A Brave New World: Defending Against Unclaimed Property False Claims Act Attacks
In the Headlines

Tax Whistleblower is Awarded $38 million by IRS

Wells Fargo Whistleblower Wins $5.4 Million and His Job Back

SEC Issues Two Whistleblower Awards, Handing Out $54 Million

$21M settlement reached in Texas whistleblower suit

EMS agencies, hospital

CFTC announces multiple whistleblower awards totaling more than $45m

WALL STREET TIPSTER GETS RICH OFF IRS WHISTLEBLOWER PROGRAM
Agenda

- Why You Should Care
- False Claims Act Standards and Defenses
  - Types of Whistleblowers
  - Elements of Claim
  - Damages
  - Procedure
  - Defenses
- Delaware
- New York
- Lessons Learned
- Best Practices
Why You Should Care

- Retailers with gift card company affiliates or using 3rd-party gift card issuers/managers
- Health care companies with unmatched insurance payments
- Companies with gaps in matching voided checks to re-issued checks
- Companies with historic compliance but with limited historical records
- Any company with a compliance gap
A state False Claims Act action goes by several additional names:
- *Qui tam*
- Whistleblower
- Private attorney general

Such action allows suit to be brought in the name of a purported defrauded government entity by a person ["relator"] with independent knowledge of the facts.

Federal whistleblower statute generally used for government contractors or Medicare fraud.

Similar state whistleblower statutes enacted.
Types of Whistleblowers

Major sources of whistleblowers

- Employees and former employees
- Professional Whistleblowers
- Competitors
- External advisors
- Third-party vendors
- Class Action Lawyers
Why People Become Whistleblowers

- Protect their position
- Advance the “cause” – do the right thing
- Misunderstanding of the rules
- Financial gain
- Vindictiveness
It Could Happen to You

Whistleblowers Get Help Now

The National Whistleblower Center (NWC) and the National Whistleblowers Legal Defense and Education Fund (NLEDF) provide direct assistance and information to help you protect your rights when reporting corrupt corporate communications. All communications are protected to the maximum extent under law by attorney-client and work product privileges.

Tips for Choosing the Best Whistleblower Attorney for Your Whistleblower Award or Whistleblower Retaliation Claim

There is no shortage of whistleblowers law firms and whistleblower attorneys. How do you choose which are best fitted to your case?

Experience Matters

There are many types of whistleblower rewards and whistleblower laws that exist. Establishing and researching whistleblower rewards can be a daunting task for even the most experienced whistleblower attorney. It is in your best interest to hire an experienced whistleblower attorney to successfully navigate through the maze of federal and state whistleblower laws.

A Whistleblower Law Firm With Record-Setting Results

- **$32 MILLION**
  - The largest healthcare fraud settlement, GlaxoSmithKline

- **$3 BILLION**
  - The largest healthcare fraud settlement, Pfizer Inc.

- **$2.3 BILLION**
  - The second largest healthcare fraud settlement

- **$400 MILLION**
  - One of the largest settlements in a healthcare case

- **$325 MILLION**
  - Largest settlement ever paid by a defense contractor, a case against Northrop Grumman

- **$302 MILLION**
  - The largest settlement ever paid by a medical device company for a faulty product, Guidant

McDermott Will & Emery

[Contact information]
Key Elements of a Reverse False Claim

- Knowing use of a false record or statement material to an obligation to pay money to the State, or
- Knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay money to the State
A “Knowing” Violation Requires:

- Actual knowledge,
- Acting in deliberate ignorance of the law, or
- Acting in reckless disregard of the law

A “knowing” violation may not require proof of specific intent to defraud.
Requirements for a FCA Plaintiff:

- Not required to be “insiders;” may proceed on behalf of government in declined cases.
- If there has been a prior public disclosure, allegations must be “based upon” independent knowledge and *qui tam* plaintiff must be “original source.”
FCA Suit vs. Unclaimed Property Audit/Appeal

- Forum
- Burden of Proof
- Discovery
- Privilege
- Confidentiality
- Damages
- Penalties
- Attorney’s Fees
Significant Damages May Be Awarded

- Treble damages (three times unclaimed property liability)
- Attorneys’ fees (state and *qui tam* plaintiff)
  - But see *People ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow, Inc.*, 2017 IL App (1st) 152668 (June 15, 2017) (a law firm serving both as client and attorney may not recover statutory attorneys’ fees under the Illinois False Claims Act)
- Per occurrence penalties
- Long term public relations issues can also result...
  - Tried in public domain and often labeled as fraud
  - Attorney General may issue press release and hold press conference
Procedural Development of a Qui Tam Action

