

# [False claims act essay example](https://assignbuster.com/false-claims-act-essay-example/)

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In 2012, the federal government recovered in excess of $3. 8 billion (including $2. 2 billion from a leading pharmaceutical company) in judgments and settlements under the False Claims Act, 31 U. S. C. §§ 3729-33 (the “ FCA”, “ PL 99–562” or the “ Act”). This was until then, the second largest haul. By the close of 2012, in excess of $17 billion had been similarly recovered in the preceding five years. In January 2013, more than 846 cases were pending, of which whistleblowers filed 752. The increasing number of quit tam cases is a testament to the increased investment in the same by whistleblowers as well as the Department of Justice, and possible effectiveness of freelance litigators to help the government ensure compliance with regulations. First enacted in the US in 1863, the FCA initially sought to rein in Union Army suppliers that Congress suspected to be defrauding the state. The Act imposed double penalties (and $2000) for government suppliers found liable for knowingly submitting a false payment claim. The FCA represented a powerful new tool to leverage freelance litigators (whistleblowers) in combatting billion dollar losses in revenue (and costs) due to fraud.
There are multiple contemporary qui tam statutes in the US, other than FCA. As the Supreme Court found in United States ex rel. Marcus v. Hess (1943), that any legislation such as the Rivers & Harbors Act that provides rewards for informers that did not specifically forbid or authorize such informers to undertake the action are interpreted to authorize informers to sue. The FCA, as first enacted, sought to prohibit certain specific frauds against the state, including but not limited to making or producing fraudulent claims, false oaths, false vouchers, embezzlement, theft, conspiracy and forged signatures. § 3729(a) defines conduct that created liability under the Act, while §§ 3729(a)(1)(A-B) sets out specific liabilities. Any parties that knowingly presents or causes to be presented, a fraudulent or false claim for approval or payment, employs false statements or materials, and or conspires to commit violations under A, B, D, E, F and G will be in violation of the Act. Further liabilities arise from issuance of false official receipts, illegal acquisition and/or disposal of government property, negligence on the part of state officers (e. g. knowing delivery or creation of receipts without knowledge of the information contained therein among others). § 3729(a)(1)(G) defines liability for parties that act improperly, not necessarily to defraud the state, but to avoid meeting their financial obligations to the state, while § 3729(a)(1)(C) renders it liable to conspire to undermine the FCA. Civilian offenders faced up to five years imprisonment and/or a fine of less than $5000. Offenders also faced liability for $2000, and double the costs/damages sustained by the state as a result of their fraud and/or prosecution. Any person could bring a suit in their name and the state’s to recover civil penalties, even though the settlement was only possible with the leave from the federal prosecutors and the courts.
In 1942, initiated amendments to the Act to prevent parasitical actions by plaintiffs driven only by the possibility of substantial rewards. Effectively, PL 78-213, Statute 608 of 1943 curtailed qui tam provisions to require that relators provide the state with the evidence upon which their actions was based and permit the state 60 days to intervene. It also precluded suits that used information that was already in the government’s possession and reduced the relator’s entitlement in the event of a successful suit to less than 25% (if they litigated and less than 10% if the state litigated). Despite it being an old law that went back to the colonial times, the FCA remained largely dormant until 1986, when Congress became convinced that insider information was critical in combatting the culture of non-compliance in public procurement. Without whistleblowers with privileged access to information, the FCA was inadequate in its functions. The 1986 amendments sought to ensure the law had more teeth.
The changes included a robust cause of action for reverse false claims and protection for whistleblowers from possible retaliation (U. S. C. 3730(h) (1988 Ed.). Retaliatory actions against insiders and outsiders with privileged access to information that lawfully volunteer the same and/or cooperate with attempts to investigate and prosecute offenders under the FCA are strictly prohibited . It also strengthened penalties to between $5000-$10, 000 and treble the costs/damages, increased the award for qui tam relators to between 25% and 30% and defined the knowledge required violations as well as a declaration that a specific intent wasn’t necessary. In addition, the 1986 amendments declared that states could bring qui tam actions, relaxed prohibitions on actions based on information in public domain, expanded the statute of limitations and set the burden of proof standard that was to be met by relators. Once again, in 2009, the FCA was amended mainly to incorporate judicial precedents requiring greater clarity. The reforms included the elimination of suggestions that false claims must be submitted directly to a federal employee/officer, and the inclusion of specific materiality elements so that they included false statements that could naturally influence payment. The amendments also expanded the conspiracy proscription to cover all violations of the FCA and enlarged the reverse claims offense to include improper avoidance.
The Fraud Enforcement and Recovery Act of 2009 amended the FCA to allow private citizens to bring actions under the federal government’s prerogatives. Under § 3730(a) and (b) both the attorney general and private citizens may bring an action, although the state has the option under § 3730(c)(3) and § 3730(c)(2)(c) of dismissing, limiting the relator’s participation or assuming responsibility for litigation from the beginning, or at any stage of the proceedings upon showing a reasonable cause. Relators are still prohibited from lodging claims based on information in the government’s possession (except when they are the primary source of such information) and precludes third parties from bringing similar actions based on the same information under the first-to-file clause. In addition, while civil servants may bring actions unless barred by statute, members of the armed forced may not. The basis for liability comprises seven separate misconducts as defined under § 3729 above.
While there are exceptions for undiscovered fraud for up to ten years, FCA actions must be lodged within six years of the violation. Despite this time limitation, the state enjoys considerable flexibility in regard to the limitations. Litigation for defendants who retaliate contrary to § 3730(h) is subject to the applicable state statute of limitations since time limitations under the FCA only apply to actions under § 3729. The process starts with a formal filing with a federal court with jurisdiction over the matter as provided under § 3732(a) and § 3730(b), following which the relator must deliver all information in their possession with regard to the case to the state. The shall within 60 days and/or as permitted by the court conduct investigations and decide on the appropriate intervention, after which the defendants will be given notice within 20 days of the state’s decision. The burden of the proof rests with the state and/or the relator. Defendants found to be liable under § 3729 shall pay up to $10, 000 in penalties, the state’s and relator’s litigation costs and up to treble a number of damages incurred. In the event one is guilty of retaliation against a relator and/or other parties that cooperate with the state in the investigation and prosecution, they shall pay the plaintiff’s costs and damages. § 3730(h)(2) includes double the back-dated pay and interest on the same, and reasonable compensation for any other injury incurred due to the retaliation. A successful action under the FCA entitles the primary relator to 25%-30% of the proceeds recovered from the defendant (if the state did not take participate in the action). If the government participates in the litigation as provided for under § 3730(c), then the relator is entitled to between 15% and 25%, although this may be capped at 10% or completely denied in cases where the action was based on information that is already in the government’s possession and/or the relator was personally involved in the violation of the FCA (Roberts and Vale 15; Doyle 17). However, in common with other civil proceedings, in the event of a failed action under the FCA and the determination by the court that the action was vexatious and frivolous, then the defendant may be awarded damages arising from the suit as the court may deem it fit.

