

THE VIEW FROM THE FRONT LINES

LITIGATION UNDER THE FALSE CLAIMS ACT IN A NEW ERA OF ENFORCEMENT

Washington Legal Foundation MONOGRAPH

In 1863, Congress passed the False Claims Act (FCA) in response to perceived Civil War-era fraud by government contractors. In order to supplement government enforcement efforts, Congress included a provision that utilized the profit motive to encourage private citizens who uncovered fraud, so-called “relators” or “whistleblowers,” to bring lawsuits against contractors on behalf of the government. These citizens would receive a percentage of the damage award if the “*qui tam*” suit was successful. During times of crisis and in reaction to abuses of the law, Congress has taken action to amend the FCA numerous times in the past century.

Today, the False Claims Act is one of the federal government’s most potent civil and criminal prosecutorial weapons, and the *qui tam* provisions have become a favorite litigation tool for whistleblowers and entrepreneurial plaintiffs’ lawyers. In addition to federal and private FCA actions, regulated entities must also contend with a new wave of state false claims laws. And as the size of government has grown, the number of false claims law enforcement targets has expanded, with business sectors such as financial services, pharmaceuticals, and even agriculture being newly scrutinized.

This aggressive expansion makes it essential that affected parties fully understand the False Claims Act. Washington Legal Foundation’s latest MONOGRAPH provides readers with a clear and concise overview of the Act, its *qui tam* provisions, the latest trends in FCA enforcement, and anticipated future developments. The MONOGRAPH’s authors are **Brian Morrissey** and **Kristin Koehler** of the law firm Sidley Austin LLP. It features a foreword by Senior Vice President, General Counsel and Secretary of Raytheon Company, **Jay B. Stephens**.

The authors outline the False Claims Act’s history, its statutory scheme, and how the federal courts have interpreted and applied the law when private whistleblowers invoke its *qui tam* device. They focus particular attention on the most recent amendments and how those changes created an atmosphere for heightened enforcement in areas such as financial services.

After its detailed description of the FCA today, the MONOGRAPH assesses enforcement trends in particular industries, such as government contracting, health care, and pharmaceuticals. It then reviews and explains seven key issues affecting future False Claims Act litigation. Those issues are:

- **The FCA’s Applicability to “Legally False” Claims**
- **Scope of FCA’s First-to-File Bar**
- **Increased Pursuit of “Reverse” False Claims**

- **Constitutionality of Mandatory Damages**
- **Increase in False Claims Act Suits Brought against Numerous Defendants in the Same Industry**
- **Increased Use of Civil Investigative Demands in False Claims Act Investigations**
- **Sanctions over Privileged Documents Obtained by *Qui Tam* Relators**

This WLF MONOGRAPH will help policy makers and the public better understand the law, while informing those under its broad jurisdiction how to protect themselves from suit, or properly defend themselves if they are pushed into the *qui tam* quagmire.