The False Claims Act*: Qui Tam* and Anti-Retaliation Provisions

31 U.S.C. Section 3729, *et seq.*

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The False Claims Act (FCA) is a federal, treble damages statute designed to prevent persons from perpetrating fraud against the U.S. government. The FCA, also referred to as the "Lincoln Law," prohibits individuals and companies from defrauding the federal government by making it illegal to submit claims for payments that involve deception or misrepresentation. In addition to tasking the Attorney General with responsibility for investigating and prosecuting violations of the FCA, Congress created a private right of action for individuals to bring suit. An FCA suit filed by a private person on behalf of the government is called a "*qui tam*" action, and the person bringing the action is referred to as a "relator" or, in common parlance, a "whistleblower."

Qui tam (pronounced, "key-tam" or "kwee-tom") is short for the Latin phrase, "*qui tam pro rege quam pro se ipso hac parte sequitur,*" which is roughly translated as, "who pursues this action on our Lord the King's behalf as well as his own."

Under the current version of the FCA, if the *qui tam* recovers any money for the government, the relator is entitled to a share of the proceeds -- ranging from 0-30% of the funds recovered. If a *qui tam* action is successful, the relator is also entitled to legal fees and other expenses of the action by the defendant. Further, and as discussed in Section IV, below, the FCA protects whistleblowers from retaliation by their employers.

Recoveries under the FCA are mounting. According to statistics reported by the U.S. Department of Justice, the FCA has helped the U.S. government recover more than $40 billion over the last two decades.[1] The DOJ further reports that relator share proceeds have totaled more than $6.5 billion over the past twenty years. The trend is upward. In FY 2012, the government recovered $4.9 billion; in FY 2013, $3.8 billion, and FY 2014, $5.7 billion.

[1] *See* U.S. Department of Justice Civil Division Fraud Statistics – Overview (December 19, 2017), at https://www.justice.gov/opa/press-release/file/1020126/download.

I. HISTORY OF THE FCA STATUTE

Based on English common law, the precursor to the modern-day False Claims Act was enacted by Congress and signed into law by President Lincoln in 1863 during the height of the Civil War to stop rampant profiteering against the federal government and Union troops.

- "For sugar [the Army] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys[.]" *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 722 F. Supp. 607, 609 (N.D. Cal. 1989) (quoting Tomes, *Fortunes of War*, 29 Harper's Monthly Mag. 228 (1864)).

To incentivize private citizens to sue war profiteers, the FCA provided that any person who knowingly submitted false claims to the government was liable for double the government's damages plus a penalty of $2,000 for each false claim – for which relators received a reward of 50 percent of recovered funds.

Little used for many years due to a variety of flaws, the statute underwent significant revisions over time. For instance, a major hurdle to bringing a *qui tam* between 1943 and 1986 was that a suit could not be brought if the government already had the information in its possession. It was impossible to know in advance of filing suit what information the government possessed or didn't. It wasn't until 1986 that the statute was rejuvenated and then received important amendments in 2009 and 2010.

Under President Reagan, the statute was changed in 1986 to:

- Eliminate the government knowledge bar;
- Clarify the role for whistleblowers in pursuing the case with or without the government;
- Guarantee a minimum relator-share award;
- Provide for attorney fees; and
- Create a cause of action for retaliation against the whistleblower.

In 2009, the FCA was substantially amended for the first time since 1986 by the Fraud Enforcement and Recovery Act of 2009 ("FERA"), which

- significantly expanded the scope of liability under the FCA, including by making it a violation to knowingly conceal, avoid, or decrease an obligation to pay money to the Government, thereby eliminating the need to show a false record or statement in certain circumstances.
- The definition of "obligation" was also expanded in response to courts that had construed the term too narrowly

In 2010, the Patient Protection and Affordable Care Act (PPACA) strengthened the provisions of the FCA, including by weakening the public disclosure bar, a technical procedural requirement that defendants often use to evade liability.

