Predatory Landlords, Beware Lincoln's Law: The Federal (and State) False Claims Acts as Powerful Tools for Protecting Low-Income Section 8 Tenants From "Side Payment" Fraud

RAPHAEL P. MOVSESIAN*†

* Copyright © 2023 Raphael P. Movsesian, J.D. University of Virginia School of Law.

† Many thanks to the editors of the *UC Davis Social Justice Law Review* for their helpful feedback and superb editorial assistance. I would also like to give special thanks to my Housing Litigation Clinic supervisors at *Legal Aid Justice Center*: Caroline Klosko, Victoria Horrock, and Emily Smith. All errors are my own.

TABLE OF CONTENTS

ABSTRACT 127
INTRODUCTION 128
I. OVERVIEW OF THE FALSE CLAIMS ACT AND SECTION 8 HOUSING CHOICE VOUCHER PROGRAM..130
A. A PRIMER ON THE FEDERAL FALSE CLAIMS ACT.............................131
1. ORIGINS..131
2. ELEMENTS OF FCA LIABILITY...134
B. THE SECTION 8 HOUSING CHOICE VOUCHER PROGRAM...................136
1. OVERVIEW 136
2. THE PROBLEM OF ILLEGAL "SIDE-PAYMENTS" 139
II. THE FEDERAL FALSE CLAIMS ACT IS A POWERFUL TOOL FOR PROTECTING SECTION 8 TENANTS FROM SIDE PAYMENT FRAUD 143
A. WHAT IS "RENT?" 143
B. SIDE PAYMENT FRAUD SATISFIES ALL OF THE REQUIRED ELEMENTS OF AN FCA CLAIM...144
1. A FRAUDULENT COURSE OF CONDUCT.......................................145
2. MADE WITH SCIENTER...147
3. THAT WAS MATERIAL TO THE GOVERNMENT'S DECISION TO PAY 148
4. CAUSING THE GOVERNMENT TO PAY OUT MONEY 149
C. THE TERMS OF THE HAP CONTRACT SUPERSEDE ANY OTHER AGREEMENTS 150
D. SUBSTANTIAL FCA AWARD AMOUNTS SERVE AS POWERFUL DETERRENTS 151
III. APPLYING STATE FALSE CLAIMS ACTS ("SFCAS") TO SECTION 8 SIDE PAYMENT FRAUD 154
A. AN OVERVIEW OF STATE FALSE CLAIMS ACTS...............................154
B. FOUNDATIONS FOR ESTABLISHING LIABILITY UNDER SFCAS FOR SECTION 8 SIDE PAYMENT FRAUD...156
1. THE DEFINITION OF A "CLAIM" UNDER THE 2009 AMENDMENTS EXPANDED FEDERAL FCA LIABILITY TO FUNDS ADMINISTERED BY THE GOVERNMENT 156
2. THE AMENDED DEFINITION OF A "CLAIM" ADOPTED BY STATE FCAS TO MIRROR THE FEDERAL FCA COULD ESTABLISH SFCA LIABILITY FOR SECTION 8 SIDE PAYMENT FRAUD............................158
CONCLUSION...161

Abstract

Low-income individuals receiving government-subsidized housing vouchers under Section 8 of the Housing Act of 1937 ("Section 8") are a class of people most in need of legal assistance, yet often the least protected. In a recurring issue in the Section 8 Program, dishonest landlords sometimes extract payments in excess of what they are legally entitled to by charging unpermitted "side payments." These side payments oftentimes take the form of demands for utility fees not required under the rental agreement, mandatory charges for optional amenities, or even just plain demands for additional rent above the amount authorized under the housing contract. When tenants are unable to pay these excess fees, landlords oftentimes turn to harassment, abuse, and intimidation as ways of bullying tenants into handing over the extra cash. Not uncommonly, landlords also file evictions based on the nonpayment of these fees to unjustly oust tenants from their homes. In circumstances such as this, the False Claims Act ("FCA") has proven to be a powerful tool for protecting Section 8 tenants from economic exploitation and for ensuring that unscrupulous landlords are held accountable for conduct that violates housing regulations.

This Article analyzes recent developments in the application of the FCA to instances of Section 8 side payment fraud. It reveals that the FCA has the power to balance the scales of justice for Section 8 tenants who are faced with such predatory behavior. Additionally, this Article addresses the novel question of whether state false claims acts that are analogous to the federal FCA could also be implicated under similar fact patterns. Through a close reading of recently amended statutory definitions and legislative history, this Article is the first to answer that question in the affirmative — thus, potentially allowing aggrieved tenants to establish causes of action under both the federal and a state FCA to redress side payment fraud.

Introduction

"If we acknowledge that housing is a basic right of all Americans, then we must think differently about another right: the right to make as much money as possible by providing families with housing — and especially to profit excessively from the less fortunate."[1]

Christopher Harrison is a disabled, wheelchair-bound U.S. Navy veteran who relies on Social Security Disability Insurance for most of his income after having suffered a spinal cord injury in the 1980s.[2] In 2006, after nearly ten years on a waitlist, he finally obtained a Section 8[3] rental assistance voucher through the Housing Authority of the City of Los Angeles ("HACLA"), and rented an apartment from Ms. Shu-Hwa Baran in October 2009.[4] The contract that Ms. Baran signed with the housing authority designated the total rent for the unit as $1,050, with Mr. Harrison's portion of the rent being $370, and the remaining $680 to be paid by the Section 8 voucher.[5] However, shortly after Mr. Harrison moved in, Ms. Baran demanded that he pay her a total of $735 per month — in other words, $365 *more* per month than he was legally obliged to pay for his portion of the rent in order to stay at the unit.[6]

Between October 2009 and September 2013, Ms. Baran thereby extracted thousands of additional dollars from Mr. Harrison through these "side payments," while also collecting the full amount of the government-subsidized portion of the rent, all without ever informing HACLA that she was collecting such excess amounts.[7] When a puzzled Mr. Harrison asked a HACLA counselor in 2013 whether he was paying too much for rent, he was finally informed that Ms. Baran's excess charges were unlawful.[8] After that, Mr. Harrison stopped paying any additional charges that were in excess of his portion of the rent as stated on the housing contract.[9] But Ms. Baran

[1] MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 305 (2016).

[2] Compl. at 3, United States *ex rel.* Harrison v. Baran, No. CV 1402639, 2015 WL 5446833 (C.D. Cal. Aug. 28, 2015) [hereinafter *Baran* Complaint].

[3] Section 8 refers to the federal Housing Choice Voucher Program which assists low income, elderly, and disabled families with obtaining affordable rental housing through the issuance of subsidized rental vouchers that cover a portion of a participating tenant's monthly rent. The Program is authorized by Section 8 of the Housing Act of 1937, Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. § 1437), and governed by regulations contained in 24 C.F.R. § 982 (2022).

[4] *Baran* Complaint, *supra* note 2, at 4.

[5] *Id.* at 8.

[6] *Id.*

[7] *Baran*, 2015 WL 5446833, at *2.

[8] *Id.*

[9] *Id.*

would not accept this. She promptly served him a ninety-day notice to vacate, claiming (unlawfully) that within ninety days, Mr. Harrison's tenancy would terminate and he "will be responsible for the FULL MONTHLY RENT."[10] She then left multiple voicemail messages that consisted of aggressive, abusive, and profane language regarding Mr. Harrison's tenancy — causing him severe emotional distress, discomfort, and anxiety.[11]

However, Mr. Harrison — with the assistance of clever legal aid attorneys — sued Ms. Baran under the whistleblower provisions of the federal False Claims Act ("FCA")[12] for her wrongful conduct in defrauding both Mr. Harrison and the U.S. government by her extraction of thousands of dollars in unpermitted side payments.[13] The court found that Ms. Baran violated the FCA, and entered default judgment against her in the amount of $608,407 to the U.S. government for damages and penalties, of which 27% of the proceeds — or $164,269.89 — would go to Mr. Harrison as his share; an additional $6,000 in punitive damages to Mr. Harrison for unlawful retaliation; and attorneys' fees in the amount of $52,900.[14] In January 2018, the parties executed a settlement agreement in which Ms. Baran agreed to pay $400,000 in exchange for dropping her pending appeal of the default judgment to the Ninth Circuit.[15] She made a full and complete payment of this amount on February 12, 2018, and the judgment was marked as satisfied.[16]

Mr. Harrison's story is not an outlier — side payment fraud is one of the most frequently-occurring forms of abuse taking place within the Section 8 Housing Choice Voucher Program.[17] Illegal side payments often

---

[10] *Baran* Complaint, *supra* note 2, at 9.
[11] *Id.* at 9, 14.
[12] 31 U.S.C. §§ 3729–33. The FCA, also known as "Lincoln's Law," was originally enacted during the Civil War to fight government procurement fraud. *See* Sean Hamer, *Lincoln's Law: Constitutional and Policy Issues Posed by the Qui Tam Provisions of the False Claims Act*, 6 KAN. J.L. & PUB. POL'Y 89, 90 (1997) (discussing President Lincoln's encouragement for implementing a law designed to prevent and dissuade profiteers from selling overpriced and defective supplies to the government). The FCA's qui tam provision authorizes private citizen whistleblowers (known as "relators") with knowledge of past or present fraud committed against the federal government to bring suit on the government's behalf in exchange for a share of the award. 31 U.S.C. § 3730(b)(1).
[13] *Baran*, 2015 WL 5446833, at *2.
[14] *Id.* at *10. The $52,900 attorneys' fees award was determined in a separate motion. *See* United States v. Baran, No. 14CV02639, 2015 WL 6745151, at *12 (C.D. Cal. Oct. 28, 2015).
[15] Satisfaction of J. at 2, *Baran*, 2015 WL 5446833.
[16] *Id.*
[17] *See also infra* note 91 and accompanying text.

take the form of demands for additional utility charges, fees for extra amenities, or even just plain requests for extra rent — none of which are authorized under the applicable Housing Assistance Payment ("HAP") contracts that landlords execute to participate in the Section 8 Program. Due to fears of a potential eviction, tenants — feeling helpless — oftentimes simply acquiesce to their landlords' unlawful demands for extra payments.

What Mr. Harrison's story does illustrate, however, is the immense power of the FCA in holding greedy landlords accountable for this kind of unlawful conduct. Applying the FCA to instances of Section 8 side payment fraud has the potential to transform the federal government's most important fraud-fighting weapon into a tool for protecting marginalized populations from economic exploitation and "ensuring every single dollar of Section 8 funds goes toward safe and affordable housing" for low-income individuals.[18]

This Article discusses the application of the False Claims Act to side payment fraud to raise awareness of the FCA's potency in protecting low-income Section 8 tenants. In Part I, an overview is given on the False Claims Act and on the Section 8 Housing Choice Voucher Program. Part II analyzes recent caselaw and current developments regarding FCA actions brought to redress Section 8 side payment fraud. It reveals that in every instance, courts have found landlords liable for violating the FCA when they attempted to charge any amount above what was allowed under the HAP contract. Finally, Part III explores a novel question previously left unaddressed: Could certain *state* false claims acts also be implicated alongside the federal FCA in instances of Section 8 side payment fraud? Based on a close reading of legislative history and recent statutory amendments that modified the definition of a "claim" under most state false claims acts, this Article answers that question in the affirmative. A brief conclusion follows.

I. Overview of the False Claims Act and Section 8 Housing Choice Voucher Program

Section I.A. provides a brief historical overview of the FCA and explains the elements required for a successful claim. Section I.B gives a background on the Section 8 Program along with its most pertinent regulations, and examines the issue of side payment fraud.

[18] Gordon Schnell & Elizabeth Soltan, Opinion, *A Tool to Help Level the Playing Field for Low-income Tenants*, BOS. GLOBE (Jan. 24, 2022), https://www.bostonglobe.com/2022/01/24/opinion/tool-help-level-playing-field-low-income-tenants/.

