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[Back to Article](#)

The Tar Heel State Steps Up Its Fight Against Fraud — Part II

North Carolina's False Claims Act has a more stringent "first-to-file" provision than its federal counterpart. The federal False Claims Act's first-to-file provision is intended to prevent potential relators from filing parasitic suits based on the same allegations that underlie an already pending qui tam suit.

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Editor's note: This is the second article in a two-part series discussing North Carolina's False Claims Act. The [first article](#) discussed the Federal False Claims Act and its state counterpart as passed by the legislature in North Carolina.

North Carolina's False Claims Act has a more stringent "first-to-file" provision than its federal counterpart. The federal False Claims Act's first-to-file provision is intended to prevent potential relators from filing parasitic suits based on the same allegations that underlie an already pending qui tam suit. Thus, under the federal FCA, when a relator brings a qui tam action, only the government may intervene or bring a related action on facts underlying that qui tam action.

The N.C. FCA is stricter than the federal FCA, however, and prohibits persons other than the state from intervening or bringing a related action based on the facts underlying a pending N.C. FCA action, federal FCA action or an action based on any similar provision of law in any state. Thus, the first-to-file bar could be more of a hindrance to potential relators under the N.C. FCA than under the federal FCA.

Public Employee Limitation

The N.C. FCA also includes a major departure from the federal FCA because it limits the scope of qui tam matters that can be brought by public employees. Specifically, the N.C. FCA bars public employees or officials from filing FCA suits if the allegations of the suit are based substantially upon allegations of wrongdoing or misconduct that (1) such person had a duty or obligation to report or investigate within the scope of his or her public employment; or (2) information or records to which the person had access to as a result of his or her public employment or office.

In contrast, the federal FCA does not prevent public employees from being relators, even if those employees had a duty or obligation to report misconduct to their employer. By barring an entire class of potential relators from filing suits, the N.C. FCA is less effective than the federal FCA in encouraging and incentivizing qui tam suits.

Anti-Retaliation Provision

Both the N.C. FCA and the federal FCA protect relators with anti-retaliation provisions. However, the Department of Health and Human Services also found the N.C. FCA to be less protective than the federal FCA because it lacks an explicit statute of limitations period for anti-retaliation claims.

Although the N.C. FCA contains an anti-retaliation provision that is nearly identical to the federal FCA, it lacks the federal FCA's three-year statute of limitations. The North Carolina Legislature omitted a specific statute of limitations for N.C. FCA anti-retaliation claims. Accordingly, whistleblowers must rely on the most analogous North Carolina statute of limitations provision.

Applying this standard would not pose a disincentive to N.C. FCA whistleblowers, however, because a three-year statute of limitations under §1-52(5) applies to wrongful discharge actions. This is identical to the post-amendment version of §3730(h), which specifies that claims for retaliation have a three-year statute of limitations. Thus, as applied, the N.C. FCA is "as protective"

as the federal FCA. Respectfully, HHS was mistaken on this point.

Despite its lack of an explicit statute of limitations for anti-retaliation actions, the N.C. FCA is actually more protective of potential whistleblowers than the federal FCA. Under §1-613 of the N.C. FCA, "any employee, contractor or agent who is discharged, demoted, suspended, threatened, harassed or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done ... in furtherance of an action under the article or in furtherance of other efforts to stop one or more violations of G.S. §1-607 ... shall be entitled to all relief necessary to make the employee whole." Additionally, North Carolina's Medicaid Anti-Fraud statute's anti-retaliation provision, which pre-dates the passage of the N.C. FCA, is also incorporated by reference into the N.C. FCA.

Employees who are discriminated or retaliated against in violation of the N.C. Medicaid statute may bring an action under the N.C. FCA for violations of the N.C. Medicaid statute, which predates the passage of the N.C. FCA. By adopting a strong anti-retaliation provision, the state of North Carolina removed a major intimidating influence on potential relators — the fear of being fired, demoted, harassed or discriminated against by their employer for blowing the whistle.

There is no meaningful difference between the anti-retaliation provision of the N.C. FCA and §3730(h)(1) of the federal FCA. Section 1-613 of the N.C. FCA protects employees or others acting in furtherance of both "an action under this article" and "other efforts to stop one or more violations." The federal FCA protects potential whistleblowers engaged in "lawful acts ... done in furtherance of efforts to stop one or more violations." Presumably, the N.C. FCA's "furtherance of an action" and "other efforts" would encompass "lawful acts" referred to in the federal FCA.

