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Inside the Mind of the Whistleblower
or
Book Proposal to John Grisham: “A Time to Squeal”



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* To simplify the presentation, most footnotes and other annotation materials are omitted. An annotated copy will be provided, upon request. Much thanks and appreciation to my Research Assistant, Amanda Delaney.

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I. Proposal to John G.

Steve Kardell
Dallas, Texas

John Grisham
Charlottesville, Virginia

Dear John:

You don't know me, but I'm a big fan of yours.

What I like is how you do a great job of laying out the frustrations of small-time lawyers who are up against ruthless corporate interests.

Wake-up call: how you explain how a big lawsuit can go south for a number of reasons, such as unfair judges, ruthless defense tactics, and so on.

I am surprised that you haven't done a book on whistleblowing. The subject matter would perfectly fit your themes:

- You could delve into the mind of the whistleblower; better yet: into the mind of the whistleblower's attorney.
- You could use your same protagonist in both *A Time to Kill* and *Sycamore Row*: Jake Brigance. He'd be perfect.
- Suggested title: "*A Time to Squeal*".

I am enclosing some book ideas that I hope you will like.

We can discuss a royalty sharing arrangement later.

Your (new) friend,

Steve

I. Relationship to actual cases

Note to John:

John, I get the impression that many of your books are taken from actual events. In that vein, some of the situations discussed herein relate to three recent whistleblower cases, two of which were settled with government intervention (Infosys and Citigroup) and one which went to trial without government intervention (Trinity Industries). As it stands now, the Trinity Industries verdict holds the record for the largest whistleblower recovery that went all the way to trial without government intervention.

Joelue Harman vs. Trinity Industries

Recovery: \$35 million

Issue: misrepresentation of safety of highway guardrails.



Jack Palmer vs. Infosys

Recovery: \$4 million

Issue: Visa fraud



Shony Hunt vs. Citigroup

Recovery: \$55 million

Issue: subprime mortgage fraud



II. Facts

Here's the setup:

Jake Brigrance is coming off his big trial in *Sycamore Row* when he gets a call from a woman working in one of those big Mississippi automotive plants. Let's call it "Mega Motors". (There is another automotive plant in town: "Gigante Motors"). Both are out of Detroit.

Those big automotive plants that are located in Mississippi provide the perfect backdrop for a whistleblower story:

The potential client is one he had helped stay in her house under one of the government mortgage assistance programs. Her name is Etta J. (James) Jones. She has the same fiery disposition as her namesake.

She says, “Jake, there’s big money here.” She says not only does she have evidence of super nefarious corporate wrongdoing, but she has some friends at the plant that can also back her up.

She also has a sidekick, “Sister” Johnson. She says Sister is especially resourceful, since she has been sneaking documents out of the plant for about five years, and reportedly has a whole garage full of “smoking guns”.

Etta thinks the problem has to do with the plant cutting corners on some type of safety switch. She thinks Gigante Motors makes a switch that has the proper safety features.

III. Signing up the whistleblower client

A. Jackpot dreams

Jake is excited about Etta’s case, and starts boning up on false claims law and whistleblower cases.

He remembers reading about the humongous Citigroup settlement, dealing with Citi’s role in the Wall Street subprime crisis.

Note: John, some of your best works have played on the psychology of the big score; the big payoff; the thrill of litigating with the big boys and coming out on top. I submit to you it doesn’t get any better than the real-life story of Finley Gibbs. He was the personal injury lawyer who had a pretty good experience with his first false claims client, the Citibank whistleblower.

There is a separate win-the-lottery story, however. And it will likely live in lawyer legend and lore for years to come. It’s the story of how the Citigroup employee, Sherry Hunt, picked her lawyer when she decided to bring her whistleblower case against Citigroup.

Notably, she didn’t seek out an established whistleblower lawfirm. Instead, she remembered a lawyer who had handled a fender-bender for her some years earlier.

What caused the planets to align for Sherry and her lawyer, however, was the fact that at that particular moment in history, there was an activist U.S. Attorney (Preet Bharara) pledging to clean up Wall Street, coupled with intense public pressure on the Obama

Administration to bring well-publicized Department of Justice proceedings against the “too big to fail” banks.

Thus, Finley Gibbs was fortunate enough to stumble into what may be, in retrospect, one of the most significant, quickest (and, relatively speaking, easiest) mega-whistleblower settlements in history.

His hometown paper tells the story thusly:



Columbia lawyer took part in Citigroup settlement

Whistle-blower went to Gibbs.

“Silex resident Sherry Hunt met Columbia attorney Finley Gibbs in 2008 when she hired him to represent her in a personal injury lawsuit. The two kept in touch after the suit, and last summer, when Hunt decided to file an action against CitiMortgage, a unit of financial behemoth Citigroup Inc., she went to Gibbs.”

“In certain circles, the two are now big names, helping to expose fraud and poor quality control in Citigroup's mortgage underwriting procedures that have cost taxpayers millions of dollars. On Feb. 15, Citigroup agreed to settle a U.S. civil lawsuit for \$158.3 million, a settlement aided by Hunt's knowledge of the company's business and her cooperation with federal authorities.”¹

By all accounts, Finley has made the most of his somewhat changed circumstances and has handled his post-Citigroup law practice wisely.

He fulfilled his civic duty by running for judge:

Many well-informed voters thought he was one of the best candidates that had come come along in years.



¹ See *Columbia Lawyer Took Part in Citigroup Settlement; Whistle-Blower Went to Gibbs* (February 26, 2012); available at <http://m.columbiatribune.com/content/tncms/live/> (last visited March 24, 2015).

More importantly, he seems to enjoy activities that most busy lawyers would love to have more time for.



After ruminating on Finley's story, Jake is fired up to get into this "whistleblower" game.

B. Missing the boat

Scene: Before she comes to Jake, Etta J. goes to a divorce lawyer, Floyd. Floyd had handled her third divorce a few years ago. She outlines her government fraud theory.

John, this will make a great backstory, because it's always a vicarious thrill when a lawyer gets a comeuppance; makes a fool of himself, etc. Better still, if it costs him a huge fee that he could have retired on. (I think the Mississippi term is "go to the house" or, "dadgummit, he settled a case and went to the house"). See Finley Gibbs' hunting and fishing pictures.

Floyd is dismissive:

- "Aren't these claims limited to army fraud or Medicare? "
- "Etta, I just don't think there's a case here."

Etta then takes her case to Jake, who realizes the FCA value of the facts outlined.

Follow up scene:

Four or five years later, after a front page story in the hometown paper runs about Jake's big payoff, Jake runs into Floyd at the bar association fish fry. All Floyd can do is hang his head. In therapy, Floyd "talks through" the fact that he failed the bar exam twice because of his being unable to spot legal issues. (Flashbacks to Floyd in law school or studying for the bar).

Query: Are there examples where even smart lawyers have failed to spot a big payday?

Answer: *Palmer v. Infosys*. The following is an October, 2013 press release from the Eastern District of Texas:

" ... the government alleged instances of Infosys circumventing the requirements, limitations, and governmental oversight of the H -IB visa program by knowingly and unlawfully using B-1 visa holders to perform skilled labor in order to fill positions in the United States for employment that would otherwise be performed by United States citizens or require legitimate H-IB visa holders."

Wikipedia description of Infosys issue:

"Controversies/Accusation of visa fraud;

"In 2011, Infosys was accused of committing visa fraud by using B-1 (visitor) visas for work requiring H-1B (work) visas. The allegations were initially made by an American employee of Infosys in an internal complaint. He subsequently sued the company, claiming that he was harassed and sidelined after speaking out. Although that case was dismissed,[58] it along with another similar case,[59][60][61] brought the allegations to the notice of the US authorities — and the U.S. Department of Homeland Security and a federal grand jury started investigating.[62]"

"In October 2013, Infosys agreed to settle the civil suit with US authorities by paying US\$34 million.[63] Infosys refused to admit guilt and stressed that it only agreed to pay the fine to avoid the nuisance of 'prolonged litigation'.[64] In its statement the company said "As reflected in the settlement, Infosys denies and disputes any claims of systemic visa fraud, misuse of visas for competitive advantage, or immigration abuse. Those claims are assertions that remain unproven".[65]"

<http://en.m.wikipedia.org/wiki/Infosys#Controversies>

Can you spot the false claims issue here?

C. Overlap of whistleblower laws

Because of the enactment of various whistleblower statutes and some courts' expansive interpretation of them, there's a general perception that a whistleblower can seek both protection and enforcement on just about any corporate ethics issues.

Jake needs to be careful in explaining limitations here, and how this works. Because he assisted Etta in restructuring her home mortgage under the government's HAMP program, he uses that program as an example of four different types of federal whistleblower laws that could apply if the program is abused by companies.