A. A Primer on the Federal False Claims Act

1. Origins

The False Claims Act was originally enacted during the Civil War at a time when vast government expenditures on military procurement led to widespread fraud by dishonest private contractors.[19] Congressional hearings held in 1862 and 1863 revealed the sheer magnitude of fraud and waste that was occurring in government contracts, such as unseaworthy ships re-painted and delivered to the Navy as newly built, sawdust packed into crates and sold to the Union Army as munitions, and sickly mules sold to units of the Union cavalry as reliable horses.[20] By 1863, such rampant fraud and war profiteering severely hampered the Union war effort.[21] In the words of an 1863 House report: "Worse than traitors in arms are the men, pretending loyalty to the flag, who feast and fatten on the misfortunes of the nation, while patriot blood is crimsoning the plains of the south, and bodies of their countrymen are moldering in the dust."[22]

At Lincoln's urging, Congress enacted legislation that would impose penalties upon unscrupulous contractors who defrauded the government, thus giving birth to the False Claims Act of 1863.[23] One of the most significant aspects of the Act was its "qui tam" provision that allowed private citizen informers, known as "relators," to initiate fraud actions against government suppliers and contractors on behalf — and in the name of — the U.S. government.[24] These relators could then receive 50% of all monies recovered under the Act, as well as reimbursement of costs, from a

---

[19] *See* United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F.Supp. 607, 609 (N.D. Cal. 1989) (discussing a history of the FCA). The original FCA was codified as the Act of March 2, 1863, ch. 67, 12 Stat. 696-98.

[20] 132 CONG. REC. 22, 339-40 (1986) (remarks of Rep. Berman and Rep. Bedell); Robert Tomes, *The Fortunes of War: How They Are Made and Spent*, 29 HARPER'S NEW MONTHLY MAG. 227, 227 (1864) ("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.").

[21] *See* JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS § 1.01, 2020 WL 4061525 (updated June 2020).

[22] H.R. REP. NO. 37-50, at 47 (1863).

[23] *See* False Claims Act of March 2, 1863, ch. 67, 12 Stat. 696 (current version at 31 U.S.C. §§ 3729–3733).

[24] Qui tam is the abbreviation of the Latin phrase *qui tam pro domino rege quam pro si ipso in hac parte sequitur*, which means he "who pursues this action on our Lord the King's behalf as well as his own." Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 n. 1 (2000).

defendant.[25] The idea behind this provision was that private individuals within the industry would have more knowledge of the fraud being perpetrated against the government and would therefore be incentivized to come forward in helping prosecute such actions.[26] However, for most of its history prior to World War II, the FCA remained a rather obscure law rarely used in practice.[27]

The FCA regained newfound prominence in the 1930s and 1940s following the implementation of the New Deal and an increase in military spending, which provided opportunities for unethical profiteers to once again defraud the government.[28] During this time, however, a problem arose from swarms of "parasitical" FCA actions; individuals simply regurgitated information already found in criminal indictments to initiate their own civil FCA suits to obtain a share of the recovery.[29] Such perceived abuses led to amendments in 1943 that severely restricted the Act.[30] For example, the 1943 Amendments prohibited qui tam suits based on information already in the government's possession — even if the relator was the original source of the information who had personally disclosed it to the government.[31] The Amendments also gave the DOJ the right to take over cases initiated by relators; required relators to submit all of their supporting evidence to the government at the time of filing a complaint and gave sixty days for the

---

[25] *See* 12 Stat. 696, 698 §6 (1863). The Act also imposed a civil penalty for a violation of double the amount of damages suffered by the government and a $2,000 penalty for each false claim submitted. S. REP. NO. 99-345, at 8 (1986).

[26] Joel D. Hesch, *Breaking the Siege: Restoring Equity and Statutory Intent to the Process of Determining Qui Tam Relator Awards Under the False Claims Act*, 29 T.M. COOLEY L. REV. 217, 221 (2012) (discussing the overall goals of the FCA, especially the need to provide incentives for whistleblowers who can shed light on instances of fraud against the government).

[27] *See* CLAIRE M. SYLVIA, THE FALSE CLAIMS ACT: FRAUD AGAINST THE GOVERNMENT § 2:6, Westlaw (updated June 2022) (explaining that "few cases were brought under the [FCA] prior to World War II, when the Act was amended and rendered largely ineffective."); Stephen F. Hayes, *Enforcing Civil Rights Obligations Through the False Claims Act*, 1 COLUM. J. RACE & L. 29, 32 (2011) ("[R]estrictive amendments in 1946 . . . effectively precluded any viable use of the Act for the next forty years.").

[28] *See* BOESE, *supra* note 21.

[29] United States *ex rel.* LaValley v. First Nat'l Bank of Bos., 707 F. Supp. 1351, 1354 (D. Mass. 1988). Senator Van Nuys, Chairman of the Judiciary Committee, explained that "the old statute had served a useful purpose . . . but conditions have changed, and today that statute has become one of the worst sources of racketeering since the days of Al Capone in the prohibition era." 89 CONG. REC. 7571 (1943).

[30] *See* Wayne Turner, *The False Claims Act: How Vigilantes Find Justice Fighting Government Fraud and Corruption*, 12 UDC L. REV. 115, 117 (2009) (describing the 1943 overhaul).

[31] *See* United States v. Pittman, 151 F.2d 851, 853–54 (5th Cir. 1945) (discussing history of the 1943 Amendments).

government to decide whether to intervene; and reduced the relator's share of any recovery.[32] These changes effectively curtailed the FCA's availability to private litigants as a means of eliminating government fraud.[33]

Major amendments to the FCA in 1986 reinvigorated the Act into a more effective tool to be used against modern forms of fraud being faced by the government.[34] The 1986 Amendments were quite significant. First, they increased the potential recovery of civil penalties and damages from $2,000 per claim — the same amount since 1863 — to between $5,000 to $10,000 per false claim.[35] Second, treble damages (permitting a court to triple the award) were authorized for the losses sustained by the government.[36] Third, the Amendments significantly lowered the standard for showing that a defendant "knowingly" submitted a false claim and eliminated the requirement that violators possess the specific intent to defraud.[37] Most importantly, the Amendments significantly enhanced the FCA's qui tam provisions, expanding the relator's share of the recovery and providing employment discrimination protections for the relator.[38] Slowly but surely, the 1986 Amendments caused a massive spike in qui tam lawsuits that led to millions of dollars in recoveries each year.[39]

More recently, through the Fraud Enforcement and Recovery Act of 2009 (FERA),[40] Congress significantly revised the FCA to broaden and expand its scope of liability.[41] As a result of periodic inflationary

---

[32] *See* SYLVIA, *supra* note 27, § 2:8.

[33] The FCA itself, however, remained important as increased government spending during WWII triggered an upsurge in the number of FCA cases brought by the DOJ. BOESE, *supra* note 21, §1.02, 2020 WL 4061536 (updated June 2020).

[34] *See, e.g.*, H.R. REP. NO. 99-660, at 16 (1986) (explaining the purpose of the 1986 Amendments to the FCA was "to strengthen and clarify the government's ability to detect and prosecute civil fraud and to recoup damages suffered by the government as a result of such fraud."); S. REP. NO. 99-345, at 1–4 (1986).

[35] 31 U.S.C. § 3729(a)(1) (1986).

[36] S. REP. NO. 99-345, at 17 (1986).

[37] *See* United States v. Entin, 750 F. Supp. 512, 518 (S.D. Fla. 1990) (noting that under the Amendments, a "specific intent to defraud is no longer required."). The current statute only requires the government to show that a defendant 1) had actual knowledge of the information; 2) acted in deliberate ignorance of the information; or 3) acted in reckless disregard of the truth of the information. 31 U.S.C. § 3729(b).

[38] *See* BOESE, *supra* note 21, §1.04, 2020 WL 4061531 (updated June 2020).

[39] *Fraud Statistics-Overview, October 1, 1986–September 30, 2021*, DEP'T OF JUST. at 1 (2021), https://www.justice.gov/opa/press-release/file/1467811/download.

[40] 18 U.S.C. § 27.

[41] *See, e.g.*, SYLVIA, *supra* note 27, § 2:12 ("Congress amended the FCA in 2009 . . . to address [a number of restrictive] court interpretations of the statute and to clarify Congress's intent in enacting the 1986 Amendments."); Jerald D. Stubbs, *The 2009*

adjustments due to the Federal Civil Penalties Inflation Adjustment Act of 1990,[42] the current FCA civil penalties have increased to $12,537 to $25,076 per false claim.[43] At the end of fiscal year 2021, DOJ recovered roughly $5.6 billion under the FCA — representing the second largest annual total in FCA history, and the largest since 2014.[44] The total amount of FCA settlements and judgments since 1986 now total more than $70 billion.[45]

2. Elements of FCA Liability

Establishing FCA liability requires four elements: "(1) a false statement or fraudulent course of conduct; (2) that was made or carried out with the requisite scienter; (3) that was material [to the government's decision to pay out a claim]; and (4) that caused the government to pay out money (i.e., that involved a claim)."[46] The terms "claim" and "knowingly" are specifically defined in the Act. The definition of "knowingly" includes both actual knowledge and deliberate ignorance or reckless disregard for the truth or falsity of the information.[47] No specific intent to defraud is required.[48] A "claim" is defined as "any request or demand" for money "whether or not the United States has title to the money," that is "presented to an officer, employee, or agent of the United States."[49]

Courts have generally recognized two theories of liability under the FCA. First, the implied certification theory provides that "liability can attach when the defendant submits a claim for payment that makes specific representations about the goods or services provided, but knowingly fails to disclose the defendant's noncompliance with a statutory, regulatory, or contractual requirement."[50] Therefore, a fraudulent course of conduct can occur "where a party merely falsely certifies compliance with a statute or

---

Amendment Expands the Types of Fraud Subject to the Federal False Claims Act, 87 FLA. BAR J. 16, 17 (2013) (noting the 2009 Amendment's effect of expanding the scope of FCA liability and correcting erroneous judicial interpretations that had narrowed its scope).

[42] Pub. L. No. 101-410, 104 Stat. 890.

[43] *See* 28 C.F.R. § 85.5 (2022).

[44] Press Release, U.S. Dep't of Just., Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021 (Feb. 1, 2022), https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year.

[45] *Id.*

[46] United States *ex rel.* Spicer v. Westbrook, 751 F.3d 354, 365 (5th Cir. 2014). These elements are codified at 31 U.S.C. §§ 3729(a)–(b).

[47] 31 U.S.C. § 3729(b).

[48] *Id.*

[49] *Id.* § 3729(b)(2)(A).

