



**Davis Wright Tremaine**

# **Whistleblowers in Research: The Role of the False Claims Act**

**Medical Research Summit**

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# **Where do laws come from?**

- 1. The scandal**
- 2. The newspaper editorial**
- 3. The sense (or political perception) that “there ought to be a law . . .”**
- 4. Then there is a law . . .**

**and the law takes on a life of its own.**



- **Any Person who**

- **knowingly presents**
- **to an officer or employee of the United States Government**
- **a false or fraudulent claim for payment or approval; or**
- **knowingly uses**
- **a false record or statement**
- **to get a false or fraudulent claim paid or approved by the Government**



**. . . is liable to the United States Government for a civil penalty of--**

- **not less than \$5,000 and not more than \$10,000, *per claim*\***
- **plus 3 times the amount of damages which the Government sustains**
- **plus attorneys' fees**
  - **\* this amount is increased by an inflation factor**



**“knowing” and “knowingly”  
mean that a person--**

- has actual knowledge of the information;
- **acts in deliberate ignorance of the truth or falsity of the information; or**
- **acts in reckless disregard of the truth or falsity of the information;**
- ***no proof of specific intent to defraud is required.***



## What is a “Claim”?

- A “claim” includes any request or demand
- whether under a contract or otherwise,
- **for money** or property which is made to a contractor, grantee, or other recipient
- **if the United States Government provides any portion of the money or property which is requested. . .**



## **The concept of a “private attorney general”**

- **A person may bring a civil action**
- **for the person**
- **and for the United States Government.**
- **The action shall be brought in the name of the Government.**
- **The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.**



The existence of the lawsuit is, initially, kept secret

- A copy of the complaint and substantially all material evidence and information the person possesses shall be served on the Government
- The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders
- The Government may elect to intervene and proceed with the action





The existence of the lawsuit may remain a secret for years

- **The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal**
- **By all accounts, “good cause” is relatively easy to establish**



Even if the government decides the case has no merit, it may not go away

- If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action.
- If the Government requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense).
- The court may permit the Government to intervene at a later date upon a showing of good cause.



The conscious effort to foster a “bounty hunter” mentality

- If the Government proceeds with the lawsuit, action, the person who brought it to its attention such person shall receive
  - at least 15 percent
  - but not more than 25 percent
- of the proceeds of the action or settlement of the claim
- depending upon the extent to which the person contributed to the success of the case



If the whistleblower goes it alone, the potential reward is greater

- If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages.
- The amount shall be
  - not less than 25 percent and
  - not more than 30 percent
- of the proceeds of the action or settlement



## The (imperfect) defense against “parasitic” lawsuits

- **No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations**
  - **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 person bringing the action is an original source of the information**



## **Use of the False Claims Act in an Academic “Grudge Match”**

- **Doctors Cantekin and Bluestone and the University of Pittsburgh**
- **Dr. Berge versus the University of Alabama at Birmingham (and the rest of academia)**



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- A medical researcher failed to disclose in NIH grant applications that he was receiving funding from pharmaceutical companies
- The failure to disclose initially occurred in 1976



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- Two of five persons on the NIH review committee said that the disclosure might have affected their evaluation
- The affair had been the subject of a critical report by Congress





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- The lower court dismissed Dr. Cantekin's lawsuit
- The Court of Appeals allowed the case to continue



## **The University of Alabama at Birmingham**

- **One characterization of the allegation was that researchers failed to give another academician “credit” in grant applications**
- **At trial, the court granted the U.S. a judgment for \$1.66 million**
- **The potential award to the whistleblower was \$498,000**



## **University of Alabama at Birmingham**

- **Outraged Universities rushed to file “friend of the court” briefs against the decision**
- **The Appeals Court vacated the judgment and granted the defendants judgment as a matter of law**



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## **University of Alabama at Birmingham**

- **“The hubris of any graduate student to think that such grants depend on the results of her work is beyond belief.”**
- **“That is not the way Big Science works.”**