Etta: Which whistleblower law do we want to utilize? Don't a lot of them cover my situation?

Jake: Yes, and many of them cover the same type of conduct.

You remember how I helped you during the financial crisis, when a lot of the mortgage companies were foreclosing on a bunch of loans?

And you were in danger of getting foreclosed on? As result of that problem, the government created the HAMP program, which was put in place to help people, like yourself, stay in their homes.

One tricky part of the program, however, was that it had all kinds of new regulations and government red tape that mortgage companies had to follow if they wanted into that program.

So, if we assume that one of these mortgage companies decides to just ignore the regulations, a whistleblower complaining about the situation might be able to go one or more of these routes:

- (1) If there was a significant breakdown of the consumer protection rules regarding mortgages, then the Dodd-Frank whistleblower laws (CFPB), enacted as a result of the post financial crisis, would protect complaints of consumer violations under CFPB jurisdiction. These would typically apply to consumer protections, such as notices that have to be given in mortgages, etc.
- (2) Under SOX, you could have violations based on a number of issues, such as a breakdown of internal controls.
- (3) Under the SEC whistleblower program, you might have a cause of action for enforcement of internal controls and also misleading investors as to the extent of risk associated with failure to follow Federal laws.
- (4) Finally, you could have a potential False Claims Act case to the extent you could prevail on a misleading certification theory, meaning that you argue that the company misled one of the government agencies (like Fannie or Freddy) either when the company was allowed into the HAMP program or when certifications were periodically required.

Two of these laws (FCA and SEC) have bounty provisions.

All of these laws have non-retaliation protection of various kinds.

Some of them are tricky, though. For example, the Fifth Circuit, here in Mississippi, requires that you actually file a complaint with the SEC to have non-retaliation protection.

Since there's obviously no consumer fraud issue presented by Etta's facts, they quickly dispense with this analysis. Jake discusses potential SOX and SEC claims, but decides that the FCA is the most likely route here.

D. Explaining non-retaliation gaps

Jake also needs to be careful in advising Etta about whether any complaints she makes internally are protected by law. Most potential clients believe that just about any complaint of a Federal law violation is legally protected. The *Infosys* case illustrates the patchwork coverage of non-retaliation protections in whistleblower laws.

Etta: If the complaint is about a violation of Federal law, like Federal criminal laws, aren't I protected against retaliation?

Jake: Yes and no. Maybe, maybe not. It really depends on the specific allegation that you're making.

The magnitude of the violations or the seriousness of the conduct doesn't necessarily mean anything.

A good example is the *Palmer vs. Infosys* matter.

The specific Federal violations were described as follows:

" ... the government alleged instances of Infosys circumventing the requirements, limitations, and governmental oversight of the H -IB visa program by knowingly and unlawfully using B-1 visa holders to perform skilled labor in order to fill positions in the United States for employment that would otherwise be performed by United States citizens or require legitimate H-IB visa holders."

Nevertheless, there is no specific non-retaliation provision contained in the immigration laws.

Consequently, just complaining about a company's violation of Federal immigration law does not provide the complaining individual non-retaliation protections.

Another example here would be the IRS whistleblower program, which provides significant financial rewards for those who blow the whistle on IRS violations at their companies. However, that particular statute also does not contain a non-retaliation provision.

Jake: Another tricky thing. You also have to be careful about how non-retaliation laws are actually interpreted by the courts. A good example here is the SEC whistleblower program, which has significant bounties and also a strong non-retaliation provision. However at least one Federal appellate court (coincidentally our own Fifth Circuit), requires that an actual SEC complaint be filed with the governmental agency, as opposed to just complaining internally. So,

this is something most lawyers don't realize.

Judge Dismisses Whistle-Blower Suit Against Infosys

By JULIA PRESTON
AUGUST 20, 2012

A federal judge in Alabama on Monday dismissed a lawsuit by an American employee of Infosys, the giant Indian outsourcing company, who claimed he was harassed and sidelined after he reported what he believed was visa fraud by managers there.

In Infosys, Palmer lost his retaliation case but won the bounty part of the 34 million.

IV. Planting the flag

A. Don't be timid about planting the "protected activity" flag.

Jake tries to explain to Etta the fact that she can't beat around the bush in in her complaints to the company.

A major factor with every whistleblower is the emotional stress required in giving the type of whistleblower notice that will trigger most non-retaliation protections. Because employees are reluctant to confront authority figures.

Etta: I'm a black female on an assembly line in Mississippi. The line foremen are intimidating to begin with. They discourage any kind of dissent. What do you think will happen if I march in and say the whole plant is guilty of defrauding the U.S. government?

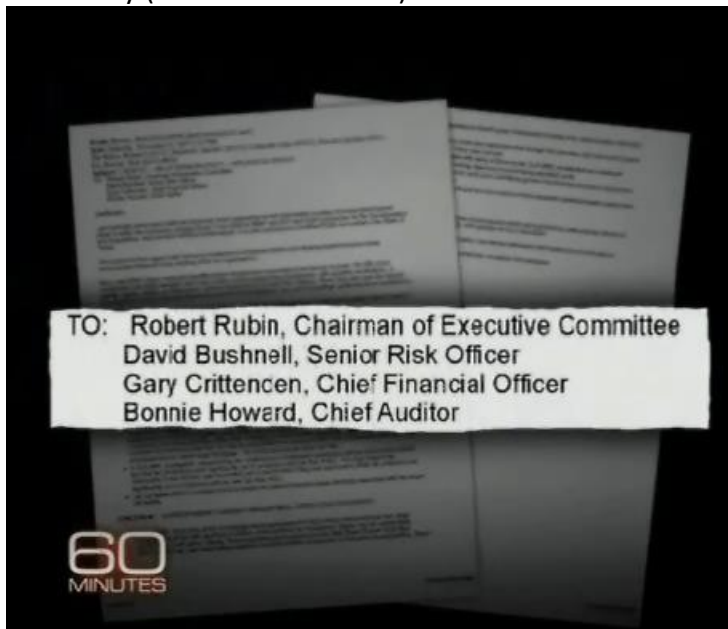
Jake: Unfortunately, many courts, especially in false claims cases, require a clear and unambiguous statement that you believe that fraud against the government is occurring.

B. Be as accurate as possible when identifying legal issues

Etta: Do I need a script that I need to go by? Should it be in writing?

Jake: Some courts require that the complaining whistleblower complain with specificity. This is why most people need a lawyer at this stage. Some courts, most notably the Fifth Circuit in SOX cases, almost require a legal pleading.

Example: Dick Bowen's email to Robert Rubin, reproduced in "How Citibank's Culture Allowed Corruption to Thrive", detailed in Report; Kellogg School of Management; Northwestern University (materials attached).



C. Don't wait until the company has built a case on you.

Etta: I'm in good standing. In my last performance review, I was given an A+. Why rock the boat?

Jake: Timing is everything. If there is a problem, you need to state it. Otherwise, the company will have the upper hand in building a case against you. Also, you will need to avoid the "see no evil supervisor". Discussion at V.

Whistleblowers are often confused when the company institutes corrections that address their problem. Most likely paranoid to begin with, whistleblowers often view this as an attempt to cover up the problem.

D. Effect of remedial corrections.

Is this a cover-up?

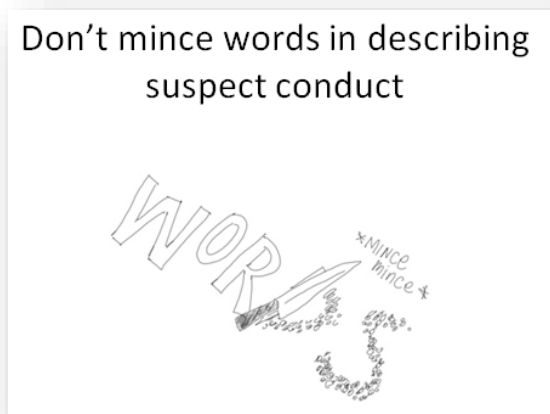
Etta: Jay, we just got a note on the assembly line that there is gonna be some changes to the safety

catch soon. Isn't this curious, since they refused to do this for many years. Now, because I have raised this issue, they are making needed changes. This looks like a cover-up to me.

Jay: I'm not sure it's a cover-up, but it could be just a window dressing for regulators. More importantly, however, this can be used as evidence that your issues were legitimate, and not just a figment of your imagination. Be sure to mention this in the internal investigation.

E. Bottom line:

Jake: you have to plant the flag, and do it with confidence:



V. The "see no evil supervisor".

It's always interesting if a business or corporate-type appears to be mendacious, manipulative and cunning. Makes for great drama. Here you have a first-line supervisor who is attempting to thwart non-retaliation protection by joining the "know nothing party".

