Session 301:
Piling On: Whistleblower Statutes
Run Amok

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Today’s Topics

- Verdicts and Settlements
- Overview of Whistleblower Laws
- False Claims Act (FCA)
- Sarbanes-Oxley (SOX)
- SEC and Dodd-Frank
- Risk Mitigation Strategies
Whistleblower Verdicts and Settlements

- **February 2012:** Last month, U.S. District court approved a settlement in which Citigroup Inc. agreed to pay $158.3 million to settle claims that it misled the government into insuring high-risk home mortgages. The whistleblower, a former Citibank employee, will collect $31 million of the settlement amount.

- **January 2012:** OSHA ordered AirTran to reinstate and pay $1 million in damages to a pilot who was fired following his reports of mechanical malfunctions at the airline.

- **May 2011:** A California court of appeal upheld a $6 million whistleblower verdict against Cedars Sinai Hospital in Los Angeles. The plaintiff, a renowned skull surgeon, alleged that he was retaliated against after accusing the hospital of negligence in maintaining and sterilizing surgical instruments.

- **February 2011:** Former executive at Countrywide Financial Corp. won $3.8 million who expressed concerns about the institution’s corporate governance and mortgage lending practices.
A Decade of Whistleblower Statutes

- Sarbanes-Oxley Act (2002) – employees at publicly traded companies
- Surface Transportation Assistance Act amendments (2007) – truck drivers
- Department of Defense reauthorization – defense contractors
- Patient Protection and Affordable Care Act (2010) – health care workers
- Dodd-Frank Act (2010) – employees at publicly traded companies and their private subsidiaries/affiliates
- Food Safety Modernization Act (2011) – food industry workers
OSHA Whistleblower Enforcement

- OSHA administers the whistleblower protection provisions of 21 federal statutes.
- OSHA’s Whistleblower Protection Program website lists the various laws and regulations under OSHA’s enforcement jurisdiction: [www.whistleblowers.gov/](http://www.whistleblowers.gov/)
OSHA Whistleblower Enforcement

- Over the past year, OSHA has been making changes to its whistleblower enforcement program to make it a priority within the agency, including adding investigators, increasing investigator training, and the following:
  - On September 20, 2011, OSHA issued an updated Whistleblower Investigations Manual overhauling complaint and investigation procedures. Some key changes:
    - Permits all whistleblower complaints to be filed orally or in writing, and OSHA will eventually accept electronically-filed complaints
    - Removes the requirement that OSHA obtain a signed statement from each relevant witness
    - Mandates attorney’s fees awards where authorized by statute
  - On March 1, 2012, OSHA announced that it was restructuring in order to boost it’s whistleblower enforcement program – now, the whistleblower program will report directly to OSHA’s director.
State Whistleblower Statutes

- In addition to approximately 50 federal whistleblower laws, 46 states have laws protecting whistleblowers from retaliation. For example:
  - California Labor Code section 1102.5 prohibits retaliation against employees for disclosing information to a government or law enforcement agency where the employee has reasonable cause to believe that the information discloses: A violation of a state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.
  - The Illinois Whistleblower Protection Act prohibits retaliation against an employee who “discloses information to a government or law enforcement agency, if the employee has reasonable cause to believe that the information discloses a violation of state or federal laws, rules, or regulations.”
False Claims Act
False Claims Act: “The Original Whistleblower Statute”

- The False Claims Act (FCA) was enacted in 1863 to combat abuse of federally-funded programs during the Civil War reconstruction era.
- The FCA prohibits *the knowing*:
  - submission of false payment claims
  - use of false records or statements in support of payment claims
  - improper retention of federal funds
- The FCA provides civil and criminal penalties, including:
  - Suspension and debarment from federal programs
  - Treble damages
  - Penalties of $5,500 to $11,000 per violation
  - Attorney’s fees and costs
What’s Special About the False Claims Act?

