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## *False Claims Act*

### **'Shock Is the Word' for Lawsuit Sale Bust, Attorneys Say**

BY DANIEL SEIDEN

**"S**hocking," "sad" and "unbelievable" are some words attorneys used to describe the recent arrest of a fellow attorney accused of trying to sell access to a sealed false claims lawsuit to a potential defendant.

Federal agents arrested Jeffrey Wertkin on Jan. 31 for trying to sell for \$310,000 a copy of a secret lawsuit to someone he believed was a representative of a company under investigation by the Justice Department (DOJ).

Wertkin himself was a former DOJ attorney, and his arrest prompted at least one attorney to suggest that DOJ should launch a review of his cases to make sure damages awards and other outcomes weren't tainted by misconduct.

Others saw the incident as a symptom of larger problems with the False Claims Act (FCA), which — according to one attorney who spoke with Bloomberg BNA — creates incentives for unethical conduct by providing monetary awards out of line with the goal of preventing fraud.

Generally, however, attorneys who work on false claims cases — specifically plaintiffs' attorneys who count on these cases to remain under seal as required by law — were floored by the details of this story.

"I've been doing this work for almost 20 years, and I haven't heard anyone in the qui tam bar raise concerns about cases being leaked, sold to defendants or seals breached by people at the Department of Justice," Matthew B. Smith of plaintiffs' firm Phillips & Cohen LLP, Washington, told Bloomberg BNA.

Justice Department employees are dedicated and treat these cases seriously, he said. "This seems like a pretty extreme situation that has really come as a shock to those that handle these cases," Smith said.

"Plaintiffs' lawyers have close relationships with government attorneys, and trust them implicitly," Ryon M. McCabe, a shareholder with McCabe Rabin P.A., a plaintiffs' law firm in West Palm Beach, Fla., told Bloomberg BNA.

"This must be an outlier, but, boy, is it terrible and sad," he said. "Shock is the word."

Defendants typically receive subpoenas and civil investigative demands from the Justice Department that hint at what conduct may be under investigation, so it doesn't take long before defendants know where to fo-

cus an internal investigation, Scott McBride, a partner with BakerHostetler in Houston, told Bloomberg BNA.

"In this case, the defendant did the right thing and likely only thing it could do to help itself by reporting the solicitation," he said.

**Recorded Conversations, Hotel Meeting.** While working as a partner for Washington law firm Akin Gump, Wertkin contacted an employee with the targeted California-based company to disclose the existence of the lawsuit, and mailed a copy of the complaint's first page to the employee shortly thereafter, according to the criminal complaint.

Weeks later, the employee discussed the matter with FBI agents, who asked for recordings of conversations with Wertkin.

Wertkin then arranged a meeting in a hotel lobby, where agents arrested him.

Prior to joining Akin Gump, Wertkin worked as a trial attorney at the DOJ, working on fraud cases.

**Supreme Court's Seal Decision.** Under the False Claims Act, a whistle-blower's complaint remains under seal for at least 60 days so the government can investigate and decide whether it wants to intervene in the case. A defendant doesn't learn of the lawsuit until a court so orders.

The Supreme Court addressed proper punishments for seal violations in December 2016, ruling that courts should examine the severity of each individual violation before issuing a sanction instead of adopting an automatic lawsuit dismissal rule.

The seal breach in that case involved disclosures to the media, but even that type of violation isn't widespread because it's a self-inflicted wound, McCabe said.

"When I get a new client, I provide a packet of materials saying not to tell friends or the press about a case," he said. "That can only hurt you."

**DOJ Investigation.** The extraordinary nature of this case raises concerns about Wertkin's conduct while at the DOJ, as McCabe speculated that Wertkin may have learned of the complaint while he was with the government and taken it with him when he left.

Lawyers who worked on cases involving Wertkin may have justifiable concerns about how he treated their cases, David Colapinto of plaintiffs' firm Kohn Kohn & Colapinto, Washington, told Bloomberg BNA.

"I would recommend that the Justice Department undertake a review of his cases, and let those lawyers involved know the results," he said.

The Fraud Section of the Justice Department and the Office of the Inspector General could take this step, he said.

The government's decisions for intervening or declining to join an FCA case "makes all the difference as to whether there would be a monetary recovery, and the Justice Department needs to ensure that the process hasn't been tainted in some way," Colapinto said.

Justice Department attorneys and U.S. attorneys act with integrity, and "this is the only instance of improper leaking I've encountered," he added.

Such an act as the one alleged "would never cross my mind," Colapinto said.

**'People Are Tempted to Act.'** Flaws within the FCA itself make this type of misconduct possible, Aaron P. Silberman, a shareholder at Rogers Joseph O'Donnell in San Francisco, told Bloomberg BNA.

"This is obviously a very strange and unusual case, but it is a symptom of greater infirmity in the FCA," he said in an e-mail. "The liability defendants may suffer

and the rewards whistleblowers and the government may enjoy are in many cases highly disproportionate to the wrong."

Therefore, "it is hardly surprising that, in many instances, people are tempted to act, and do act, in ways that do not serve the FCA's purpose of deterring, detecting and remedying fraud against the government," Silberman said.

There are cases aside from the Wertkin matter involving FCA abuse, involving "lawyers breaching their ethical duties to their clients and government insiders breaching their job duties to report suspected fraud internally, both by blowing the whistle in attempts to get the relator's bounty," Silberman said.

To contact the reporter on this story: Daniel Seiden in Washington at [dseiden@bna.com](mailto:dseiden@bna.com)

To contact the editor responsible for this story: Jerome Ashton at [jashton@bna.com](mailto:jashton@bna.com)