Demystifying the *Qui Tam* Process

By the Time Defendants Learn About a Lawsuit, a Lot Has Already Happened

By R. Scott Oswald

Defendants in *qui tam* lawsuits—in which a whistleblower accuses someone, usually a corporation, of fraud against the government—often don't realize they've been targeted until months, or sometimes years, past the original filing date.

This is deliberate: The federal False Claims Act (FCA) requires whistleblowers to file complaints under seal so that they don't jeopardize an ongoing criminal investigation, and also so that prosecutors can decide whether to intervene and throw their weight behind the civil complaint. The initial seal period is 60 days, but it's often extended at the government's request: Few U.S. Attorney's offices are ready to act on cases—especially meritorious cases—after a scant two months.

As a result, defendants tend to learn about *qui tam* suits in three main ways:

- Via investigatory demands in a civil or criminal investigation, which may tip a savvy defendant to an underlying whistleblower action; or
- Via a limited, court-authorized disclosure for the purpose of settlement discussions after the government has reviewed significant evidence; or
- Via service of an unsealed complaint, often after the government has decided to let the whistleblower proceed without further assistance.

By the time any of these things happen, much legal maneuvering has likely occurred outside the view of defendants—and even of the judge assigned to the case. As CLE Chair of the Qui Tam Section of the Federal Bar Association (FBA), my mission is to demystify this maneuvering so that all parties can act from a shared understanding of the process.

The observations in this article are drawn from my organizing work on **The False Claims Act Today**, a series of educational seminars sponsored by the FBA's Qui Tam Section in cooperation with local FBA chapters. The next seminar will be held in Sacramento on May 15, 2017, and will focus on the practicalities of *qui tam* litigation in the Eastern District of California. (See sidebar for details.)

Obviously there's no such thing as an average FCA case; defendants range from modest dental practices to huge defense contractors. Whenever a whistleblower is represented by an experienced *qui tam* lawyer, however, four themes emerge—themes that may shape the thinking of defense-side lawyers, and even some judges.

1. *Qui Tam* Cases Are Highly Personal

Under the FCA, whistleblowers are designated as "relators" who file their complaints on behalf of the United States and, by extension, on behalf of taxpayers who were ripped off in areas such as military procurement and Medicare reimbursement.

If they can prove their case, relators may be rewarded with up to 30 percent of the money that's recovered from a defendant. That's a potentially rich payout, but money is seldom a relator's main

motivation. Here I speak from experience: I have represented hundreds of whistleblowers, and with few exceptions they have filed their complaint as a last resort after their company failed them personally.

Typical relators are employees who were shocked to learn about shady practices at their workplace. Loyal team players, they reported these practices to their managers or elsewhere in their company, only to be rebuffed. Some whistleblowers were marginalized or fired because of their honesty, while others were merely ignored.

Hurt by their treatment, these employees now seek personal vindication—and the FCA, with its relator's reward and a robust anti-retaliation provision, provides a natural cause of action. Defendants underestimate such motivated antagonists at their peril.

2. Prosecutors Have a Say in Venue Selection

In its modern form, the FCA is now 30 years old—more than enough time for its specialists, both in the *qui tam* bar and within U.S. attorney's offices, to have developed preferences and working relationships.

As a result, the early stages of a well-considered *qui tam* case involve strong communication between a relator's attorney and the federal prosecutors in a jurisdiction where the case might be filed. Why? Because the easiest path to victory—for the relator and taxpayers alike—involves a complaint that is fully embraced by the local U.S. Attorney's office.

