

“There is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the Government.”

-Benjamin Franklin

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The False Claims Act

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The Federal False Claims Act

- First enacted in 1863 during the Civil War.
- Authorizes the United States Government to recover damages caused by false or fraudulent claims.



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The Federal False Claims Act

- The purposes of the False Claims Act are to make the United States whole in the event of a false claim and to deter fraud against the Government.
- Broadly protects the funds and property of the Government from false or fraudulent claims.
- In enacting the False Claims Act, Congress intended to reach all types of fraud, without qualification, that might result in financial loss to the Government.

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Qui tam pro domino rege quam pro si ipso in hac parte sequitur

Who sues on behalf of the king as well as for himself.



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Qui tam Provisions of the Act

- The False Claims Act allows a person, called the "Relator," to bring an action on behalf of the United States against an individual or company alleged to have violated the False Claims Act.
- The Relator can get a share of between 15% and 30% of the United States' recovery, plus attorney's fees and costs.

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**Liability Provisions:
31 U.S.C. § 3729(a)(1)(A)**

- The False Claims Act makes it unlawful to knowingly present or cause to be presented false or fraudulent claims for payment or approval.
- To establish a violation of this section of the False Claims Act, the Relator must prove by a preponderance of the evidence that:
 - 1) Defendant presented or caused to be presented a claim for payment;
 - 2) the claim was false or fraudulent; and
 - 3) Defendant knew the claim was false or fraudulent.

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**Liability Provisions:
31 U.S.C. § 3729(a)(1)(B)**

- The False Claims Act also makes it unlawful to make, use, or cause to be made or used a false record or statement material to a false or fraudulent claim.
- To establish a violation of this section of the False Claims Act, the Relator must prove by a preponderance of the evidence that:
 - 1) Defendant made, used, or caused to be made or used a false record or statement;
 - 2) Defendant knew the record or statement was false; and,
 - 3) the record or statement was material to a false or fraudulent claim.

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**Liability Provisions:
31 U.S.C. § 3729(a)(1)(C)-(G)**

- The False Claims Act also makes it unlawful to:
 - (C) conspire to commit a violation of the False Claims Act
 - (D) wrongfully retain Government property
 - (E) falsely certify receipt of Government property
 - (F) buy Government property from unauthorized individuals
 - (G) knowingly use false records or statements material to an obligation to pay money or property to the Government

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“Claim” Defined

- “Claim” is broadly defined as “any request or demand” for money or property made to an agent of the United States or a grantee spending Government money.
- Excludes fraud against recipients of Government paychecks or Government benefit checks.



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“Knowing” Defined

- “Knowing” means having “actual knowledge,” acting “in deliberate ignorance,” or acting with “reckless disregard of the truth or falsity of information.”
- Proof of specific intent to defraud is not required.



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“Material” Defined

- “Material” means “having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.”



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False Claims Act Damages

- The defendant is liable to the United States for:
 - A civil penalty for each violation of the Act of not less than \$5,500.00 and not more than \$11,000.00; plus
 - Three times the amount of damages which the Government sustains because of the act of that person.

31 U.S.C. § 3729(a).

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False Claims Act Damages

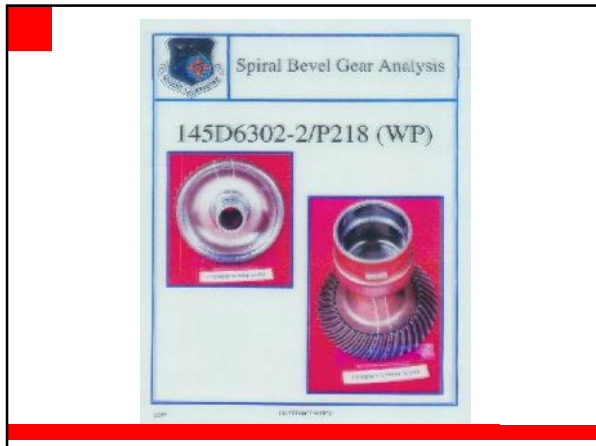
- The legal measure of damages in a False Claims Act case is often a disputed question.
 - Generally courts apply a benefit of the bargain analysis, subtracting the value of what the Government received from the value of what the Government should have received.
 - When these damages should be trebled is another disputed question.
 - Gross trebling: $(\$1,000 \times 3) - \$500 = \$2,500$
 - Net trebling: $(\$1000 - \$500) \times 3 = \$1,500$
 - When the Government is paying for something intangible, like a development grant, or the claims are tainted by bid-rigging or kickbacks, there is often no damages offset.
 - *E.g. United States ex rel. Longhi*

