
Whistleblowing 101

How to do good and do well ...
and survive to tell the tale.

Whistleblower Law Basics

- The False Claims Act covers fraud against the federal government
- Also 29 states and the District of Columbia have FCAs
- There is also an IRS Whistleblower law (\$2 million minimum)
- There is also an SEC and CFTC Whistleblower law
- FCA cases are filed under seal
- Triple damages (Treble damages)
- 15-30 percent awards for whistleblowers

General Success of FCA Law

- Since the 1986 amendments, over \$53 billion recovered
- About 80 percent of recoveries concern health care
- Most of the rest involves military defense
- Significant recoveries also in oil and gas, construction, foreign aid, and mortgage fraud

General chronology of a case

- Gather evidence, organize, analyze, summarize
- Find an FCA lawyer
- Lawyer adds to case, writes up complaint, files with DOJ
- DOJ kicks complaint to defrauded agency
- Defrauded agency may act fast or sit on case for a long time
- Case is investigated, whistleblower is asked penetrating questions

General chronology of a case

- If still with company, you may be asked to wear a wire
- Subpoena of company, interview of former employees
- If fraud is found, states may be brought in to assess scope of fraud
- Partial lifting of seal to other relators (if any) and company for purposes of settlement
- Settlement negotiations, multi-relator battles
- Settlement and announcement of case

Not quick and easy money

- Most cases are not joined by DoJ (80% declined)
- Declined cases are generally dropped (80%)
- FCA is evidence-based litigation, not a tip line
- Only 100-150 FCA cases a year are positively resolved
- FCA cases take 38 months on average, but may take a decade

You will need an FCA lawyer

- FCA is a specialty
- FCA lawyers work on contingency.
 - Good for whistleblowers (lawyers have skin in the game and will not risk whistleblowers without risking themselves)
 - Good for America (discourages frivolous lawsuits)
 - Percentage to lawyer is generally 40% but is subject to negotiation
 - Legal costs borne by company, and fees assigned to lawyer

Rewards are not always large

- Half of all successful cases settle for \$2 million or less
- Average whistleblower award in a \$2 million case is \$320,000 if there is only one whistleblower
- About half of this award will go to the lawyers and taxes
- Average case takes 38 months to resolve
- No reward at all in four out of five cases

If you are still with the company

- You probably need to find another job and it's best to do that on your terms
- If you make noise about problems, you may get fired
- If fired you may be scooted out the door without documents
- No documents probably means no case
- Humiliation and isolation may precede termination
- Documents are important to making a good FCA case
- Assume your email and phones are monitored
- Compliance officers may be *compliant* officers

Whistleblower protections

- Cases are filed under seal, but your anonymity will not last forever
- There are whistleblower protections, but they are generally triggered after you have been fired
- Filing an FCA case will not necessarily prevent you from being fired
- FCA whistleblower protections are cold comfort after the fact – a way of recovering lost salary if you are successful

A violence to conscience

- You may find people who you thought were your friends are not
- You may find the fraud runs to the top of the company
- You may find your motives are always suspect, but the company is given the benefit of the doubt
- You may find good things do not always happen to good people, and bad things do not always happen to bad people

Fatal mistakes in filing a case

- Getting fired before you have documents out
- Retaining a lawyer with no FCA experience
- Public disclosure (newspapers, court cases, etc.)
- Failure to sufficiently detail your fraud claim
- Not first to file (this may only limit your award)

How do it right

- Gather evidence and secure it
- Call TAF
- Get an experienced FCA lawyer
- Follow advice
- Do a two page sheet:
 - Page One: Detail the who, what, where, when, how, and how much of the fraud
 - On the first half of page two, detail the evidence you have in hand to support the above story
 - On the second half of page two, list people the FBI or investigators should interview in support of your story

While you file, and after you file

- You need to think about getting another job
- You may need to find a coping and support system to deal with the stress of the process
- You need to remember not to talk to anyone, especially people in your old firm. Silence is very hard for some people
- Be patient, FCA cases can take years to settle

Common misconceptions

- That it's your case (actually, it's the Government's)
- That you will be treated like a hero by the Government
- That the FCA is a tip line
- That you don't need a lawyer
- That any lawyer will do

Take away message:

- Whistleblowing is about evidence
- Whistleblowing is not for wimps
- If you have evidence, doing the right thing can make you a millionaire
- Do the calculations behind the calculated risk of blowing the whistle