

# INVESTIGATIVE CPA, LLC

FALSE CLAIMS ACT ACCOUNTING AND FRAUD CONSULTING

## Whistleblower Options when the Government Declines to Intervene in a False Claims Act Case

By Eileen K. Leslie, CPA, CFE



### Eileen K. Leslie

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Eileen Leslie is a former financial analyst for the U.S. Attorney's Office and the Federal Bureau of Investigation.

She now helps *qui tam* attorneys, government agencies and businesses investigate fraud schemes and prepare whistleblower cases involving:

- False Claims Act
  - o Medicare fraud
  - o Defense contractor fraud
  - o Royalties fraud (oil, gas, etc.)
  - o Pharmaceutical fraud
  - o Anti-Kickback & Stark Laws
- State False Claims cases
- Municipal False Claims filings
- IRS whistleblower law
- SEC whistleblower law
- Corporate fraud investigations

Contact Eileen Leslie to discuss a potential whistleblower case or other fraud matter.

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Whistleblower attorneys in search of more business may want to consider that as many as 10 cases might fail for every one whistleblower case that succeeds.

The Department of Justice recovered in excess of \$4.7 billion in settlements and judgments from civil cases of fraud and false claims against the government in fiscal year 2016. Some \$2.9 billion of that figure came from lawsuits filed under *qui tam* provisions of the False Claims Act (FCA), according to an agency news release. Billions of dollars in FCA whistleblower settlements represent just the tip of the iceberg in potential awards.

### Reasons for Lack of Intervention

While working as a financial analyst at the U.S. Attorney's Office, I acted as the government's financial and investigative expert. My primary responsibility was to identify the facts, investigate the allegations, perform forensic financial analysis as necessary and calculate damages on civil False Claims Act (FCA) cases, including those cases initiated by governmental agencies.

I have seen first-hand the most common reasons for lack of government intervention in a whistleblower case, which often include the following:

- Lack of relator credibility
- Insufficient or immaterial evidence
- Disorganized or poorly presented case
- Hard to prove "he said/she said" claims
- Limited government resources which are better devoted to larger or stronger cases

If there are weaknesses in the case, it is advantageous for the relator and relator's counsel to know this from the outset so that they can be addressed.

Focusing on the fraud identification and detection aspects of a case early can help to ascertain the validity of the fraud allegations and explore reasonable damage calculation methodologies. A solid understanding of alleged violations and the potential damages, packaged in a credible and organized format, can encourage the government to pursue a course of intervention.

There are several options available to the relator and their counsel if the Department of Justice declines to intervene in a case.

First, the parties can, and should, request clarification about why the government declined to intervene in the matter. Information obtained during this post-review meeting can play a critical role in the ultimate outcome of the case.

I strongly recommend listening to the government's feedback before reassessing the case.

The government often decides not to intervene in a whistleblower case when they determine that the facts on which the allegations are based are not properly vetted, prepared or presented.

If the basis for the government's decision not to intervene is insufficient evidence, then the relator and their counsel might consider gathering more evidence if warranted and available.

A well-prepared case that is clearly presented and outlines the facts derived from a strong investigative and financial analysis will strengthen the likelihood for success in a False Claims Act dispute.

If the government ultimately does decline to intervene, the relator can move forward with the lawsuit on their own.

## Services Provided by Investigative CPA, LLC

### Whistleblower Investigations

Investigative CPA, LLC serves as a strategic advisor to clients in False Claims Act lawsuits throughout their life cycle, from initial case development through resolution.

Founder Eileen Leslie's unique blend of experience, education and perspective in FCA cases goes beyond that of a typical accounting firm. Her insight helps clients streamline case preparation time, while increasing the likelihood of a favorable case outcome.

### Fraud Investigations

#### Forensic Accounting

- Damage calculation
- Ability to pay analysis
- Wage loss calculation

#### Fraud Examinations

- Criminal / civil investigations
- Occupational fraud
- Embezzlement

#### Litigation Support

- Expert testimony
- Discovery assistance
- Case organization

### Data Analytics

Investigative CPA, LLC applies computer-assisted audit techniques to identify, analyze and organize relevant data for use in a whistleblower case.

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#### Disclaimer

*This newsletter is for educational purposes only. It is not intended to provide an expert opinion or legal advice. Every case is different and circumstances vary widely depending on the governing state or federal law, policy provisions, and related considerations.*

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## INVESTIGATIVE CPA, LLC

### Overcoming IRS Bureaucracy in an IRS Whistleblower Case

Whistleblowers helped the IRS collect more than \$2 billion in additional taxes from 2011 through February 2016. Despite this success in uncovering tax fraud and noncompliance, the IRS Whistleblower Office is often criticized as being slow moving and poorly organized.

Recent reports by both the Government Accountability Office ("GAO") and the Treasury Inspector General for Tax Administration fault the IRS for deficiencies in its handling of whistleblower claims. As a result, thorough preparation by IRS whistleblowers and *qui tam* counsel is essential.

The \$2 billion in additional taxes collected resulted from only 732 claims in which a whistleblower award was paid, for a total of \$363 million in rewards. Processing delays are common, with most of the awards paid taking an average of 5 to 8 years to reach closure.

On average, only 2.5 percent of the thousands of IRS whistleblower claims filed in recent years completed the lengthy review process.

The most common reasons cited for claim rejection and closure are identified below.

- Allegations were non-specific, non-credible, or speculative
- Information was already known to the IRS
- Threshold level required for IRS action was not met
- Insufficient time remaining on statute of limitations or statute expired

As a forensic accounting expert for either the plaintiff or defendant in civil and criminal cases, I have seen why parties to an IRS tax dispute might want to take a "trust but verify" approach when dealing with the IRS.

### U.S. Tags 12 States as Fraud Hotspots for Home Health Services

While most home health providers are devoted to the needs of their ill or elderly patients, the industry has long been plagued by criminals gaming the system. Common fraud schemes typically involve billing for services that are not medically necessary and/or never provided.

Questionable billing practices, improper payments and compliance issues also factor into the government's vast responsibility to mitigate Medicare fraud, waste and abuse, according to a recent report from the U.S. Department of Health & Human Services Office of Inspector General.

Between fiscal years 2011 through 2015, government investigations into home health fraud resulted in some 350 criminal and civil actions and \$975 million owed to the government. In 2015 alone, it's estimated that Medicare made more than \$10 billion in improper payments to home health agencies.

The OIG analysis identified 12 states — Arizona, California, Florida, Illinois, Louisiana, Michigan, Nevada, New York, Oklahoma, Pennsylvania, Texas, and Utah — as "geographic hotspots."

Red flags for fraud are also identified by the OIG, such as a "high percentage of episodes for which the beneficiary had no recent visits with the supervising physician" and a "high percentage of episodes that were not preceded by a hospital or nursing home stay."

Whistleblowers filing *qui tam* cases play a key role in uncovering healthcare fraud. Presenting the government with an organized and cogent case offers False Claims Act (FCA) relators the best chance for their case to be accepted.