

SPECIAL FEE SHIFTING STATUTE UNDER THE CALIFORNIA FALSE CLAIMS ACT

A DEFENDANT WILL BE AWARDED HIS/HER ATTORNEYS' FEES IF THE ACTION IS FRIVOLOUS, VEXATIOUS OR BROUGHT FOR PURPOSES OF HARASSMENT

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In recent years, public entities have threatened to pursue False Claims Act ("FCA") actions in response to potential claims by contractors as a means to deter the contractors' claims. Public entities have even gone so far as to file FCA counter-claims in response to lawsuits filed by contractors before the public entity has done any type of investigation as to whether a false claim has occurred. As recognized in a recent appellate court decision, however, contractors have a powerful means at their disposal to curb this abuse, in the form of court-awarded attorneys' fees against the public entity.

California's FCA has a fee-shifting provision stating that a court may award to a prevailing defendant its reasonable attorney's fees and expenses against the public entity if the court finds that the false claim action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment. This fee-shifting provision does not require the underlying contract between the parties to include an attorneys' fee provision.

Until the recent case of *County of Kern v. Jadwin* (2011) 197 Cal.App.4th 65, there were no published California cases construing this fee-shifting provision. In the *Jadwin* case, the Court looked to federal cases construing the federal FCA for guidance since California FCA is patterned after the federal FCA and has a similar provision for attorneys' fees. (*Id.* at 71.)

Federal cases have held that, when viewed objectively, a FCA claim is



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frivolous if it is said to have no reasonable chance of success. (*Id.* at

71.) Under the FCA, subjective bad faith is not required when the action is objectively frivolous or the complaint is "bereft of any objective factual support" and "clearly has no chance of success." (*Id.* at 72 [citing *Mikes v. Straus* (2d Cir. 2001) 274 F.3d 687, 705].)

In *Jadwin*, Dr. David Jadwin was the chairman of the pathology department at Kern Medical Center, a hospital owned and operated by the County of Kern. In 2006, Dr. Jadwin was placed on administrative leave after he complained about deficient patient care and hospital regulatory violations. Dr. Jadwin then sued the County in federal court for employment retaliation, denial of his due process rights, and violation of federal and state employment laws. While the federal lawsuit was pending and while on administrative leave, Dr. Jadwin attended continuing education classes. He sought reimbursement costs for the classes and travel-related expenses from the County totaling \$3,125.

Instead of paying the reimbursement request, the County sued Dr. Jadwin in state court based on the theory that he falsely requested the \$3,125 within the meaning of the FCA. The matter was mandated to judicial arbitration by the superior court. After Dr. Jadwin propounded discovery to the County to elicit facts to support the County's false claims allegations, and the County provided no such facts, the matter was arbitrated and the arbitrator denied the County's FCA claim and awarded Dr. Jadwin statutory costs. The trial court then entered judgment on the arbitration award and, since the arbitrator awarded Dr. Jadwin his costs, the trial court included an award of attorneys' fees because fees may be recoverable as a cost or by statute.

After Dr. Jadwin filed his motion for \$50,820 in attorneys' fees, the County opposed the motion and argued that the arbitrator made no finding that the FCA claim was frivolous, vexatious, or brought primarily for purposes of harassment. The trial court found that the FCA action was frivolous and brought to harass Dr. Jadwin, stating that the County failed to investigate the FCA claim and that the County's discovery responses were evasive and conclusory. The trial court also stated that the County filed the action as one of unlimited jurisdiction even though it could have never reached the jurisdictional minimum of \$25,000. The trial court awarded Dr. Jadwin \$50,820 in attorney fees and the County appealed the trial court's ruling.

The appellate court came to the same conclusion. Relying on the federal courts' interpretation of the attorneys' fees provision of the FCA, and based on the underlying facts, the

appellate court held that the County filed and maintained a lawsuit against Dr. Jadwin for the purpose of harassing him. The timeline of events combined with the lack of probable cause to prosecute the lawsuit gave the trial court sufficient circumstantial evidence to declare the lawsuit vexatious. The events were: (1) after Jadwin filed suit in federal court, County filed its FCA complaint, (2) the County filed its action in “unlimited” jurisdiction of the Superior Court even though the amount in controversy did not exceed \$25,000, (3) the County did no investigation of the complaint, (4) the County did not propound discovery, (5) the County was sanctioned for discovery abuse, (6) the County did not prevail in federal court, (7) the County did not prevail in the

arbitration proceeding, (8) the County did not attempt to cure any deficiency in its presentation at the arbitration hearing when the arbitrator asked it to do so, (9) the County transparently attempted to dismiss the FCA action to avoid judgment and the entry of an award of attorneys’ fees, and (10) the County offered no rebuttal evidence in the superior court when given the opportunity to make out a case against a finding of frivolousness. “All of this paints a picture of a lawsuit filed without diligent investigation, and then maintained for purpose of harassing a defendant who had obtained a Federal Court judgment of \$500,000 against it.” (*Id.* at 70.)

During the course of litigation of any FCA lawsuit, it is important to elicit

from the public entity all facts and evidence regarding the alleged false claim and the public entity’s investigation. The more evidence a contractor has to prove the public entity brought the FCA claim without factual support, the more likely a court will award the contractor its attorneys’ fees in defending the claims.

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