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OUTSIDE COUNSEL

Presenting a False Claims Act Case: Back to Basics

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False Claims Act cases focus on situations where the government has been victimized by fraud. A whistleblower who invokes the act first presents the case to government enforcement authorities who decide either to intervene and take up the case, or decline and allow the whistleblower to proceed on the government's behalf. With the growing number of False Claims Act filings and the scarce resources of the government, there is a premium on presenting whistleblower cases effectively so government attorneys can quickly recognize the strength of the case and pursue it promptly.

By offering incentives to report on fraud, the False Claims Act creates a public-private partnership. The whistleblower, as the private partner, can and should carefully select and vet the claims and file the good ones. This article addresses how whistleblowers' counsel can make their cases more attractive to the government thereby increasing the likelihood of intervention.

Effective Tool to Fight Fraud

The number of whistleblower cases has been increasing with the growing recognition that whistleblowers can effectively find and address fraud against the government. Government attorneys review these filings and make the election to intervene or decline. Government intervention typically results in a recovery; however, many cases have succeeded even after government declination.[1]

The act is one of the primary legal tools that the state and federal governments use to fight fraud that depletes government funds. The federal False Claims Act[2] was enacted during the Civil War, after unscrupulous contractors sold shoddy goods to the Union Army. Since revisions in 1986, the act has taken off as an effective fraud fighting mechanism, allowing the government to recover billions of dollars that otherwise would have been lost to fraud.[3] Key to its success has been the financial incentives the act gives to whistleblowers who successfully identify frauds, thus using a legally sanctioned profit motive to combat illegal profiteering.[4]

Many states have also passed False Claims Acts that similarly provide for whistleblower incentives.[5] The Internal Revenue Service, the Securities and Exchange Commission and the Commodity Futures Trading Commission have also set up programs that incentivize whistleblowers.[6]

While the government can initiate a False Claims Act case on its own, the majority of cases are brought on the government's behalf by whistleblowers.[7] These whistleblowers are called "relators" or "qui tam plaintiffs," and the actions are called "qui tam" actions, which is short for a Latin phrase meaning "[he] who sues in this matter for the king as well as for himself."

Procedurally, a relator pursues a False Claims Act case by filing an under-seal lawsuit in the government's name and serves the complaint and disclosure materials on the government, but not on the defendant.[8] Once the complaint is served, the government has the opportunity to investigate using its investigative powers. The government can then decide to intervene and take the case on as an enforcement action (and often settle it), or decline and allow the whistleblower to proceed on the government's behalf.[9]

A relator increases the likelihood of success by presenting a well-framed, compelling case to the government. Government attorneys receive a large number of False Claims Act cases of varying quality, and separating the good claims from poor packaging can be a challenge. It is incumbent upon relator's counsel to present good claims that are well described and have a clear path forward.

Laying Out a Path to Victory

Objectively evaluate the case, and bring only good ones. To state the obvious, a relator's counsel should objectively evaluate a case before filing it and presenting it to the government. When considering a case, counsel should put himself or herself in the shoes of the government attorneys and answer some basic questions: (a) What are the violations, and how can they be proved? (b) What is the quality of the evidence, and how clearly does it show the fraud? (c) What remaining facts must the government discover, and how can it obtain them? (d) What are the likely defenses, and why should they fail? (e) How has the government been harmed, and what damages theories apply? (f) Are there other factors that make the case attractive, such as the presence of public health and safety issues? and (g) Can the defendant pay a judgment. When I was in government and reviewing whistleblower cases, I wanted to see relator's counsel lay out a clear path to victory at trial or explain why the case vindicated particularly important public principles. It was also great if the case promised a big recovery, but that was not the only consideration.

Build a relationship of trust with the government. A case will be more attractive if the government lawyers recognize that they can trust relator's counsel to have thoroughly vetted the case by thinking through the same issues they would consider. Reliably formulated cases that tell a powerful story of fraud will always be more attractive than a collection of facts that might make out a case.

Breaking the trust is much easier than building it. Relator's counsel can and have undermined such trust by positing that something must have been done wrong that the government should try to figure out; by disclosing the defendants' privileged documents; by treating the case as belonging exclusively to the relator and not the government; by failing to convey important facts about the status of the case, such as prior declinations by other government entities; by presenting one-sided legal analyses that ignore contrary precedent; and by asking the government lawyers up front if they are man enough to take the case.

Present a complaint the government would file. The ideal complaint from a relator will look like the complaint that the government would file if it had known the facts. The government will learn additional facts through its investigation, but the government attorneys' job will be made easier if relator's complaint provides a solid framework.

