

# Whistleblowers and Prosecutors

## Achieving the Best Interests of the Public

By William Y. Culbertson

[Editor's Note: *Business Law Today* encourages the exchange of opinions, and to that end, we offer two different viewpoints on *qui tam* actions. A response to William Culbertson's article is presented by Robin Page West on the following pages.]

The False Claims Act (FCA) offers a bounty to encourage anyone with unique information about fraud in our government's business relationships to blow the whistle, reporting what they know to public prosecutors. The Department of Justice (DOJ) is obliged to diligently investigate all allegations and has the discretionary authority to pursue criminal or civil remedies or none at all. The law contains a special provision, known by the Latin abbreviation *qui tam*, that allows whistleblowers to act as surrogates who join in such controversies on our government's behalf, but it doesn't end there. Private lawyers are also allowed to act as surrogates who litigate such controversies on our government's behalf. Since its enactment in 1986, the distinction has become almost invisible; most lawmakers, judges, and commentators tend to view whistleblowers and their lawyers inseparably as "private attorneys general."

### Brief History

Roughly translated, the *qui tam* abbreviation means "he who pursues this action on behalf of the King as

well as for himself." It was popularized in thirteenth century England as a means of enabling commoners to do something that they otherwise were powerless to do in those days—gain access to the royal courts. We first borrowed this concept from the British for use during our Civil War. Senator Howard's purpose behind the Informer's Act of 1863 was "setting a rogue to catch a rogue." That may sound like an odd way to enforce the rule of law, but our fledgling federal government lacked sufficient prosecution resources until sometime after 1870, when the DOJ was created.

The 1863 Act received little attention until some 80 years later when, in the midst of World War II, someone discovered a loophole that allowed an individual to bring a *qui tam* action based on information the government already had and was actively prosecuting. When the challenge came before the U.S. Supreme Court in *Marcus v. Hess* (1943), the trial court's decision was upheld, reluctantly, because the case had been filed under the old law. Tellingly, Justice Jackson noted in his dissent, "If we were to add motives of personal avarice to other prompters of official zeal the time might come when the scandals of law-enforcement would exceed the scandals of its violation." Congress immediately replaced the old law with the False Claims Act of 1943, finally placing control of the process in the hands of the DOJ.

Thereafter, the *qui tam* provision was largely ignored as a dead letter of U.S. law for another 40 years. When military spending increased during the Reagan administration, fraud in gov-

ernment contracting once again became the focus of public scrutiny. It was 1986 when Congress turned back the clock by remaking the False Claims Act much as we know it today. In contrast, by 1951 Parliament had removed all such provisions from the laws of England in favor of other enforcement means because they were overwhelmed with the negative consequences, including extortion of secret settlements, fraudulent accusations, and unrestrained pursuit of defendants for minor offenses. (For an in-depth analysis of the English experience, see J. Randy Beck, "The False Claims Act and the English Eradication of Qui Tam Legislation," 78 *North Carolina Law Review* 539 (March 2000).)

### The Modern Era

The obvious purpose for bringing back this abandoned provision in 1986 was to punish fraud and, like the old law, it had two basic components: encouraging its discovery through whistleblowers and allowing its prosecution through private lawyers. Unlike the Civil War era, however, our government had plenty of public prosecutors on staff, which made it necessary for proponents to criticize the DOJ in order to rationalize the private lawyers' role in the modern era. That criticism took the form of a rather remarkable claim that the DOJ did not always aggressively prosecute alleged fraud, largely relying at the time on three prominent defense contract investigations. According to then Assistant Attorney General William F. Weld, however, DOJ actually dropped those same investigations because the pro-

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curement agencies had tacitly approved the contractors' conduct and, as a result, prosecution was unwarranted.

Congress paid little heed to the DOJ's internal evaluation, instead bowing to the public outrage over wasteful government spending during the Cold War, including examples of \$400 hammers and \$7,000 toilet seats, and ultimately decided to punish government contractors rather than overhauling the procurement system. When it was done, Congress had shifted the entire burden for both components of the *qui tam* provision onto defendants based in part on a weak premise. This is not to say that the basic concept could be successfully challenged on constitutional grounds, which by now has largely been settled without distinguishing the two components, but rather to illustrate that the discretionary function of the DOJ offered a complete answer to the prosecution questions being raised at the time, just as it does today, without the need for private lawyers. Today, there is strong factual support to go along with what should have been a commonsense answer back in 1986.

