

Frequently Asked Questions False Claims Act

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Frequently Asked Questions

The following answers frequently asked questions about the False Claims Act:

Does the FCA cover tax fraud? The FCA explicitly excludes tax fraud. Section 3729(e) states that the Act "does **not** apply to claims, records, or statements made under the Internal Revenue Code." Some **state** FCA's, however, do include tax and revenue fraud.

What does "qui tam" mean? The term "*qui tam*" stands for a longer Latin phrase *qui tam pro domine regis quam pro ipso se* that is translated as "he who brings an action for the king as well as for himself." *Qui tam* is the unique mechanism in the federal FCA that allows persons with evidence of fraud against federal programs or contracts to sue the wrongdoer on behalf of the Government.

A *qui tam* action is one brought by a private plaintiff on behalf of the Federal Government instead of the Government itself. These actions are called "whistleblower lawsuits." With *qui tam*, the Government may intervene and join the action. Or the Government may decline intervention, in which case the private plaintiff may proceed on his own.

What is a Relator? A whistleblower that files a suit under the FCA is known as a "relator", instead of a plaintiff. Technically, the United States is the plaintiff.

When did the FCA become law? The FCA, also known as the "Lincoln Law," dates back to the Civil War. The original law included *qui tam* provisions that allowed private persons to sue those who defrauded the Government and receive half of any recovery from the defendant.

The *qui tam* provisions were greatly weakened by the Congress in 1943 causing *qui tam* litigation to virtually cease. As more and more fraud went undetected and unaddressed, in 1985 the law was amended to strengthen the incentives for citizens to uncover and fight fraud as *qui tam* relators.

How much money has been recovered from qui tam lawsuits? Since 1986, the FCA settlements and judgments have totaled over \$12 billion. In fiscal year 2003 alone, a record \$2.1 billion was recovered under the FCA.

What is covered by the FCA? The primary activities that constitute violations under the FCA are: (1) knowingly presenting (or causing to be presented) to the Federal Government a false or fraudulent claim for payment; (2) knowingly using (or causing to be used) a false record or statement to get a claim paid by the Federal Government; (3) conspiring with others to get a false or fraudulent claim paid by the Federal Government; and (4) knowingly using (or causing to be used) a false record or statement to conceal, avoid, or decrease an obligation to pay money or transmit property to the Federal Government.

In general, the FCA covers fraud involving any federally funded contract or program, with the exception of tax fraud.

What's the FCA cover?

- ❑ Knowingly presenting (or causing to be presented) to the Federal Government a false or fraudulent claim for payment;
- ❑ Knowingly using (or causing to be used) a false record or statement to get a claim paid by the Federal Government;
- ❑ Conspiring with others to get a false or fraudulent claim paid by the Federal Government; or
- ❑ Knowingly using (or causing to be used) a false record or statement to conceal, avoid, or decrease an obligation to pay money or transmit property to the Federal Government.
- ❑ The FCA covers fraud in federal contracts or programs, except tax fraud.

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Virtually every trade, business and profession is susceptible to FCA violations. A few examples are: a contractor falsifies test results or other information regarding the quality or cost of products it sells to the Government; a health care provider bills Medicare and Medicaid for services that were not provided or were unnecessary; or a grant recipient charges the Government for costs not related to the grant.

Does the FCA cover government waste and mismanagement? No. While the Government undoubtedly loses billions of dollars each year through its own waste and mismanagement, as well as that of outsiders (e.g., government contractors), the FCA does not provide a remedy for waste or mismanagement that does not rise to the level of fraud. The Act is aimed only at fraud committed against the US Government. But some states have their own FCAs.

What is the liability for violating the FCA? Violators of the FCA are liable for three times the dollar amount that the Government is defrauded — treble damages — and civil penalties of \$5,500 to \$11,000 for each false claim.

How can a Relator recover for blowing the whistle under the FCA? Only a *qui tam* lawsuit and a subsequent settlement or favorable judgment enables a private party to recover under the FCA. To recover money under the Act, you must file a *qui tam* lawsuit. Merely informing the Government about the FCA violation is not enough. A relator receives an award only if, and after, the Government recovers money from the defendant as a result of the lawsuit.

