BY BARBARA J. DAWSON &
DANIEL W. HUITINK

In Government's Shoes

The Continuing Force Behind the False Claims Act & *Qui Tam* Complaints

To combat fraud by contractors selling faulty war supplies to the Union Army, in 1863 President Abraham Lincoln signed into law the False Claims Act (the "FCA"). Designed to root out fraud on the federal government,[1] this act uniquely allows certain private parties—"relators"—to bring "*qui tam*" lawsuits in which they can sue businesses on behalf of the government and potentially reap substantial rewards for their efforts. Now 150 years old, "Lincoln's Law" has seen multiple changes since its inception. In particular, changes in the mid-1980s and as recently as 2010 have boosted the FCA to extraordinary relevance.

BARB DAWSON, a co-chair of Snell & Wilmer's Commercial Litigation Practice Group, has more than 20 years of experience assisting companies and their boards of directors with complex litigation, internal investigations and compliance issues. She often assists clients with issues involving non-U.S. parties and venues, and formerly chaired the global affiliation of 160 law firms, Lex Mundi. She is recognized by Chambers, *Southwest Super Lawyers* and *Best Lawyers in America* in categories including "Bet-the-Company."

DAN HUITINK is a commercial litigation associate at Snell & Wilmer and a member of the firm's appellate, financial services litigation, internal investigations and regulatory compliance, professional liability litigation, and white-collar defense and investigations groups. Prior to joining Snell & Wilmer, he was an Assistant United States Attorney and a law clerk to Hon. Michael J. Melloy, United States Court of Appeals for the Eighth Circuit. Dan graduated from the University of Iowa College of Law in 2008.

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Today, the landscape is particularly ripe for FCA lawsuits, especially in states like Arizona. From a legal perspective, the statutory incentives for FCA claims are at an all-time high. Companies found responsible for FCA violations may be subject to treble damages and significant statutory penalties. And *qui tam* plaintiffs, a growing type of whistleblower, who pursue such claims may recover as much as 30 percent of those amounts. From a factual perspective, the target field is rich. Arizona companies are doing billions of dollars of business with the federal government in a wide spectrum of industries ranging from financial to health care to construction to aerospace to national defense to education, and beyond. And one need only follow the daily news to see the growing ranks of whistleblowers, who now can access data, publicize claims and achieve levels of notoriety for their efforts unlike any other point in history.

Together, these laws and facts create a minefield of risks and potential liabilities for businesses when FCA allegations arise. Indeed, according to the Department of Justice ("the DOJ"), 2012 saw nearly $5 billion recovered by the federal government through FCA claims, over $3.3 billion of which was under the *qui tam* enforcement provision of the act.[2] Given that whistleblowers can obtain significant portions of those staggering amounts, it should come as no surprise then that the DOJ also reported that 2012 saw more than 650 whistleblower-filed actions, also an all-time high.[3]

The Anatomy of a *Qui Tam* Action

As noted, a *qui tam* action is initiated by a private person, legally known as a "relator," acting as a whistleblower on behalf of the government.[4] To initiate a *qui tam* suit, a complaint alleging FCA violations—which typically involves allegations of fraudulent claims made by a business to the government for goods and services—is filed under seal, without notice to a defendant. Copies of the complaint are then provided to the DOJ with a written disclosure of the evidence that the whistleblower claims to have in support of his or her allegations.[5] It is important to note that not just any claim qualifies a whistleblower for relator status. The relator must have independent knowledge of the false claims or knowledge that "materially adds to … publically disclosed allegations or transactions."[6] Claims asserted on the basis of certain statutorily defined public disclosures do not suffice, unless the relator is an original source of that information.

Once the lawsuit is filed and delivered to the government, the government has 60 days to investigate the action and decide how to proceed. At the end of that period, which can be extended with court permission, the government has four options:

- **Option One:** The government can elect to intervene in the case. If it does, it will assume primary control of litigating the claim or claims. This step, however, does not take the whistleblower out of the picture entirely. He or she can still participate in the case, object to any settlement and potentially recover between 15 percent and 25 percent of any damages collected, as well as attorneys' fees and costs, just for blowing the whistle and filing suit.
- **Option Two:** The government can dismiss the case. The FCA, however, does not make this option particularly

enticing for the government. To achieve a dismissal, the government—despite not having brought the claim or having participated as a defendant—must show cause as to why the case should be dismissed. In response, the relator is entitled to object to the government's decision and to have a hearing to voice his or her objections.

