The False Claims Act:
Starting, Working, and Finishing a False Claims Act Case
July 2010

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STEPHEN E. VALE, RISK SOLUTIONS & INVESTIGATIONS
“There is no kind of dishonesty into which otherwise good people more easily and frequently fall than that of defrauding the Government.”

Benjamin Franklin
Introduction—Agenda

• False Claims Act
  – History
  – Statutory framework
  – State FCA’s
  – Recovery statistics

• Hypothetical Case
  – David v. Goliath Consulting
  – Problems, Issues, and Opportunities
False Claims Act Review

- Lincoln’s Law
- 1986 revamp
- Triple damages
- Basic statistics
The Audience

Are you:
- In House
- Independent
- Lawyer
- Accountant
- Private Investigator

Do you have Industry experience?
- Defense
- Financial
- Healthcare
- Engineering
- Telcom
Abraham Lincoln & The Creation of the False Claims Act in 1863
Qui Tam Actions

Qui Tam legislation delegates to private citizens the right and the financial incentive to act in the government’s place.
The Birth of the Modern FCA

• During the Second World War the old False Claims Act was amended to decrease its effectiveness.

• 1981 to 1989: Ronald Reagan and the Great Cold War defense expenditure

• Government officials were overwhelmed by the amount of fraud

• Very little White Collar procurement fraud was uncovered by the government

• The modern FCA legislation was passed in 1986, in a bipartisan effort
False “Claim”

A “claim” includes:

any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

31, U.S.C., § 3729(c)
False Claims Act—Process

- The relator and her lawyer investigate the case
- A disclosure statement is filed with DOJ
- DOJ conducts its own initial investigation
- A suit is filed
- The suit remains under seal (secret) for at least 60 days (and often for years) so that investigations can continue.
- DOJ may expand the scope of the investigation.
- DOJ may intervene in (take over) the suit, the relator remains as a party.
The Federal False Claims Act is a civil remedy initiated by private citizens and their lawyers (it’s not a criminal remedy)
Government Recovery

✓ Penalties under the False Claims Act are up to triple the actual damages plus up to $11,000 for each violation

✓ Damages can also be triple the entire value of a government contract not simply 3x improper payment or other illegal arrangements.
A Public-Private Partnership

- Joint investigations by Relator/Counsel and government and its investigators
- Government can intervene and prosecute the case
- Relator/Counsel can assist with joint prosecution agreements
Relator Rewards

✅ If the government intervenes and prevails, the relator may be awarded between 15% to 25% of the government’s total recovery

✅ If the government does not intervene and the relator prevails, the relator may be awarded between 25% to 30% of the government’s total recovery
The False Claims Act
Relator Issues

☑ If the relator was personally involved in the violation, the court may reduce the award as it finds appropriate. Any award is barred by a criminal conviction arising out of the activity.

☑ The act prohibits an employer from retaliating against an employee for attempting to uncover or report a fraud against the government (Section 3730(h))
Investigation of a False Claim

- If it smells like a dead fish...it usually means it’s a dead fish
- Industry knowledge is crucial
- Business practice fraud
- Gather evidence during normal business or consulting or examining activities
- If it’s an industry-wide best practice...then others are doing it.
Relator Eligibility to Recover

- Must file a qui tam lawsuit
- Must be an “original source” of non-public information
- Merely informing the government about False Claims Act violations is not enough
- Receives an award only if the government recovers money from the defendant as a result of the lawsuit
Practical Issues

✓ Juicy facts—this is:
  ✓ A Smoking Gun
  ✓ A sick child
  ✓ A dead patient

✓ Right Jurisdiction

✓ Right Judge
<table>
<thead>
<tr>
<th>States with False Claims Act</th>
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<tbody>
<tr>
<td>✓ California</td>
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<tr>
<td>✓ Colorado</td>
</tr>
<tr>
<td>✓ Delaware</td>
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<tr>
<td>✓ District of Columbia</td>
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<td>✓ Tennessee</td>
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<td>✓ Texas</td>
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<td>✓ Virginia</td>
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<td>✓ Wisconsin</td>
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</table>
The Success of the United States False Claims Act 1986-2009
# Total Recoveries

