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# JUNE 24, 2020

# USING THE FALSE CLAIMS ACT AS A HUMAN RIGHTS TOOL

*This post explores the viability of using the FCA in conjunction with the TVPRA to hold perpetrators of forced labor and human trafficking accountable.*

Imagine that a company had a contract to provide food to US military personnel based in a foreign country. The company employed workers from a third country. However, the company held onto the workers' passports, did not allow them to leave the facilities, and did not pay them for the full hours that they worked. In such a case, these workers could bring two types of claims against the company: the first under the Trafficking Victims Protection Reauthorization Act (<https://www.justice.gov/humantrafficking/key-legislation>) (TVPRA) and the second under the False Claims Act ([https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS\\_FCA\\_Primer.pdf](https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf)) (FCA). While the FCA deals with fraudulent claims made by contractors to the US government (think: misuse of millions of dollars of federal funding by state departments of corrections (<https://www.whistleblowersblog.org/2020/04/articles/false-claims-quitam/utah-prison-whistleblower-disclosures-lead-to-17-million-fca-lawsuit/>)), and the TVPRA is about human trafficking (like forced labor experienced by foreign workers in the Asian fishing industry (<https://www.cohenmilstein.com/sites/default/files/media.8332.pdf>)) the example above highlights that there are cases where these laws may overlap and could be used to fight both corporate fraud and trafficking.

But why would a victim bring both claims? After all, a TVPRA claim would cover the same harm as an FCA claim and could, on its own, provide relief in the form of money to the trafficking victim. We think it's worth bringing both TVPRA and FCA claims together because they provide different types of remedies for victims and hold corporations accountable in diverging ways.

In these cases, the TVPRA claim tries to provide remedy for the victim through asserting the victim's rights directly – the victim was harmed and sues the employer for that harm. This is a rights-respecting form of justice, as the claim is based on the harm to the victim. The FCA, in contrast, seeks a structural remedy. It is based on the employer's relationship with the US government, while the trafficking victim is a relator who is seeking to leverage that relationship to receive a remedy. Moreover, the fact that a government contract is involved means there is a higher likelihood of gaining some form of remedy than in a TVPRA case, especially if the government intervenes. This could incentivize companies to inspect supply chains more thoroughly prior to entering a government contract, which is a step towards the long-term goal of ending human trafficking.

## **The FCA and TVPRA**

The FCA ([https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS\\_FCA\\_Primer.pdf](https://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer.pdf)) prohibits fraud when making claims to the US government for the payment of money. An FCA violation requires 1) a false statement or fraudulent conduct 2) made

knowingly 3) that is material to the US government's decision to pay and 4) a claim for the payment of money to the US government. The TVPPRA (<https://www.justice.gov/humantrafficking/key-legislation>) provides for prevention, protection, and prosecution, including assisting other countries in drafting laws to prosecute trafficking, providing assistance to victims if they cooperate with investigating and prosecuting traffickers, and adapting definitions to recognize modern slavery that takes place under fraud, force, and coercion.

In the last two years, plaintiffs in two cases brought claims under the FCA against their employers – corporations that are US government contractors – and have argued (<https://www.leagle.com/decision/infdco20200129a77>) that when these contractors violated the TVPPRA, the contractors also violated (<https://casetext.com/case/united-states-ex-rel-fadlalla-v-dyncorp-intl-llc-1>) the FCA. The defendants (the US government contractors) in these cases were accused of holding plaintiffs' passports, creating schemes to keep plaintiffs in the foreign country working illegally, and forcing plaintiffs to work in poor working conditions. For instance, in *United States ex. Rel Hawkins v. Mantech Int'l Corp.*, the defendants allegedly confiscated the employee's passports and did not obtain the proper work visas for the employees, meaning they lived in Kuwait illegally. As a result of this, employees were forced to go on "visa runs" to obtain new tourist visa stamps in their passport. The employees also alleged poor working conditions, including working around chemicals and toxic fumes without safety precautions. The employees could not just terminate their employment, because their contract committed them to work for 2 years with significant financial penalties for early termination. In *United States ex rel. Elgasim Mohamed Fadlalla v. Dyncorp. Int'l LLC*, the defendants allegedly also confiscated the employees' passports and failed to obtain work visa for several employees, forcing them to work in violation of local laws. Some employees were then arrested when they tried to leave the country. The employees also made claims of poor living conditions supplied by the defendants.

