

# Whistleblower Retaliation & Qui Tam Litigation

## Successfully Litigating False Claim Act Claims

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A live 90-minute CLE webinar with interactive Q&A by Rossdale CLE

**Presented by Jason Zuckerman, Amy Wagner, and Benjamin Shatz**  
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# Blowing the Whistle

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## When the Client Calls

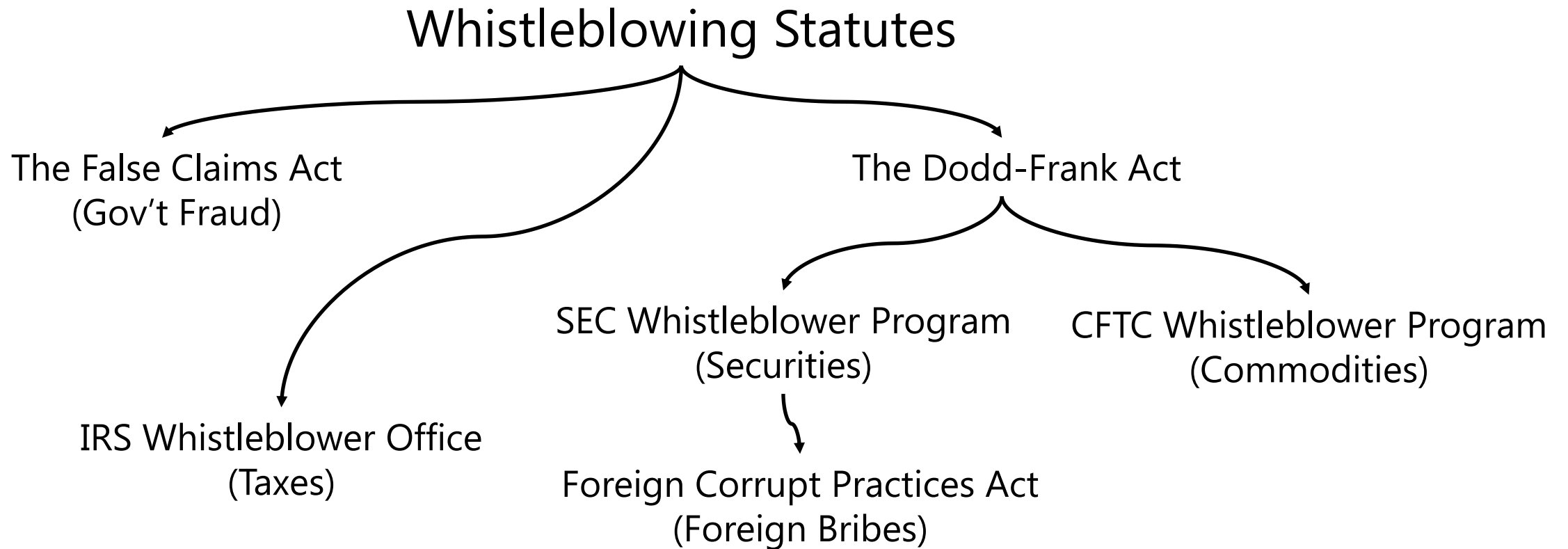
- Listen carefully
- Consider the source
- Whistleblower psychology and needs
- Investigate the claims

Associate with Experienced Co-Counsel



# Picking the Statute

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# The False Claims Act

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Sergeant from NY Volunteers

- The False Claims Act, 31 U.S.C. § 3729-3733, was enacted in 1863 and is this country's oldest *qui tam* whistleblower law.
- President Abraham Lincoln sought to curb the war profiteering that was occurring during the Civil War. The provision incentivized whistle-blowers through financial rewards based on the amount of the government's recovery.
- The FCA was strengthened through amendments in 1986 and in 2009 and 2010.
- The FCA has prompted the passage of similar laws in 29 states and the District of Columbia, as well as whistleblower programs at the Securities Exchange Commission, the Commodities Future Trading Commission, and the Internal Revenue Service.