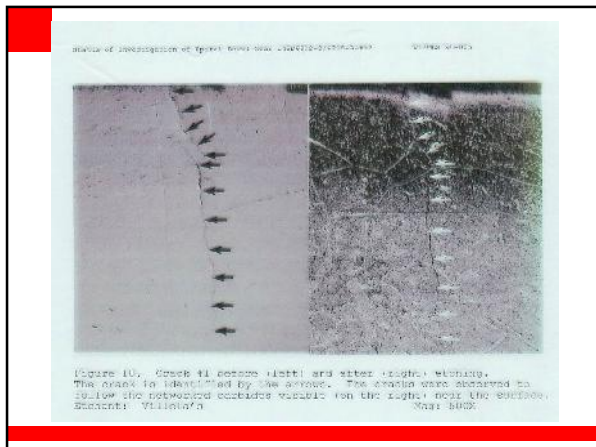
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United State ex rel. Roby: Product Substitution, Substandard Parts



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**United States ex rel. Magee:
Bid Rigging**



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United States ex rel. Magee



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United States ex rel. Magee

THE DEPARTMENT OF JUSTICE
OFFICE OF PUBLIC AFFAIRS

FOR IMMEDIATE RELEASE
Thursday, June 6, 2013

United States Alleged That Ohio-based Companies Falsely Claimed Disadvantaged Business Status

The Justice Department announced today that a number of related entities and individuals agreed to pay \$2.58 billion to resolve allegations that they falsely claimed disadvantaged business status on a number of federally-funded transportation projects. These entities are Dayton-based Testech, Inc. and its owner, Sheril Acia, and Dayton-based CESCO Testing Technology, Inc., CESCO International, LLC, and CESCO, Inc. (collectively CESCO), and their owners, David and Sheril Oakes.

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United States ex rel. Parker: Program eligibility, Disadvantaged Business Enterprise

Department of Justice
Office of Public Affairs

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Testech and Cesco Agree to Pay \$2.58 Billion to Resolve False Claims Act Allegations

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United States ex rel. Yarberry: Kickbacks

Kmart pharmacy

SHOP YOUR WAY MEMBERS GET A

\$30 Kmart Award Card
with the purchase of a TRANSFERRED prescription.

*Award card good towards the next purchase of non-pharmacy items. Excludes...

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**United States ex rel. Wall:
Davis Bacon Act**



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**United States ex rel. Donegan:
Services Not Provided**



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**United States ex rel. Palmer:
Product Substitution**



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Preparing the Disclosure Statement and the Complaint

- Before filing their Complaint, relators must provide a written disclosure of all of their material evidence and information on the United States.
31 U.S.C. §§ 3730(b)(2), 3730(e)(4)(B)(i).
- Both the Disclosure Statement and the Complaint must be served on the United States pursuant to Federal Rule of Civil Procedure 4.
31 U.S.C. § 3730(b)(2)



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Preparing the Disclosure Statement and the Complaint

Ensure You Have a Case:

- The case must be filed *in camera* and under seal.
31 U.S.C. § 3730(b)(2)
- At this stage, the Complaint should only be served on the United States --- **not on defendants**
- If the relator breaches the seal, they may not be entitled to a share of the proceeds.



