ADDING INSULT TO INJURY:
OPPORTUNITIES FOR FRAUD IN THE KATRINA-RELATED GOVERNMENT CONTRACTS UNDER THE FALSE CLAIMS ACT

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I. INTRODUCTION

The year 2005 saw a record hurricane season for the Atlantic Ocean. During the Atlantic hurricane season, which officially lasts from June 1 to November 30, there were twenty-eight named storms, fifteen of which reached hurricane strength. The previous record for the most named storms

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in any one season was twenty-one.\textsuperscript{4} The last of these storms, Zeta, formed on December 30, 2005, well after the official end of the hurricane season, tied the record for the latest-forming storm.\textsuperscript{5} In 2005, four hurricanes made direct hits on the United States, also setting a new record.\textsuperscript{6} Of those four, the deadliest and most destructive was Hurricane Katrina.\textsuperscript{7} Hurricane Katrina first made landfall in the U.S. on August 25, 2005, as a category one hurricane near Miami, Florida.\textsuperscript{8} It continued into the Gulf of Mexico, and four days later made its second landfall as a category three hurricane on August 29, 2005, near Buras, Louisiana, just south of New Orleans.\textsuperscript{9} Katrina was the third most intense Atlantic hurricane to hit the U.S. since record-keeping began in 1851.\textsuperscript{10} The storm surge from the hurricane caused the levees protecting New Orleans from Lake Pontchartrain and the Mississippi River to break, causing massive flooding in about 80% of New Orleans.\textsuperscript{11} The number of deaths related, directly or indirectly, to Katrina is 1,833—ranking Katrina among the top five deadliest hurricanes to hit the U.S.\textsuperscript{12}

Beyond loss of life, Hurricane Katrina also caused significant economic damage. Hurricane Katrina was the costliest hurricane to ever hit the United States—estimates as of August 10, 2006, placed the total amount of damage to homes, government buildings, oil refineries, and businesses at $81 billion, of which approximately $40 billion is covered by private insurance.\textsuperscript{13} As of January 8, 2007, the Federal Emergency Management Agency (FEMA) had awarded almost $8.6 billion in contracts for Katrina-related work.\textsuperscript{14} Additionally, the United States Army Corps of Engineers (USACE) has granted nearly $3.5 billion in Katrina-related contracts.\textsuperscript{15} With so much money being awarded by the government to private contractors, it seems...
likely that some fraud will be committed in the performance of these contracts.

This Comment seeks to explore the possible opportunities for fraud in the government contracts awarded by FEMA and the USACE for Katrina-related work and whether such fraud would be subject to prosecution under the civil False Claims Act (FCA), the primary federal statute used to prosecute fraudulent government contractors. This Comment does not suggest that fraud has been, or will be, committed by the contractors doing Katrina-related work; it simply examines the potential for such fraud. Part II will provide an overview of the FCA. Part III describes the major types of contracts awarded by FEMA and the USACE. Given these types of contracts, Part IV discusses the different economic incentives that may give rise to fraud and whether such fraud would violate the FCA.

II. OVERVIEW OF THE FCA

A. Background

Congress initially passed the FCA in 1863 in response to pervasive fraud in government defense contracts during the Civil War. The FCA originally contained provisions for both criminal and civil penalties, which were separately codified in 1874. Subsequent amendments weakened the FCA so that qui tam actions became rare and ineffective. In 1986, however, Congress made significant amendments to the FCA that “were intended to be a watershed in enforcement and recovery under the Act.” The 1986 Amendments made the following changes:

[They] increased the amount of recovery a relator could obtain, established a generous mandatory minimum recovery for relators, . . . relaxed provisions that had prevented many relators from filing suit[, . . .] relax[ed] the mens rea requirement, expand[ed] the statute of limitations, . . . establish[ed] that the preponderance burden of proof, rather than clear and convincing, applies to FCA cases[, . . .] [and] provided a cause of action for relators who suffer retribution from employers for whistleblower activities related to the FCA.

