

Why Is Qui Tam Litigation Often So Difficult to Resolve?

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The Current Qui Tam Environment

There has been a shift in the fault patterns of qui tam litigation. More qui tam cases are being filed than ever before. The statistics demonstrate that the number has increased steadily over the last few years, with the largest number of qui tams ever filed in federal and state courts in 2010.¹ This accelerated pace shows no signs of abating as the False Claims Act (FCA) is widely described as “the fastest growing area of federal litigation.” Since Congress enacted the FCA’s comprehensive qui tam provisions in 1986, qui tam cases have accounted for over half of all FCA cases filed.² Last year alone, more than 80% of FCA matters were initiated under the qui tam provisions.³ One reason behind this wellspring of new cases is that relators have capitalized on sweeping changes to the federal FCA,⁴ which make it easier for relators to initiate cases.

If you add to this mix the more than 30 states, counties, and cities with their own FCAs, the ensuing explosion of qui tam litigation is better understood. The vast majority of these state and local FCAs have strong qui tam provisions—some more comprehensive than the federal act—that relators are using with increased vigor. State and local governments also are using their newly passed FCAs, intervening in an increasing number of cases, and, at times, are aggressively advancing beneficial state-based fraud theories. Unquestionably, this confluence of federal, state, and local activity has changed the legal landscape of FCA litigation.

Current qui tam litigation represents a hybrid amalgamation of state and federal FCA cases, initiated by private relators and their counsel. Sometimes these cases move forward in



tandem with federal and state prosecutors, sometimes they do not. Many qui tams are far more complex and sophisticated than those filed in the past. Federal district courts and a growing number of state courts are becoming more comfortable with private relators proceeding with these often complex fraud cases, with or without government intervention, thereby validating the legislative intent behind the 1986 amendments to the FCA that added the qui tam provisions.⁵

The relators' bar also has grown exponentially over the last two decades into a skilled, battle-hardened group that often is less risk adverse than its federal or state colleagues. The bar is more willing than in the past to go the distance to prove what they believe to be meritorious cases on behalf of their clients and, of course, federal and state taxpayers. The defense bar is equally skilled, vigorous in their defense of these complex cases, and well-versed in the intricacies of federal and state qui tam litigation. The defense is more than willing to litigate difficult theories, unrelenting in their pursuit of outright dismissal of cases, and resolute that non-meritorious qui tams should never result in a recovery.

A Sea Change Is Underway

Under the old paradigm, the government would intervene in cases it believed were meritorious at the end of a lengthy, sealed investigation period, but before the commencement of litigation. Historically, courts provided the government with liberal extensions in which to fully investigate the allegations and settle or otherwise dispose of the claim, with some cases remaining under seal for three years or even longer. Government intervention decisions played a pivotal role in how qui tam cases were resolved. Where the government intervened, statistics demonstrate that success was all but assured. Over 95% of intervened cases either were settled for substantial amounts or a significant judgment was achieved.⁶ Few cases, however, were ever litigated. Conversely, in cases in which the government did not intervene, over 90% were dismissed with no recovery.⁷ The remaining percentage of cases resulted in mostly smaller settlements. This paradigm, however, is in flux.

A variety of reasons explain this shift. First, the size and complexity of settlements and judgments has increased. Second, as the size of settlements have increased, relator shares also have increased. Third, prior scorched-earth litigation postures have substantially driven up attorneys' fees and costs on all sides. Fourth, following the most recent FCA amendments, it is now easier to bring 31 U.S.C. § 3730(h) retaliation claims, which often are drivers of qui tams. As a result, the class of relators who can and do bring these claims has expanded significantly.

The new paradigm is not one in which the primary stakeholders—federal and state governments, defendants, defense counsel, relators, relators' counsel, or the courts—are entirely comfortable. Whether or not these cases are meritorious, they consume massive amounts of legal, judicial, and corporate resources. Are there ways to resolve appropriate cases

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more efficiently and fairly before they denigrate into scorched-earth campaigns?⁸ This article discusses the roles of the primary stakeholders in qui tam litigation, both from a historical perspective and in the current, evolving environment. The article considers what has and has not worked in the resolution of complex FCA cases and what should be more carefully examined going forward in the ever-changing face of vigorous qui tam enforcement. The article concludes by suggesting practices that may facilitate faster, more efficient, and more equitable settlement of appropriate qui tam cases.

