

THE DARK SIDE OF STIMULUS

How to prepare for the emergence of qui tam lawsuits targeting government fraud and excess

The pervasive expansion of our federal government into the private sector has been both quick and expensive. Is your company receiving any stimulus money, indirectly, or directly? You need to find out. Why the sense of urgency? Because there may be invisible strings attached to that money that you may not be aware of — and, whether you can see them or not, those strings could spell the dividing line between you and trouble with Uncle Sam.

Last month, we outlined the steps employers should take to protect themselves from worker and vendor theft. Now we'll examine a bet-the-company remedy available to workers who discover fraudulent behavior of their employer, which may be more prevalent amid a flood of stimulus funding.

Qui what?

The recent wave of government stimulus money, coupled with a general lack of fiscal oversight, is bringing with it the heightened opportunity for fraud and waste. When private companies waste government funds as a result of fraudulent activities, the common remedy for recovering funds is a qui tam lawsuit brought under the federal False Claims Act. Most states, including Texas, have similar statutes encouraging the discovery and reporting of the fraudulent use of state and local funds.

The words "qui tam" may sound exotic, but every corporate executive needs to learn at least the basics of this process. The phrase comes from the Latin, "qui tam pro domino rege quam pro sic ipso in hoc parte sequitur," which translates roughly as "he who sues in this matter for the king as well as for himself." In qui tam cases, the private plaintiffs involved are commonly referred to as "relators." Relators are different than "whistleblowers," who focus primarily on



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John T. Palter

a wrong done to an individual. A qui tam relator sues for wrongs done to the public purse through misapplication of government money.

What is the incentive for a relator and his counsel to bring an action? Money, and lots of it. Relators are entitled to 15% to 30% of whatever amount the government recovers, depending on whether the government intervened and other factors. The potential reward serves as a strong incentive to take the personal and professional risks involved in reporting and litigating fraud.

Real men file qui tam cases

How big can these matters really be? Consider the case of John Kopchinski, who was terminated by Pfizer after raising his concerns with the company over Pfizer's "off-label" marketing of the drug Bextra. The drug, approved by the FDA to treat osteoarthritis and adult rheumatoid arthritis, was allegedly marketed for acute and surgical pain (non-approved treatments) at dosages above the maximum levels approved by the FDA. Kopchinski filed a qui tam lawsuit against Pfizer in 2003 — and, after years of investigation, Pfizer recently agreed to pay \$2.3 billion to resolve criminal and civil health care liabilities — making it the largest combined federal and state health care fraud settlement in the history of the Department of Justice. Texas alone will recover \$55 million for its Medicaid program. Kopchinski, a San Antonio resi-

dent, is slated to receive more than \$51 million for his role in uncovering and reporting the fraud.

As a taxpayer, you should applaud these results. As a business operator, you should take careful note — and advantage — of the lessons the Bextra case offers us all. A few tips to get you started:

- Establish and publicize confidential and independent hot lines reporting to the board of directors — and provide an objective screening process to identify potentially legitimate accusations. Many third-party entities now provide these services as part of Sarbanes-Oxley compliance.

- Monitor e-mail, consistent with a company policy, for indications of improper employee or management conduct — and conduct prior reviews of termination decisions for evidence of revealed allegations of "theft" and "waste."

- If wrongdoing is discovered, ask yourself: "Does this involve state, federal or local money?" If so, be doubly assertive in getting it corrected.

Of course, the best advice is voluntary compliance with all applicable laws and regulations. But if risk avoidance isn't enough to motivate self-regulation, keep in mind that False Claim Act "bounties" essentially turn all employees into paid governmental informants. Keep in mind that many qui tam cases begin as complaints for other wrongs, including sexual harassment, discrimination, employee theft and wage and hour claims. Be mindful, be vigilant — but, most importantly, be ethical.

PALTER is a trial lawyer and managing member of Riney Palter PLLC (www.rineypalter.com). For the past 25 years, he has advocated the interests of emerging growth and institutional clients in complex commercial, employment and intellectual property disputes. Contact him at jtpalter@rineypalter.com