



FALSE CLAIMS ACT OVERVIEW: Spring 2011

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Civil FCA: A Brief History

- **1863:** President Lincoln enacts the first FCA, enlisting citizens to identify and pursue claims against contractors defrauding the Union Army. 50% recovery for the whistleblower
- **1943:** Congress responds to “parasitic” qui tam suits. Relator can only bring case where Gov is unaware of information precipitating action. Qui tams cease.
- **1986:** Whistleblower recovery benefits reinstated. Treble damages. Anti-retaliation protection. Culpability expanded to cover “deliberate ignorance, reckless disregard,” not just intentional fraud.

Impact of 1986 Changes

- **Decrease** in non qui tam suits
 - 1987-1991: 1,254
 - 2005-2009: 599
- **Increase** in qui tam (whistleblower) suits
 - 1987-1991: 316
 - 2005-2009: 1,966
- Dollars recovered 1987-1991: \$1.046 billion
- Dollars recovered 2005-2009: \$10.447 billion
- Dollars recovered 2010: \$3 billion

Whistleblower Incentives

- **Percentage of Recovery:** Whistleblower entitled to share in proceeds of the action or settlement of the claim
 - 15-25% if the Government intervenes in the action
 - (reduced to no more than 10% if the action based on publicly available information)
 - 25-30% if the Government does not intervene
- **Attorneys Fees:** If successful, whistleblower is entitled to recover reasonable expenses, attorneys fees, and costs.

31 USC § 3130

Whistleblower Protections

- **Retaliation Prohibited:** Whistleblower entitled to all relief necessary to be “made whole” if:
 - discharged, demoted, suspended, harassed
discriminated against
- **Nature of relief is comprehensive:**
 - Reinstatement with same seniority status
 - 2 times amount of back pay
 - Interest on back pay
 - Compensation for special damages
 - Litigation costs, attorneys fees

31 USC § 3130(h)

Anti-Retaliation Protections Expanded

- **1986:** FCA protected employees
- **2009:** FERA
 - employees
 - contractors
 - agents
 - associated others in furtherance of qui tam action
- **2010:** Dodd-Frank
 - employee “associated with” someone reporting violation (e.g., friends, family, colleagues)
- **Upshot:** increase in qui tam litigation

Direct Exposure

- **Treble damages:** Three times the amount the Government sustains in damages
- **Civil penalties:** \$5,500 to \$11,000 for each false claim
- **Costs** of civil action
- **Attorneys fees**

31 USC § 3729

Indirect Exposure

- **Forfeiture of claim:** including legitimate portions of claim. 28 USC § 2514, Court of Federal Claims, Special Plea in Fraud (Forfeiture)
- Liability for amount equal unsupported part of claim. 41 USC § 604, Contract Disputes Act, Fraudulent Claims
- **Termination** for default
- **Suspension, Debarment:** Exclusion from Government contracting

Daewoo Engineering & Construction v. United States

73 Fed. Cl. 547 (2006)

- Contractor submits certified claim for \$64 million because adverse weather made soil impossible to compact to specifications, alleging superior knowledge, defective specifications, impossibility of performance
- Contractor adds \$50 million to legitimate \$13 million claim to “get the Government’s attention,” as “negotiating ploy”

Daewoo Engineering & Construction v. United States

73 Fed. Cl. 547 (2006)

- **Forfeiture:** Daewoo forfeits entire claim (including the \$13 million)
- **Antifraud penalty:** Daewoo pays Government \$50 million under antifraud provisions of CDA
- **Civil Penalty:** 762 misrepresentations x \$10,000 penalty = \$7.62 million under FCA
- **Fees:** Daewoo responsible for \$4 million in attorneys fees

Liability Under the 1986 FCA

- **Direct False Claim:** presenting or causing to be presented a false or fraudulent claim for payment or approval 31USC § 3729(a)(1)
- **Indirect False Claim:** knowingly making a false record “to get” a false claim paid or approved by the Government 31USC § 3729(a)(2)
- **Reverse False Claim:** knowingly making a false record to conceal, avoid or decrease an obligation to pay the Government 31USC § 3729(a)(7)



United States ex rel. Totten v. Bombardier Corp.

