



## Chapter 2

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# False Claims Act v. the Energy and Minerals Industry

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**§ 2.01. Introduction.**

During the past few years, a virulent strain of False Claims Act (FCA) litigation — arising out of alleged noncompliance with environmental, health and safety requirements — has been brought against perceived environmental “bad actors.” Anyone doing business with the government, including subcontractors and suppliers of goods or services to a government contractor, is potentially exposed to the extraordinary liability which is authorized under the FCA.<sup>1</sup> This statute is far more potent than the “citizen suit” provisions in the environmental laws under which citizens may file suit against anyone who is out of compliance with those laws and seek injunctive relief, civil penalties can be awarded to the government, and litigation costs, including attorneys’ and expert witness fees awarded to the prevailing party.

The energy and minerals industry likely will be, and to some extent already has been, targeted for attack under the FCA. There are several reasons for this. First, many citizen activists perceive the energy and mineral industries as more likely to adversely impact the environment than other industries. In some states like Montana, where citizen activists secured a legislative halt to new mining activity, the industry is under siege. Second, much of what the energy and minerals industry does occurs on public lands and under leases requiring that royalties be paid to the federal government. Third, these industries are among the most heavily regulated in the nation. Heavy regulation often presents challenging compliance problems that, when not met, may lead to FCA *qui tam* actions based upon noncompliance. Finally, deregulation and privatization on the

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<sup>1</sup> False Claims Act, 31 U.S.C. §§ 3729 *et seq.* (2000).

energy side and a new royalties regulatory framework on the minerals side add new compliance challenges that sophisticated *qui tam* plaintiffs' lawyers likely will monitor.

Although our primary focus here (because it is the focus of many of the recent cases) is on the environmental noncompliance context, FCA actions alleging other kinds of regulatory noncompliance – especially in the mineral royalties context – are on the rise. Of course, FCA litigation against Defense Department contractors has been prevalent for years. It is spreading to all areas of government procurement of goods or services. The discussion below applies beyond the environmental noncompliance context to any FCA suit alleging regulatory noncompliance.

This chapter begins with a discussion of the key elements of the False Claims Act. We then turn to a discussion of some recent cases arising in the environmental noncompliance context. Each case involves threats of exceptionally high potential liability and litigation costs. We then discuss a series of significant legal issues, some of which involve ambiguities in the statute and inconsistency in the case law. From there we turn to significant strategic and tactical issues involving the defense of such cases. We conclude with a discussion of preventive measures, focusing on how this type of liability can be avoided or minimized.

## **§ 2.02. Key Elements of the False Claims Act.**

### **[1] — Overview.**

The False Claims Act allows the federal government to sue anyone who presents a “false claim” which, in the environmental context, can include any request for payment coupled with a misrepresentation with respect to environmental compliance or failure to disclose material noncompliance within any environmental, health or safety requirement. If successful, the government may recover treble damages, a civil penalty of up to \$10,000 per violation, and litigation costs. In addition, any private citizen may file a complaint under seal in federal district court alleging the submission of a false claim. If the government does not elect to intervene, the individual may maintain the suit under the *qui tam*<sup>2</sup> or

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<sup>2</sup> The phrase “*qui tam*” is short for the expression “*qui tam pro domino rege quam pro se ipso*” which means literally “he who as much for the King as for himself.” A “*qui tam*”