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Changing Tactics at the DOJ Stand to Permanently Alter the Face of Qui Tam Litigation



By R. SCOTT OSWALD AND DAVID L. SCHER

In 2013, a record 753 new qui tam matters under the False Claims Act (“FCA”) were opened at the Department of Justice, marking a 15.5 percent increase in volume over 2012 and illustrating the steady growth in this fast expanding area of law.

The growth was even higher in cases involving the Department of Health and Human Services as the “primary client agency,” with a 20.5 percent increase to 500 new matters in 2013. The growth is due in part to whistleblower-friendly changes in the False Claims Act, as well as recent record setting settlements, which make the FCA cases even more attractive to whistleblowers and their counsel.

This fast growth has spurred important changes in how courts and the DOJ handle qui tam matters. These changes in turn represent new threats to those who transact business with the government and significant barriers to entry to new plaintiff’s counsel.

The False Claims Act

The FCA, 31 U.S.C. §§ 3729–3733, imposes civil liability on any person, including a corporation, who knowingly uses a “false record or statement to get a false or

Oswald is managing principal of The Employment Law Group, PC, in Washington. He can be reached at (soswald@employmentlawgroup.com). Scher is principal. He can be reached at (dscher@employmentlawgroup.com). Their law firm is at <http://www.employmentlawgroup.net/>.

fraudulent claim paid or approved by the government,” and any person who “conspires to defraud the government by getting a false or fraudulent claim allowed or paid.” *Allison Engine Co. v. United States ex rel. Sanders*, 2008 BL 122109, 553 U.S. 662, 665 (2008). Violators of the FCA face treble damages and a civil penalty of \$5,500 to \$11,000 per occurrence.

The FCA’s qui tam provision, § 3730(b), allows a private person, known as a “relator” or “qui tam relator” to bring an action for a violation of § 3729 for themselves and the United States government. A successful relator may receive a reward of up to 30 percent of the proceeds plus reimbursement for attorneys’ fees, costs, and expenses.

Qui tam actions are filed under seal and must remain so for at least 60 days. Unlike a regular lawsuit, a qui tam action is not served on the defendant, at least not immediately. Instead, the complaint and a document known as a “relator’s statement” are served on the DOJ, which then use the period under seal to investigate the relator’s claims. The DOJ may also seek a partial lift of the seal to share with the defendant the existence of the allegations against it and to discuss possible defenses or settlement.

Once the DOJ completes its investigation, the government has three options: 1) intervene as the plaintiff on one or more claims; 2) decline intervention; or 3) move to dismiss the complaint. If the government intervenes, its attorneys act as lead counsel and the government will frequently prepare its own complaint, sometimes including counts under other laws such as the Truth in Negotiations Act or anti-kickback statute.

Once the government makes its intervention decision, the matter is unsealed and proceeds much like any other lawsuit. If the government declines to intervene,

the relator may pursue the claims on its own. Conflicting sources place the rate of government intervention at between 22 and 27 percent.

In practice, the government rarely, if ever, makes its intervention decision within 60 days. Instead, the government seeks the consent of the relator to extend the seal, usually for six months.

It is not uncommon for the government to seek multiple extensions or for cases to remain under seal for one or more years while the government conducts its investigation. In recent years, over 90 percent of the cases in which the government intervened have resulted in a settlement or judgment against the defendant. Thus, relator's counsel are generally receptive to the government's requests.

A Growing Backlog

The growing number of qui tam cases has outpaced the availability of resources at the DOJ and resulted in an increasing backlog. In 2008, the Washington Post reported that over 900 cases are "languishing in a backlog." Carrie Johnson, *A Backlog of Cases Alleging Fraud*, The Washington Post (July 2, 2008). The backlog results in cases remaining under seal for years at a time, clogging court dockets and allowing witnesses' recollections to fade and documents to grow scarce.

The backlog caught the attention of Sens. Patrick Leahy (D-Vt.) and Chuck Grassley (R-Iowa), members of the Senate Judiciary Committee, who introduced a bill called the Fighting Fraud To Protect Taxpayers Act of 2011. The Act sought to allow the DOJ to retain up to three and a half percent of the money that it collects pursuant to its civil debt collection activities, an increase from three percent. The additional one half percent was to be spent on the investigation and prosecution of fraud.

Sen. Leahy estimated that the Act would provide nearly \$15 million in additional funding. According to accompanying Senate Report, the increased spending is justified by DOJ estimates that it earns a 7-to-1 return on investment on health-care fraud cases and a 10-to-1 overall return on the criminal division. See S. Rep. No. 112-142.

Health care economist Jack Meyer estimates that every dollar invested by the government in investigation and prosecution of federal health care fraud returns at least \$20 back to the U.S. Treasury. See Jack A. Meyer, *Fighting Medicare & Medicaid Fraud The Return on Investment from False Claims Act Partnerships* (Oct. 2013), available at <http://www.taf.org/public/drupal/publications/reports/TAF-ROI-report-October-2013.pdf>. In his article, Meyer also notes that the true benefit of the qui tam provision of the False Claims Act is understated, as federal statistics do not include federal criminal and state civil recoveries.