<table>
<thead>
<tr>
<th>Year</th>
<th>Settlement &amp; Judgment</th>
<th>Relator Share Awards</th>
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</thead>
<tbody>
<tr>
<td>1983</td>
<td>$26,000,000</td>
<td>$0</td>
</tr>
<tr>
<td>1987</td>
<td>$86,479,949</td>
<td>$0</td>
</tr>
<tr>
<td>2009</td>
<td>$2,428,232,366</td>
<td>$254,794,658</td>
</tr>
<tr>
<td><strong>Total 1987-2009</strong></td>
<td><strong>$24,056,382,238</strong></td>
<td><strong>$2,472,000,000</strong></td>
</tr>
</tbody>
</table>
2009—A Good Year

- USDOJ collected $2.4 billion in 2009 FCA settlements
- Second largest collection year ever
- Relator awards of $255,000,000
- Health care fraud: $1,600,000,000
  - Aventis/Bayer/Eli Lily/Quest = $866,000,000
- Procurement fraud: $608,000,000
  - DOD contracts $422,000,000
2009—An Even Better Year

• The “true” FCA related collection total for 2009 is........
• $5,600,000,000!
• Typical DOJ statistics do not count associated criminal recoveries:
  – Pfizer alone—$1,000,000,000
  – Lilly—$615,000,000
• State Settlements:
  – NY State and City paid $540,000,000 on Medicare false claims
# Top 25 Recoveries To Date

<table>
<thead>
<tr>
<th>Company</th>
<th>Amount Case Was Settled for ($)</th>
<th>Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Pfizer</td>
<td>1,000,000,000</td>
<td>Sep-09</td>
</tr>
<tr>
<td>2. Tenet Healthcare</td>
<td>900,000,000</td>
<td>Jul-08</td>
</tr>
<tr>
<td>3. HCA</td>
<td>731,400,000</td>
<td>Dec-00</td>
</tr>
<tr>
<td>4. Merck</td>
<td>650,000,000</td>
<td>Jan-08</td>
</tr>
<tr>
<td>5. HCA</td>
<td>631,000,000</td>
<td>Jun-03</td>
</tr>
<tr>
<td>6. Serono Group</td>
<td>567,000,000</td>
<td>Oct-05</td>
</tr>
<tr>
<td>7. TAP Pharmaceuticals Products Inc.</td>
<td>559,483,560</td>
<td>Oct-01</td>
</tr>
<tr>
<td>8. New York State &amp; New York City</td>
<td>540,000,000</td>
<td>Jul-09</td>
</tr>
<tr>
<td>9. Schering Plough</td>
<td>255,000,000</td>
<td>Aug-08</td>
</tr>
<tr>
<td>10. Eli Lilly</td>
<td>800,000,000</td>
<td>Jan-09</td>
</tr>
<tr>
<td>11. Abbott Labs</td>
<td>400,000,000</td>
<td>Jul-03</td>
</tr>
<tr>
<td>12. Fresenius Medical Care of N. America</td>
<td>385,000,000</td>
<td>Jan-00</td>
</tr>
<tr>
<td>13. Cephalon</td>
<td>375,000,000</td>
<td>Nov-07</td>
</tr>
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## Top 25 Recoveries To Date

