

FALSE CLAIMS ACT & WHISTLEBLOWER REPRESENTATION

Hodgson Russ's False Claims Act team is made up of whistleblower attorneys and paraprofessionals with substantial experience with the federal False Claims Act and the New York State False Claims Act. The team includes former federal and state prosecutors, former government attorneys, and practitioners in fields such as health care and government procurement.

Our interdisciplinary approach to False Claims Act cases is unique, and the geographic scope of our practice is noteworthy. In addition to litigating False Claims Act cases in New York State courts and U.S. District Courts for Western, Northern, Southern, and Eastern Districts of New York, our team of attorneys has handled False Claims Act and whistleblower cases in California and Florida state courts and U.S. District Courts for the District of Massachusetts and Eastern District of Pennsylvania, as well as before the IRS. Moreover, we possess substantive depth in critical risk areas and legal disciplines, which is enhanced by our representation of both whistleblowers (relators) and defendants in False Claims Act cases. As a result, the team has a thorough understanding of those factors relevant to a successful False Claims Act case. Few other firms are capable of bringing this type of balanced experience to a case.

From 30 new whistleblower cases filed in 1987 to 753 in 2013, it is clear that whistleblowers are now driving the fight to expose the waste of taxpayer dollars through fraud against the government.

Whistleblowers accomplish this through the False Claims Act (FCA)—the federal statute that allows private individuals to bring a *qui tam* lawsuit against an individual or entity defrauding the government. If successful, whistleblowers, also called “relators,” are entitled to a portion of the recovered funds under the FCA. These recoveries can be substantial. In fiscal year 2013, whistleblowers recovered almost \$400 million.

The importance of whistleblowers cannot be overstated, and Hodgson Russ recognizes and respects the contributions that whistleblowers make to protecting taxpayers. Hodgson Russ is one of only a few major law firms with experience representing both whistleblowers and companies accused by whistleblowers of wrongdoing in high-profile federal and state FCA cases. We believe in pursuing meritorious cases on behalf of whistleblowers. We also believe in helping companies accused of wrongdoing investigate allegations, correct any deficiencies they may encounter, and reach favorable resolutions. This rare perspective means we are

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exceptionally well positioned to advise you about a potential whistleblower claim.

For whistleblowers, we offer an approach to representation that is as distinct as is our perspective. We are not a “whistleblower mill” that pays little attention to the personal needs of its clients or the factual nuances of complex cases. Rather, our Whistleblower Representation Practice is composed of highly experienced lawyers who, only after careful consideration, agree to represent the claims of select whistleblowers. We do not take every case, nor do we believe the number of cases we have at any given time is a measure of our success. Instead, we select only the best cases, allowing us the ability to become fully immersed in the factual and legal details necessary to bring cases to successful resolutions. Under the False Claims Act, our whistleblower attorneys have successfully represented a variety of whistleblowers in cases involving, for example, pharmaceutical company fraud, medical device fraud, and government procurement fraud of various types.

For defendants, we offer the same interdisciplinary approach, substantive subject area depth, and successful track record. By way of example, our False Claims Act defense experience includes the successful representation of hospitals, home health agencies, physicians, accounting firms, educational institutions, and nursing homes in both criminal and civil False Claims Act investigations. We have also represented various defense contractors in matters involving allegations of procurement fraud and pricing disputes.

Our unique approach and case experience enable us to efficiently and effectively assess and either prosecute or defend False Claims Act cases in virtually every substantive area of concern. Our experience is further enhanced by close relationships with a range of forensic experts who are familiar with the collection and analysis of False Claims Act data and the assessment of potential False Claims Act damages.

Our False Claims Act team is well positioned to represent clients in False Claims Act matters, whether federal or state, in a highly sophisticated and efficient way. We encourage you to explore our website, where you can find answers to many frequently asked questions, obtain a description of the False Claims Act, and review an explanation of how the whistleblowing process works. **We will not charge you for an initial consultation. If you are a whistleblower, our legal fees are paid by you only if you recover, as a percentage of that recovery.**

Or call us at 716.848.1433. Dan Oliverio, who leads our False Claims Act & Whistleblower Representation Practice, can be reached via e-mail or at his home telephone number: 716.873.4090. Contact him any time, including on weekends.