18. Id. at 486-87.
19. Id. at 487.
20. 1 John T. Boese, Civil False Claims and Qui Tam Actions § 1.04[A], at 1-17 (Supp. 2006).
These amendments drastically increased the number of qui tam cases received by the Department of Justice (DOJ). 22

B. Initiating a FCA Action

Currently, a civil FCA action may be initiated in two ways: “First, the Government itself may bring a civil action against the alleged false claimant. . . . Second, . . . a private person (the relator) may bring a qui tam civil action ‘for the person and for the United States Government’ against the alleged false claimant, ‘in the name of the Government.’” 23 To pursue a qui tam civil action under the FCA, an individual (the relator) first files a sealed complaint in the name of the U.S., 24 which is not served on the defendant. 25 The relator must then serve the DOJ with a copy of the complaint and “all material evidence and information” the relator has. 26 The complaint remains under seal while the DOJ investigates the matter. 27 The DOJ will then choose whether or not to intervene in the action within sixty days. 28 If the DOJ intervenes, the relator may still participate as a party to the action, subject to certain limitations. 29 If the DOJ declines to intervene, the relator can continue prosecuting the action; however, the government can choose to intervene at a later date upon a showing of good cause. 30

If the information forming the basis of the action is publicly available or already known by the DOJ, 31 the jurisdictional bar provision prevents the relator from proceeding with the suit unless the relator was an original source of the information. 32 An original source is “an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.” 33

22. Id. at 490. Before the amendments, the DOJ only received approximately six qui tam cases per year; between the 1986 amendments and October 30, 2000, 3,326 qui tam cases were filed. Id.
23. Vt. Agency of Natural Res. v. U.S. ex rel. Stevens, 529 U.S. 765, 769 (2000) (quoting 31 U.S.C. § 3730(b)(1) (2000)). The constitutionality of the qui tam action has been upheld by the Supreme Court in challenges that the relator does not have Article III standing. See id. at 774. Qui tam actions have also been held constitutional in challenges under the Take Care and Appointments Clauses of Article II. See Riley v. St. Luke’s Episcopal Hosp., 252 F.3d 749 (5th Cir. 2001).
25. Id. § 3730(b)(2).
26. Id.
27. Id.
28. Id.
29. Id. § 3730(c)(1).
30. Id. § 3730(c)(3).
33. Id. § 3730(e)(4)(B). Many interpretative difficulties have arisen since the amendment of the FCA in 1986 to include this jurisdictional bar provision. See BUCCY, supra note 17, at 489-90 (listing difficulties in interpretation of this provision).
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As for damages, the FCA provides for a civil penalty of $5,000 to $10,000 and three times the amount of damages sustained by the government because of the false claims. If the DOJ intervenes in the action, the relator is entitled to collect 15%-25% of the proceeds of the action or settlement. If the DOJ does not intervene, the relator is entitled to collect 25%-30% of the proceeds of the action or settlement. Whether or not the DOJ intervenes, the relator is also entitled to collect “an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys’ fees and costs.” Although the relator collects a greater share of the proceeds if the DOJ does not intervene, the goal of an experienced relators’ attorney is to procure the DOJ’s intervention because cases in which the DOJ does not intervene “are dismissed more often and their recoveries are substantially less.”

C. Elements of the FCA

The FCA prohibits seven types of conduct. Relevant to the contracts analyzed in this Comment are two types of conduct: false claims and false statements. First, the FCA holds liable any person who “knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval.” Secondly, the FCA also holds liable any person who “knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.”

34. 31 U.S.C. § 3729(a).
35. Id. § 3730(d)(1).
36. Id. § 3730(d)(2).
37. Id. § 3730(d)(1).
38. BUCY, supra note 17, at 492.
39. Id. The total paid to relators between October 1, 1986 and September 30, 2000, where the DOJ did not intervene was $35.3 million compared to the total of $576 million awarded to relators when the DOJ did intervene. Id. n.t. Also, 71% of cases where the DOJ did not intervene were dismissed whereas only 2.1% of cases where the DOJ did intervene were dismissed. Id.
41. Id. § 3729(a)(1).
42. Id. § 3729(a)(2). The statute also provides liability for [a]ny person who . . . (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; (4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt; (5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true; (6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government.

Id. § 3729(a)(3)-(7).

The elements of a claim under 31 U.S.C. § 3729(a)(1), the false claim, as enumerated by the court in Wilkins ex rel. United States v. Ohio, are as follows:

(1) that the defendant presented or caused to be presented to an agent of the United States a claim for payment;

(2) that the claim was false or fraudulent;

(3) that the defendant knew that the claim was false or fraudulent; and

(4) that the United States suffered damages as a result of the false or fraudulent claim.

