AN OVERVIEW OF "QUI TAM" ACTIONS

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BACKGROUND

Originally enacted in 1863, the False Claims Act[1] (FCA) was part of a concentrated effort by the Federal Government to combat defense contractor fraud during the Civil War.[2] Although the statute has undergone modifications throughout the years, its purpose remains the same: To prevent fraud against the United States. While there is little extraordinary about much of the FCA, the unusual enforcement mechanisms warrant examination. Within the FCA, two means of enforcement are outlined. Not surprisingly, the first vests primary authority for enforcement of the FCA in the hands of the Attorney General of the United States.[3] However, the second mode of enforcement is somewhat more remarkable. These provisions, referred to as "qui tam" provisions, vest additional authority for enforcement of the FCA in the hands of private citizens, who are authorized to bring suit on behalf of the United States, with the promise of a share of any monies recovered serving as incentive.[4] These suits, commonly known as "qui tam" actions, permit private individuals to sue on behalf of the United States to recover money that was fraudulently obtained by a person or corporation. The rationale behind sanctioning such suits was perhaps best expressed by the Supreme Court in United States ex rel. Marcus v. Hess: "... [O]ne of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain."[5]

INITIATING A "QUI TAM" ACTION

To initiate the process, a private citizen, referred to as a "relator," files the complaint in the United States District Court. The complaint must be filed in camera and remain under seal for at least 60 days, during which time all information contained within the complaint must be kept confidential from outside parties, including the defendant.[6] The relator is also required by law to serve a copy of the complaint, as well as a written disclosure statement detailing all pertinent information in the relator's possession, upon the United States Government.[7] Once these steps have been taken, the United States is granted a mandatory 60-day period to investigate the relator's allegations and decide whether to intervene in the lawsuit and assume primary responsibility for the litigation.[8]

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[1] 31 U.S.C.S. Sec. 3729 et. seq.
[2] Originally enacted in 1863 as the "Informer's Act."
[3] 31 U.S.C.S. Sec. 3730(a)
[4] Id. at Sec. 3730(b). The phrase "qui tam" is an abbreviation for "qui tam pro domino rege quam pro se ipso in hac parte sequitur," which, when translated, means "Who brings the action for the King as well as for himself."
While "qui tam" actions originally developed in thirteenth-century England, the concept was first utilized in the United States by lawmakers of the First Congress, who included "qui tam" provisions in ten of the first fourteen
American statutes imposing penalties. See Major John C. Kunich, USAF, "Qui Tam: White Knight or Trojan Horse," 33 A.F.L. Rev. 31 (1990).
[5] 317 U.S. 57, 541 n.5 (1943)
[6] 31 U.S.C.S. Sec. 3730(b)(2)
[7] Id.
[8] Id.

This 60-day period may be extended upon a showing of "good cause" and, as a practical matter, extensions are often liberally granted.[9]

GOVERNMENT ACTION

A. Government Intervenes

If the United States elects to intervene and assume primary responsibility for the litigation of the suit,[10] the relator remains a party to the action. However, the United States may restrict the relator's role upon a showing of undue delay, repetition, etc..[11] For example, a relator may perform certain functions during the trial, such as calling and cross-examining witnesses, but the United States may limit the scope or length of that cross-examination to prevent undue delay. Further, if the United States intervenes, it may dismiss or settle the lawsuit over the relator's objection. Should the United States move to dismiss or settle the action, the relator must be notified of the intended action and provided an opportunity to be heard on the matter.[12] If the court determines the settlement to be "fair, adequate, and reasonable under all the circumstances," it will allow the settlement despite the objections of the relator.[13] Where the United States elects to intervene in the action, the relator is nevertheless entitled to a share of any monies recovered from the defendant. Specifically, when the Government intervenes in a "qui tam" action, the relator is typically entitled to between 15% and 25% of the proceeds recovered in the action, as well as reasonable expenses and attorney's fees.[14]

B. Government Declines to Intervene

Following its investigation, the United States may decline to intervene in place of the relator.[15] In such cases, the relator has the right to conduct the action and has primary responsibility for the litigation. Nonetheless, the United States maintains a significant amount of leverage to influence the lawsuit. For example, although not a party to the action, the United States may require both parties, upon request, to provide copies of all pleadings filed in the action, as well as copies of all deposition transcripts.[16] Additionally, the court may, "without limiting the status and rights of the person initiating the action," allow the United States to intervene in a "qui tam" action after initially declining to do so, upon a showing of "good cause."[17] Finally, some courts have permitted the United States to veto the proposed settlement of a "qui tam" action, even though it has previously declined to intervene in the case and makes no attempt to do so at a later date.[18]