Etta is suspicious when, out of the blue, she gets a new boss. The typical practice is for supervisors to stay with their line for quite a while.

Etta: I really can't understand what he is doing. Plus, he goes out of his way to avoid talking to me. Totally different than the previous line supervisor.


Jake: This sounds a little suspicious to me, but I don't think it's illegal. Let me do a little checking.

A. Emerging "best practices" for defense of retaliation allegations?

Jake calls an old friend who is now in HR in Jackson. She has an anonymous blog, titled "The Evil HR Lady".

Evil HR lady: Oh yeah, Jake, that's a relatively new trick. You replace the supervisor, make sure the new supervisor has no knowledge of the protected activity, and then claim that the firing had nothing to do with the issues she raised. I actually did a PowerPoint on this for a presentation to our management, and they loved it:

Supervisor ignorance=no retaliation?



Step 4 - Keep it Confidential - Can Kill Causation

- Retaliation depends on cause and effect - whistleblowing caused the adverse job action
- A manager can't retaliate against a whistleblower if she never knew the employee blew the whistle...
- Let managers know *only* if they need to know
- Lack of manager knowledge = "Retaliation Insulation"
- Implications for Investigation

VI. The internal investigation

A. Generally

Companies usually do an internal investigation whenever there has been an ethics complaint. It usually involves bringing in high-priced, intimidating lawyers. This can be especially stressful for employees, and most lawyers don't have a whole lot of experience in dealing with this issue. You definitely should have a scene where this takes place.

The internal investigation



"Buenas noches from a lonely room"
Dwight Yoakum

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B. Can you have counsel present?

A big issue with clients is whether you can have a lawyer present. Jake needs to finesse this issue. If he knows what to say, it is likely he can be present.

Etta is notified that because the company takes these issues seriously, the company has initiated a formal internal investigation, and that she is expected to be interviewed by unidentified corporate types, from home office, within a few days.

She is terrified, and asks Jake if he will represent her.

Jake: I'm pretty sure that the company can refuse to allow your lawyer to be present.

Etta: they said on Fox & Friends that there was a constitutional right to have your lawyer present at all times.

Jake: Federal courts have spoken on this, and this is one of those rare instances where Fox & Friends might be wrong. However, it never hurts to ask, and I have some good reasons at companies allow me to be present.

Conversation between Jake and in-house counsel on the issue:

Jake: best practices support my position that her lawyer should be allowed to be present during the interview.

In-House counsel: Which best practices are you talking about?

Jake: It's in the company's best interest for a witness to recognize that the company lawyer conducting the interview is not representing her in any way.

If in any statements later become part of a criminal proceeding, there could be due process and other procedural problems that are avoided if she has her own counsel.

As long as I agreed to not disrupt the proceeding, there's more upside to allowing me to be present than downside.

Note: Jake needs to be aware of the fact that the company might try to disqualify him later, as a potential witness. This would seem to be a rare situation, however.

For a good discussion by the Proskauer law firm on the pros and cons of allowing an employee to have his or her attorney present, see *Attorneys in Attendance* (Monday, August 8, 2011); available at <http://www.hreonline.com/HRE/view/story.jhtml?id=533340507> (last visited

March 24, 2015). “Nonetheless, while private employees have no legal right to the presence of counsel during ordinary workplace investigations, case law presents several compelling reasons to consider allowing the employee's attorney to attend such proceedings, **and moreover, even to encourage it.**” (Emphasis added).

VII. Potential missteps (NCB/NCH situations)

A. NCBF/NCH Scene number 1:

John, one of the literary techniques that you utilize better than just about anybody could be called the “no count husband/no count boyfriend” dynamic.

This is where a well-meaning female is steered in the wrong direction by a husband or boyfriend of suspect breeding, intelligence, ethics or otherwise. Most often because of his need for gambling or liquor money, bail bondsman fees, loan shark pressure, etc. Best example: Simon Lang, in *Sycamore Road*.

Here are four potential scenes you might consider:

Bobby Earl, Etta’s no count boyfriend proposes the following: Etta, I have a great idea; let’s demand \$10 million in return for us keeping quiet. Once they pay up, we can start a new life in (pick new location).

Suggested Jake approach:

This requires precise research, from reliable sources. Consequently, Jake consults his back issues of People Magazine, and brings himself up to speed on the notorious shakedown efforts directed toward Paula Dean, David Letterman, and René Angélil (husband of Celine Dion). Advises the couple that such an approach would likely bring a criminal extortion proceeding.

B. NCBF/NCH Scene number 2:

Etta, I’m getting frustrated with the company’s refusal to bargain with us. Let’s threaten to go to the Mississippi Atty. General, the FBI, or Jerry Springer.

Suggested Jake approach:

Etta, threats to institute a criminal proceeding, in lieu of a monetary settlement, come close to extortion under a number of statutes. Threats to go to the media are usually self-defeating, since it

shows bad faith. Most significant issues will find their way into the media without assistance from the employee whistleblower.

C. NCBF/NCH Scene number 3:

Etta, I say tell the (expletive deleted) company that we are not going to settle for anything less than (exorbitant sum). The company is basically buying our silence, and they’re going to pay dearly for it.

Suggested Jake approach:

Settlement demands in return for “silence” are tricky. There’s no question that the company will impose confidentiality, as a condition of settlement. Whether a whistleblower can utilize this as a prime demand, is another question. Demands for silence, coupled with exorbitant money demands, reek of bad faith. Add in a situation where the underlying legal claims are specious, and you again approach the extortion area. And will likely taint the possibility of settlement resolution.

Settlement demands can be grandiose, as long as there is a colorable legal claim. Meaning, can the demand be put in a pleading with a straight face?

D. NCBF/NCH Scene number 4:

Honey, we don’t have time to wait out this false claims business. It could take years. Let’s see if we can release the false claims business and get the severance package.

Suggested Jake approach:

This is a common conundrum. Points up the subtle tension between FCA relators and whistleblowers. Generally speaking, any whistleblower who signs a release is barred from later participating in any false claims litigation. A lawyer advising a client in this regard has to be careful to point out the pros and cons of proceeding one way vs. another way. Factors such as an individual’s desire to continue working in a certain industry are important, whether they have the ability to wait a long time for a settlement, etc.

Malpractice tip #1: it is conceivable that another relator may decide to go the FCA route, with another law firm. Thus, there is always the possibility of your client finding about a big verdict later, involving her company and the same allegations. If the client decides against FCA litigation, it is probably a good idea to put that advice in writing since the client may later question whether she was advised of the pros and cons of pursuing a FCA case

VIII. Severance payments and releases

See above.

IX. Getting the government interested

A. Benefits of government’s decision to intervene (FCA);

The decision to undertake False Claims Act litigation means that an individual and his lawyer are in for a long, costly and time consuming process.

Litigation in general is considered slow, but compared to False Claims Act litigation, run-of-the-mill litigation moves at warp speed.

False claims act litigation is extremely expensive. Thus, the government's decision to intervene can alleviate a significant amount of the financial burden that typically occurs in this type of litigation.

Additionally, because a government intervention decision can send a message to the defendant corporation that it is facing an extensive and expensive process, in many instances government intervention can also significantly accelerate settlement pressures on a corporate defendant.

"Please, Please Mr. Postman":
John, you do a great job illustrating how the ups and downs of a law practice can take its toll on a marriage. Example, because his law practice is not doing too well, Jake and Carla have to live a hand- to - mouth existence during the time between *A Time to Kill* and *Sycamore Row*. I suggest a scene where the Brigrance family is awaiting a letter from the US Attorney.

Hunt v. Citigroup illustrates how that can be a make or break event

Even after the government makes a decision to intervene in a case, it usually takes a while for a case to get to the point where reasonable settlement discussions can be productive.

Additionally, depending on the creativity of the legal underpinnings of the case, many cases fail to settle and thus have to be taken to trial or wind up in summary dismissal. (See Happy Ending or Sad Ending, at XI)

If the case goes all the way to trial, the delay inherent in a big case can be significant, meaning that there may be years before a case is finally resolved.

It is unlikely that we will see another case settle as fast as the Citigroup case:

Not only was the amount received in the settlement significant, but the speed involved in the *Sherry Hunt vs. Citigroup* case adds to the overall "through-the looking-glass" nature of that case.

In *Hunt vs. Citigroup*, everything seemed to happen at warp speed, primarily because of media pressure to take action against the too-big-to fail banks that were viewed as responsible for the subprime crisis.

