Mastering Whistleblower & Qui Tam Litigation: Telephonic CLE

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Summary
The False Claims Act provides for *qui tam* or whistleblower recovery, enabling citizens with evidence of fraud against government contracts and programs to sue, on behalf of the government, in order to recover the stolen funds. To encourage such suits, and compensate for the risk and effort of filing a *qui tam* case, the whistleblower or "relator" may be awarded a portion of the funds recovered, generally between 15 and 25 percent. A qui tam suit initially remains under seal for at least 60 days during which time the U.S. Department of Justice can investigate and decide whether to join the action. Most seals are extended at least once, and it is common for a case to remain under seal for many years.
A History of the False Claims Act
Qui tam statutes have been traced in history as far back as the 7th Century.

The False Claims Act, 31 U.S.C. § 3729-3733, was enacted in 1863 and is this oldest qui tam whistleblower law in the United States Code.

Less formalized qui tam statutes existed in U.S. courts previously as the early colonies had virtually no law enforcement officers.

The False Claims Act was enacted during the Lincoln Administration in response to profiteering at the hands of the Americans taxpayers during the American Civil War.

The early provisions fostered whistle-blowers via financial compensation based as a contingency of the government’s recovery.

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Part II

– The False Claims Act was strengthened in 1986, after a period of military growth, when there were many accounts of defense contractor price gouging. It was later amended and strengthened in 2010.

– The False Claims Act has ushered the enactment of similar laws in 29 states and the District of Columbia, as well as whistleblower programs at the Internal Revenue Service, U.S. Securities & Exchange Commission, and the Commodities Future Trading Commission.
Purpose of the Statute

• The False Claims Act, 31 U.S.C. § 3730, is used for allegations of fraud against the federal government, but is excluded from tax claims to the Internal Revenue Service.
Background

- *Always start by reading the statute*
- Action is initiated by filing a complaint UNDER SEAL
- Relator cannot appear *Pro Se*
- Serve on the United States – the complaint and a disclosure of substantially all of the evidence
- Meet threshold requirements:
  - Be First-to-File
  - Complaint cannot be based on public disclosures, unless Relator is an original source
  - File within the statute of limitations, 31 U.S.C. § 3731
Types of Fraud Covered
Part I

Billing for goods and services that were never delivered or rendered

Double billing for the same goods or service

Billing for marketing, lobbying or other non-contract related corporate activities

Submitting false service records or samples to falsely show better-than-actual performance

Presenting broken or untested equipment as functional

Shifting expenses from one fixed-price contract to another
Part II

Illegal marketing of prescription drugs and devices through kickbacks

Billing for non-FDA approved drugs or devices

Performing inappropriate or unnecessary medical procedures to falsely augment Medicare reimbursement

Billing for work or tests not performed

Billing for premium equipment while providing inferior equipment

Automatically running additional lab tests when the second test was not specifically requested

Billing for unlicensed or unapproved drugs
Part III

Billing to increase revenue instead of billing actual work performed

Failing to report known product defects in order to sell or bill the government for the inferior product

Billing for research that was never conducted

Falsifying research data that paid for by the U.S. government

Winning a contract through kickbacks or bribes

Prescribing a medicine or recommending a type of treatment or diagnosis regimen to win kickbacks

Forging physician signatures when such signatures are required for reimbursement from Medicare or Medicaid
Part IV

Upcoding - Inflating bills by using diagnosis billing codes that suggest a more expensive illness or treatment

Billing for brand -- billing for brand-named drugs when generic drugs are actually provided

Phantom employees and doctored time slips: charging for employees that were not actually on the job, or billing for made-up hours in order to maximize reimbursements

Upcoding employee work: billing at doctor rates for work that was actually conducted by a nurse or resident intern

Falsifying natural resource production records -- pumping, mining or harvesting more natural resources from public lands that is actually reported to the government

Being over-paid by the government for sale of a good or service, and then not reporting that overpayment
Part V

Defective testing – falsely certifying a produced as approved

"Lick and stick" prescription rebate fraud and "marketing the spread" prescription fraud, both of which entail lying to the government about the true wholesale price of prescription drugs

Unbundling - Submitting multiple billing codes instead of one billing code for a drug panel test in order to increase remuneration

Bundling -- billing more for a panel of tests than for a single test

Misrepresenting the value of imported goods or their country of origin for tariff purposes

False certification that a contract falls within certain guidelines (i.e. minority or veteran)
Part VI

Average Wholesale Price
Up-Coding
False Certifications
Disaster Relief Fraud
Procurement Fraud
Off-Label Marketing
Defense Contractor Fraud
Banking Industry Fraud

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Before You File
Possible Issues to Spot

– Unclean hands of relator
– Background check of relator
– Releases and nondisclosures
– Privileged documents
– Actual knowledge
United States v. Purdue Pharma L.P.

600 F.3d 319 (4th Cir. 2010).

A broad release in a severance package protected the employer from "all liability to Employee for...claims...which Employee...ever had, may now have or hereafter can, shall or may have...as of the date of the execution of this Agreement” precluded the qui tam complaint.
United States ex rel. Acad. Health Ctr., Inc. v. Hyperion Found., Inc.


