False Claims

EXECUTIVE SUMMARY

In the wake of the U.S. financial crisis, a trend is emerging among lawmakers to adopt long-standing ideas from the FCA in an effort to prevent fraud in the marketplace, rather than simply recover damages for the U.S. government. There are handsome whistleblower incentives in the Dodd-Frank Wall Street Reform and Protection Act of 2010 [7 U.S.C. section 26 and 15 U.S.C. section 78u-6] while in California the state's insurance commissioner recently invoked the seldom-used Insurance Frauds Prevention Act (Cal. Ins. Code section 1871–1879.8) to combat the rising cost of health insurance.

Our panel of experts discusses these issues, as well as a recent ruling impacting the definition of government knowledge, and how defense counsel can help the government decide whether or not to intervene in qui tam cases. They are Shawn Hanson of Akin Gump Strauss Hauer & Feld; Martha Boersch of Jones Day; Robert J. Nelson of Lieff Cabraser Heimann & Bernstein; and Steven J. Saltiel of the U.S. Attorney's Office for the Northern District of California. *California Lawyer* moderated the roundtable, which was reported by Krishanna DeRita of Barkley Court Reporters. The discussion took place in May.

MODERATOR: How will the SEC and Commodities Futures Trade Commission whistleblower reward programs in the Dodd-Frank Wall Street Reform and Protection Act of 2010 influence potential whistleblowers?

NELSON: Under the new law, a whistleblower can come forward and collect somewhere between 10 and 30 percent of whatever the government is able to recover. In passing the law, Congress was hoping to hear from people with insight into the next major bank, mortgage, or securities fraud. It makes good sense, but in practice I haven't seen it.

HANSON: False claims cases can have a long period where they are being looked at and investigated.

BOERSCH: I haven't seen any cases from the defense side, but I do think that there's going to be a lot of FCA type cases in the future as a result.

NELSON: Is there anything that you [Saltiel] have got that you are not allowed to tell us about?

SALTIEL: No, there isn't. I don't anticipate that this statute is going to generate cases that government civil prosecutors deal with.

Cases come to us through the qui tam provisions of the FCA when there's fraud against the government. This seems to be a separate whistleblower statute involving the SEC or the Commodities Futures Trade Commission.

NELSON: It seems to me that this statute is not primarily designed to protect the U.S. Treasury, and it's not necessarily focused on fraud against the U.S. government. It's different from a traditional qui tam statute. It's focused on fraud in the marketplace. Ultimately when the U.S. has to bail out banks or other financial entities, the government winds up paying the bill.

So it's probably not correct to say that it's a qui tam statute. It's an anti-fraud statute designed to protect our commercial institutions. Traditionally, in the private sector at least, we've had securities class actions as a way to enforce the securities laws. This is now a potentially different front, and a lucrative front for whistleblowers, to step forward.

BOERSCH: It's likely to generate a lot more leads and investigations by the criminal division of different U.S. attorney's offices for traditional wire, mail, bank, and securities fraud cases. Now witnesses have a financial incentive to come forward.

HANSON: Your view would be the claims under this new statute really don't belong to the government in the classic qui tam sense, but somehow belong to the whistleblower intrinsically, which is a big departure from the classic paradigm.

NELSON: I'm suggesting that the government has not gone out of pocket, which is traditionally the case in a FCA case. The damage is to the system in a larger sense. Other people have been defrauded. This statute will likely lead to more criminal enforcement in other areas, but it's a different way to approach a whistleblower statute from the classic paradigm.

MODERATOR: What impact will the Insurance Frauds Protection Act—now being used by the new California insurance commissioner—have on cases of fraudulent billing by medical providers?

NELSON: Section 1871 of the California Insurance Code essentially protects insurers against fraud. The statute is about 25 years old, but has been very seldomly utilized and allows a whistleblower to get a piece of the recovery.

Now we have an insurance commissioner interested in rooting out fraud against insurers because he's very sensitive to the fact that Californians pay higher insurance premiums than do consumers in other parts of the country. He hopes the statute will address some of that fraud and make insurers pay less, which in turn will allow consumers to pay less. He recently intervened in two cases under this statute, one of which is a case that Shawn and I are involved in. It involves allegedly false billing for anesthesia services by Sutter hospitals.

Not only does the whistleblower have an opportunity to recover a large portion of the recovery, but the penalties are between $5,000 and $10,000 per claim. So this is a very powerful tool and it's arguably going to be a game changer for FCA practice in California.

ROUNDTABLE

FALSE CLAIMS

SALTIEL: How is it going to change FCA practice?

NELSON: Going back to where we started the discussion on Dodd-Frank, this statute is also unusual in that it is not rooting out fraud against the state of California, but, rather, against insurance companies. It is like Dodd-Frank in that the fraud is not directed toward the government.

