

# Whistleblowers: Friend or Foe to Industry, Litigation & Society?

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# Statutory Provisions

- The **False Claims Act**, 42 U.S.C. § 3729 – 3733, is an enforcement mechanism used to combat fraud against the United States government
- Applies to all contract fraud (except tax fraud) involving any federally funded contracts or program
- Allows for private *qui tam* enforcement
- The U.S. has recovered over **\$28 billion** under FCA in last 25 years
- Over 700 FCA cases filed in 2010
- Government intervenes or pursues approximately 22% of cases

- Knowingly presenting, or causing to be presented to the Government a false claim for payment;
- Knowingly making, using, or causing to be made or used, a false record or statement to get a false claim paid or approved by the government;
- Conspiring to defraud the Government by getting a false claim allowed or paid;
- Falsely certifying the type or amount of property to be used by the Government;
- Certifying receipt of property on a document without completely knowing that the information is true;
- Knowingly buying Government property from an unauthorized officer of the Government, and;
- Knowingly making, using, or causing to be made or used a false record to avoid, or decrease an obligation to pay or transmit property to the Government.

The False Claims Act provides for:

- Triple damages; plus
- A civil penalty of \$5,500 to \$11,000 for *each* false claim.

Relator's share → 15% - 30%

Liability also exists for reasonable costs, expenses and attorneys' fees Relators pay or incur in successfully prosecuting a *qui tam* action.

- Eligibility/ certification for contract
- False statements in bids or negotiations
- False pricing
- False quality
- False testing
- Product substitution
- Violations of other statutes

- Procurement
- Healthcare
- Defense Contractor
- Pharmaceutical
- Energy
- Iraq Reconstruction
- Construction
- Disaster Relief
- Research & Development

Fraud Enforcement and Recovery Act of 2009 (FERA), Pub.L. 111-21, signed May 20, 2009 by President Obama

- Broadens liability: elimination of “presentment” language in § 3729(a)(1)
- protects more Relators from retaliation
- liberalizes statute of limitations provisions
- weakens “materiality” requirement – i.e., capable of influencing
- broadens investigative powers of DOJ

For overpayments, FCA “reverse false claim” liability where a person “knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.”

- Patient Protection and Affordability Act (PPACA), signed by President Obama on March 23, 2010
  - Far reaching statute providing further regulation on private health insurance, drug coverage, Medicare, and many other areas of health care
- PPACA also has major implications on FCA and lowers bar for *qui tam* Relators
  - Requires companies to disclose and refund known overpayments or else they turn into false claims

- PPACA makes it easier for Relators to file “parasitic” lawsuits based on publicly-disclosed information and where the Relator has a less-significant level of personal knowledge or information about the alleged false claims
- PPACA lowers bar for Relators to bring FCA cases
  - ACA removes the “direct knowledge” requirement of the FCA
  - Relator need not have any personal knowledge at all to be an “original source”
  - Relator must now have “knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions...”
  - Relator information can still be considered “original” even if it is hearsay evidence or from an unreliable source
  - Definition of “material” was watered down by FERA
  - “Public disclosure” bar much narrower
- 60-day Rule
  - PPACA requires overpaid funds to be reported and returned within 60 days of “identification” or when corresponding cost report is due.

# Best Practices for Cases

## How Plaintiffs Build a *Qui Tam* Case



- Potential Relator Approaches Firm and Thinks He has a Case
  - Initial contact with the client
  - Building rapport
  - Don't scare them off!
  - Make them aware that their identity will be disclosed at some time
  - Temperamental clients
- **YOU NEED DOCUMENTS / HARD EVIDENCE**
  - Internal documents
    - » E-mails, meeting minutes
    - » Sales and marketing documents (posters, handouts, leave-behinds)
    - » Voicemail recordings
    - » Invoices, checks, shipping forms
  - Witnesses
- Identifying the issues



## Filing a Complaint

- Must be filed under seal
  - Remains under seal for at least 60 days after government receives Complaint and material evidence (Initial Disclosures); seal extensions
- Where to file?
  - Where did the alleged fraud occur? If nationally, you have a wide choice.
  - Where is your Relator located?
  - Company's headquarters
  - Relationships with prosecutors
- Favorable case law, Rule 9(b)

## When to File?

- Do you have enough evidence?
- “First to File Rule”: 31 U.S.C. § 3730(b)(5)
  - Percentage of Relator's recovery usually based on whether he was the first to file; comparison of allegations in multiple Complaints