The terms of a release in a bankruptcy settlement was not broad enough to encompass claims of fraud against the government.
United States ex rel. Ritchie v. Lockheed Martin Corp.,

558 F.3d 1161, 1171 (10th Cir. 2009).

Court enforced a settlement release entered into after the disclosure of the fraud to the government.
“Where the government has no knowledge of the claims that form the basis for a qui tam complaint prior to the time that the relator signs the release, enforcement of the release interferes with and frustrates the FCA's goals of incentivizing individuals to reveal fraudulent conduct to the government.”
What Evidence Is Needed

• Documents
  ▪ Are they privileged?
  ▪ Were they accessed without authority?
  ▪ Were the documents obtained by a mass download of all of the company’s files?
Evidence, Part II

• Tapes
  ▪ Were the recordings made lawfully?
  ▪ Each state’s laws govern the level of consent needed. For example, some states (California) require that all parties to the conversation must consent, while other states (New York) require only one party to consent.
What You Need to Know about Confidentiality

• 637 F.3d 1047 (9th Cir. 2011).
• Employee’s “vast and indiscriminate appropriation” of employer’s documents violated a confidentiality agreement.
United States v. Cancer Treatment Ctrs. of Am.

- “[T]he confidentiality agreement cannot trump the FCA's strong policy of protecting whistleblowers who report fraud against the government.”
United States ex rel. Head v. Kane Co.

- “Enforcing a private agreement that requires a qui tam plaintiff to turn over his or her copy of a document, which is likely to be needed as evidence at trial, to the defendant who is under investigation would unduly frustrate the purpose of this provision.”
Investigating the Fraud
Investigation, Part I

- Specifics of the fraud
- Roles of the parties engaged in the fraud
- How the whistleblower learned of the fraud
- Whether the whistleblower was involved in the fraud
- Period of the fraud
Investigation, Part II

• Evidence (documents, tapes, emails)
• Whether whistleblower reported the fraud
• Whether the fraud was publicly disclosed
• Whether whistleblower was terminated in connection with the fraud
• Size of the damages to the government
31 U.S.C. § 3730(h)(1) – Relief from Retaliatory Action:
Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent 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 by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop one or more violations of this subchapter.
Government Disclosure

• Produce all documents referenced or relied upon in drafting the complaint
• Relator’s background
• Timeline chart
• Organizational chart
• Details on witnesses
• Information that would assist the government in preparing a subpoena
Initiating Government Action
Government Action

• The government assembles a team of investigators, attorneys, and personnel to determine the strength of the whistleblower’s claims.

• The relator is often interviewed, early in the process, in a fashion similar to a deposition.

• The time it takes to evaluate the case depends on complexity of the issues, background facts, admissions of the whistleblower, and the cooperation of the government.

• Pleadings can be sealed for substantially longer than the statutory 60 days.
Response to Allegations
Possible Scenarios

– Prompt and thorough investigation
– Set expectations of a fair process
– End alleged violations
– Retain outside counsel
– Notify stakeholders
– Document retention
– Take remedial action
– Annotate all actions
– Consider self-disclosure
Damages
Determining Damages

A defendant in violation of 31 U.S.C. § 3729 “is liable to the United States Government for a civil penalty of not less than $5,000 and:

1. Not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), plus

2. 3 times the amount of damages which the Government sustains because of the act of that person.” 31 U.S.C. § 3729(a)(1)(g).

3. Pursuant to 28 CFR § 85.3, that amount is modified as follows: “minimum from $5,000 to $5,500; maximum from $10,000 to $11,000.”
Alternative Remedies

31 U.S.C. § 3730(c)(5):

 Under the federal False Claims Act, and certain state False Claims Acts, the Government may pursue its claim through an alternate remedy that is available to the Government and the Relator will still have the same rights as they would have if the case proceeded in the Relator’s action.
Relator’s Award
Award – Part I

- Relator may receive:
  - 15 to 25% if the Government intervenes, based upon extent of Relator’s contribution to prosecution
  - 25 to 30% if the Government declines to intervene and Relator proceeds
  - This award is designed to compensate for the time and risk of the prosecution and to encourage similar conduct by others in the future.
Award – Part II

• In both scenarios, the Relator is entitled to reasonable expenses, plus reasonable attorneys’ fees and costs, which will be awarded against the defendant.

• Between 1987 and 2013, over $4.2 billion was paid in Relator Share Awards for over $27 billion in civil *qui tam* settlements and judgments with the U.S. Department of Justice. Nearly $21 billion was attributable to health care fraud.
Award – Part III

• Possible complications:
  – Persons who participated in the fraud may have the award reduced or be barred from receiving an award
  – Concurrent personal claims may be included in the complaint but the government will scrutinize any settlement in a declined case very carefully before it consents to dismissal
  – Damages for retaliation claims are completely separate from the relator’s award
Limits of the False Claims Act
Limits – Part I

• While the False Claims Act is a powerful tool to combat fraud, it is dramatically constrained by both the legal confines and economics of litigation.
• For a civil case to be filed, the fraud has to be far reaching, otherwise it is generally not worth it for the whistleblower to risk his or her career to file suit, nor is it worth it for a law firm to take on the case and risk the loss of the time and expense required to litigate a False Claims Act case.
Limits – Part II

- A defendant in a False Claims Act has to have relatively deep pockets to finance the investigation and litigation. Some of the smaller companies that may be defrauding the government are liable to declare bankruptcy if faced with the triple damages that can be levied under the False Claims Act.

- A whistleblower and his/her counsel must believe they have a strong case in order to proceed. Not only can a law firm be out time and financial resources if a case fails, but if the government does not take the case and the whistleblower proceeds, he or she can be forced to pay the defendant’s attorney's fees if the court finds that the claim was frivolous, or brought primarily for purposes of harassment.
End of Materials