BOERSCH: Who gets recovery? Do the defrauded insurance companies get the recovery?

HANSON: The way it reads—if Robert [Nelson]'s client and the insurance commissioner have standing—they would divide up the recovery and the statute creates the percentages. What's unusual is no recovery would come to the allegedly defrauded insurers as your Sutter case (*California ex rel. Rockville Recovery Associates Ltd. v. Multiplan, Inc.,* No. 34-2010-00079432 (Sacramento Sup. Ct.)) is currently pled. The insurance commissioner has not historically brought these cases in the health care insurance arena and now he has in two cases and that is a big change.

BOERSCH: What's the role of the defrauded insurer in the case?

HANSON: The allegedly defrauded insurer is not in the case. With respect to the amount of penalties, there are a number of issues. Just by the nature of the health care industry, there can be thousands and thousands of claims and possibly civil penalties. They may add up to numbers that can be large. In *People ex rel. Monterey Mushrooms, Inc. v. Thompson* (136 Cal. App. 4th 24 (2006)) the Court recognized this. The appellate court affirmed the trial court in reducing the civil penalties to something like hundreds of dollars per claims. The rationale was that the statute says the purpose of these civil penalties is remedial, not punitive.

SALTIEL: Are these cases brought in state court?

NELSON: Yes.

SALTIEL: Have cases been brought under the state or federal FCA where an ancillary claim is brought under this statute, so that the universe of claims is both public and private?

NELSON: Interesting question. Not yet. One rationale for why insurers don't get any money from the litigation is that it appears the insurers typically pass on the inflated costs to their consumers, so they haven't necessarily suffered monetary harm in terms of their bottom line. It's the consumers who suffer in the form of higher premiums.

BOERSCH: That's a theory. It does seem odd to me that the insurance companies that have been defrauded wouldn't be entitled to anything.

HANSON: If you look at the reported cases on the statute, often they are insurance companies that bring these cases. Robert's case is unusual where the insurance company is standing in the shoes of the relators, and I haven't looked at Bristol Meyers Squib (*California ex rel Wilson v. Bristol Myers Squibb, Inc., No. BC 367873* (Los Angeles Sup. Ct.)).

NELSON: It's the same.

HANSON: The other area that will be interesting to see is Robert [Nelson]'s well-stated rationale for why the insurance companies wouldn't recover because their inflated costs get passed along to the consumers. Even in the simplest paradigm where an insurance company is paying a percent of bill charges, they are usually doing so at a pre-negotiated rate having received a healthy discount for payment charges and often the bill charges they pay are a per diem rate anyway, which is the classic situation with the government claims. It will be interesting to see how the idea of inflated charges gets evaluated under the statute.

MODERATOR: What are the differences between, and the level of knowledge required for, government knowledge and public disclosure defenses?

BOERSCH: The federal FCA was recently amended to allow the government to object to dismissal of a FCA case based on public disclosure, which was a jurisdictional defense. The government knowledge defense, on the other hand, only goes to disproving two of the elements of the FCA case: the falsity of the claim and intent. The courts look to see whether or not the government knew or had reason to know of the facts underlying the false claim.

The case law is unsettled, but there's a trend, at least on the defense side, to look more and more at the government knowledge defense. It's one of the few strong defenses that defendants often have in these false claim cases.

HANSON: How you go about proving government knowledge creates some fascinating kind of evidentiary because in California, and this is limited to California, you get a little bit of, "Well, that agency over there may know about it, but I don't know about it and I'm the one who has got this claim."

BOERSCH: That is a significant issue. In April there was a case in which the Fourth Circuit held that the fact that there were two agencies involved did not matter, and that the knowledge of one agency of the government was relevant and admissible on the issue of the defendant's intent. In the Fourth Circuit case (*U.S. ex rel. Ubl v. IIF Data Solutions*, 2011 WL 1474783 (4th Cir.)) the GSA was the agency to whom the false statements were made and the agency paying the claims, while there was another agency that was actually dealing with the defendant under a contract and that agency had the required knowledge.

HANSON: Sort of administering the contract.

BOERSCH: Yes, so the agency that's administering the contract knew of the fact that underlay the claims, but the GSA did not and the Fourth Circuit said it didn't matter.

HANSON: So they imputed that one agency.

BOERSCH: Now, how broadly that holding might be interpreted in the future, I don't know, but because it goes to the intent on the part of the defendant or the falsity of the claim, it makes sense that it wouldn't matter which agency knew as long as somebody in the government knew. If the defendant is dealing with the governmental agency and the governmental agency knows what they are doing and says, fine, that certainly suggests that the defendant doesn't have knowledge that anything he's doing is false or wrong.