[50] Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 181 (2016).

regulation as a condition to government payment."[51] Second, liability can arise based on the promissory fraud theory. That theory provides that "liability will attach to each claim submitted to the government under a contract, when the contract or extension of government benefit was originally obtained through false statements or fraudulent conduct."[52]

Defendants currently found liable face (1) a civil penalty of at least $12,537 to $25,076 per false claim, (2) three times the amount of losses that the government sustains, and (3) the costs of the action.[53] Each false claim counts as a separate violation and generates one penalty, and it is therefore entirely possible that the penalties assessed could far outweigh the government's actual damages.[54]

Although the DOJ has the ability to bring direct enforcement actions under the FCA, the "overwhelming majority of actions filed under the FCA are qui tam actions, and the vast majority of recoveries under the FCA are attributable to qui tam cases."[55] In qui tam actions, the relator files the lawsuit under seal, and a copy of the complaint is served on the government along with a formal, written disclosure of the material evidence and information in the plaintiff's possession.[56] The complaint must remain sealed for at least sixty days, during which time the government is required to investigate the allegations of the complaint to determine whether or not it will choose to intervene and take over the action.[57]

If the government elects to intervene, it assumes primary responsibility for prosecuting the action, and the relator retains a right to continue as a party subject to several limitations.[58] In this instance, the relator is entitled to receive at least 15%, but not more than 25%, of the award or settlement of the claim.[59] If the government does not intervene, the relator may still proceed with the action, though the government may

---

[51] United States *ex rel.* Mathis v. Mr. Prop., Inc., No. 214CV00245, 2015 WL 1034332, at *4 (D. Nev. Mar. 10, 2015) (quoting United States *ex rel.* Hendow v. Univ. of Phx., 461 F.3d 1166, 1171 (9th Cir. 2006).
[52] *Hendow*, 461 F.3d at 1173–74.
[53] *See False Claims Act Penalties: A Complete Guide*, WHISTLEBLOWER LAW COLLABORATIVE (May 11, 2022), https://www.whistleblowerllc.com/false-claims-act-penalties/. *See also* 31 U.S.C. § 3729(b).
[54] *See* United States *ex rel.* Smith v. Gilbert Realty Co., 840 F.Supp. 71, 75 (E.D. Mich. 1993) (awarding $35,000 FCA penalty when the government's actual damages were $1,630).
[55] David Farber, *Agency Costs and the False Claims Act*, 83 FORDHAM L. REV. 219, 221–22 (2014), https://ir.lawnet.fordham.edu/flr/vol83/iss1/7/.
[56] 31 U.S.C. § 3730(b)(2).
[57] *Id.* § 3730(b)(4).
[58] *Id.* § 3730(c)(1).
[59] *Id.* § 3730(d)(1).

request to be served with copies of pleadings and depositions.[60] In this instance, the relator is entitled to a larger share of the award or settlement — with the percentage awarded to the relator between 25% and 30% of the proceeds.[61]

The FCA, mostly due to its unique qui tam provision, has undeniably become one of the government's most potent tools for fighting government fraud.[62] The 1986 and most recent 2009 Amendments have served to effectively deputize private individuals in detecting government fraud while maintaining governmental sovereignty in the prosecution of actions brought under the FCA.[63]

B. The Section 8 Housing Choice Voucher Program

Section B.1 gives a brief overview of the Section 8 Program, including some of the pertinent requirements that participants must agree to abide by. Section B.2 discusses the problem of illegal side payments, which continues to be a frequently-occurring issue in the Section 8 Program.

1. Overview

The origins of the Section 8 Program can be traced back to the Housing Act of 1937, which established a system for the federal government to pay local public housing agencies offering safe and sanitary living arrangements for low-income families.[64] In 1974, Congress created the Section 8 Program in order to "aid[] low-income families in obtaining a decent place to live" and "promot[e] economically mixed housing."[65] For over four decades, the Program has provided rental assistance to low-income, elderly, and disabled families to secure affordable housing.[66] The vast majority of federal housing assistance takes place through the Housing Choice Voucher Program, which subsidizes the cost of renting privately-owned housing units.[67] Section 8 is funded and regulated by the federal

---

[60] *Id.* § 3730(c)(3).
[61] *Id.* § 3730(d)(2).
[62] *See supra* note 44 and accompanying text.
[63] *See* United States *ex rel.* Taxpayers Against Fraud v. Gen. Elec. Co., 41 F.3d 1032, 1040 (6th Cir. 1994) (noting that the FCA qui tam provisions "have been crafted with particular care to maintain the primacy of the Executive Branch in prosecuting false-claims actions, even when the relator has initiated the process.").
[64] *See* United States Housing Act of 1937 (Wagner-Steagall Act), Pub. L. No. 75-412, 50 Stat. 888 (codified as amended at 42 U.S.C. §1437).
[65] Housing and Community Development Act of 1974, Pub. L. 93-383 § 201(a), 88 Stat. 633, 662–66 (codified as amended at 42 U.S.C. § 1437(f)).
[66] Park Vill. Apartment Tenants Ass'n v. Mortimer Howard Tr., 636 F.3d 1150, 1152 (9th Cir. 2011) (providing a background on the Section 8 Program).
[67] 42 U.S.C. § 1437f(o).

Department of Housing and Urban Development ("HUD"), which provides housing assistance funds to local and state governmental entities known as "public housing agencies" ("PHAs") for administration.[68] The PHAs then remit these payments on behalf of participating tenants to the private landlords, in accordance with Housing Assistance Payment contracts (HAP contracts) entered into between the PHAs and the property owners (and executed on forms directed by HUD).[69]

The PHAs determine whether individuals are eligible to participate in the program.[70] When an individual is approved, the PHA gives that person a voucher subsidy which entitles them to search for qualifying privately-owned housing.[71] When a voucher-possessing family finds a qualifying unit, the unit owner and PHA will negotiate and enter into a HAP contract, which specifies the maximum monthly rent that the unit owner may charge to the tenant.[72] In general, to be eligible to participate in the program, at least 75% of new voucher participants must have extremely low incomes not exceeding 30% of the area median income, with the rest having incomes not exceeding 50% of the area median income.[73]

Each HAP contract specifies the "maximum monthly rent (including utilities and all maintenance and management charges)" that the landlord may receive.[74] The maximum allowable rent must be "reasonable,"[75] as determined by the PHA and HUD regulations.[76] Tenants pay a fixed share of their monthly income for rent,[77] with the federal government's subsidy covering the remaining balance.[78] The total paid by the tenant and the government may not exceed the maximum rent specified in the contract.[79]

[68] 24 C.F.R. § 982.1(a) (2022).
[69] *Id.* § 982.162.
[70] *Id.* § 982.201(a).
[71] *Id*. § 982.302.
[72] 42 U.S.C. § 1437f(c). *See also id.* §§ 982.162(a), 982.451(b)(4)(ii).
[73] U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-53, HOUSING CHOICE VOUCHER PROGRAM: LIMITED INDICATIONS OF POTENTIAL FRAUD AGAINST PARTICIPANTS IDENTIFIED 5 (2017) [hereinafter GAO FRAUD REPORT].
[74] 42 U.S.C. § 1437f(c)(1)(A).
[75] 24 C.F.R. §§ 982.507(a)–(b) (2022).
[76] *Id.* §§ 982.501–521.
[77] 42 U.S.C. § 1437a.
[78] *Id.* § 1437f(c)(3).
[79] 24 C.F.R. §§ 982.451–456 (2022).

Additionally, HUD's prescribed tenancy addendum[80] must be attached to every lease and cannot be changed by agreement of the parties.[81] The terms of the addendum are controlling so that they "prevail over any other provision of the lease."[82] The addendum provides some important basic tenant protections, with some of the more pertinent ones including:

1. Limiting the unit rent to the reasonable rent approved by the PHA or comparable unassisted units in the premises and prohibiting rent increases during the initial term;[83]
2. Prohibiting charging or collecting other payments for rent from the tenant or any source, and requiring any excess payments to be returned to the tenant;[84]
3. Clarifying that the tenant is not responsible for the PHA's Housing Assistance Payment (HAP) and cannot be evicted for nonpayment of the HAP;[85]
4. Specifying that the owner cannot require the tenant to pay extra for furniture, meals, supportive services, or anything else customarily included in rent in the locality or for other unassisted tenants on the premises;[86]
5. Requiring the landlord to maintain the property and provide utilities sufficient to comply with the housing quality standards (HQS);[87]
6. Requiring 60 days' notice to the PHA of any rent changes (presumably at the end of the initial term);[88]
7. Requiring written notice between the parties for actions under the lease, and that any agreed changes to the lease be in writing and provided to the PHA.[89]

---

[80] DEP'T OF HOUS. AND URB. DEV., FORM 52641-A: TENANCY ADDENDUM (2019), https://www.hud.gov/sites/dfiles/OCHCO/documents/52641A.pdf (although this Addendum states that it expired on July 31, 2022, it is the most recent version available on the HUD website).
[81] *Id.* ¶ 18a; 24 C.F.R. §§ 982.308(f)–(g) (2022).
[82] 24 C.F.R. §§ 982.308(f)(2) (2022).
[83] HUD FORM 52641-A, *supra* note 80, ¶ 4.
[84] *Id.* ¶¶ 5e–f.
[85] *Id.* ¶ 5d.
[86] *Id.* ¶ 6.
[87] *Id.* ¶ 7.
[88] *Id.* ¶ 18d.
[89] *Id.* ¶ 18 (agreed-upon lease changes must be in writing and provided to the PHA); 24 C.F.R. § 982.308(g) (2022).

Finally, the tenancy addendum requires a new tenancy and HAP contract for any changes concerning utilities, appliances, the lease term, or the unit rented.[90]

2. The Problem of Illegal "Side-Payments"

In the Section 8 Program, side payment fraud is consistently noted as one of the most pervasive forms of abuse perpetrated by dishonest landlords.[91] The scheme usually follows a familiar fact pattern: a landlord, oftentimes frustrated by the maximum limit on rent that they may charge pursuant to the signed HAP contract, demands additional payments (or other illicit favors)[92] from their Section 8 tenants that are above the legally permitted rent that may be charged as stated in the HAP contract.[93] These additional payments may take the form of demands for a tenant to pay utility fees that are not required under the rental agreement,[94] mandatory charges for amenities such as laundry machines, parking, and lawncare when such fees are not authorized by the HAP contract,[95] or even just plain demands

---

[90] HUD FORM 52641-A*, supra* note 80, ¶ 18b.

[91] GAO FRAUD REPORT, *supra* note 73, at 11–14 (describing side payment fraud as the most frequently-noted form of abuse in a survey of PHAs representing approximately 1.9 million households, with 41% of PHAs in one year being aware of side payment fraud); Andrew L. Campbell & Gary M. Victor, *Redressing Landlord Overreach in Cases Involving Low-Income Section 8 Tenants*, 97 MICH. BAR J. 26, 28 (2018) ("Landlords who participate in Section 8 housing contracts will sometimes look for ways to increase their profits by making side deals with their tenants."); OIG Fraud Alert: Bulletin on Charging Excess Rent in the Housing Choice Voucher Program, 73 Fed. Reg. 39712 (July 10, 2008) [hereinafter 2008 HUD Fraud Alert] (noting that side payment fraud is a "recurring problem in the Housing Choice Voucher program.").

[92] *E.g.*, GAO FRAUD REPORT, *supra* note 73, at 11 (describing a PHA representative being aware of a landlord that demanded sexual favors from his Section 8 tenants in exchange for permission to reside in the units).

[93] *See* Schnell & Soltan, *supra* note 18 ("Extracting these kinds of surplus payments for utilities, parking, or even extra rent, is a common practice among unscrupulous Section 8 landlords."); GAO FRAUD REPORT, *supra* note 73, at 10–11.

[94] *See, e.g.*, United States *ex rel.* Gionson v. NVWM Realty, LLC, No. 218CV01409, 2019 WL 2617816, at *2 (D. Nev. June 25, 2019) (finding landlord liable for FCA violations for illegally charging an additional $35 per month for sewer and trash); Coleman v. Hernandez, 490 F. Supp. 2d 278, 280 (D. Conn. 2007) (holding water fees not included in HAP contract were illegal side payments and therefore violated FCA); United States *ex rel.* Sutton v. Reynolds, 564 F. Supp. 2d 1183, 1185 (D. Or. 2007) (unlawfully charging additional $30 per month for utilities violated FCA); United States *ex rel*. Abea v. Odiye, No. C1806296, 2019 WL 2009287, at *1 (N.D. Cal. May 7, 2019) (same).

