THE FUTURE OF FRAUD IS NOW

April 28, 2023
4:00 p.m. – 5:00 p.m.

Continuing Legal Education

The Future of Fraud Is Now

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[1] These numbers correspond to those in bold at the lower-right corner of each page.

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The Future of Fraud Is Now

About the Speakers
(Listed Alphabetically)

Denise Barnes, a partner with Honigman LLP, is a former U.S. Department of Justice ("DOJ") Trial Attorney who focuses her practice on compliance, white collar and regulatory investigations, and complex commercial litigation. She represents clients in both public and non-public investigations, regulatory inquiries, and other proceedings involving federal and state agencies as well as commercial litigation.

Denise's investigative and litigation experience enables her to provide effective, yet pragmatic, counsel to clients in a broad range of practice areas with extensive experience in government investigations related to allegations arising under the False Claims Act, Anti-Kickback Statute, Stark Law, and FIRREA. During Denise's time at DOJ, she led a myriad of multidistrict investigations resulting in over $2.7 Billion in recoveries to federal taxpayers.

Renée Brooker represents whistleblowers in all U.S. federal courts and partners with other attorneys all over the country. She is a Partner at the Washington, D.C. law office of Tycko & Zavareei LLP, a public interest plaintiff's law firm.

Renée is the U.S. Justice Department's former Assistant Director for Civil Frauds, the office that supervises False Claims Act whistleblower cases in all 94 federal district courts. Renée had oversight for hundreds of cases, with nearly $6 billion in False Claims Act recoveries. Her experience cuts across all industries from financial to health care to government contracting and more. Renée received numerous Justice Department awards including the Attorney General's highest award for fraud enforcement.

Graham Lake is the Chief of the Workers' Rights and Antifraud Section at the Office of the Attorney General for the District of Columbia. He supervises a broad range of workers' rights and D.C. False Claims Act cases. Before joining the Office of the Attorney General, Mr. Lake worked for several years at Bredhoff & Kaiser, PLLC, where he represented local and national unions in a variety of litigation in state and federal court.

Mr. Lake graduated magna cum laude from the New York University School of Law and received his undergraduate degree from Amherst College. After law school, he clerked for the Honorable Harry T. Edwards on the U.S. Court of Appeals for the D.C. Circuit and for several judges on the U.S. District Court for the District of Connecticut (Judge Michael P. Shea, Judge Janet Bond Arterton, and the late Judge Mark R. Kravitz).

TAB ONE

THE FUTURE OF FRAUD IS NOW

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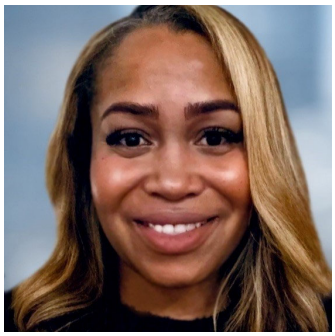
MEET YOUR PRESENTERS

Government: Graham Lake, Chief of the Workers' Rights and Antifraud Section, Office of Attorney General—District of Columbia

Relator: Renée Brooker, Representing Whistleblowers, Former Assistant Director U.S. Dept. of Justice
reneebrooker@tzlegal.com



Defense: Denise Barnes Partner, Investigations & White Collar Defense Honigman LLP

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FEDERAL AND D.C. FALSE CLAIMS ACTS

- Emerging fraud schemes that threaten to deplete taxpayer money
- Combating these fraud schemes with existing enforcement tools:
  - Federal False Claims Act (31 U.S.C. §§ 3729 - 3733)
  - DC False Claims Acts (D.C. Code Ann. §§ 2.381.01, et seq.)
  - Other Whistleblower Reward Programs

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WHAT IS THE PURPOSE OF THE FALSE CLAIMS ACT?

- **Recover** misspent taxpayer money
- **Deter** future misspending of taxpayer money
- **Encourage individuals to blow the whistle** on taxpayer fraud, waste and abuse through financial incentives
- **Protect** whistleblowers from retaliation

31 U.S.C. § 3729 et seq.

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FALSE CLAIMS ACT RECOVERIES ARE SIZEABLE FY2022

- $**2.2 BILLION**: Settlements & judgments under the False Claims Act
- $**1.9 BILLION**: Recovered thanks to qui tam (whistleblower) lawsuits
- $**488 MILLION:** Rewards paid to relators (whistleblowers)
- Since 1986, when Congress substantially strengthened the civil False Claims Act, now total more than **$72 billion**

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WHAT IS A FALSE CLAIMS ACT VIOLATION?

Knowingly **submitting** (or causing someone else to submit) a **materially** **false** or fraudulent **claim** for payment under a Government program, grant or contract, resulting in financial loss (**damages**) to the Government program, grant or contract.

- Each of these represents a legal element that plaintiff must prove:
- Knowing + false + claim + material + damages = False Claims Act violation
- 31 U.S.C. § 3729 et. seq. (federal False Claims Act)
- D.C. Code Ann. §§ 2.381.01, et seq. (District of Columbia False Claims Act)

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KEY TYPES OF FALSE CLAIMS ACT VIOLATIONS

Affirmative False Claims	Reverse False Claims
Knowingly submitting (or causing someone else to submit) a materially false or fraudulent claim for payment under a Government program, grant or contract, resulting in financial loss (damages) to the Government program, grant or contract	Knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government.

