



AMERICAN  
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# Reference Materials

## Volume II

2009 Annual Convention  
San Francisco, California

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# THE FALSE CLAIMS ACT: A PUBLIC-PRIVATE PARTNERSHIP<sup>1</sup>

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The False Claims Act (FCA)<sup>2</sup> was enacted in 1863 in response to profiteering on government procurements during the Civil War. Stories of, among other things, Union soldiers' uniforms disintegrating when exposed to water ensured swift passage of what came to be known as "Lincoln's Law." The FCA, substantially strengthened by amendments in 1986, remains the foremost tool available to fight fraud and abuse in government contracting and payments. Numerous states have enacted similar false claims acts that borrow from, though often do not exactly mirror, the federal FCA.

This paper will provide: (1) a brief overview of the FCA; (2) a short description of the initial steps in assessing and filing an action; and (3) tips on what constitutes a good case. Given that the FCA has somewhat esoteric—but essential—filing requirements, including an initial disclosure provision and a requirement that actions be filed under seal, it is best for attorneys new to the field to consult with more experienced FCA practitioners prior to filing. This article does not attempt to set forth all of the FCA's provisions or explore in depth the case law that has developed around the FCA or its state counterparts.

## I. Overview of the FCA

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The FCA provides that those who knowingly present, or cause another person or entity to present, false claims for payment of government funds are liable for the government's damages, trebled, plus civil penalties of \$5,500 to \$11,000 per false claim.<sup>3</sup> Similarly, liability attaches

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<sup>1</sup>Copyright © 2009 John D. Radice.

<sup>2</sup>False Claims, 31 U.S.C. §§ 3729-3733 (2006).

<sup>3</sup>31 U.S.C. § 3729(a)(1-3) (include in the Attachment, located on the CD-ROM version of these *Reference Materials*).

when one uses false records or statements to avoid an obligation to pay the government (this is often referred to as a “reverse” FCA claim).<sup>4</sup>

To incentivize people with knowledge of false claims to assist the government in uncovering and prosecuting fraud and abuse, the FCA has a whistleblower provision that awards the person who brings the case to the government’s attention (the relator) a percentage of any recovery the government receives.<sup>5</sup> The percentage of the government’s recovery that constitutes the *qui tam* award generally ranges from 15 percent to 30 percent, depending on the government’s involvement in the case. A court may reduce a *qui tam* award if it determines that the relator “planned or initiated” the fraud and will deny the award outright if the relator is convicted of criminal conduct associated with the fraud.<sup>6</sup>

The goal of the FCA’s whistleblower provision is to help the government *uncover* fraud in government contracting. Therefore, the FCA deprives courts of jurisdiction to hear any action “based upon the public disclosure of allegations or transactions” that are the subject of the suit unless the person bringing the suit is an “original source” of that information.<sup>7</sup> “Public disclosure and “original source” are terms of art with the attendant interpretive case law. Practitioners should be aware, though, that it is highly unlikely their clients will receive *qui tam* awards for bringing to the government’s attention allegations they read about in the local newspaper.

By one estimate, since the FCA was first enacted, spending by federal, state, and local governments has increased nearly 400 times in inflation-adjusted dollars.<sup>8</sup> Government fraud, too, has been a growth business. While the FCA was initially enacted to address fraud in defense contracting, over time, major fraud cases have shifted to healthcare, disaster relief (especially following Hurricane Katrina), and, with wars in both Iraq and Afghanistan, full circle back to

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<sup>4</sup>State escheat laws provide one common example of reverse false claims. Under most escheat laws, holders of unclaimed property are required to file reports identifying the amount of unclaimed property they hold, the name and last known address of the owner, and other identifying information. When financial institutions file reports that intentionally or recklessly understate the amount of unclaimed property in their possession, this can give rise to false claims liability. In California alone, false unclaimed property reports have been the basis for successful false claims suits against the likes of Bank of America, Citibank, and Union Bank. These lawsuits collectively netted well over \$200 million in recoveries. 31 U.S.C. § 3729(a)(7).

<sup>5</sup>31 U.S.C. § 3730(d).

<sup>6</sup>31 U.S.C. § 3730(d)(3).

<sup>7</sup>31 U.S.C. § 3730(d).

<sup>8</sup>See USGovernmentSpending.com, [http://www.usgovernmentspending.com/year1865\\_0.html](http://www.usgovernmentspending.com/year1865_0.html) (last visited May 6, 2009); The Inflation Calculator, <http://www.westegg.com/inflation/> (last visited May 6, 2009).

defense contracting. Even the most opaque crystal ball would suggest, going forward, that there might be some misdirection of the substantial economic stimulus money now flowing.

Government fraud can take various forms, including:

*General False Claims*

- Billing for goods and services that were never delivered or rendered.
- Double billing by charging more than once for the same goods or services.
- Charging for employees that were not actually on the job, or billing for made-up hours in order to maximize reimbursements.
- Billing for marketing, lobbying, or other non-contract related corporate activities.

*False Certifications*

- Submitting false service records or samples in order to show better-than-actual performance.
- Defective testing certifying that something has passed a test, when in fact it has not.
- False certification that a contract falls within certain guidelines (e.g., that the contractor is a minority or veteran).
- Winning a contract through kickbacks or bribes.
- Presenting broken or untested equipment as operational and tested.

