
United States Commercial Law Seminar

Masaryk University

April 11-21, 2011

Lecture Six:

***Internal investigations, Special Committees, and
director duties to investigate and disclose possible
wrongdoing: a case study***

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Readings

1. A hypothetical factual scenario to be drafted
2. Larry D. Lahman, "Bad Mules: A Primer on the Federal False Claims Act", 76 Okla. B. J. 901, 901 (2005)
3. http://www.okbar.org/obj/articles_05/040905lahman.htm

False Claims Act

- ❑ Civil War era statute
- ❑ Penalizes submitting false statements (claims) to the U.S. government
 - To obtain more money from the government than it owes
 - To reduce the amount owed to the government
- ❑ Claim must be “knowingly” submitted to violate the FCA
- ❑ FCA contains both civil and criminal penalties

False Claims Act Procedure

- ❑ Filed by a “relator” – a private citizen – on behalf of the government
- ❑ Pre-suit “disclosure statement”
- ❑ Case filed initially under seal
 - Government (DOJ Civil Division) reviews case
 - Decides whether to intervene “Original source” requirement
- ❑ Relator receives a percentage of the recovery
 - 15-25% if government intervenes
 - 25-30% if government does not intervene
- ❑ Potential recovery
 - Penalties per false claim (\$11,000)
 - Treble damages
- ❑ Attorney’s fees recoverable

Largest False Claims Act Cases

1.	Pfizer	1,000,000,000	Sep-09
2.	Tenet Healthcare	900,000,000	Jul-06
3.	HCA	731,400,000	Dec-00
4.	Merck	650,000,000	Jan-08
5.	HCA	631,000,000	Jun-03
6.	GlaxoSmithKline	600,000,000	Oct-10
7.	Serono Group	567,000,000	Oct-05
8.	TAP Pharmaceuticals	559,483,560	Oct-01
9.	NY State and NYC	540,000,000	July-09
10.	Astra Zeneca	520,000,000	April-10