Our clients work side by side with our whistleblower lawyers and staff from start to finish – in essence becoming part of the Hodgson Russ family. And, like family, we stick by our clients through every step of the False Claims Act process.

OUR EXPERIENCE

Hodgson Russ has worked on industry-leading False Claims Act cases and settlements. In 2013, Daniel C. Oliverio, Joseph V. Sedita and Robert J. Fluskey Jr. of Hodgson Russ were the attorneys for two whistleblowers at Johnson & Johnson who were awarded what was, at the time, the largest False Claims Act settlement.

The case was filed after employee whistleblowers raised concerns about how Johnson & Johnson was marketing one of its drugs, Risperdal. Risperdal was approved for schizophrenia and other conditions in 1993, but Johnson & Johnson was marketing the drug for uses that were not approved, including for the treatment of anxiety disorders, bipolar disorder,

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dementia, mood disorders and other conditions.

Eventually, Johnson & Johnson agreed to a settlement that would see the company pay \$1.273 billion to state and federal governments. In addition, the company reached a settlement in the criminal investigation of the same case, agreeing to pay an extra \$800 million in penalties. Since the False Claims Act allows whistleblowers to share in the settlement proceeds, the whistleblowers represented by our team were awarded 15 percent of the awards of the settlement.

Hodgson Russ also represented whistleblowers in a False Claims Act claim involving another larger organization – Columbia University – in what was the largest Health & Human Services (HHS) grant fraud claim against a college. Our team consisting of Daniel C. Oliverio, John L. Sinatra Jr., Reetuparna Dutta and Margaret M. Cmielewski, represented an individual who worked at the university and who had information about the incorrect reporting the university's health program, International Center for AIDS Care and Treatment Program (ICAP), made in conjunction with a U.S. HHS grant earmarked for HIV/AIDS programs.

The former Columbia University ICAP employee represented by our whistleblower attorneys was entitled to a portion of the more than \$9 million in proceeds awarded in the settlement of the case. After the employee was terminated from his position, he continued to work with Hodgson Russ in a related retaliation claim against Columbia University.

THE FALSE CLAIMS ACT

The False Claims Act, also known as the Lincoln Law, is the primary legal rule used by the U.S. government to prosecute individuals and businesses that attempt to defraud federal programs. Passed in 1863 because of the poor quality of supplies sold to the Union Army during the Civil War, the False Claims Act also protects and rewards whistleblowers who report the fraudulent activity. The law has recovered well over \$35 billion since 1987, after Congress passed several important amendments. Of this amount, about \$24 billion was recovered as a direct result of whistleblower involvement.

As False Claims Act attorneys, Hodgson Russ provides innovative, experienced representation to whistleblowers and others involved in government fraud cases. The federal False Claims Act gives you the power to identify government fraud and bring a lawsuit on behalf of the United States to recover ill-gotten gains through a legal device called a *qui tam* provision. In these cases, the False Claims Act permits the government to recover up to triple damages from those who knowingly present, or cause to be presented, false claims to a U.S. government officer or employee, or member of the U.S. armed forces, or who knowingly make, or cause to be made, false statements to get such claims paid by the United States. The law also applies to those who make false statements to conceal, avoid, or decrease an obligation to pay or transmit money or property to the government, and it covers certain conspiracies to violate the act. In return, the False Claims Act provides whistleblowers with a monetary incentive of 15 to 30 percent of any recovery. Many states have their own false claims acts, which are often similar to the federal act. Visit the Taxpayers Against Fraud Education Fund's website to view individual state's false claims acts.

