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WHISTLEBLOWERS

New York Becoming the Leading Venue for Financial Fraud Whistleblower Suits



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Prolific bank robber Willie Sutton reportedly once said he robbed banks because ''that's where the money is.'' Judging by recent trends, whistleblowers might now give the same reason for filing their financial fraud suits in New York, which has quickly become the venue of choice for financial fraud whistleblowers suing under the False Claims Act (''FCA'').

The FCA, which authorizes private parties (known as ''relators'') to sue for treble damages and penalties for fraud upon the United States government, contains a generous venue provision. In short, it authorizes the relator to bring suit in any judicial district where any defendant can be found, resides, or transacts business, or in which any act proscribed by the FCA occurred. Since most major companies transact business across the nation, venue in significant FCA cases often turns less on where the defendant happens to be and more on what district relators and their counsel consider the most likely to produce the largest payout in the shortest amount of time.

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When a relator's counsel makes that decision, a significant consideration is the track record of the local U.S. Attorney's Office in the district, since that office will not only investigate the allegations but also (along with their counterparts at the Department of Justice in D.C.) decide whether to intervene, how much to accept in settlement, and how large the relator's share of the settlement will be. Because FCA settlements are usually significantly higher when the government intervenes, and because the government intervenes in only two out of every ten *qui tam* cases, relators' counsel are far more likely to file in a judicial district in which they perceive the local U.S. Attorney's Office to be both experienced in the subject matter and likely to pursue the case quickly and aggressively.

In significant health care fraud cases, the District of Massachusetts has long been the venue of choice for whistleblowers. The United States Attorney's Office for the District of Massachusetts has an aggressive and experienced Health Care Fraud Unit with a proven track record that draws relators. In fact, the Health Care Fraud Unit in Massachusetts has accounted for more than half of the nation's total civil and criminal recoveries in health care fraud matters since 2009, recovering more than $8.5 billion. Not surprisingly, the government's $3 billion settlement announced earlier this year with GlaxoSmithKline, the largest health care fraud settlement in U.S. history, arose out of *qui tam* actions filed in the District of Massachusetts. While other U.S. Attorneys' Offices — most notably those in Philadelphia and Los Angeles — also boast large settlements in health care fraud cases, Massachusetts remains the

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leading venue for whistleblowers bringing significant health care fraud *qui tams*.

In financial fraud cases, however, New York has quickly established itself as the go-to venue for FCA cases. Increasingly, relators choose to file their financial fraud *qui tams* in Manhattan or Brooklyn rather than in Massachusetts or Philadelphia. This is not simply a matter of New York's being the financial capital of the world, either. Although New York may appear the logical and obvious venue for a lawsuit against a major financial institution, one reason health care fraud cases gravitate toward Massachusetts or Philadelphia is because of the track record of the local U.S. Attorney's Office than the presence of the defendant health care companies in those districts. Indeed, GlaxoSmithKline is a Delaware company headquartered in Pennsylvania and North Carolina — but the whistleblowers filed their *qui tams* in Massachusetts. When it comes to the kind of track record that draws relators and their counsel, the U.S. Attorneys' Offices in Manhattan and Brooklyn have quickly distinguished themselves in financial fraud cases.

Size of Recoveries, Speed of Disposition

Just as the United States Attorneys' Offices in Massachusetts and Philadelphia have the expertise and track record in health care fraud cases, their counterparts in Manhattan and Brooklyn have developed the expertise and track record in financial fraud cases. In March 2010, the Manhattan U.S. Attorney, Preet Bharara, announced the establishment of a Civil Frauds Unit that would dedicate prosecutors and resources to pursuing financial fraud. Additional staff and resources means more time and attention devoted to these cases, which leads to greater expertise in this complex subject matter. Those efforts have already produced results.

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In the short time since its establishment, the Southern District's Civil Frauds Unit has filed seven major civil fraud lawsuits against large financial institutions, including six major FCA cases, and recovered settlements totaling more than half a billion dollars, with one mortgage fraud relator achieving a whistleblower award of $31 million. For its part, the United States Attorney in Brooklyn, which also has developed expertise in mortgage fraud cases, announced the single largest FCA settlement in a civil mortgage fraud case, with a $1 billion settlement recovered as part of the Department of Justice's nationwide servicing settlement with five large mortgage servicers in February 2012.

But large recoveries are not the only reason financial fraud whistleblowers are coming to New York. Because lawyers for relators typically take the cases on contingency, they are keenly interested in whether the government will pursue investigations quickly or, alternatively, let cases languish. According to the Department of Justice, the average *qui tam* case takes more than a year to investigate, and many FCA matters remain under investigation for two years or more. In New York, however, the Manhattan U.S. Attorney's Office has pursued financial fraud investigations quickly and made intervention decisions at an unusually fast pace. Last year, for example, the Manhattan U.S. Attorney intervened in a substantial financial fraud *qui tam* suit less than six months after the relator filed his complaint. Earlier this year, the Manhattan U.S. Attorney filed and settled (for nearly $160 million) a fraud suit against a financial institution in just six months. And in October 2012, the government intervened in a *qui tam* case – and claimed more than $1 billion in damages and penalties against a financial institution – less than nine months after the relator filed the *qui tam* action.

With so much money potentially at stake for relators and their counsel in these financial fraud *qui tams*, time literally is money, and fast action by the local U.S. Attorney is likely to draw more filings to that district.

For defendants in these cases, venue in New York can pose significant risks and unique challenges. First, if the *qui tam* is filed in New York, there is a greater likelihood that the case will lead to contested litigation, increasing costs to the defendant. When the United States intervenes in a *qui tam* case, it usually settles the case on the same day it files its complaint, thereby avoiding protracted litigation. But the United States is filing more and more FCA lawsuits in New York without a simultaneous settlement. In fact, of the seven large financial fraud lawsuits brought by the Manhattan U.S. Attorney since March 2010, five were filed without a simultaneous settlement, requiring the defendants to expend considerable resources litigating large and complex cases before the government will agree to settle.

Indeed, one of the five cases that the Manhattan U.S. Attorney filed without settlement in May 2011 later settled for more than $200 million, after a full year of litigation. Second, while most civil fraud suits are settled without defendants admitting misconduct, the Manhattan U.S. Attorney has announced that he will insist upon admissions of certain conduct as a condition of settlement in civil fraud cases. Such admissions can result in significant collateral consequences, including in subsequent, follow-on litigation by private parties. Third, the prevailing case law in the Second Circuit is generally considered favorable to the government on several FCA issues, including the calculation of damages, a factor that not only draws relators to New York but undoubtedly influences (and hardens) the government's settlement position in cases venued there. In sum, when a *qui tam* is filed in New York, the costs to the defendant — in terms of the ultimate settlement paid and the cost of litigation — could be substantial.

If the present trend continues, banks and other financial service institutions increasingly will find themselves facing FCA investigations and litigation in New York. And that trend will continue as long as whistleblowers and their lawyers see New York as the place ''where the money is.''

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