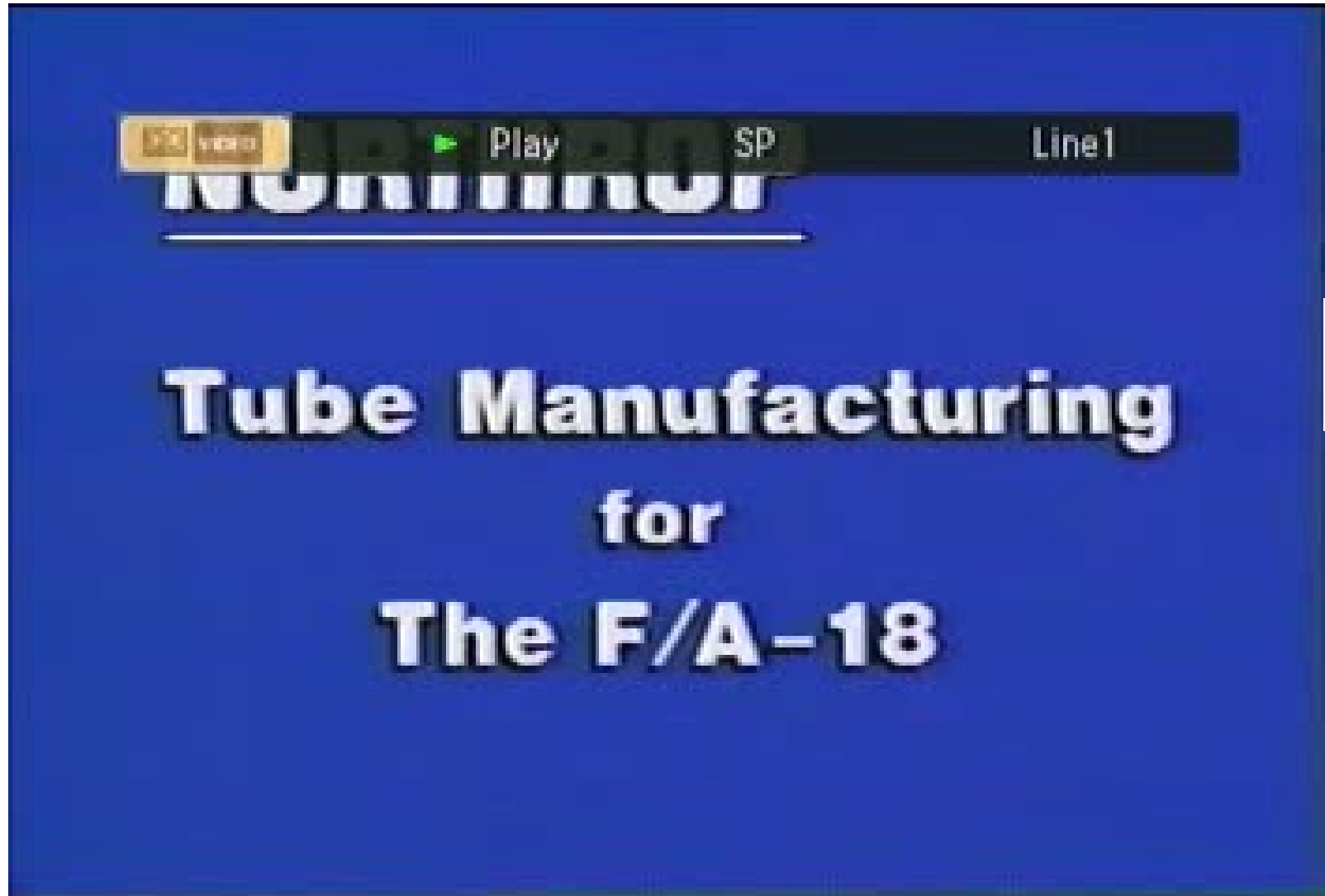
HCA Case

- \$731,000,000 recovered (via settlement)
- Alleged frauds
 - Billing for lab tests that were not ordered by physicians
 - “Upcoding” medical problems to get higher reimbursements
 - Billing for advertising (called “community education”)
 - Billing for non-reimbursable costs

U.S. ex rel Robinson & Patterson v. Northrop

- Qui tam relators
 - Walter Robinson
 - Erma Patterson
- Alleged fraud in multiple programs
 - 747 (Air Force One)
 - F/A-18
 - Other programs
- F/A-18 allegations – tubing
 - Skipping required tests and inspections – false certifications
 - Falsifying test and inspection results

Jet Fighter Video



How the Case was Won

- Prominent plaintiffs' counsel
 - History of suing Northrop
 - "NDSI" cases
- Depositions of the Plaintiffs
- Summary judgment motion
 - No material disputed facts
 - Northrop entitled to judgment as matter of law

Here we go again

- ❑ Joe's Bike Co. sold 10,000 bikes to U.S. government
- ❑ Bikes included certification that they were 100% carbon fiber
- ❑ In fact, 2,000 of the bikes were made in China and included aluminum
- ❑ The JBC employee (Xander Dumass) who signed the certification knew about the aluminum
- ❑ 25 different invoices included Chinese bikes

Potential False Claims Act Exposure

- 2,000 bikes x \$5,000 = \$10 million
 - Trebled = \$30 million
- Penalties of \$11,000 x 25 invoices = \$275,000
- Total exposure: \$30,275,000
 - Plus attorneys' fees to the Relator's counsel

Qui Tam Lawsuit

- ❑ In February 2011, JBC discloses the China bike issue in an SEC filing
- ❑ In March 2011, a JBC employee (Jane Turncoat) files a *qui tam* lawsuit against JBC
- ❑ Government declines to intervene
- ❑ Turncoat is a poor performer who was going to be fired
- ❑ Turncoat alleges that she was punished (poor reviews) for reporting false claims internally
- ❑ Turncoat settlement demand:
 - \$12 million to government
 - Attorneys' fees
 - \$1 million for retaliation plus promotion
- ❑ Anticipated defense costs: \$2 million

Questions for the Board

1. Should we fight the case or attempt to settle?
2. If we attempt to settle, what should we counter-offer as to:
 - a. \$12 million demand (false claims)
 - b. \$1 million demand (retaliation)
 - c. Promotion demand (retaliation)
3. What other terms should we propose in settlement?
4. What should we do to improve our internal controls for sales to government?

The Rule of Law

“For 500 years the West patented six killer applications that set it apart. The first to download them was Japan. Over the last century, one Asian country after another has downloaded these killer apps—competition, modern science, the rule of law and private property rights, modern medicine, the consumer society and the work ethic. Those six things are the secret sauce of Western civilization.”

Harvard historian Niall Ferguson

Civilization: The West and the Rest