



HEALTH CARE FRAUD REPORT



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Rewarding Whistleblowers Under the False Claims Act: The Great American Giveaway



By MICHAEL K. LOUCKS

In October 2010, the Department of Justice paid more than \$96 million from the federal recovery of \$436,400,000 in a False Claims Act case to a single whistleblower. Another whistleblower was paid in the month of December a whopping \$156,600,000 from two False Claims Act settlements that recovered \$701,200,000 for the American taxpayer.

Were these payments an effective use of the taxpayer's money? Are such massive payments necessary to encourage whistleblowing on corporate conduct that

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causes losses to the government? Would lesser payments achieve that same goal?

Smart enforcement, designed to prevent the payment of false claims by government agencies, requires two principal components: a mechanism that encourages blowing the whistle on the submission of false claims, and a mechanism that encourages complying with the law by not submitting false claims.

Both mechanisms—whistleblower rewards and corporate compliance programs—exist; today, these tools are in increasing conflict. Rational evaluation of the efficacy of these tools dictates that the whistleblower tool must be changed.¹

The Whistleblower Tool

In 1986, to encourage whistleblowing, Congress strengthened the False Claims Act by providing for a payment of up to 25 percent of the recovery (30 percent in certain cases).

Those changes worked. Before 1986, few health care qui tam actions had been filed; since 1990, there have been 478 criminal and civil settlements involving \$1,000,000 or more; the vast majority of those have included a False Claims Act recovery and a whistleblower reward.

But, the whistleblower receives a payment within the percentage range whether the government's recovery is one dollar—a 25 cent share maximum share—or \$1 billion—a \$250 million maximum share.

¹ While these tools apply across all industries, given the strong body of data that exists in the health care sector, this article focuses on these tools as implemented in that sector of the economy.

	Total Recovery	Federal Civil Share	Whistleblower Payment	% share
	72,500,000	43,500,000	7,825,000	18
	81,510,000	50,688,483	9,000,000	17.8
	118,000,000	60,896,476	10,787,392	17.7
	313,000,000	88,000,000	14,000,000	17.5
	108,000,000	108,000,000	23,500,000	21.8
	422,500,000	149,241,306	25,000,000	16.8
	600,000,000	210,250,000	37,800,000	17.9
	302,000,000	262,000,000	45,000,000	17.1
	280,000,000	280,000,000	67,200,000	24
	421,200,000	421,200,000	88,400,000	21
	520,000,000	301,907,007	45,000,000	15
	750,000,000	436,440,000	96,016,800	22
	1,415,000,000	438,171,543	78,870,877	18
	2,300,000,000	668,514,830	102,000,000	15.2
Totals	7,703,710,000	3,518,809,645	650,400,069	18.4

The Compliance Tool

In 1986, few health care companies had compliance programs; no companies were then operating under government imposed corporate integrity agreements. Today, this has changed.

Over the past 10 years, there has been an enormous increase in the resources devoted by corporations and other organizations to *compliance*. The compliance budgets of some major companies are in the millions of dollars. Moreover, dozens of corporations are doing business with the government in accordance with extensive Corporate Integrity Agreements.²

The government has much invested in the success of these corporate compliance efforts. As the inspector general for the Department of Health and Human Services has noted, "A provider or entity consents to these obligations as part of the civil settlement and in exchange for the OIG's agreement not to seek an exclusion of that health care provider or entity from participation in Medicare, Medicaid and other Federal health care programs."

These Corporate Integrity Agreements typically force, through an onerous set of requirements, changes in a company's internal operations in a manner designed to reduce the chances of fraud. Implementation of these changes is dependent on the corporate compliance function; indeed, some Corporate Integrity Agreements have required that the chief compliance officer report directly to the company's board and chief executive officer.

Are These Tools Working Harmoniously?

The short answer is no: the whistleblower tool undercuts the compliance tool. A whistleblower who reports

² The government, because of the settlement of major False Claims Act cases, has required some corporations to have compliance programs of a particular design, and has dictated some specific terms to improve their efficacy; that a corporation has an efficacious program is a factor a judge can use to reduce the corporation's punishment, in the event of a criminal conviction.

false claims activity to an effective corporate compliance program is in essence slitting his own financial throat. Indeed, the sheer magnitude of some payments made to whistleblowers discourages reporting bad conduct within the corporation.

A putative and rational whistleblower, when faced with a choice between reporting bad conduct to compliance versus initiating a suit that might reap a \$100,000,000 reward, will always choose the latter. A whistleblower who seeks advice from private counsel who himself stands to gain from the False Claims Act litigation by sharing in the recovery will most likely be advised not to report the matter to corporate compliance.