[95] *See, e.g.*, United States *ex rel.* Price v. Peters, 66 F. Supp. 3d 1141, 1149 (C.D. Ill. 2013) (excess payments for use of storage shed violated FCA); *Sutton v. Reynolds*, 564 F. Supp. 2d at 1187 (additional fees for landscaping could constitute illegal side payments); United States *ex rel.* Mathis v. Mr. Prop., Inc., No. 1400245, 2015 WL 1034332, at *5 (D. Nev. Mar. 10, 2015) (additional fees for pool maintenance violated FCA); Terry v. Wasatch

for additional rent in order to avoid eviction.[96] The Section 8 voucher program exists to aid low-income families in obtaining housing, "and that purpose is clearly undermined when a program participant overcharges a beneficiary of the program."[97]

Frequently, when Section 8 tenants are unable to make these additional side payments, landlords turn to harassment, intimidation, and coercion as means of extracting whatever amount of additional cash they can from their tenants.[98] For example, in one case, a Section 8 tenant acceded to his landlord's demands to sign an unauthorized second lease calling for additional charges because the tenant's "disabilities, frailty and limited financial means left him little option."[99] Moreover, threatening to file for eviction — and actually evicting tenants on the basis of nonpayment of such unpermitted fees — is one of the more reprehensible, yet effective tactics employed by predatory landlords in extracting more money from vulnerable tenants.[100] This is because when a Section 8 tenant is evicted for nonpayment of rent, they risk losing their voucher subsidy completely (in addition to all of the other devastating consequences of an eviction).[101]

Advantage Grp., No. 215CV00799, 2022 WL 17178388, at *8 (E.D. Cal. Nov. 23, 2022) (additional charges for washer and dryer rentals, renter's insurance, and covered parking were illegal side payments and violated FCA).

[96] *See, e.g.*, United States *ex rel.* Salvatore v. Fleming, No. 111157, 2015 WL 1326327, at *2 (W.D. Pa. Feb. 23, 2015) (illegally charging $163 additional per month and for utilities); United States *ex rel.* Wade v. DBS Invs., LLC, No. 11CV20155, 2012 WL 3759015, at *2 (S.D. Fla. Aug. 29, 2012) (charging an extra $200 per month); United States *ex rel.* Ellis v. Jing Shu Zheng, No. 216CV01447, 2018 WL 1074483, at *3 (D. Nev. Feb. 26, 2018) (charging an extra $300 per month); Doe v. Gormley, No. CVADC152183, 2016 WL 4400301, at *5 (D. Md. Aug. 17, 2016) (charging an extra $411 per month).

[97] United States *ex rel.* Carmichael v. Gregory, 270 F. Supp. 3d 67, 71 (D.D.C. 2017). *See also* Press Release, U.S. Att'ys Off. E. Dist. Cal., Sacramento Landlord Pays $75,000 to Settle "Section 8" False Claims Act Allegations (Nov. 28, 2016) [hereinafter Sacramento Landlord Settlement], https://www.justice.gov/usao-edca/pr/sacramento-landlord-pays-75000-settle-section-8-false-claims-act-allegations ("[C]harging in excess of the agreed tenant rate frustrates a primary goal of [the Section 8] program: to provide affordable housing to low-income families.").

[98] *E.g.*, United States v. Baran, No. CV1402639, 2015 WL 5446833, at *2 (C.D. Cal. Aug. 28, 2015); United States *ex rel.* Richards v. R & T Invs., LLC, 29 F. Supp. 3d 553, 556 (W.D. Pa. 2014).

[99] United States v. Ogden, No. 20CV01691, 2021 WL 858466, at *2 (N.D. Cal. Mar. 8, 2021).

[100] *See, e.g.*, *Salvatore*, 2015 WL 1326327, at *2; *Baran*, 2015 WL 5446833, at *9; *Richards*, 29 F. Supp. 3d at 556; *Mathis*, 2015 WL 1034332, at *1; *Terry*, 2022 WL 17178388, at *2.

[101] *Terry*, 2022 WL 17178388, at *2 ("Section 8 tenants evicted for non-payment of rent lose their voucher."); DESMOND, *supra* note 1, at 296 ("Often, evicted families also lose the opportunity to benefit from public housing because Housing Authorities count evictions and unpaid debt as strikes when reviewing applications. And so people who have

Therefore, tenants fearful of the potential ramifications of an eviction and of losing their voucher oftentimes simply acquiesce to their landlord's demands for additional payments.[102]

In one particularly egregious example, when a tenant (upon the correct guidance of his PHA caseworker), stopped paying an illegal $150 per month side payment to his landlord for "pool maintenance fees," he was evicted and had to hastily leave behind his personal property at the unit — which was later found to have been burglarized resulting in a loss of $4,238 in personal property.[103] In another case, a low-income single mother of four minor children was evicted and forced to relocate after she stopped paying (again upon the correct advice of a PHA caseworker) unlawful side payments to her landlord in the amount of an additional $163 per month as well as water and sewer costs — none of which the landlord was permitted to charge under the HAP contract.[104] As a final example, one Section 8 tenant was unlawfully forced to pay utility fees for the *entire* complex — not just her apartment — and had to seek reimbursement from her downstairs neighbor for utility costs within that illegal unit.[105] As one judge put it, such conduct is "reprehensible" as "[t]he purpose of the Section 8 agreements [is] to enable a family to receive government aid in order to afford a rental apartment, not to enlarge the pockets of greedy landlords."[106]

HUD's Office of the Inspector General (OIG) has long been aware of this problem, and has issued fraud bulletins both in 2008 and as recently as October 2022 trying to raise awareness of this issue.[107] In its 2008 Alert, HUD described the "recurring problem" of Section 8 landlords submitting false claims to the government "where such landlords have violated their continuing obligations to not charge tenants rents in excess of what is authorized by the HAP contract."[108] The Alert goes on to explain that "[i]mproperly requiring tenants to pay rent in excess of what is authorized by the applicable contract represents both an actionable offense under the

---

the greatest need for housing assistance — the rent-burdened and evicted — are systematically denied it.").

[102] *See Richards*, 29 F. Supp 3d at 556 (tenant paid excess side payment in fear of eviction).

[103] *Mathis*, 2015 WL 1034332, at *1.

[104] *Salvatore*, 2015 WL 132632, at *2.

[105] United States *ex rel*. Abea v. Odiye, No. C1806296, 2019 WL 2009287, at *1 (N.D. Cal. May 7, 2019).

[106] Crutchley v. Costa, No. SP527001, 2001 WL 1666007, at *2 (N.Y. Dist. Ct. Dec. 6, 2001).

[107] 2008 HUD Fraud Alert, *supra* note 91; Press Release, HUD Off. of Inspector Gen., Landlord Overcharging Section 8 Tenant Fraud Scheme (Oct. 19, 2022) [hereinafter 2022 HUD Fraud Alert], https://www.hudoig.gov/sites/default/files/2022-10/Landlord%20Overcharging%20Section%208%20Tenant%20Fraud%20Scheme.pdf.

[108] 2008 HUD Fraud Alert, *supra* note 91.

False Claims Act and deplorable behavior directed towards the very persons whom the program was designed to serve."[109] HUD reiterated this in its most recent 2022 Alert where it again explained that a landlord "may not demand or accept any rent from the tenant in excess of the contracted amount and must immediately return any excess rent payment to the tenant," this time specifically noting that "[t]hreatening to evict tenants or in fact evicting tenants for failure to pay any of these additional charges is illegal."[110]

Additionally, as more PHAs have become aware of the serious harms posed by side payment fraud, some have taken steps at trying to inform landlords and tenants of the illegality of demanding excess charges. For example, the Richmond, Virginia Housing Authority has created a "Side Payment Acknowledgment" form for both the landlord and tenant to read and sign, which plainly explains that "demanding side payments violates the HAP contract."[111] The form also goes on to describe the serious consequences for participants who engage in side payments, and stresses that the housing authority "has a zero tolerance for side payments and will prosecute to the fullest extent of the law."[112] As another example, an Ohio PHA also created a letter addressed to participating landlords explaining the illegality of side payments after it had "become aware of such activities by landlords participating in our local program."[113] In addition to citing the potential liability and penalties under the FCA, the letter finishes off with a prominent warning to the landlord that "IF YOU HAVE NEGOTIATED OR ARE COLLECTING EXCESS RENT FROM YOUR SECTION 8 ASSISTED TENANT, YOU MUST STOP THIS PRACTICE IMMEDIATELY."[114] Informational letters such as these could serve as an effective method for clearly notifying both landlords and tenants of the illegal nature of side payments — thus potentially reducing their prevalence, while also increasing the likelihood of tenants reporting such misconduct to their PHA caseworkers, who can then provide referrals to legal services for enforcement action.

---

[109] *Id.*

[110] 2022 HUD Fraud Alert, *supra* note 107.

[111] *Side Payments*, RICHMOND HOUS. AUTH., https://www.rrha.com/wp-content/uploads/2020/07/RRHA-side-payments.pdf.

[112] *Id.* The form also warns that "[s]ide payments are actionable offenses against the Federal False Claims Act," and lists the potential FCA penalty amounts.

[113] *Side Payment Letter*, STARK METRO. HOUS. AUTH., https://www.starkmha.org/wp-content/uploads/2015/10/OIG-Side-payments-letter.pdf.

[114] *Id.* The letter also warns that "[i]f the PHA receives a report from the tenant or any other source that a breach of the HAP contract has occurred we will refer the identified breach to the OIG." The last sentence of the letter declares how "[t]he serious nature of any breach of [the] HAP Contract is immense."

Legal aid and pro bono attorneys who assist clients facing side payment fraud are undoubtedly well-versed in the remedies available through state landlord-tenant or consumer protection laws.[115] But many might not be aware that one of the federal government's most important and lucrative fraud-fighting statutes — the False Claims Act — can also be leveraged as a powerful weapon for holding greedy landlords accountable for their illegal extraction of side payments from Section 8 tenants. One of the main goals of this Article is to thus raise awareness of the FCA's effectiveness in combatting side payment fraud, in addition to highlighting that it is perhaps the *best* way of securing justice for low-income tenants victimized by this form of economic exploitation.

II. The Federal False Claims Act is a Powerful Tool for Protecting Section 8 Tenants From Side Payment Fraud

Part II discusses the application of the federal False Claims Act to instances of side payment fraud committed against Section 8 voucher tenants. An analysis of the current caselaw and recent developments reveals a unanimous consensus among courts that the charging of any amount above the agreed-upon rent as stated in the HAP contract constitutes a violation of the FCA. Section II.A examines the definition of what constitutes "rent" for the purposes of understanding the illegality of side payments. Sections II.B and II.C discuss how side payment fraud easily satisfies the required elements of an FCA claim. Section II.D examines the powerful deterrent effect that significant FCA award and settlement amounts can play in preventing side payment fraud.

A. What is "Rent?"

In order to understand how unpermitted side payments can establish a violation of the FCA, it is important to first consider what the word "rent" encompasses under a HAP contract. As previously mentioned, a HAP contract sets out the total "rent to owner" that a landlord may charge, a portion of which is remitted by the Section 8 tenant, and the remaining by the PHA.[116] Additional side payments are illegal if they can be construed as "rent" that should be included as part of the total "rent to owner" in the HAP

---

[115] *E.g.*, Crutchley v. Costa, No. SP527001, 2001 WL 1666007, at *3 (N.Y. Dist. Ct. Dec. 6, 2001) (counterclaim brought under state law for unlawful side payments); Ray v. Thirty LLC, No. A081020, 2009 WL 1819288, at *5 (Neb. Ct. App. June 23, 2009) (state causes of action brought against landlord for unlawful side payments and wrongful eviction).