380 F.3d 488 (D.C. Cir. 2006)

- To be liable for **direct false claim** under the FCA, defendant must have **presented** the claim directly to the Government
- Presenting false claim to a Government contractor or grantee (Amtrak) did not constitute a violation under 31 USC § 3729(a)(1)

Allison Engine Co. v. United States ex rel. Sanders

128 S. Ct. 2123 (June 9, 2008)

- For **indirect false claim**, not enough to show that a false statement resulted in use of Government funds to pay for false or fraudulent claim
- Person presenting claim must have intended statement was “**to get**” the Government to pay the false claim
- Getting a claim “paid . . . By the Government” is not the same as getting a claim paid using “government funds”
- Defendant must **intend** that the Government itself pay the false claim; limited liability for subs, grantees receiving funds indirectly

Allison Engine Co. v. United States ex rel. Sanders

128 S. Ct. 2123 (June 9, 2008)

- A subcontractor may be liable (under (a)(2)) if it submits a false claim to a prime contractor with the intent of getting the government to pay the false claim, but not if it only seeks to defraud the prime.
- FCA is not an all purpose anti fraud statute for protection of private parties
- Absent the intent to defraud the Government, the reach of the FCA under (a)(2) would be “almost boundless”

2009 FERA Amendments

- **May 20, 2009:** President Obama signs the Fraud Enforcement and Recovery Act of 2009
- **Purpose:** Improve enforcement of securities and commodities fraud related to federal assistance and relief programs, for the recovery of funds lost to these frauds
- **Amends Civil FCA:** most significant changes since 1986

2009 FERA Amendments

- **Overrules** *U.S. ex rel. Totten v. Bombardier*
- For **direct false claim**, it is no longer necessary to present the claim to an officer or employee of the Government under (a)(1)
- **“Claim” expanded**: Enough that false claim is presented to “contractor, grantee or other recipient **if** the money . . . is to be spent or used on the **Government’s behalf** or to **advance a Government program or interest**” and any portion of that money is provided by the Government or reimbursed by the contractor

2009 FERA Amendments

- **Overrules** *Allison Engine*
- Eliminated intent requirement from **indirect false claims**, without which Supreme Court found FCA's reach would be "almost boundless"
- **Before**: Liability created when false claim was made "to get" a false or fraudulent claim paid by Government
- **Now**: Liability arises for false statement that is "material" to a false or fraudulent claim.
 - "paid by the Government" removed from (a)(2)

2009 FERA Amendments

- “Material” defined:

“having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”

2009 FERA Amendments

- Expands **reverse false claims** to include retention of overpayments
- **Before**: Liability existed where false statement was made to conceal, avoid or decrease an obligation to pay the Government, i.e. **intent**
- **Now**: Liability arises if
 - False statement is **material** to an obligation to pay money to the Government, or
 - Knowingly concealing or knowingly and improperly avoiding or decreasing an **obligation** to pay money to the Government

2009 FERA Amendments

- “**Obligation**” defined:

An established duty, **whether or not fixed**, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment

2010 PPACA

- Patient Protection and Affordable Health Care Act of 2010, effective March 23, 2010
- Prior to PPACA: Large financial Incentives offered to whistleblowers were counterbalanced by public disclosure bar
- PPACA weakened prohibition by narrowing scope of public disclosure, expanding definition of original source

2010 PPACA

- **Limitation of public disclosure bar**
- **Before:** Disclosure of information (including in state lawsuit) would bar qui tam
- **Now:** Limits public disclosure bar to “federal” proceedings, or proceedings in which Government is an agent or party.
- Thus, qui tam suits where the information forming the basis of the suit is in state civil or criminal litigation, or state administrative hearings, or federal litigation where government is not a party, are not categorically prohibited.

2010 PPACA

- **Expansion of original source exception**
- **Before:** whistleblower required to have “direct [i.e., first hand] and independent knowledge of the information,” and voluntarily disclose information before public disclosure
- **Now:** whistleblower may qualify as original source
 - just by having voluntarily disclosed information to government before public disclosure
 - If whistleblower has knowledge that is independent and “materially adds” to the publicly disclosed information

Expanse of Potential Liability

- Progress Payments
- Certified Payroll
- Change Orders
- Conformance with specs / quality control
- Employee professional certifications
- Statements made in contract negotiation
- Buy American Act
- Key personnel – apparent authority
- Subcontractor compliance
- Small Business Certifications – presumption of loss

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Mandatory Disclosure

- **FAR 52.203-13**: mandatory for all prime contracts over \$5 million lasting more than 120 days
 - Flow down to subcontractors
- Requires contractor have a written code of business ethics and conduct
 - Doesn't apply to contracts with small business or for commercial items
- Failure to disclose is specific ground for suspension and debarment

Mandatory Disclosure

- Contractors must disclose “credible evidence” of:
 - Violations of criminal law involving fraud, conflicts of interest or bribery
 - Violations of the civil FCA
 - Significant overpayments

Protective Measures

- Internal controls and compliance policies
- Fully explain FCA and related laws to management.
- Maintain a Compliance Team of trained managers.
- Periodic Training in Ethics and Compliance
- Monitor compliance internally and by subcontractors.
- Implement an Internal Mandatory Disclosure program.
- Establish a process for reviewing prime contractor flow-downs of contract clauses, ensure that clauses are flowed down to subcontractors.

Protective Measures

- Labor and employment policies
- Require managers and employees to share information relating to suspected fraudulent activity with Compliance Team.
- Assure managers and employees that no retaliatory action will be tolerated.