

CLIENT ALERT

VIDEO: False Claims Act Litigation: Hot Issues & Trends

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The civil False Claims Act is the federal government's primary tool used to recover damages and penalties against companies and individuals who have committed a fraud on the government. Typical targets of the False Claims Act are defense contractors performing government contracts and health care related companies involved in billing through Medicare. The Act, which also empowers individual citizen whistleblowers to bring suit, provides for treble damages and penalties for each false claim for payment submitted to the government.

In this three-part video alert series, Crowell & Moring partner **Mark Troy** provides an overview of the trends in False Claims Act litigation that are likely to affect companies in the coming year, including the proper measure of damages and how to deal with whistleblower employees and enforce contractual releases.

Part 1: Determining Damages

Part 2: Handling Whistleblower Employees

Part 3: Whistleblower Releases and Other Tricky Issues

Transcript

What is the hottest issue now in False Claims Act litigation?

The key issue in False Claims Litigation is the proper measure of damages. Some courts have held that any false statement made in connection with an award of a contract results in damages in the amount of the entire value of the contract. Other courts have limited damages and required the government to prove that there was actual financial harm from the false certification.

What is an example of a [typical?] False Claims Act damages case?

Well, in one case that I handled, the government alleged that a slaughterhouse submitted a false certification that it was treating the cattle in a humane manner, and it brought a false claims action against the slaughterhouse and

alleged as damages the entire amount of the contract value that had been paid to the slaughterhouse. The defendant slaughterhouse argued that that was not a proper measurement of damages because they had provided all of that meat to the government, which was consumed.

What was the result?

In the end, the court—the district court in Los Angeles—actually ruled that the damages would relate more to the entire value of the contract. But courts are divided on that issue, and courts in other jurisdictions have required the government to prove that they didn't get any value from the contractor's performance.

What trends are you seeing in these damages cases?

The government has taken a very aggressive position that any false statement or false certification that leads to a contract award can render as damages all the dollars that are paid under the contract. And, defendants have taken the counter-position that that's not a real measure of the government's financial harm from the liability. So, for example, a false statement about not having a conflict of interest. It is a false statement. It generates a false claims liability, but it really shouldn't render all the dollars that are paid on the contract as false claims damages.

What steps should a company take if it thinks one of its employees has become a whistleblower?

The False Claims Act has an anti-retaliation provision in it, which protects whistleblowers against any form of discrimination. That includes taking a person off a project, certainly reducing their pay, and, of course, firing the individual, because that person engaged in protected conduct. And, protected conduct is defined as actions taken to pursue a whistleblower claim. So, when a company learns it has a whistleblower in the workplace, the company has to be very careful in how to treat that person.

What limits can a company place on a whistleblower employee in the course of their continued work at the company?

It doesn't mean that that person has a free ride to run roughshod over the company and not perform his or her duties. The person still has to perform his job. But, he's not allowed to go off and steal documents, become involved in the company's internal investigation, and devote most of his time to working on pursuing the case.

What is most important for a company to do when dealing with a whistleblower employee?

The company should not permit the employee to take documents home; to have full access to the company's server; to download documents. There are ways that the company can allow the employee to continue performing his or her normal job responsibilities, but without giving that employee free discovery before the case even commences.

What success are companies having when whistleblowing employees sign releases not to sue?

Unfortunately, what we think of as a contract between an employee and a company, where an employee releases his rights to sue the company, many courts are not enforcing those agreements, because they view them as a violation of public policy. There are several instances where whistleblowers have brought complaints to

management and then have voluntarily resigned from the company. The company gets them to sign a waiver and release in return for a severance package saying they're not going to sue the company. Then the former employee turns around and does precisely that; and sues the company.

What does it take for a court to enforce a whistleblower's release?

Courts have held that those, those agreements are not enforceable; unless certain conditions are met. And, those main conditions there is that the company has to disclose the employee's allegations to the government and, if that disclosure occurs, then it's presumed that the government has at least been made aware of the allegations. And, that overrides the public policy argument and the court would enforce the severance agreement at that point.

How can a company legitimately discipline a whistleblower employee and avoid it being seen as retaliation?

Whistleblowing employees are resentful of the company. They're nervous and they presume that anything that happens in the workplace is happening because they blew the whistle. So, when companies take any form of disciplinary action against a whistleblowing employee, the company has to make sure that there's a valid basis for it and that the action is completely unrelated to the whistleblowing. So, an employee who's got a poor performance record, and the company is ready to lay off people, that person could be subject to layoff; as long as there's a legitimate reason separate and apart from the whistleblowing for taking that action against the employee.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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