It certainly didn't hurt that during on *60 Minutes* feature on this topic (containing Dick Bowen's appearance), the interviewer (Steve Croft) also included an interview with Barak Obama, and specifically grilled the President on why no serious criminal prosecutions had yet to come out of Citigroup's acknowledged conduct.

The Hunt settlement moved fast thereafter: The government then intervened in Hunt's complaint, which had been filed under seal in August of the previous year.

Hunt was interviewed on the same date (September 15), at which time she announced the settlement and her whistleblower portion of it (\$31 million). The government's complaint was filed on September 15.

Consequently, the case was settled and her recovery was approved **before the government's case was formally filed.**

This is virtually unheard of in the slow grind normally associated with false claims cases.

B. Decision to go it alone when government decides not to intervene.

Everybody is on pins and needles waiting for the letter from the government on the intervention decision.

Though not exactly living in the hand-to-mouth situation that they were in prior to *Sycamore Row*, Jake and Carla would still like to move his litigation practice up a notch or two, and enjoy the financial benefits being a big-time litigator. When the government's decision not to intervene comes down, Jake is faced with a momentous decision that could make or break him and his family financially

The letter finally arrives, but the government declines to intervene.

Jake, surprised by the unexpected turn of events, talks to a friend in the U.S. Attorney's office. His friend says the agency employees that wrote the regulations don't think there is actual fraud here So the U.S. Attorney's office has to defer to the agency's expertise.

Jake suspects they are just lazy.

Everybody is crestfallen. Carla is devastated, because she sees this as the death knell of their case.

Consequently, all dreams of a new house, of an improved standard of living, are dashed.

Jake decides "screw the government". "We will do it ourselves, we request the pleading be unsealed, and we litigate on our own."

Significance of the decision: Because of the time involved, the cost involved, and other factors common to large-scale litigation, the refusal on the part of the government to intervene has often been viewed as the death knell in these types of cases.

Trinity Industries guard rail case:

One aspect of the huge verdict in this case was the fact that the government had refused to intervene. Nevertheless, the plaintiff/relator pressed on. Commentators are using this case as an illustration that for certain types of FCA cases, the fact that the government has refused to intervene doesn't necessarily mean that the case dies, depending on the resources available to the plaintiff, of course.

See Whistleblower Verdict is False Claims Act Wake-Up Call, found at <http://blogs.wsj.com/riskandcompliance/2014/10/22/the-morning-risk-report-whistleblower-verdict-is-false-claims-act-wake-up-call/>, (last visited March 30, 2015).:

The \$175 million verdict handed down by a federal jury Monday in a case brought by a whistleblower is notable not just for its size, but for the fact that the government hasn't intervened in the case.

Previously, these so-called relators would often lose interest in proceeding with the cases if the government didn't get involved, she said

.Beyond the scope of this discussion is the process required when a small-time litigator has to associate with a bigger law firm, in order to keep a case alive.

For an accurate description of this process, readers can refer to the situation in *Gray Mountain*, where the case against the large coal mining companies was rescued by a V a solo lawyers association with a larger law firm.

At this point, there would need to be some description of how Jake locates the necessary financing to keep his case alive

There, the case was likely to die a for lack of financial support, until a well-funded plaintiff's attorney.

(complete with private jet, and all the other big-time litigation trappings) stepped in and gave the case, and it's small-time lawyers, a necessary financial infusion.

Here, in order to proceed without government intervention, Jake would need to line up this type of financial support.

Because interest in whistleblower cases is at an all-time high, many law firms are getting into whistleblower litigation, with some unexpected teams and non-traditional alliances being formed. Thus, there are more ways for a smaller litigator to keep rolling here.

See IX (C).

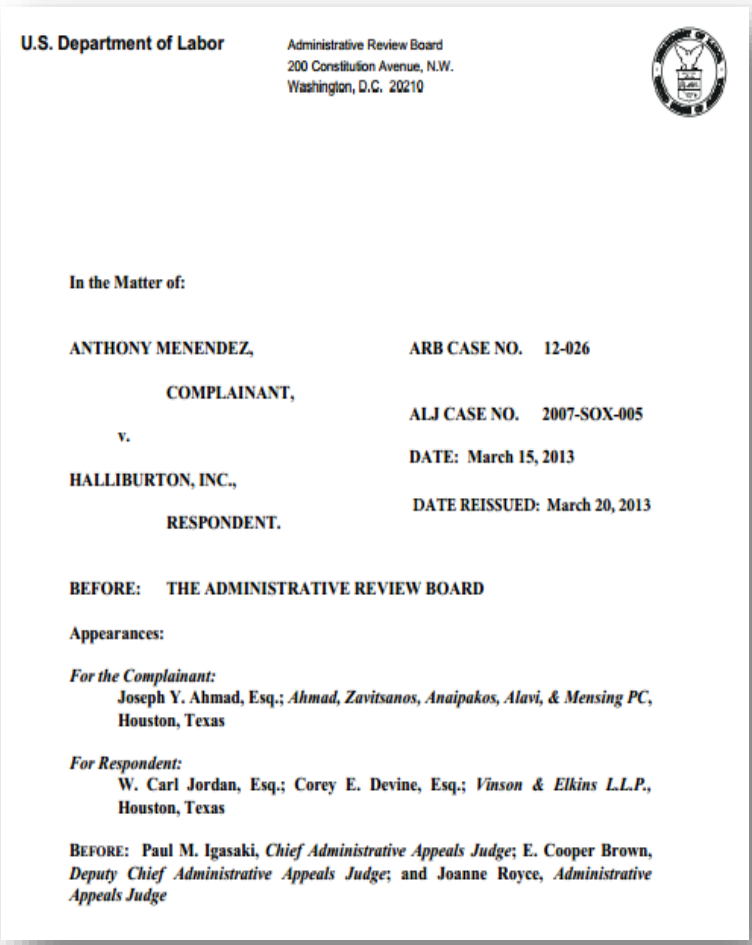
Every story needs a little bit of anti-government outrage. Here, that element could be developed much later, assuming Jake and his new litigation partners hit "a big lick". Then the government will come in, looking for their share.

Readers with an anti-government perspective will be upset when the U.S. Attorney swoops in to take its percentage, even after it had abandoned Jake in his hour of desperate need. And even though the suit would have died an unnatural death had it not been for Jake's relentless efforts to keep it alive. But that's just the way Uncle Sam works in FCA cases.

C. Heightened interest in whistleblower cases is illustrated by crossover law practices.

Whistleblower plaintiff lawyers are representing companies:

Defense firms are representing whistleblower plaintiffs:
Whistleblower plaintiff lawyers are representing companies:
With this type of legal exposure at stake, conflicts and lawyer disqualification issues are inevitable.



Defense firms are representing whistleblower plaintiffs:

Blank Rome Whistleblower Group Defects, Plus More Lateral Moves

Brian Baxter, *The Am Law Daily*
October 10, 2014 | 0 Comments

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Illustration by Paul Dilakian

One of the few whistleblower practices at an Am Law 100 firm is heading out on its own.

With this level of activity, conflicts and lawyer disqualification issues are inevitable. (Don't think DQ motion against McCool Smith was successful).

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McKool Smith Helps Secure \$525 Million Fraud Verdict in Whistleblower Suit Against Trinity Industries Inc.

Trinity Wants McKool Smith Off Guardrail FCA Suit

By Jeremy Heallen

Law360, Houston (September 03, 2014, 6:49 PM ET) -- Trinity Industries Inc. told a Texas federal judge Wednesday that attorney ethics rules prohibit the company's former law firm McKool Smith PC from representing a plaintiff in False Claims Act litigation that accuses Trinity of secretly modifying the design of its ET-Plus guardrail end terminal. In a motion to disqualify McKool Smith and firm attorney Samuel F. Baxter, Trinity says that the firm recently gleaned "relevant confidential information" about the company's business operations and quality control practices while representing it in connection with Trinity's wind turbine structural tower business.

X. Miscellaneous concerns

A. Documents and confidentiality

Jake gets a threatening letter from the attorney representing Big Motors. The letter says Etta has taken confidential documents, and unless they are returned immediately, she will be subject to disciplinary action and possible criminal prosecution.

Jake believes that the documents in question are necessary to demonstrate her reasonable belief that the violation in question has taken place.

1. Generally

Confidentiality and non-disclosure agreements are frequently utilized with C-level corporate executives.

Coincidentally, these are the employees most likely to have firsthand knowledge of securities violations.

The situation with Etta illustrates the tendency to argue that all levels of employees are subject to these restrictions

a) *SEC whistleblowers.*

Under a specific regulation applicable to the SEC under their whistleblower program, employers are basically prohibited from utilizing confidentiality agreements to impede the whistleblower process.

