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ONE-ON-ONE INTERVIEW

FILING *QUI TAM* ACTIONS AND FALSE CLAIMS LITIGATION

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Geoff Garinther is the chair of Venable's Litigation Division and a member of the firm's Management Committee. A former federal prosecutor with 30 years of trial experience, his practice focuses on defending corporations and individuals accused of white-collar crime – particularly where there are allegations of healthcare fraud or antitrust violations – and on conducting independent investigations for the boards of public companies.

CD: Could you provide a brief overview of the key issues surrounding *qui tam* litigation? What types of fraud are covered under *qui tam* claims?

Garinther: The False Claims Act (FCA) is a statutory provision that aims to rectify fraud against the federal government. Under the Act's *qui tam* provision, a private citizen with knowledge of a false claim can file an action on behalf of the government. These private citizens, called relators, are eligible to share in the government's financial recovery. The FCA is utilised to target many types of alleged fraud, including healthcare fraud, housing and mortgage fraud, and procurement fraud. Healthcare fraud, in particular, is a huge area of enforcement, and appears to be growing. FCA issues are commonly litigated. Those issues include what constitutes a "false claim", the level of detail required to meet civil pleading standards, the limitations period, the FCA's public disclosure bar, precluding an action when the allegations have already been the subject of a public disclosure, and the first-to-file bar, prohibiting an action "based on the facts underlying the pending action".

CD: What recent trends have you observed in litigation arising from the FCA?

Garinther: Healthcare fraud continues to be an area targeted under the FCA. In 2014, the government recovered $2.3bn in cases involving false claims against federal programs, making five consecutive years of recoveries exceeding $2bn. Healthcare fraud cases brought under the FCA include allegations of off-label promotion and manufacturing deficiencies against pharmaceutical companies, violations of the Anti-Kickback Statute, and claims of exaggerated patient risk adjustment scores by Medicare Advantage providers. Notably, in 2014, two-thirds of federal *qui tam* actions initiated by whistleblowers concerned healthcare-related businesses. Eighty percent of plaintiffs' rewards stemmed from healthcare claims, although non-*qui tam* healthcare-related actions initiated by the government declined. Additionally, 2014 saw a huge rise in claims in the financial services industry. Banks and financial institutions were charged $3.1bn for false claims for federally insured mortgages and loans in the wake of the mortgage and housing crisis.

CD: Have any recent, high-profile FCA-related decisions caught your attention in particular? What can we learn from the outcome of these cases?

Garinther: One high profile case comes from the US Court of Appeals for the Fourth Circuit. In *United States ex rel. Barry Rostholder v. Omnicare, Inc.*,

the Fourth Circuit held that a false representation of compliance with the FDA's current Good Manufacturing Practices (GMPs) will only give rise to FCA liability if certification with the regulation is an express condition of federal reimbursement. Because compliance with GMPs is not an express condition of Medicare or Medicaid reimbursement, the court found no FCA liability. This case is a significant reminder to whistleblowers, as well as the government, that the FCA does not allow courts to replace regulatory agencies – instead, it protects government resources from fraudulent conduct. Of note, the Supreme Court declined to hear the case.

CD: In what circumstances can the Statute of Limitations for *qui tam* lawsuits be extended? How impactful are the differences in jurisdictional limits on *qui tam* actions?

Garinther: A claim under the FCA must be brought within six years or within three years after the date when the United States knew or reasonably should have known about the fraud. Under no circumstances can an FCA claim be brought more than 10 years after the violation occurred. In recent years, the most prevalent attempts to extend the limitations period have been through the Wartime Suspension of Limitations Act (WSLA). When the United States is engaged in armed conflict, the WSLA tolls the statute of limitations for any offence "involving fraud or attempted fraud against the United States" until five years after the war ends. After a string of back-and-forth cases in the lower courts, just a few days ago, the Supreme Court handed down a decision holding that the WSLA only tolls the statute of limitations for criminal offences, not civil FCA cases. The Court's ruling prevents the FCA limitations period from becoming a nullity. The consequences of nearly indefinite FCA liability would be significant – the older a claim is, the harder it is to defend.

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CD: To what extent have *qui tam* actions been affected by 'opportunistic plaintiffs' who are leveraging information already

publicly available, such as through social media disclosures?

Garinther: In drafting the FCA, Congress included a public disclosure provision that prevents a relator from bringing an FCA action based on allegations that are already publicly disclosed through enumerated channels, including, in the statute's terms, the "news media". In today's internet age, the statute's use of "news media" has caused some confusion. Some parties defending against FCA actions have successfully used the public disclosure provision to argue that virtually all websites are "news media". In other cases, courts have read the provision strictly. One court, for instance, found that a company's product postings on eBay were not public disclosures. Even though the postings were readily available to the public, the court concluded,

they did not fit into any of the public disclosure categories listed in the statute. Like postings on eBay, information from social media sites and online communities may face the same problem under a strict reading of the statutory language. Despite the narrow phrasing of the statute, however, when deciding public disclosure arguments, courts tend to look at whether the public disclosure revealed the essential elements of the fraud, or if the disclosure needed to be supplemented with the relator's own personal knowledge to reveal the fraud. This distinction may thwart truly opportunistic plaintiffs who gain information from these types of sources.

CD: What initial advice would you give to parties looking to pursue a *qui tam* action? How would you characterise the inherent risks involved in whistleblowing, compared to the potential rewards?

Garinther: The rewards for whistleblowers can be astronomical – in 2014, for example, whistleblowers received $435m. And, at the same time, the FCA provides employment protection for whistleblowers through its anti-retaliation provision. The anti-retaliation provision, however, does not bestow blanket protection from retaliation – it only makes employers susceptible to a lawsuit if the statute is violated. Potential whistleblowers need to carefully consider the career and reputational risks in addition to the anticipated payout of the action. In that calculus, plaintiffs need to be mindful of the challenges in recovering the whistleblower reward. Plaintiffs' attorneys must be selective in accepting *qui tam* cases and the government must be selective in pursuing FCA cases. And if the government ultimately declines to intervene in the case, the whistleblower will be left to pursue the action alone.

CD: What trends and developments do you expect to see as far as *qui tam* litigation is concerned over the next 12 months or so?

Garinther: FCA actions aren't going away any time soon. In the last three fiscal years, the US has seen the three largest annual recoveries ever under the FCA, and more than one-third of all *qui tam* claims have been filed within the last five years. We expect the healthcare industry, in particular, will remain a primary target of the FCA. With the Affordable Care Act – whose viability may be determined in a Supreme Court decision expected any time now – the federal government is more involved in healthcare, more people are enrolling in federally-subsidised insurance plans, and through the ACA's Physician Payments Sunshine Act, more healthcare payment information is available through online databases, which may help whistleblowers develop their cases. CD

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