

Inside the Plaintiff's Bar: How Plaintiff Counsel is Selecting and Litigating Big Ticket *Qui Tam* Cases



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Key Factors in Evaluating Cases



- Relator's knowledge and credibility
- FCA theory of liability
- Damages and recoverability
- Public interests to be vindicated
- Potential road blocks, e.g., relator involvement, public disclosure

Evaluating the Relator



- **What is/was relator's relationship with defendant/s and source of knowledge?**
 - Employee/seniority
 - Customer/consumer, e.g., doctor, pharmacy, HMO, patient
 - Competitor
 - Vendor, e.g. consultant
- **How extensive is the relator's knowledge, e.g., expertise in industry, seniority in company?**
- **Credibility**
 - Can the relator clearly explain the fraud?
 - Will the relator make a good witness?
 - What motivated the relator to come forward?

Other Considerations



- **If an employee:**
 - Did the relator report the fraud internally?
 - Is the relator still employed at the company?
 - If not, did the relator sign a severance agreement?
- **Did the relator report to the government?**
- **Did the relator report promptly?**
- **Is there more than one relator? Multi-relator representation issues.**

Evaluating the Case



- **FCA analysis:**
 - What is the theory of liability?
 - Which jurisdiction is best?
 - ✦ Elements of liability, e.g., false certification
 - ✦ Rule 9(b), public disclosure, first to file
 - ✦ Damages theory
 - ✦ Choice of USAO
 - Public interests to be vindicated, e.g., patient harm, military personnel at risk, policy considerations
- **What will the agency say?**

What evidence does the relator have?



- **Documents**

- *But we don't want to see anything that is:*

- ✦ Privileged

- ✦ Accessed without authority

- ✦ Random (e.g. a data dump of all of the company's files)

- **Relators make tapes!**

- *But make sure that recordings were made lawfully*

- Determined by state law, e.g. NY is a one-party consent state

- See "Tape-recording laws at a glance," Reporters Committee for Freedom of the Press <http://www.rcfp.org/reporters-recording-guide/tape-recording-laws-glance>

What other evidence might be available?



- Witnesses the government should interview/documents the government should subpoena?
- Consider prefiling investigation
- Will the relator be able to help the government interpret additional information?

Potential Roadblocks



- **Need to satisfy FRCP 9(b) and 11: sufficiency of evidence**
- **Has someone else already filed a case?**
- **Is there a public disclosure concern?**
 - E.g. other cases, government reports, news media
- **Was the relator involved in the fraud?**
 - Relator may have criminal exposure—should have the relator get advice from a criminal attorney

Additional Questions



- **What employment issues is the relator facing?**
 - Possible Sec. 3730(h) retaliation claim
- **Is this the right legal remedy for the relator?**
- **Potential consequences for the relator — professional and personal**