Philadelphia, Monday, June 7, 2008

The Legal Intelligencer

The Oldest Law Journal in the United States

incisivemedia

The Key to Qui Tam Doesn't Unlock Door to Big Firm Life

BY GINA PASSARELLA
Of the Legal Staff

Large law firms have increasingly dabbled in the contingent-fee arena, representing corporate plaintiffs in large-scale matters, but there is one highly lucrative practice the firms can't seem to make work.

When members of the disbanding Miller Alfano & Raspanti were looking for new homes last year, it was the qui tam practice created largely by Marc S. Raspanti that had the most trouble finding the right fit. And it wasn't for a lack of interest from several big firms.

Qui tam cases involve whistleblowers who bring claims of fraud against their employers in conjunction with the government through cases that are initially brought under seal. The whistleblower gets a cut of any settlement with the government, as does his attorney.

Raspanti said several large firms in the area "gave lip service" to their interest in the qui tam practice once they saw the numbers Raspanti had traditionally brought in. Others were interested in bringing on his white-collar defense practice to say they had "captured" Raspanti and brought him over strictly to the defense side.

As talks progressed with several firms, he said he got the sense that he would have significant problems if he were to join a larger firm.

"I would be fraught with conflicts but would also have unfair prejudices against the practice" from partners who wouldn't understand the commitment in time and money qui tam cases require, Raspanti said.

Frank D'Amore of Attorney Career Catalysts had to "carve out" an attorney from a merger deal with a larger firm because of the lawyer's qui tam work. While all sides were looking to find a way to make it work, it was just too tricky a match, he said.

"It's like doing plaintiffs work in a large firm but because it can garner more publicity and generate pretty significant damages ... it becomes a little more problematic," he said.

Several large firms do personal injury work on occasion because they can pick and choose the cases and avoid conflicts, but qui tam steps it up a notch and cuts across a firm's ability to gain new defense clients, D'Amore said.

Marlan Wilbanks had been handling qui tam cases at a small Atlanta firm for years, but decided last year to go out on his own with one other attorney, creating Wilbanks & Bridges.

Qui tam is all the new firm does, and Wilbanks said the practice is best suited for a small firm. The money in qui tam cases really comes from national settlements, which means the "Web gets so thick with conflicts," he said. There is too much competition for defense work at large firms for them to risk losing it over a qui tam case, Wilbanks said.

Running a qui tam practice on a small-firm model has its challenges, too. Something has to cover the overhead during the years a qui tam case is making its way through the system. Wilbanks said handling some hourly work that doesn't conflict "keeps the lights on."

While he wouldn't be interested in merging with a large firm, Wilbanks said he has teamed up with some defense firms on qui tam cases that don't conflict with the large firm's client base.

RASPANTI

MORSE

For Raspanti, it was after much deliberation and talks with colleague Michael Morse, who will now take over the qui tam practice at their new firm, that he realized he had no interest in giving up a practice he had spent the past two decades developing.

The former Philadelphia assistant district attorney was either going to hang his own shingle again or find a smaller firm interested in taking a chance on the practice.

William Pietragallo II of then-Pietragallo Bosick & Gordon heard of Raspanti's situation and flew down from Pittsburgh to meet him. By January, Raspanti, Morse, name partner Gaetan Alfano and six others made the move over to what is now known as Pietragallo Gordon Alfano Bosick & Raspanti.

With around 80 attorneys, it's still one of the largest firms to have a qui tam practice, but Raspanti said he was basically given all the freedom he had at his previous firm. There are now 12 attorneys in total who focus on qui tam work with two more on the way.

"There have been several large firms who have tried, or are trying, to do qui tam and I don't think it's succeeding," Raspanti said.

The most successful firms are those around 40 or 50 attorneys or even smaller, he said. Most qui tam practices are started by former prosecutors, former employment attorneys or, in the past five to six years, class action lawyers.