[116] DEP'T OF HOUS. AND URB. DEV., FORM 52641: HOUSING ASSISTANCE PAYMENTS CONTRACT pt. C, paras. 4, 20 (2019), https://www.hud.gov/sites/dfiles/PIH/documents/Housing_assistance_payments_contract.pdf (although this Form states that it expired on July 31, 2022, it is the most recent version available on the HUD website); *see also* 42 U.S.C. § 1437f(c).

contract.[117] Although HAP contracts do specify "rent to owner" as including "all housing services, maintenance, utilities and appliances to be provided and paid by the owner in accordance with the lease,"[118] neither Section 8's governing statute nor the implementing regulations explicitly provide a definition of "rent."[119]

In addressing this question, courts have found that additional charges could constitute "rent" if the charges were mandatory, formed the basis for eviction, or were part of the "total expense for the use of land during the term of occupancy."[120] In *Terry v. Wasatch*, for example, the court found that additional charges for appliances not disclosed in the HAP contract constituted "rent," because they were part of the total monthly obligation due, renewal letters described the charges as part of the "new rental rate" when tenants renewed their leases, and some of the landlord's forms combined rent and additional charges in several places.[121] In finding that these charges violated the FCA, the court pointed out how the landlords admitted to serving demands to their Section 8 tenants for the payment of additional charges or to face eviction — even for amounts of less than $100.[122] In other words, any mandatory charge for living in a unit that may form the basis of an eviction can be considered "rent" that must be included in the "total rent to owner" portion of the HAP contract. The failure to do so would render those charges illegal side payments.

B. Side Payment Fraud Satisfies All of the Required Elements of an FCA Claim

As mentioned in Part I, a plaintiff in an FCA action must sufficiently allege that there was "(1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to pay out money or forfeit moneys due."[123] Section 8 side payment fraud would easily satisfy all of these elements for establishing a cause of action under the FCA.

---

[117] United States *ex rel.* Terry v. Wasatch Advantage Grp., No. 215CV00799, 2017 WL 3116940, at *4 (E.D. Cal. July 21, 2017).
[118] HUD FORM 52641, *supra* note 116, pt. C, para. 5(e).
[119] Terry v. Wasatch Advantage Grp., No. 215CV00799, 2022 WL 17178388, at *6 (E.D. Cal. Nov. 23, 2022) (citing Velez v. Cuyahoga Metro. Hous. Auth., 795 F.3d 578, 582–83 (6th Cir. 2015)).
[120] *Id.* (citing *Velez*, 795 F.3d at 585 (reasoning that short-term lease fees, which were the basis for eviction, were not optional and thus constituted "rent.")).
[121] *Id.* at *7.
[122] *Id. See also* Coleman v. Hernandez, 490 F. Supp. 2d 278, 280 (D. Conn. 2007) (landlord threatened to evict tenant for not paying $60 per month side payment).
[123] United States *ex rel* Hendow v. Univ. of Phx., 461 F.3d 1166, 1174 (9th Cir. 2006).

1. A Fraudulent Course of Conduct

Unlawfully charging additional amounts above what is permitted under the HAP contract would satisfy the first element of a "fraudulent course of conduct."[124] The HUD Housing Choice Voucher Program Guidebook defines "fraud" and "abuse" in the Section 8 Program as: "a single act or pattern of actions made with the intent to deceive or mislead, constituting a false statement, omission, or concealment of a substantive fact."[125] Moreover, the collection of side payments in excess of the tenant's share of rent or charging for utilities that are the landlord's responsibility are specifically denoted as "fraud or abuse" in the Guidebook.[126] When landlords enter into a HAP contract with a PHA, they explicitly certify that

> [(1) they] had not received and would not receive any payments or other consideration for the rental during the HAP contract term, except for the rent [they are] entitled to under the HAP Contract; (2) in the event that [the landlord] did receive any excess rent payments from the tenant, [they] would return it immediately; and (3) if [they] failed to comply with any provision of the HAP Contract, [they would] not have the right to receive housing assistance payments under the HAP Contract.[127]

Collecting monthly subsidies from the PHA while simultaneously receiving excess side payments from the tenant would violate the HAP contract and therefore satisfy the element of a fraudulent course of conduct.[128] For example, in *Mathis v. Mr. Property*,[129] the court held that charging a Section 8 tenant an additional pool maintenance fee of $150 per month when it was not included in the HAP contract constituted an illegal side payment and "fraudulent course of conduct" under the FCA.[130] In its reasoning, the court looked to Part C, paragraph 5, of the HAP contract which prohibited the landlord from charging additional "rent," where rent was defined as "payment for all housing services, maintenance, equipment, and utilities to

---

[124] *Id.* at 1171 (explaining that a fraudulent course of conduct can occur "where a party merely falsely certifies compliance with a statute or regulation as a condition to government payment").

[125] DEP'T OF HOUS. AND URB. DEV., HOUSING CHOICE VOUCHER PROGRAM GUIDEBOOK 22-1 (2022), https://www.hud.gov/sites/documents/DOC_35632.pdf.

[126] *Id.* at 22-9.

[127] United States v. Baran, No. CV1402639, 2015 WL 5446833, at *4 (C.D. Cal. Aug. 28, 2015).

[128] *Id.*

[129] United States *ex rel.* Mathis v. Mr. Prop., Inc., No. 214CV00245, 2015 WL 1034332 (D. Nev. Mar. 10, 2015).

[130] *Id.* at *5.

be provided by the owner without additional charge to the tenant, in accordance with the HAP contract and lease."[131] Because the HAP contract did not contain any provision related to pool maintenance fees, the court could infer that the PHA did not agree to the pool payment, and it was therefore an improper side payment that constituted a "fraudulent course of conduct."[132]

In another case, a court held that charging a tenant an additional $35 every month for sewer and trash payments for nearly two years satisfied the falsity element of the FCA when the HAP contract provided that sewer and trash payments were to be the responsibility of the landlord.[133] Basically, whenever a landlord charged or demanded *any* amount greater than what was allowable under the HAP contract, courts found the landlord's conduct satisfied the falsity element of the FCA.[134] Moreover, the question of falsity depends on the act of *charging* any additional unpermitted fees, not necessarily requiring that the tenant prove that they actually paid such charges for establishing falsity under the FCA.[135] By submitting requests for payment, a landlord impliedly certifies their compliance with HUD regulations concerning the amount of rent they are permitted to charge.[136] A breach of this certification through the charging of unpermitted fees would thereby establish the element of falsity under the FCA.

---

[131] *Id.* at *4. This definition was subsequently codified at 24 C.F.R. § 983.353.
[132] *Id.* at *5.
[133] United States *ex rel.* Gionson v. NVWM Realty, LLC, No. 218CV01409, 2019 WL 2617816, at *2 (D. Nev. June 25, 2019). *See also* United States *ex rel.* Salvatore v. Fleming, No. 111157, 2015 WL 1326327, at *2 (W.D. Pa. Feb. 23, 2015).
[134] *See, e.g.*, Doe v. Gormley, No. CV ADC152183, 2016 WL 4400301, at *5 (D. Md. Aug. 17, 2016) ("[A]ny additional rent in excess of the approved [amount] collected by Defendant would qualify as fraud and/or abuse under the terms of the HAP Contract."); United States *ex rel.* Sutton v. Reynolds, 564 F. Supp. 2d 1183, 1187 (D. Or. 2007) (holding that any amount landlord collected from tenant in excess of that specified in HAP contract qualified as fraud); United States *ex rel.* Wade v. DBS Invs., LLC, No. 11CV20155, 2012 WL 3759015, at *3 (S.D. Fla. Aug. 29, 2012) (holding the same).
[135] United States *ex rel.* Holmes v. Win Win Real Est., Inc., No. 213CV02149, 2015 WL 6150594, at *4 (D. Nev. Oct. 19, 2015) ("The question is not whether [the tenant] ever paid [side payments], but rather whether [the landlord] charged her additional fees in violation of the HAP contract which formed the basis for the Government's decision to pay out moneys."). *See also* United States *ex rel.* Karvelas v. Melrose-Wakefield Hosp., 360 F.3d 220, 225 (1st Cir. 2004) ("[T]he statute attaches liability, not to the underlying fraudulent activity or to the government's wrongful payment, but to the 'claim for payment.'").
[136] United States *ex rel.* Carmichael v. Gregory, 270 F. Supp. 3d 67, 71 (D.D.C. 2017); United States *ex rel.* Wade v. DBS Invs., LLC, Civ. A. No. 1120155, 2012 WL 3759015, at *3 (S.D. Fla. Aug. 29, 2012) ("[A] landlord commits fraud when that landlord endorses or presents for payment housing assistance payment checks while knowingly receiving additional payments in excess of that approved[.]").

2. Made with Scienter

In order not to punish honest mistakes or incorrect claims submitted through mere negligence, Congress specifically amended the FCA to include the requirement of scienter.[137] Scienter is defined as "the knowing presentation of what is known to be false."[138] The FCA defines "knowing" and "knowingly" as having actual knowledge of information or acting in either deliberate ignorance or reckless disregard of the truth or falsity of the information.[139] The false statement or fraudulent conduct must be made with knowledge of the falsity and with intent to deceive.[140]

In side payment fraud cases, courts have pointed to the language of the HAP contract, and a landlord's disregard thereof, as satisfying the requisite scienter element. For example, a court highlighted that by accepting monthly Section 8 subsidy payments, a landlord was explicitly certifying that they would not receive any additional side payments since such conduct was plainly prohibited under the HAP contract that the landlord executed.[141] Disregarding the contractual language would be enough to establish the scienter element. In another case holding that scienter was plausibly pled, the court looked to the facts that a PHA counselor explicitly informed the landlord that charging additional maintenance fees constituted illegal side payments, the landlord never informed the PHA of any changes to the lease agreement, and the PHA did not agree to the extra charges.[142] Basically, because HAP contracts plainly mention the illegality of side payments, landlords are presumed to act with knowledge of their wrongful conduct whenever they disregard the contractual language and proceed to collect excess payments from their tenants.

[137] United States *ex rel.* Hochman v. Nackman, 145 F.3d 1069, 1073 (9th Cir. 1998).
[138] United States *ex rel.* Mathis v. Mr. Prop., Inc., No. 214CV00245, 2015 WL 1034332, at *5 (D. Nev. Mar. 10, 2015) (citing *Hochman*, 145 F.3d at 1073).
[139] 31 U.S.C. § 3729(b).
[140] United States v. Baran, No. CV1402639, 2015 WL 5446833, at *4 (C.D. Cal. Aug. 28, 2015) (citing *Hochman*, 145 F.3d at 1073).
[141] United States *ex rel.* Gionson v. NVWM Realty, LLC, No. 218CV01409, 2019 WL 2617816, at *3 (D. Nev. June 25, 2019). *See also* United States *ex rel.* Price v. Peters, 66 F. Supp. 3d 1141, 1150 (C.D. Ill. 2013) (holding that landlord's failure to inform PHA of excess side payments demonstrated deliberate ignorance or reckless disregard supporting liability under FCA).
[142] *Mathis*, 2015 WL 1034332, at *5. *See also Baran*, 2015 WL 5446833, at *5 (finding landlord "knowingly" violated the HAP contract by collecting side payments because when she executed the contract, she had explicitly agreed to comply with the provisions therein).

3. That Was Material to the Government's Decision to Pay

To satisfy the third element, the false statement or fraudulent course of conduct "must be material to the government's decision to pay out moneys to the claimant."[143] In other words, there must be a causal relationship between the fraudulent conduct and the government's loss. Courts have found that the amount of a Section 8 recipient's monthly payment is material to the government's payment decision.[144] As the court in *Sutton v. Reynolds* observed, the collection of excess side-payments "affect[s] one of the most basic terms of the Contract and [is] relevant to HAP's decision to continue to pay the subsidy every month."[145] Moreover, charging excess side payments would violate federal regulations, which provide that "[t]he owner may not demand or accept any rent payment from the tenant in excess of this maximum. . . ."[146] In fact, federal regulations specifically prohibit the government from "approv[ing] a tenancy unless the rent is reasonable."[147]

The key factor in determining materiality is whether the PHA would have terminated the HAP contract were it to know that a landlord was charging additional side payments.[148] As one court put it, "any additional charge, including trash and sewer fees, [is] material to [the PHA] and the government's decision to pay out moneys."[149] Since in every instance the illegal charging of additional side payments would result in a termination of the HAP contract, it would satisfy the materiality element of an FCA claim.

---

[143] United States *ex rel.* Hendow v. Univ. of Phx., 461 F.3d 1166, 1172 (9th Cir. 2006).

