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The False Claims Act: A weapon often overlooked

The federal False Claims Act and similar state laws not only protect whistleblowers, but also force wrongdoers to stop the underlying fraud

By Jessica T. Moore

A potential client explains that he discovered components his employer uses to make radio equipment for police and fire departments are defective, rendering the radio communications unreliable. He informed his supervisor and various other managers at the company. Rather than implementing a fix or informing customers, the company transferred him to another product line and drastically reduced his responsibilities. He is worried that the defect won't ever be remedied and that the company will fire him soon.

Employment lawyers will instantly recognize a number of important issues in this scenario, including potential use of many whistleblower protections provided by federal and California law. Some may realize the questionable practices implicate public policies, which can provide further protection from retaliation. But less obvious is that a False Claims Act action should be considered because the company's practices may wrongly cheat the government of funds.

The federal False Claims Act and similar state laws not only protect whistleblowers, but also force wrongdoers to stop the underlying fraud and may result in punishment – a matter of justice deeply felt by many whistleblowers. False claims laws also reward and compensate whistleblowers for the substantial risks they take professionally and personally in exposing the fraud.

The False Claims Act and state laws contain "qui tam" provisions that allow private citizens on the government's behalf to sue companies and individuals that are defrauding the government (and ultimately taxpayers). "Qui tam" is short for a Latin phrase, *"qui tam pro domino rege quam pro se ipso in hac parte sequitur,"* roughly translating to "he who brings an action for the king as well as himself."

Successful False Claims Act plaintiffs can receive a reward based on the amount of money the government recovers as a result of the qui tam lawsuit. To encourage attorneys to accept these cases and put their own resources into them, the law requires defendants to pay the whistleblower's attorneys' fees and reasonable expenses when the case is successful.

The large rewards some whistleblowers have received in recent years as a result of successful qui tam cases have prompted new interest in bringing such cases. It is almost impossible to overstate, however, the procedural complexities and unique challenges of qui tam law and practice. Such pitfalls can trip up those who aren't well versed, costing clients their rewards and attorneys their fees, even if the allegations of wrongdoing made by the whistleblower are proven.

In addition, defendants in qui tam cases, particularly ones with deep pockets, often respond aggressively, so whistleblower's counsel must be well prepared and should expect to bring in additional resources for potentially long, drawn-out battles. If the whistleblower case isn't solidly constructed or ably handled, defense challenges could lead to bad law – hurting not only that case but also other False Claims Act cases brought in that jurisdiction.

Thus, while attorneys should not overlook the possibility of a False Claims Act case in an employment or other matter, such an action should be brought only with thorough knowledge of the pertinent laws and ideally with some successful experience in the area.

Background and overview

In addition to the original federal False Claims Act, many states – with California leading the way – have passed their own False Claims Acts. (See 31 U.S.C. §§ 3729-3733 (federal False Claims Act); Gov. Code, §§ 12650-12656 (California False Claims Act). The California False Claims Act is similar to the federal law but differs in some key ways. Federal law is the most developed in this area and thus most appropriate for this general discussion of qui tam practice.

Congress passed the original False Claims Act in 1863, when the Government fell victim to rampant war-supply fraud during the Civil War. The law contained "qui tam" provisions that entitled whistleblowers, known as "relators," to receive (at that time) 50 percent of the amount the government recovered as a result of their qui tam cases.

The False Claims Act fell into disuse from 1943 to 1986 due to amendments that drastically cut its effectiveness. But in 1986, Congress revised the False Claims Act, spurred by reports of widespread defense contractor fraud.

The 1986 amendments strengthened the law in many ways, clarifying the application of the "preponderance" standard of proof and eliminating the need to provide specific intent to defraud in favor of the broader "knowledge" definitions including "deliberate ignorance" or "reckless disregard." The amendments further specified that companies would be liable for civil fines for each false claim as well as treble damages. Congress amended the Act in 2009, primarily to further clarify the intent of the 1986 amendments.

Qui tam cases can be brought for any sort of fraud against or false claim submitted to the government – whether in the areas of Medicare or other governmental health programs, defense contracts, construction work and many other areas involving the government fisc. To encourage whistleblowers to come forward with good information, the law provides relators 15 percent to 30 percent of the recovery as a reward. (31 U.S.C. § 3730(d)(1) & (2).) The law also creates a partnership between the government and the relator by allowing relators to remain as parties in the lawsuits the government joins. (*Id.* §3730(c)(1) & (2).)