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<tr>
<th>Company</th>
<th>Amount Case Was Settled for ($)</th>
<th>Date</th>
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<tr>
<td>14. Bristol Myers Squib</td>
<td>328,000,000</td>
<td>Sep-08</td>
</tr>
<tr>
<td>14. SmithKline Beecham Clinical</td>
<td>325,000,000</td>
<td>Mar-97</td>
</tr>
<tr>
<td>16. HealthSouth</td>
<td>325,000,000</td>
<td>Dec-04</td>
</tr>
<tr>
<td>18. Gambro Healthcare</td>
<td>310,000,000</td>
<td>Dec-04</td>
</tr>
<tr>
<td>19. Schering-Plough</td>
<td>292,969,482</td>
<td>Jul-04</td>
</tr>
<tr>
<td>20. AstraZeneca Pharmaceuticals</td>
<td>266,127,844</td>
<td>Jun-03</td>
</tr>
<tr>
<td>21. St. Barnabas Hospitals</td>
<td>265,000,000</td>
<td>Jun-06</td>
</tr>
<tr>
<td>✓22. Bayer Corporation</td>
<td>257,200,000</td>
<td>Apr-03</td>
</tr>
<tr>
<td>23. Schering-Plough</td>
<td>255,000,000</td>
<td>Aug-06</td>
</tr>
<tr>
<td>24. First American Health Care of Georgia</td>
<td>225,000,000</td>
<td>Oct-96</td>
</tr>
<tr>
<td>✓25. Amerigroup</td>
<td>225,000,000</td>
<td>Mar-08</td>
</tr>
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Financial Reform Bill
Whistleblower Provisions I

• Key provisions regarding whistleblowers contained in the new Dodd-Frank Wall Street Reform and Consumer Protection Act

  • Section 922 – Whistleblower Protection
    – 10-30% of monetary sanctions awarded – over $1mm
    – Requires “Original Information” – From independent analysis or knowledge
    – Various protections for whistleblowers
    – Invalidates pre-dispute arbitration agreements of disputes under this section

  • Section 748 - Commodity Whistleblower Incentives and Protection
    – Amends Commodity Exchange Act adding similar sanctions as 922 above
Section 1057 – Employee Protection
- Protection for employees who provide information to the new Bureau of Consumer Financial Protection
- “Covered Employee” – performing tasks related to offering a consumer financial product or service

Section 929A – Protection for Employees of Subsidiaries and Affiliates of Publicly Traded Companies
- Extends Sarbanes-Oxley Act protections to employees who report securities fraud and other violations

Section 1079A – Financial Fraud Provisions
- Amends the False Claims Act expanding protected whistleblower conduct to include an “agent or associated others in furtherance of an action”.
Questions about FCA basics
Choosing Our Hypothetical I

✓ False Billing
  ✓ Goods not delivered
  ✓ Double billing
  ✓ Non-contract corporate activity

✓ False (defective) prices
  ✓ Pricing that violates existing federal regulations

✓ Defective products
  ✓ Broken/used
  ✓ Not effective
  ✓ Lower grade content

✓ Hidden financial arrangements
  ✓ Keeping over-payment
  ✓ “Marketing” payments
  ✓ Kickbacks and bribes

✓ Regulatory violations
  ✓ Unknown/unapproved off label drugs
Choosing Our Hypothetical II

- Economic case
- Original Knowledge
- Mens rea (intent)
- Enough data to build a damage model
The Hypothetical

• The Players:
  – Goliath Consulting Partnership (GCP)
  – David—a high level employee of GCP

• GCP famous for:
  – “Teaming” skills
  – “Best practices”
  – Skillful management of cost structure and engagement margins
  – Trusted Third Party Advisor

• David was known for:
  – Consulting skills and team building
  – Integrity and ethical standards
  – Quirky personality traits
GCP’s External Business Model

Deliver various “solutions”

- State of the art information technology
- Skilled workforce consisting of highly paid white collar workers
- High profits and lean overhead cost structure
- Significant discounts from the vendors
- Plus “teaming” with the technology vendors who sold GCP’s clients the IT products and software—the platform for GCP’s consulting practice
- “Teaming Agreements,” “Partnerships,” or “Alliances”
- Advertising stressed GCP’s use of alliances helped solve problems
GCP’s Internal Business Model

• “Market Clearing Mechanisms”
  – Non-collusive competitors
  – Maximize returns
  – Cost to profit conversion
  – Alliances and influencers
  – Volume “discounts”

• Bottom Line—unknown to David and most GCP employees and its clients, GCP:
  – Had secret contractual arrangements with vendors and IT partners
  – Received secret cash payments/rebates/commissions on goods purchased from vendors and paid for by GCP clients
David Discovers the Scheme I

- David finds out through a series of emails directed to him during the course of his employment that GCP is receiving cash payments and cash rebates that it is not disclosing to its clients, including the Federal Government.