## Effects of FCA on the Economy

Since the 1986 reforms, in $20 billion has been recovered by the federal government, $17 billion of which was recovered after 2009. The FCA has had the effect of empowering whistleblowers to take on corrupt public and private citizens defrauding the state, by affording them protections and offering them incentives to cooperate with the government in ensuring regulatory compliance. This is perhaps best evidenced by the soaring number of whistle blower-initiated actions that have succeeded and/or are pending before courts. According to Gibson Dunn (2013), more than 800 cases were pending in January 2013. The fact that the actions do not only result in the recovery of lost monies but also recovers treble makes it a viable and potentially lucrative venture for many whistleblowers. According to Braithwaite (2008), qui tam statutes can, and should be extended to financial markets and taxation to ensure compliance (p. 74). Qui tam has the effect of creating a network of whistleblowers, law firms, prosecutors and state regulatory bodies, which effectively enhances evidence and intelligence gathering, ultimately bolstering litigation capabilities. The very reason why qui tam emerged in England in the 13th century i. e. supplement the failures in the state regulatory capacity has largely been realized by modern legislations.
Rhoad and Fornataro (2009) argues that qui tam enhances the efficiency of regulation nd the entire economic system by ensuring increased compliance (and recovery of defrauded resources), prevention of wastage and abuse. Between 1986 and 2009, in excess of 10, 063 cases had been filed under the FCA, of which 38% were by government agencies (on-qui tam and involved no relator). The state recovered more than $22 billion, with $8 billion having resulted from primarily qui tam proceedings without the state’s considerable involvement. Relators have earned an estimated $2. 2 billion. It amounts to a privatization of regulatory enforcement, which in effect frees up resources that are used by the state in achieving the same goals for other uses. Braithwaite (2008) asserts that this law create checks and balances in the economy, where every party is incentivized to look out for the state’s best interests, thereby creating inherent deterrents to fraud (p. 74). However, these benefits may only be realized if there are adequate safeguards against vexatious and frivolous actions in industries such as pharmaceuticals, where such proceedings can derail research and development, cause unnecessary legal expenditure and instil irrational fear among practitioners.
In common with other governments across the world, the US government loses billions annually due to fraud. While multiple enforcement/regulatory agencies exist to ensure compliance, the extent of the problem and the resource limitation means that it is impossible to ensure complete compliance. Qui tam statutes effectively enlist the assistance of private citizens with privileged access to information about fraud by incentivizing them to independently bring actions against offenders on their own and the state’s behalf, and/or cooperate with the state in the investigations, prosecution and recovery of civil forfeitures and penalties (Doyle 1; Braithwaite 78). The freelance regulatory compliance inspectors and enforcers effectively ensure greater compliance, and efficiency of the entire economic system.

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