's being done and what the result is. Because I think that will go a long way in many cases to protect entities from relator-filed whistleblower cases or False Claims Act cases.

**Jana:** I agree. I think a strong corporate compliance program is crucial here. And I think it's really smart for organizations to update their corporate compliance programs based on this administration's priorities.

So, you know, for example, we've been talking about this memo. To the extent that an organization receives Title IX funds, make sure your corporate compliance program addresses all of the requirements associated with those funds and addresses, you know, the Trump administration's related priorities. Or, Kevin talked about tariffs. You know, make sure that your corporate compliance program addresses tariffs and how everything should be calculated, documented.



I think it's a real temptation with other announcements the Trump administration has made to sort of let corporate compliance programs go by the wayside. You know, the administration announced that they're not as interested in the Foreign Corrupt Practices Act. So I think organizations think, oh, you know, we're not going to be subject to as intense oversight during this administration and therefore we can focus on other things, you know, and not focus on compliance. But I think this is a clear warning with the way the administration intends to use the False Claims Act, that compliance should continue to be a top priority.

**Matt:** Jana, what's the first thing you tell a client when they come to you and report that through the chain of command internally that an employee has raised a potential compliance issue that may invoke the sort of parade of horrors that we're discussing here when it comes to the FCA?

**Jana:** I think the most important thing to do is investigate. Do that internal investigation. They may, you know, based on a number of considerations, they may be able to do that internal investigation internally if they have robust in-house counsel or a robust compliance department. Or sometimes, you know, if it's a public company, if it's an alleged violation of a major law that could have criminal consequences, if there are concerns about protecting the attorney-client privilege, it may be very important to hire outside, independent counsel to conduct that investigation. But it's very important to do that investigation. And like Kevin was saying, to respond to the whistleblower, you know, respond to the person who triggered the investigation to the extent that you can. And if any wrongdoing is found, if any violations of the alleged laws are found, it's important to correct that to the extent that you can. And to update corporate policies in the corporate compliance program to try to prevent those violations from happening again.

**Matt:** Kevin, against the backdrop of what Jana said, where it's important to make sure your policies are up to date and in line with the priorities of the administration-- how do you address some of the pitfalls and some of the issues that might arise in a particular organization?

Because it almost seems like the FCA is being used to bring conformity. Is it even an option to sort of resist if your organization doesn't want to sort of fall in line?

**Kevin:** Sure, and that's a good question, I think there's two buckets, right? There's the classic, real, you know, historical risk factors in health care, military procurement, right now, tax, I think.

**Matt:** Sure, sure.

**Kevin:** So that, that's, that's one.

**Matt:** That's not what this memo is addressing.

**Kevin:** Exactly right. So that's a different answer. If you're asking me about executive orders that seek to impose a particular viewpoint on institutions whether they be universities or corporations. There has to be a discussion with the stakeholders, right? At university level, there's multiple stakeholders and student professors, student bodies, the administration and, and alumni or active donors to the



institution. And at the corporate level, there's shareholders and then there's the, the employees who do the daily work.

I think that entities are going to have to make a decision if they are going to challenge the executive order, many of which have already been challenged in court and the legality of which have not been determined yet. They need to make sure that they are comfortable, that they have a legal basis on which they can challenge those executive orders on the off chance that they are subject to False Claims Act because of an alleged violation.

So you have the legal challenges there. And I think that this memo, what's interesting about this memo is that it's really saying to those people who support the administration's policies, we encourage you to file whistleblower claims so that you can help us drive our policy issues forward.

Now I will say that there are many entities in the health care industry that make business decisions that, you know, they're going to engage in this type of conduct-- which arguably violates the False Claims Act --'cause the profits are significantly going to outweigh the loss of the risk if they're caught and they need to repay under the False Claims Act. I think entities in this second bucket are going to have to make similar determinations. I think that's a lot of internal discussion at the C-suite and at the, uh, administration level. And then, you know, a lot of consultation with in-house or outside counsel so that you can make sure that you have a reasonable basis to challenge the legal underpinnings of the executive orders.

**Matt:** And, and Jana, I know you do a lot of counseling to organizations on their compliance programs. I know that this is a point you made earlier, but do you think-- I, I really have a two-part question. Do you think we are going to see entities sort of standing their ground and fighting? Or do you think you're going to see sort of a, an evolving way of doing business at some of these entities?

**Jana:** I think you're going to see both. I mean, I, I think it is going to depend on that particular organization's, how their stakeholders feel about these issues.

