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# VERDICT

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*Whistleblower/qui tam laws empower citizens to meaningfully protect government agencies from financial malfeasance by even the most powerful corporations. In this regard they promote the mission of all plaintiffs' trial lawyers, and knowing about them empowers us to be of greater assistance to our clients, present and future. This issue of the Verdict introduces whistleblower/qui tam laws, reveals how those laws play out in practice, and discusses how to recognize potential claims both in general and on behalf of existing personal injury clients.*

**A Primer on the False Claims Act for Trial Lawyers**

## Is it a Potential *Qui Tam* Case?



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An employment attorney calls you with a potential referral: A former employee of a healthcare provider has walked into the attorney's office distraught over her recent termination. As the attorney probed deeper into her complaints, the attorney learned that the client's harassment and subsequent termination occurred after she raised concerns regarding certain questionable billing practices.

Could she be a potential whistleblower entitled to a *qui tam* award?<sup>1</sup> Is it a (good) case?

In 2017, the Department of Justice reported that it recovered more than \$3.7 billion in judgments and settlements under the federal False Claims Act (FCA), with approximately \$2.4 billion coming from the healthcare industry.<sup>2</sup> Whistleblowers received about \$392 million pursuant to the *qui tam* provisions of the FCA.<sup>3</sup>

Understanding the below issues will help determine whether a client may potentially recover an award under the FCA.<sup>4</sup>

### The Basics

The fundamentals of a viable *qui tam* case are similar to those of

any personal injury action: significant loss to the government (i.e., damages); a financially viable defendant; and strong evidence supporting liability.

However, there are many unique aspects to whistleblower practice that create pitfalls for the unwary. This article will highlight a few of those dynamics. Nevertheless, if you believe your client has a potential *qui tam* case, it is important to get him or her in the care of a firm experienced in handling whistleblower matters.

### *Damages to the Government*

The FCA permits a whistleblower to recover 15 to 30 percent of the money recovered by the government – but only (1) for monies paid (2) by the United States.<sup>5</sup> Absent unique circumstances, the FCA does not cover fraud perpetrated on private insurers (i.e., Aetna, Blue Cross, Geisinger, etc.). So, make sure the alleged fraudulent conduct resulted in an actual loss to a government healthcare plan such as Medicare or Medicaid.

### *Financial Viability of the Defendant*

The FCA requires that the whistleblower first notify the government of the fraud and allow the government to investigate the allegations.<sup>6</sup> The United States (through its local U.S. Attorney's Office or "USAO") considers a range of factors in pursuing a potential defendant. If the United States declines to pursue the allegations, the *qui tam* provisions of the FCA permit the whistleblower and her attorneys to litigate the matter against the

defendant.<sup>7</sup> Understanding whether or not the defendant has sufficient revenues and assets to pay the potential damages is the difference between obtaining a practically unenforceable judgment, the defendant being put on a payment plan that could stretch out for years, or the whistleblower receiving her award in a timely manner.

### *Evidence Supporting Liability*

Unlike personal injury matters, particularly medical malpractice actions where the attorney can request and review documents to determine whether or not there is a case, the success of the whistleblower case is largely determined by what the whistleblower has in her possession at the time she enters your office. Though clients without inside knowledge or documents may bring successful cases (more on that below), the strongest cases are those in which the whistleblower has detailed information documenting the fraud at the outset. A word of caution: how the individual came to access and retain that information may kill the case before it begins.

If the client has any documents, they must be carefully reviewed in the context of the applicable Medicare and/or Medicaid statutes and regulations, Department of Justice guidance, and relevant agency interpretations.

### Important Things to Know about False Claims Act Practice

Know that the FCA giveth, and the FCA taketh away. Below are

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some highlights and lowlights of the whistleblower practice.

### ***Your Case, However Strong, May be Foreclosed Before You File***

To discourage parasitic suits, the FCA provides that, once a *qui tam* action has been filed, “no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.”<sup>8</sup> This so-called “first-to-file bar” essentially precludes recovery by later-filed whistleblowers. Because FCA cases are filed under seal, and may remain sealed for years, there is no way to know if a whistleblower has already filed similar allegations three days, three months, or three years prior to the client walking in your door. That said, a quick Google search may reveal recently *unsealed* actions, saving much unnecessary time and effort.