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[9] Id. at Sec. 3730(b)(3)
[10] Id. at Sec. 3730(b)(4)(A)
[11] Id. at Sec. 3730(c)(2)(C)
[12] Id. at Sec. 3730(c)(2)(A) and (B)
[13] Id. at Sec. 3730(c)(2)(B)

[14] Id. at Sec. 3730(d)(1). Pursuant to Sec. 3730(d)(3), a relator will not be allowed to recover from the proceeds if he or she is convicted of criminal conduct arising from his or her role in the violation of the FCA.
Further, if the relator is in some manner responsible for the violation, the court may reduce the share of the proceeds that the relator might otherwise receive, taking into consideration the role the relator played in bringing the case to court.
[15] Id. at Sec. 3730(b)(4)(B)
[16] Id. at Sec. 3730(c)(3)
[17] Id.
[18] See Searcy v. Phillips Electronics North America Corp., 117 F.3d 154 (5th Cir. 1997)(holding that United States has an absolute right to veto any proposed

Regardless, in those cases where the Government declines to intervene, the relator's recovery amounts increase, as he or she bears the burden of financing the lawsuit. Specifically, when the relator pursues the action without United States intervention, the relator is entitled to receive an amount between 25% and 30% of the proceeds recovered in the action, as well as reasonable expenses and attorney's fees.[19]

PUBLIC DISCLOSURE BAR

Prior to 1943, relators were permitted to initiate suits based upon information that was already in the possession of the Government. Thus, relators who had contributed little or no relevant information to the Government in their fight against fraud were reaping the benefits of the FCA.[20] In response to these "parasitic" lawsuits, Congress amended the FCA in 1943 to prohibit "qui tam" actions based upon information in the possession of the United States or any of its employees. This effectively prohibited any employee of the United States from initiating a "qui tam" action. The result of this broad jurisdictional bar was a drastic reduction in the number of "qui tam" actions brought during the years 1943 to 1986. However, the 1986 amendments to the FCA revitalized the "qui tam" provisions of the FCA and broadened the right to pursue "qui tam" actions as a means of combating fraud against the United States. These amendments eliminated the ban against "qui tam" actions based upon information in the possession of the United States or its employees and, instead, authorized private citizens (including employees of the United States) to bring "qui tam" actions, subject to only four (4) exceptions. One notable exception is the "public disclosure" bar. The "public disclosure" bar forbids a court from hearing a "qui tam" action if the litigation is based upon previously, publicly disclosed allegations or transactions, unless the relator is an "original source" of the information.[21] Through this exception, "Congress was attempting to prevent parasitic lawsuits while, at the same time, not barring proper 'qui tam' claims by individuals who provided new information to the Government."[22]

The "public disclosure" of information can take place in one of three ways: First, during a criminal, civil, or administrative hearing; second, in a Congressional, Administrative, or General Accounting Officer report, hearing, audit, or investigation; or, third, in the news media.[23] If the qui tam" action is not based upon publicly disclosed information, the public disclosure" bar is inapplicable and the action may continue. However, if the court determines the qui tam" action is

settlement, even if it previously declined to intervene). But
see United States ex rel. Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994)(holding that United States
may only veto a proposed settlement during the initial sixty days of the action, when it may still intervene as a
matter of right).

[19] 31 U.S.C. Sec. 3730(d)(2)

[20] See Hess, supra note 5, where the Supreme Court allowed a "qui tam" action in a case where the relators
copied their complaint from a criminal indictment and had no original information of their own.

[21] 31 U.S.C.S. Sec. 3730(e)(4)

[22] See Christopher C. Frieden, "Protecting the Government's Interests: Qui Tam Actions Under the False Claims
Act and the Government's Right to Veto Settlements of Those Actions," 47 Emory L.J. 1041, 1048 (1998).