[144] Kelly v. Denault, 374 F. Supp. 3d 884, 892 (N.D. Cal. 2018). Several courts have also recognized that collecting or attempting to collect side payments gives rise to a cognizable claim under a FCA false-certification theory. *See, e.g.*, United States *ex rel.* Carmichael v. Gregory, 270 F.Supp.3d 67, 71 (D.D.C. 2017); Doe v. Gormley, No. CVADC152183, 2016 WL 4400301, at *5 (D. Md. Aug. 17, 2016); United States *ex rel.* Ellis v. Jing Shu Zheng, No. 216CV01447, 2018 WL 1074483, at *4 (D. Nev. Feb. 26, 2018).

[145] United States *ex rel.* Sutton v. Reynolds, 564 F. Supp. 2d 1183, 1189 (D. Or. 2007); *Carmichael*, 270 F.Supp.3d at 71 (holding that there is no "doubt that the amount of rent [landlord] charged is a 'material' term").

[146] 24 C.F.R. § 982.451(b)(4)(ii) (2022).

[147] 24 C.F.R. § 982.1(a)(2) (2022).

[148] United States *ex rel.* Mathis v. Mr. Prop., Inc., No. 214CV00245, 2015 WL 1034332, at *6 (D. Nev. Mar. 10, 2015) (holding unpermitted side payments were "material" to the Government's decision to pay out moneys because the PHA would have terminated the HAP contract had it been aware of them).

[149] United States *ex rel.* Gionson v. NVWM Realty, LLC, No. 218CV01409, 2019 WL 2617816, at *3 (D. Nev. June 25, 2019).

4. Causing the Government to Pay Out Money

For the last element of an FCA claim, a plaintiff must show that there was an actual claim, meaning that the government must have paid out moneys due.[150] The government's remittal of the full amount of subsidy payments to the landlord would satisfy this element.[151] In some FCA cases, defendant landlords have attempted to argue as a defense that additional side payments they collected from a tenant "had no effect on the government" because "the contracted for monthly rent subsidy matche[d] exactly what was paid to [the landlord] by [the PHA]."[152] However, courts have refuted such defenses on the basis that they ignore the clear language of the HAP contract, which specifically states that "[u]nless the owner has complied with all provisions of the HAP contract, the owner does not have a right to receive housing assistance payments under the HAP contract" and that the rights and remedies for a breach "include recovery of overpayment, suspension of housing assistance payments, abatement or other reduction of housing assistance payments, termination of housing assistance payments, and termination of the HAP contract."[153]

Based on such reasoning, the government's decision to pay the *entire amount* of rental subsidy payments to a Section 8 landlord is contingent on the landlord's certification to not receive any additional payments from a tenant. The HUD OIG also warned in its 2008 Fraud Bulletin that "[t]he United States may take the position that the entire amount of its HAP payment, not merely the amount of the excess payment by the tenant, is the claim that should be trebled where landlords make false certifications concerning excess rent charged."[154] Courts tasked with calculating the government's damages should therefore consider the entire amount of the remitted subsidy payments in determining the appropriate penalties to be awarded in a side payment fraud case.[155]

---

[150] *Mathis*, 2015 WL 1034332, at *6 (citing United States *ex rel.* Hendow v. Univ. of Phx., 461 F.3d 1166, 1173 (9th Cir. 2006)).
[151] United States v. Baran, No. CV1402639, 2015 WL 5446833, at *5 (C.D. Cal. Aug. 28, 2015) (stating that the HAP contract "explicitly states that the owner of the rental property does not have a right to receive housing assistance payments under the HAP Contract unless the owner has complied with all provisions therein").
[152] Doe v. Gormley, No. CV ADC152183, 2016 WL 4400301, at *5 (D. Md. Aug. 17, 2016).
[153] *Id.*
[154] 2008 HUD Fraud Alert, *supra* note 91.
[155] *See infra* Section II.D.

C. The Terms of the HAP Contract Supersede Any Other Agreements

In some FCA cases, landlords have attempted to argue in their defense that because the side payments they charged were mentioned in leases or other agreements attached to the requests for HAP contract approvals filed with the PHA, this would imply that the PHA approved the additional charges, therefore precluding a claim from being "false." Courts presented with such arguments have universally rejected them on the basis that the terms of a HAP contract would supersede any other agreements, and the charging of any amount above the allowable rate stated under the HAP contract would constitute a fraudulent claim.[156]

For example, in *United States* ex rel. *Holmes v. Win Win Real Estate, Inc.*, the defendant landlords presented a similar defense, arguing that because they attached a lease agreement which contained the extra charges to their Request for Tenancy Approval with the PHA, that this implied the PHA was aware of and approved the lease agreement and it became part of the HAP contract, thereby permitting the extra charges.[157] However, the actual HAP contract that was approved and signed did *not* make any reference to these additional fees.[158] The court thus rejected defendants' argument on the basis that the HAP contract made it "clear that when the terms of the lease agreement and the terms of the HAP Contract conflict, the HAP Contract controls."[159] The court then found that the defendants violated the FCA by charging their Section 8 tenants a monthly fee for property management and HOA fees that were not referenced in the HAP contract, despite them having submitted a lease to the PHA that *did* mention those charges.[160]

---

[156] *See, e.g.*, *Doe v. Gormley*, 2016 WL 4400301, at *1 (holding that landlord breached the HAP contract despite having signed a lease which provided that tenant would pay "all charges for gas, electricity, water, heat, and security alarm" in addition to the monthly rent, when such charges were not allowed under the HAP contract); United States *ex rel.* Mathis v. Mr. Prop., Inc., No. 214CV00245, 2015 WL 1034332, at *4–6 (D. Nev. Mar. 10, 2015) (finding that despite landlord's contention that he submitted a lease containing a $150 per month additional maintenance fee to the PHA, the fee still constituted an illegal side payment because it was not included in the HAP contract); United States *ex rel.* Abea v. Odiye, No. C 1806296, 2019 WL 2009287, at *2 (N.D. Cal. May 7, 2019) (denying landlord's motion to dismiss and argument that a handwritten note on the lease stating tenant would pay for all utilities could excuse landlord's liability for FCA violations, when the HAP contract could show that landlord was responsible for all utilities).

[157] United States *ex rel.* Holmes v. Win Win Real Est., Inc., No. 213CV02149, 2015 WL 6150594, at *3 (D. Nev. Oct. 19, 2015).

[158] *Id.* at *2.

[159] *Id.* at *4.

[160] *Id.*

In a similar case, the defendant landlords argued that they did not submit false claims to the PHA because the agency was aware of the additional charges and the landlords "consistently disclosed" to the PHA the "practice of entering into [additional service arrangements ("ASAs")]" with their Section 8 tenants.[161] Even then, the court denied defendants' motion for summary judgment on this argument, holding that plaintiffs raised a dispute of material fact as to whether the PHA authorities were "generally aware" of the defendants' use of the ASAs or whether "representatives of housing authorities have expressed approval of the use of ASAs in the context of [the Voucher Program]."[162] Ultimately, the takeaway is quite simple: a landlord cannot charge *any* additional amount above what is stated on the HAP contract, despite the existence of any other agreements or leases to the contrary. The terms of the HAP contract control.

D. Substantial FCA Award Amounts Serve as Powerful Deterrents

Punitive and actual damages awarded in FCA actions for Section 8 side payment fraud have varied in amount, but they all serve as effective deterrents for preventing side payment fraud and encouraging landlords to settle rather than proceed to litigation. The highest amounts awarded under FCA side payment cases were in instances of default judgments, with a total of $614,407 awarded in one case, not including attorney's fees and costs, which were also awarded,[163] and $587,999 in another.[164] Other FCA side payment cases have resulted in awards amounting to $177,316,[165] $35,194,[166] $24,939,[167] and $12,940.[168] Moreover, recent press releases issued by the Department of Justice suggest similar amounts reached through settlement agreements, including $150,000,[169] $80,000,[170]

---

[161] Terry v. Wasatch Advantage Grp., No. 215CV00799, 2022 WL 17178388, at *9 (E.D. Cal. Nov. 23, 2022).
[162] *Id.*
[163] United States v. Baran, No. CV1402639, 2015 WL 5446833, at *10 (C.D. Cal. Aug. 28, 2015).
[164] United States *ex rel.* Carmichael v. Gregory, 270 F. Supp. 3d 67, 72 (D.D.C. 2017).
[165] United States *ex rel.* Ellis v. Jing Shu Zheng, No. 216CV01447, 2018 WL 1074483, at *5 (D. Nev. Feb. 26, 2018).
[166] United States *ex rel.* Wade v. DBS Invs., LLC, No. 11CV20155, 2012 WL 3759015, at *6 (S.D. Fla. Aug. 29, 2012).
[167] Coleman v. Hernandez, 490 F. Supp. 2d 278, 285 (D. Conn. 2007).
[168] United States *ex rel.* Price v. Peters, 66 F. Supp. 3d 1141, 1151 (C.D. Ill. 2013).
[169] Press Release, U.S. Att'ys Off. E. Dist. Mich., U.S. Attorney's Office Reaches Settlement Under The False Claims Act Over Allegations That Defendants Collected Excess Rent (Dec. 4, 2020), https://www.justice.gov/usao-edmi/pr/us-attorneys-office-reaches-settlement-under-false-claims-act-over-allegations.
[170] Press Release, U.S. Att'ys Off. E. Dist. Mass., Chelsea Landlord and Property Manager Agree to $80,000 Settlement for False Claims Act Violations (Nov. 23, 2021),

$75,000,[171] $57,000,[172] $15,000,[173] $8,500,[174] and $7,000[175] settlements. As mentioned earlier, the tenant would be entitled to keep a certain percentage of the total award amount.[176]

Some courts, citing Eighth Amendment excessive fines concerns, have reduced the FCA award amount after considering the actual damages suffered by the government and tenant.[177] Another court refused to award punitive damages brought under a state cause of action because the "False Claims Act penalties serve the purpose of punitive damages," and "[a]ll actual damages requested [under the state cause of action] would be duplicative of those already awarded [under the FCA]."[178] Even though "these courts may be justified in their concern about the *amount of damages*

---

https://www.justice.gov/usao-ma/pr/chelsea-landlord-and-property-manager-agree-80000-settlement-false-claims-act-violations.

[171] Sacramento Landlord Settlement, *supra* note 97.

[172] Press Release, U.S. Att'ys Off. Dist. Mass., Dorchester Landlords and Property Manager Agree to Settle False Claims Act Allegations (June 11, 2018), https://www.justice.gov/usao-ma/pr/dorchester-landlords-and-property-manager-agree-settle-false-claims-act-allegations.

[173] Press Release, U.S. Att'ys Off. W. Dist. Tex., Landlord Pays $15,000 to Resolve Allegations that It Collected Excess Rent from a Tenant (Apr. 12, 2022), https://www.justice.gov/usao-wdtx/pr/landlord-pays-15000-resolve-allegations-it-collected-excess-rent-tenant; Press Release, U.S. Att'ys Off. Dist. Mass., Holyoke Landlord Agrees to $15,000 Settlement for False Claims Act Violations (Feb. 8, 2023), https://www.justice.gov/usao-ma/pr/holyoke-landlord-agrees-15000-settlement-false-claims-act-violations.

[174] Press Release, U.S. Att'ys Off. Dist. Mass., Roxbury Landlord Agrees to Settle False Claims Act Allegations (Sept. 24, 2020), https://www.justice.gov/usao-ma/pr/roxbury-landlord-agrees-settle-false-claims-act-allegations.

[175] Press Release, U.S. Att'ys Off. Dist. Mass., Chelsea Landlord Agrees to Settle False Claims Act Allegations (Mar. 6, 2020), https://www.justice.gov/usao-ma/pr/chelsea-landlord-agrees-settle-false-claims-act-allegations.