- **Option Three:** The government can avoid litigation by settling the case. Again, however, this option also is subject to the whistleblower's ability to object to the settlement and to demand a court hearing to have objections heard. Moreover, a court must find that the settlement is fair and, even if it does, the relator is still potentially able to recover a portion of the settlement.
- **Option Four:** The government can investigate a claim and simply choose to decline to intervene. In this scenario—which often is the most reasonable option from the government's perspective—the whistleblower is free to continue the lawsuit and, if successful, he or she can recover between 25 percent and 30 percent of any damages as well as fees and costs, allowing the government to collect the rest without having pursued the claim.

Explaining the rationale for this unique prosecuting authority, the Senate Committee on the Judiciary stated, "In the face of sophisticated and widespread fraud … only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds."[7] On this basis, the FCA's force is strong, allowing individuals to stand in the shoes of the government in raising potentially devastating claims.

Recent Lessons Learned

Currently, FCA litigation has much momentum, particularly with respect to *qui tam* lawsuits. As explained by the government, and echoed by the attorneys who represent whistleblowers, "Vigorous enforcement of the [FCA] allows us to protect not only taxpayer dollars, but also the integrity of important government programs on which so many Americans rely."[8] While there is justification for that position because fraud against the government is an economic and legal reality, in the wrong hands, the *qui tam* tools are subject to misuse. The potential of substantial whistleblower rewards has created momentum for a number of unsuccessful *qui tam* claims, which can result in no financial gain by the whistleblower but great financial loss for the target business.

Given the high stakes of an FCA claim, businesses and the attorneys who represent them must be attuned to the substantial costs that may accompany even fully unsuccessful FCA suits. And although the FCA does provide an opportunity to recover fees and costs after successfully defending a *qui tam* claim, such a recovery requires a finding that the claim was "clearly frivolous, clearly vexatious, or brought *primarily* for purposes of harassment."[9] Under this exacting standard, the Ninth Circuit Court of Appeals has said, "The award of fees under the FCA is reserved for rare and special circumstances."[10] Thus, when faced with a *qui tam* claim, the recognition that the stakes are high and costs might not be recoverable is a necessary reality.

Furthermore, companies must consider the vast protection afforded *qui tam* claimants under the law. The FCA protects a whistleblower who "is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment" because of whistleblowing activities authorized under the FCA.[11] An employee alleging retaliation under the FCA is required to show that he engaged in protected activity under the FCA, the employer knew that the employee engaged in protected activity, and that the employer retaliated against the employee because of the protected activity.[12] Whether the employer actually committed fraud against the government is irrelevant to an FCA retaliation claim—the employee is only required to show that he reasonably believed that fraud was being committed.[13] Coupled with current trends in whistleblowing, this authority makes FCA claims challenging for employers, including those against whom allegations of fraud are never proven.

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Trends, Scenarios Leading to Claims

Increasingly, claims are being pursued across a broader range of industries. High on the industry watch list are the following:

1. **Health Care/Pharmaceuticals/ Medical Device Companies:** 2012 saw a record-breaking $3 billion in recoveries relating to fraud allegedly committed against federal health care programs.[14]
2. **Defense/Procurement:** In 2012, $427 million was recovered in false claims for goods and services purchased by the government.[15] There are more than 4,000 defense contractors in Arizona.[16] Those contractors were awarded more than $12.5 billion in government contracts in 2012.[17]
3. **Mortgage/Financial:** There was $1.4 billion in housing and mortgage-related cases in 2012 under the FCA.[18] Allegations of mortgage loan servicing/foreclosure abuses are rampant against banks in connection with federally insured mortgages. But more broadly, claims are arising outside traditional areas, raising the stakes for companies that typically would not be

considered government contractors.

Regardless of the industry settings, the most common scenarios leading to claims appear to be situations in which internal corporate reports preceded external *qui tam* claims. The National Whistleblowers Center, in a study of *qui tam* cases between 2007 and 2010, found that nearly 90 percent of employees "who would eventually file a *qui tam* case initially reported their concerns internally, either to supervisors or compliance departments."[19] In contrast, only 10 percent reported their concerns first to the government.[20] As the overwhelming majority of employees did utilize their company's internal reporting process to address issues, presumably the employees only took further steps after being dissatisfied with the internal response. While such data does not reflect upon the validity of the claims, it does suggest that, by and large, companies do receive notice of potential claims before they are pursued as *qui tam* complaints.