Thus, employers seeking to enforce confidentiality agreements under state law will find that process basically thwarted by the SEC's rules.

b) *FCA whistleblowers.*

Unfortunately, under the False Claims Act or other whistleblower programs, such as the IRS whistleblower program, there's no similar regulation that restricts the use of confidentiality agreements in the whistleblowing context. Court decisions are all over the board here.

Although most of these decisions are in the employment discrimination context, many courts have applied a multipronged test to determine whether an employer's confidentiality policies should be enforced in the face of an argument that the information, documentation or other evidence is directly probative of a whistleblower's cause of action or issue.

Most of the courts make an exception when the information alleged to be confidential relates directly to the fraud or ethical issues raised by the whistleblower.

Recent decisions under both SOX and the FCA have upheld reasonable takings by employees under circumstances where the evidence directly relates to the underlying improper conduct.

In some of these cases, the courts tend to be influenced by whether the whistleblower has articulated a reasonable basis for their belief that the documentation under consideration supports an unlawful practice.

c) Bottom line.

Jake decides to be especially carefully in examining Etta's documents.

2. Wholesale document dumps.

On the issue of "Sister" Johnson's garage full of company documents, Jake consults a newly published tome of irrefutable authority: *Whistleblower Law*, by Lisa Banks and Steve Kardell (ALM-Law Journal Press, anticipated publication date, Winter 2016).

Therein, the sad case of Ms. Cafasso is detailed. She was ultimately assessed costs in the hundreds of thousands of dollars for her extensive, and unauthorized collection of General Dynamics documents:

Protections are also weak where the employee has engaged in indiscriminate collection of employer documents to support an FCA claim. In a case involving an employee who downloaded and refused to return 21 CDs of employer data—including trade secrets belonging to the employer and third parties, proprietary research and development information, over 30,000 emails, and one patent application with sensitive national security implications—the court ruled that the employee was liable for breach of contract and that her actions were not protected under the FCA.² In setting out the limits of the public policy oriented protections of the FCA, the court explained:

Public policy does not immunize Cafasso. Cafasso confuses protecting whistleblowers from retaliation for lawfully reporting fraud with immunizing whistleblowers from wrongful acts made in the course of looking for fraud[.] Statutory incentives encouraging investigation of possible fraud under the FCA do not establish a public policy in favor of violating an employer's contractual confidentiality and nondisclosure rights by wholesale copying of files admittedly containing confidential, proprietary, and trade secret information.³

² *U.S. ex rel. Cafasso v. General Dynamics C4 Sys., Inc.*, No. CV 06-1381, 2009 WL 1457036 (D. Ariz. May 21, 2009). Cafasso's FCA retaliation claim was also dismissed on summary judgment. *Id.* at *12.

³ *Id.* at *14; *see also Zahodnick v. IBM Corp.*, 135 F.3d 911, 915 (4th Cir. 1997) (rejecting FCA retaliation claim filed after employee realized his voluntary resignation rendered him ineligible for enhanced severance package, and upholding employer counterclaim for violating non-disclosure agreement by sending confidential documents to counsel).

The ruling was affirmed on appeal, with the appellate court further noting, “Although we see some merit in the public policy exception that Cafasso proposes, we need not decide whether to adopt it here. Even were we to adopt such an exception, it would not cover Cafasso’s conduct given her vast and indiscriminate appropriation of GDC4S files.”⁴

3. CFAA (Computer Fraud and Abuse Act).

More from Banks & Kardell; *Whistleblower Law*:

Potential Criminal Liability

Although few whistleblowers have incurred criminal liability for acquiring and disseminating confidential documents without their employers’ permission, the prosecution of employees and former employees for these actions is theoretically possible under a number of statutes and does occasionally occur.⁵ Whistleblowers have faced criminal charges and trial after providing documents to newspapers that indicated the failure to meet quality assurance standards by a major aviation manufacturer⁶ and voting machine fraud,⁷ and for providing documentation to a state medical board concerning the fraudulent practice of medicine by a doctor.⁸ In a case that did not involve purloined documents but is

⁴ *Cafasso, U.S. ex rel. v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1062 (9th Cir.); see also *Walsh v. Amerisource Bergen Corp.*, No. 11–7584, 2014 WL 2738215 (E.D. Penn. June 17, 2014) (applying *Cafasso* to deny the defendant’s motion to dismiss breach of contract and fiduciary counterclaims in FCA action).

⁵ Employees who “purloin” documents may face criminal liability for theft of trade secrets or violation of various statutes, including the Computer Fraud and Abuse Act, 18 U.S.C. § 1030; National Stolen Property Act, 18 U.S.C. § 2314, and the Electronic Espionage Act, 18 U.S.C. § 1831.

⁶ In 2008, Boeing employee Gerald Eastman blew the whistle on alleged quality assurance and inspection problems by leaking documents to newspapers. As a result of his actions, Eastman was tried for felony computer trespass, resulting in a hung jury. King County, Washington, prosecutors, after significant urging from Boeing, initially indicated that they would try Mr. Eastman a second time. In order to avoid a second criminal trial and potentially 3.5 to 4.5 years in jail, Eastman settled with the government by promising to help recover the documents he had leaked and to cooperate in any legal proceedings that arose from the company’s efforts to retrieve the documents. See Natalie Singer, *Was Inspector Source of Leak at Boeing?*, The Seattle Times, Mar. 26, 2008, available at http://seattletimes.nwsourc.com/html/boeingaerospace/2004306499_leaktrial26m.html; Mike Carter and Steve Milech, *Whistle-blower Settles Case*, The Seattle Times (July 11, 2008) available at http://seattletimes.nwsourc.com/html/localnews/2008046014_eastman11m0.html.

⁷ In 2006, Stephen Heller was charged in Los Angeles Superior Court with felony access to computer data, commercial burglary, and receiving stolen property for releasing confidential information regarding manufacturer Diebold’s certification of voting systems. Prior to trial he pled guilty and was sentenced to three years probation, \$10,000 in restitution, and was ordered to submit an apology to Diebold and its attorneys. See Hemmy So, *Man Pleads Not Guilty in Voting Device Case*, LOS ANGELES TIMES, (Feb. 22, 2006), available at <http://articles.latimes.com/2006/feb/22/local/me-diebold22>; Ian Hoffman, *E-voting ‘hero’ pleads guilty to computer crime in Diebold case*, INSIDE BAY AREA, (Nov. 21, 2006), available at http://www.insidebayarea.com/sanmateocountytimes/ci_4701950.

⁸ In 2010, two nurses in Texas faced trial on felony charges for supposed “misuse of official information” in their reporting of patient-care issues to the state medical board. The nurses, who had each worked at Winkler County Memorial Hospital for ten or more years, filed an anonymous complaint with the board reporting that a doctor at the facility was operating a side business selling sham herbal remedies to patients. Authorities searched

indicative of the risks associated with whistleblowing more generally, an IRS whistleblower who reported unlawful tax sheltering by UBS and saved the government nearly a billion dollars was sentenced to prison for his role in the wrongdoing, despite winning a \$104 million award from the IRS for his disclosures.⁹

The risk of criminal prosecution for use of confidential employer documents is greater where the employee has accessed the information through the employer's computer system, as unauthorized computer access may violate a number of criminal statutes concerning computer trespass and unlawful computer access, which were originally targeted at hackers who attack computer systems but can be used to prosecute whistleblowers as well.¹⁰

The Computer Fraud and Abuse Act ("CFAA")¹¹ was designed primarily for the criminal prosecution of computer hackers who engage in "unauthorized" access of computers in interstate commerce to cause harm, and includes a civil action provision that prohibits several acts of computer access undertaken "without authorization or exceeding authorized access."¹² What constitutes "authorization" for computer access is not settled and is the subject of a split among the circuits. The Fifth, Seventh, and Eleventh circuits have adopted a broad interpretation – i.e., that an employee acts without authorization, or exceeds authorization, as soon as the employee acquires an interest adverse to the employer or breaches a duty of loyalty to the employer.¹³

The Ninth and Fourth circuits have adopted much narrower readings, as have district courts within the Second Circuit.¹⁴ These courts have held that later misappropriation of the information does not strip the accessing employee of "authorization" as long as the employee was authorized at the time of access. In *U.S. v. Nosal*, for example, an *en banc* Ninth Circuit held that a former employee

the nurses' computers, found their complaint, and indicted them on third-degree felony charges. Prosecutors ultimately dismissed charges against one of the nurses and a jury acquitted the other after deliberating for only one hour. The nurses later sued the county and county officials, won a \$750,000 settlement, and no doubt found additional solace in the board discipline of the doctor and the criminal convictions and jailing of the sheriff and county attorney who led the campaign of retaliation. See <http://www.nytimes.com/2010/02/12/us/12nurses.html>; http://seattletimes.com/html/nationworld/2016396245_apusnursesretaliation.html.