[176] *See* 31 U.S.C. § 3730(d)(1), (c)(3), (d)(2).

[177] *See, e.g.*, United States *ex rel.* Stearns v. Lane, No. 208CV175, 2010 WL 3702538, at *4–5 (D. Vt. Sept. 15, 2010) (discussing Eighth Amendment excessive fines concerns in refusing to award treble damages and civil penalties under the FCA, when it was clear that the tenant was the one who induced her landlord into entering an illegal side payment agreement — therefore confining the total award to the government's actual damages only); United States *ex rel.* Wade v. DBS Invs., LLC, No. 11CV20155, 2012 WL 3759015, at *5 (S.D. Fla. Aug. 29, 2012) (declining to award civil penalties in the amount of $253,000, representing $11,000 per violation for twenty-three violations, but instead awarding $22,000 in penalties, representing $5,500 for four violations).

[178] Coleman v. Hernandez, 490 F. Supp. 2d 278, 284 (D. Conn. 2007).

that may follow from FCA liability," this would ultimately not affect the question of *establishing liability* for violations of the FCA.[179]

In determining the losses suffered by the Government, courts should consider the *entire* amount of the subsidy payments remitted to a landlord, and not just the portion overcharged to the tenant via side payments.[180] This is because if a landlord was truthful about collecting these extra payments, they "would not have a right to receive *any* housing assistance payments from the government."[181] There is also a grave injury to the public, in the sense that "HUD could have entered a different contract with a compliant owner, subsidizing another needy renter."[182] This public policy concern provides support for holding the entire amount of the subsidy payments as the damages to be trebled under the FCA, thereby resulting in a higher award amount.

In short, the potential awards from an FCA action can be significant. This fact alone should act as a clear deterrent for landlords who may contemplate extracting additional amounts of money from their Section 8 tenants. The slew of recent settlements announced by the Department of Justice also suggests that landlords are beginning to recognize the serious liabilities and low chances of success they face should they choose to proceed to litigation rather than settle FCA claims.[183] Moreover, the potential for significant attorney's fees awards could encourage private

[179] *See* James Wiseman, Note, *Reasonable, but Wrong: Reckless Disregard and Deliberate Ignorance in the False Claims Act After Hixson*, 117 COLUM. L. REV. 435, 436 n.8 (2017) (concerning the idea that liability in FCA cases may almost be boundless).

[180] *See* 2008 HUD Fraud Alert, *supra* note 91 ("The United States may take the position that the entire amount of its HAP payment, not merely the amount of the excess payment by the tenant, is the claim that should be trebled where landlords make false certifications concerning excess rent charged.").

[181] United States *ex rel.* Ellis v. Jing Shu Zheng, No. 216CV01447, 2018 WL 1074483, at *5 (D. Nev. Feb. 26, 2018) (emphasis added). *See also* United States v. Baran, No. CV1402639, 2015 WL 5446833, at *8 (C.D. Cal. Aug. 28, 2015) ("Had Defendant been truthful about the extra payments she was receiving from Plaintiff, the government would not have distributed those monthly payments."); Cummings v. Hale, No. 15CV04723, 2017 WL 3669622, at *10 (N.D. Cal. May 17, 2017) ("[T]he government would have known that [the landlord] was entitled to nothing if it had known she required [the tenant] to pay for utilities in violation of the HAP Contract.").

[182] *Zheng*, 2018 WL 1074483, at *4; *see also Cummings*, 2017 WL 3669622, at *9 (giving an example of how this causes great injury to the public).

[183] To date, the author has not found any reported FCA suit where a landlord was found *not* liable for charging additional payments beyond the amount authorized under the HAP contract.

attorneys to take on side payment fraud cases, thereby increasing Section 8 tenants' access to legal representation.[184]

III. Applying State False Claims Acts ("SFCAs") to Section 8 Side Payment Fraud

Part III addresses the novel question of whether *state* false claims acts ("SFCAs") could also be implicated in instances of Section 8 side payment fraud. Section A provides a brief overview of SFCAs. Section B provides the foundations for answering this question in the affirmative. Ultimately, due to the recently amended definition of a "claim," this Article proposes that SFCA liability could also be implicated through a state's administration of federal funds designated for the Section 8 Program.

A. An Overview of State False Claims Acts

While most qui tam false claims litigation arises under the federal False Claims Act, many states have also enacted their own state-specific analogues of the FCA.[185] Many of these SFCAs also feature qui tam provisions, the earliest of which emerged after the 1986 Amendments to the federal FCA.[186] In 1987, California was the first state to enact a false claims act with qui tam provisions, and Illinois and Florida soon followed in the early 1990s.[187] As of 2022, twenty-three states currently have general false claims statutes with qui tam provisions.[188]

Although the body of caselaw, practice, and procedure under the federal FCA is overwhelmingly more developed than that of SFCAs,[189] it is nevertheless worth considering the possibility of SFCAs as additional, independent sources of liability that could be brought in conjunction with federal FCA actions. While coupling both federal and state false claims causes of action in a single complaint is already prevalent in cases arising under healthcare laws,[190] this Article is the first to propose that SFCA liability may also be implicated by Section 8 side payment fraud, based on a close reading of legislative history and recent statutory amendments of

---

[184] *See* Schnell & Soltan, *supra* note 18 ("It [FCA] also provides tenants with greater access to legal counsel with the promise of what can be a sizeable monetary award.").
[185] BOESE, *supra* note 21, § 6.01, 2020 WL 4061479 (updated June 2020).
[186] *Id.*
[187] *Id.*
[188] *Id.*, app. S, 2020 WL 3643602 (updated Dec. 2022) (providing a table detailing current state false claims acts).
[189] SYLVIA, *supra* note 27, § 12:1 ("There is little case law interpreting most of these statutes.").
[190] BOESE, *supra* note 21, § 6.01, 2020 WL 4061479 (updated June 2020).

both the federal and (most) state FCAs.[191] Bringing causes of action under SFCAs could increase a plaintiff's options concerning the jurisdiction in which to initiate a false claims suit for side payment fraud.[192] Moreover, as various courts establish caselaw interpreting SFCA statutes, they may be viewed as more attractive forums for initiating suits based on side payment fraud.[193]

Most SFCAs with qui tam provisions closely mirror the language of the federal FCA because of the financial incentive offered by the Deficit Reduction Act ("DRA"), which entitles state with false claims laws that are "at least as effective in rewarding and facilitating qui tam actions" as the federal FCA to a keep a 10% larger share of its Medicaid recoveries.[194] Following the amendments to the federal FCA that were enacted by the Fraud Enforcement and Recovery Act of 2009 ("FERA"),[195] the Affordable Care Act,[196] and the Dodd-Frank Act,[197] most state legislatures began updating their own false claims laws to comply with the DRA requirements by mirroring the FCA 2009 Amendments.[198] In order to analyze the applicability of SFCA causes of action in instances of Section 8 side payment fraud, it is first important to understand Congress's motivation for amending the definition of a "claim" in the first place.

---

[191] SFCAs would undoubtedly apply in the case of state-funded housing vouchers, which this Article does not address since they are seldom used. *See* Noah M. Kazis, *The Failed Federalism of Affordable Housing: Why States Don't Use Housing Vouchers*, 121 MICH. L. REV. 221, 242 (2022) (noting that state-funded housing vouchers are only used "sparingly" and "almost never for the general low-income population").

[192] BOESE, *supra* note 21, § 6.04, 2021 WL 1063824 (updated Mar. 2021).

[193] *Id.*

[194] 42 U.S.C. § 1396(h).

[195] Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009) ("Clarifications to the False Claims Act to reflect the original intent of the law").

[196] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (changing the application of the False Claims Act to cover payments made/through an Exchange and increasing the damages for those found liable).

[197] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (changing a sentence of the False Claims Act and adding a Statute of Limitation on bringing civil action).

[198] *See, e.g.*, A.B. 1196, 2009–10 Reg. Sess. (Cal. 2009) (revising the definition of a "claim" and expanding liability along the lines of the FERA Amendments); *accord* H.B. 1135, 2009 Gen. Assemb. (N.C. 2009); *accord* S.B. 167, 67th Gen. Assemb., 2d Reg. Sess. (Colo. 2010); *accord* H.B. 5951, 96th Gen. Assemb. (Ill. 2010); *accord* S.B. 1113, 193d Gen. Assemb., 2009–10 Reg. Sess. (Pa. 2009).

B. Foundations for Establishing Liability Under SFCAs for Section 8 Side Payment Fraud

The groundwork for establishing an additional cause of action under SFCAs for Section 8 side payment fraud rests on a close reading of the definition of a "claim" that was recently amended in the federal FCA in 2009. Most states have modified their own false claims acts to mirror the amended federal definition. Section B.1 explores the reasoning behind Congress's amendment of "claim," which was to expand the scope of FCA liability in instances where the government *administers* money belonging to another entity, regardless of whether the government holds title to it. Section B.2 proposes that this definition could also implicate liability under SFCAs where a state *administers* federal government funds via the Section 8 Program, even when the state does not hold title to them. Thus, committing side payment fraud in the Section 8 Program could have the potential to establish a cause of action not only under the federal FCA, but also under a state's FCA.

1. The Definition of a "Claim" Under the 2009 Amendments Expanded Federal FCA Liability to Funds Administered by the Government

In the 1986 Amendments to the FCA, Congress did not define "claim," but instead added a description of transactions that were to be considered "claims," penalizing any request or demand for money or property made to any "contractor, grantee, or other recipient" if the United States "provides" or "will reimburse" any portion of the money or property that is requested or demanded.[199] This provision was intended to clarify that the FCA may apply specifically where federal funds were implicated. However, certain courts began unduly restricting the scope of the FCA in instances where a specific drawing of U.S. Treasury funds was not shown.[200] Congress came to view such restrictive interpretations as contrary to the intent of the FCA, and sought to provide clarification through the 2009 Amendments. In the 2009 Amendments to the FCA — which rendered the current version of the Act — Congress explicitly defined a "claim" under Section 3729(b)(2) to mean:

> (A) . . . any request or demand, whether under a contract or otherwise, for money or property *and whether or not the United States has title to the money or property*, that
>
> > (i) is presented to an officer, employee, or agent of the United States; *or*

---

[199] False Claims Amendments Act, Pub. L. No. 99–562, 100 Stat. 3153 (1986) (current version at 31 U.S.C. § 3729).

[200] *See infra* note 203 and accompanying text. *See also* SYLVIA, *supra* note 41.

> (ii) is made to a contractor, grantee, or other recipient if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government
>
> (I) provides or has provided any portion of the money or property requested or demanded or
>
> (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and
>
> (B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restriction on that individual's use of the money or property.[201]

In broadening this definition, Congress sought to clarify that a "claim" extends to any request or demand for money presented to an officer, employee, or agent of the United States, *regardless of whether the government holds title to the funds under its administration*. In other words, establishing a "claim" did not require showing a specific drawing of funds from the U.S. Treasury, but instead attached to any funds that the government administered on behalf of other parties.[202] Furthermore, the inclusion of a semicolon and the conjunction "or" at the end of § 3729(b)(2)(A)(i) means that a plaintiff only has to satisfy the requirements of *either* § 3729(b)(2)(A)(i) *or* § 3729(b)(2)(A)(ii) in order to establish a "claim" under the FCA. This represents a marked expansion in the scope of liability for an actionable "claim" under the FCA.

Congress's main motivation for providing this definition was in response to a district court decision which held that funds administered by the United States on behalf of the Iraqi people during the "reconstruction of Iraq" were not government funds within the scope of the False Claims Act.[203] In opining that this decision was "inconsistent with the spirit and intent of the FCA," the Senate Judiciary Committee further explained that

> When the U.S. Government elects to invest its resources in administering funds belonging to another entity, or providing property to another entity, it does so because use

[201] 31 U.S.C. § 3729(b)(2) (2009) (emphasis added).