Provide the government with a substantive disclosure statement. Relator's counsel sometimes present the government with disclosure statements that add nothing to the complaint. A disclosure statement, however, can be a valuable tool for making a case attractive because it can provide useful context and information outside the more formal confines of a complaint. It is also a chance to explain why the case should excite the government lawyers.

An effective disclosure statement should include some basic elements. First, it should recite up front the basic facts that a government lawyer might include in a case intake form, including a description of the parties and how each element of a False Claims Act violation is satisfied. It should describe the regulatory or contractual framework for the obligations claimed to have been violated, with citations to applicable law and precedents.

The disclosure statement should provide useful additional factual information that illuminates the facts in the complaint, including, potentially, speculation on how facts may fit together. It should also give guidance on how the government can develop further facts, including by identifying persons who potentially have relevant knowledge of the facts and by setting forth proposed document requests tailored to the facts of the case. It is also helpful to describe where defendants keep their documents and how they maintain their relevant electronically stored data.

Privileged Documents

Relator's counsel should not disclose the defendant's privileged documents to the government attorneys. If that is done without warning, the government attorney assigned to the case may be "tainted" and the case will likely have to be reassigned, thus slowing the process and breaching a relationship of trust. Counsel should expect that the government attorneys will evaluate the case without consideration of privileged matter, at least early in the process. It might be that the privilege was waived by the crime-fraud exception or on some other basis, but in most cases, the government will likely not come to that conclusion until there is an opportunity for the defendant, who owns the privilege, to state its position.

Considerations for Tax Cases

New York's False Claims Act, unlike most other False Claims Acts, allows whistleblower claims concerning tax violations.[10] Typically, these cases allege that a defendant submitted knowingly false tax returns and underpaid personal income, corporate income, sales, excise or other taxes.

Tax cases raise some special issues. One is that there are dollar thresholds requiring that (a) the defendant had net income or sales of more than $1 million for any tax year at issue, and (b) the damages, as plead, exceed $350,000.[11] The purpose of these thresholds was to focus these cases on bigger-ticket frauds. Generally, cases at or near these threshold amounts are unlikely to be attractive to the government unless they are coupled with other factors, such as criminal conduct, health and safety issues, or a very clear path to successful resolution. Tax cases also require a

focus on New York's tax secrecy laws, which will prevent the government attorneys from disclosing to relator's counsel facts arising out of a defendant's tax filings,[12] and thus may allow for less communication between government attorneys and relator's counsel than in other types of cases.

Relator's Counsel

First impressions matter even in the qui tam world, and relator's counsel are well advised to do the up-front work to present their cases well to the government. The government lawyers will want the benefit of counsel's critical thinking and efforts at streamlining claims with a view toward a future trial. So armed, they can move more quickly to an intervention decision. Even if the government declines, the relator will benefit from moving forward without unnecessary delay and with a solid framework for pursuing the case.

Endnotes:

1. For example, a whistleblower recently won a $175 million jury verdict in a declined case about the sale of highway barriers. See Danielle Ivory and Aaron Kessler, "Guardrail Maker Trinity Industries Liable for Fraud in Texas," New York Times, Oct. 20, 2014.

2. 31 U.S.C. §§3729–3733.

3. According to Department of Justice Statistics, the federal government recovered $27.2 billion from False Claims Act whistleblower actions between Oct. 1, 1987, and Sept. 30, 2013. See Department of Justice statistical survey at http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.

4. If the government intervenes in the case, the whistleblower receives a share of between 15 percent and 25 percent of the recovery. If the government declines, the share is between 25 percent and 30 percent. 31 U.S.C. §3730(d)(1).

5. E.g., New York enacted its False Claims Act in 2007. See N.Y. State Finance Law §187, et seq.

6. See 26 U.S.C. §7623 (2006) (IRS whistleblower program); 15 U.S.C. §78u-6 (2010) (SEC whistleblower program as part of the Dodd-Frank Act, P.L. 111-203); 7 U.S.C. §26 (2010) (CFTC whistleblower program, also as part of Dodd-Frank).

7. Under the federal False Claims Act, 9,244 qui tam actions were commenced between 1987 and 2013, compared to 4,522 started by the government. See Department of Justice Statistical Survey, supra.

8. 31 U.S.C. §3730(b)(2).

9. 31 U.S.C. §3730(c)(3).

10. See N.Y. State Fin. Law §189(4)(a). See also 740 Ill. Comp. Stat. 175/2 (excluding only income tax claims but not other tax-related claims under the Illinois False Claims Act).

11. N.Y. State Fin. Law §189(4)(a).

12. See, e.g., N.Y. Tax Law §697(e) (concerning personal income taxes).
