

# THE DAILY RECORD

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## Advocate's VIEW

# Understanding the federal False Claims Act

The federal False Claims Act grants the government (or a private party suing on the government's behalf) the right to seek damages vastly exceeding what is normally available in a fraud action. Enacted in 1863 to combat fraud by government contractors during the Civil War, the FCA is a complex statute that has recently undergone considerable revision and interpretation.

In its most basic sense, the FCA creates a cause of action by the government against a defendant who knowingly makes false claims for payment in federal funds, 31 U.S.C. §§ 3729(a)(1), 3730(a)-(b). In its earlier form, the FCA only applied to false claims submitted directly to the government. By dealing with an intermediary, such as a government contractor, rather than the government itself, a defendant could avoid FCA liability even if the government ultimately paid money based on the defendant's false claims.

For example, the FCA did not apply to defendants alleged to have defrauded Amtrak by selling it defective rail cars, even though Amtrak paid the defendants with federal funds, *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004).

In 2009, responding to what it called an "erroneous interpretation" of the FCA, Congress enacted the Fraud Enforcement Recovery Act, *United States ex rel. Osmose v. Chem. Specialties, Inc.*, 994 F. Supp. 2d 353, 361 (W.D.N.Y. 2014). FERA broadened the FCA to reach false claims made to private parties if the government "(I) provides or has provided any portion of the money or property requested or demanded; or (II) will reimburse such [private party] for any portion of the money or property which is requested or demanded," 31 U.S.C. § 3729(b)(2)(A)(ii). FERA may expose a defendant to FCA liability if it submits false claims to a private party who receives even nominal federal funding for those claims.

The FCA imposes a treble damages award and a civil penalty for each false claim. If a defendant is found to have violated the FCA, assessment of both treble damages and civil penalties is mandatory, see *United States v. Karron*, 750 F. Supp. 2d 480, 493

n.12 (S.D.N.Y. 2011) ("The statute is clear that courts most impose both civil penalties and treble damages for violations of the FCA."). Even taken alone, FCA damages and civil penalties can dwarf the amount that the defendant received from the false claim.

In terms of treble damages, the FCA imposes liability equal to "3 times the amount of damages which the government sustains because" of the false claim, 31 U.S.C. § 3729(a)(1). The FCA does not explain how to calculate the government's damages. The traditional view is that the government's base FCA damages (before trebling) equal "the difference between the value that the government received and the amount that it paid" for defective goods or services, *United States ex rel. Feldman v. van Gorp*, 697 F.3d 78, 87 (2d Cir. 2012).

However, a recent trend – exemplified by the Second Circuit's *Feldman* decision – is to define the government's base damages as the total amount the government paid, without any offset for the value of the defendant's goods or services, on the theory that "the government would not have paid anything if the claimant had been entirely truthful," *Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, 2014 U.S. Dist. LEXIS 89357, at \*13 (M.D. Fla. July 1, 2014).

In *Feldman*, the defendants obtained government grants based on false representations about a research fellowship. The court found that the government's damages equaled the gross amount of the grants because the government did not receive the program it bargained for, and "entirely lost its opportunity to award the grant money to a recipient who would have used the money as the government intended," *Feldman*, 697 F.3d at 88.

Similarly, in *United States v. Rogan*, 517 F.3d 449 (7th Cir. 2008), the court addressed a medical facility that obtained Medicare and Medicaid reimbursements while concealing the existence of a patient kickback scheme. The court found that the

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government's base FCA damages equaled the gross amount of the reimbursements – regardless of what services the facility performed – because the facility would not have been eligible for any of the reimbursements if it had disclosed the kickback scheme, *Id.* at 453.

While the traditional view of FCA damages should remain applicable when a defendant remains entitled to some amount of federal funds notwithstanding its false claim, Feldman and Rogan show that the calculation of FCA damages is an evolving issue. In light of the FCA's automatic trebling of the government's base damages, the method in which a court calculates those damages can have dramatic consequences on a defendant's overall liability.

Trebling of damages under the FCA is mandatory, unless the defendant satisfies rigorous requirements with respect to disclosing the false claim. To avoid trebling, the defendant must provide the government with all of his information about the false claim within 30 days of obtaining that information, and cooperate fully with any government investigation of the false claim.

Further, at the time the defendant provided the government with information about his false claim, he must have been unaware that the government was investigating the false claim. If the defendant meets all of these criteria, the court may assess less than treble damages. But even then, the court still must award at least double damages, 31 U.S.C. § 3729(a)(2).

The FCA's civil penalty is an amount not less than \$5,500, and not more \$11,000, assessed for each false claim, *Id.* § 3729(a)(1) (imposing civil penalty); 28 C.F.R. § 85.3(a)(9) (setting the current range of the civil penalty as adjusted for inflation). A court “enjoys considerable discretion in setting a penalty amount within the prescribed range,” but cannot depart from the range or decline to impose a penalty altogether, *Miller v. Holzmann*, 563 F. Supp. 2d 54, 146 (D.D.C. 2008).

While the civil penalty component of the FCA may initially appear less intimidating than the treble damages award, civil penalties can become massive when a defendant submits numerous false claims. Cases involving frequent submissions of bills

to the government can involve hundreds or thousands of false claims. In such cases, civil penalties can run into the millions of dollars. For example, in Rogan, the defendant medical facility submitted 1,812 false claims for Medicare and Medicaid reimbursements. The civil penalties on those false claims exceeded \$13 million, *Rogan*, 517 F.3d at 453.

Civil penalties become especially significant when a defendant submits a high number of false claims, but each claim is for a relatively small amount of federal funds. In such a case, civil penalties can greatly exceed the government's damages, even after trebling.

The same conduct that gives rise to FCA liability may also constitute a criminal offense such as mail or wire fraud. The government can use the FCA in tandem with criminal prosecution, combining an FCA recovery with forfeiture, restitution and fines. Further, the FCA estops a defendant who is convicted of violating a criminal fraud statute from contesting FCA liability based on the same conduct, 31 U.S.C. § 3731(e).

The government can use the combined threat of criminal prosecution and an FCA action as leverage in plea negotiations, or use the estoppel effect of criminal convictions to obtain FCA damages on a motion for summary judgment, see *United States v. All Funds on Deposit in Dime Sav. Bank of Williamsburg Account*, 255 F. Supp. 2d 56, 58-59 (EDNY 2003) (as part of plea deal in health care fraud case, defendant agreed to forfeit \$1.49 million and pay \$710,000 in settlement of FCA claim); *Karron*, 750 F. Supp. 2d at 491-93 (granting summary judgment to the government in FCA case following the defendant's criminal conviction for fraud, and awarding \$4 million in treble damages).

FCA suits, often brought by whistleblowers in the government's name, recover billions of dollars each year. Since 2009, Congress has broadened the FCA's reach, and courts have sided with the government by enlarging the FCA's definition of “damages.” The FCA is more than 150 years old, but it is not a relic.

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