

FALSE CLAIMS ACT: BRIEF OVERVIEW

WHAT DOES THE FALSE CLAIMS ACT COVER?

The Federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729 – 3733, generally attaches to any person who knowingly submits a false claim to the government or causes another to submit a false claim to the government or knowingly makes a false record or statement to get a false claim paid by the government.

The 1986 amendments to the FCA, Congress strengthened the Act by amending it to increase incentives for whistleblowers to file lawsuits on behalf of the government. In 2009, Congress enacted the Fraud Enforcement and Recovery Act ("FERA") which further expanded the definition of "claim" to include a broader array of transactions and expanded the reverse false claims provision. A claim is any request or demand of money from the government, made directly or made through an intermediary, including a contractor, grantee, or other recipient of federal funds.

WHAT MUST BE PROVEN FOR A SUCCESSFUL FCA CASE?

TO STATE A CLAIM, PLAINTIFF/RELATOR MUST PROVE:

- **Claim** for Government Payment
 - Direct payment or reimbursement. *See* Section 3729(a)(1)(A)-(B).
 - Reverse False Claim - FCA liability attaches when any person acts improperly in order to avoid making a payment to the government. *See* Section 3729(a)(1)(G).
 - Conspiracy to violate FCA. *See* Section 3729(a)(1)(C).
- **Falsity** – Claim was false/fraudulent. The False Claims Act does not define what types of claims are "false."
 - Courts addressing this issue have held that the FCA recognizes two categories of actionable false claims:
 - Factual Falsity
 - Legal Falsity
- **Knowledge** – Defendant knew claim was false/fraudulent. *See* Section 3729(b)(1).
 - Actual knowledge of falsity of the information
 - Deliberate ignorance for the falsity of the information

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AND POLICING FRAUD CLE DISCUSSION

- Reckless disregard for the falsity of the information
- **Materiality** – The FCA defines "material" as "having a natural tendency to influence, or be capable of influencing, the payment of receipt of money or property" *See* Section 3729(b)(4).
 - The FCA specifically includes a materiality requirement for certain violations.
 - Under the false statement provision of the FCA only for a false statement that is material to a false or fraudulent claim. *See* Section 3729(a)(1)(B).
 - Under the reverse false claim provision of the FCA only for false records or statements material to an obligation to pay the government. *See* Section 3729(a)(1)(G).
- **Statute of Limitation** – Generally, government and/or Relator must bring case within 6 years after the date of the violation. *See* Section 3731(b).
 - **Tolling Provision** – The FCA states that, as an alternative, an action may not be brought "more than 3 years after the date when facts material to the right of action are known or reasonably should have been known" by the government. Regardless of the date of discovery, all cases must be brought within 10 years of the violation. *See* Section 3731(b)(2).

WHO BRINGS THE CASE?

FEDERAL GOVERNMENT

- Cases are brought by the Commercial Litigation Branch, Civil Fraud Section of the Department of Justice and/or one of the many U.S. Attorney offices.

QUI TAM PROVISIONS –

- Private persons, or relators, bring FCA case on behalf of the government (e.g., Whistleblower). *See* Section 3730(b).
- Qui Tam relators must file complaint under seal in US District Court and the complaint remains under seal for 60 days. The complaint and a written disclosure of all the relevant information known to the relator must be served on the U.S. Attorney for the judicial district where the qui tam was filed and on the Attorney General of the United States. *See* Section 3730(b)(2).
- During 60 days, the government is required to investigate the allegations and notify the court whether it will:
 - **Intervene** – Government takes lead role in prosecuting the case. The relator stays involved. *See* Section 3730(c)(1).

- **Decline to Intervene** – Relator may choose to continue to case and take lead role in prosecuting the claim.
- Statutory Bars to Qui Tam Action
 - “First to File bar” – Another qui tam concerning the same conduct already has been filed. *See* Section 3730(b)(5).
 - The relator was convicted of criminal conduct arising from role in the FCA violation. *See* Section 3730(d)(3).
 - The government already is a party to a civil or administrative money proceeding concerning the same conduct. *See* Section 3730(e)(3).
 - “Public Disclosure Bar” -- The qui tam action is based upon information that has been disclosed to the public through any of several means: criminal, civil, or administrative hearings in which the government is a party, government hearings, audits, reports, or investigations, or through the news media. *See* Section 3730(e)(4)(A).

DAMAGES AND PENALTIES – WHAT’S AT STAKE?

DAMAGES AND PENALTIES

- Damages – Defendants found guilty of violating the False Claims Act are required to pay the federal government three times the amount of damages sustained by the government.
- Civil Penalties – In addition to damages, the defendant is charged a penalty of between \$5,500 and \$11,000 for each false or fraudulent claim. Civil penalties have recently been made subject to inflation and may be adjusted by DOJ in 2016, and each year following.

IMPACT OF GOVERNMENT INTERVENTION

- Government Intervention in qui tam action – the Relator is entitled to receive between 15 and 25 percent of the amount recovered by the government.
 - Whistleblowers filed **638 qui tam suits** in fiscal year 2015. During the same year, DOJ recovered \$2.8 billion in these and earlier filed suits. Relator/Whistleblower awards during the same period totaled \$597 million.
 - The Relator’s share is paid by the government out of the payment received by the government from the defendant. If successful, the relator also is entitled to legal fees and other expenses of the action by the defendant. *See* Section 3730(d).
- Government declines to intervene in qui tam action, the relator’s share is increased to 25 to 30 percent. *See* Section 3730(d).