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Ensuring fairness in Illinois Whistleblower Act claims

By Stuart Chanen and Chris Stetler; Katten Muchin Rosenman, LLP, Chicago, Illinois

Summary: In an effort to fight fraud, the Illinois Whistleblower Reward and Protection Act allows private parties to bring lawsuits on behalf of the State. But what should the State do when those private parties abuse that power by bringing claims that are without merit?

The Illinois Whistleblower Reward and Protection Act (the "Whistleblower Act" or "Act") was designed to target false claims made to the government and reward private "whistleblowers" who expose and report these fraudulent acts. The significant financial incentives for the private litigants who bring these claims, however, have necessitated the enactment of statutory provisions that seek to limit the Act's coverage to those who *knowingly* submit false claims to the government while weeding out the claims of those who unjustly seek to reap a financial windfall based not on a false claim, but on gossip, misunderstandings, innuendo, or simply the desire to reap the financial windfall.[1]

One such provision in Illinois allows the state to intervene in and dismiss a private *qui tam* action, even when the plaintiff opposes dismissal. While there is no publicly available standard used by the Illinois Attorney General in deciding when to intervene and dismiss an action, common sense dictates that the Attorney General should dismiss cases she deems to be without merit. Such an approach would not only promote justice by protecting state contractors from bogus claims, but it would also guard Illinois taxpayers from paying the costs related to litigating bogus claims.

I. Coverage of the Illinois Whistleblower Act

The Act, codified at 740 ILCS 175/1-7, imposes civil liability on anyone who perpetuates a fraud on the state, such as by knowingly presenting, or causing to be presented, to an officer or employee of the state a false or fraudulent claim for payment or approval. Actions under the Act may be commenced by the Attorney General or private individuals who bring *qui tam* actions in the name of the state. The Act offers private plaintiffs generous incentives: he or she is entitled to receive 15-25 percent of the proceeds, plus attorneys fees and costs, if the Attorney General intervenes and 25-30 percent of the proceeds, plus attorney fees and costs, if the Attorney General does not intervene.

Ultimately, if the Attorney General determines through her investigations that a *qui tam* case should not proceed, "she may dismiss [it], and plaintiffs shall have no right to proceed."[8]

If a private citizen brings a *qui tam* action, she must serve the state with a copy of the complaint and a written disclosure that includes substantially all material evidence and information. The complaint is filed *in camera* and remains under seal for 60 days (plus any extension granted by the court), during which time the Attorney General is supposed to investigate the claim and decide whether to intervene in the action. If the Attorney General decides to intervene, she assumes primary responsibility for prosecuting the action, although the *qui tam* plaintiff has a right to continue as a party. If the Attorney General decides not to intervene, the *qui tam* plaintiff may proceed, and the Attorney General can continue monitoring the proceedings by receiving copies of all pleadings and deposition transcripts and may intervene at a later time. The state will also receive 70-75% of the proceeds even in cases in which it does not intervene. In *State ex rel. Beeler, Schad & Diamond, P.C. v. Burlington Coat Factory Warehouse Corp.*, the Illinois Appellate Court clarified that the Attorney General also has a third option: Because the lawsuit is brought in the name of the state, the Attorney General may intervene and dismiss the action at any time, "notwithstanding the objections of the person initiating the action," if she believes the case lacks merit, or for almost any reason at all.[2]

II. Why the Attorney General should dismiss cases that lack merit

So what should the Attorney General do when she receives a *qui tam* complaint alleging some kind of fraudulent act against the state but finds after investigation that the claim is without merit? The Act enables the Attorney General to simply opt out and allow the private plaintiff to continue with the action. But is that a just outcome? Is it fair to the business or individual accused of defrauding the state? And is it fair to the taxpayer, who may not only have to pay for the state's involvement in monitoring the litigation (even if the state does not intervene), but who may also be on the hook for the higher cost of the services the vendor-defendant provides to the state to account for its litigation costs.