Judicial Approach to the Backlog

Courts have grown impatient with the government and no longer grant extensions routinely. For example, in one of the authors' cases, the federal district judge assigned to the complaint refused to grant extensions unless the DOJ identified, under oath, its tasks undertaken, hours expended and persons involved in the investigation.

Another federal district court judge, the Hon. Joseph F. Anderson, Jr., of the United States District Court for the District of South Carolina, even went to so far as to issue a standing order in which his exasperation was evident:

[I]n recent years, this court has extended the seal period, at the request of the government, on eight occasions in two actions. The government recently announced its intention not to join in those actions, and the court, therefore, has authorized the unsealing of those cases and the service of the pleadings upon the defendants. These cases are now both more than three years old and, therefore, must be reported on this court's semi-annual report of long-pending cases.

In four other sealed actions, this court has extended the seal numerous times, ranging from two (in an action filed March 12, 2013) to five (in an action filed June 14, 2011). Most of the time, the government has suggested that an extension of the seal period is appropriate because the government has received permission from this court to disclose the existence of the lawsuit to the defendant for the purpose of requesting documents from the defendant and attempting to settle the case.

[T]his court enters this Standing Order to provide notice to the government that, hence forth, the court will no longer consider informal discovery and/or settlement negotiations as sufficient grounds for extending the seal period. Rather, the court will determine, as commanded by the statute, whether the government has shown "good cause" for extending the seal period.

See *In re: All Qui Tam Actions Filed Under the Federal False Claims Act Pending On The Docket Of United States Dist. Judge Joseph F. Anderson, Jr.*, No. 3:13-mc-452-JFA (D.S.C. Nov. 18, 2013).

Notice of "No Decision"

Section 3730(b)(3) of the FCA states that prior to the expiration of the seal, "the Government shall—(A) proceed with the action, in which case the action shall be conducted by the Government; or (B) notify the court that it declines to take over the action." Section 3730(c)(3) further grants the government the right to intervene at a later date "upon a showing of good cause."

Likely in part due to the judiciary's unwillingness to allow cases to remain under seal for extended periods, the DOJ has initiated a practice not recognized by the statute: issuing a notice of "no decision" and requesting that the case be unsealed, reserving the right to intervene at some later date at the government's discretion.

The DOJ's notice of no-decision has the same operative effect as a declination in that the relator may then prosecute the case on its own, but may not carry the same negative connotations for the court and outside parties as a declination. Once unsealed, the government can watch the case unfold from the sideline and intervene later if the relator uncovers favorable evidence of false claims.

To protect its legal interest, the government may file statements of interest with the court under 28 U.S.C.

§ 517 in order to clarify its position on how the court should construe the statute.

The government's new approach of punting the ball creates increased risk for both the relator and the defendant.

Uncertainty for Defendants

The DOJ's trend of postponing its intervention decision brings with it uncertainty for defendants. Typically, the government uses one-sided investigative tools such as subpoenas, interviews, civil investigative demands, and audits to gather information while a case is under seal. Once the DOJ renders its intervention decision and the case is unsealed, traditional two-sided discovery methods are utilized.

By delaying its decision, the threat of intervention looms over the defendant, along with the possibility of the government requesting additional information as it continues its investigation. The defendant must then weigh the benefits of cooperating with the government with the real possibility that the government will share with the relator any information that it provides.

Hardship for Relators

For many years, relators' counsel could depend on a predictable procedural progression for qui tam cases. First, counsel investigated and substantiated the relator's claims. If the relator and counsel could identify the who, what, where, when, and how of an alleged fraudu-

lent scheme, counsel would either approach the government to discuss the fraud and gauge the government's interest, or prepare to file a complaint in federal court and draft a relator's disclosure statement.

After filing the complaint and disclosing information about the claims to the government, relators' counsel would continue their informal investigation and assist the government as best possible while awaiting an intervention decision.

After making a decision regarding its formal intervention, the government would file a notice with the court and the case would be unsealed. If the government declined to intervene, then counsel would decide whether to prosecute the case without government assistance. Aside from the resources necessary to investigate the relator's claims and to prepare a complaint and disclosure statement, initiating a qui tam action took relatively little investment.

The game is quickly evolving. Courts are less willing to grant extensions to the government, and the government does not want courts to force its hand. Counsel now must consider whether their firm has the resources necessary to oppose one or more motions to dismiss and to underwrite the expenses associated with large scale complex discovery where documents can number in the millions.

Those costs create a barrier to the entry of new firms and hurdles for existing firms and may ultimately result in fewer qui tam cases at the detriment of American tax payers.