NELSON: Actually, I was going to say just exactly that. It seems to me that the government-knowledge defense is really more an inquiry into scienter, and I think the law is strongly heading this way. To the extent that the government is saying to company X that it's okay that you do this, that fact goes to whether the company has the requisite scienter to be liable under an FCA case.

SALTIEL: I agree with that and I would go even farther. I would say most government civil prosecutors you ask in the Ninth Circuit will say that it's a misnomer to call it a defense. The Ninth Circuit in the last 20 years since the Hagood case (*U.S. ex rel Hagood*

v. Sonoma County Water Agency, 929 F. 2d 1416 (9th Cir. 1991)) has said that it's not a defense per se. It's relevant and it goes to the issue of scienter and how significant it is will depend on the circumstances and facts in every case. If you have spreadsheets with thousands and thousands of line items, and it's buried in there, it's a weaker argument than if it's a discussion. There also is the issue of whether you are talking to someone with authority. Strictly speaking it's only the contracting officer who has authority to modify a contract or accept something less than what is asked for.

BOERSCH: I think that's right. I do think it is a defense. If you are defending a criminal case and you have something that goes toward your intent, that's a defense and you can get a theory of the defense instruction. But the other issue that you raised is what does the government have to know. Is it enough for them to know it's an industry wide practice? This happens in the Medicare field where there tend to be industry wide practices of billing or charging. I don't think that has been settled.

HANSON: I've certainly seen it argued that for California purposes, the knowledge that one cannot be imputed to the other. That's a little different than the Fourth Circuit case or some of these other cases that have emerged. Didn't we just amend the California FCA to make it clear that it has to be the DOJ's knowledge?

BOERSCH: Yes and no. The California FCA (Cal. Gov. Code 12654 (a)) was amended to make it clear that it is the knowledge of the California attorney general's office that matters, but that is with respect to the statute of limitations.

HANSON: As to what knowledge would trigger the limitations period and there again they narrowed it.

BOERSCH: Right, to the attorney general as opposed to the agency.

SALTIEL: There's case law that says the same thing about the federal FCA statute of limitations, that it's got to be the DOJ or the DOJ investigators that knew or should have known and not someone administering a contract, or even an auditor.

HANSON: An auditor is not enough to trigger?

SALTIEL: If they are not within the Department of Justice investigative team.

BOERSCH: That's where the new whistleblower statutes may help, because when they get filed, then presumably DOJ will be more likely to gain knowledge of whatever it is.

MODERATOR: How can counsel for relators and defendants help the government make a prompt, fair and just determination in qui tam cases?

SALTIEL: There's initially a 60-day period for the government to make an intervention decision. But it often takes 60 days for the government to put

PARTICIPANTS

SHAWN HANSON is a partner in the San Francisco office of Akin Gump Strauss Hauer & Feld. His practice focuses on false claims and regulatory litigation involving health care and insurance. Recently, he has handled litigation under the California and Federal False Claims Acts, and California's Insurance False Claims Act. **shanson@akingump.com**

MARTHA BOERSCH is a trial lawyer with Jones Day and a former federal prosecutor whose practice focuses on federal criminal defense and complex civil litigation. She has broad experience investigating and litigating matters involving the Foreign Corrupt Practices Act, the False Claims Act, and RICO. Martha obtained summary judgment in favor of the County of Los Angeles in a False Claims Act case involving the potential for billions of dollars of damages. She has argued more than 20 cases before the Ninth Circuit Court of Appeals. **mboersch@jonesday.com**

ROBERT J. NELSON, a partner in Lieff Cabraser's San Francisco office, served as lead trial counsel in a false claims case against the University of Phoenix that settled for $78.5 million-among the largest FCA settlements where the government did not intervene. A 2008 and 2010 CLAY Award recipient, he currently serves as lead counsel in several qui tam cases. He has served as court-appointed class counsel in dozens of state and nationwide class actions, and led the firm's landmark litigation against the tobacco industry. **rnelson@lchb.com**

STEVEN J. SALTIEL is an Assistant United States Attorney in the U.S. Attorney's Office for the Northern District of California. He currently serves as a Deputy Chief in the Civil Division. Previously, he was a partner at Gordon & Gordon in New York. A graduate of George Washington University and Benjamin Cardozo School of Law, he focuses on affirmative civil enforcement. He is a member of a team that recently secured multi-million dollar settlements in health care and procurement fraud cases. **steven.saltiel@usdoj.gov**

ROUNDTABLE

FALSE CLAIMS

together a team to actually investigate the case. And so the government will often make requests for extensions of that deadline. But increasingly the courts are reluctant to grant multiple extensions. In addition, Congress has been critical of the DOJ for taking too long to resolve these cases.

