

FCA Basics: Liability Theories

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This is the fifth post in the Dorsey FCANow Blog's FCA Basics Series covering the fundamentals of the False Claims Act ("FCA"), outlining FCA procedure, and highlighting key facets of FCA practice. Today's post covers the categories and scope of FCA liability.



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Theories of Liability

There are three principal ways an FCA defendant can be found liable: factual falsity, legal falsity, and/or "reverse" false claims. In addition, the criminal Anti-Kickback Statute often provides an independent basis for FCA liability in the healthcare sector.

- **Factual Falsity.** A claim to the federal government is factually false where some fact about the deliverable is false. A classic (and perhaps apocryphal) example traces back to the American Civil War where the Union Army was said to have received sawdust instead of gunpowder. As a more contemporary example, a claim for medical services that were not actually rendered—or that are different from those actually rendered—would be a factually false claim.
- **Legal Falsity.** A claim is legally false if it violates a legal condition of payment for the

product or service being billed. For example, if a non-licensed individual provides healthcare services for a federal healthcare program beneficiary, those claims would be considered legally false for violating the condition of payment that the provider be qualified to provide the billed-for services.

- **Reverse False Claims.** The reverse false claims provisions of the FCA give the government a means to recover from someone who makes a material misrepresentation to avoid paying an obligation owed to the government. Unlike traditional false claims, reverse false claims involve preventing the government from collecting money it is owed, rather than making a false claim to receive money from the government. One classic example of a reverse false claim is if a provider knowingly retains an overpayment. Liability for retention of an overpayment arises where a party received from the government more money than it was due and knowingly fails to return the overpayment. Another increasingly common example is when importers misrepresent the product being imported into the country or the product's country of origin to avoid paying tariffs or other duties. Notably, however, the FCA specifically excludes tax-related obligations.
- **Anti-Kickback Statute.** The Anti-Kickback Statute ("AKS") is a criminal liability statute that prohibits rewarding or paying for referrals for services covered by federal health care programs (i.e., kickbacks). It was enacted to prevent kickbacks from influencing healthcare decisions and is designed to protect federal healthcare programs from overutilization, increased costs, and potential fraud. The AKS has numerous "safe harbor" provisions exempted certain conduct from liability, but claims submitted to the government that are "tainted" by an AKS violation are false claims under the FCA.

Scope of Liability

FCA damages and penalties are crucial components of FCA litigation as damages often drive the government's or relator's decision to litigate. The FCA imposes a rough form of justice upon those found liable for defrauding the government: the FCA applies treble (triple) damages in most circumstances, plus per-claim penalties. Public policy concerns, primarily deterrence, justify these steep penalties. However, recovery is not meant to be a windfall for the government, and FCA damages generally exclude consequential damages, pre-judgment interest, punitive damages, and investigation costs.

In some FCA contexts, the government's damages are the amount of money it paid minus the amount it would have paid had the claim not been false—multiplied by three. For example, if the government paid for \$5 per widget for 100 widgets (\$500) but only twenty widgets were delivered (\$100), then the government's actual damages are \$400 and its trebled damages are \$1,200. In other FCA contexts, the damage to the government could be the entire amount paid without claims for offsets. In reverse false claims, damages are the difference between the amount paid to the government and the amount the government should have been paid. If the government collects a duty of \$2 on each microwave imported into the United States, and Acme imports 1,000 microwaves but only discloses and pays the duties on the first shipment of 100, then the actual damages are \$1,800 and the trebled damages are \$5,400.

Trebled damages are accompanied by per-claim penalties, which are adjusted annually for inflation. Currently, the adjusted per-claim penalties range from \$14,308 per claim to \$28,618 per claim. As a result, what is considered a "claim" under the FCA can have

significant impacts on potential exposure.

The Eighth Amendment's Excessive Fines Clause

In an FCA action, civil penalties may dwarf the government's actual damages. These situations may implicate the Excessive Fines Clause of the Eighth Amendment which prohibits punitive fines that are excessively disproportionate to an offense. Several courts have applied the Excessive Fines Clause to FCA cases as well as *qui tam* actions where the government has chosen not to intervene.