### ***You Do Not Control the Litigation at the Outset***

Unlike a personal injury case, where the attorney determines the litigation strategy, the United States determines the pace and scope of the investigation at the outset. As such, two of the most important factors determining the success of a *qui tam* are the particular USAO overseeing the case and the specific Assistant United States Attorney (AUSA) assigned to the case. Having a relationship with, and understanding of, particular offices and individual AUSAs is vital.

### ***Having an Insider Client Helps, but is Not Required***

In 2016, Kline & Specter’s whistleblower client received \$1.17 million (an award of 20%) based on information he provided to the Arizona USAO.<sup>9</sup> Our client had never worked for the defendant and had no inside knowledge as to how the defendant came to misreport data about the hours worked by its employees on its annual cost reports, which improperly inflated the amount of money it received from the Medicare program. It did not matter. The FCA encourages whistleblowers that have “knowledge that is independent of and materially adds” to publicly disclosed allegations or transactions.<sup>10</sup> Working closely with our client, we were able to effectively present his allegations to the USAO, leading to a recovery of nearly \$6 million in taxpayer dollars. The lesson: Do not overlook whistleblowers just because they did not work for the defendant. They may possess a sophisticated working knowledge of government programs and be able to assess publicly available information to reveal previously unknown fraud to the government.

### ***Any Potential Employment Action May Impact the Potential Whistleblower Claims***

Whistleblowers seeking redress through parallel employment actions present unique issues that must be carefully assessed.

As an initial matter, these individuals are often presented with

separation agreements with broad release language. Depending on the jurisdiction and the timing of the government’s notice of potential FCA allegations, signing these agreements may prohibit the whistleblower from any *qui tam* recovery.

What’s more, should a whistleblower pursue litigation against her former employer while she has a *qui tam* complaint filed under seal, her deposition presents an Odyssean challenge as she navigates between the Scylla of not violating the seal on her *qui tam* complaint and the Charybdis of answering her deposition questions truthfully.

### ***The Client May Have a Potential Retaliation Case, Despite Not Having a Viable Qui Tam Case***

If, at the end of the day, the client does not appear to have a viable *qui tam* claim, all is not lost. The FCA’s retaliation provisions permit her to seek a host of remedies, including reinstatement, two times her back pay, interest on the back pay, and special damages.<sup>11</sup> ♦

<sup>1</sup> The *qui tam* provisions of false claims acts enable private citizens to collect an award for voluntarily reporting and pursuing those who perpetrate government fraud. *Qui tam* is an abbreviation of the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, meaning “he who brings an action for the king as well as for himself.”

<sup>2</sup> See Dept. of Justice, “Justice Department Recovers Over \$3.7 Billion From False Claims Act

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Cases in Fiscal Year 2017,” available at <https://www.justice.gov/opa/pr/justice-department-recovers-over-37-billion-false-claims-act-cases-fiscal-year-2017> (last accessed July 4, 2018).

<sup>3</sup> *Id.*; see 31 U.S.C. § 3730(d)(1)-(2) (providing that a whistleblower may receive between 15 and 30 percent of proceeds of an FCA action).

<sup>4</sup> This article does not address state false claims acts, of which there are now more than 30. Unfortunately, Pennsylvania has failed to enact one despite the demonstrated return on investment. See Phila. Inquirer, “Op-Ed

article on Pa. False Claims Act Legislation,” available at <https://www.klinespecter.com/sites/www.klinespecter.com/files/Faalse-Claims-Act-Ligistlation-1.pdf> (last accessed July 4, 2018).

<sup>5</sup> 31 U.S.C. § 3730(d).

<sup>6</sup> See 31 U.S.C. § 3730(b)(2) (requiring the whistleblower to serve the government with a copy of her complaint and a written disclosure of substantially all material evidence and information she possesses).

<sup>7</sup> 31 U.S.C. § 3730(d)(2).

<sup>8</sup> 31 U.S.C. § 3730(b)(5).

<sup>9</sup> See USAO District of Arizona, “Yavapai Regional Medical

Center Agrees to Pay \$5.85 Million to Resolve False Claims Allegations,” available at <https://www.klinespecter.com/sites/www.klinespecter.com/files/whistleblower-yavapai-medical-center.pdf> (last accessed July 4, 2018).

<sup>10</sup> 31 U.S.C. § 3730(e)(4)(B).

<sup>11</sup> 31 U.S.C. § 3730(h)(2).

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