



**Liability Under the
Federal False Claims Act**

Lincoln's Law Looms Larger



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Don Blevins is a construction litigation attorney with the Auburn Hills, Michigan law firm of McAlpine & Associates, P.C. Mr. Blevins has extensive experience handling large, complex commercial and construction disputes. Mr. Blevins has represented contractors, owners, and lenders in disputes throughout the United States. He regularly represents contractors against charges of improper payment applications by them and their subcontractors. He also has represented owners in disputes with lenders over construction financing and progress payment submissions.

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A Brief History

- **1863**: President Lincoln signs into law the Nation's first False Claims Act, deputizing citizens to identify and pursue claims against war contractors who defrauded the Government.
- **1943**: Congress took the power from the public, leaving it to the Government to root out fraud.
- **1986**: The Government again enlists the public, providing for "*qui tam*" whistleblower suits.

The FCA's Impact

- Since 1986, more than 10,000 cases have been filed under the FCA.
- 62% were filed by whistleblowers.
- The government has recovered more than \$25 billion.
- Whistleblowers have been awarded over \$2 billion.

United States Dep't of Justice, Civil Division, "Fraud Statistics – Overview: October 1, 1986 – September 30, 2008" (Nov. 5, 2008)

Whistleblower Incentives

- Percentage of Results: The whistleblower is entitled to share in the proceeds of the action or settlement of the claim.
 - 15-25% if the Government takes up the action
(Reduced to no more than 10% if the action was based on publicly available information.)
 - 25-30% if the Government does not take up the action
- Attorneys Fees: Upon success, the whistleblower is entitled to recover their reasonable expenses, attorney fees, and costs.

31 U.S.C. § 3729

Whistleblower Protections

An employee who is discharged, demoted, suspended, threatened, harassed, or discriminated against because of actions under the FCA is entitled to be made whole.

- Reinstatement with the same seniority status they would have had
- Two times their back pay, with interest
- Any special damages sustained
- Litigation costs and attorney fees

31 U.S.C. § 3730(h)

2009 Expanded Whistleblower Protections

In May 2009, whistleblower protections were expanded beyond employees to include contractors and agents.

31 U.S.C. § 3730(h)

Direct Penalties Under FCA

- Treble damages
- Civil penalties between \$5,000 and \$10,000 per violation
- Attorneys fees and costs

Indirect Exposure

- Surrender of entire claim (including legitimate portions) (Special Plea in Fraud (Forfeiture) -- 28 U.S.C. § 2514)
- As a penalty under Federal Contract Disputes Act (if applicable), pay Government entire amount of false claim (41 U.S.C. § 604)
- Contract Termination
- Suspension or debarment from federal contracting

Daewoo Engineering & Construction v. United States,

73 Fed.Cl. 547 (2006)

Road contractor sued Government for \$64 million based on defective specifications, superior knowledge, and impossibility of performance.

Government proved that \$50 million of claim was fraudulent. Contractor witness admitted that it was included to “get the Government’s attention.”

Daewoo Engineering & Construction v. United States,

73 Fed.Cl. 547 (2006)

- Contractor forfeits entire claim (including any legitimate portion).
- Under Contract Disputes Act, contractor must pay Government \$50 million for false claim.
- Contractor faces \$10,000 penalties for each of 762 false claims (totaling \$7,620,000) under the FCA.
- Contractor pays \$4 million in Government attorneys fees.

Liability Under 1986 FCA Amendments

- Direct False Claim: Submitting or causing someone else to submit a false claim ***to the Government.***
- Indirect False Claim: Making false records or statements to get a false claim paid ***by the Government.***
- Conspiracy: Conspiring to defraud the government by getting a false claim paid ***by the Government.***
- Reverse False Claim: Submitting a false claim or statement to avoid or decrease a payment obligation ***to the Government.***

31 U.S.C. § 3729

Liability Under 1986 FCA Amendments

- Failure to Return Funds or Property. Failing to return Government funds or property in a person's possession, custody, or control with intent to defraud the Government.
- False Certification of Receipt. Falsely certifying the receipt of property by the Government, with the intent to defraud the Government.
- Fraudulent Sale. Knowingly buying Government property from someone without authority to sell it.