[202] United States v. Wells Fargo & Co., 943 F.3d 588, 602 (2d Cir. 2019) (noting that "the FCA nowhere limits liability to requests involving 'Treasury Funds,'" and that the word "'provides' is properly read to reach some circumstances in which the government makes money available through an exercise of its legal authority outside the appropriations process").

[203] S. REP. NO. 111-10, at 12 (2009) (discussing United States *ex rel*. DRC, Inc. v. Custer Battles, LLC, 376 F. Supp. 2d 617 (E.D. Va. 2005)).

> of such investments for their designated purposes will further the interest of the United States. False claims made against Government-administered funds harm the ultimate goals and U.S. interests and reflect negatively on the United States. The FCA should extend to these administered funds to ensure that the bad acts of contractors do not harm the foreign policy goals or other objectives of the Government. Accordingly, this bill includes a clarification to the definition of the term "claim" . . . and attaches FCA liability to knowingly false requests or demands for money and property from the U.S. Government, without regard to whether the United States holds title to the funds under its administration.[204]

Shortly after the enactment of these federal amendments, most states moved to align their own state false claims laws with the new federal definition of a "claim" in order to satisfy the DRA requirements to qualify for financial incentives.[205] Ultimately, states' adoption of this amended definition of a "claim" is what could potentially establish an additional cause of action under SFCAs for Section 8 side payment fraud, as this Article proposes.

2. The Amended Definition of a "Claim" Adopted by State FCAs to Mirror the Federal FCA Could Establish SFCA Liability for Section 8 Side Payment Fraud

The amended definition of a "claim" as enacted under SFCAs (modeled after the federal FCA Amendments) could form the basis for establishing an additional cause of action under an SFCA for Section 8 side payment fraud. Although no caselaw has explored this particular issue yet,[206] this Article is the first to propose that the plain language of the amended definition of a "claim," along with the federal legislative intent behind the 2009 FCA Amendments, may support finding such liability.

---

[204] *Id.* at 12–13.

[205] *See, e.g.*, California: 2009 Cal. Stat. 277, § 1, *amending* CAL. GOV'T CODE § 12650; Illinois: 2010 Ill. Pub. Act 96-1304, § 10, *amending* 740 ILL. COMP. STAT. § 175/3 (LexisNexis); New York: 2010 N.Y. Laws 379, § 1, *amending* N.Y. STATE FIN. LAW § 188; North Carolina: 2009 N.C. Sess. Laws 2009-554, § 1, *amending* N.C. GEN. STAT. § 1-606 (2023); Maryland: 2010 Md. Laws 4, § 1, *adding* MD. CODE ANN., HEALTH–GEN., § 2-601.

[206] Although combining causes of action under the federal FCA and a state FCA are not uncommon where claims involve both federal and state funding — such as in the healthcare area — no caselaw has yet addressed whether SFCA liability would attach in the instance of a state *administering* funds of the federal government, which is the situation implicated by Section 8 side payment fraud. For more information regarding mixed federal-state funding cases, *see* BOESE, *supra* note 21, § 6.04, 2021 WL 1063824 (updated Mar. 2021).

To begin with, consider the California False Claims Act ("CFCA").[207] It was modified to mirror the 2009 federal FCA Amendments, and defines a "claim" as

> (1) *[A]ny request or demand*, whether under a contract or otherwise, *for money*, property, or services, and *whether or not the state or a political subdivision has title to the money*, property, or services that meets *either* of the following conditions:
>
> (A) Is *presented to an officer, employee, or agent of the state or of a political subdivision*.
>
> (B) Is made to a contractor, grantee, or other recipient, if the money, property, or service is to be spent or used on a state or any political subdivision's behalf or to advance a state or political subdivision's program or interest, and if the state or political subdivision meets either of the following conditions:
>
> (i) Provides or has provided any portion of the money, property, or service requested or demanded.
>
> (ii) Reimburses the contractor, grantee, or other recipient for any portion of the money, property, or service that is requested or demanded.[208]

California also expanded the definition of "state funds," as explained by a Judiciary Committee bill analysis, to "include any money, property, or services that were appropriated, *administered*, expended, or that will be reimbursed directly or indirectly by the state or political subdivision."[209] This was so that the "CFCA protections apply to billions of dollars of government funds disbursed to contractors and other organizations that administer state or local programs."[210]

By such logic, it is plausible that the CFCA (and other similar state FCAs) could establish an additional, independent cause of action for instances of Section 8 side payment fraud. After all, state and local PHAs — whose employees can be considered "officers, employees, or agents of the state or of a political subdivision"[211] — are tasked with administering

---

[207] CAL. GOV'T CODE §§ 12650–56 (West 2022).

[208] *Id.* § 12650(b)(1) (emphasis added).

[209] CAL. B. ANALYSIS, ASSEMB. COMM. ON JUDICIARY, A.B. 1196, 2009–2010 Reg. Sess., at 1 (2009), *available at* CA B. An., A.B. 1196 Assem., 4/21/2009 (Westlaw) (emphasis added).

[210] *Id.*

[211] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 34240 (West 2022) (defining a "housing authority" as a "public body corporate and politic" under California law); VA. CODE ANN. § 36-4 (West 2022) (Virginia law defines housing authorities as "political subdivision[s] of the Commonwealth."); CONG. RSCH. SERV., R41654, INTRODUCTION TO PUBLIC HOUSING 9, (2014) (describing that PHAs were created by states in response to the federal

and serving as the gatekeepers of federal funds earmarked by HUD for the issuance of rental vouchers in the specific geographic locale covered by that PHA. Even though the state would not hold "title" to the federal funds it administers under the Section 8 Program, this revised definition of a "claim" simply attaches to "any request or demand . . . for money . . . whether or not the state . . . has title to the money . . . that is (A) presented to an officer, employee, or agent of the state."[212] Therefore, a California landlord who illegally charged their Section 8 tenant additional side payments could not only be liable for violating the FCA, but also potentially for the CFCA — thus potentially increasing the final award amount in a judgment or settlement, and allowing a plaintiff greater jurisdictional flexibility.

Federal caselaw and legislative history can also be persuasive for examining potential liability under SFCAs, since they tend to be modeled so closely to the federal law.[213] By analogy, simply substitute the references to the federal government in the U.S. Senate Judiciary Committee's report previously mentioned with references to a hypothetical state government, and the reasoning appears consistent for finding SFCA liability in instances of Section 8 side payment fraud:

> When the [state] elects to invest its resources in administering funds belonging to another entity . . . it does

---

government's creation of the housing program, and their "authorities and structures are dictated by the state laws under which they were chartered").

[212] CAL. GOV'T CODE § 12650(b)(1) (West 2023).

[213] *See, e.g.*, SYLVIA, *supra* note 27, § 12:1 ("For those state statutes modeled after the federal False Claims Act, it is likely that federal precedent will be valuable in construing the statutes, at least where the provisions are similar or identical.); CAL. B. ANALYSIS, ASSEMB. COMM. ON JUDICIARY, A.B. 1196, 2009–2010 Reg. Sess., at 3 (2009), *available at* CA B. An., A.B. 1196 Assem., 4/21/2009 (Westlaw) (commenting that the California FCA closely mirrors many provisions of the federal FCA, and thus federal judicial authority is persuasive in interpreting parallel provisions of the California FCA); Michael J. Davidson, Note, *VFATA: Virginia's False Claims Act*, 3 LIB. U. L. REV. 1, 14 (2009) (noting that "with few exceptions, [Virginia's FCA] is a carbon copy of the FCA."); State v. Shaw's Supermarkets, Inc., No. PC20154895, 2017 WL 1806898, at *5 (R.I. Super. Ct. May 01, 2017) ("Because Congress and the [R.I. legislature's] versions of the [R.I. FCA] are so similar, and without any Rhode Island precedent on point, the Court will look to the federal courts for guidance on interpreting the [R.I.] False Claims Act's terms."); Scannell v. Att'y Gen., 872 N.E.2d 1136, 1138 n.4 (Mass. App. Ct. 2007) ("There is little decisional law interpreting the [Massachusetts] FCA . . . [h]owever, the MFCA was modeled on the similarly worded Federal False Claims Act . . . [t]herefore, we look for guidance to cases and treatises interpreting the Federal False Claims Act."); State v. Altus Fin., 116 P.3d 1175, 1184 (Cal. 2005) ("[T]he CFCA is patterned on similar federal legislation and it is appropriate to look to precedent construing the equivalent federal act."); United States *ex rel.* Stierli v. Shasta Servs. Inc., 440 F. Supp. 2d 1108, 1111 (E.D. Cal. 2006) ("Because of the similarity between the [FCA and California FCA], federal decisions are deemed persuasive authority in interpreting both state and federal provisions.").

> so because use of such investments for their designated purposes will further the interest of the [state]. False claims made against [state]-administered funds harm the ultimate goals and [state] interests and reflect negatively on the [state]. The [state] FCA should extend to these administered funds to ensure that the bad acts of contractors do not harm the foreign policy goals or other objectives of the [state]. Accordingly, this bill includes a clarification to the definition of the term "claim" . . . and attaches FCA liability to knowingly false requests or demands for money and property from the [state], without regard to whether the [state] holds title to the funds under its administration.[214]

Because courts interpreting SFCA statutes frequently look to federal caselaw for guidance, the same logic could be applied in considering federal legislative history as well. [215] When doing so, it becomes clear that SFCA liability should attach to instances where a state administers funds on behalf of another party, as is the case in the Section 8 Program.

One of the more practical benefits of establishing liability under a SFCA for side payment fraud is that plaintiffs could leverage it — alongside the federal FCA and other state causes of action — in a demand letter to persuade a defendant to quickly settle rather than risk potential liability for both a state and the federal FCA.[216] As caselaw eventually develops around this issue, plaintiffs may also be able to choose more favorable jurisdictions in which to bring an FCA/SFCA action, and the tenant's share of any award or settlement amounts may turn out to be greater than suits brought solely under the federal FCA.[217]

Conclusion

The False Claims Act has proven to be a powerful tool for protecting low-income Section 8 tenants from side payment fraud. By discussing the

---

[214] S. REP. NO. 111-10, at 12–13 (2009) (substituting references to the federal government with a state government).

[215] *See, e.g.*, People *ex rel.* Levenstein v. Salafsky, 789 N.E.2d 844, 849 (Ill. App. Ct. 2003) ("We presume that, when [the Illinois] legislature passed the [Illinois FCA], it was aware of federal court opinions that had construed the False Claims Act. Thus, we also give weight to federal court opinions that interpreted the federal law before the [Illinois FCA] was passed."); Joseph M. Makalusky, *Blowing the Whistle on the Need to Clarify and Correct the Massachusetts False Claims Act*, 94 MASS. L. REV. 41, 58 (2012) (noting that an analogous situation in which the state or a political subdivision thereof might administer funds belonging to another entity could be implicated by Massachusetts' FCA if the definition of a "claim" mirrored that of the 2009 federal FCA Amendments).

[216] *See supra* Section II.D.

[217] *See* BOESE, *supra* note 21, § 6.04, 2021 WL 1063824 (updated Mar. 2021).

recent caselaw surrounding this topic, this Article importantly demonstrates that the charging of any amounts greater than the legally permitted total rent to owner would establish a violation of the FCA. In fact, the FCA may even be the *best* way for ensuring that every single dollar of Section 8 funds goes towards safe and affordable housing for low-income individuals, and not to the pockets of greedy landlords trying to exploit America's most valuable affordable housing program. Moreover, the FCA's potential for massive awards and attorneys' fees could serve to increase Section 8 tenants' access to justice by encouraging private attorneys to provide legal representation to this long-underserved population. Finally, this Article addresses the novel question of whether liability under state false claims acts could also be implicated under similar fact patterns. Through a close reading of the statutes and recent amendments to the definition of a "claim," this Article answers that question in the affirmative.