⁹ See <http://www.time.com/time/business/article/0,8599,1928897,00.html>.

¹⁰ See Singer, *supra* note 6; see also Nikola Strahija, *Wi-Fi Whistle Blower Faces Criminal Charges*, Xatrix Security (Sep. 17, 2003), available at <http://www.xatrix.org/print.php?s=3551>.

¹¹ 18 U.S.C. § 1030 *et seq.*

¹² 18 U.S.C. § 1030(a).

¹³ See *United States v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010), cert. denied 131 S.Ct. 2166 (2011); *United States v. John*, 597 F.3d 263 (5th Cir. 2010); *Int'l Airport Ctrs LLC v. Citrin*, 440 F.3d 418 (7th Cir. 2006).

¹⁴ *U.S. v. Nosal*, 676 F.3d 854 (9th Cir. 2012) (*en banc*); see also *WEC Carolina Energy Solutions, LLC v. Miller*, 687 F.3d 199 (4th Cir. 2012), cert. denied 133 S.Ct. 831 (2013) (holding that the employer failed to state a claim under the CFAA against a former employee and his assistant where the two employees had allegedly downloaded proprietary information before leaving the company and had later used the information to aid a competitor for whom they had begun working); *United States v. Aleynikov*, 737 F. Supp.2d 173 (S.D.N.Y. 2010), reversed on other grounds, *United States v. Aleynikov*, 676 F.3d 71 (2d. Cir. 2012) (dismissing criminal charges under the CFAA on the grounds that the defendant had been authorized to access company computers and did not exceed the scope of his authorization, and that his authorized use of a computer was not a criminal offense under the CFAA despite using the information in a manner that constituted misappropriation).

did not exceed his authorized access under the CFAA when he obtained computerized information from current employees and then used that information for the unauthorized purpose of starting a competing company. Nosal was indicted for aiding and abetting his former colleagues in the crime of “exceed[ing] authorized access” for a fraudulent purpose. The district court dismissed the CFAA counts, holding that simply using the information for an unauthorized purpose did not constitute exceeding authorized access.¹⁵ A Ninth Circuit panel reversed and the *en banc* Ninth Circuit then affirmed the judgment of the district court.¹⁶ The Justice Department declined to seek review of the *en banc* opinion.

B. In-house lawyer as whistleblower.

This is a potential minefield.

Jake gets a call from his old pal Rhea Butler (pronounced “Ray”). He had forgotten that Rhea is now an in-house lawyer with Big Motors, working out of the home office in Detroit. His pitch to Jake is as follows: “I know where all the skeletons are hidden in this company; let me in on your whistleblower suit”.

Earlier views (court decisions; bar rules, etc.) absolutely prohibited this type of involvement, based on the theory that attorney-client privilege here was sacrosanct.

Now there’s a trend toward allowing lawyers to advance whistleblower claims, even if they must disclose attorney-client privileged information, with some courts taking steps to lessen the damage by limiting testimony or issuing protective orders.

The issue is clouded because a number of states seem to have divergent views.

A recent ethics opinion in New York State indicated that, at least under the Dodd-Frank whistleblower law, lawyers would be prohibited from acting as whistleblowers because of a

“presumptive” conflict of interest.

The ABA model rules, however, take a different approach, and allow lawyer whistleblower claims under specifically limited circumstances.

¹⁵ *Nosal*, 676 F.3d at 856-57.

¹⁶ *Id.* at 864. The court’s *en banc* decision in *Nosal* went further than a previous decision, *LVRC Holdings, LLC v. Brekka*, 581 F.3d 1127, 1133 (9th Cir. 2009), in which the Ninth Circuit affirmed that that an employee had not engaged in “unauthorized” access by downloading documents during his employment merely because the employee acted for his own benefit and against the interests of the employer.

The Second Circuit Court of Appeals recently dismissed a False Claims Act case brought by a former general counsel against his previous company, basing its decision on the rather restrictive rule applicable to New York lawyers.

The court mentioned, however, the public policy of encouraging whistleblowers' to disclose unlawful conduct harmful to the government.

Adding further confusion here is the Supreme Court's *Lawson, et al. v. FMR LLC* decision, which extended SOX coverage to independent contractors of public corporations.

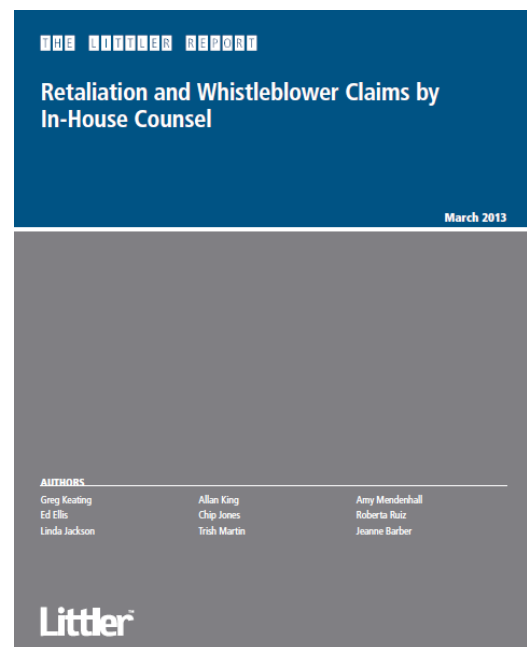
In addition to the expansive reach of the decision, numerous references were made therein to the fact that lawyers, in-house or otherwise, were the type of professionals who were most capable of determining whether fraud is occurring, and therefore should be afforded protections against retaliation.

Bolstering prior criticisms of the overall "Alice in Wonderland" tenor of the Court's reasoning in *Lawson* was the statement that if SOX coverage were not thusly expanded, "Legions of accountants and lawyers would be denied §1514A's protections."

Given the unsettled state of the case here, Jake decides that the distraction associated with a fight over public disclosure of privileged information, coupled with potential disputes over a breach of fiduciary duty and potential disciplinary action, are too much of a distraction, and decides to gracefully decline Rhea's invitation to join his lawsuit.

Practice note: The Littler firm, and Chip Jones, are the acknowledged experts on this issue:

Another interesting aspect of whistleblower cases, at least in federal false claims cases, is the fact that rival businesses have realized the potential for significant recoveries. One of the best examples is a small pharmacy in Florida that has recovered somewhere around \$600 million in cases brought against pharmaceuticals. Now the best example is the big lick against Trinity Industries, in Dallas.



C. Competitor as whistleblower.

Jake gets a late night call from the plant manager of Gigante Motors. They are the other auto manufacturing plant in Ford County.

Says the home office in Detroit has been aware of the issue for a long time. Thinks that that's one reason why Mega motors is able to make more money than Gigante.

Gigante has deep pockets. Can they join the party as a Relator?

Could you possibly see a False Claims Act case styled *United States ex rel General Motors vs. Ford Motor Company*? Theoretically, yes.

- Can a corporation be a relator in a false claims case?
- Can a competitor be a relator in a false claims case?
- Are there any restrictions on whether a company can actually finance a false claims case?

Under the False Claims Act, any “person” may bring an action, and a person is defined in the statute to include any legal entity: “the term “**person**” means any natural person, partnership, **corporation**, association, or other legal entity, including any State or political subdivision of a State ...”

Example: Harmon v. Trinity Industries (guard rail case).

The best example of a competitor obtaining a significant verdict in a False Claims Act context is the \$175 million verdict in Harmon vs. Trinity Industries. There, the Relator, Josh Harman, was the previous owner of a company that was not only a competitor of Trinity, but was also a defendant in a previous patent-infringement claim brought by Trinity.

Trinity claimed retaliation on the part of Harman: “Trinity has described Harman in court documents as “an opportunistic litigant hoping for a windfall.” He is seeking “to retaliate against Trinity for pursuing a patent- infringement lawsuit against his companies,” Trinity has said.

See *Firm Owned by Guardrail Whistleblower Files for Bankruptcy*,
<http://www.insurancejournal.com/news/national/2015/03/19/361188.htm>

There are other examples of competitors successfully suing the other companies under the False Claims Act. For example, Ven-A-Care of the Florida Keys Inc., a specialty pharmacy, has recovered around \$600 million in false claims recoveries, the most recent example being a case against Sandoz, where Sandoz agreed to pay that company \$150 million to settle a drug pricing claim.

XI. Happy ending or sad ending?

From the Berg & Androphy website:

“Pitfalls of filing a Qui Tam suit”.

As discussed below, the False Claims Act and its qui tam provisions have several statutory bars to a qui tam whistleblower bringing suit. These bars are found in Title 31, Section 3730 of the United States Code.