# The False Claims Act

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The FCA is used for allegations of fraud against the federal government, but not if the fraud is covered by another whistleblower statute (*e.g.*, IRS).

31 U.S.C. § 3730(b) –

- *Always start by reading the statute*
- Action is initiated by filing a complaint UNDER SEAL
- Relator cannot appear *Pro Se*
- Serve on the United States – the complaint and a disclosure of substantially all of the evidence
- Meet threshold requirements:
  - Be First-to-File
  - Complaint cannot be based on public disclosures, unless Relator is an original source
  - File within the statute of limitations, 31 U.S.C. § 3731

# The False Claims Act – Recent Amendments

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- The Fraud Enforcement and Recovery Act of 2009 (“FERA”)
- The Patient Protection and Affordable Care Act of 2010 (“ACA” or “PPACA”)

# Types of Fraud

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- Average Wholesale Price
- Best Price Fraud
- Off-Label Marketing
- Kickbacks or Bribes
- Undisclosed Side Effects
- Disaster Relief Fraud
- Procurement Fraud
- Up-Coding
- Billing Improprieties
- Defective Testing
- Falsifying Records
- False Certifications
- Defense Contractor Fraud
- Banking Industry Fraud

# Know Your Whistleblower

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## Check

- Unclean hands
- Internet profiles and social media
- Background check
- Releases and nondisclosures
- Privileged documents
- Actual knowledge
- Circuit Court split!



# Did the Whistleblower Release any Claims?

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*UNITED STATES V. PURDUE PHARMA L.P.*,  
600 F.3d 319 (4th Cir. 2010).

A broad release in a severance package protected the employer from "all liability to Employee for...claims...which Employee...ever had, may now have or hereafter can, shall or may have...as of the date of the execution of this Agreement" precluded the *qui tam* complaint.

*UNITED STATES EX REL. ACAD. HEALTH CTR., INC. V. HYPERION FOUND., INC.*,  
2014 U.S. Dist. LEXIS 93185 (S.D. Miss. July 9, 2014).

The terms of a release in a bankruptcy settlement was not broad enough to encompass claims of fraud against the government.

*UNITED STATES EX REL. RITCHIE V. LOCKHEED MARTIN CORP.*,  
558 F.3d 1161, 1171 (10th Cir. 2009).

Court enforced a settlement release entered into after the disclosure of the fraud to the government.

*UNITED STATES EX REL. MCNULTY V. REDDY ICE HOLDINGS, INC.*,  
835 F. Supp. 2d 341 ( E.D. Mich. 2011).

"Where the government has no knowledge of the claims that form the basis for a *qui tam* complaint prior to the time that the relator signs the release, enforcement of the release interferes with and frustrates the FCA's goals of incentivizing individuals to reveal fraudulent conduct to the government."

# What evidence does Relator have?

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## Documents

- Are they privileged?
- Were they accessed without authority?
- Were they a mass download of all of the company's files?



## Tapes

- Were the recordings made lawfully? (See <http://www.rcfp.org/taping/>)
- Each state's laws govern the level of consent. For example, in California and Florida, all parties to the conversation must consent, while in New York and New Jersey, only one party needs to consent.



# Case Study: Confidentiality Agreements

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*CAFASSO V. GEN. DYNAMICS C4 SYS.,*  
637 F.3d 1047 (9th Cir. 2011).

Employee's "vast and indiscriminate appropriation" of employer's documents violated a confidentiality agreement.

*UNITED STATES V. CANCER TREATMENT  
CTRS. OF AM.,*  
350 F. Supp. 2d 765 (N.D. Ill. 2004).

"[T]he confidentiality agreement cannot trump the FCA's strong policy of protecting whistleblowers who report fraud against the government."

*UNITED STATES EX REL. HEAD V. KANE  
CO.,*  
668 F. Supp. 2d 146 (D.D.C. 2009).