- The “qui tam” provision: from a Latin phrase meaning “he who brings a case on behalf of our lord the King, as well as for himself”.
- The qui tam provision turns employees into BOUNTY HUNTERS!!!
- 25% to 30% of the recovery – plus attorney’s fees
Key Facts Regarding the FCA

- The government can choose to join the qui tam litigation or not.
- In fiscal year 2011, the government recovered $3 billion in FCA cases.
- 638 Qui Tam suits were filed last year alone -- a new record.
- The Department of Justice has identified these industries as FCA targets:
  - Pharmaceutical
  - Healthcare
  - Financial Institutions (i.e. Bank of America’s $1 billion FCA settlement on 2/14/12)
Recent Legal Challenges

- **U.S. ex rel. Bunk v. Birkart Globistics GmbH & Co. (E.D. Va. Feb 14, 2012):** After jury found over 9,000 false claims based on invoices submitted, the court refused to award statutory penalties of between $50.2 and $100.4 million. The court held that, when the *qui tam* relator failed to show that the government suffered damage, imposing penalties of this magnitude would violate the Eighth Amendment’s Excessive Fines Clause.

- **United States ex rel. Radcliffe v. Purdue Pharma L.P., 600 F.3d 319, 327 (4th Cir. 2010), cert. denied, 131 S. Ct. 477 (2010):** Releases executed by *qui tam* relators are enforceable where the fraud allegations have already been disclosed to the Government.

- **Chapman Law Firm, LPA v. United States, No. 09-891C, 2012 WL 256090 (Fed. Cl. Jan. 18, 2012):** An FCA claim turned on the meaning of a single phrase in the contract, but one as to which the Government and Defendant disagreed. The court concluded that the phrase was ambiguous because both parties’ interpretations fell “within a ‘zone of reasonableness.’” Applying the doctrine of *contra proferentem*, the court construed the ambiguity in the disputed provision against the drafter, the Government.
Sarbanes-Oxley (SOX)
What is SOX?

- Sarbanes-Oxley – or SOX -- enacted in 2002, created:
  - a new, quasi-public agency charged with regulating accounting firms in their roles as auditors of public companies; and
  - new and enhanced standards for auditor independence, corporate governance, internal control assessment, and enhanced financial disclosure.
- The law arose out of growing hostility and distrust of big business and government — Enron, Adelphia, and WorldCom financial scams.
- SOX included *new, significant whistleblower provisions.*
Key SOX Whistleblower Provisions

- **Three** Whistleblower sections in SOX:
  - Section 302: Internal and anonymous whistleblowing provisions – the rise of whistleblower hotlines; audit committees required to establish whistleblowing procedures and retaining and treating reports
  - Section 806: Anti-retaliation provisions and bring civil suit law suits
  - Section 1107: Criminal provisions for knowing and intentional retaliation (different standard)
Issues with SOX’s Effectiveness

- Cumbersome and employer friendly remedial process
- Inadequate Protection for whistleblowers - illusion of protection without true remedies
- Use of arbitration agreements to circumvent statutory Purpose
- Lack of incentives to spur whistleblowing
Recent Legal Challenges

- **Lawson v. Fidelity Management & Research LLC, et al., No. 10-2240 (1st Cir. Feb. 3, 2012):** The First Circuit held that SOX whistleblower protections do not extend to employees of a public company’s contractors or subcontractors who work at private companies.

- **Villanueva v. Core Laboratories, NV, ARB No. 09-108, ALJ No. 2009-SOX-6 (ARB Dec. 22, 2011):** By a 3-2 vote, the DOL’s Administrative Review Board (ARB) limited the jurisdiction of SOX whistleblower protection outside the United States.

- **Tides v. Boeing Co., No. 10-35238 (9th Cir. May 3, 2011):** SOX Whistleblower provisions do not protect employees who disclose information to the media.
Recent Legal Challenges (Continued)

- *Prioleau v. Sikorsky Aircraft Corp.*, DOL ARB, No. 10-060 (November 9, 2011): The ARB extended SOX’s anti-retaliation protection to an internal report that an employee submits to his or her employer about a policy conflict, even though it does not communicate a belief that fraud had been committed or that SOX or the securities laws have been violated.

- *Gale v. U.S. DOL*, 2010 U.S. App. LEXIS 13104 (11th Cir. June 25, 2010): The Eleventh Circuit joins the First, Fourth, Seventh and Ninth Circuits in strictly applying SOX’s “reasonable belief” requirement, stressing that Section 806 “requires an employee to demonstrate both a subjective belief and an objectively reasonable belief that the company’s conduct violated a law listed in that section.”
Securities and Exchange Act (SEC) and Dodd-Frank
The Whistleblower’s Bounty: Eligibility Requirements

- Under this provision, the SEC will pay an award to one or more whistleblowers who:
  - Voluntarily provide the SEC
  - With original information
  - About any possible (reasonable belief) violation of federal securities laws that has occurred, is ongoing, or is about to occur (facially plausible)
  - That leads to a successful federal court or administrative enforcement action by the SEC
  - In which the SEC obtains monetary sanctions (penalty, disgorgement, interest) totaling more than $1M
Who Can Be a Whistleblower?