In addition, the relief available to an employee under the N.C. FCA is identical to that available under §3730(h)(2) of the federal FCA: two times the amount of backpay and interest on the backpay; reinstatement with the same seniority status; and compensation for any special damages, including litigation costs. Furthermore, North Carolina's Medicaid Anti-Fraud statute's anti-retaliation provision, which predates the passage of the N.C. FCA, is also incorporated by reference into the N.C. FCA. The N.C. FCA allows actions to be filed based on acts committed prior to Jan. 1, 2010, if that action would have been covered under the North Carolina Medical Assistance Provider False Claims Act and if the applicable statute of limitations period has not lapsed.

Thus, employees who are discriminated or retaliated against in violation of the N.C. Medicaid statute may bring an action under the N.C. FCA. Because §1-616 of the N.C. FCA mandates that the act be construed to be consistent with the federal FCA and its amendments, the scope of the N.C. FCA's anti-retaliation provision is at least as protective as that of the federal FCA. The only difference is that, while the N.C. FCA encompasses the same statute of limitations as the federal act, it does not contain an explicit three-year statute of limitations.

The Civil Investigative Demand

Like the federal FCA and several other qui tam states, North Carolina has added an FCA-specific civil investigative demand process. This process allows the North Carolina attorney general (NCAG) to issue subpoenas to obtain information and documents from a defendant related to false claims.

While this process will do much to further an N.C. FCA investigation, it does not specifically authorize the NCAG to take depositions or seek oral testimony from a defendant. By contrast, the federal FCA allows the government to request an oral examination of any person who the government reasonably believes to be in possession or control of evidence indicating a violation of the federal FCA. Because this provision strengthens the government's ability to investigate FCA violations, the omission of such a provision in the N.C. FCA may curtail an NCAG FCA investigation that does not potentially involve Medicaid fraud.

Seal Period

Under §1-608(b)(2) of the N.C. FCA, a qui tam complaint filed under the act will remain under seal for at least 120 days while the NCAG investigates the relator's allegations. The federal FCA, however, provides for a more limited 60-day seal period to investigate the relator's claim and to make a decision on whether to intervene before the complaint is unsealed.

Because the state of North Carolina has far fewer personnel and resources than the federal government, this longer seal period could afford the state the opportunity to make a more thorough determination on the merits of a relator's complaint before making an intervention decision. On the other hand, the longer seal period could slow the litigation process and lead to a backlog of cases. However, as a practical matter, very few (if any) qui tam matters are unsealed within the first 120 days.

Litigation-Cost Provision

Notably, under §1-608(c), the NCAG can recoup the state's cost to litigate FCA cases, including reasonable attorney fees. The NCAG may also retain a portion of the state's recovery from successful qui tam suits. This provision, which is not found in the federal FCA, will provide necessary funding for the NCAG's Office to investigate and litigate N.C. FCA cases. Eventually, this provision may allow the NCAG's Office to become self-sustaining, as litigation costs collected from wrongdoers will facilitate stronger investigation and prosecution of even more cases. When this occurs, reductions in the state's overall budget will not have as great an impact on the NCAG's offensive against fraud committed against the state fisc.

An Important Tool for Recovery

The N.C. FCA provides a very important tool for recovering wrongfully taken state taxpayer money. The qui tam provisions will

incentivize whistleblowers to file suit on behalf of the state to recover funds lost to fraud, while also providing for the NCAG's effort to become self funding. While North Carolina taxpayers will immediately benefit from this new fraud-fighting mechanism, a few changes are needed for the N.C. FCA to reach its potential. The North Carolina General Assembly should modify its public disclosure bar, original source exception and first-to-file provision to bring them in line with their counterparts under the most recent amendments to the federal FCA.

In addition, removing the public employee limitation would incentivize an entire sector of potential whistleblowers. The North Carolina General Assembly should also add to the NCAG's arsenal of investigative tools so that it encompasses the ability to conduct depositions — a powerful tool in collecting crucial information for a qui tam investigation. Additionally, the state might shorten the 120-day seal period so that it mirrors the federal FCA. These changes would further strengthen the N.C. FCA and bring this important legislation in line with the federal FCA qui tam provisions. These efforts would create the maximum return for the taxpayers of North Carolina. •

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