31 U.S.C. § 3729

United States ex rel. Totten v. Bombardier Corp.,

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

To be liable for a *direct false claim* under the FCA, the defendant must have “presented” the claim directly to the Government.

Presenting the false claim to a Government contractor or grantee (such as Amtrak) did not constitute a violation of under 31 U.S.C. § 3729(a)(1).

Allison Engine Co. v. United States,

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

For an ***indirect false claim***, it is not enough to show that a false statement resulted in the use of Government funds to pay a false or fraudulent claim.

A person must have the ***purpose*** of getting a false or fraudulent claim “paid or approved by the Government.”

Getting a claim “paid ... by the Government” is not the same as getting a claim paid using “government funds.”

A defendant must intend that the Government itself pay the claim.

Allison Engine Co. v. United States,

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

Eliminating the element of intent would render the FCA “*almost boundless*: for example, liability could attach for any false claim made to any college or university, so long as the institution has received some federal grants-as most of them do.”

2009 FERA Amendments

- On May 20, 2009, the President signed in to law the **Fraud Enforcement and Recovery Act** of 2009.
- Prompted by the Government's increased exposure under the various stimulus packages.
- The most sweeping changes to the False Claims Act in 30 years.

2009 FERA Amendments

- Overrules *U.S. ex rel. Totten v. Bombardier*.
- For a **direct false claim**, no longer necessary to present the claim to an officer or employee of the United States Government.
- Enough that a false claim is presented to a contractor, grantee, or other recipient, “if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest” and any portion of the money has been provided or will be provided by the Government.

2009 FERA Amendments

- Overrules *Allison Engine*.
- Eliminates the “**intent**” requirement from indirect false claims, without which the Supreme Court found that the FCA would be “**almost boundless**.”
- Before: Liability was created where a false statement or record was made “**to get**” a false or fraudulent claim paid by the Government.
- Now: Liability exists for a false statement that is “**material**” to a false or fraudulent claim.
- “**Material**” means “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”

2009 FERA Amendments

- Eliminates the “*intent*” requirement for *failure to return* claims.
- Before: Liability existed where a person with possession, custody, or control of Government funds or property delivers less than all of it *with intent to defraud* the Government.
- Now: Liability exists whenever that person “knowingly” delivers less than all of the funds or property.
- “Knowingly” means actual knowledge, deliberate ignorance, and reckless disregard of the truth.

2009 FERA Amendments

Expands **reverse false claims** to include retention of Government overpayments.

- Before: Liability existed where a false statement was made “to conceal, avoid, or decrease an obligation to pay” the Government.
- Now: Liability exists for:
 - (1) Knowingly making or using a false statement “material to an obligation to pay” the Government.
 - (2) Knowingly concealing, or knowingly and improperly avoiding or decreasing, an **obligation** to pay the Government.

2009 FERA Amendments

“**Obligation**” includes:

“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”

2009 FERA Amendments

Expands the use of ***Civil Investigative Demands (CIDs)***, to obtain documents, interrogatory responses, and testimony.

Before:

- Only the Attorney General could approve CIDs.
- Information could not be shared with relators (whistle blowers).

Now:

- AG may appoint a designee to approve CIDs.
- Information can be shared with relators.
- Information can be put to “any use that is consistent with law, and the regulations and policies of the Department of Justice.”

Expanse of Potential Liability

- Progress Payments
- Change Orders
- Statements made in contract negotiation
- DBE participation
- Key personnel
- Subcontractor compliance

PROTECTIVE MEASURES

Know the applicable law:

- Prompted by the Federal Government, many states have enacted their own false claims acts.
- Sources of funding generally dictate the applicable law.

PROTECTIVE MEASURES

Internal controls and compliance policies

- Fully explain FCA and related laws to management.
- Maintain a Compliance Team of trained managers.
- 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.

PROTECTIVE MEASURES

Internal investigations

- Thoroughly investigate reports of suspected fraudulent activity.
- Strive to ensure discreet and confidential investigations through assistance of counsel.
- Disclose investigation results so as to minimize exposure.



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