WHISTLEBLOWERS' INCREASING IMPORTANCE

Those who report fraud under a False Claims Act, whether federal or state, are called relators or whistleblowers. As the size of the government has grown and the complexity of its business affairs expanded, whistleblowers have exposed fraud in a multitude of industries, including health care, transportation, defense contracting, pharmaceutical sales, Medicare, Medicaid, construction, and a host of others. The U.S. Department of Justice recognizes the important role whistleblowers play in the fight against government fraud and has stepped up its enforcement efforts. Working together, whistleblowers, their counsel, and the U.S. Department of Justice have recovered billions of dollars in taxpayer money obtained by fraud.

THE WHISTLEBLOWER PROCESS

Federal and state False Claims Act cases are often very complicated, and the stakes can be high for the relator. At Hodgson Russ, our whistleblower lawyers possess deep knowledge of the law and extensive experience dealing with people on both sides of False Claims Act cases, which can make or break a case and be invaluable in helping the relator and his or her family get through what can be a very trying experience.

The first step our firm takes in any potential False Claims Act case is to discuss the facts thoroughly with you. We study the allegations and applicable law, and we conduct any necessary factual investigations with your input and participation. If we determine that your case is worth further investigation, we discuss the particulars of our engagement with you. If you agree to hire us, and we agree to the representation, we execute an engagement letter setting forth the terms of our representation.

Next, we draft a complaint and other case-initiation documents as well as a disclosure statement, which contains the evidence and other factual information that supports the complaint. The complaint is filed under seal with the appropriate court, which means that it is filed in such a way that the neither the defendant nor the public knows about the case. Your identity is known only to the court and to the government at this stage, and these entities must keep your identity confidential for a certain period of time.

Under the federal statute, the complaint initially remains under seal for 60 days. That period may be, and usually is, extended to allow the government to decide whether to intervene in the case. During this period, we work with you and the government's attorneys to help them understand and investigate the facts of the case and the evidence available to prove the allegations. Until the case is unsealed and the complaint is served on the defendant, you also share the obligation to keep the case confidential.

Once the defendant receives the complaint, the case is litigated like most other cases, with motions and discovery. Cases with merit are resolved either through settlement or by a trial. There is no typical case. Some are resolved in a year or less, some in one or two years, and others may take several years to resolve.

At the conclusion of the case, assuming a favorable settlement or successful trial and appeal, you are entitled to share in the proceeds recovered by the government in percentage amounts set forth in the applicable statute and depending on how helpful you have been to the case.

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WHISTLEBLOWER REWARD

A whistleblower is awarded a share of the proceeds if the false claims act case he or she brings to the government is successful. The whistleblower's reward – also called the relator's share – can be between 15 and 30 percent of the government's recovery.

Several factors affect the size of a whistleblower reward. These factors include:

- The scope of the whistleblower's contribution to the government's case and investigation.
- Whether the case primarily depended on disclosures from other sources (in which case the whistleblower's reward can be no more than 10 percent).
- Whether the whistleblower planned and participated in the false claim scheme. If so, the whistleblower's reward can be reduced to any amount the court deems appropriate.
- Whether statutory bars preclude the whistleblower from sharing in the recovery because of a criminal conviction or a jurisdictional disqualification in the case.
- Whether the government intervened in the case or whether the whistleblower pursued it alone.

Part of our job is to ensure, at the conclusion of a successful case, that our whistleblower client receives the maximum reward permitted under the law. As your counsel, we catalog and track the information and input you provide the government so we can make the case for a high share at the case's conclusion.

FEDERAL RETALIATORY PROTECTIONS

Many whistleblowers worry about retaliation. Fortunately, the False Claims Act provides whistleblowers with protection against many of the risks associated with coming forward.

First and foremost, a whistleblower's identity remains secret while the case is under seal. When the case is no longer under seal, the False Claims Act provides remedies for whistleblowers who come forward against their employers and are subsequently discharged, demoted, suspended, "or in any other manner discriminated against in the terms and conditions of employment" in retaliation for involvement in a False Claims Act case. If the court finds a whistleblower or other person covered by the anti-retaliatory provision of the False Claims Act was terminated or otherwise mistreated for the whistleblower's activities, the person is entitled to reinstatement at the same seniority level; two times the amount of back pay owed, plus interest; and compensation for any special damages sustained as a result of the discrimination, such as litigation costs and attorneys' fees.