The Resolution of FCA Cases in the Past

In the past, most qui tam cases have followed well-traveled litigation paths. Defendants hire experienced law firms that attempt to achieve quick victory by filing a slew of motions to dismiss based on Federal Rules of Civil Procedure 9(b) and 12(b)(6), or on related jurisdictional grounds. Historically, defense counsel has had significant success with this approach. Recent congressional amendments to the FCA,⁹ however, have removed some of these successful defenses. Motion practice continues to be an effective tool to reduce the scope of allegations, but outright dismissal is now less assured. Nevertheless, this early motion practice also can drag on for months and even years in some cases.

On both sides, voluminous written discovery is exchanged, followed by depositions, expensive experts, and typically multiple rounds of summary judgment motions in the hope

that the case never makes it to a jury. Much too often both sides use discovery to bolster or attack the relator and/or the defendants, which often is coupled with unproductive and distracting disputes about document production and years of depositions. In some cases, sanction motions and counter-claims are threatened or exchanged to add more drama to this legal brinkmanship.

For both sides, this pyrrhic approach is extremely expensive, often alienates both sides, and taxes limited judicial resources. Most importantly, it routinely leads to unwanted results for both sides by adding years to the litigation and millions of dollars in fees and costs. Other fallout from this approach is not as easy to articulate, but is a predictable by-product. The warring litigants can become so distrustful of each other that it makes resolution short of summary judgment, a jury verdict, or the literal death of the relator, virtually impossible.

If counsel could engage in a meaningful dialogue at the action's inception, even in a highly contentious case, discovery could be tailored to address the merits, not the costly and contentious skirmishes that often predominate in today's qui tam litigation. By doing so, both sides would have a better sense of the strengths and weaknesses of their respective positions without expending years of time, energy, and resources on ancillary issues.

An Emerging Paradigm

A shift also is occurring in the way FCA cases are being viewed and litigated. Many in the relators' bar are deciding not to wait for their government partners to proceed on what they deem to be valid, and, at times, untested but highly viable theories. The government, on the other hand, seems more inclined to allow relators to take the lead while it assesses the overall merits of the case. Consortiums of seasoned counsel are banding together to provide relators with expertise and litigation stamina to survive a vigorous defense. These decisions also are fueled by increasingly aggressive state attorneys general who are using their far-reaching state laws at a time of mounting budget shortfalls. The defense is responding to this shift with early and vigorous motion and discovery practice and putting relators and government prosecutors to their proof.

More recently, district courts are imposing deadlines on the government to make prompt intervention decisions, in many cases before the government has fully evaluated the case.¹⁰ This dynamic has impacted both relators' and defense counsel. Relators' counsel must ensure their complaint is solid enough to survive a motion to dismiss, while early unsealing gives defense counsel a preview of the case and an optimal opportunity to attempt to dismiss some or all of the allegations before the government has finished its evaluation of the claims.

Some courts not only seem willing, but also appear to encourage relators to move forward even without government intervention. Historically, many federal courts have taken a dim view of non-intervened cases, but this trend also appears to be changing. While a host of non-intervened cases continue

to be dismissed at or near inception, the number of non-intervened cases surviving the dismissal stage has risen. A growing number of these non-intervened or partially intervened cases appear to be headed for the courthouse or at least the courthouse steps.¹¹

The Government's Changing Role

The government is and shall always remain the most pivotal player in the enforcement and interpretation of the federal FCA, but its role also appears to be changing. As noted above, the government now appears to be choosing, in some selected cases, to make no decision on intervention, but to see how a case progresses through the courts. Part of this strategy is driven by severe budget cuts, other resource issues, and shifting prosecutorial priorities. If the government views the case as progressing toward an acceptable resolution, it always can intervene at a later time in the litigation, and still obtain up to 70% of any recovery while reducing the expenditure of its limited resources.

In many cases, the government is not passively watching the case proceed, but rather actively participating by filing "Statements of Interest," amicus briefs, litigating appeals, appearing in court, and otherwise coordinating wherever possible with relators. Although the government is not technically "in the case," the government makes its position known to the courts on substantive legal issues. For example, in some of the non-



intervened cases referenced earlier,¹² the government filed strong Statements of Interest in response to dispositive motions filed by defendants and submitted and argued appeals of dismissals as amicus. In each case, the government has cited its status as a party in interest, even though not a party to the litigation. Indeed, in both the *Genentech* and *Blackstone Medical* cases, the government not only argued against dismissal, but also that, if the cases were dismissed, the dismissal should be without prejudice to the government, a non-party to the litigation.