- 31 U.S.C. § 3729(a)(1)(G) (federal False Claims Act)
- D.C. Code § 2-381.02(a)(6) (District of Columbia False Claims Act)

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DAMAGES

- Often the amount of money the Government paid because of the false or fraudulent claims ("single damages figure")
- "Single damages" figure x 3 = treble damages
- Penalties of $13,508-$27,018 for each false claim
- D.C. FCA penalties of $11,181-$22,363 since 2019; AG rulemaking authority to increase every four years.

31 U.S.C. § 3729 (1)(1)

D.C. Code § 2–381.02(a), § 2–381.10; 27 DCMR § 5101

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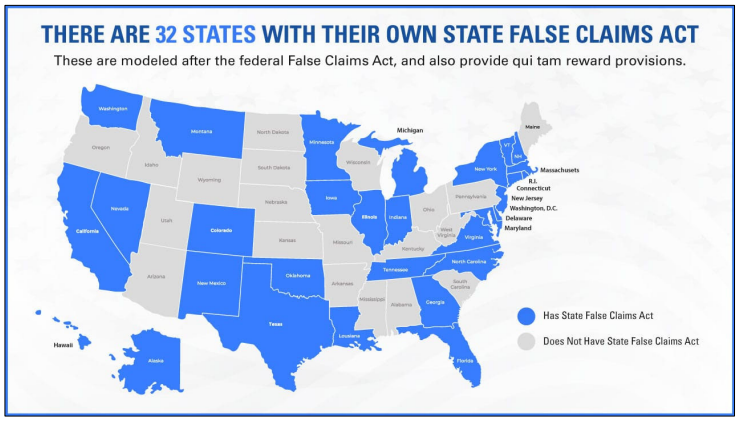
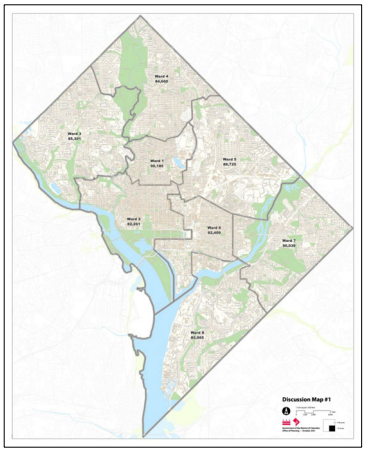
- Many states + D.C. with qui tam provisions
- Most modeled on federal False Claims Act
- Some only address Medicaid fraud
- Some states have False Claims Acts, but lack *qui tam* ("whistleblower") mechanisms
- States have different procedures
- Some have stronger retaliation provisions than others
- Many states have analogues to Stark Law & Antikickback violations
- Some states like DC & NY now address tax fraud



STATE + D.C. FALSE CLAIMS ACTS

- Qui tam provisions
- Modeled on federal False Claims Act
- Medicaid fraud, government contractor fraud, tax fraud
- Unique procedures
- Strong retaliation provisions
- Unique tax fraud provisions



DISTRICT OF COLUMBIA FALSE CLAIMS ACT

PART 2

Qui Tam Provisions: How Can An Individual or Company Bring A False Claims Act Case Against Their Employer or a Competitor?

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UNIQUE PUBLIC-PRIVATE PARTNERSHIP

- The False Claims Act has a unique "qui tam" provision, meaning that an individual (a whistleblower called a "relator") can stand in the shoes of the United States and file a False Claims Act case on behalf of the United States
- Relator is suing a private company on behalf of the Government
- The Government is always the "party in interest"
- There are financial rewards for whistleblowing:
  - 15-30% of the government's recovery
- There are protections for blowing the whistle on behalf of the government