### Representational Problems

When private lawyers litigate on behalf of our government, shouldn't the DOJ be expected to pay for the benefit? Defendants are never required to pay the tab of the public prosecutor, and to say that private lawyers are paid on a contingency basis does not make it free to the public, let alone to defendants. Once the DOJ declines to intervene in *qui tam* cases, the role of private lawyers is fraught with conflicts and causes demonstrable waste of taxpayer money and palpable abuse of innocent defendants.

Every *qui tam* case involves at least four interested parties on the government's side of the controversy alone, above and beyond the private lawyer, which begs the question: What interest does that lawyer represent? The procurement agency? The federal treas-

ury? The DOJ? The whistleblower? Conflicts between those interests can occur under the best of circumstances. Adding another layer of complexity on top of the discretion exercised by public prosecutors only makes matters worse, especially when private lawyers are motivated by a contingent fee and have substantially less access to government information.

The ethically challenged can easily exploit this scenario, much like the serious problems exposed in other complex litigation scenarios. In fact, according to Professor Lester Brick-

## WHEN PRIVATE LAWYERS LITIGATE ON BEHALF OF OUR GOVERNMENT, SHOULDN'T THE DOJ PAY FOR THE BENEFIT?

man, attorney misconduct in class actions involving mass torts and public securities law has recently been brought to the attention of the Standing Committee on Ethics and Professional Responsibility of the American Bar Association, over the same issue—contingent fees. "Contingency-Fee Con-Men," the *Wall Street Journal* (Sept. 25, 2007). *Qui tam* cases can be even worse, due to their complex nature and long duration and the fact that whistleblowers frequently are not privy to salient information. This not only places private lawyers in a position to take advantage of fee maximization opportunities, it also might explain why the DOJ so often declines to intervene.

Moreover, when the cost of litigation can be greater than any potential liability, defendants simply cannot afford to vindicate their behavior in contract performance against allegations of false claims. Given the extraordinary protections built into the FCA, which prevent innocent defendants from holding whistleblowers or their lawyers responsible for filing speculative complaints, most simply settle. Although there are no statistics available because defense costs are undisclosed and some cases

are settled on other grounds, there is little doubt among leading defense attorneys that the aggregate costs of defending or settling declined *qui tam* cases exceed the amounts recovered.

Beyond its weak historical underpinnings and the conflicts inherent in allowing private lawyers to litigate public disputes, it's also hard to argue with current facts. Today, there is a clear statistical record for all to see what has actually been achieved in the interests of the public, based on 20 years of experience rather than the merest handful of cases. According to

a report prepared by the Government Accountability Office (GAO), there had been nearly 9,000 civil suits filed and over \$15 billion recovered under the FCA through the end of 2005. (DOJ reports are more current but less comprehensive.) Included in those totals was some \$9.6 billion that came from the 5,100 cases initiated by whistleblowers, but the vast majority of that money was recovered from the very small quantity of cases of which the DOJ actually took control. On the other hand, only \$327.6 million of the \$9.6 billion total was recovered from the overwhelming quantity of cases pursued by private lawyers alone. In fact, the GAO report reveals that private lawyers caused 87 percent of the cost to the public system (by caseload quantity), yet they produced only about 3 percent of the monetary recoveries.

Admittedly, the GAO report leaves little doubt that whistleblowers facilitate the *discovery* of fraud. However, there is no doubt that our government has sufficient resources when it comes to *prosecution*, especially considering that some \$5.4 billion was recovered without any whistleblowers at all in the other 3,900 cases brought by the DOJ itself. The overwhelming weight of experience

clearly shows that DOJ has done quite well on its own, working with or without whistleblowers, and private lawyers have proven to be a poor substitute.