How much can a Relator receive for bringing a *qui tam* action? A relator can receive between 15 and 30 percent of the total recovery from the defendant, whether through a favorable judgment or settlement. If the Government intervenes and joins an action brought by a relator, the relator generally is eligible to receive at least 15 percent, but not more than 25 percent, of the recovery, depending upon the relator's contribution to the prosecution of the action. If the Government chooses not to intervene and the relator proceeds with the action on his own, the relator can receive between 25 and 30 percent of the recovery.

Can there be more than one Relator in a *qui tam* lawsuit? Yes. More than one person or entity can join together and file a *qui tam* lawsuit.

Is there a deadline for filing a *qui tam* action? Under the FCA, an action must be filed no later than: (1) six years from the date of the violation of the Act; **or** (2) three years after the Government knows or should have known about the violation, but in no event more than ten years after the fraud.

If someone else publicizes allegations or files a FCA lawsuit similar to yours before you file, you may lose your *qui tam* suit.

How is a *qui tam* action filed? A *qui tam* complaint must be filed in the appropriate federal district court and a copy of the complaint, along with a written disclosure statement of substantially all material evidence and information in the relator's possession, must be served on the US Government.

The complaint must be filed under “**seal**” — without notice to the public or wrongdoer. Until the seal is lifted by the court, the complaint and its contents must be kept strictly confidential. The complaint must not be served on the defendant without court permission. A violation of the FCA seal provision by the relator may result in dismissal of the *qui tam* suit.

“Does the FCA cover tax fraud? The FCA explicitly excludes tax fraud. . . .”

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What happens after a qui tam action is filed? After the *qui tam* complaint is filed and served on the Government with the disclosure statement, the case remains private for at least 60 days. This 60-day seal period may be extended upon request by the Government. It is common for the seal period to last a year or more. During the seal period, the Government investigates the allegations. At the end of the seal period, the Government chooses either to intervene and proceed with the action or to decline intervention.

If the Government intervenes and proceeds with the action, the Department of Justice is responsible for prosecuting the case. The relator has the right to continue as a party in the action and may participate in the litigation with his lawyer subject to certain limitations. The Government may dismiss or settle the action over the objection of the relator, but only if the court consents after a hearing on the proposed dismissal or settlement.

If the Government declines to intervene, the relator has the right to conduct the action on his own. The Government may, however, intervene at a later date for good cause. After the Government decides to intervene and the seal period ends, the complaint is served on the defendant. The lawsuit then proceeds generally in the same manner as any other federal civil litigation, except for the special issues raised by the *qui tam* concept.

How long does a qui tam action take? The time from the filing of a *qui tam* action until its resolution varies greatly from case to case. Typically *qui tam* actions take several years. As with other complex federal civil litigation, after the complaint is served on the defendant, a *qui tam* action may be delayed by contentious, costly, and time-consuming discovery and motions. In addition, the duration of a *qui tam* action is extended by the existence of the initial seal period. The *qui tam* complaint is not served on the defendant until after the seal is lifted. The Government investigates the allegations and decides whether to join the action during the initial seal period, a minimum of 60 days. The seal period may be extended upon request by the Government, and it is not unusual for it to last several years. Some *qui tam* actions are settled relatively quickly, especially when the Government decides to intervene.

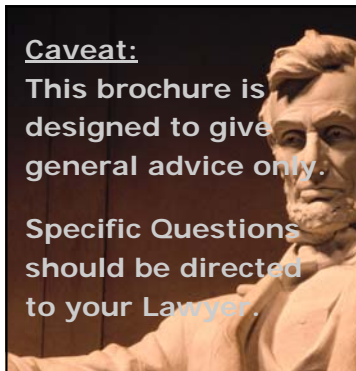
What if someone else has already filed a FCA lawsuit against the same company or individual that I want to file against? If the Government or a private party has already filed a FCA lawsuit based on the same allegations, the statute bars a second lawsuit by a relator. However, if the allegations are different from those of the earlier suit, the first to file rule may not apply. Because cases are under seal, a relator and his attorney may not be able to determine if a suit has already been filed on the alleged fraud.

Must the fraud be reported to the Government or an employer first? In general, the FCA does not require that the fraud be reported before filing a *qui tam* action. However, there are circumstances in which it must, or would be wise to, inform the Government before filing. An attorney should be consulted about this issue.