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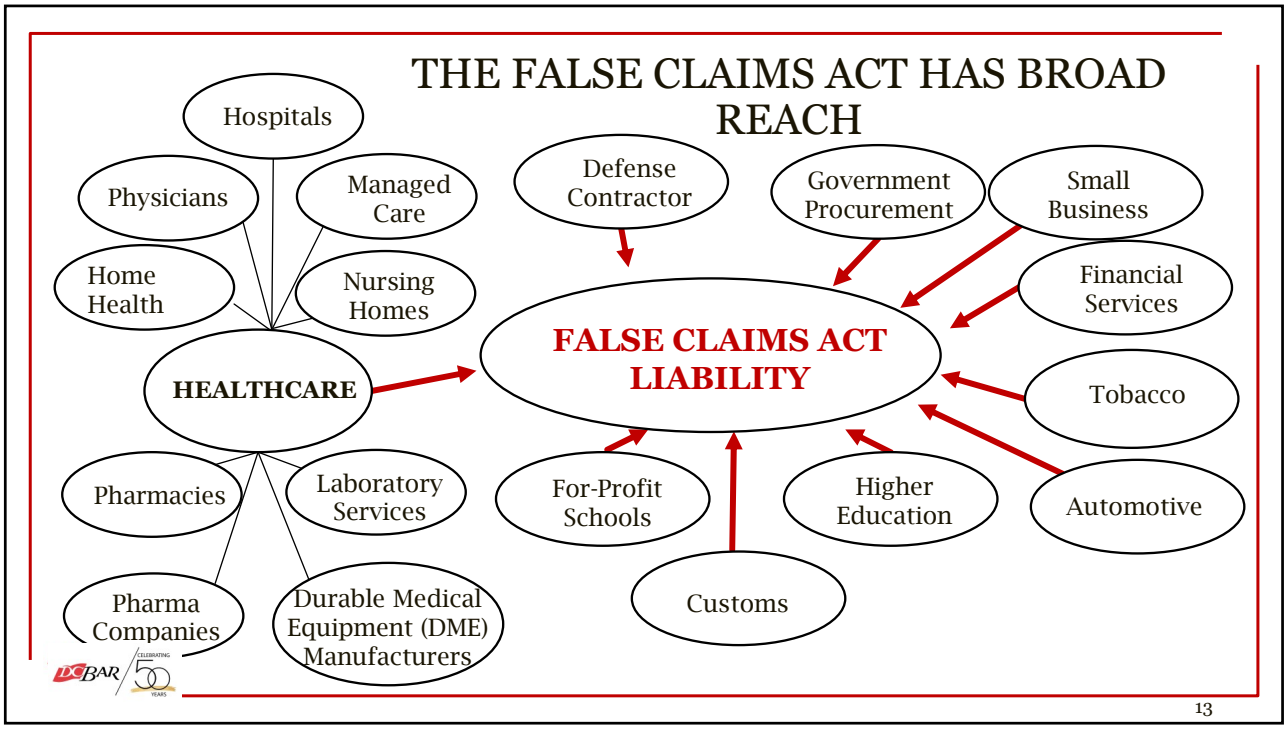

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WHO CAN BE A WHISTLEBLOWER?

- Employees—current or former employees
- Employees of government contractors, health care entities, or any regulated company
- Non-employees (competitors, clients, consultants, industry experts)
- Almost anyone with evidence & knowledge of fraud involving government money

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FALSE CLAIMS ACT RECOVERIES ARE SIZEABLE FY2022

- $2.2 BILLION: settlements & judgments under the False Claims Act
- $1.9 BILLION: recovered thanks to qui tam (whistleblower) lawsuits
- $488 MILLION: rewards paid to relators (whistleblowers)

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DEPT. OF JUSTICE INITIATIVES OR PRIORITIES

- **Health care fraud** enforcement priorities: pharmaceutical, medical devices, durable medical equipment, managed care, Medicare Advantage, unlawful kickbacks to doctors or patients
- **Government contracting fraud** priorities: fraud affecting military bases such as state-of-the art technology (such as jets, helicopters, tanks, ships, and submarines), as well as food, fuel, and other provisions; procurement fraud involving satellites and transportation into space; disaster relief; administrative services; international shipping; computers and information technology services; and everyday government office supplies

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KICKBACKS & IMPROPER FINANCIAL ARRANGEMENTS

- Anti-Kickback Statute – prohibits payments for referrals involving federal health care programs such as Medicare and Medicaid, 42 U.S.C. § 1320a-7b(b)
- Stark Law – prohibits improper financial arrangements among health care providers, 42 U.S.C. § 1395nn(g)(1)
- Violations of the Anti-Kickback Statute and the Stark Law result in "tainted" and fraudulent claims being submitted to the government-health care programs such as Medicare and Medicaid. This is a basis for False Claims Act liability.
- Kickbacks as predicate violations to False Claims Act liability exist outside the health care space, too. For example, conduct showing payment for access to government contracts is also actionable.

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COST OF NONCOMPLIANCE

Hidden Costs Of FCA, Anti-Kickback Claims For Public Cos

By Michael Shaheen and Rebecca Baskin · *Listen to article*

Law360 (February 22, 2023, 2:00 PM EST) --

A U.S. Department of Justice Civil Division press release usually starts with the result — that is, how much money a company has paid to resolve allegations of fraud. But that settlement price is only a small fraction of the actual economic toll inflicted upon an entity targeted by the government.

Public disclosure of enforcement actions results in reputational and pecuniary penalties that are exponentially costlier than the value of the announced settlement as investors adjust share prices to reflect the cessation of targeted behaviors, the threat of disbarment, the removal of corporate officials and board members, shareholder derivative suits and other ancillary litigation.

Examining 16 publicly traded companies that resolved False Claim Act and/or Anti-Kickback Statute claims in the past five years, and comparing their stock prices at the time of the public disclosures of the investigations with their prices at the time of resolution, reveals the staggering cost of being targeted by the government: On average, the companies lost 25% of their value over the public lifespan of the cases.

The conclusion here — investing in a strong compliance program and creating an open environment where concerning behavior is identified and resolved in its infancy is far cheaper than becoming the target of a DOJ investigation.