Adding the current environment of limited budgets and resources and trying to do more with less, in the qui tam cases, it becomes very important for the government to make an informed decision a little bit more quickly than in the past, but at the same time, it wants to make the right decision. So the question is how counsel can help with that.

BOERSCH: Would you ever reach out to defense counsel before a case, before an intervention decision is made and the complaint is unsealed?

SALTIEL: Typically, the government's first contact with a defendant is through a subpoena or civil investigative demand. But once we do make contact, we have to assess the evidence objectively, and we want the defendant's counsel to help us with that.

HANSON: Because the courts are making the government make decisions sooner.

SALTIEL: I think that's a trend. When the client gets the investigatory subpoena, one of the early things that [you] may be doing, as well as responding to the subpoena, is thinking about your presentation to the government and doing that more quickly.

BOERSCH: So say the client gets a subpoena and your name is listed on there as the AUSA. The defense counsel should call right away?

SALTIEL: That's true in any case. But we want to start resolving these quicker. And we have limited resources as you know.

NELSON: I have to say from the relator's perspective, if there is a trend amongst courts to be less sympathetic to continued requests, that's a good thing. I've found myself in several qui tam cases in which the government basically won't intervene until the case is resolved and often times that can mean years before there's an intervention.

SALTIEL: I don't think we have the luxury to do that any more. Another factor is that the records we are getting in response to subpoenas are largely electronic. Therefore, we want to have a discussion with the defendant and get it as focused as possible so we are not poring through thousands of pages of irrelevant documents.

BOERSCH: What's the most helpful approach that defense counsel could take in those early discussions with the government when you are trying to decide whether to intervene?

SALTIEL: The most helpful approach would be for counsel to conduct a very thorough investigation and let us know what they found.

BOERSCH: Well, obviously there's going to be some tension on the defense's part as to whether or not that's a good idea. On the criminal side, if a case is under investigation, often the prospective defendant will get their outside counsel to do an investigation and then turn the results over to the government. But on the criminal side, you do that because you typically get something in return. You get a decent plea agreement or a non-prosecution agreement, whereas on the FCA side, what are you getting in return for doing your own investigation and turning the results over to the government? Nothing.

SALTIEL: I'm not saying turning it over. I'm just saying present what your findings are and your view of what they mean. But to answer your question, what the defendant gets in return is a more prompt resolution, which is probably valuable to the company. You also get to frame the issue and present your view of the case.

NELSON: In my experience, Martha [Boersch], when we are in the pre-intervention stage, I have found that a back and forth between the government, relators and the defendant can be very helpful.

BOERSCH: I'm sure.

NELSON: And I have had a number of occasions where the defense counsel said, "All right. I understand what you are saying, but you know, your relator's got it all wrong in terms of the damages and here is why." Sometimes we are persuaded and ultimately that provides the basis for a resolution with the government.

BOERSCH: Obviously there are going to be very close judgment calls over a lot of those issues.

HANSON: My approach if the relator's counsel and the government are willing to have these conversations is as a protected settlement discussion, depending on where you are in the process.

NELSON: It would surprise me if a relator would not agree to participate under those terms.

BOERSCH: I guess my concern is, say as defense counsel you make a presentation to the government, turn a bunch of stuff over, convince the government not to intervene, but the relator is still out there. Is the government going to give all that stuff to the relator's counsel so that they can proceed?

SALTIEL: I haven't faced that situation. The government's ability to disclose investigative materials is limited under the Freedom of Information Act (FOIA) (5 U.S.C. § 552) and Rule 408 of the Federal Rules of Evidence.

BOERSCH: The issue from defense counsel's perspective is do they want their work product handed over to relator's counsel.

HANSON: In the investigatory subpoena statute for California, it expressly says anything you produce in response to the investigatory subpoena can't be given to any third party, and in fact, makes it a misdemeanor for the government lawyer.

BOERSCH: I don't know what the rules are in the civil context. In a criminal context, Federal Rule of Criminal Procedure 6(e)(2) would theoretically prevent the government from turning the stuff over to anybody, but I don't know what exists on the civil side or how defense counsel could protect their work product privilege.

HANSON: I usually get an express agreement or it's dealt with in the settlement context. I'm not sure it's come up a lot as a practical matter, but I'm now thinking Robert [Nelson] is going to send me a bunch of discovery requests.

NELSON: To my knowledge, this hasn't come up in my cases. My sense has always been that when we've engaged in these pre-intervention negotiations, and I'm dealing directly with defense counsel on an ongoing basis and seeing a lot of materials, that I'm seeing everything the government is seeing. But maybe I'm not. Maybe I need to make that discovery request, Shawn [Hanson].

SALTIEL: I guess the bottom line is that the government needs help from all sides, and we look for everyone to be as candid as possible. ■