- A *whistleblower* is an individual who provides the SEC with information relating to a *possible* violation of the securities laws
  - Almost any individual may be eligible to receive a whistleblower bounty (e.g., employees, former employees, vendors, agents, contractors, clients, customers, and competitors)
  - Even securities laws violators may be eligible whistleblowers

- Dodd-Frank bars certain individuals from award eligibility:
  - Officer/Director/Trustee/Partner
  - Anyone who has Compliance/Audit/Legal Responsibilities
  - Member of Investigation Firm
  - Public Accountant
  - Anyone who learns of a possible violation from any of the above individuals
The reward to eligible whistleblowers is between 10 percent and 30 percent of the aggregate monetary sanctions obtained by the SEC and other U.S. governmental entities in any related actions.
SOX and Dodd-Frank
New SEC Whistleblower Program

- Dodd-Frank *also added a new federal whistleblower retaliation* cause of action for employees who provide information to the SEC about violations of the securities laws or who make SOX- or SEC-required disclosures.
  - *The would-be whistleblower now has a choice whether to pursue his or her remedy via the Dodd-Frank Act’s SEC Whistleblower Program, or via SOX, or both.*
  - The cause of action looks nothing like a SOX action and has the potential to be much more lucrative to a claimant than under SOX:
    - Avoidance of SOX administrative proceedings – claims are filed directly in court
    - Avoidance of SOX’s new 180-day limitations period – claims have up to a six-year limitations period
    - Increased monetary incentives for whistleblowers
    - Employers may not require employees to waive anti-retaliation rights
SOX and Dodd-Frank

- Increases time limits to file a complaint of retaliation with OSHA from 90 days of a violation to **180 days** of a violation, or **180 days after the date on which the employee became aware of the violation**.
- Prohibits certain waivers of SOX civil whistleblower claims: “The rights and remedies provided for in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement.”
- Renders unenforceable any predispute arbitration agreement that requires arbitration of a SOX dispute: “No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.”
- Adds to the definition of “publicly traded company” any “subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company.”
Top Strategies for Mitigating the Risk of Whistleblower Claims
Risk Mitigation Strategies

- Have policies in place that encourage the reporting of complaints.
  - Since the Dodd-Frank Act took effect, three-quarters of companies report that they have increased communications with employees on how to report internally, and 46 percent of companies have increased manager training on how to handle such complaints.
- Find new ways to *incentivize internal reporting* of complaints.
- Implement employee hotlines.

- Consider preemptive reporting of issues to the SEC to eliminate the risk of employees who later seek to provide the same information to the SEC from being found to have reported “original information.”
Risk Mitigation Strategies

- Consider mandatory arbitration provisions to cover certain whistleblower claims – but remember the Dodd-Frank exceptions.
- Use broad employee releases to cover whistleblower claims – but consider prohibitions on waiver of SOX and SEC claims!
- Audit “High Risk” areas within the corporation.
- Conduct regular compliance training
Risk Mitigation Strategies

- **Conduct thorough and competent internal investigations of all complaints.**
- Encourage a reporting employee to document as many details of the alleged violation as possible so that the investigation is focused on the actual complaint.
- Document all steps taken in the investigation process.
- Document a conclusion, whether it is the existence of a compliance issue or the absence of one.
- If a violation occurred, document and follow through with corrective action.
- Determine if improper conduct is ongoing.
- Evaluate whether existing compliance and legal staff are adequate to meet the challenges of the whistleblower laws.
- Take steps to maintain the attorney-client privilege.
Risk Mitigation Strategies

- **Develop an effective compliance program:**
  - Establish an effective code of ethics
  - Designate specific high-level personnel with direct responsibility for overseeing compliance who have direct access to the CEO and board of directors
  - Appoint a compliance officer with responsibility for independently investigating and acting on matters related to compliance
  - Inform employees of the existence and details of the company's compliance program
  - Arrange for regular reports to the board concerning internal investigations
  - Establish effective methods of monitoring, auditing, or reporting on compliance, including, without limitation, establishing an anonymous hotline and providing protection for whistleblowers
  - Implement systems to ensure reasonable steps to respond to or investigate reported violations
  - Consistently enforce the company's policies and procedures through corrective action
Questions?