- Relator files complaint under seal
- State has period to investigate allegations
- State decides whether to intervene in the lawsuit
- If State intervenes, it assumes primary responsibility for the litigation
  - Relator remains a party
  - State may dismiss or settle case even if relator objects and if court deems this action fair
  - Relator may receive 15% - 25% of proceeds
The State may decline to intervene at the outset.
  - Relator has right to continue the case
  - Relator may recover 25% - 30% of proceeds
  - State may subsequently decide to intervene at any time
Common Defenses

- Failure to Meet Heightened Pleading Standard
- Inappropriate Use of False Claims Act
Common Defenses (cont’d)

- **State-Related Defenses**
  - State-filed motion to dismiss
  - Prior audit history
  - Government knowledge defense
  - Conflicts between FCA and other areas of law (e.g., state constitution)

- **Prior Public Disclosure/Not an Original Source**

**What if general topic is disclosed, but not facts regarding specific defendant?**
Fact-Specific Defenses

- Audit facts
- Returns disclosed practice
- No false statement
- Reliance on advice of experienced advisor
- Researched issue
- Other
Defenses Based on Legal Arguments
– Not owed as a matter of law
– No “knowing” violation because state of the law regarding the obligation is unclear
– Statute of limitations
– Reduction of penalty
Qui Tam Actions are not new in the unclaimed property area

Examples:
- Grayson v. AT&T Corp. (DC 2009)
- State, ex Re. McCann v. Bank of America (CA 2011)
- Life Insurance cases (2012)
- State of Delaware ex rel. Higgins v. SourceGas LLC (Delaware 2012)
Recent False Claims Act Case: Delaware

  - Numerous DE-incorporated retailers alleged to have violated unclaimed property law by failing to remit unclaimed gift card funds after 5 years of inactivity
  - Original over 80 defendants: retailers and restaurants and Card Compliant issuing entities
  - Cards issued by related entities incorporated in a jurisdiction with an exemption. Case removed to federal court; remanded by order finding claims involved questions of state law (12/10/14)
  - 116 page complaint; Delaware joined in 2014
  - Alleged: sham; CardFact entity not actual issuer; lack of economic substance; retailers maintained control of proceeds
Recent False Claims Act Case: Delaware

  - Some defendants previously subject to Delaware audit or voluntary disclosure agreement
  - Delaware previously accepted arrangement during audits
  - Determination of who was “debtor” and “holder” was central to case
All defendants except Overstock settled.
- Reported settlement total between $25 and $30 million

Jury verdict finding against Overstock
- $3 million gift card liability
  - Delaware cost-of-goods sold value
  - Treble damages
  - 3 years of liability – there may be subsequent years with allegedly similar conduct
- One hour of jury deliberation after a five-day trial
False Claims Act Cases: New York

- Recent history in tax cases
  - Starbucks example
- New York Attorney General’s office may have a FCA investigation with or without a relator
- Current unclaimed property developments
Court's viewpoint may be influenced by belief in importance of false claims act litigation.

Court may be challenged by complex intersection of state unclaimed property/false claims act laws.

"Fact dispute" temptation.

Emphasize heightened pleading requirement.

Disclose positions to state/auditors. Record the fact of disclosure
  
  Request affirmative guidance?
Lessons Learned: *Qui Tam* Plaintiffs

- Hire the right people. Vet new hires. Monitor stressors. Use a team approach with levels of review.

- Publicize opportunities for internal disclosure and assure confidentiality.
Lessons Learned: Protecting Against Claims

- Know and monitor the law. Set policies and follow them.
- Review basis of and support for positions.
- Prepare legal memoranda supporting positions.
- Contemporaneously map out how positions could be defended – witnesses, documents, etc.
Best Practices for Dealing with Potential Claims

- Have a **robust internal reporting function** and regularly discuss that things are investigated
  - Establish process for receiving internal claims
  - Publicize internal claim process
  - Use process—investigate all reported claims and report generic requests or investigations
  - Publicize results where possible – build a positive internal perception that process works
Best Practices for Dealing with Potential Claims

- **Document and investigate** claims and the results of the investigation
- **Communicate outcomes** and decisions to claimant, where possible
- Conducting an internal investigation
  - Who should conduct the investigation?
  - Should the company hire external counsel? Criteria?
  - Privilege issues: Communications with advisors and consultants that are not lawyers are not privileged, must be turned over to state/relator if asked and can be damning
Best Practices for Dealing with Potential Claims

- Focus on who you hire
  - Background checks
  - Monitor workload and other stressors
  - Use team approach with levels of review
- Involve HR in investigating claims
- Termination procedures
Best Practices for Dealing with Potential Claims

- “Narrow the circle”: limit disclosures of compliance planning/exposure to as small a group as possible

- When privileged information is at issue, preserve the company’s assertion of privilege by warning the relator and any government agency already involved