The Courts' Role in Today's Qui Tam Cases

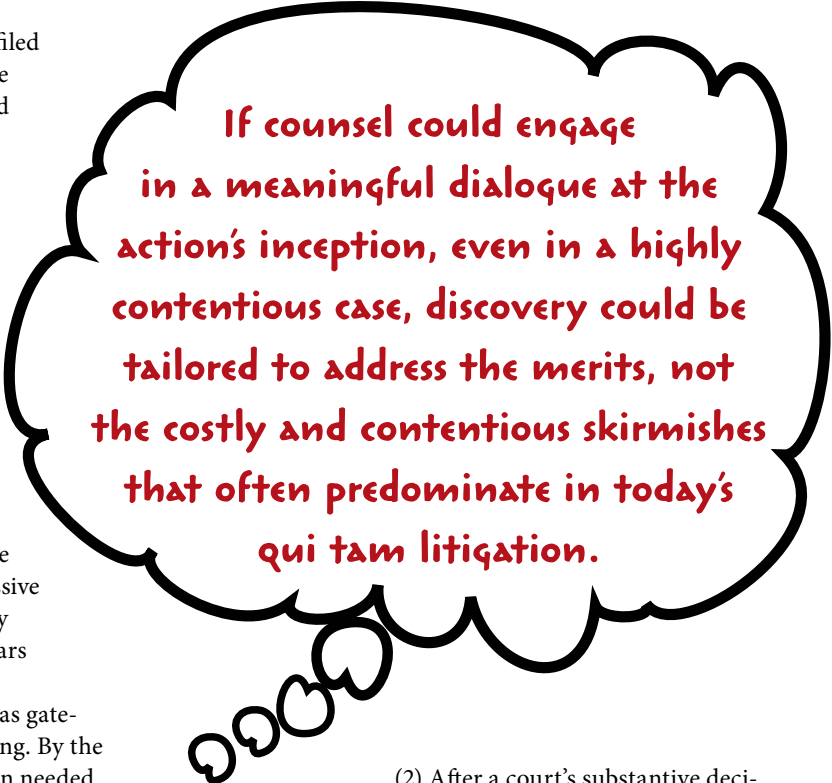
As noted above, in the past many courts seemed to believe that if the government declined a qui tam case, there was something inherently defective with the relator's action. For a variety of reasons, including massive budget cuts, dwindling investigative resources, and key personnel and administration changes, this view appears to be changing.

Courts play an important role because they serve as gatekeepers to keep non-meritorious cases from proceeding. By the same token, they also can assist meritorious cases gain needed traction without the government. Courts are more reluctant to involve themselves too quickly in a qui tam case out of concern that the full facts on both sides have not been presented or developed. Some courts, however, have wondered out loud during routine court proceedings whether prosecutors are being aggressive enough on the more difficult and complex cases. Consequently, the courts have afforded relators' counsel a greater opportunity to prove their case with or without the assistance of the government or its agencies.

The Rhythm of Litigation and Opportunities for Resolution

In the authors' combined experience, qui tam litigation has a clear rhythm, despite these cases' complexity. In appropriate cases, there are natural junctures in the litigation to explore the possibility of an efficient and fair resolution. The following describes these junctures in the litigation process. Both sides should engage each other as early and often as practicable to take advantage of these opportunities where appropriate.

(1) After declination, or more likely if no intervention decision is reached by the government, but before discovery has begun, is a natural and appropriate time to discuss mediation or settlement. This is a logical time before positions are entrenched and costs have skyrocketed when the parties should probe critically the parameters of the case and whether there may be a resolution favorable to both sides.



If counsel could engage in a meaningful dialogue at the action's inception, even in a highly contentious case, discovery could be tailored to address the merits, not the costly and contentious skirmishes that often predominate in today's qui tam litigation.

(2) After a court's substantive decision on a motion to dismiss, but before the bulk of discovery has commenced, can be an excellent time to engage in settlement discussions. This juncture in the litigation is a natural time to evaluate the court's opinion on the likely future progression of the case while avoiding substantial discovery costs.

(3) After discovery closes, but before extensive summary judgment briefing, is another natural time to discuss resolution. By this time, both sides should have evaluated the strengths and weaknesses of their respective cases. Stepping back to take a less-jaundiced view of the other's case would benefit both sides.

If possible, depending on issues in the case, some type of alternative dispute resolution, such as mediation, discussed below, should also be explored, provided that both sides are motivated to conduct good faith negotiations.

