

## THE CIVIL FALSE CLAIMS ACT

GOLDWYN INTERNATIONAL STRATEGIES

NOVEMBER 21, 2006\*

### INTRODUCTION

This paper describes the United States system for empowering citizens to blow the whistle on fraud against the federal Government. The paper discusses the specific statutory framework of the False Claims Act, as well as the essential components of the legal system that enable it to function effectively. Finally, this paper makes some modest suggestions how such a system might be implemented in Nigeria.

The United States' civil False Claims Act (the "Act" or "FCA"), codified at 31 U.S.C. §§ 3729-3733, has frequently been described as the Government's most effective legal tool for discovering and redressing fraud against the United States Treasury. The Act provides that any person (including a corporate entity) who knowingly submits, or who knowingly causes someone else to submit, false claims for payment of government funds is liable for treble damages and civil penalties of \$5,500 to \$11,000 per false claim.

The range of misconduct covered by the Act is broad, including, for example, the submission of claims for work not done; the misrepresentation of the quality of goods provided under a government contract; the disclosure of false cost or pricing information during negotiations over the price of work to be performed under a government contract. The United States Supreme Court has said that "the Act was intended to reach all types of fraud, without qualification, that might result in financial loss to the Government."<sup>1</sup>

---

\* This paper was written by Robert L. Vogel, a partner in Goldwyn International Strategies, LLC, and also in the law firm Vogel & Slade, LLP. From 1987 to 1990, Mr. Vogel worked as a trial attorney in the Commercial Frauds Section of the Civil Division United States Department of Justice. Since 1990, Mr. Vogel has been engaged in the private practice of law, representing numerous clients in cases under the False Claims Act.

<sup>1</sup> United States v. Neifert-White, 390 U.S. 228, 232 (1968).

One of the most important provisions of the Act is its "qui tam" provision, which gives private citizens the right to initiate a fraud lawsuit and, as a reward for their providing information and participating in the case, to receive as much as 30% of whatever proceeds the Government recovers from the civil case. Over the past 20 years, the United States has recovered nearly \$20 billion as the result of cases filed under the FCA. In addition, the Congressional sponsors of the bill estimate that the Act has caused significant changes in the culture of firms doing business with the Government, and consequently has deterred a much larger amount of fraud against the federal Treasury.

#### HISTORY OF THE FALSE CLAIMS ACT

The False Claims Act was originally proposed by President Lincoln and enacted by the United States Congress in 1863 to combat fraud by defense contractors during the Civil War (hence, the Act was often called the "Lincoln Law").<sup>2</sup> The Act enabled the government to recover double damages caused by the submission of false claims to the government, as well as civil penalties of \$2,000 per false claim. Although the Act permitted the Government to bring an action under the FCA, the Act also contained a qui tam provision stating that a lawsuit enforcing the statute "may be brought and carried on by any person, as well for himself as for the United States." Such a person, known as the "relator" (but now more commonly referred to as a "whistleblower"), would be entitled to half the government's recovery, plus costs. The Act also provided that the "district attorney" could initiate a lawsuit enforcing its terms. However, once a private citizen commenced a qui tam suit, the government had no power to intervene in or interfere with the lawsuit.

The idea behind the qui tam provision was to encourage privateering, even among co-conspirators themselves. As one Senator suggested, law enforcement would flourish by "setting a rogue to catch a rogue."<sup>3</sup> In *United States v. Griswold*, a case

---

<sup>2</sup> Act of March 2, 1863, ch. 67, 12 Stat. 696.

<sup>3</sup> Cong. Globe, 37th Cong. 3d Sess. 955-56 (1863) (remarks of Sen. Howard).

decided in 1885, a district court noted that the qui tam provision aimed to deter fraud by making the wrongdoer liable to private persons acting "under the strong stimulus of personal ill will or the hope of gain. Prosecutions conducted by such means compare with the ordinary methods as the enterprising privateer does to the slow-going public vessel."<sup>4</sup>

Congress modified the Act in 1943, significantly cutting back on the rights and rewards of the relator. Consequently, between 1943 and 1986, the Act was rarely used.