## Relator's Initial Disclosures

- The most essential document a Relator prepares
- § 3730(b)(2) states that Relator must provide the government with a “written disclosure of substantially all material evidence and information” possessed by him to permit the government to investigate the allegations and decide whether to intervene in the action.
- BE AS DETAILED AS POSSIBLE

## Documents Obtained By Relator to assist the government's investigation

- May require Court approval (i.e., warrant)
- Confidentiality issues in employment agreements as to what can / cannot be removed from the company


## Government Intervention / Non-intervention

- Intervention: Relator remains a party to the case but the government assumes primary responsibility for pursuing the case.
- Non-intervention: Relator may proceed; Relator's recovery increases to 25 to 30%
  - Government stays peripherally involved through service
  - Government retains the right to intervene at a later date

## Motions to Dismiss and for Summary Judgment, Fed. R. Civ. P. 9(b) and 12

- Relator and the gov't must plead the alleged fraud with particularity
- “Public Disclosure Bar”: 31 U.S.C. § 3730(e)(4)
  - What constitutes “public disclosure”?
  - Is the action “based upon” publicly disclosed allegations or transactions?
  - Is the Relator an “Original Source”?  
31 U.S.C. § 3730(e)(4)(B) – “direct and independent knowledge of the information” – courts take different approaches
- 12(b)(6) motion may be based on various grounds such as whether Complaint alleges a violation of a statutory or regulatory requirement or whether it fails to meet the requisite intent or element of materiality

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA ex rel. RELATOR,  Plaintiff,  v.  JOHN DOE COMPANY,  Defendant.	Civil Action No. 1:01-cv-11111  
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**JOHN DOE COMPANY'S MOTION TO DISMISS THE COMPLAINT WITH  
PREJUDICE FOR FAILURE TO STATE A CLAIM**

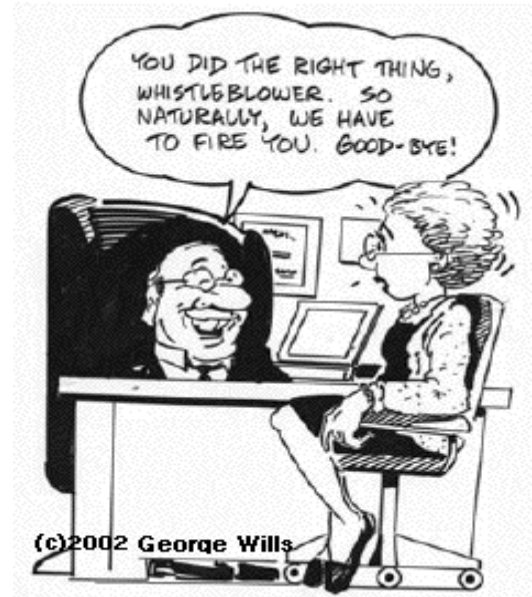
COMES NOW Defendant John Doe Company ("John Doe"), by and through its undersigned counsel, who respectfully moves to dismiss Plaintiff Relator's Complaint with prejudice pursuant to Federal Rules of Civil Procedure 12(b)(6), 12(b)(1), and 9(b). The two False Claims Act ("FCA") Counts asserted against John Doe Company (Counts III and IV) are invalid and the Court lacks subject matter jurisdiction, as discussed in the accompanying Memorandum in Support.

## Retaliation Claims

- Complex issues requiring a great deal of care
- FERA Amendments broaden the scope
- Various statute of limitations – state vs. federal; employment vs. *qui tam*
- Retaliation is not just firing – similar standard found in employment cases (i.e. failure to promote)

## Employment Suit vs. *Qui Tam*

- Releasing the company from liability under the FCA
- Whether the gov't intervenes affects enforceability of such agreements
- District courts split on whether Relator can pursue on his own



# Self-Disclosure or Non-Disclosure

## Plaintiff's View → It's better to report

- A company remains best positioned to obtain leniency from the DOJ, the SEC, and other government agencies when it discovers a problem through self-policing, remediates it, and then self-reports it to the government — all before a whistleblower does.
- Is the company under a current Corporate Integrity Agreement?
- Penalties less harsh – normally the government will cap the damages at double, not treble, damages
- The government might take into account how much time has elapsed between when a whistleblower reported information and when the company self-reported to the government