I think some organizations will decide that, you know, compliance is more important and they'll try their best to follow all of the executive orders that have been put out and really take the administration's priorities into account as they make decisions. And I think there are other organizations out there who will decide that their priorities don't align with that of the administration, that they'll continue to make decisions that may be inconsistent with the executive orders or with the administration's priorities because they feel that those decisions are right for them. And I agree with what Kevin said, that those organizations would be well advised to consult counsel and to see, you know, if those decisions are challenged under the False Claims Act or in some other way, that they have a solid basis for making those decisions and that they have good arguments that perhaps the executive orders or other laws and policies that they may be violating aren't constitutional.

**Matt:** In our waning moments here, with one another today, I want to get your crystal balls dusted off and, ask you to engage in a bit of an exercise in predicting the future. If we're sitting here a year from today, Kevin, what do you think will be the single biggest area where the FCA has been utilized



in a non-traditional manner? Not health care, not government contracting. We're talking about the administration's use of the FCA in a uncharted, novel way.

**Kevin:** Well first I think it will be the tariff enforcement. And you know, it's arguable whether that's novel or not. I think that the reverse False Claims Act provisions can be a novel application in that sphere.

As far as the executive orders, I think that the continual driving of, you know, what's been called the "culture war policies" are going to be the, the biggest aspects. You know, how broadly based are the executive orders and do they tie to an actual statute, like the Civil Rights Act and the Supreme Court's opinions about the breadth of the statute? So I think, you know, I think the interesting thing is that in the next couple years, if things continue the way they are, a lot of FCA litigation in these novel spaces are really going to be about the legitimacy of the underlying executive orders that the policies are based on. And so it's going to be a lot of First Amendment, 14th Amendment litigation. That's not typical in False Claims Act cases.

**Matt:** Jana?

**Jana:** And I think that we could see a lot more, uh, FCA litigation against colleges and universities as well. I mean, I, as we mentioned, you know, we're used to seeing those types of cases brought against health care organizations and government contractors. But I think colleges and universities may be defendants in a lot more of these cases.

**Matt:** What about local governments? What do you guys think about the idea that, you know, a lot of money funnels down from the top: The federal government funds the states which fund the counties, which fund the municipalities. Can you envision a scenario in which the FCA under these same sort of novel theories, or maybe even not-so-novel theories, could be used by the federal government to go after local governments?

**Kevin:** So I, think that, that's an interesting thought. What may be lacking with federal funds to municipalities would be the certification or fraudulent statement elements. 'Cause you know, the, this most recent policy came out is really relying on the legal theory that these entities are certifying that they're going to comply with these executive orders and other underlying laws in exchange for receiving the money.

A lot of local municipalities receive the money as part of congressional programs, where they're, supporting municipal governments for road work or some other aspects. And they haven't to date required any sort of certifications. So, you know, in order for, I think for the False Claims Act to really apply, there would have to be, there's some sort of certification requirement that the federal government is now imposing on municipalities, which brings its own constitutional issues. Or, there's a new templated invoice or payment that the municipalities have to submit to get paid that would have a certification like that on it. And 'cause I don't think as currently constructed, as I understand, monies flow from federal government to municipalities for most of the things that regularly flows for, there is any sort of certification or statement, right? The money's just handed out as part of federal programs approved by Congress. And the other interesting thing there is whether that would be a



invasion of the congressional branch's constitutional authority to, to spend money, spend and distribute money. So I think there are some constitutional issues there as well.

**Matt:** Well, I think that one thing that's settled from our dialogue here today is that we are about to enter, if we have not already, a brave new world when it comes to FCA litigation. And that's really why the firm has endeavored now to stand up a subgroup to our White-Collar Criminal Defense and Regulatory Compliance Practice focused exclusively on this FCA litigation.

Kevin, I know that's one of your, uh, brainchildren, uh, brainchild, whatever the word is. Why don't you tell us a little bit about that?

**Kevin:** Sure, certainly. So, Fox Rothschild has a number of lawyers across the country in various practice groups in dealing with different industries that practice in some way False claims Act defense and response work.

The subgroup to the White-Collar Practice is going to bring all those attorneys together under one roof so that we can better marshal our resources, including the talent of our widespread, geographically spread associate base, and really consolidate all that talent under one roof so that we're in, in the best position to represent clients across multiple industries, whether it's higher ed, military procurement, health care or other government procurement.

And, really bear the talents of those lawyers in different practice groups where this is now going to become relevant.

**Matt:** Well, we've been spending our time today talking with, my partners, Jana Volante Walshak, and Kevin Raphael, two of the very active members of our White-Collar Criminal Defense and Regulatory Compliance Practice here at the firm.

That's all the time we have for this episode of "The Presumption of Innocence." But until next time, I'm your host, Matt Adams. We'll see you then. Take care. Bye-bye.