Mediation and the Mediator

Mediation unquestionably should have a more prominent role in resolving today's complex qui tam litigation. In the past, alternative dispute resolution has not been particularly successful or embraced by any of the parties other than the courts. Modern qui tam litigation is such a complex and ever-changing area that a mediator must be well-versed in the substantive law and the actual practice and procedure of these types of cases, an admittedly mixed bag of talents. Given the complexity of qui tam practice and the substantial increase in this type of litigation, many mediators are simply not equipped



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in the intricacies of this practice area to be productive facilitators. At a minimum, a successful mediator must grapple with several issues that are unique to qui tam litigation, including:

- » What is an appropriate measure of damages since the measure of damages is not defined by statute and has been subject to varying judicial interpretations?
- » What is the breadth and scope of the release?
- » What is the role of all of the respective agencies and agents who are involved in the potential settlement?
- » What about potential collateral consequences? Are Corporate Integrity Agreements, Compliance Certification Agreements, and/or administrative penalties involved?
- » What will be the resolution of attorneys' fees and costs? This issue often is highly contentious. What is the relator's share, or, if multiple relators have sued the same entity, how will their recoveries be allocated among the various claims and defendants?

Successful mediation requires a mediator who is acceptable and trusted by both sides. This is an area that needs further development. Many parties who might embrace mediation are left wondering who could mediate the case with the requisite skill sets needed to resolve all of the issues that are extant in a qui tam case to the parties' satisfaction. There are too few mediators who possess such skill sets and are perceived as fair to both sides. At times, the parties leave the mediation table dissatisfied with the outcome, with more ill will generated than progress toward resolution.

Conclusion

So where does that leave the litigants in a modern qui tam case? As more qui tams are filed, the litigants need to examine those cases that can and should be resolved early before costs escalate, and the parties' positions attenuate. Litigants should review each case with a fresh eye and determine whether it is an appropriate one to try to resolve and, if so, at what juncture? This article highlights the natural times for quick, cost effective settlements to both sides in appropriate cases. The parties must triage these cases the way they would other types of litigation and make an attempt at dispassionate claims resolution. We also need more mediators who are conversant in the peculiar intricacies of qui tam litigation and who can assist the parties to achieve the right resolution in appropriate cases. Qui tam litigation is an ever-changing landscape, but with these changes come opportunities to achieve the right equipoise for all stakeholders involved. **C**

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Mr. Raspanti and Ms. Auten serve as Co-Chairs of the American Bar Association White Collar Crime Committee Qui Tam Subcommittee and are frequent lecturers and authors on qui tam litigation.

Endnotes

- 1 From January through September 2010, 574 new qui tam matters were filed, more than any other year since 1987. DEP'T OF JUSTICE, *Fraud Statistics Overview* (2011), www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.
- 2 *Id.*
- 3 Over 7,000 qui tams have been filed since 1987. See Elizabeth Wang, *Trends In Qui Tam False Claims Cases*, Law360.com, July 26, 2011.

- 4 See Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, and Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by Pub. L. No. 111-152.
- 5 Healthcare qui tams have predominated over the last decade in FCA litigation. Over \$2.5 billion of the \$3 billion recovered under the FCA in 2010 alone came from healthcare cases. See DEP'T OF JUSTICE Press Release, dated Nov. 22, 2010, available at www.justice.gov/opa/pr/2010/November/10-civ-1335.html. While the percentage of defense contracting FCAs declined after peaking during the Cold War in the 1980s and 1990s, these cases are on the rise given the massive war efforts in Iraq and Afghanistan. The economic downturn also has resulted in a growing number of financial industry qui tams. Recent additions of strong whistleblower programs by both the Internal Revenue Service and Securities and Exchange Commission certainly will lead to even more litigation across all industries.
- 6 See Wang *supra* note 3.
- 7 See *id.*
- 8 The authors both agree that some cases are not appropriate for resolution and must proceed to final adjudication by a fact finder.
- 9 See *supra* note 4.
- 10 See Sheri Quarters, *Cases deluge Boston Courts*, NAT'L L.J., Aug. 1, 2011.
- 11 For example, relators in the following cases proceeded with prosecuting cases where the government either declined to intervene or had not made a timely intervention decision: *United States ex rel. Underwood v. Genentech, Inc.* (E.D. Pa.); *United States ex rel. Hutcheson v. Blackstone Med., Inc.* (D. Mass); *United States ex rel. Bierman v. Orthofix Intern'l NV* (D. Mass); *United States ex rel. Carpenter v. Abbott Labs.* (D. Mass) (recently dismissed by joint motion of the relator and defense); and *United States ex rel. Taylor v. Gabelli* (S.D.N.Y.).
- 12 See *id.*

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