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DOJ'S CIVIL CYBER-FRAUD INITIATIVE

- Announced October 6, 2021: Calling all whistleblowers
- False Claims Act as the tool to pursue cybersecurity fraud by government contractors and grant recipients.
- Companies that put U.S. information or systems at risk by (1) knowingly providing deficient cybersecurity products or services, (2) knowingly misrepresenting their cybersecurity practices or protocols, or (3) knowingly violating obligations to monitor and report cybersecurity incidents and breaches

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FALSE CLAIMS ACT HOT TOPICS AND TRENDS

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KNOWLEDGE/SCIENTER

- *U.S. ex rel. Sheldon v. Allergan,* 2022 WL 4396367 (4th Cir. 2022) (*en banc*) **(defendant could not have the requisite scienter based on objectively reasonable interpretation and limited "authoritative guidance" sufficient to warn defendant's away to (a) circuit precedent or agency guidance)**
- *U.S. ex rel. Proctor v. Safeway Inc*., 30 F.4th 649, (7th Cir. 2022), *pet. for cert. pending* (S.Ct.) **(reg "ambiguous" and "no authoritative guidance warning the defendant away from its interpretation"—"Subjective intent is irrelevant")**
- *Olhausen v. Arriva Medical, LLC*, 2022 WL 1203023 (11th Cir. 2022), *pet. for cert. pending* (S.Ct.)
- *U.S. ex rel. Schutte v. Supervalu Inc*., 9 F.4th 455 (7th Cir. 2021), *pet. for cert. pending* (S.Ct.) **(Subjective intent is "irrelevant" where statute/reg is "ambiguous" and where defendant's interpretation is "objectively reasonable")**

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GOVERNMENT DISMISSAL AUTHORITY

- U.S. ex rel. Polansky v. Executive Health Resources, Inc., 17 F.4th 376 (3rd Cir.), cert. granted (S.Ct. 2022)
- *U.S. ex rel. Borzilleri v. Bayer Healthcare Pharmaceuticals, Inc.,* 2022 WL 190264 (1st Cir. 2022)

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D.C. FCA - NOTABLE CASES

Two Key Developments: (1) FCA tax-related enforcement & (2) the intersection of workers' rights enforcement and FCA enforcement.

- In 2021, Washington D.C. joined several other States in authorizing False Claims Acts actions involving tax fraud.
- August 31, 2022: DC-OAG sued DC-based billionaire Michael Saylor & software company MicroStrategy for evading more than $25M in DC taxes.
- November 17, 2022: DC-OAG settled case with Drizly that required payment of ~$6 Million to resolve FCA and tax allegations that it failed to pay D.C. sales tax under its Marketplace Facilitator law and, separately, allegations that it solicited tips from consumers that did not go to delivery drivers. Settlement included $1.95M in restitution for delivery drivers.
- March 30, 2023: DC-OAG settled case with cleaning contractor who failed to disclose subcontractors, who in turn failed to pay janitors minimum wage or provide paid sick leave.

OTHER WHISTLEBLOWER REWARD PROGRAMS

- THE **DOJ** BANK FRAUD WHISTLEBLOWER REWARD PROGRAM:
  - The Financial Institutions Anti-Fraud Enforcement Act (FIAFEA)
- THE **CFTC** WHISTLEBLOWER REWARD PROGRAM:
  - Fraud: Commodity futures, options, over-the-counter derivatives, swaps & violations of Commodity Exchange Act
- **TAX** WHISTLEBLOWER REWARD PROGRAMS:
  - The IRS Program & certain State False Claims Acts (NY, DC, IL, IN, RI, DE, HI, NV, NH)
- THE **SEC** WHISTLEBLOWER REWARD PROGRAM:
  - Violations of securities laws, Foreign Corrupt Practices Act, bribery of foreign Government officials
- THE **TREASURY DEPARTMENT** ANTI-MONEY LAUNDERING WHISTLEBLOWER REWARD PROGRAM:
  - For Bank Secrecy Act violations & making illegally-gained proceeds ("dirty money") appear legal ("clean")
- THE **DOT/NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION** WHISTLEBLOWER REWARD PROGRAM:
  - Auto safety

TAB TWO

Here's how to get started in representing individuals—or whistleblowers—who want to hold companies accountable for defrauding the government.

The ABCs of QUI TAM ACTIONS

By || **Renée Brooker and Jaclyn Tayabji**

Every day, employees and other insiders come across evidence that companies are defrauding the U.S. government—including through government health insurance, contract and procurement, tax, securities, COVID relief, and cyber fraud.[1] Those individuals must decide whether to "blow the whistle" and bring the corporate wrongdoing to the attention of the government through a "qui tam," or whistleblower, False Claims Act (FCA) lawsuit.[2]

The FCA is a tool to remedy corporate wrongdoing, fraud, and other unlawful business practices that come at the taxpayers' expense.[3] The FCA prohibits any person from knowingly filing (or causing the filing of) a false claim, using a false or fraudulent statement to obtain payment from the government, or knowingly retaining overpayment from the government.[4]

Relators

The whistleblower who brings a qui tam action is known as a relator and files suit on the federal government's behalf.[5] Collectively, in fiscal year 2021, whistleblowers filed 598 qui tam suits and helped the government recoup more than $1.6 billion in FCA settlements and judgments.[6]

The purpose behind the FCA's qui tam provisions is to "set up incentives to supplement government enforcement of the Act by encourag[ing] insiders privy to a fraud on the government to blow the whistle on the crime."[7] This purpose underlies the procedures and remedies available under the FCA.