Best Practices for Claim Prevention

The data suggesting that employees overwhelmingly report internally first, before becoming external whistleblowers, suggests that best practices for internal compliance programs really do matter. Although *qui tam* claims may be asserted in any culture, companies in highly regulated sectors with internal volatility and high employee turnover are at the greatest risk. Risk can never be completely eliminated, but it may be reduced with a strong compliance structure aimed at encouraging internal reporting and leaving no reasonable basis for employees to pursue action externally. Best practices in this area include:

- Employee training to understand regulations and job responsibilities
- A consistent focus on compliance including helplines—a safe, protected way for employees with questions and/or concerns to "ask before acting"
- Ongoing communication from senior leaders reinforcing a commitment to compliance as the "tone from the top"
- Employee awareness of negative consequences of non-compliance with rules and regulations
- Attention to audit results that show a need for improvement in risk-related areas
- Awareness of industry-specific risks and trends to ensure learning from similarly situated entities
- Careful attention to—and training focused on—changes in laws affecting internal obligations
- Alternative options for employees who would feel uncomfortable with face-to-face reporting to superiors about concerns
- Well-defined procedures for reporting internal findings to the appropriate body if problems arise
- Empowering all employees, through training and communication, to know they will not face discrimination if they "report up" regarding an internal concern

As discussed previously, the FCA provides a clear path for reporting of false claims and rewards for "relators" who step out of their company roles to blow whistles. But the flipside of that coin is that there are economic incentives for prompt corporate self-reporting and handling of potential FCA claims. Given the data showing that nearly 90 percent of employees start by internally reporting to their employers before reporting to the government, the likelihood remains strong that companies have the chance to take charge, correct problems early and prevent potentially devastating claims from proceeding. Or, in the circumstances where external reporting is inevitable, companies often have the opportunity to be the first to do so—thereby drawing the sting from any *qui tam* claim to potentially follow.

In the end, broad use of *qui tam* claims across industry sectors may be far afield from the concerns about faulty Union war supplies that led to the creation of the FCA. That said, the fundamentals underlying the FCA's inception remain intact. False claims for recovery against the government are harshly treated, and those who bring them forward may be richly rewarded. And, unquestionably, the stakes are high in this multi-billion dollar area, making "Lincoln's Law," at 150, alive and thriving.

endnotes

1. Michael J. Davidson, *10 U.S.C. § 2408: An Unused Weapon in the Procurement Fraud Wars*, 26 Pub. Cont. L.J. 181, 182 (1997).
2. Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Acting Associate Attorney General Tony West Speaks at Pen and Pad Briefing Announcing Record Civil FY 2012 Recoveries (Dec. 4, 2012), www.justice.gov/iso/opa/asg/speeches/2012/asg-speech-1212041.html.
3. *Id.*
4. Sean Elameto, *Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act*, 41 Pub. Cont. L.J. 813, 814–15 (2012).
5. 31 U.S.C. § 3730(a)(2).
6. *Id.*
7. *See* S. REP. NO. 99-345 at 2, reprinted in 1986 U.S.C.C.A.N. 5266, 5286.
8. *See* Press Release, *supra* note 2.
9. 31 U.S.C. § 3730(d)(4) (emphasis added).
10. *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1006 (9th Cir. 2002).
11. 31 U.S.C. § 3730(h)(1).
12. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1103 (9th Cir. 2008).
13. *Id.*
14. *See* Press Release, *supra* note 2.
15. *See* Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Department Recovers Nearly $5 Billion in False Claims Act Cases in Fiscal Year 2012 (Dec. 4, 2012), www.justice.gov/opa/pr/2012/December/12-ag-1439.html.
16. GovernmentContractsWon.com, www.governmentcontractswon.com/department/defense/arizona_counties.asp (last visited Jan. 23, 2014).
17. *Id.*
18. *See* Press Release, *supra* note 15.
19. *See* Nat'l Whistleblowers Center, *Impact of Qui Tam Laws on Internal Compliance: A Report to the Sec. Exch. Comm'n* 4 (Dec. 17, 2010), *available* at http://whistleblowers.nonprofitsoapbox.com/storage/whistleblowers/documents/DoddFrank/nwcreporttosec.pdf.
20. *Id.*