- GCP is also steering government procurement business towards its Alliance partner’s products.
David Discovers the Scheme II

- David
  - If it smells bad...
  - Use internal processes
  - Don’t get fired
  - Inside scope of employment
  - Don’t steal
  - Test information

- Government
  - 90% of cases rejected
  - “blowin’ whistles”
David: What To Do Now?

• David has to:
  – Evaluate his own risks:
    • Loss of Employment
    • Counter suits by GCP
    • Criminal risk for his participation
    • Risk of other skeletons in his closet
  – Investigate his suspicions and gather written evidence
  – Interview potential lawyers
  – Build the case with his lawyers and the support team
  – Decide, with lawyers, if GCP is liable under the FCA
  – Decide if the case will result in big damages

• Make the decision to go forward?
David’s Next Steps:

- Get personal attorney to help negotiate fair engagement letter with FCA counsel
- Create co-relator contract with any fellow relators
- Help lawyers prepare Disclosure Statement and Complaint
- Initial interview with DOJ and Investigators
- If criminal investigation—wear wire and get live evidence
Basic Issues Facing Goliath

• Identifying risk
• Compliance response
• Internal legal response
• Management response
• Outside counsel
• Investigating the case
• Discovery
GCP’s Risk Process

- Hotline
- Risk Management partner
- General Counsel’s office
- Compliance function

**Issues:**
- Targeted on expected risk
- Administrative abuses
- Regulatory/independence issues
- FCA never considered
- Economic challenges—contributions to margin

**Sideline: Compliance role**
GCP’s Initial Indications

- Indirect first contact
- Audit on contract
- Administrative subpoena
- Who’s fishing?
David’s Team

- Lawyers
- DOJ
- Government Agencies
- Forensic Accountants
- Investigators
- Damage Consultant
Goliath’s Team

- Management
- Compliance/Internal Control Group
- General Counsel’s Office
- Outside Lawyers
- Forensic Accountants
- Investigators
- Damage Consultants
Initial Legal Steps—David

• Prepare disclosure statement with lawyers
• Submit to DOJ
• File complaint in Federal Court under seal
Next Steps—David

• Government conservatism
  – DOJ is naturally skeptical and makes very measured decisions
  – DOJ intervenes in only 10 to 15% of cases filed
  – Interagency cooperation challenges

• DOJ resource issues:
  – limited use of subpoenas
  – Limited technical resources—IT, damages, etc.
  – Since DOJ has limited legal and technical resources, it may be up to David’s legal team to do much heavy lifting over many years
Next Steps—Goliath

- Hire outside counsel
- Assess business model damage
- Internal investigation
- Forensic and damage consultants
- Risks
  - Government debarment
  - Defensive damage models can be reverse engineered
Damages—David

- Granularization
- Rogan damages
- Damage model
- Specific false claims
- Relator share
- Federal/State split
- Non-FCA remedies
Damages—Goliath

• Internal issues—fix and prevent
• Legal issues
  – Discovery
  – Criminal risk
  – Debarment
• SEC/regulatory risk
  – Disclosure issues
    • No damages
    • Non-material
    • May be......
• Publicity risk
• Risk to high-level executives—including criminal risk
The End Game

• Mediation
• Settlement
• Trial
• Relator’s Share
  – Best friend = enemy
  – Settle and pay
  – Pay counsel
  – Discussion between DOJ/relator/target takes time
Damages—ACFE
Advantages

✓ A Fraud Examiner brings a real world financial perspective

✓ Data management skills:
  ✓ Sampling
  ✓ Damage modeling

✓ Examples
  ✓ Cross the two parties in kick backs
  ✓ Off label
Show Me the Money

Big Money = Big FCA Cases

✓ Past-Defense
✓ Present-Healthcare
✓ Future-Financial Collapse?
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Questions regarding the hypothetical?