In 1986, however, Congress overhauled the entire False Claims Act.<sup>5</sup> The 1986 amendments increased statutory liability from double to treble damages, and raised the level of civil penalties, which now stands at \$5,500 to \$11,000 per false claim for conduct that occurred after September 29, 1999.<sup>6</sup> Also, Congress sought to reinvigorate the qui tam provisions governing the rights of private persons to pursue FCA cases.

#### STATUTORY FRAMEWORK OF THE UNITED STATES FCA

Under the current (post-1986) version of the Act, an action under the FCA can be filed either (a) by the United States, acting through the Department of Justice ("US DOJ"), or (b) by a private citizen (the relator), who files the case on behalf of and in the name of the United States. In only the latter case, the case is known as a "qui tam" case.

Unlike ordinary lawsuits, a qui tam case must initially be filed under seal, i.e., secretly, with the trial court. When it is filed, the case is not listed on the court's public docket, so the public does not know that it has been filed. In addition, unlike ordinary lawsuits, a copy of a qui tam lawsuit is not served on the defendant in the case. Instead, the

---

<sup>4</sup> 24 F. 361 (D. Ore. 1885), 366, aff'd, 30 F.2d 762 (C.C. Ore. 1887).

<sup>5</sup> False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (1986), *codified at* 31 U.S.C. §§ 3729-3733.

<sup>6</sup> See 64 FR 47099, 47104 (8/30/99).

relator served a copy of the lawsuit only on the US DOJ. In other words, when the relator files a qui tam suit, the rules require that neither the relator nor the court notify the defendant that the case has been filed. The only entity that is notified of the case is the US DOJ. The reason for this secrecy is to provide the US DOJ the opportunity to conduct an undercover investigation, i.e., to investigate the allegations before the defendant is alerted to them.<sup>7</sup>

After the qui tam case is filed, and while it remains under seal, the US DOJ has a period of time to investigate the allegations and then to decide whether to take over the lawsuit, i.e., adopt it as its own. Under the Act, this time period is 60 days, subject to extensions for "good cause." In practice, the US DOJ routinely asks for several extensions, and the court routinely grant such requests, with the result that lawsuits are often kept under seal for well over a year, during which time the US DOJ can continue its investigation. Once there has been sufficient time to investigate the allegations, the US DOJ must notify the court either that it will intervene in (i.e., adopt) the case, or that it will decline the case. At that point, the court unseals the case and the lawsuit is served on the defendant.

If the US DOJ intervenes in the case, then US DOJ assumes primary responsibility for handling the case. The relator can still participate as a plaintiff, but he must take a secondary role to US DOJ. On the other hand, if US DOJ declines the case, then the relator may still pursue the case as the lead plaintiff.

As a practical matter, if the US DOJ intervenes, the Government usually prevails in the case, either through judgment or, much more often, through settlement. On the other hand, if the US DOJ declines, the defendant usually prevails. The main explanation for this is simply the fact that, after having had a chance to investigate the cases, US DOJ usually intervenes in the stronger ones and declines the weaker ones.

---

<sup>7</sup> The seal gives the Government the opportunity to find out what relevant documents exist and, if necessary, take steps to preserve them; to conduct a covert investigation, for example, by placing a recording device on the relator and monitoring his conversations with other employees; and, if the circumstances warrant, to conduct a criminal investigation without tipping off the potential defendant.

The statutory range of the relator's potential recovery depends on whether the US DOJ has intervened. Where the US DOJ has intervened and recovered for the government, the relator is ordinarily entitled to receive between 15 and 25 percent of the government's recovery, depending on the relator's contribution (both in terms of information and effort) to the successful outcome of the case. If the US DOJ has not intervened, but the relator has gone forward on his own and achieved a recovery through judgment or settlement, the relator is entitled to receive between 25 and 30 percent of the recovery; the remainder goes to the government. Although this enhanced recovery looks enticing at first, in reality, because of the rarity with which relators actually prevail in cases where the US DOJ has declined, the relator usually ends up recovering far greater amounts in cases in which the US DOJ has intervened. In other words, because the government's total recovery is usually much higher in intervened cases, the relator usually ends up better off than in declined cases, even though the relator recovers a smaller percentage of the government's proceeds in an intervened case.

