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**Weil's False Claims Act Institute**

# **The False Claims Act on Steroids: The New York FCA**

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*with guest speaker Gregory M. Krakower, Senior Advisor and Counselor  
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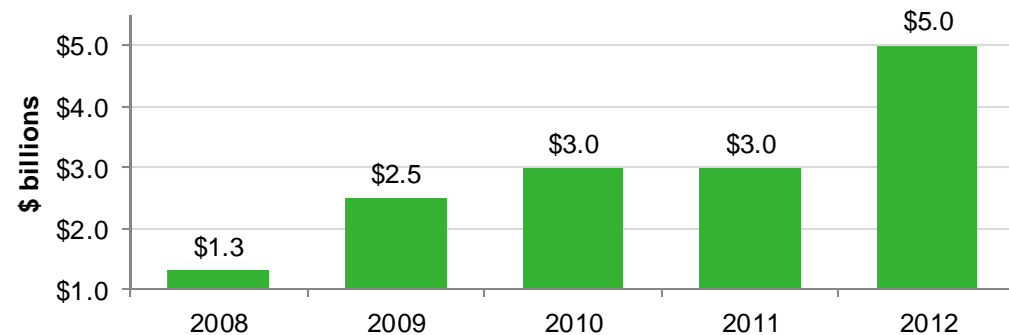
- Lori Pines
  - Head of Weil's False Claims Act/*Qui Tam* practice, and partner in Weil's Complex Commercial Litigation practice
- Konrad Cailteux
  - Partner in Weil's Product Liability/Mass Tort practice, and a leading FCA practitioner and trial lawyer.
- Steven A. Reiss
  - Head of Weil's Appellate practice, and partner in Weil's Antitrust/Competition practice
- Gregory Krakower
  - Senior Advisor & Counselor to the New York Attorney General

# Where It All Began: An Overview of the Federal False Claims Act

**Lori Pines, Steven A. Reiss and Konrad Cailteux  
Weil, Gotshal & Manges LLP**

- Enacted during the Civil War to address procurement fraud
- Rarely used after WWII
- Increased use after 1986 Amendments
- Recently amended under 2009 Fraud Enforcement and Recovery Act, Affordable Care Act, and 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act

- Federal government recovered nearly \$15B since 2008
- FCA recoveries have increased significantly since FERA amendments in 2009
- In 2012 alone, Federal government recovered nearly \$5B
- Total FCA recovery this year will be even greater
  - \$2.2B J&J settlement announced last week
  - JP Morgan currently in negotiations for projected \$13B settlement



- Healthcare
- Financial Services/Housing and Mortgage
- Defense Contractors
- Government Contracts
- Life Sciences
- Accounting
- Manufacturing
- Stimulus Projects and Alternative Energy
- Technology, including Cloud Computing and Counterfeit Electronics
- Educational Lending
- Any industry in which the government spends money

- The FCA creates liability for any person who:
  - Knowingly presents, or causes to be presented, a false or fraudulent claim for payment to the federal government.
  - Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim to the federal government.
  - Improperly avoids or decreases an obligation to pay money or transmit money or property to the government.
  - Conspires to commit a violation of the same.

- The U.S. Government
  - May file criminal or civil actions.
- Private parties, or “Relators”
  - Must file civil *qui tam* complaint under seal.
  - Must disclose all information to the government.
  - Government has 60 days to decide whether to intervene, which may be extended by court order.
  - Relator gets 15-30 percent of a successful judgment or settlement.
  - Relator protected from retaliation.



- *Qui tam* complaint dismissed if “substantially the same allegations or transactions” were publicly disclosed:
  - In a federal case by the government;
  - In a Congressional, GAO or federal “report, hearing, audit or investigation;” or
  - By the news media.
- Unless:
  - Opposed by the government; or
  - Relator is an “original source.

- First-to-File rule
  - *Qui tam* complaint dismissed if allegations similar to those that have been filed by another relator.
  - Circuits split on whether a first-filed *qui tam* complaint must meet pleading requirements.
- Privileged information protected from disclosure
  - Inside counsel likely cannot be a Relator.
  - Cannot use privileged information to file *qui tam* complaint.
- Relator may take and use documents subject to confidentiality agreement.

- Civil Investigative Demands
  - Use expanded under FCA amendments.
  - Can be approved by any USA or AUSA for Civil Division.
  - Can be used to obtain documents, ROG responses, and depositions.
  - Counsel for company cannot be present during CID depositions.
- Office of Inspector General Subpoenas
  - Can be used to obtain documents.
  - Can send evidence to DOJ for criminal prosecution.

- The FCA imposes a limitations period of:
  - six years after alleged violation; or
  - three years after the date when the responsible government official knew or should have known about the alleged violation, but not more than ten years after the violation occurred.
- Limitations period may be extended by Wartime Suspensions of Limitations Act (“WSLA”).
- Retaliation claims under the FCA have a three year limitations period.

- Treble damages
- Civil penalties of \$5,500 to \$11,000 per false claim
- Costs and attorneys' fees
- Companies may also face suspension or debarment
- Can be reduced to double damages and penalties if company engages in self-disclosure

- Chamber of Commerce recently proposed amendments to the FCA.
- Over 36 states, including New York, and numerous municipalities, including New York city, have their own FCAs.
- Large recoveries have led other states, *e.g.* Pennsylvania, and municipalities to consider passing their own FCAs.