*Healthcare*

- Performing inappropriate or unnecessary medical procedures in order to increase Medicare or Medicaid reimbursement.
- Automatically running unnecessary lab tests.
- “Marketing the spread” prescription fraud, involving lying to the government about the true wholesale price of prescription drugs.
- Upcoding by using diagnosis billing codes that suggest a more expensive treatment.
- Prescribing a medicine or recommending a type of treatment or diagnosis regimen in order to win kickbacks from hospitals, labs, or pharmaceutical companies.

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- Billing for unlicensed or unapproved drugs.
- Forging physician signatures when such signatures are required for reimbursement from Medicare or Medicaid.

### *Financial and Natural Resource*

- Yield burning and skimming profits off the sale of municipal bonds.
- Misrepresenting the value of imported goods or their country of origin for tariff purposes.
- Falsifying natural resource production records and pumping, mining, or harvesting more natural resources from public lands than is actually reported to the government.<sup>9</sup>

Nearly half of the states have enacted false claims acts covering state expenditures. These statutes range from mirror images of the federal FCA applicable to the state, to statutes limited to only certain state expenditures.<sup>10</sup> In California, for example, the state false claims act is similar to the federal FCA, but it has a longer statute of limitations and a higher *qui tam* share ceiling.<sup>11</sup>

## II. Investigating and Filing a Case

Filing an FCA action requires compliance with the statute's idiosyncratic provisions aimed at providing the government with a full opportunity to investigate the claims that are brought on its behalf.

*First*, practitioners should collect all of the information their clients have concerning the fraud and arrange to make an initial disclosure to the government.<sup>12</sup> This pre-filing initial disclosure provides an opportunity to explain the case to the government and to begin assisting the

<sup>9</sup>See Taxpayers Against Fraud, *What Is the False Claims Act & Why Is It Important?*, <http://www.taf.org/whyfca.htm> (last visited May 6, 2009); see also Press Release, Office of the Attorney General, State of California, Atty. General Brown Forces Settlement with Citibank: Investigation Reveals bank Was Stealing From Its Customers (Aug. 26, 2008) (included in the Attachment to this paper, located on the CD-ROM version of these *Reference Materials*).

<sup>10</sup>See, e.g., TEX. HUM. RES. CODE ANN. § 36.001 *et seq.* (Vernon 2009) (covering only state Medicaid expenditures).

<sup>11</sup>Compare 31 U.S.C. §§ 3170(d), 3171, with CAL. GOV'T CODE §§ 12652(g), 12654 (included in the Attachment to this paper, located on the CD-ROM version of these *Reference Materials*).

<sup>12</sup>See 31 U.S.C. § 3730(e)(4).

government with its investigation.<sup>13</sup> Because the case is brought on behalf of the government for fraud that it suffered, it is crucial to maintain open lines of communication with the government attorneys.<sup>14</sup> Equally important for the relator, an initial disclosure is necessary if one later needs to overcome a “public disclosure” claim by showing that the relator is an “original source” of the information.

*Second*, the case must be filed *under seal* in the appropriate jurisdiction, and the defendant is *not* to be served with the Complaint.<sup>15</sup> This sealing requirement gives the government time to investigate the claim without the defendant being informed that an investigation has been launched. Different courts (even within the federal system) require different procedures to file a case under seal.<sup>16</sup> It is imperative to follow the procedures. “Blowing the seal,” even for a short time, may provide the defendant with notice of the claim, which could substantially hinder the government’s investigation. The FCA provides that the seal last for 60 days and can be renewed by the government for good cause shown. In practice, it is not uncommon for cases to remain under seal for two or more years.

*Finally*, one should do all of this relatively quickly. The FCA has a first-to-file provision, meaning that after the first case is filed, subsequent actions “based on the facts underlying the pending action” cannot be brought.<sup>17</sup>

Many non-specialized practitioners’ first encounter with a *qui tam* case will come through an employment action. Practitioners should be alert to whether clients complaining of adverse employment actions are or were employed by a company that does business with the

<sup>13</sup>Depending on the fraud at issue, a case may be federal-only (e.g., defense contracting), state-only (e.g., school construction involving only state and local funds), or a combined federal and state case (e.g., Medicaid or highway projects where costs are shared by the federal government and the states). Many cases fall into the last category. Practitioners who have a case that spans two or more sovereigns must endeavor to coordinate with all the government entities that have an interest in the case. See *United States ex rel. Bogart v. King Pharm., Inc.*, No. 03-1538 (E.D. Pa. Feb. 7, 2006) (denying *qui tam* award from state settlements because states were not served with the Complaint in a joint federal-state case).

<sup>14</sup>After the government completes a sufficient investigation of the claims, it will make a decision whether to intervene and join the case. 31 U.S.C. § 3730(b)(4). Though the relator can pursue a case absent government intervention—and is entitled to a higher percentage award if he or she successfully prosecutes the case without the government’s intervention—a case benefits substantially from a government decision to intervene. A relator’s counsel should work to help the government understand the fraud and the evidence, and thereby increase the chance of government intervention.

<sup>15</sup>31 U.S.C. § 3730(b)(2).

<sup>16</sup>See Confidential Cover Sheet False Claims Act, MC-060 (Cal.) (included in the Attachment to this paper, located on the CD-ROM version of these *Reference Materials*).

<sup>17</sup>31 U.S.C. § 3730(b)(5).