The plaintiff must prove these elements by a preponderance of the evidence.

The first element is relatively basic: presentation of a claim to the United States for payment. The statute itself defines a “claim”:

[A claim is] any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

It should be noted that the claim must be “for payment or approval.” Thus, “only (i) ‘actions which have the purpose and effect of causing the government to pay out money’ where it is not due, or (ii) actions which intentionally deprive the government of money it is lawfully owed are considered ‘claims’ within the meaning of the FCA.”

The second element requires that the claim presented was false or fraudulent. As it is “impossible to meaningfully discuss falsity without implicating the knowledge requirement,” the fact that the claim was false...
or fraudulent is best understood when considered alongside the third element, knowledge that the claim was false. 51 However, the court in Hindo v. University of Health Sciences 52 stated the falsity element succinctly: “In short, the claim must be a lie.” 53 This means that neither innocent mistakes nor negligence are actionable under § 3729(a). Courts have also generally held that when a contract involves ambiguous terms, a contractor will not be liable for presenting a false or fraudulent claim if the contractor’s interpretation of those ambiguous terms is reasonable. 54

The third element of the false claim is the intent requirement—the defendant must have known that the claim was false or fraudulent. 55 The statute defines “knowingly” to mean that the defendant “(1) ha[d] actual knowledge of the information; (2) act[ed] in deliberate ignorance of the truth or falsity of the information; or (3) act[ed] in reckless disregard of the truth or falsity of the information.” 56 The statute also makes it clear that specific intent to defraud is not necessary to prove that the defendant acted knowingly. 57 For liability to attach, the defendant must have acted with more than simple negligence but with less than specific intent. 58 Indeed, “‘[t]he requisite intent is the knowing presentation of what is known to be false,’ as opposed to innocent mistake or mere negligence.” 59

According to Wilkins, the final element of the false claim is that the government suffered damages due to the knowing presentation of the false claim. 60 However, some courts have disagreed, holding that there is no such requirement. In Harrison v. Westinghouse Savannah River Co., 61 for example, the court said that there is no requirement that the government suffer damages 62 but rather a requirement that the false claim be material. 63 A claim is material if it “has a natural tendency to influence agency action or is capable of influencing agency action.” 64

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51. See U.S. ex rel. Durcholz v. FKW Inc., 189 F.3d 542, 544-45 (7th Cir. 1999).
52. 65 F.3d 608 (7th Cir. 1995).
53. Id. at 613.
54. See Boese, supra note 20, § 2.03[B][1], at 2-100.
55. See Wilkins, 885 F. Supp. at 1059; see also supra note 44 and accompanying text.
57. Id.
60. See 885 F. Supp. at 1059; see also Blusal Meats, Inc. v. United States, 638 F. Supp. 824, 827 (S.D.N.Y. 1986) (stating that § 3729(a)(1) and (2) require that the government suffer damages as a result of the false or fraudulent claim); supra note 44 and accompanying text.
61. 176 F.3d 776 (4th Cir. 1999).
63. Harrison, 176 F.3d at 785.
64. Id. (quoting U.S. ex rel. Berge v. Bd. of Trs. of Univ. of Ala., 104 F.3d 1453, 1459 (4th Cir. 1997)) (internal quotation marks omitted).

The elements of a claim under 31 U.S.C. § 3729(a)(2), the false statement, are similar to the elements of the false claim. As enumerated by the court in Wilkins, the elements of 31 U.S.C. § 3729(a)(2) are the following:

(1) that the defendant made, used, or caused to be made or used, a record or statement to get a claim against the United States paid or approved;

(2) the record or statement and the claim were false or fraudulent;

(3) the defendant knew that the record or statement and the claim were false or fraudulent; and

(4) the United States suffered damages as a result.65

As with the false claim, some courts have replaced the damages requirement with a requirement of materiality for the false statement.66 Thus, the last three elements of the false statement are similar to the last three elements of the false claim67 and must also be proved by a preponderance of the evidence.68 The difference lies in the first element: § 3729(a)(1) requires “a false or fraudulent claim” whereas § 3729(a)(2) requires “a false record or statement.”69 The actual statement can take many forms: “So long as the statement in question is knowingly false when made, it matters not whether it is a certification, assertion, statement, or secret handshake; False Claims liability can attach.”70