"Three things can happen when you pass, and two of 'em are bad". (Darrell Royal).

"Four or five things can happen when you file a False Claims Act case, and most of them are bad" (lawyer who bet the farm on a FCA case).

John, you are a master at describing how what appears to be a slam-dunk, "go-to-the-house," great case can go south. Suddenly. Examples are the hapless Wally Figg in *The Litigators*, and the well-meaning husband and wife lawyer team (Mary and Wes Grace), in *The Appeal*, who saw a big verdict wiped out with the stroke of an appellate court's pen.

1. First to File Rule

The first to file rule found in Section 3730(b)(5) provides that " when a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." The purpose of Section 3730(b)(5) is to clarify that only the Government may intervene in a qui tam action. The goal of Section 3730(b)(5) is to prevent opportunistic qui tam whistleblowers from filing subsequent suits based on the same underlying facts of a pending action. This is an absolute bar, and no exceptions exist. Therefore, a qui tam whistleblower must be the first whistleblower to file suit or his or her action will be barred.

2. Members of Armed Forces

If the qui tam whistleblower is a former or present member of the armed forces, potential problems may arise. Section 3730(e)(1) bars a former or present member of the armed forces, from being a qui tam whistleblower and suing another member or entity of the armed forces for violations arising out of the whistleblower's service. In addition to this bar, a qui tam whistleblower who is a former or present member of the Armed Forces must be ready for a challenge that he cannot bring suit because he is a government employee. While there is no per se

exclusion of governmental employees bringing an FCA action, some courts have held that the public disclosure bar precludes governmental employees from bringing suit. Section 3730(e)(1), however, does not prevent a former armed service employee from bringing a qui tam action against a Government contractor.

3. Members of Legislative, Judiciary or Executive Branches

Section 3730(e)(2)(A) bars a qui tam whistleblower from bringing suit against a Member of Congress, a member of the judiciary, or a senior executive branch official if the suit is based on evidence or information known to the Government when the action was brought.

4. Pending Governmental Proceedings: 31 U.S.C. § 3730(e)(3)

Section 3730(e)(3) bars an action based on allegations or transactions which are already the subject of a civil suit or an administrative civil money penalty proceeding to which the

Government is a party. It appears to be an extension of the first-to-file bar in Section 3730(b)(5). Courts emphasize that Section 3730(e)(3) bars an action only if it is based on allegations or transactions pleaded by the Government attempting to recover for fraud committed against it.

5. Public Disclosure Bar and Original Source

Section 3730(e)(3) provides that a qui tam whistleblower may not bring an action which is based upon “the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information . . .” The public disclosure bar in Section 3730(e)(4)(A) is one of the most difficult and complicated concepts in the qui tam area. This is due to the varied treatment the public disclosure bar receives from the circuit courts. In examining whether an action is barred under Section 3730(e)(4)(A), the courts attempt to answer the following three questions: “(1) Have the allegations made by the plaintiff been ‘publicly disclosed’? (2) If so, is the lawsuit ‘based upon’ that publicly disclosed information? (3) If so, is the plaintiff an ‘original source’ of the information?”

Even if the whistleblower’s qui tam suit is based on public disclosure, courts will next analyze whether the qui tam whistleblower is the original source. The qui tam whistleblower must meet two requirements to qualify as an original source: 1) the qui tam whistleblower must have “direct and independent knowledge of the information on which the allegations are based” and 2) the qui tam whistleblower must have “voluntarily provided the information to the Government before filing” his or her qui tam action. A minority of courts requires an additional element, either that the qui tam whistleblower provided the Government with the information prior to the public disclosure or that the qui tam whistleblower had a hand in bringing about the public disclosure.

The courts have also determined that phrase “information on which the allegations are based” of Section 3730(e)(4)(B) refers to the information upon which the relator's allegations are based and not any publicly disclosed allegations. Moreover, the term “allegation” includes not only those included in the original complaint, but also those appearing in any amended complaints.

Also, Courts are unlikely to find that a relator is an original source when the information he relies upon for his allegations are predictive in nature and lack certainty.

An issue that often arises in this area is whether a Government employee can be an original source. Some courts hold that a Government employee cannot voluntarily provide the information if he was required to provide it as part of his employment with the Government.

There is, however, no per se exclusion of Government employees from being original sources. Government employees will only be barred from bringing a qui tam action if one of the four statutory jurisdictional bars discussed above applies.

A qui tam whistleblower should only discuss his or her case with an attorney to avoid public disclosure.

Other Pitfalls

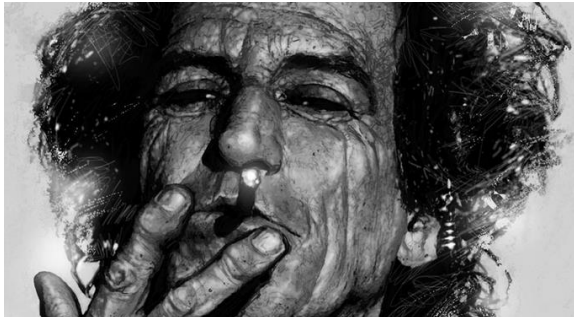
Prefiling Release

If the qui tam whistleblower signs a release of claims prior to filing suit, the action may be barred. Although the FCA does not expressly address the issue of pre-filing releases, some courts hold that enforcing pre-filing releases contravenes the public policy of providing incentives to private individuals for blowing the whistle on attempts to defraud the Government. However, some narrow exceptions exist to this general rule. When the Government has an opportunity to investigate and has full knowledge of the qui tam whistleblower's claims before the qui tam whistleblower and defendant settle and agree to release future qui tam claims, the court will dismiss a subsequent qui tam action and enforce the pre-filing release.

For more information and case citations, please see "Federal False Claims Act and Qui Tam Litigation," published by Law Journal Press (2010).¹⁷

XII. What do whistleblower laws and Keith Richards have in common?

Someone famously said that only two species could survive a full-scale nuclear holocaust: the common cockroach and Keith Richards.



Since the expansion of whistleblower laws is widely viewed as a Democrat Party priority, a natural question is whether the somewhat decisive November election results will quell, stifle or otherwise throw cold water on the current emergence and expansion of whistleblower laws?

A *Wall Street Journal* article that ran on November 25, 2014 (a few days after the election results had been examined and analyzed), lends credence to the Keith Richard theory that whistleblower laws may be difficult to eradicate.

Senator Grassley is the newly-named chair of the now Republican-controlled Senate Judiciary Committee.

As reported in the *Journal*:

"The combination of a Republican Party-controlled Congress and a president looking to make his mark in the area of employment law could

¹⁷ Berg & Androphy; *Pitfalls of Filing a Qui Tam Suit*; http://www.bafirm.com/articles/qt-over/qt-pitfalls_of_filing_suit.html (last visited March 30, 2015).

result in new laws to increase protections for whistleblowers and to extend those rights to even more workers, two attorneys said”. “This is a real area of interest” for Sen. Grassley, who is expected to become chairman of the Judiciary Committee, Mr. Oswald said. “I think he’ll further press the administration to continue to enforce the False Claims Act, and maybe even enact additional provisions”.

Risk & Compliance Journal.
Risk & Compliance Report | Strategy | Governance | Compliance | Operations | People Moves
November 25, 2014, 4:33 PM ET
GOP, Obama Could Team Up on Whistleblower Protections

On February 15, 2015, Senator Grassley emphasized the creation of a bipartisan “Whistleblower Protection Caucus”:

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Grassley Leads Bipartisan Group of Senators in Launching Whistleblower Protection Caucus
Feb 26, 2015

Sections ☰ **The Washington Post**

Sen. Charles Grassley plans new whistleblower-protection caucus

Eye Opener



A co-author of the [1989 Whistleblower Protection Act](#) plans to create a new Senate caucus dedicated to upholding the federal-workforce legislation, which became law 25 years ago to the day.

Grassley's "Whistleblower Protection Caucus" is a development of some significance, since "bipartisan" achievements in Congress are relatively rare.

Consequently, like "Keef" and the household cockroach, whistleblower laws may be difficult to eradicate.

XIII. Appendix the

A. How Citibank's Culture Allowed Corruption to Thrive

Available at :<http://insight.kellogg.northwestern.edu/article/how-citibanks-culture-allowed-corruption-to-thrive>

How Citibank's Culture Allowed Corruption to Thrive

Leaders can learn from a whistle-blower's case against CitiMortgage.

Based on insights from [Adam Waytz](#)

How Citibank's Culture Allowed Corruption to Thrive

Leaders can learn from a whistle-blower's case against CitiMortgage.

