



COMMENTARY
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Strategic Budgeting for Early Resolution in False Claims Act Cases

IN SHORT

The Situation: False Claims Act ("FCA") cases are high-risk matters, given their potential to result in "company-busting judgments."

The Strategy: The high stakes require defendants and their counsel to treat the budget for the matter as an actual part of the litigation strategy.

The Action: An analysis of dozens of recently resolved FCA cases suggests that deploying sufficient resources at the critical first and second stages of these matters is a key factor in achieving early resolution and saving significant expense.

The Players in False Claims Act Cases

The vast majority of FCA cases begin as *qui tam* cases filed by individual whistleblowers ("relators"). *Qui tam* cases are filed under seal to give the government time to investigate and determine whether to intervene and take over the case from the relator.

The government's intervention decision is a critical juncture in the case, but it is not case-dispositive. Even if the government does not intervene, the relator can and often does proceed—and is doing so more frequently in recent years. Therefore, the client faces at least three interested parties on the other side: (i) the relator and his or her lawyers; (ii) the regulatory agency involved (such as DOD, HHS-OIG, etc.); and (iii) the Department of Justice.



If a case proceeds to the summary judgment stage, the client can expect to pay for more extensive discovery. This additional work does not necessarily improve the chances of success but certainly will increase the costs.



The Four Stages of False Claims Act Cases

1. **Investigation/Intervention:** In this stage, the claims are investigated (usually to include a significant document production), the government decides whether to intervene, and the parties may consider settlement. Approximately 52 percent of the cases we examined have been resolved at this stage, either by agreed dismissal or settlement.
2. **Motion to Dismiss:** In this stage, the defense is focused on attempting to have the court dismiss the case through legal (not fact-based) arguments, such as a lack of specificity of pleading or materiality of alleged violations. Another 27 percent of cases we analyzed have been resolved at this stage, through either settlement or a court-ordered dismissal.
3. **Discovery/Summary Judgment:** In the absence of settlement or an order of dismissal, the parties in this third stage engage in more extensive discovery, including expert and fact witness depositions, and more complex briefing to address purported issues of fact and contested legal issues. Nearly 80 percent of the FCA cases we examined were resolved before the summary judgment stage.
4. **Trial:** The overwhelming majority of FCA cases (more than 99 percent) settle or are dismissed before trial.

Strategic (Counterintuitive) Budgeting

Given the very high percentage of early resolutions achieved in the first two stages of FCA cases, one might think it is unnecessary to budget significant resources at these stages—that these higher budget amounts are required only if the case reaches the stage of more extensive discovery and trial preparation. Our experience and data suggest taking a counter-intuitive approach in crafting the case budget, specifically focusing resources on the early stages.

Our experience shows that, if a case proceeds to the third (summary judgment) stage, the client can expect to pay for more extensive discovery, including more document review and production, depositions of witness and experts, and more complicated briefing (because summary judgment briefing involves a factual record). And beyond that, the demands of the fourth (trial) stage only add to those costs.

In contrast, budgeting the early stages to give counsel the resources to develop the facts and engage the government and the relator early on produces better, faster, and more cost-effective results. Absent a grant of summary judgment, winning at trial, or the government or relator giving up, the costs of defense and settlement amounts are often higher at the later stages of an FCA case.

TWO KEY TAKEAWAYS

1. Laying the groundwork for a successful resolution in the early stages of an FCA case requires strategic budgeting for an early and thorough investigation of the claims and for early and persistent engagement with opposing counsel to advocate for the company.
2. Armed with the results of their investigation, experienced counsel must engage the government and, in some cases, even the relator's counsel, on an early and ongoing basis, through in-person meetings and presentations, to explain the company's record on the allegations and argue the company's positions on the legal issues.



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