The relator must file the qui tam action under seal to allow the government an opportunity to investigate the allegations and determine whether it wants to intervene and take the case on as its own or decline intervention and permit the relator to continue litigating on the government's behalf.[8] The government at its discretion may also begin a parallel criminal investigation. The initial seal period is 60 days, but the court may grant extensions allowing the government more time to make an intervention decision—the seal will be lifted after the government intervenes or declines to intervene.[9]

However, the FCA's "first-to-file" rule permits only the initial qui tam to proceed, prohibiting any subsequent relator from filing a qui tam "based on the facts underlying the pending action."[10] Similarly, if "substantially the same allegations or transactions" are already publicly disclosed in certain court or administrative hearings in which the government is a party, a government report or investigation, or the news before the qui tam action is filed, the court likely will dismiss the qui tam action unless the relator is an "original source" of the alleged information.[11]

A relator is considered an "original source" if either they voluntarily disclose to the government information about the fraud before the public disclosure, *or* if they have knowledge that is "independent of and materially adds" to the publicly disclosed information and voluntarily provide that information to the government before filing the qui tam complaint.[12] The meaning of "public disclosure" and "original source" has been litigated, so you must understand these potential risks and barriers before bringing a qui tam action.[13]

Evidence

What is required for a relator to bring a qui tam action? Although the FCA does not require a relator to have specific types of evidence—or any evidence at all—to support the qui tam action, evidence is paramount. It both informs the government about the nuances of a defendant's fraudulent scheme and aids the government's initial investigation. The government also can consider the quality and scope of the relator's evidence in determining a relator's share when the litigation is resolved. Further, evidence will help the relator satisfy the heightened pleading standards for allegations of fraud if the government declines to intervene.

When filing the qui tam complaint, the relator must provide to the government "substantially all material evidence and information" in the relator's possession—including any documents they have obtained.[14] Providing documentary evidence makes it more likely that the government will further investigate the relator's claim.

The specific types of documentary evidence that will best support a qui tam action vary by the type of fraud at issue. But a few types of evidence can address foundational questions about the nuances, scope, and impact of the defendant's fraud. These types of evidence include internal company communications such as emails, Slack or Teams messaging, PowerPoint presentations, calendars, organizational charts, billing records, contract documents, patient medical records, internal reports, investigations, or audits—any documents that help inform the government about the allegations. While these and other categories of documents may add value to a relator's qui tam action, you must consider the risks involved in obtaining evidence.

Risks

On a case-by-case basis, consider the risks involved in your client filing a qui tam action and collecting evidence. And do so expeditiously; time is of the essence. Several areas of risk and potential liability can arise—discuss these with your client before they obtain or provide documents to you.

General release. Your client may be concerned about their ability to bring a qui tam action if they signed a general release of claims with their previous employer. A release of claims is generally unenforceable to bar subsequent FCA claims—under the U.S. Supreme Court's balancing framework in *Town of Newton v. Rumery*,[15] "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."[16] Courts have applied this framework to hold that the public policy interest in notifying the federal government about fraud generally outweighs the public policy interest in private settlement via a release of claims.[17]

Your client also may have the option to sign a release of claims after filing the qui tam action. There is less case law on the enforceability of a release signed after the qui tam is filed—enforceability likely will turn on the relevant circuit court's interpretation of the FCA provision requiring consent of the court and the U.S. Attorney General to dismiss

the complaint.[18] Whereas most circuits to decide this question, including the Fourth, Fifth, and Sixth Circuits, have construed the FCA to prohibit a relator from voluntarily dismissing a qui tam action without the U.S. Attorney General's consent at *any time* during the qui tam action, the Ninth Circuit has held this consent requirement no longer applies once the government declines to intervene.[19]

Acquiring documents. Your client should acquire only company documents (copies, not originals, although most documents are stored electronically now) that they have access to in the ordinary course of their job duties and that are relevant to the FCA allegations. If your client still works at the company, they may be concerned about raising red flags by downloading and saving documents—this is particularly true with employers increasingly using tracking software. If this is a concern, your client should consider whether emailing documents, saving them to a USB, printing them to PDF, or other means of acquiring documents will raise any suspicion.

Once your client obtains documents, certain exceptions allow for the disclosure of sensitive information to attorneys and the government for purposes of reporting unlawful conduct—for example, the whistleblower exception to the HIPAA privacy rule.[20] Your client should not share or discuss evidence with anyone besides their counsel and in their disclosures to the government.

Also review relevant state wiretap laws and consider whether your client may lawfully record conversations without the consent of all parties to the recording. Further, if your client exceeds their authorization and acquires documents they are prohibited from accessing (for example, by using another employee's login credentials), they may face liability under the Computer Fraud and Abuse Act.[21] Your client should not provide—even to you—classified documents if you or members of your legal team lack the requisite government security clearance.