III. GOVERNMENT CONTRACTS

A. FEMA and USACE Katrina-Related Contracts

After Hurricane Katrina, FEMA was responsible for the “federal response and recovery efforts.”71 FEMA’s efforts included deploying search and rescue teams; establishing a Housing Area Command to oversee temporary housing operations; providing commodities such as water, ice, ready-
to-eat meals, cots, blankets, and generators; and providing up to $2,000 per household for food, shelter, clothing, personal necessities, and medical needs. As of January 8, 2007, FEMA had awarded 5,084 contracts worth $8,599,759,971.18. These contracts have been awarded to a myriad of different contractors for items such as travel trailers and manufactured homes, office space leases and land for travel trailers, trucks and other vehicles, and computer and office supplies. The majority of the contracts awarded by FEMA fall under one of the following categories: fixed-price, indefinite delivery indefinite quantity (IDIQ), blanket purchase agreement (BPA), cost-plus-fixed-fee, cost-plus-award-fee, labor hours, and time and materials.

In response to Hurricane Katrina, the USACE provided engineering, logistics, and reconstruction support, including patching broken levees, restoring navigation, and providing debris removal services. The USACE has awarded 2,161 contracts worth $3,461,868,429.46. Companies receiving contracts worth more than $100 million include: Ashbritt, Inc., $679 million for debris removal; Phillips and Jordan, $453 million for debris removal; ECC Operating Services, $410 million for debris removal, storm drains, waste collection, and other services; Ceres Environmental Services, $349 million for temporary roofing and debris removal; IAP/Worldwide Services, $160 million mostly for goods and services related to generators; and Lipsey Mountain Spring Water, $100.3 million for providing bottled water. Most of the contracts awarded by the USACE are fixed-price; however, there are also contracts awarded as cost-plus-fixed-fee, cost-plus-award-fee, and time and materials.

B. Types of Contracts

1. Fixed-Price Contract

There are numerous types of fixed-price contracts, but all of them have the same basic structure. Fixed-price contracts "provide for a firm price or,
in appropriate cases, an adjustable price. 81 If an adjustable price is used, it can only be adjusted by operation of a clause providing for equitable adjustment or when certain circumstances provided for in the contract are met. 82 Fixed-price contracts generally place the higher risk on the contractor and a lesser administrative burden on the agency. 83

With a firm-fixed-price contract, a price is agreed on and that price cannot be adjusted according to the contractor’s cost in performance. 84 The most common firm-fixed-price contract provides for a definite quantity with no room for modification. 85 Other firm-fixed-price contracts could be structured as a definite quantity with optional additional units or an indefinite quantity where the agency directs performance at certain places and times. 86 This type of contract “places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss. It provides maximum incentive for the contractor to control costs and perform effectively and imposes a minimum administrative burden upon the contracting parties.” 87

2. Cost-Reimbursement Contracts

Cost-reimbursement contracts “are used when the uncertainties involved in contract performance are of such magnitude that the cost of performance cannot be estimated with sufficient accuracy to permit use of any type of fixed-price contract.” 88 Under a cost-reimbursement contract, the government agrees to pay the contractor for allowable incurred costs, to the extent described in the contract. 89 These contracts allow the government to determine an estimate of the total cost of the project for the purpose of designating appropriate funds. 90 The contractor cannot exceed the cost amount in the contract without approval of the contracting officer. 91

a. Cost-Plus-Fixed-Fee Contract

The cost-plus-fixed-fee contract is the most common type of cost-reimbursement contract. 92 In addition to providing payment for all allowable costs as determined in the contract, it also provides “payment to the contractor of a fee that remains fixed regardless of the contractor’s actual cost experience.” 93 Thus, under a cost-plus-fixed-fee contract, there is more incen-

81. 48 C.F.R. § 16.201.
82. Id.
83. ARNAVAS, supra note 31, § 4.17, at 4-12.
85. ARNAVAS, supra note 31, § 4.17(a), at 4-12.
86. Id.
88. ARNAVAS, supra note 31, § 4.18, at 4-14.
89. 48 C.F.R. § 16.301-1.
90. Id.
91. Id.
92. ARNAVAS, supra note 31, § 4.18(e), at 4-16.
93. Id.
tive for a contractor to do work that might otherwise pose too great a risk\textsuperscript{94} since it provides “virtually complete insulation from financial risks.”\textsuperscript{95} However, the cost-plus-fixed-fee contract also provides minimal incentive to perform the contract in a cost-efficient manner.\textsuperscript{96}