If you are retaliated against for making a whistleblower complaint, the whistleblower attorneys at Hodgson Russ will work with you to determine whether to bring a claim for retaliation against your employer as part of your False Claims Act case.

ON THE DEFENSE SIDE

If your company is the target of an FCA investigation or defending an FCA litigation, we offer you vast defense experience as well. Our skill set is augmented by substantive knowledge across many subject areas and an understanding of how the relators' bar works. We encourage you to call us. We are here to help.

Types of Fraud

The False Claims Act permits the government to recover up to triple damages from those who knowingly present, or cause to be presented, false claims to a U.S. government officer, employee, or member of the armed forces, or who knowingly make, or cause to be made, false statements to get such claims paid by the United States. The law also applies to those who knowingly conceal, avoid, or decrease an obligation to pay or transmit money or property to the government, and it covers certain conspiracies to violate the FCA.

Importantly, the False Claims Act applies to a broad spectrum of frauds on the government. Any false claim knowingly made to the government or attempt to avoid an obligation to pay money to the government can be addressed under the FCA. In fact, the false claim does not even have to be made to the government – it can be made to a private individual or entity who then passes on the claim to the government. This is often seen in the construction industry, where contractors hire subcontractors and incorporate their claims for payment and pass them to the government project manager. If you are aware of any falsity or dishonest conduct in connection with a claim that may ultimately be paid by the government, you should consult with an attorney to see whether you have a claim.

Below are some of the common examples of fraud covered by the False Claims Act:

- Medicare & Medicaid Fraud
- Health Care Fraud
- Pharmaceutical Fraud
- Procurement Fraud
- Education & Grant Fraud
- Banking & Financial Services Fraud
- Securities and Exchange Commission Fraud
- Defense Contractor Fraud
- Tax Fraud
- Other Fraud

COMPETITORS USING THE FALSE CLAIMS ACT

The False Claims Act is not only for employees or other insiders. If you are a company that believes that one of your competitors is competing unfairly by defrauding the federal government, you can also use the act to stop this conduct and obtain redress.

Experience

In 2013, the U.S. Justice Department announced that Johnson & Johnson would pay \$1.273 billion to the federal government and most states to settle a civil False Claims Act investigation into its off-label marketing of its drug Risperdal. J&J settled a criminal investigation into the matter for an additional \$800 million. Two of the J&J whistleblowers were represented by a Hodgson Russ team led by Daniel C. Oliverio. Other team members were Joseph V. Sedita and Robert J. Fluskey, Jr. Risperdal, once J&J's best-selling drug, was approved by the FDA in 1993 for psychiatric disorders including schizophrenia. According to documents filed with the court, the company made efforts to sell Risperdal for unapproved uses that included bi-polar disorder, dementia, and mood and anxiety disorders, among others. After the local case against J&J was filed in Western New York in 2004 for its off-label marketing of Risperdal, the federal government consolidated this case in Philadelphia with four other similar cases related to Risperdal marketing. In False Claims Act cases like this one, whistleblowers are entitled to a share of the proceeds; the two whistleblowers represented by Hodgson Russ shared in 15 percent of the settlement awards. At the time of the settlement, Dan said, "As one of only a few major law firms to have experience successfully representing corporate clients in defending complex whistleblower litigation as well as select whistleblowers, we feel we were exceptionally well positioned to represent our remarkable clients in this case." Dan continued, "This settlement, which is the largest FCA relator share settlement in history, follows on the heels of another whistleblower suit, in which we served as lead counsel, that resulted in the largest FCA settlement in Western New York history. I am incredibly proud of the work our team is doing to support our clients in these matters."