[23] 31 U.S.C.S. Sec. 3730(e)(4)(A)

based upon publicly disclosed information, the relator must qualify as an "original source" of the information to avoid having the lawsuit dismissed. To qualify as an "original source," the relator must have direct and independent knowledge of the allegations of fraud and voluntarily provide the information to the United States prior to filing a "qui tam" action.[24] By definition, a relator will not generally qualify as an "original source" if his or her information is obtained secondhand (e.g., from a friend or spouse).[25] Similarly, employees of the United States whose jobs require the investigation and uncovering of fraud (e.g., fraud investigators) will likely fail to qualify as an "original source" of the information, as they are not "voluntarily" providing the information to the United States, but are required to do so in the course of their duties.[26]

PROVING A VIOLATION OF THE FCA

The FCA prohibits a variety of fraudulent acts.[27] However, in most actions brought pursuant to this statute, the relator must prove that the defendant "knowingly" presented to the United States a false or fraudulent "claim" for payment. Previous versions of the FCA required the relator to prove the defendant had "actual" knowledge of the false nature of the claim, as well as the specific intent to defraud the United States. However, the current version defines "knowing" and "knowingly" in a much more expansive manner and eliminates completely the requirement to demonstrate the defendant had the specific intent to defraud the United States. Now, a relator may succeed if it can be shown that the defendant (1) had "actual" knowledge of the false nature of the claim; (2) acted in "deliberate ignorance" of the truth or falsity of the

[24] Id. at Sec. 3730(e)(4)(B)

[25] See generally United States ex rel. Devlin v. California, 84 F.3d 358 (9th Cir.), cert. denied, 519 U.S. 949,
136 L.Ed.2d 252, 117 S. Ct. 361 (1996)("... relator had ?direct and independent' knowledge because he had
discovered the information ... through his own labor").

[26] See generally United States ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17 (1st Cir.), cert. denied, 499 U.S.
921, 113 L.Ed.2d 246, 111 S. Ct. 1312 (1990)("It was LeBlanc's responsibility, a condition of his employment, to
uncover fraud. The fruits of his effort belong to his employer ? the government").

[27] 31 U.S.C.S. Sec. 3729(a) imposes liability on any person who "(1) knowingly presents, or causes to be presented, to an officer of employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval; (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government; (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid; (4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate of receipt; (5) authorized to make or deliver a document
certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government,
makes or delivers the receipt without completely knowing that the information on the receipt is true; (6)
knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of
the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or (7)
knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an
obligation to pay or transmit money or property to the Government."

claim; or (3) acted in "reckless disregard" of the truth or falsity of the claim.[28] Thus, a relator may ultimately succeed without ever having to prove the defendant had knowledge of the claim's falsity. For example, a doctor who delegated billing authority to his wife and failed to review the claims for accuracy, was found guilty of a violation of the FCA based upon his "reckless disregard" for the truth or falsity of the billing records.[29]

A "claim" under the FCA is defined as:

> "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded."[30]

The recognition of what constitutes a claim is critical for two reasons. First, the number of fraudulent claims presented by a defendant will determine the penalties that may be adjudged. Typically, a defendant is "liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus three times the amount of damages which the Government sustained because of the act of that person," per claim.[31] Second, and on a more practical level, increased penalties will result in an increased recovery for the relator, whose recovery is based upon the total proceeds recovered in the action.

PROTECTION AGAINST RETALIATION

While virtually anyone can be a relator, the majority of those who bring "qui tam" actions are current or former employees, who have an insider's perspective on the wrongdoing. In order to protect vulnerable relators or employees, the FCA specifically forbids retaliation against those who initiate or assist in furthering a "qui tam" action.[32] To aid in enforcing this prohibition, the statute confers a cause of action on the relator or employee in United States District Court.[33] In order to recover under the retaliatory provisions of the FCA, a relator or

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[28] Id. at Sec. 3729(b)

[29] See United States v. Krizek, 111 F.3d 934 (D.C. Cir. 1997).

[30] 31 U.S.C.S. Sec. 3729(c). Of note, pursuant to §3729(e), the FCA does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

[31] Id. at Sec. 3729(a)

[32] Sec. 3730(h) provides that "any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in the subsection."

[33] Id.

employee must prove that (1) his or her actions were taken in furtherance of the "qui tam" action; (2) the employer knew of the actions of the relator or employee; and (3) the relator or employee was retaliated against because of his or her actions in furtherance of the "qui tam" action.[34] If the relator or employee is successful, extensive relief may be granted, to include reinstatement with the same seniority status, two times the amount of back pay, interest on the back pay, etc..[35]

CONCLUSION

In this article, a general overview of selected issues has been provided to assist Federal law enforcement officers in gaining a basic understanding of "qui tam" actions. These actions provide the United States with a valuable tool in the fight against fraud. Further, through an understanding of these provisions, Federal law enforcement officers investigating fraud against the United States may likewise find the "qui tam" provisions to be a useful addition to their arsenal of weapons.

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[34] See Frieden, supra note 22, at 1056.

[35] 31 U.S.C.S. Sec. 3730(h)