In any successful qui tam case, whether the US DOJ has intervened or not, the relator is also entitled to recover an award to cover his reasonable legal fees and costs. This award is in addition to whatever percentage of the government's recovery to which the relator may be entitled. On the other hand, if the US DOJ has declined the case and the relator continues to pursue the case after the declination, and the court ultimately determines that the relator's claims were frivolous or pursued in bad faith, the court may order the relator to reimburse the defendant for its attorneys fees and costs.

#### CONDITIONS FOR A SUCCESSFUL FALSE CLAIMS ACT

There are several characteristics of the United States legal system that are absolutely essential to the success of the False Claims Act. These are: (1) a Government agency that has the will, resources, and expertise to vigorously prosecute criminal and civil cases of fraud against the Government, even when such fraud is committed by powerful and politically well-connected corporate defendants; (2) a reward system that provides adequate incentives to relators (whistleblowers) for

providing information, and to the lawyers who represent them; (3) the confidence of potential relators that, if they report information to the Government and commence a qui tam suit, they will be protected from retaliation by the defendants; and (4) a court system that will keep the cases secret while the Government gathers evidence against the defendants, and will fairly apply the provision of the Act when the Government presents sufficient evidence that the defendants are liable.

A. The Role of the Prosecuting Agency.

In order to have a successful FCA, the Government must have a strong prosecuting agency, such as the US DOJ. In the United States, while the role of relators in exposing fraud has been crucial, the role of the US DOJ has been even more important.

The Department of Justice is organized into a dual system. In this system, the US DOJ headquarters in Washington ("main DOJ") has ultimate responsibility over cases throughout the country. However, each judicial district also has its own United States Attorney's Office (the "USAO") with extensive authority over cases within that district. Every state has at least one judicial district, and some states can have as many as three or four judicial districts within the state.<sup>8</sup>

Main DOJ and the USAOs usually decide how to divide responsibilities for handling matters on a case-by-case basis. It is customary that the USA is the lead prosecuting office on criminal cases, with little or no input from main DOJ. In civil cases such as those under the FCA, however, main DOJ usually takes the lead in large matters with nationwide implications, while the USAOs usually take the lead in smaller matters. There is an exception to this custom for some USAOs that have developed an expertise in FCA cases; when a FCA case is filed in

---

<sup>8</sup> For example, the state of Maryland has one judicial district covering the entire state; the state of California, on the other hand, has four: a Northern District (including San Francisco), a Central District (including Los Angeles), an Eastern District (including Sacramento), and a Southern District (including San Diego). There is no reasonable way to explain why certain states have more judicial districts than other states, except for the political power of Senators from the various states at the time the districts were created.

one of these districts, main DOJ is more likely to share responsibility for handling the case, or delegate it, to the local USAO.

Within main DOJ, there is a unit of approximately 70 lawyers who specialize in handling FCA cases. This unit, known as the Commercial Frauds Section within main DOJ's Civil Division, is made up entirely of civil servants (i.e., non-political employees). The director of this unit has been in place since 1984 - thus, he has been around during the entire post-1986 period - during a succession of Republican and Democratic administrations. When it comes to conducting specific cases, the director's decisions are virtually never overruled by his superiors, who are political appointees. In short, there is a tradition of professionalism within this office, and it is well insulated from politics.

As a consequence, in the past 20 years, there have been many successful FCA cases against some of the most powerful U.S. companies. For example, in recent years the Government has pursued the country's largest hospital chain, Columbia HCA, for defrauding the Medicare program, reaching settlements totaling \$1.362 billion - notwithstanding the fact that Columbia HCA was run by the brother of Bill Frist, the outgoing Republican Senate majority leader. Likewise, the Government has pursued cases against Lockheed Martin, the largest U.S. defense contractor, for providing false costs to Government officials, achieving a settlement of \$37.9 million. The Government has also recovered over \$200 million from Shell, \$95 million from Chevron, \$43 from Texaco, and \$32 from BP Amoco in settlements of cases alleging that these companies understated the amounts of royalties owed to the Government for oil extracted under federally-leased lands.

While the US DOJ plays the most important role in enforcing the FCA, the other various federal agencies also play an important role: they are the agencies whose money has been taken by the contractors. In cases involving government-funded health care, there is usually a question of whether a health care provider has defrauded the federal Medicare program, which provides insurance for Americans over the age of 65. The US DOJ will typically want to know the views of the Centers for Medicare and Medicaid Services ("CMS"), which administers Medicare, as to whether the contractor acted properly or not.