II. THE ELEMENTS OF A FALSE CLAIMS ACT CLAIM WITH KEY TERMS

In general terms, the FCA imposes liability on 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 key terms being:

- Knowingly
- Take certain actions (generally relating to obtaining payment or keeping money owed)
- Federal funds
- To which not entitled

Relevant Statutory Liability Language of 31 U.S.C. § 3729(a)(1)

> **(A):** Knowingly present or cause to be presented a false or fraudulent claim for payment or approval;
>
> **(B):** Knowingly make, use, or cause to be made or used a false record or statement material to a false or fraudulent claim;
>
> **(C):** Conspire to commit a violation;
>
> **(G):** Knowingly make, use, or cause to be made or used a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceal or knowingly and improperly avoid or decrease an obligation to pay or transmit money or property to the Government.

Section (g) is known as a "reverse false claim," and creates liability for the knowing and improper receipt or retention of money owed to the government. In other words, malfeasance not to get money from the government, but to avoid paying money due to the government. Congress specifically amended the FCA's reverse false claim provision in 2009 to remove any requirement that a defendant make or use a false record or statement in the course of avoiding an obligation to pay money to the government.

Treble Damages, Section 3729(a)

The statute provides that liable persons must pay a civil penalty of between $5,000 and $10,000 for each false claim (those amounts are adjusted from time to time; the current amounts are $5,500 to $11,000) and treble the amount of the government's damages. Where a person who has violated the FCA reports the violation to the government under certain conditions, the FCA provides that the person shall be liable for not less than double damages.

The Knowledge Requirement, Section3729(b)(1)

A person does not violate the False Claims Act by submitting a false claim to the government; to violate the FCA a person must have submitted, or caused the submission of, the false claim (or made a false statement or record) with knowledge of the falsity. Knowledge of false information is defined as being (1) actual knowledge, (2) *deliberate ignorance* of the truth or falsity of the information, or (3) *reckless disregard* of the truth or falsity of the information.

The Materiality Requirement, Section 3729(b)(4)

For liability to attach to a false claim, the falsity (or non-disclosure) must be material. To be material, it must have a "natural tendency to influence or be capable of influencing, the payment or receipt of money or property." In a 2016 case decided by the U.S. Supreme Court, the Court unanimously determined that a matter is material in "only two circumstances:"

1. a reasonable man would attach importance to it in determining his choice of action; or

2. the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter in determining his choice of action.

Universal Health Services, Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989 (2016).

Statute of limitations, Section 3731(b)

The FCA's statute of limitations has three prongs: three years, six years, and 10 years. The limitations period applicable to civil FCA actions is the later of: (1) six years after the date on which the violation is committed; or (2) three years after the date when the material facts giving rise to the cause of action are known or reasonably should have been known by the U.S. official responsible for acting on FCA violations, (3) but in no event more than 10 years after the date on which the violation is committed. Because the Department of Justice is charged with enforcing the laws in connection with fraud on the federal government, courts have held that the DOJ constitutes a responsible government official for the purposes of the statute.

III. THE *QUI TAM* PROVISIONS of 31 U.S.C. § 3730

The FCA invites and incentivizes private persons to file suit for violations of the FCA on behalf of the government.

a. **Filing a *qui tam* complaint, Section 3730(b).** A *qui tam* complaint must be filed with the court under seal. Local rules differ on the procedures for filing matters under seal. DO NOT SERVE THE DEFENDANT. 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. The disclosure statement is NOT filed with the court.

b. **Government investigation, Section 3730(b)-(c).** The *qui tam* complaint is initially sealed for 60 days. Practically speaking, a *qui tam* will stay under seal much longer, with an average of 18 months. Do NOT violate the seal – otherwise, the relator's case may be dismissed. While under seal, the government is required to investigate the allegations in the complaint. If the government cannot complete its investigation in 60 days, it can and typically does seek extensions of the seal period while it continues its investigation. The government must then notify the court that it is proceeding with the action (generally referred to as "intervening" in the action) or declining to take over the action, in which case the relator can proceed with the action.

