The Mind of a Whistleblower:
*The Civil False Claims Act and its Qui Tam Provisions*

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**Outline**


2. Whistleblowers’ Motivations

3. How Organizations Respond to Whistleblowers

4. Ideas for Compliance Professionals
Federal and State

• The (federal, civil) False Claims Act, 31 U.S.C. § 3729 *et seq.*

• There are 31 state False Claims Acts, including a Florida False Claims Act.

“the Lincoln law”
“The Atomic Bomb of Lawsuits”

Damages & Penalties:

➢ Treble damages  
  (3 x loss)  

➢ $11,463-$22,927  
  per false claim  

➢ Attorney’s Fees

Civil Penalties

• That means at least $1.146 million in civil penalties alone for every 100 false claims.
Largest FCA Recoveries

- $2B  GlaxoSmithKline (2012)
- $1.72B  Johnson & Johnson (2013)
- $1.2B  Wells Fargo (2016)
- $1B  Pfizer (2009)
- $1B  Bank of America (2014)
- $900M  Tenet (2016)
- $800M  Abbott Labs (2013)
- **About 80 more over $125M**

“Knowledge” requirement is light:  EITHER...

(1) actual knowledge;

(2) acting in deliberate ignorance (head in the ground); or

(3) acting with reckless disregard.
“Qui tam”

• Basically means “for the King”; i.e., “for the Government”

Statute of Limitations

The LONGER of either 6 years from the date the violation is committed or 3 years from when the material facts are known or should have been known by the Government, but in no event more than 10 years after the violation is committed.
Whistleblower Rewards

- **15 - 25%** of the Government’s recovery if the Gov. takes over the *qui tam* suit

- **25 - 30%** if the Gov. doesn’t take it over and the relator pushes it to a recovery

- **0 - 10%** if the Relator’s info was publicly disclosed and the Relator isn’t an original source thereof, or if the Relator was a significant perpetrator of the fraud

**Average Whistleblower Reward**

$1.7 M
**Whistleblower Protections**

If retaliated against:

- Reinstatement
- 2 x’s Back Pay
- Special Damages
- Attorney’s Fees

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**Florida False Claims Act**

Very similar to the federal FCA, except:

- Deals with Fla. funds
- Also covers fraudulent tax returns (Fla. tax revenues)
- “innocent mistake” defense
What Makes a Good FCA case

- Large damages
- Public safety element (e.g., patient harm)
- A whistleblower who
  - is a true insider and knows details;
  - has proof of the fraud;
  - yet isn’t a perpetrator;
  - knows the financial effects of the fraud;
  - is grounded and doesn’t exaggerate;
  - isn’t a serial plaintiff;
  - isn’t trying to capitalize on info already in the public domain; and
  - listens to the sound advice of counsel.

Who Can Serve as Whistleblowers?

- Individuals, including present and former employees and contractors
- Companies, including competitors
- Patients
- Data miners
How NOT to Treat An Employee
Who Reports “Non-Compliance”

> Don’t make him the problem.
> Thank her. Consider promoting her.
> Promptly and seriously investigate.
> Keep him apprised of the progress of the investigation.
> Keep her realistic about the amt. of time need to investigate.
> Don’t start writing him up.

How to Treat An Employee
Who “Reports” Bogus Non-Compliance

> Contact outside compliance counsel to verify compliance.
> Explain to employee how the company is actually in compliance.
> Don’t fire or demote her.
> Contact employment defense counsel.
> Beware: the employee could have a winning wrongful retaliation suit even if he is wrong. Not likely, but possible.
Planning Ahead

- Employee arbitration agreements
- Document substandard employee conduct.
- Compliance programs that are “inclusive” of the employee who reports non-compliance
- Train managers to avoid even minor actions that could isolate or alienate the would-be whistleblower.

Thank you!

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