## Defendant's View on Reporting

- Under PPACA, must disclose identified overpayments within 60 days
  - » Failure to disclose within 60 days converts overpayments into false claims under FCA
- FCA's 30-day voluntary disclosure window does not provide great value
  - » Many factors must be met for the court to reduce damages to double
  - » If Company discloses within 60 days and cooperates with government investigation, it is likely to settle for double damages or less anyway
- Remember, case is not closed after self report
  - » Government can and will investigate further

- When Company must report...
  - »Retain independent outside counsel
  - »Counsel will fully underlying facts and draft the report
  - »Counsel's independence will give report additional credibility
  
- Report must be thorough and follow necessary protocols set forth by OIG, fiscal intermediary, etc.
  - »Limit government's follow up questions
  - »Identify open issues and close them through investigation

## **Whistleblowers: Dealing With Them and Protecting Them**

- CYA Whistleblower – reports to cover own misconduct and take advantage of whistleblower protection. (Practical tip – save the questions about misconduct for the last part of the interview.)
- Last Resort Whistleblower – reports to the government after finding no resolution internally. (Practical tip – make whistleblower follow-up a part of the compliance plan.)

- Make sure company and all employees are clear that there can be no retaliation.
  - FCA protects whistleblower, and any other employee who participates in the investigation or testifies in related proceedings, from retaliation
  - FCA imposes substantial penalties against companies that retaliate
    - » Includes double the amount of back pay to which the employee is entitled, plus special damages and attorneys' fees
  - May NOT try to discover the identity of the whistleblower

- Investigate the complaint.
- Explain the whistleblower role: Avoid the junior G-man.
  - Fact witness like any other fact witness.
  - Not part of the investigative team.
  - Do not search for documents.

Do NOT pay for silence

- Cannot buy peace
- Looks like a pay-off - obstruction of justice

But – if employee is receiving severance package, be sure to add release language for FCA relator's share recoveries

Do not engage in debate.

- Keep the whistleblower informed that investigation is ongoing.
- Be responsive, but do not engage.
- Create a point person to handle all correspondence.

Do not interview whistleblower alone.

Assume that every conversation with the whistleblower is being recorded.

Document, document, document!

## **Practical Guidance for Investigations**

Compliance, the Board, Auditors, and the Government

## COMPLIANCE-DRIVEN INVESTIGATION

- If the matter concerns a compliance, regulatory, or financial issues, the investigation could be conducted by a compliance officer. In addition, compliance groups may regularly coordinate with individuals who conduct the internal audit functions.

## HR-DRIVEN INVESTIGATION

- Minor HR-related issues can usually be handled by HR only, with appropriate input from in-house counsel as necessary

## IN-HOUSE DRIVEN INVESTIGATION

- In-house counsel should be consulted on matters that are sensitive, could raise whistleblower issues, require self-reporting, involve allegations of fraud, or could lead to litigation.

## OUTSIDE COUNSEL-DRIVEN INVESTIGATION

- If the matter is sensitive, raises whistleblower issues, requires significant resources, could lead to criminal penalties, would require self-reporting if true, or involves high-level personnel within the company, consider outside counsel.
  - » Decision: regular or “independent” counsel?
  - » Whether to be engaged by audit committee?

## Why?

- *Caremark, Stone v. Ritter*
- SOX
- Dodd-Frank
- US DOJ Guidelines
- U.S. Sentencing Commission Guidelines
- SEC Guidance
- OIG Guidance
- Auditors' requirements to take action under Section 10A of Exchange Act



"' HONESTY IS THE BEST POLICY.' O.K.! NOW, WHAT'S THE SECOND-BEST POLICY? "

## When?

- Most investigations will not be directed by the Board
- Board level investigations conducted when:
  - Senior management or interests of management are implicated
  - Significance of the allegation to the company (financial, strategic, reputational)
  - Concerns of DOJ, SEC, regulatory bodies, and auditors regarding independence of review

Who Will Direct Investigation?

- Full Board
- Audit Committee or Other Committee
- Special Litigation Committee

Question: Can interested directors participate?

Act Quickly!

Conclusion, Recommendations, Disciplinary, and Remediation

*Factors to consider when hiring investigators:*

- Do they have the right skills and resources?
- Can they work with the Board and do they have experience in conducting Board-level reviews?
- Can they work with the company's auditors and understand the auditors' role?
- Do they understand the laws and regulations that govern the conduct under review?
- Do they have an understanding of how the regulators or enforcement authorities may view the investigation and the underlying conduct?