As the potential payment to the whistleblower rises, the efficacy of the compliance tool diminishes.

The chart above reflects the total recovery, the federal False Claims Act share, the whistleblower payment, and the whistleblower's percentage of the recovery, in 14 settlements in the past two years.

In just these 14 cases, whistleblowers have shared \$650 million dollars. Had there been a \$2 million cap on whistleblower payments in any single matter, the total share instead would have been \$28 million, and an additional \$622,400,069 would have been returned to the American taxpayer.

A Better Solution?

Would a cap on whistleblower payments discourage whistleblowing? If not, what would be the optimal cap that while rewarding whistleblowers would not mispend the taxpayers money? Lastly, what accommodation should be made in the False Claims Act to encourage initial referrals to corporate compliance programs?

A careful review of 20 years of settlement data in the health care arena supports implementing two changes.

First, Congress should impose a jurisdictional requirement that no payment may be made to a whistleblower who did not first report the alleged conduct to

Four year Period Ending	Total Recovery	Number of Settlements	Settlements Less than \$10,000,000	Settlements More than \$99,999,999
12/31/1994	\$ 602,000,000	6	1	2
12/31/1998	\$ 1,676,837,748	44	21	7
12/31/2002	\$ 4,644,027,772	90	45	7
12/31/2006	\$ 8,099,212,264	152	96	18
Thru 11/1/10	\$12,388,848,750	186	114	19
	\$27,410,926,534	478	277	53

an existing corporate compliance program.³ This jurisdictional bar would support the enormous investment that the Office of Inspector General has made in Corporate Integrity Agreements.⁴

Second, Congress should impose a monetary cap of \$2 million.

Rationale

In the 478 settlements of \$1,000,000 or more in health care fraud cases⁵ since 1990, the statistics are⁶:

The median settlement is \$6,350,000; the whistleblowers in that case received \$1,111,250.⁷ The range is from \$1 million⁸ to \$2.3 billion; in that largest settle-

³ This bar should include a one year “waiting period” before filing suit, to permit corporate action.

⁴ A company that failed timely and appropriately to act on the report information, including returning sums improperly collected on previously submitted false claims, would remain at risk for a False Claims Act suit.

⁵ Loucks and Lam, *Prosecuting and Defending Health Care Fraud Cases* (BNA Books, Second Edition, 2010), Appendix G. The vast majority of these health care settlements have included a federal civil False Claims Act resolution, and a payment to a whistleblower. The reader should note that there have been many fewer cases in all other sectors and that the government does not maintain a comprehensive, error free listing of all False Claims Act recoveries.

⁶ Whistleblower payments under the federal false claims are not paid on criminal fines or recoveries to State Medicaid programs. Accordingly, to determine the total federal civil False Claims Act recovery in a particular case, the criminal fine and the state recoveries, if any, must be subtracted from the total.

⁷ <http://www.justice.gov/opa/pr/2010/March/10-civ-293.html>.

⁸ The reader should note that there have been False Claims Act recoveries of less than \$1 million. That means that the statute as structured has provided sufficient incentive to encourage whistleblowing in matters where by definition the whistleblower will never receive more than \$300,000. These facts also support the conclusions of this article.

ment, the whistleblowers were paid \$102 million.⁹ Of the 478 settlements, 79 recovered more than \$50 million; **293 settlements, or 60 percent, recovered \$10 million or less.** Within that group, 90, or 19 percent, recovered less than \$2 million. In almost 20 percent of the recoveries, the whistleblower received less than \$400,000. Thirty-nine of those 90 settlements occurred in just the past five years.

These facts support the following conclusions:

- ▶ The 1986 amendments raising the whistleblower payments encouraged blowing the whistle.
- ▶ The percentages encourage whistleblowing in matters involving all sizes of false claims losses, from less than \$1 million to in excess of \$1 billion.
- ▶ The potential for earning even as “little” as \$400,000 has encouraged blowing the whistle, and that incentive is just as powerful today as it was 10 years ago.
- ▶ The vast majority—60 percent—of whistleblowers were encouraged to blow the whistle for less than \$2 million.
- ▶ A cap on whistleblower payments of \$2 million will not deter blowing the whistle.

Conclusion

Congress should act immediately to make these changes. Today’s lavish and unnecessary whistleblower rewards come at the expense of the sound management of the federal health care programs.

Moreover, today’s law discourages employees from reporting conduct to corporate compliance programs that the government has urged, and in many instances, forced, companies to create and fund. There are no public policy reasons that support this continued wasting of the taxpayer’s money.

⁹ <http://www.justice.gov/opa/pr/2009/September/09-civ-900.html>.