Based on insights from [Adam Waytz](#)

Four years after receiving more bailout dollars than any other U.S. bank during the financial crisis, Citi defrauded the Federal Housing Administration. Citi admitted to breaking FHA rules, certifying thousands of unqualified mortgages for FHA insurance, and paid a \$158.3 million settlement after CitiMortgage whistle-blower Sherry Hunt filed a false claims suit. One month after the 2012 settlement, CitiMortgage's CEO was asked why Hunt's concerns were not resolved inside the company. She had alerted her supervisor. She had gone to CitiMortgage HR. Filing a lawsuit had been a last resort. "Did you ask her if she spoke to me?" he responded to the Bloomberg journalist.

When Adam Waytz, an assistant professor of management and organizations at the Kellogg School, delved into Hunt's story, he wondered: How could Citi have prevented this chain of events?

Multiple factors, he believes, contributed to a culture where unethical behavior could thrive: disorganization, misaligned incentives, physical distance between leaders and employees—and perhaps especially, an unwillingness to seriously engage with dissent. “Championing people who speak out against fraud really sends a message about the reputation of your organization,” says Waytz. “People are looking for organizations they can trust.”

Inside Citi

In 2006, Hunt, then a VP and chief underwriter at CitiMortgage headquarters in Missouri, and her boss, Richard Bowen, then a chief underwriter for Citigroup’s Real Estate Lending group in Texas, began to uncover problems with the bank’s internal controls. Quality reporting was dubious: the bank was misrepresenting mortgages it purchased from external lenders, which it then sold to government sponsored enterprises like Fannie Mae and Freddie Mac. From 2006 to 2007, Hunt and Bowen found that an astonishing 60–80% of these mortgages were defective: missing required documents or containing fraudulent information from the loan officer or loan seeker.

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Hunt reported her findings to Bowen, who in turn alerted his supervisors in ongoing reports. But no significant action was taken. The problems were merely technical and would not translate into losses, Bowen was told—even from CitiMortgage’s chief risk officer.

So Bowen and Hunt worked to address the problems that plagued Citi’s understaffed Quality Assurance team, which was responsible for spot-checking the mortgages Citi had already purchased from external lenders, and attempted to implement processes to stop Citi from buying unqualified loans from lenders in the first place. Again, Bowen and Hunt’s efforts were largely fruitless. “We were expected to play nice in the sandbox and if sales wanted a new program, we needed to go along with it even if I thought it wasn’t a good program to have on our books,” Hunt says.

Catering to sales was not entirely illogical. At the time, Citi placed a significant corporate emphasis on growth, with all employees of the Real Estate Lending group receiving quarterly memos congratulating them on consecutive quarters of growth in mortgage originations and highlighting their rising rank in market share. Bonuses for all CitiMortgage employees, including its CEO, depended on a high percentage of approved loans.

So instead of managers fixing their underwriters’ mistakes and providing additional training, these managers fought Hunt and her team at every turn. “It ended up being a war every day,” Hunt says. “They didn’t like me very much.”

The Punishment Continues

When Hunt sent another grave summary of the mortgage defect rate to Bowen in November 2007, he concluded that Citi was at dangerous risk. If the defective mortgages were to default, the affected government-sponsored enterprises could legally require Citi to purchase back billions of dollars in loans that it had wrongly certified. From his home on November 3, 2007, Bowen sent a detailed email explaining his findings to the company's new chairman, copying Citi's chief auditor, chief financial officer, and senior risk officer in New York City. "The reason for this urgent email concerns breakdowns of internal controls and resulting significant but possibly unrecognized financial losses existing within our organization," Bowen wrote.

Days later Bowen received a call from one of Citi's general counsels, who assured him that they had received his email and would follow up shortly. Again, no significant action was taken.

In December, Vikram Pandit was hired as Citigroup's new CEO and embarked on a campaign he called Responsible Finance. "We're going to stand for the financial services company that practices responsible finance—making sure we're transparent, making sure we're honest, making sure we manage our shareholders' money prudently," he pledged to stakeholders in a video on Citi's website.

Meanwhile, by early 2008, Bowen's direct reports were reduced from 220 people to 2, and he was forced to take administrative leave. Soon Hunt's direct reports were reduced from 65 to 1. "I was literally put in a corner," Hunt says, explaining that she was "placed as far away in the office as possible from the underwriters.... They didn't change my title or my salary, but they changed everything else."

By January 2009—after the housing bubble had burst, there were widespread defaults on mortgages, and the U.S. government had provided over \$476 billion in cash and guarantees to stabilize Citi—Bowen, still on administrative leave, left the company.

Blowing the Whistle

Now Hunt began to record her troublesome findings in a spreadsheet on her home computer: the defective mortgages she found in late 2009 that Citi had failed to report to the FHA, despite having been flagged as containing evidence of fraud two years earlier; the email in 2010 from a senior executive recommending others use "brute force" on Hunt's team to drive down the defect rate; the day in 2011 an executive three levels above Hunt told her and a colleague that their "asses [were] on the line" if they did not change their reports.

Hunt also watched as members of the Quality Rebuttal Committee—a new team that CitiMortgage had formed to review and potentially refute the mortgage defects identified by Hunt's team—received employee-of-the-month awards.

Having witnessed Bowen's unfortunate fate, Hunt attempted to report these issues anonymously. She submitted information through the reporting mechanism on the website of the U.S. Department of Housing and Urban Development (the FHA's parent department). When there was no response, she did the same on the FBI's website. Still seeing no evidence of investigations, Hunt told CitiMortgage HR, who took no significant action.

Finally, in August 2011, she filed a false claims lawsuit against Citi for defrauding the FHA. A few months later, she received word that an attorney would be joining her case on behalf of the Department of Justice. By February, Citi admitted wrongdoing and paid a \$158.3 million settlement to Hunt and the DOJ.

Organizational Warning Signs

Hunt's is a cautionary tale. Waytz suggests a variety of interventions for leaders seeking to cultivate more ethical and accountable corporate cultures:

Create clear reporting procedures in your organization's whistle-blowing policy. Employees should know whom to approach with their concerns and what the chain of command is should they face obstacles. "Disorganization can lead to unethical behavior because it creates too much ambiguity around what is and is not acceptable," said Waytz.

Minimize physical and psychological distance between leaders and employees. While this can mean paying more frequent visits to the workplaces you oversee, it can also be establishing more regular lines of communication during which you explicitly communicate to your subordinates that you value honest information—including negative news.

Use mission statements and incentives to reinforce your organization's values. Waytz sees mission statements—when carefully crafted and frequently referenced in day-to-day work and decision making—as key vehicles for reminding employees of core values. They serve as a compass, helping employees determine what to do when facing a difficult choice or "gray area." Mission statements that emphasize fairness and justice can help set organizational norms that foster ethical behavior.

But even the most admirable values are no match for incentives designed to undercut them. Consider the misalignment between Citi's bonus structure and the values proclaimed by Citi's "Responsible Finance" campaign.

Require senior leadership to embody your organization's values. Leaders who are perceived as ethical have organizations that prosper. Waytz points to recent research conducted by his colleague—Paola Sapienza, a researcher in Kellogg's finance department—who finds that proclaimed values appear irrelevant to a company's culture, but "when employees perceive top managers as trustworthy and ethical, firm's performance is stronger." Sapienza and her coauthors found that high levels of perceived integrity of management were positively correlated with

outcomes, including higher profitability, higher productivity, better industrial relations, and higher attractiveness to prospective job applications.

Cultivate a culture that is open to dissent. “Whistle-blowing is often seen as the most disloyal thing an employee can do,” says Waytz. “But it can be reframed [by leaders] as an act of larger loyalty—loyalty to the community in which you operate, loyalty to society, and ultimately loyalty to the long-term success of your company.”

To access the full Kellogg case “Through the Eyes of a Whistle-Blower: How Sherry Hunt Spoke Up About Citibank’s Mortgage Fraud” (winner of the 2014 competition for Outstanding Case on Anti-Corruption, supported by the United Nations Global Compact Principles for Responsible Management Education) for corporate trainings or university classrooms, visit [here](#).

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- Represents executives and employees in corporate ethics litigation, including internal investigations and whistleblower litigation.
- Represented a number of key Wall Street whistleblowers subsequent to the 2010 financial crisis, including Richard Bowen, the Citigroup whistleblower whose testimony was largely responsible for Citigroup's \$ 7 billion Wall Street settlement.
- Successfully litigated a number of multimillion-dollar whistleblower recoveries under SEC Section 922; Dodd-Frank Section 1057; SOX Section 1415A, including one Sarbanes-Oxley whistleblower recovery in excess of \$ 4 million dollars.
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- Whistleblower and Bounty Law, American Lawyer Media/Texas Lawyer Books; 2012.
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