Employees who are discriminated against because they have filed a qui tam lawsuit or are considering doing so are protected under Section (h) of the federal False Claims Act. An employee who brings a successful employment retaliation claim against his/her employer is entitled under the False Claims Act "to all relief necessary to make the employee . . . whole." This can include reinstatement, two times the amount of back pay, interest on back pay, reimbursement of litigation costs and reasonable attorneys' fees and compensation for special damages. 31 U.S.C. §3730(h).

Just about anyone with knowledge of fraud against the government may file a qui tam lawsuit. The False Claims Act identifies multiple types of actions that create liability under the statute. The most common are:

• Presentation of a false claim for payment.
• Use of a false statement to get a claim paid.
• Conspiracy to get a false claim paid.
• Reverse false claims, i.e., avoiding an obligation to pay the government.
(See 31 U.S.C. §3729(a)(1).)

It is important to note that the "falsity" of the claim can present itself in many ways. The claim need not contain a lie or misrepresentation on its face; rather, generally there need only be a wrongful claim to the government for payment to which the defendant knows it is not entitled. In the radio-components scenario above, the invoices to the police and fire agencies need not have specified that the radios were "free of defects" to constitute false claims under the law. Indeed, the request for government payment for goods that were defective was one of the primary motivations behind Congress's passage of the original act.

In the past two decades, the False Claims Act has become the most effective weapon the government has to fight fraud – whether it's Medicare fraud, defense contractor fraud or fraud by Wall Street banks that has cost the government money. The federal government has recovered more than $18.1 billion as a result of qui tam cases plus billions more from related criminal fines.

Tax fraud is specifically exempt from the False Claims Act. But impressed with the success of the False Claims Act, Congress in 2006 created a separate tax whistleblower program that rewards whistleblowers who bring tax fraud to the attention of the IRS. Congress also created a whistleblower reward program for the Securities and Exchange Commission and the Commodity Futures Trading Commission under the Dodd-Frank law last year. Note that while the whistleblower provides information to the IRS, SEC and CFTC under these new whistleblower programs, unlike False Claims Act cases the whistleblower is not a party to these proceedings.

Filing a qui tam lawsuit – unique considerations

When considering whether to encourage a client to pursue a qui tam case, a lawyer should be aware of many important aspects of such a lawsuit, some of which may crucially affect the client's well-being.

First, the case must be filed under seal. The attorney and the relator may not discuss the existence of the case with anyone other than government attorneys and investigators. If the seal is broken, that can be grounds for dismissal of the relator from the case, although the government may still pursue it. Given the stress that can accompany whistleblower activity and the extreme length of some qui tam seal-periods, clients sometimes find the seal requirements extremely taxing.

Second, there are first-to-file provisions in the various False Claims Acts. If a qui tam lawsuit isn't the first one filed making certain allegations, it can be dismissed. Because of the seal in qui tam lawsuits, relators and their counsel won't know whether other qui tam lawsuits making the same charges have been filed until after the significant efforts and expense of researching, investigating, creating and filing the qui tam complaint.

Third, a relator needs to understand and feel comfortable with the potential risks and consequences to filing a qui tam lawsuit. Filing a qui tam lawsuit sets in motion a chain of events that often the relator can't control because the government generally has ultimate control over the case, even though the relator remains a party to the lawsuit. For example, the government and affected public agencies may immediately start investigating the allegations, including interviewing the relator and other witnesses and obtaining documents via subpoena to the alleged wrongdoer. During these activities, the defendant may correctly guess the existence of a qui tam action and even the identity of the relator – events for which the relator and counsel should be prepared.

Fourth, qui tam cases can be very expensive. To substantiate a client's allegations, the relator's attorney may need to hire experts to conduct analyses or additional investigations. There are other potentially significant out-of-pocket expenses, including extensive document processing and management, and travel costs. The relator's lawyer shouldn't expect that the government will do all of the work once a case is filed. Such an approach likely will mean the case won't go anywhere and eventually will be dismissed. Further, the case might remain under seal for years before it is resolved one way or the other, and any ultimate recovery is far from guaranteed regardless of the merits of the case.

Fifth, the decision on where to file a case can be crucial, where circumstances permit for such a choice. Courts in various jurisdictions have interpreted parts of the False Claims Act in different ways, and those rulings should factor into a decision on the jurisdiction in which to file a qui tam lawsuit.

Last, the statute of limitations is complicated and depends on circumstances. In the case of the federal False Claims Act, generally the qui tam lawsuit must be filed within six years of the date the law is violated, or within three years of material facts being known by government officials with certain responsibilities (but no more than 10 years after the date of violation). (See 31 U.S.C. § 3731(b).) State False Claims Act statutes of limitations vary widely.