On a case-by-case basis, consider the risks involved in your client filing a qui tam action and collecting evidence.

It is critical for your client to understand that after the qui tam is filed, they should cease all investigative activity without the express permission of the government.

Breach of contract. Further, if your client signed a confidentiality agreement or takes confidential company documents, consider whether your client may face counterclaims for breach of contract. Courts have noted that "nothing in the FCA addresses confidentiality agreements, nor the potential liability relators may incur by virtue of their obligations of confidentiality to former employers."[22] Thus, by necessity, this inquiry must be client specific.

In general, your client is less likely to face liability if their search for documents is reasonable and limited to documents relevant to the FCA allegations. Some courts have adopted a public policy exception when defendants bring breach of contract counterclaims. These courts have applied the *Rumery* balancing framework to ascertain whether the public interest related to the disclosure of fraud to the government outweighs the public interest in enforcing confidentiality agreements—ultimately deciding that it does.[23]

Even if the jurisdiction has adopted a public policy exception, your client should be judicious in deciding which documents to obtain. Only those categories of documents that are relevant to the FCA allegations will be protected. That is precisely what happened in *Siebert v. Gene Security Network, Inc.*: The Northern District of California adopted a public policy exception but did not dismiss the defendant's breach of contract counterclaim in its entirety "because it is possible that [relator] also took confidential documents that bore no relation to his False Claims Act claim. . . . As to those documents, if there are any, [defendant] has adequately pleaded a counterclaim."[24]

To that end, your client is most likely to face counterclaim liability if they engage in a "vast and indiscriminate" search.[25] For example, in *United States ex rel. Cafasso v. General Dynamics C4 Systems, Inc.*, the Ninth Circuit affirmed

DNY59/GETTY IMAGES

summary judgment in favor of the defendant for its counterclaim alleging breach of a confidentiality agreement against a relator who collected thousands of documents (11 gigabytes of data) without reviewing any for relevance.[26] The Ninth Circuit viewed the relator's document collection as a "wholesale stripping" of the company's documents.[27]

Speak with your client about any confidentiality obligations, their employer's monitoring practices, and where and how they will access documents as early as possible to best advise them on how to proceed.

Attorney-client privilege. Also ascertain whether your client has collected evidence that violates the attorney-client privilege of the company. It may help to identify names of corporate counsel during your initial client consultations and perform electronic searches to identify documents containing the names of counsel.

Then segregate any potentially privileged documents and remove them from document review or case development. When the time comes to produce documents to the government, withhold potentially privileged documents to avoid tainting the government investigation or disqualifying you from involvement in the case.

Retaliation

Whistleblowers play a crucial role in deterring and exposing fraudulent conduct. The FCA recognizes this by protecting individuals from retaliation for standing up against and reporting fraudulent conduct. Retaliation claims under the FCA are known as "Section H claims."[28]

Section H claims typically arise in the context of an employer-employee relationship, but the FCA allows such claims to be brought by "any employee, contractor, or agent" and is concerned primarily with the type of conduct underlying the dispute.[29] To prove a Section H claim, your client must demonstrate they engaged in a protected activity and were discriminated against because of that protected activity.[30]

A plaintiff need not actually file a qui tam action or demonstrate success as to the underlying claims of fraud to state a valid retaliation claim.

A plaintiff need not actually file a qui tam action or demonstrate success as to the underlying claims of fraud to state a valid retaliation claim. Protected conduct includes all acts in furtherance of an FCA action (such as addressing, opposing, investigating, obtaining documents related to, or reporting the unlawful conduct) when the plaintiff had an objectively reasonable basis to believe the defendant is or soon will violate the FCA. This, coupled with the defendant's discriminatory conduct—such as harassing, demoting, marginalizing, or terminating an employee or filing retaliatory counterclaims because of the protected conduct—may give rise to Section H liability.

Section H claims are brought in the same action as qui tam allegations unless your client is not filing a qui tam action. Regardless of how they are brought, there are some differences between Section H claims and qui tam claims. Section H claims are filed on behalf of the plaintiff, not the government. Accordingly, a general release of claims typically is enforceable as to a Section H claim, even if the release would be unenforceable as to the qui tam claims.[31]

Additionally, remedies under a Section H claim are aimed at making the plaintiff, not the government, whole. Remedies under a Section H claim include reinstatement; double back pay plus interest; and special damages, including litigation costs, attorney fees, emotional distress damages, and compensation for other noneconomic harm from the retaliation—without any cap on compensatory damages.[32]

Wending your way through FCA qui tam case issues can be complex.[33] Understanding the unique procedures that a whistleblower must follow is key to holding companies accountable for defrauding the government.