\textit{b. Cost-Plus-Award-Fee Contract}

A cost-plus-award-fee contract provides for payment of all allowable costs as determined in the contract as well as “a fee consisting of (a) a base amount (which may be zero) fixed at inception of the contract and (b) an award amount, based upon a judgmental evaluation by the Government, sufficient to provide motivation for excellence in contract performance.”\textsuperscript{97} The first base amount does not vary with performance while the award amount takes into account considerations such as quality, timeliness, ingenuity, and cost effectiveness.\textsuperscript{98}

\section*{IV. POTENTIAL FALSE CLAIMS}

Each type of contract presents different incentives for fraud. This Part examines those incentives to commit fraud in the two most common contract types—fixed-price contracts and cost-reimbursement contracts—and analyzes potential liability for such acts under the False Claims Act.

\textit{A. Fixed-Price Contract}

In a fixed-price contract arrangement, the government pays a fixed amount to the contractor for a specified amount of goods or services; the contractor is obligated to provide the goods or services and will receive the fixed price as payment despite the end cost to the contractor.\textsuperscript{99} In these situations, the contractor’s incentive is to decrease cost as much as possible, thereby increasing profit. There are two basic methods to fraudulently decrease cost: (1) the contractor may claim that it has completed its performance under the contract when it actually has not done so; and (2) the contractor may claim that it has completed performance under the contract when it has done so, but has performed in a manner inconsistent with the contract specifications.

The first type of fraud is a contractor claiming that it has finished the work required by the contract when the work is actually unfinished. By simply not doing the work, the contractor clearly saves on cost and makes a greater profit than it would have if it had finished performance. Under these

\begin{footnotes}
94. 48 C.F.R. § 16.306.
95. ARNAVAS, \textit{supra} note 31, § 4.18(e), at 4-16.
96. \textit{Id}.
97. 48 C.F.R. § 16.305.
98. ARNAVAS, \textit{supra} note 31, § 4.18(e), at 4-16.
99. \textit{See supra} notes 80-87 and accompanying text.
\end{footnotes}
circumstances, a violation of the FCA would be fairly straightforward. The elements of a false claim under § 3729(a)(1) are (1) the defendant presented or caused to be presented to an agent of the US a claim for payment; (2) the claim was false or fraudulent; (3) the defendant knew that the claim was false or fraudulent; and (4) the government suffered damages as a result of the false or fraudulent claim, or that the claim was material.\textsuperscript{100}

As the contractors will be making their claims to either FEMA or USACE, the requirement in the first element, that the claim be made to the government, will easily be met because both FEMA and USACE are government agencies.\textsuperscript{101} The elements of 3729(a)(1) will be met if (1) the contractor sends an invoice, work order, or similar request or demand for payment to FEMA or USACE, (2) alleging that is has provided the goods or services listed in the claim even though it has not done so, and (3) with the knowledge that it has not provided all of those services. As to the fourth element, the government will need to show that it either suffered damages as a result of the false claim or that the claim was material.

This type of fraud was at issue in \textit{United States ex rel. Fahner v. Alaska}.\textsuperscript{102} The Attorney General of Illinois brought a qui tam action alleging that the defendant, an optometrist, had defrauded the government by submitting claims to Medicaid for services, such as eye exams and providing eyeglasses, that he did not actually perform.\textsuperscript{103} The court found that the defendant had violated the FCA: “[W]hile [the defendant] performed no optometric services, he nevertheless signed a document in which he swore that he did perform those services . . . . The services billed were not in fact rendered, and the Government thus paid on the basis of the false claims presented.”\textsuperscript{104}

Second, in performing the contract, the contractor might be tempted to reduce its cost and thereby increase its profits by providing subpar performance. While the contractor may be generally free to use the cheapest means necessary to complete performance, the contractor must still complete performance within the specifications of the contract. If the contractor submits a claim for payment under the contract but has not performed according to the specifications that the contract requires, the contractor may be liable under the FCA.