Those few cases pursued by private lawyers alone that have actually gone to trial represent the smallest group of all. Given the substantial cost of the process and the inherent risk of any trial, it is indeed rare to find a defendant that can afford to prove its innocence and refuses to settle for less. Ironically, it turns out that defendants are allowed to include their costs of defending *qui tam* cases, and sometimes even the cost of settlement, as being ordinary and necessary to the conduct of business under our current labyrinth of government contracting. Thus, whenever possible, defendants openly pass along those costs to their customer, our government, either directly or indirectly, meaning that taxpayers must ultimately pay for the ambitions of the plaintiffs' bar.

### The Latest Salvo

Senator Charles Grassley (R-Iowa) has been the acknowledged champion of the FCA since 1986. Thankfully, most federal courts have favored restraint in interpreting the *qui tam* provision, but it hasn't ended there. Recently, Senator Grassley has sponsored amendments specifically intended to sweep aside many well-established defenses and would further increase the bounty paid to both whistleblowers and their lawyers. Since its proposal in September 2007, Senate Bill 2041 has managed to fly beneath the radar of mainstream media, while defense counsel and other opponents have voiced sharp criticisms and predicted disastrous results.

Senator Grassley reacted with this statement: "I don't know how anybody can hold up legislation where the underlying legislation has brought \$20 billion that would have otherwise been lost to fraud back to the federal treasury." With all due respect, the senator has missed the devil in the detail. In fact, his office did not respond to a simple inquiry from this author about the

GAO's statistical data described above.

It's one thing for Congress to consider offering a bounty to all comers with secondhand knowledge, in some ill-advised attempt to further encourage the discovery component of the *qui tam* provision. Such overreaching folly would quickly teach them what Parliament understood some six decades ago, and force an early retreat from the ensuing chaos. However, it's another thing altogether to continue rationalizing the dubious role of contingent-fee lawyers, which now flies in the face of both common sense and 20 years of unambiguous experience to the contrary. If no defendant's conduct has ever adversely affected the DOJ's discretion as to whether or not to prosecute, then why must all defendants pay the price for uninformed private lawyers to second-guess that same discretion, for a profit motive?

The best response is that whistleblowers would likely be even more reluctant to come forward but for the private lawyers' role in the process. However, much like the original rationalization back in 1986, there is only anecdotal support for such an argument and, as the statistics clearly show, in practice there is a high price to be

paid by hundreds that were not. Is it necessary for all those defendants to abandon the presumption of innocence? Even if this passes constitutional muster, it clearly is bad public policy. Third, had the whistleblowers gone directly to the DOJ at the beginning, the defendants would not have been liable for attorney fees and the whistleblowers could have saved 30 percent to 50 percent of their bounty. At its best, the role of private lawyers is irrelevant.

Now, more than ever, it should be obvious that contingent-fee lawyers impose a huge systemic cost on the entire framework of our government's business, and produce negligible benefit for anyone other than those who know how to game the system legally. Once and for all, it's time to eliminate the private lawyers' role altogether and leave whistleblowers to work directly with the DOJ, or, at the very least, require the DOJ to pay private lawyers' fees and thereby restore some sense of balance and discipline to the process.

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*Author's rebuttal to Robin Page West's article: The nonprofit Taxpayers Against Fraud (TAF) was cited in the counterpoint to this opinion piece as having commissioned a 2006 study claiming to*

## DEFENDANTS OPENLY PASS ALONG THE COSTS OF DEFENDING QUI TAM CASES TO THEIR CUSTOMER, OUR GOVERNMENT.

paid by both defendants and taxpayers for mere hand-holding. Another counterargument is that a few cases have been litigated by private lawyers for a number of years before the DOJ intervened, thus skewing the statistics. This argument is not well taken for several reasons. First, it demonstrates that prosecutorial discretion is eviscerated by the very nature of the *qui tam* provision because the DOJ can take a wait-and-see approach while allowing contingent-fee lawyers to conduct a fishing expedition. Second, for every case that was later intervened in, there are literal-

show a healthy return on investment in FCA cases. TAF was reportedly founded by, and had some rather unusual financial arrangements with, early *qui tam* practitioners. "Lawyer Helped Strengthen a Law from Civil War, Now Brings in Big Bucks," the *Wall Street Journal* (Jan. 11, 1995). As noted in the title, the individual subject of that article was instrumental in drafting the FCA amendments in 1986, testifying before the House committee responsible for the legislation. *Testimony of John R. Phillips on S. 1562* (Sept. 17, 1985).