Keith Schenker, MD, a client of Hodgson Russ, received a substantial portion of the \$15 million settlement ISTA Pharmaceuticals agreed to pay to resolve allegations that the company aggressively and systematically promoted the off-label use of the prescription drug Xibrom, resulting in the submission of fraudulent claims to the U.S. government for Medicare and Medicaid reimbursement. Xibrom has only been approved by the Food and Drug Administration (FDA) for the treatment of postoperative inflammation and reduction of ocular pain in patients who have undergone cataract extraction. Law prohibits prescription drug retailers from marketing prescription drugs for any use not approved by the FDA. The allegations against ISTA arose when Dr. Schenker, a former ISTA sales representative with first-hand knowledge of the fraudulent practices, who returned to medical school during the pendency of the case, filed a lawsuit against the company under the qui tam provisions of the False Claims Act. Hodgson Russ attorneys Daniel C. Oliverio and Joseph V. Sedita, who represented Dr. Schenker, helped show that ISTA knowingly and unlawfully marketed Xibrom for the prevention and treatment of cystoid macular edema (CME), for use for pre-cataract surgery, as an aid to securing better surgical results, and for use with high-risk patients. They further showed that the company's off-label marketing scheme, which included elaborate training programs and financial incentives for its sales representatives, caused medical professionals to submit claims to the United States for payment and/or reimbursement to cover the use of Xibrom to treat the unapproved conditions. Unaware of the fraud, the United States paid the claims, thus sustaining substantial financial damages. ISTA

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also pleaded guilty to a crime in the U.S. District Court for the Western District of New York. The company will pay the government \$15 million to settle the civil claims, a portion of which will be awarded to Dr. Schenker for his contribution to the investigation and recovery.

Defense of Whistleblower retaliation claims under OSHA in the Department of Labor

A Hodgson Russ team led by Daniel C. Oliverio, and including John L. Sinatra, Jr., and Reetuparna (Reena) Dutta, represented an employee of Columbia University who alerted the government of the school's improper effort reporting in connection with a U.S. Health & Human Services (HHS) grant intended to fund its work in the area of AIDS/HIV prevention. A subsequent investigation revealed that Columbia, as administrator of the grants received through President Bush's Emergency Plan for AIDS Relief program, failed to verify that ICAP, a Columbia-affiliated health program, was charging the grant only for work its employees performed in service of approved projects. Columbia agreed to pay more than \$9 million to settle the allegations of false claims lodged against the university by the U.S. government under the False Claims Act, making it one of the largest-ever HHS grant fraud cases against an institution of higher education. The whistleblower represented by Hodgson Russ received a portion of the settlement proceeds. The whistleblower, who has been terminated from his position at Columbia's ICAP, also retained Hodgson Russ in his retaliation claim against the university.

Hodgson Russ has successfully defended multiple federal False Claims Act investigations which include corporate representation and representation of business executives.

News

Citigroup Accused of Improperly Avoiding \$800 Million in New York State Taxes
New York Times, October 19, 2015

Indiana Economist Says Citigroup Owes New York \$2.4 billion
Buffalo News, October 15, 2015

Buffalo Lawyer Plays Key Role in Major Grant-Fraud Case
Buffalo News, October 30, 2014

Columbia University to Pay \$9 Million to Settle Allegations of False Claims in Connection With AIDS/HIV-Related Grant
Press Release, October 30, 2014

How Risperdal Whistle-Blowers Made Millions From J&J
Bloomberg News, December 10, 2013

Buffalo Law Journal Publishes Interview With Daniel C. Oliverio on Landmark Johnson & Johnson FCA Settlement
December 2, 2013

Local Firm Helps Plaintiffs in Johnson & Johnson Suit
WBFO, November 5, 2013

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Whistle-Blowers Expose Huge Drug Company Scam

Buffalo News, November 4, 2013

Johnson & Johnson Agrees to Largest-Ever False Claims Act Settlement in Risperdal Lawsuits

Buffalo Business First, November 4, 2013

Reetuparna Dutta Named to *Lawyers of Color's* Hot List

July 22, 2013

Events

Government and Internal Investigations' New Focus on Individual Accountability for Corporate Wrongdoing

Hilton Albany, 40 Lodge St., Albany, NY, June 28, 2016

American Conference Institute's 3rd Advanced Forum on False Claims & Qui Tam Enforcement