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Renée Brooker *is a partner and* **Jaclyn Tayabji** *is a fellow at Tycko & Zavareei in Washington, D.C. They can be reached at reneebrooker@tzlegal.com and jtayabji@tzlegal.com, respectively.*

Notes

1. If "substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed" before the qui tam was filed, the whistleblower must be considered "an original source of the information." 31 U.S.C. §3730(e)(4)(A). Whistleblowers are most frequently employees or other individuals who have access to the corporate conduct occurring behind closed doors.
2. *Id.* at §3730(b)(1).
3. 31 U.S.C. §§3729–30.
4. *Id.* at §3729(a)(1)(A), (B), (G).
5. *Id.* at §3730(b)(1).
6. U.S. Dep't of Justice, *Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021*, Feb. 1, 2022, https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year.
7. *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 963 (9th Cir. 1995) (internal quotations and citations omitted) (alteration in original). The FCA permits a financial reward to the relator known as the "relator's share," which is between 15–25% of the proceeds (if the government intervenes) or 25–30% (if the government does not intervene). *See* 31 U.S.C. §3730(d)(1), (2).
8. 31 U.S.C. §3730(b)(4).
9. *Id.* at §3730(b)(2)–(4).
10. *Id.* at §3730(b)(5).
11. *Id.* at §3730(e)(4)(A). The court need not dismiss the qui tam on public disclosure grounds if the government opposes dismissal.
12. *Id.* at §3730(e)(4)(B).
13. *See generally United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 298–99 (3d Cir. 2016); Joel D. Hesch, *Restating the "Original Source Exception" To the False Claims Act's "Public Disclosure Bar" In Light of the 2010 Amendments*, 51 U. Rich. L. Rev. 991 (2017).
14. 31 U.S.C. §3730(b)(2).
15. *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987).
16. *Id.*
17. *See United States ex rel. Ladas v. Exelis, Inc.*, 824 F.3d 16, 24 (2d Cir. 2016); *Northrop Corp.*, 59 F.3d at 963, 969. Although the balance of the interests generally skews in favor of allowing relators to proceed with qui tam actions, if the government was already aware of the fraud, the interest in notifying the government is reduced and the balance of interests skews in favor of enforcing the release of claims. *See United States ex rel. Radcliffe v. Purdue Pharma L.P.*, 600 F.3d 319, 329, 333 (4th Cir. 2010); *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1168–70 (10th Cir. 2009); *United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230, 233 (9th Cir. 1997), *as amended on denial of reh'g and reh'g en banc* (Mar. 19, 1997). This exception is known as the "government knowledge test." Talk to your client about whether the government already knows about the fraud such that the general release may be enforceable.
18. 31 U.S.C. §3730(b)(1) ("The [qui tam] action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."); *see United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 481 F. Supp. 2d 815, 822–23 (S.D. Tex. 2007) (because "the basic effect of a settlement and a release are the same insofar as they relate to the position of the parties to the action," the holdings of cases interpreting the scope of the FCA's consent provision "can be applied to releases as well").
19. There is a circuit split regarding the interpretation of the FCA's consent provision, 31 U.S.C. §3730(b)(1). *Compare United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 339 (4th Cir. 2017); *United States ex rel. Longhi v. United States*, 575 F.3d 458, 474 (5th Cir. 2009); *United States ex rel. Doyle v. Health Possibilities, P.S.C.*, 207 F.3d 335, 339 (6th Cir. 2000); and *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 158 (5th Cir. 1997) *with United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 722 (9th Cir. 1994).
20. 45 C.F.R. §164.502(j)(1).
21. 18 U.S.C. §1030(e)(6) (2020). *See Van Buren v. United States*, 141 S. Ct. 1648, 1662 (2021) (interpreting Computer Fraud and Abuse Act to refer to information that a person is not entitled to obtain).
22. *Siebert v. Gene Sec. Network, Inc.*, 2013 WL 5645309, at *7 (N.D. Cal. Oct. 16, 2013).
23. *See id.* "Several courts, some relying on the Ninth Circuit's openness to the public policy exception [relator] proposes here, have adopted just such an exception." (citing *United States ex rel. Ruhe v. Masimo Corp.*, 929 F. Supp. 2d 1033, 1039 (C.D. Cal. 2012); *United States ex rel. Head v. Kane Co.*, 668 F. Supp. 2d 146, 152 (D.D.C. 2009);

NOTICE OF PROPOSED AAJ LEADERS FORUM MEMBERSHIP DUES INCREASE

Pursuant to Article IX; Section 1 of the Association Bylaws, notice is hereby provided that there is a proposed membership dues increase for the Patron level of Leaders Forum. The proposed dues increase will be considered for approval by a two-thirds vote of the Board of Governors present at the Board's meeting at the 2023 Winter Convention.

A vote on the proposed dues increase will take place at the Board of Governors meeting on Tues., Feb. 7, 2023, in Phoenix, Ariz.

AAJ Leaders Forum Patron Level Increase Proposal: $12,000 annually to $13,500 annually.

United States v. Cancer Treatment Ctrs. of Am., 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004)).

24. *Siebert*, 2013 WL 5645309, at *8.

25. *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1062 (9th Cir. 2011).

26. *Id.* While the Ninth Circuit in *Cafasso* did not adopt a public policy exception, it noted that, if it did, "those asserting [the exception's] protection would need to justify why removal of the documents was reasonably necessary to pursue an FCA claim."

27. *Id.*

28. 31 U.S.C. §3730(h).