Have I lost my right to bring a qui tam action if I have already informed the Government about the fraud committed by the potential defendant? No. You do not give up your right to bring a *qui tam* action by going to the Government before filing your *qui tam* lawsuit. You are barred from bringing a *qui tam* suit based upon allegations or transactions which are the subject of a FCA suit already filed by the Government. If you deliver your information to the Government before filing a qui tam action, and the Government in turn files a FCA action before you file, then you will have lost your right to bring a qui tam lawsuit. However, this can be avoided if you file promptly after informing the government.

Caveat:
This brochure is
designed to give
general advice only.

Specific Questions
should be directed
to your Lawyer.



"How much can a
Relator receive for
bringing a qui tam
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The Author

Larry D. Lahman, the author of this publication, was born in Carmen, Oklahoma. He attended Northwestern Oklahoma State University receiving a Bachelor of Science in Chemistry, Mathematics and Physics in 1965.

Lahman subsequently attended graduate school at OSU and later received a Juris Doctorate Degree from the OU Law School. He is admitted to practice before all state and local federal courts including the United States Supreme Court.

Lahman served as President of the Garfield County Bar Association and numerous other organizations.

Lahman and our firm achieved the largest recovery in the state of Oklahoma in the 140 year history of the FCA in late 2004 — \$16 Million.

He was a parachute officer with the U.S. Army Special Forces – the Green Berets – in Vietnam and retired as a Lieutenant Colonel in the U.S. Army Reserves.

Our Law Firm

P.C. Simons, who served as Attorney General of Oklahoma Territory, organized the predecessor to **Mitchell & DeClerck** in 1907.

The Firm has been in continuous existence for nearly a century and is the oldest law firm in Enid, Oklahoma, while also one of the oldest law firms in the state of Oklahoma.

For decades the Firm has held the highest possible “A” rating by the Martindale-Hubbell Legal Directory. The Firm has long been listed in the “Bar Register” of preeminent law firms in the United States and “Best’s Directory of Recommended Insurance Attorneys.”

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Can I keep my identity a secret if I file a *qui tam* action? If you file a *qui tam* action, the Government will know your identity, and your name will likely be disclosed to the defendant at some point. During the initial seal period, the defendant is not supposed to learn that you have filed the lawsuit; however, defendants sometimes realize that a FCA case has been filed, as well as the identity of the relator.

After the seal period ends, when the Government announces its decision regarding intervention and the complaint is served on the defendant, your identity will be revealed. There are circumstances in which you may be able to file a *qui tam* action and then voluntarily dismiss it during the seal period without having your identity ever revealed to the defendant, but there is no guarantee of anonymity. If you are seriously concerned about the disclosure of your identity, your attorney may be able to help you minimize that eventuality.

Do I have protection against my employer for blowing the whistle under the FCA? Yes. Under the FCA, any employee who is discharged, demoted, harassed, or otherwise discriminated against because of lawful acts by the employee in furtherance of an action under the Act is entitled to all relief necessary to make the employee whole. Such relief may include reinstatement, double back pay, and compensation for any special damages, including litigation costs and reasonable attorneys’ fees.

Will the wrongdoers go to jail because of my *qui tam* action? A *qui tam* suit is a civil action, not a criminal action. For that reason, imprisonment is not a sanction in a *qui tam* case. Filing a *qui tam* action may, but does not necessarily, trigger a criminal investigation and prosecution by the Government which could lead to criminal fines or jail time for the wrongdoer’s. Any criminal action would be separate from the *qui tam* action, and you would have no control over it. However, you may be asked to assist in the Government’s criminal action.

Do I need a lawyer to file a *qui tam* action? You are not required to use a lawyer to file a *qui tam* lawsuit. You can file one on your own. Nevertheless, given the complexity of *qui tam* litigation, most relators retain lawyers to represent them.

How much does it cost to file a *qui tam* action? If you choose not to retain an attorney to represent you in your *qui tam* action, you will have to bear various costs directly. If you choose to hire an attorney, you will normally enter an arrangement which will set forth how much the attorney will receive in fees and who is responsible for out-of-pocket costs.

Because most relators cannot afford to pay hourly fees as they are incurred, most *qui tam* attorneys accept a contingency fee. Simply, the attorney gets paid only if there is a recovery, with the fee being some percentage of what you are awarded.