IF ONLY CONFLICTS WERE IT

Conflicts are only one small part of why the qui tam practice didn't make it to a large firm. After all, conflicts hadn't been a major problem for Raspanti who said his white-collar defense practice unexpectedly "exploded" after he won his first successful qui tam case in the late 1980s.

He couldn't quite say why that was other than to guess savvy clients figure if a firm can beat large pharmaceutical companies or defense contractors for millions and get the Department of Justice to pay up for its clients, it would probably do well on the defense side, too.

Explaining the practice to a management committee is tough. Unlike a medical malpractice case, a qui tam case can't easily be sized up to determine its worth or cost.

The average qui tam case lasts a little more than five years, with Raspanti's longest finishing in eight years. That's millions in investments with no return for several years. The qui tam practice made up a significant part of Miller Alfano's revenue in some years, and for others it wasn't as noticeable. Raspanti called it a "feast or famine" practice.

At Pietragallo Gordon, Raspanti calls Pietragallo when a new case comes in and, after a brief talk, the case usually gets the firm's approval. Things aren't always so easy at large firms where memos circulate and committees are involved, he said.

Time is often of the essence when it comes to qui tam practices. Morse said clients often call when they've found important documents and don't know whom they should tell, whether they'd get fired or how long they'd have access to the information.

"This is a practice area that doesn't always lend itself to institutional barriers," he said.

Many firms aren't used to giving up control of their cases either. In qui tam matters, the firm is teamed up with either state or federal government entities that ultimately have control over the case and could decide to settle or back out at any time, Raspanti said.

Because the cases are filed under seal, the government may also know of similar cases that were filed by parties who may look to have a piece of a win he gets for his client.

When Raspanti secured a $334 million settlement with SmithKline Beecham, for example, he went up and down federal court to get rid of other parties claiming rights to the settlement and had to go to trial against his one-time ally — the DOJ — over the payment his client was going to receive.

There are several other variables when it comes to qui tam cases ranging from states that have their own version of the U.S. False Claims Act to government officials who are more involved in some jurisdictions than one might find in other locations.

Raspanti and Morse have seen cases fail for a number of unexpected reasons. The pair was in the middle of a case in Alabama in 2001. Right after Sept. 11, nearly every government official was called away to help with security measures. The case just died in its tracks, Raspanti said.

In another case in Florida, the whistleblower — also known as the relator — won the lottery and decided he didn't want to go through with the case.

THE EVOLUTION OF QUI TAM

Qui tam cases got a major boost in 1986 when a Republican senator and a Democratic congressman vastly amended the federal False Claims Act.

At that time, Raspanti said, there were about 10 attorneys across the country handling qui tam cases. Now there are about 400 to 500, which include the 50 to 100 attorneys who do qui tam work seriously while the others dabble, he said.

Most of his cases were filed in the federal court until 21 states created their own version of the federal statute at the urging of the federal government, which now provides 10 cents more on every dollar recovered to states that pass their own statutes. Pennsylvania has pushed the bill through the House 10 years running, but it hasn't made it out of the Senate Judiciary Committee, Raspanti said.

Morse said they probably haven't filed a case in the last five years that didn't include both federal and state claims.

When Raspanti filed his first case in 1989 in the Eastern District of Pennsylvania, there were no procedures for filing a case under seal. He would often sit in the judge's courtroom, avoiding questions from staff, until the judge walked by and Raspanti could grab his attention to get an order placing the case under seal.

Now there are procedures in place to file qui tam cases. The clients and cases are different, too. It's no longer the billing clerk, but instead the company chief executive officer or chief operating officer, Raspanti said. Clients are putting their careers on the line to shed light on fraud in a number of industries.

Raspanti and his colleagues have recovered more than $1 billion for their clients and the government since starting the practice.

When qui tam suits first started taking off, it was during former President Ronald Reagan's military build up and fraud by defense contractors was the most common type of case. Then it moved to health care fraud and now a lot of cases resulting from Hurricane Katrina and alternative energy programs, Morse said. The firm is expecting the return of more defense contracting claims.

Focus areas shift and government attorneys change.

"You have to adapt," Morse said. •