New York's False Claims Act:  
*"The False Claims Act on Steroids"*  
Comparison with the U.S. FCA

**Gregory Krakower, Esq.**

**Senior Advisor & Counselor to the New York Attorney General**

# New York's Model for *Qui Tams*: An Overview

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- Only FCA expressly allowing tax fraud *qui tams*!
- Key differences than federal act designed to generate and allow FCA actions:
  - *Longer statute of limitations*
  - *More narrow public disclosure bar*
  - *Lower pleading standard for relators*
  - *More comprehensive anti-retaliation provision*
- Synergies with state securities and consumer fraud laws
- Dedicated and enhanced state enforcement
- Broad civil subpoena power
- Covers fraud against NY State & Local Governments
- Allows withdrawing of *qui tams* under seal



# Tax Fraud: NYFCA § 189(1)(d), (g); 189(4)

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- New York has the only FCA in country expressly allowing tax fraud qui tams. Applies if:
  - Defendant has “net income or sales” over \$1 million in year covered by the action; and
  - Damages “as plead” is greater than \$350,000.
- OAG must “consult” with Tax Dep’t before filing.
- Relator needs AG permission to subpoena the Tax Dep’t in non-intervened case .
- Reverse false claims for taxes [§ 189(1)(g)] requires a false statement.

- Ten years in all cases.
- Amendments apply retroactively from 2010 to claims, records and statements.
- Ex Post Facto defense rejected by NY Sup. Ct. (on appeal).

# Public Disclosure Bar: NYFCA vs. USFCA

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- NY – “Gov’t reports” have to be broadly disseminated to the general public or on the public record.
- NY – “Freedom of Information” requests allowed and encouraged.
- NY – Disclosures on the internet are not necessarily the “news media.”

# Liberal Pleading Standard for Relators: § 192(1-a)

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- Relators are not required to identify specific claims, records or statements used if the facts, if proven true, would:
  - Indicate a violation of the FCA
  - Provide reasonable notice of the alleged misconduct so the government can investigate
  - Provide reasonable notice of alleged misconduct so defendants can fairly defend themselves

A relator may withdraw a filed case under seal if the government does not intervene, unless Attorney General deems otherwise.

(13 NYCRR Pt. 400.4)



## The NYFCA cannot be used against

- the state or local governments, or their agencies; or
- any employee or officer of the state or a local government “acting in his or her official capacity.”

# Anti-Retaliation Private Right of Action (§ 191)

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- Employers & “prospective employers” may not “discriminate”, “harm” or “otherwise penalize” current, former or prospective employee for “**lawful acts**” to stop an FCA violation.
- Lawful acts include “obtaining or transmitting documents” to government or qui tam plaintiff's counsel to stop violation of statute.
- Prohibits industry blacklisting of relator.
- Ten year statute of limitations.

# Big Businesses Beware: Recent FCA Trends

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- The Supreme Court is focused on the FCA
  - *U.S. ex rel Nathan v. Takeda Pharm. N.A. Inc.* – What does Rule 9(b) require in an FCA case?
  - *U.S. ex rel Carter v. Kellogg Brown & Root Servs., Inc.* - Applicability of WSLA to extend FCA statute of limitations.
- Some courts limiting implied certification theory
  - *U.S. ex rel Hobbs v. Medquest Assocs., Inc.* – Condition of payment versus participation.
  - FCA not intended to police all regulatory violations.

- Some courts placing Constitutional or other limits FCA damages
  - *U.S. v. Anchor Mortgage Corp.*
- State and federal FCA claims brought together
- Criminal and civil FCA claims brought together
- Government likely to wait before intervening
- More FCA trials

- Quality System Regulation (QSR) and Good Manufacturing Practice (GMP) Non-Compliance
  - \$500M *Ranbaxy* settlement
- Medicare Rebate/Price Manipulation
  - *Amphastar Pharm. Inc. v. Sanofi Pharma SA*
- Defective Devices/Deceptive Labeling
  - \$30M *Boston Scientific Corp.* defibrillator settlement
- Kickbacks
  - Sunshine Act
  - Plans on ACA exchanges not federal programs under Anti-Kickback Statute
- Off-label Promotion
  - *US v. Caronia*

- Medical Necessity
  - 55 hospitals settle allegations that compression fracture treatment should have been performed as outpatient procedure for \$34M
- Quality of Care
  - U Cal. Regents settle allegations regarding lack of supervision during anesthesia for \$1.2M
- Retention of Overpayments
  - ACA requires return within 60 days
- Stark Law
  - Bar on referrals where family holds financial interest
  - Self-Referral Disclosure Protocol (SRDP)

- Tax Scrutiny under NYFCA
  - *N.Y. v. Sprint*
- FIRREA and FCA
  - *U.S. v. Wells Fargo Bank NA*
- Loan origination and securitization
  - *U.S. v. Bank of America*
- Certifications
  - Troubled Asset Relief Program
  - Home Affordable Modification Program

- Will continue to see government and whistleblowers aggressively pursue alleged procurement fraud
- Fraud-in-the-inducement
  - *U.S. ex rel Simpson v. Bayer Healthcare*
- Overcharges/Services Not Performed
  - *U.S. v. U.S. Investigations Services LLC*
- Defective Product/Supplier Liability
  - *U.S. v. Toyobo*

- Establish a comprehensive compliance program.
- Know your business and stay current on laws and regulations.
- Regularly train employees on compliance issues.
- Regularly evaluate and update compliance procedures and consider risk areas for your business.
- Establish mechanisms for internal reporting, *e.g.* compliance hotline.
- Immediately investigate and remedy compliance problems.

Questions?						