Or, if the case involves allegations that a contractor provided substandard equipment to the Department of Defense ("DOD") and lied about it, the US DOJ will ask the DOD office that administered the contract its view of the matter.

At that point in the process, politics or personal relationships can sometimes play a significant role in the outcome of the case. Unless the government officials in charge of supervising a program or contract are willing to testify that the contractor violated established rules, failed to meet established specifications, or said something false - and that the contractor's misconduct caused the Government to pay out money that should not have been paid -- it will be difficult for the US DOJ to prove a fraud claim in the court. In the health care context, the strictness with which CMS interprets the Medicare rules sometimes varies depending on the current administration. Or, when officials in DOD have developed a close relationship with a particular contractor, they may be more likely to say that they authorized the contractor to provide a substandard product. The officials might even say that they would have accepted the product for the same price if the contractor had simply admitted that the product was deficient, instead of lying about it!<sup>9</sup>

In the context of the FCA, there is a world of difference between (1) cases where the contractor makes the most of loosely-written rules or contracts, taking advantage of poor Government management but not committing fraud; and (2) cases where the contractor, well aware of its legal or contractual obligations, cheats or lies in order to get paid by the Government. The FCA only redresses the second situation.

#### B. The Importance of a Reward System.

Since 1986, approximately three-quarters of the Government's recoveries in FCA cases have been in qui tam cases

---

<sup>9</sup> The cozy relationship between Government officials and the contractors they are supposed to oversee explains why many practitioners in this area do not expect to see many successful FCA cases against the contractors responsible for Iraqi reconstruction -- despite the numerous reports that the contractors have charged outrageous amounts for services or have provided goods of notoriously bad quality.

initially filed by a private citizen. In those successful qui tam cases, the large majority of Government recoveries has been from cases in which, after investigating the sealed qui tam complaint, the Government chose to intervene. The reason for this trend is no mystery: informants with solid information about fraud are much more willing to provide that information to the Government only if there is a prospect for reaping a large reward.

A typical relator is a company insider who takes a huge career risk when he decides to file a qui tam case. Once it becomes known that the relator filed a qui tam suit, a relator who has sued his employer is not likely to be employed there much longer, even though the employer may be liable for damages for firing the relator in retaliation for his filing suit.<sup>10</sup> Moreover, the stigma of filing a qui tam suit is not over once the relator has left the company. Others in the industry may refuse to hire someone who is known as a "whistleblower," and references from the former employer are not likely to be kind.

Prior to revising the FCA in 1986, Congress heard testimony that a "conspiracy of silence" existed among those employed by companies that were committing fraud. No one was willing to reveal the fraud, or even to cooperate with Government investigations into fraud, for fear of becoming unemployable.<sup>11</sup> To compensate relators for taking the risk of exposing fraud -- and therefore, to break the "conspiracy of silence" -- the FCA now guarantees that relators who bring successful claims will ordinarily receive a minimum of 15 percent of the Government's proceeds from the case (taking into account the multiple of

---

<sup>10</sup>The FCA provides that an employer who fires or otherwise discriminates against an employee because the employee either filed, prepared to file, or assisted in a qui tam suit, is liable for double damages. 31 U.S.C. § 3730(h). Because of the anger that most company officials feel when they find out about a qui tam suit, this provision does not effectively deter retaliatory actions against relators. Companies are often willing to pay this price - which is usually small in comparison to the company's liability for the underlying qui tam case - just to get rid of, and possibly get even with, the "troublemaker."

<sup>11</sup>S. Rep. No. 345, 99th Cong., 2d Sess., at 5, *reprinted in* 1986 U.S. Code Cong. & Admin. News, 5270.

civil damages, plus any civil penalties).<sup>12</sup> Consequently, several relators have reaped huge rewards as the result of filing qui tam suits. For example, one of the relators who filed suit against Columbia HCA received a reward of nearly \$100 million. Several other relators have received rewards exceeding \$10 million. Although the magnitude of these rewards can strike some as excessive, the prospect of this kind of windfall - like the prospect of winning a Government-sponsored lottery - is frequently necessary to induce prospective relators to make what can often amount to a career-ending choice.