### **A contractor's TVPPRA violation amounts to fraud under the FCA: The implied false certification theory**

The plaintiffs in *United States ex rel. Hawkins v. Mantech Int'l Corp.* (<https://www.leagle.com/decision/infdco20200129a77>) and *United States ex rel. Elgasim Mohamed Fadlalla v. Dyncorp Int'l LLC* (<https://casetext.com/case/united-states-ex-rel-fadlalla-v-dyncorp-intl-llc-1>) argued that when the defendants, US government contractors, violated the TVPPRA, they also violated the FCA. These cases relied on the implied false certification theory.

(<https://www.leagle.com/decision/infdco20200129a77>) of the FCA, which does not require an affirmative false representation of compliance to constitute a violation– it simply requires that the contractor did not comply with a statute (such as the TVPRA), a regulation, or a contractual term.

The implied false certification theory (<https://casetext.com/case/united-states-ex-rel-fadlalla-v-dyncorp-intl-llc-1>) requires all elements of the FCA to be met (see above), as well as two additional conditions. The plaintiff must also show that (1) the defendant’s claim included specific representations about the goods or services provided and (2) that the defendant’s failure to disclose noncompliance with a material statute, regulation, or contract provision makes those representations misleading half-truths.

While both of these cases have only been heard in district court on motions to dismiss, the cases show that it is possible that a violation of the TVPRA could be a violation of the FCA. In both cases, the district courts found that the stand-alone TVPRA claims survived the motion to dismiss.

In one of the cases, *Mantech*, the court found (<https://www.leagle.com/decision/infdco20200129a77>) that the pleading did not sufficiently show an FCA violation because the plaintiffs did not provide evidence of the defendants’ specific representations in invoices or requests for payment that were inconsistent with or made misleading by violations of the TVPRA. The court found that the plaintiffs had sufficiently pleaded the element of materiality, stating that the TVPRA was a material statute, as required by the conditions of an implied false certification theory. Federal regulations and the contract “emphasize that noncompliance with the TVPRA is not ‘minor or insubstantial’” and both “impose an affirmative duty to report any known violations,” withholding payments as a sanction. However, due to the failure to provide evidence of defendants’ specific representations as required by the implied certification theory, the court dismissed this claim.

On the other hand, in *Dyncorp*, the complaint did survive a motion to dismiss (<https://casetext.com/case/united-states-ex-rel-fadlalla-v-dyncorp-intl-llc-1>). The plaintiffs provided evidence that the defendants had submitted a reimbursement claim to the government for a subcontractor’s sponsorship fees, when the subcontractor was used as a front in a scheme to violate the TVPRA. This scheme included confiscating passports and subjecting plaintiffs to threats of arrest, detention, and deportation. The court denied the motions to dismiss ,citing plaintiffs’ provision of evidence that the defendants had made specific representations about the services provided and failed to disclose they had violated the TVPRA. This made the representations about the sponsorship fees misleading half-truths.

## Bringing both TVPRA and FCA claims together could be a useful legal strategy

Although these two cases are still in their early stages, they demonstrate that in certain cases the FCA could be used to hold perpetrators of forced labor and human trafficking accountable. As we continue to look for more legal strategies to hold corporations accountable, this congruence of the FCA and the TVPRA could provide some relief to victims. Of course, the bar for an FCA claim of this type is high. In addition to meeting the TVPRA standard, the claim must meet all elements of the FCA, as well as the heightened pleading standards for fraud claims. Many cases that would meet the TVPRA standard would not meet the FCA standard. However, the FCA provides an opportunity to broaden the forms of justice available and improves prospects of non-repetition because of a broader diversity of prospective litigants.

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