29. *Id.* at §3730(h)(1).

30. *See, e.g.*, *Singletary v. Howard Univ.*, 939 F.3d 287, 293 (D.C. Cir. 2019) (citing *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 736 (D.C. Cir. 1998)).

31. *See, e.g.*, *United States ex rel. Higgins v. HealthSouth Corp.*, 2019 WL 4060176, at *4–5 (M.D. Fla. Aug. 28, 2019).

32. 31 U.S.C. §3730(h)(2).

33. AAJ's Qui Tam Litigation Group offers a chance to network and discuss strategies with more experienced attorneys—as well as a document library where you can search for court documents, briefs, depositions, and more. For more, visit https://www.justice.org/community/litigation-groups/qui-tam-litigation-group.

AAJ Code of Conduct and Professionalism

In the representation of clients and otherwise in the practice of the profession as trial attorneys, AAJ members shall abide by the following principles:

1. Zealously represent the best interests of their clients within the framework of all applicable Rules of Professional Responsibility and with the highest ethical standards of the profession.

2. Not prosecute or counsel any action, or assert any claim or defense, which is false, frivolous, or wholly insubstantial.

3. Engage only in advertising that fully complies with the rules of the jurisdictions in which the member is admitted or where the advertising is placed, and not engage in any form of false, misleading, or deceptive advertising.

4. Not initiate personal contact with any injured party or aggrieved survivor, either personally or through a representative, without a specific request or for the sole purpose of attracting cases.

5. Not initiate press contact following a disaster or incident that resulted in injury or death for the sole purpose of attracting cases.

6. Not knowingly accept referral of a case that has been the subject of conduct that violates the provisions of this Code or other applicable rule.

7. Disclose and explain the fee to be charged to the client and how it is calculated; the handling of costs while the case is pending and on resolution; and, if contingent upon recovery, memorialize the fee clearly in a written fee agreement.

8. To the extent consistent with state law or Rules of Professional Conduct, ensure that all decisions to arbitrate disputes arising from contracts with clients are voluntary and that a client's judicial rights and remedies are not waived under coercion; include no pre-dispute mandatory binding arbitration clauses in agreements with clients.

9. Accept only cases and legal matters for which the attorney or co-counsel possesses the requisite knowledge, skill, time, and resources to prosecute diligently and competently.

10. Disclose to clients the intention to refer their case to another attorney or to engage the services of another attorney to represent their interests.

11. Communicate promptly, frankly, and fully with clients when they inquire about their cases and at other times as appropriate to keep them informed about the progress and status of their cases.

False Claims Act Cases Brought by Individuals: DOJ paid Whistleblowers over $488M in FY22

Contact Renée and Eva: reneebrooker@tzlegal.com and eva@tzlegal.com

Healthcare Fraud

- Pharma lab paid $900M for kickbacks to doctors • **Marketing manager (employee)** received over $270M LINK
- Drug company paid $260M for underpaying drug rebates • **Neurology specialist & director (employees)** received nearly $30M LINK
- Medical device manufacturer paid over $33M for unreliable cardiac device • **Quality control analyst (employee)** received over $5M LINK
- Pharmacy paid over $5M for overbilling for insulin • **Pharmacists (employees)** received over $1.2M LINK
- Dental clinic chain paid over $23M for medically unnecessary pediatric dental services • **Dental assistant, office manager & dentist (employees)** received between $3.45M-$5.75M LINK
- Pain clinics paid over $24M for unnecessary urine drug testing • **Recruiter, laboratory manager, chief medical officer & physicians (employees)** received between $3.6M-$6.1M LINK
- Healthcare services contractor paid over $70M for unallowed medical expenses • **Director of member services & controller (employees)** received over $13M LINK
- Hospital & its management company paid $48M for improper financial relationship between hospital & doctors • **Doctors (employees)** received almost $14M LINK

Government Contractor Fraud

- Software & hardware developer paid over $199M for overcharging government • **Contract specialist (employee)** received $40M LINK
- Military vehicle manufacturer paid $50M for overcharging Marines for suspension system for armoured vehicles • **Contracts manager (employee)** received over $11M LINK
- Drone maker paid $25M for using recycled military parts • **Financial analyst (employee)** received over $4.6M LINK
- Ergonomic office furniture manufacture paid over $7M for overcharging government for office furniture • **Sales manager (employee)** received over $1M LINK
- Connector assembly manufacturer paid $11M for improperly testing electrical connector • **Facility quality manager (employee)** received over $2M LINK

Cybersecurity Fraud

- **Cyber Fraud Initiative**: DOJ is looking for employees with knowledge of cybersecurity failures, incidents, and breaches of government contractors or grant recipients LINK
- Electronic health records software vendor paid $155M for misrepresenting the capability of its software • **Project manager (employee)** received $30M LINK
- Space vehicle systems manufacturer paid $9M for cybersecurity failures • **Cybersecurity manager (employee)** received $2.6M LINK
- **SEC** is sanctioning companies for deficient cybersecurity procedures. LINK SEC has paid Whistleblowers over $1.3B as of FY22 LINK