"Enforcing a private agreement that requires a qui tam plaintiff to turn over his or her copy of a document, which is likely to be needed as evidence at trial, to the defendant who is under investigation would unduly frustrate the purpose of this provision."

# Investigating the Alleged Fraud

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## Need to know:

- Specifics of the fraud(s)
- Roles of the parties engaged in the fraud
- How the whistleblower learned of the fraud
- Whether the whistleblower was involved in the fraud
- Period of the fraud
- Evidence (*e.g.*, documents, recordings)
- Whether whistleblower reported the fraud
- Whether the fraud was publicly disclosed
- Whether whistleblower was terminated in connection with the fraud
- Quantify the damages to the government



# Protection

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## 31 U.S.C. § 3730(h)(1) – Relief from Retaliatory Action:

- Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

# Preparing the Disclosure to the Gov't

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**Provide the Government with a disclosure of substantially all of the evidence:**

- Produce all documents referenced or relied upon in drafting the complaint
- Relator's resume and/or background
- Timeline chart
- Organizational chart
- Information regarding witnesses
- Information that would assist the government in preparing a subpoena

# Government Action

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- The government assembles a team of investigators, attorneys, and agency personnel to evaluate the whistleblower's claims.
- The relator is often interviewed, at length, early in the process, which can sometimes feel like a deposition.
- The time it takes to evaluate the case depends on many factors including the complexity of the issues, the detail of the whistleblower submissions, and the cooperation of the governmental client/agency.
- Pleadings can be sealed for substantially longer than the statutory 60 days.

# Working with the Government

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## Working Together

- Whistleblower's involvement in the investigation
- Whistleblower as a government informant



# Next Steps

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- Confidentiality
- Continuing disclosure requirements
- Civil Investigative Demands (“CID”)
- Partial unsealing
- Strategic and practical concerns



# Response to Whistleblower Allegations

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- Prompt and thorough investigation
- Set expectations of a fair process
- End alleged violations
- Retain outside counsel
- Notify stakeholders as necessary
- Appropriate document retention
- Take remedial action
- Document everything
- Consider self-disclosure

# Settlement

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## **Going Forward**

- Roles for the parties in settlement
- Cooperative efforts (or not)
- Benefits of early settlements

# Damages

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A defendant in violation of 31 U.S.C. § 3729 “is liable to the United States Government for a civil penalty of not less than \$5,000 and:

1. Not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), plus
2. 3 times the amount of damages which the Government sustains because of the act of that person.” 31 U.S.C. § 3729(a)(1)(g).
3. Pursuant to 28 CFR § 85.3, that amount is modified as follows: “minimum from \$5,000 to \$5,500; maximum from \$10,000 to \$11,000.”

# Alternate Remedy

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31 U.S.C. § 3730(c)(5):

- Under the federal False Claims Act, and certain state False Claims Acts, the Government may pursue its claim through an alternate remedy that is available to the Government and the Relator will still have the same rights as they would have if the case proceeded in the Relator's action.

# Relator's Award

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## Relator may receive:

- 15 to 25% if the Government intervenes, based upon extent of Relator's contribution to prosecution
- 25 to 30% if the Government declines to intervene and Relator proceeds

In both instances, the Relator is entitled to reasonable expenses, plus reasonable attorneys' fees and costs, which will be awarded against the defendant.

Between 1987 and 2013, over \$4.2 billion was paid in Relator Share Awards for over \$27 billion in civil *qui tam* settlements and judgments with the U.S. Department of Justice. Nearly \$21 billion was attributable to health care fraud.

## Possible complications:

- Persons who participated in the fraud may have the award reduced or be barred from receiving an award
- Concurrent personal claims may be included in the complaint but the government will scrutinize any settlement in a declined case very carefully before it consents to dismissal
- Damages for retaliation claims are completely separate from the relator's award

# Questions?

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