Under § 3729(a)(2), a false statement is required for FCA liability to attach.\textsuperscript{105} This means that in order for a contractor to be liable under § 3729(a)(2), it must submit an affirmative false statement alleging compliance with contract specifications.\textsuperscript{106} If the contractor does submit an af-
firmative false statement to the government and knows that the statement is false, all the elements of § 3729(a)(2) would be met, and the contractor would be liable under the FCA for making a false statement to the government.

However, even if the contractor does not provide an affirmative false statement alleging compliance with contract specifications, it still may be liable under § 3729(a)(1). Section 3729(a)(1) fundamentally differs from § 3729(a)(2) in that “section 2 requires an affirmative false statement. To provide any distinct meaning to section 1 it is clear that no such express false statement is required.”107 As the court in Shaw v. AAA Engineering & Drafting, Inc.108 stated, “[T]he language and structure of the FCA itself supports the conclusion that, under 31 U.S.C. § 3729(a)(1), a false implied certification may constitute a ‘false or fraudulent claim.’”109

In Shaw, the defendant contractor, AAA, had a fixed-price contract under which it provided photography services to an Air Force base in Oklahoma.110 Under the contract, AAA was required to perform silver recovery111 and to dispose of the chemicals in accordance with Environmental Protection Agency standards.112 AAA did not remove the silver from the chemicals—it simply poured the used chemicals down the drain.113 An employee of AAA brought a qui tam action alleging that AAA had violated the FCA § 3729(a)(1)-(2).114 At the close of trial, the trial court denied AAA’s motion for a judgment as a matter of law, and the jury found that AAA had violated the FCA.115 The defendants appealed the denial of their motion, arguing that “an invoice, submitted after the violation of a contractual provision, cannot constitute the knowing presentation of ‘a false or fraudulent claim for payment or approval’ under the FCA.”116

The appellate court upheld the trial court’s denial of AAA’s motion for a judgment as a matter of law because the employee had adequately demonstrated that AAA submitted invoices to receive payment on the contract even though it knew that it had failed to comply with the silver recovery required by the contract.117 In so holding, the court found that “[p]ermitting FCA liability based on a false certification of compliance with a govern-
ment contract, whether the certification is express or implied, is consistent with the legislative history of the 1986 Amendments to the FCA.118

The notion that an implied certification of compliance with contract specifications can be the basis for an FCA action has also found support in other cases. In Ab-Tech Construction, Inc. v. United States,119 the contractor violated a provision of the contract and subsequently submitted vouchers for payment to the government.120 The court found that the contractor had violated the FCA because “[t]he payment vouchers represented an implied certification by Ab-Tech of its continuing adherence to the requirements.”121

In United States ex rel. Pogue v. American Healthcorp, Inc.,122 the plaintiff alleged that the defendants had violated the FCA by submitting Medicare claims in violation of federal anti-kickback and self-referral statutes.123 The plaintiff argued that by submitting the claims for payment the defendant was certifying that it had complied with all statutes, rules, and regulations governing Medicare.124 The court found that the plaintiff had sufficiently alleged a violation of the FCA by claiming that the defendants “concealed their illegal activities from the government in an effort to defraud the government into paying Medicare claims it would not have otherwise paid.”125

However, liability under § 3729(a)(1) cannot be predicated solely on a failure to comply with statutes or regulations. In United States ex rel. Hopper v. Anton,126 a teacher brought an FCA action against her school district.127 She alleged that by cashing checks from the state education department that were funded in part by the federal government and by submitting triennial certificates of compliance with state and federal law and regulations to the state education department, the school district had submitted false claims.128 The court disagreed, finding that since the forms the school district sent in requesting payment did not contain any false certifications, there was no violation of the FCA.129 While the school district may have been in violation of certain regulations, “[v]iolations of laws, rules, or regulations alone do not create a cause of action under the FCA. It is the false certification of compliance which creates liability when certification is a prerequisite to obtaining a government benefit.”130