### C. Protecting the Safety of Relators.

Enticed by the prospect of large monetary rewards, relators have shown themselves willing to risk the career harm that often follows the filing of a qui tam suit. One form of retaliation against relators that apparently has not occurred, or at least has not been reported, has been physical violence. If relators had good reason to fear for their safety or their lives, that would have an extremely chilling effect on qui tam suits, despite the potential monetary benefits associated with them.

Given the power of many of the defendants, one can speculate that the reason relators have not been subjected to violence is that the costs of inflicting violence would be far greater than the costs associated with settling the FCA cases, even when such cases involve very large amounts of money. Whereas the company may have to pay a large sum to settle the claim, if there is a conspiracy to harm the relator, then individuals within the company are likely to face serious

---

<sup>12</sup>There are several circumstances in which a relator is barred from recovering any reward, or may be given a reduced award below the 15 percent level. If the relator is not the first to file a qui tam suit based on the same facts, or if the Government itself has already filed suit based on those facts, the relator is barred. 31 U.S.C. §§ 3730(b)(5), e)(3). Also, if the relator basis his allegations on public disclosures of information, the relator is barred unless the relator was the "original source" who provided the information to the Government. 31 U.S.C. §§ 3730(e)(4). If the relator "planned and initiated" the fraud, the court may reduce the award, even as low as zero. 31 U.S.C. § 3730(d)(3). Finally, if the relator is criminally convicted in connection with the conduct he has reported, he is barred from receiving a reward. 31 U.S.C. § 3730(d)(3).

criminal charges and jail terms - and the US DOJ will be very motivated to investigate and prosecute the crime. In addition, once the defendant learns that the relator has filed a qui tam suit - which happens after the relator has filed the complaint, and the Government has had time to investigate - the defendant no longer stands to benefit from silencing the relator, as he has already disclosed his information to the Government. At that point, the defendant's only "benefit" from retaliation would be the satisfaction of retribution.

D. The Role of the Courts.

The final condition that is necessary for a successful FCA is a court system that keeps qui tam cases secret while they are still under seal, and that fairly applies the law against even the most powerful defendants. In the United States, there have been a number of cases where court clerks inadvertently lifted the seal on cases that had just been filed, erroneously placing the cases on the public docket where they can be discovered by the defendants. In these cases, the Government has lost the opportunity to do any covert investigation. In addition, if the defendant learns of a case before the Government has had the chance to interview the Relator, the defendant might be tempted to take steps to prevent the Relator from sharing his information with the Government. Finally, in order for the FCA to deter fraud and bring restitution to the Government, it is of course necessary for the court system to apply the law even-handedly, without regard to the power or influence of the defendant.

ENACTING AN EFFECTIVE FALSE CLAIMS ACT IN NIGERIA

As the discussion above demonstrates, to be an effective deterrent to fraud, an FCA cannot be enacted in isolation.

First, the Government would need to develop a prosecuting office with the expertise, resources, and independence to pursue fraud cases with or without the participation of a relator. Perhaps this office could be formed under the umbrella of the Economic and Financial Crimes Commission ("EFCC"). The success of the United States FCA depends on the fact that, when a whistleblower presents a good case, the US DOJ is capable of taking it forward. Even though relators in the United States have the right to pursue FCA cases on their own, very few would

have the resources to go head-to-head against the most powerful companies in the country. Relators will only suffer the risks of reporting fraud if they can be confident that their cases will be handled competently and aggressively.

Second, FCA cases are typically complex and long, involving unusual procedures, the exchange of many thousands of documents, and testimony by many witnesses including experts. It has taken the United States civil courts several years to become familiar with qui tam cases, and even now, 20 years after the FCA was amended, the law governing such cases varies greatly from region to region. To handle FCA cases, Nigeria might consider forming specialized courts that are trained in the procedures governing such cases, as well as the complex procurement and contract issues that are likely to arise. Court personnel should also be trained to keep FCA cases secret during the time period when the allegations are being investigated by Government attorneys.

Third, if the Government enacts a False Claims Act, it should also enact whatever legislation is necessary to ensure the safety of whistleblowers, and the EFCC must be given the means to enforce such laws. Simply put, the costs of intimidating or hurting a relator must be much higher than the benefits of doing so. The public must have confidence that, if any person intimidates or hurts a relator, the Government will devote all necessary resources to pursuing and severely punishing that person.