Blowing The Whistle
The False Claims Act

By Frederick M. (Rick) Morgan, Jr. and Michael S. Miller

Consider the plight of the Union soldier as his commanders tried to obtain the supplies necessary to the prosecution of the Civil War. "For sugar, [the Army] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys; and for serviceable muskets and pistols, the experimental failures of sanguine inventors, or the refuse of shops and foreign armories."[1] Aware that procurement fraud could destroy the Nation, President Lincoln proposed legislation intended to provide private citizens with a reward for suing the perpetrators of these unpatriotic frauds.

While the government may buy fewer "spavined beasts" than in centuries past, it is estimated that as much as ten percent of the quarter-trillion-dollar Medicare budget goes to fraud, together with a like portion of the half-trillion-dollar defense budget, as well as substantial portions of every other federal program budget, from highway funds to welfare reform to science research grants. Fortunately, the law Lincoln advocated, the False Claims Act, which imposes liability upon one who submits, or causes submission of, a false or fraudulent claim to the United States or a federal contractor or grantee, is still on the books. (31 U.S.C. 3729.) Moreover, bold improvements to it were signed into law by President Reagan in 1986.

The courts have recognized that "[e]very change made [to the Act] in 1986 made it more likely for FCA claims to be filed and to succeed."[2] Civil penalties were raised from $2,000 to the current range of $5,500-$11,000 for each violation, and a treble-damage remedy was imposed. Further, "FCA damages 'typically are liberally calculated to ensure that they' afford the government complete indemnity for the injuries done it."[3] Defendants are also required to pay the attorney's fees of a successful relator, and Congress created a private cause of action in favor of employees who are retaliated against by their employer for blowing the whistle.

The Supreme Court has stated that the Act is "the primary vehicle [used] by the Government for recouping losses suffered through fraud."[4] This is largely the result of the Act's most unusual and controversial feature – the qui tam provisions by which private citizens are empowered to bring a case in the name of the government and, if successful, receive 15-30 percent of the proceeds. The citizen who brings such a case is called a "relator," because the action is "on the relation of" the United States. Although FCA cases may be commenced by the Justice Department, the vast majority are qui tam cases brought by citizen relators.

Congress and President Reagan got it largely right in 1986. Qui tam cases have yielded large judgments against powerful adversaries – Astrazenica, Boeing, Harvard College, HCA, HealthSouth, Northrop Grumman, TAP Pharmaceuticals, Tenet – the list of household names is long. FCA claims have returned nearly $17 billion to the United States Treasury in the past two decades, and relators have received more than $1.1 billion in statutory shares.

The FCA is such an effective tool against fraud that more than a dozen states have enacted qui tam statutes of their own. Ohio is not among them. Although a qui tam bill was introduced in the Ohio legislature in early 2005, it withered under pressure from the special interests most likely to occupy its crosshairs. At this writing, however, the U.S. Senate has passed legislation designed to motivate Ohio and the remaining states to enact False Claims Acts of their own to help combat Medicaid fraud. This pending federal legislation may inspire the Ohio General Assembly in a way that the mere prospect of recovering millions improperly obtained by state contractors apparently could not.

Frederick M. (Rick) Morgan, Jr. and Michael S. Miller, Volkema Thomas Miller Burkett Scott & Merry

Qui tam cases are procedurally quite unusual. Complaints must be filed under seal, during which time the government is to decide whether to intervene, in which case the relator remains as a party but the government has primary litigating responsibility. Although the FCA calls for the decision whether to intervene to be made within sixty days, in the overwhelming majority of cases that sixty day period is extended by court order to a period of many months or, often, several years. If the government decides to not intervene, although the relator has the authority to go forward with the lawsuit, the case will have suffered from the passage of time.

There is no low-hanging fruit. The cases are lengthy, difficult, expensive cases against rich, determined adversaries represented by the most powerful law firms. Although the FCA has survived multiple constitutional challenges, many legal, prudential, and practical issues lurk in the wings. Of greatest concern is the "specificity" requirement of Rule 9(b), Fed. R. Civ. P., which has been transformed from a shield against frivolous claims into a sword by which many meritorious FCA cases are dismissed because relators lack information of specific details regarding the false claims submitted to the government. The "original source" and "first to file" provisions of the FCA also generate considerable litigation, and relators are routinely frustrated in attempts to obtain information about their case from the government.

Congress correctly predicted that a cadre of lawyers specializing in FCA cases would emerge. Accordingly, both whistleblowers and lawyers considering a qui tam case can easily consult with experienced counsel, thereby eliminating much of the mystery and stress attending these unusual and often-daunting cases.

1. *F. Shannon, The Organization and Administration of the Union Army 1861-1865, at 54-56 (Peter Smith Press 1965).*
2. *United States ex rel. Chandler v. Cook County, Illinois (7th Cir. 2002), 277 F.3d 969, 975, aff'd (2003), 538 U.S. 119.*
3. *United States ex rel. Roby v. The Boeing Company, 302 F.3d 637, 645 (6th Cir. 2002), cert. denied, C U.S. C (2003).*
4. *Vermont Agency of Natural Resources v. United States ex rel. Stevens (2000), 529 U.S. 765, 792.*

rmorgan@vt-law.com
mmiller@vt-law.com