## Outside Independent Legal Counsel

- Board-level investigations often use independent counsel
  - Privilege will generally apply
  - Use of regular counsel could call independence into question and regular counsel might not be experienced in investigations

## Board should identify liaison with counsel

- Internal audit, compliance officer, in-house counsel

## Specify Scope of Review

- In writing and periodically reviewed
- Investigator submits a written investigative plan

## Board Monitors Investigation

- Who is on investigative team?
- Have documents been gathered and preserved for review?
- What is status of review?
- Does Board receive interim reports?
- Are public disclosures required?
- Is investigation being conducted in an appropriate manner (e.g., pre-texting, privacy)?
- What report will Board receive?

Tension because management will have no role in conducting or overseeing investigation

- Some management may be completely removed from all aspects of review, except as witnesses

Management may need to communicate to employees or with the public (e.g., 8-Ks)

- Role in these communications will depend on management's involvement
- Counsel should provide guidance to Board on appropriate role for management

Other considerations: How to respond to competitors attempting to use investigation against company in marketing to competitors?

Duty to cooperate absent a contractual provision to the contrary.

Generally no Fifth Amendment right.

Other issues:

- Normal fact witness
- Whistleblower
- Parallel to criminal investigation?
- Union representation?

Give disclosures/warnings at the beginning of every interview:

- Attorney represents company, not employee.
- Conversation is privileged.
- Privilege belongs to the company.
- Can be waived by company and disclosed.

In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

. . . a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Avoid undue influence.

No group interviews.

Give continuing instructions.

- Not to discuss.
- Continue to cooperate.
- Do not destroy documents.

Document the interview.

- Use experienced counsel.
- Dictate shortly thereafter.

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## Preparing for Dodd Frank Whistleblower Provisions Now

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## Competing Regulatory Priorities

### **Dodd Frank Act**

Whistle Blowers can be financially rewarded for direct allegation reporting to the SEC

### ***The Ethics & Compliance Program***

### **USSC Guidelines**

Adoption of internal reporting lines is an element of an effective ethics & compliance program

***Caught between a rock and a hard place?***

## What is the Impact on Companies?

SEC claims to want to support internal compliance programs

- Includes provisions to discourage employees from bypassing internal compliance programs
- Preserves “place in line”
- Permits higher percentage awards for whistle blowers who first report through compliance program

## What Steps a Company Can Take Now

Preparing

Investigating

Resolving

Things to do  
**BEFORE** any  
allegations arise.

Things to do  
**WHEN** allegations  
arise.

Things **AFTER**  
allegations have been  
substantiated or found  
to be unsubstantiated.

## PREPARING / Investigating / Resolving

Things to do BEFORE any allegations arise:

- 1) Evaluate **quality of controls** designed to deter illegal conduct
- 2) Continue to **endorse a culture of ethics and integrity**
  - Consider revising code of ethics to cover preservation of documents relevant to pending investigations.
- 3) Evaluate **reporting processes** (e.g., hotlines)
- 4) Consider a new processes for **termination of employment**
  - Obtain acknowledgment of compliance with reporting processes.
  - Ensure releases and non-disparagement clauses do not conflict with strong public interest fostering identification of corporate wrongdoing
- 5) **Increase communication** about existing policies and reporting options
  - Posters, cards for desk, and training for field offices.
- 6) Improve **practical education** about internal whistleblower program
  - Videos for internal conferences or brief, periodic online e-training
- 7) Ensure you have the ability and organizational backing to perform thorough investigations

*Allstate's conversational model fosters a culture of integrity and enhances reputation.*

## ALLSTATE'S "SPEAK UP" CYCLE



- The "Speak Up" Cycle supports the expectation that when employees share ethical questions and concerns, management is prepared and actively responds
- Conversations may first address smaller items, but create a bridge for more difficult matters, if needed.

## Preparing / **INVESTIGATING** / Resolving

Things to do WHEN allegations arise:

- 1) Balance speed without losing accuracy / thoroughness
- 2) Employ the appropriate investigative resources based on case factors (internal vs. external)
- 3) Involve appropriate subject matter experts internal and possibly external
- 4) Use ethics case management software and metrics
- 5) Maintain effective internal communication protocols

## Preparing / Investigating / **RESOLVING**

Things to do AFTER allegations have been substantiated or found to be unsubstantiated:

- 1) Enact the appropriate disciplinary steps on substantiated cases
- 2) Recognize the value of self-reporting to regulators
- 3) Document extent of company investigation
- 4) Ensure secure storage of documentation
- 5) Consider using sanitized cases to communicate resolution to larger groups of employees

## General Discussion / Recent Cases