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Preparing the Disclosure Statement and the Complaint

Ensure you have a case:

- Race to the Courthouse - only the first-filed relator can bring a case
31 U.S.C. § 3730(b)(5)



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Federal Rule of Civil Procedure 9(b) generally applies. The Complaint should allege:

- The who, what, when, where, and how of the scheme

AND

- allege representative false claims

OR (in the Sixth Circuit)

- describe the invoices, explain why the relator has reason to know that they were actually submitted, and allege a detailed scheme

OR (the prevailing trend)

- allege particular details of a scheme to submit false claims paired with reliable indicia that lead to a strong inference that claims were actually submitted.

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Preparing the Disclosure Statement and the Complaint

Other Considerations:

- Discuss with the client what information they should and should not give you.



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Preparing the Disclosure Statement and the Complaint

Ensure You Have a Case:

- A prospective relator is better off not signing a severance agreement that could be construed as releasing a False Claims Act action or a False Claims Act retaliation claim
- Nor should a relator tell a defendant about a filed suit to initiate settlement talks before the Complaint is unsealed. That is a breach of the seal.



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Actions That May Be Barred

Tax Bar

- Violations of the Internal Revenue Code Cannot Be a Basis of a False Claims Act suit
31 U.S.C. § 3729(d)
- The IRS has a separate whistleblower reward program.

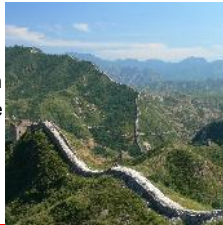


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Actions That May Be Barred

First to File Bar

- Actions based on the same facts underlying a pending case (and no one can intervene in a pending case except for the Government)
31 U.S.C. § 3730(b)(5)
- Actions based on allegations made in a pending civil or administrative case to which the Government is a party
31 U.S.C. § 3730(e)(3)



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Actions That May Be Barred

Criminal Conviction

- Relator is criminally convicted for their role in the violation.

31 U.S.C. § 3730(d)(3)



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Actions That May Be Barred

Limited Bar on Armed Forces Relators

- Actions brought by a member of the armed forces against another member of the armed forces arising out of the defendant's service

31 U.S.C. § 3730(e)(1)



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Actions That May Be Barred

Bar Against High Level Government Defendants

- Actions against a member of Congress, member of the judiciary, or certain senior members of the executive branch if based on information known to the United States when the action was brought.

31 U.S.C. § 3730(e)(2)(A)



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Actions That May Be Barred

Public Disclosure Bar

Unless the relator is an "original source," an action in which the allegations were publicly disclosed:

- in a Federal criminal, civil or administrative hearing to which the Government is a party
- in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation, or
- in the news media

31 U.S.C. § 3730(e)(4)(A)



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Actions That May Be Barred

A relator is an original source if either:

- the relator voluntarily disclosed the information on which the allegations are based to the Government prior to the public disclosure, or
- the relator has knowledge that is independent of and materially adds to the publicly disclosed allegations and provided the information to the Government before filing the case

31 U.S.C. § 3730(e)(4)(B)



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Actions That May Be Barred

Statute of limitations

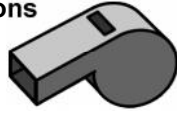
- 6 years after the False Claims Act violation or
- 3 years after the United States should have known of the violation (whichever is last),
- but no more than 10 years after the violation

31 U.S.C. § 3731(b)



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Relief from Retaliatory Actions
31 U.S.C. § 3730(h)



Any employee, contractor, or agent

- Who is discharged, demoted, suspended, threatened, harassed, or discriminated against in the terms and conditions of their employment
- Because of their lawful acts
 - In furtherance of a False Claims Act case

OR

- For efforts to stop 1 or more violations of the False Claims Act

Is entitled to all relief necessary to make them whole.

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Relief from Retaliatory Actions
31 U.S.C. § 3730(h)



• Relief Includes:

- Reinstatement with the same seniority status
- 2 times the amount of back pay
- Interest on the back pay
- Compensation for any special damages
- 3 year statute of limitations

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Whistleblower Reward Programs

- **IRS Rewards:** Original Information on tax law violations. Up to 30% reward.
- **SEC Rewards:** Up to 30% reward for original information on securities law violations
- **Commodity Futures Trading Commission Rewards:** Up to 30% reward for original information about fraud and misconduct in the commodities trading markets.



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Questions



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