These are only some of the many issues and concerns facing a false claims act practitioner. Depending on the circumstances, there may be other considerations (such as the "public disclosure" bar and other limitations) and procedures that will be absolutely critical in bringing a successful False Claim Act case.

Government intervention — the crucial crossroads

One of the main factors in a successful False Claims Act case is whether the government intervenes and therefore actively takes over the case. The law states that the government has 60 days to determine whether to intervene. In actuality, that decision generally takes at least one year but usually takes years longer. The government has limited resources to assign to qui tam cases, and hundreds of qui tam lawsuits are filed each year, creating a huge backlog. The investigation varies greatly from case to case, depending on the type of case (e.g., healthcare, defense fraud) and the allegations.

Out of some 7,200 cases filed since 1986, the government has intervened in only 1,327 of them, according to Department of Justice statistics.

If the government intervenes in a qui tam lawsuit, typically the case is immediately unsealed. If settlement does not occur at that time, the relator remains a party to the case and can generally litigate in the normal fashion in conjunction with the government. If the relator's participation "would interfere with or unduly delay the Government's prosecution of the case or would be repetitious, irrelevant," the government may ask the court to restrict the participation of the relator in the case. (31 U.S.C. §3730(c)(2)(C).)

If the government declines to intervene in the action, the False Claims Act allows a relator to continue to pursue the qui tam lawsuit, but counsel can expect to spend vastly more resources on the case. Even after the government has declined to intervene, it remains a party to the case and may intervene at any time. If the government moves to dismiss a case, the relator is given an opportunity for a hearing to object.

The federal statute provides for up to triple damages and $5,500 to $11,000 per false claim; state counterparts have similar damage and penalty provisions. Defendants who are able to settle reasonably and well in advance of significant litigation or pretrial activity often pay far less than what the statutes allow. The Department of Justice recommends to the court the relator's reward, which is a percentage of the recovery within the statutory 15 percent to 25 percent. The actual percentage is based on many factors, such as how helpful the relator and the relator's lawyers were in the case.

The California False Claims Act

California has one of the strongest false claims laws in the country and is based in large part on the federal act. There are differences. One is that the California False Claims Act permits an "inadvertent beneficiary claim" against one who inadvertently receives the benefit of a false claim, later discovers it and fails to report it within a reasonable time. (Gov. Code, § 12651(a)(8).

Cases can be brought on behalf of many government entities in California, whether it's a state agency, a school district or a local water district. Moreover, local prosecuting authorities, such as a city attorney or county counsel, as well as the attorney general, may intervene and prosecute the action if appropriate funds are involved. For example, the defective police/fire radios scenario described above likely would involve primarily local and state funds, implicating a state False Claims Act such as California's.

The rewards for relators also are a little more generous under California law. Whistleblowers may receive 15 percent to 33 percent of any recovery the state obtains as a result of a qui tam lawsuit. If the state doesn't intervene and the relator is successful, the relator is eligible to receive 15 percent to 50 percent of the recovery, in addition to attorneys' fees and costs.

These are only a few of the unique considerations for actions under the California False Claims act. Other provisions, such as the statute of limitations, must be thoroughly understood before bringing such a claim.

Proceed with caution

A False Claim Act action may be an appropriate vehicle for a client if any fraud has been committed against the government. Justice Holmes wrote: "Men must turn square corners when they deal with the Government." (*Rock Island, A. & L. R. Co. v. United States* (1920) 254 U.S.

141, 143 [41 S.Ct. 55, 56]. When companies and individuals cheat the government, they hurt taxpayers who provide the funds.

Counsel should be aware, however, of the complexities of a False Claims Act case, and novices should seek guidance from experienced False Claims Act practitioners or other resources. Before proceeding with a qui tam lawsuit, clients should know the risks attendant to such cases, including professional risks and personal sacrifice. The most common False Claims Act whistleblowers are deeply troubled by the wrongdoing, and they bring their cases not primarily for a substantial award, but because they want the fraud to end.

Success in a qui tam lawsuit often depends on a number of events that may or may not be in counsel's or the client's control. But the satisfaction that relators and their counsel get from a successful case can be immense. Qui tam cases have not only recovered billions for U.S. taxpayers, but they have stopped medical practices that are harmful to patients and fraud that has endangered U.S. soldiers' lives. The potential to stop such wrongful practices alone may make them worth pursuing.

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