c. **Parties in a *qui tam* action, Section 3730(c).** If the government intervenes in the *qui tam* action, it has the primary responsibility for prosecuting the case. It can move to dismiss the action, even over the objection of the relator, so long as the court gives the relator an opportunity for a hearing. The government can settle the action even if the relator objects so long as the relator is given a hearing and the court determines that the settlement is fair. If a relator seeks to settle or dismiss a *qui tam* action, the relator must first obtain the consent of the government. If the government declines to intervene in a *qui tam*, the relator may litigate the case on its own or voluntarily withdraw it. If the relator decides to prosecute the case, it will then have to serve the defendant, and the case proceeds like other civil litigation -- keeping in mid the higher pleading standards of FRCP Rule 9(b) in fraud cases.

d. **Relator award, Section 3730(d).** If the government intervenes in the *qui tam* action, the relator is entitled to receive between 15 and 25 percent of the amount recovered by the government through the *qui tam* action. If the government declines to intervene in the action, the relator's share is increased to 25 to 30 percent. Under certain circumstances, the relator's share may be reduced to no more than ten percent. If the relator planned and initiated the fraud, the court may reduce the award without limitation. The relator's share is paid to the relator by the government out of the payment received by the government from the defendant. If a *qui tam* action is successful, the relator also is entitled to legal fees and other expenses of the action by the defendant. The FCA also provides that if the government chooses to obtain a recovery from the defendant in certain types of proceedings other than the relator's FCA suit, this is known as an alternate remedy and the relator is entitled to the same share of the recovery as if the recovery was obtained through the relator's FCA suit.

e. **Statutory bars to *qui tam* actions, Section 3730(b), (d), (e).** The FCA provides a number of circumstances in which a relator cannot file or pursue a *qui tam* action, including:
   1. If 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 (this is known as the "public disclosure bar.") There is an exception to the public disclosure bar where the relator was the original source of the information.
   2. If the relator was convicted of criminal conduct arising from his or her role in the FCA violation.
   3. If another *qui tam* concerning the same conduct already has been filed (known as the "first to file bar").
   4. If the government already is a party to a civil or administrative money proceeding concerning the same conduct.

IV. FCA's ANTI-RETALIATION PROVISIONS, Section 3720(h)

The FCA prohibits an employer from retaliating against an employee for attempting to uncover or report fraud on the federal government. More precisely, the anti-retaliation provisions protect employees, contractors or other agents of a company from being "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer" because the employee, contractor, or agent lawfully investigated, reported or sought to stop a company from engaging in practices that defraud the federal government. It is NOT necessary to file a *qui tam* for the protections from retaliation to apply.

To prove that a company retaliated against a whistleblower, an individual must demonstrate that: (1) she engaged in protected activity; and (2) that she was discriminated against because of her protected activity. A whistleblower engages in "protected activity" in the context of False Claims Act retaliation when she opposes the company's attempt to get a false or fraudulent claim paid or approved by the Government, and where that opposition to fraud "reasonably could lead to a viable FCA action," or when litigation is a reasonable possibility. Investigatory efforts short of filing suit may still constitute protected activity. To demonstrate that he or she was discriminated against "because of" conduct in furtherance of a False Claims Act suit, an individual must show that her company had knowledge of the protected activity and that its retaliation was motivated, at least in part, by the individual's engaging in protected activity. An employee, contractor, or agent may bring his or her FCA retaliation claim in U.S. federal district court and has up to three years after the date of the retaliation to initiate litigation.

Remedies available under the FCA's anti-retaliation provision include reinstatement with seniority, double back pay with interest, and special damages, including litigation costs and attorneys' fees. Many courts have held that compensatory damages for emotional and reputational harm are also available, although the statute does not expressly provide for those damages.