In short, it would be unfair for the Attorney General to simply do nothing under such circumstances. Government lawyers, including the Attorney General, have special obligations and duties due to their powerful

and representative positions. For instance, in criminal cases government lawyers have a duty to "seek justice," rather than simply pursuing a conviction, and they are prohibited from instituting charges when they "know[] or reasonably should know that the charges are not supported by probable cause."[3] The Supreme Court has also made the following observation in *Berger v. United States*:

> The [Prosecuting] Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.[4]

While Rule 3.8 and the Supreme Court's comments in *Berger* were directed at criminal prosecutors, the logic behind them extends equally to the Attorney General's handling of *qui tam* actions. In both criminal and *qui tam* actions (which are often referred to as "quasi-criminal"), defendants are being prosecuted by the state or someone acting on its behalf. Both types of cases confront defendants with severe consequences—a *qui tam* defendant faces substantial civil penalties if it loses, will have to incur substantial expenses defending itself, and, even if successful, will always have the stigma of being accused of defrauding the state. (A finding of liability against a *qui tam* defendant often results in debarment of the defendant from engaging in future state contracts.) And in both criminal and *qui tam* cases the lawyers are acting on behalf of the people, who are entitled to good government and should not have their tax dollars spent on litigation and court costs related to unmeritorious claims.

The Act also clearly allows the Attorney General to make case determinative decisions in *qui tam* cases. It contemplates that, while *qui tam* plaintiffs can "conduct" the litigation on the state's behalf, the Attorney General retains the authority to "control" the litigation at every stage of the proceedings. Indeed, as the Illinois Supreme Court has concluded, "*qui tam* plaintiffs, acting as statutorily designated agents for the state, may proceed only with the consent of the Attorney General, and remain completely subordinate to the Attorney General at all times."[5]

And while in other jurisdictions the government must identify a valid governmental purpose for dismissing a *qui tam* lawsuit and show a rational relation between dismissal and that purpose, in Illinois the Attorney General has "almost unlimited discretion" to dismiss a *qui tam* action.[6] Indeed, as the Illinois Supreme Court ruled in *Burlington Coat*, "the presumption is that the state is acting in good faith and, barring glaring evidence of fraud or bad faith by the state, it is the state's prerogative to decide which case to pursue."[7] Ultimately, if the Attorney General determines through her investigations that a *qui tam* case should not proceed, "she may dismiss [it], and plaintiffs shall have no right to proceed."[8]

III. Conclusion

The Illinois Whistleblower Act arms private citizens with a powerful tool, which unfortunately can be used to bring highly consequential claims against innocent defendants. Just as she would be obligated to ensure that criminal defendants are not wrongly prosecuted, the Attorney General should intervene in and dismiss unmeritorious *qui tam* actions. Such an approach would be in the best interests of not only innocent defendants, but also "the People" the Attorney General serves. ■

Stuart Chanen is a partner and Chris Stetler is an associate in the White Collar Practice Group at Katten Muchin Rosenman LLP.

1. *See U.S. ex rel. Chandler v. Cook Co., Ill.*, 277 F. 3d 969, 976 (7th Cir. 2002).
2. *See State ex rel. Beeler, Schad & Diamond, P.C. v. Burlington Coat Factory Warehouse Corp.*, No. 1-05-3824, 2006 WL 3511713, at *3 (Ill. App. Ct. Dec. 6, 2006).
3. Ill. R. Prof'l Conduct 3.8 (2009).
4. *Berger v. United States*, 295 U.S. 78, 88 (1935).
5. *Scachitti v. UBS Fin. Servs.*, 831 N.E.2d 544, 562, 215 Ill.2d 484, 515 (Ill. 2005).
6. *Burlington Coat*, 2006 WL 3511713, at *3.
7. *Id.* at *7.
8. *Scachitti*, 831 N.E.2d at 562, 215 Ill.2d at 515.