New York, NY, January 21, 2016

Publications

Health Care Fraud: First, Do No Harm

New York Law Journal, November 10, 2014

New York Attorney General Pushes Forward With Tax Prosecutions Under False Claim Act

State & Local Tax Alert, March 8, 2013

SEC's New Whistleblower Rules Become Effective

Corporate & Securities Alert, August 24, 2011

Important Tax Whistleblower News for Practitioners, Businesses, and Whistleblowers

State & Local Tax Alert, June 3, 2011

Calling All Tax Whistleblowers — New York Wants You!

State Tax Notes, February 15, 2011

New York's New Tax Whistleblower Statute

Tax Stringer, February 2011

Nationwide Implications for Whistleblowers in DHL Decision

Buffalo Law Journal, June 14, 2010

Enforcement Trends Demand Stronger Compliance Strategies in 2009

Life Sciences Alert, January 29, 2009

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New York Enacts False Claims Act: New Remedies for Recovery of Fraudulent Payments
Health Alert, July 2007

FAQS

Below are answers to some of the most frequently asked questions related to reporting fraud. If you have further questions, do not hesitate to contact us for more information.

What is a "whistleblower"? What is a "relator"?

A False Claims Act whistleblower, or relator, is a person who, as a plaintiff, brings a False Claims Act case on behalf of the government. These two words are often used interchangeably.

A whistleblower/relator can be an employee, a customer, an unrelated party, a competitor, or any other person or entity that learns about government billing or claim fraud. Often current employees have the best "view" of a scheme to defraud the government. These individuals have the ability to see such a scheme first hand and are typically familiar with the claims and billing process. Competitors may suspect a billing scheme is being perpetrated by another company because of pricing differentials or from information received from disgruntled employees. It is also not unusual for former employees to report a scheme to defraud. In all cases, it is important that the whistleblower/relator be the "original source" of the information; i.e., that the information is not publicly-known or known to the government in advance.

What are some examples of government fraud that might give rise to a viable claim?

Under certain circumstances, False Claims Act cases can arise from overcharges, fraudulent non-compliance with a contract, fraudulent billings, overpayments, unrefunded amounts owed to the government, certain false certifications, and concealment of product defects. There are countless possible false claims scenarios.

Is my case confidential? For how long?

Initially, yes. False Claims Act cases begin under seal, which keeps the case and the whistleblower's identity confidential. These cases are only unsealed when the court orders it. The length of the process can be as short as two months to as long as a year or more.

Does the anti-retaliation protection extend to me if I am not an employee of the company at issue?

It may. The recent amendments to the False Claims Act's anti-retaliatory provisions cover contractors and agents of the retaliating party who are not technically "employees."

How long will my case take?

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There is no typical case. Some are resolved in less than a year, some in one or two years, and others take several years to resolve. Each case depends on the complexity of its facts, defenses, and other factors.

Why should I hire Hodgson Russ?

Hodgson Russ has considerable experience on both sides of False Claims Act cases. We have defended corporate clients that have been sued under the act, and we have represented whistleblowers alleging a wide range of frauds. We know how the process works, we know the players, and we know what it takes to ensure you are represented well, that you are most helpful to the government, and that you receive the highest share of the proceeds to which you are fairly entitled. We pride ourselves on being a full-service firm with substantive knowledge and experience beyond the False Claims Act — experience in the areas and industries where fraud commonly occurs, including medical technology and pharmaceuticals, military contracting, and transportation.

What sorts of False Claims Act cases has Hodgson Russ worked on?

Examples include Medicare and Medicaid fraud, off-label pharmaceutical sales, and defense contractor fraud.

Can Hodgson Russ represent me anywhere in the country?

Yes. Your lawyers do not have to have offices near you or the company at issue. Hodgson Russ has pursued False Claims Act cases in various jurisdictions across the country.

How do I pay your legal fees?

Our legal fees are paid as a percentage of your recovery. If you do not recover, you do not have to pay our legal fees.