118. Id. at 531 (footnote omitted).
119. 31 Fed. Cl. 429 (1994), aff’d without written opinion, 57 F.3d 1084 (Fed. Cir. 1995).
120. Id. at 433-34.
121. Id. at 434.
123. Id. at 1507-08.
124. Id. at 1508.
125. Id. at 1513.
126. 91 F.3d 1261 (9th Cir. 1996).
127. Id. at 1263-64.
128. Id.
129. Id. at 1266-67.
130. Id. at 1266.
Thus, it appears that if a Katrina contractor simply fails to comply with a law, rule, or regulation, there would be no violation of the FCA. It is when the contractor falsely certifies that it has complied with that law, rule, or regulation, or a specific contractual provision that there could be a violation of the FCA. This false certification must accompany a claim for payment to the government, and the certification must be of a nature that the government would not have otherwise paid the contractor if it had known that the certification was false. If the contractor has done as much, the first two elements of § 3729(a)(1)—that the defendant presented or caused to be presented to an agent of the U.S. a claim for payment and that the claim was false or fraudulent—would be met and there would be a false claim. As for the third and fourth elements, the contractor must also have filed the false claim with the requisite knowledge, and in some courts, the government must have suffered damages as a result. If all of this is proved by a preponderance of the evidence, the contractor would be guilty of violating § 3729(a)(1) of the FCA.

B. Cost-Reimbursement Contracts

In both the cost-plus-fixed-fee contracts and the cost-plus-award-fee contracts, the government pays the contractor for allowable costs and an additional fee. Thus, in these contracts, the incentive for fraud is for the contractor to inflate costs, thereby earning a greater profit when the government reimburses it for costs that it did not actually expend. This would be a violation of the FCA if all the elements of § 3729(a)(1) are met: (1) the defendant presented or caused to be presented to an agent of the U.S. a claim for payment; (2) the claim was false or fraudulent; (3) the defendant knew that the claim was false or fraudulent; and (4) the government suffered damages as a result of the false or fraudulent claim, or the claim was material.

The first element can be met if the contractor simply submits a request for payment, such as an invoice or a work order, to FEMA or the USACE. The second element would be met—the claim would be false or fraudulent—if, on that request for payment, the contractor reports costs for goods or services that it has not actually incurred. Furthermore, the contractor must have had knowledge that the claim was false, which can include actual knowledge, deliberate ignorance, or reckless disregard of the falsity

131. See supra note 44 and accompanying text.
132. Id.
133. See supra notes 92-98 and accompanying text.
134. See, e.g., U.S. ex rel. DRC, Inc. v. Custer Battles, L.L.C., 376 F. Supp. 2d 617, 619 (E.D. Va. 2005) (plaintiff brought action alleging that defendant violated the FCA “by using ‘shell companies’ to create the appearance of additional costs and overhead, thus inflating the price of those products and services charged on a cost-plus basis”).
135. See supra note 44 and accompanying text.
136. See supra notes 46-48 and accompanying text.
of the information. Finally, if the government suffered damages or the
claim was material, all the elements of § 3729(a)(1) would be met and the
contractor would be guilty of violating the FCA.

This type of fraud has already occurred in the performance of contracts
awarded for hurricane relief. In United States v. Killough, the govern-
ment brought an FCA action against the defendants who managed a temporary
housing program as part of the relief effort in the wake of Hurricane
Frederic, alleging that they had inflated the invoices submitted to the gov-
ernment to provide financing for illegal kickbacks. The court affirmed the
trial court’s judgment in favor of the United States, finding that the evidence
consisting of the actual inflated invoices, testimony from other contractors
that they would have performed the contract for less money, and expert tes-
timony concerning the fair market value of such services was sufficient to
support the jury’s finding against the defendants.

V. Conclusion

Hurricane Katrina caused extensive damage to the Gulf Coast, and the
federal government has authorized billions of dollars to help rebuild the
area. With so much money being awarded in government contracts, it is
inevitable that fraud will be committed against the government and the peo-
ple of the United States. As Attorney General Alberto Gonzales said at the
Hurricane Katrina Fraud Task Force Conference, “We have a responsibil-
ity to ensure that relief aid and reconstruction dollars reach the shattered com-
unities and victims of these powerful natural disasters. . . . Every dollar
that is directed for hurricane relief should be used in the affected communi-
ties—not to pad the bank accounts of fraudsters and criminals.”

This Comment has examined how fraud may occur in the performance of these
contracts and whether such fraud may be prosecuted under the False Claims
Act. The U.S. Department of Justice and possible qui tam relators should
utilize this statute to hold accountable those criminals who would profit
from the national tragedy of Hurricane Katrina.

Rachel Grace Stabler

137. See supra notes 55-59 and accompanying text.
138. 848 F.2d 1523 (11th Cir. 1988).
139. Id. at 1525-26.
140. Id. at 1531.
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