Our seminar series has helped to illuminate this dynamic. Based on the feedback of federal Affirmative Civil Enforcement (ACE) coordinators who have participated—typically rising Assistant U.S. Attorneys—we know that prosecutors are hungry for FCA cases that fall in their comfort zone:

- In the right industry: Some U.S. Attorney's offices are most familiar with Medicare cases, for instance, while others focus on fraud in higher education, or in military spending.
- Under the right legal theory: Some offices prefer cases of outright thievery, while others are comfortable with complaints that rely on implied certification (a theory recently endorsed by the Supreme Court) or kickbacks.
- Having the right connection to their jurisdiction: Some U.S. Attorneys believe they should pursue mainly corporations that are headquartered in their district, while others like reeling in "big fish" that do business all over the U.S.
- Fitting their staff capacity/philosophy: Some ACE programs have a team that's designed to investigate a small number of large, complex cases, while others can handle a more diverse caseload.
- Brought by law firms they trust: If a U.S. Attorney's office has had previous success with a law firm, it is likely to look seriously at complaints brought by the same attorneys.

None of this dispositive, of course—and ACE teams are obliged to investigate every FCA complaint filed in their jurisdiction anyhow. Still, experienced *qui tam* attorneys will conduct pre-filing discussions with one or more Assistant U.S. Attorneys in candidate districts, outlining the general shape of their complaint and gauging levels of interest. Usually the district that offers the warmest reception will get the case.

3. Whistleblowers Can (and Do) Help to Direct Investigations

The primary legal document in a *qui tam* case, obviously, is the complaint. But the FCA also requires relators to file a confidential disclosure statement that contains substantially everything known by the whistleblower, along with supporting documentation. This hefty dossier serves as a jumping-off point for the government's investigation.

Defendants are forbidden from seeing the disclosure statement, even after the seal is lifted, so *qui tam* lawyers often present it as a detailed roadmap for the U.S. Attorney's office. As long as the tone is respectful, short-staffed prosecutors say they're happy to see everything from a chronology of events to a list of document search terms to a complete witness roster—including each witness' likely testimony. Drafting the text of civil investigative demands, a major tool in FCA probes, may be seen as a step too far; it depends on the U.S. Attorney's office.

Even after the government starts its investigation, whistleblowers and their lawyers may continue to be deeply involved in reviewing evidence and even, in some cases, gathering more.

A caveat we heard from prosecutors at this point: They want to work with relators who will be upfront about the weaker aspects of a case—and who can recognize setbacks when they occur. No one wants to waste time.

4. Non-Intervention Doesn't Mean As Much Anymore

Because of a growing backlog of *qui tam* investigations, government officials often can't reach a conclusion on whether to intervene in an FCA case within the time allotted—and federal judges may be loath to grant endless extensions of a seal order.

One judge involved in our seminars said she doesn't believe that Congress intended to authorize years-long secret investigations; she deals with each extension request on a case-by-case basis, but becomes far more skeptical after two years have elapsed.

One result: When the clock runs out, the Department of Justice may issue a notice of "no decision," allowing the seal to be lifted but reserving the prosecutors' right to intervene at a later date. Such a notice isn't formally recognized by the FCA—but it generally is accepted by courts, since the government remains a party in the case regardless, its interest represented by the relator.

Even a decision of outright non-intervention, once the sign of a relatively weak *qui tam* case, may simply mean that the whistleblower's complaint didn't catch the eye of a time-pressed ACE coordinator at the U.S. Attorney's office.

Taken together, these four themes should help defendants to understand the path taken by an FCA case before they learn about it. Increasingly, the complaint will have been vetted by an ambitious AUSA in a jurisdiction that's been hand-picked by an experienced *qui tam* lawyer with a motivated client who has gathered enough evidence to proceed—but who also has identified the case's flaws.

What happens next? According to prosecutors, a defendant's smartest move is to engage in exactly the same process already followed by the whistleblower: A frank but informal discussion of the strengths and weaknesses of the case. Stakes are high under the FCA, with its large penalties and triple damages, and every actor needs as much information as possible.

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SIDEBAR

On May 15, 2017, author R. Scott Oswald will bring the FBA's **The False Claims Act Today** seminar to Sacramento, where panelists will discuss the logistics of FCA practice in the Ninth Circuit generally and the Eastern District of California (E.D. Cal.) in particular. Speakers will include lawyers from both sides of the aisle, as well as Colleen Kennedy, who is AUSA and ACE coordinator for E.D. Cal., and Hon. Kimberly J. Mueller, U.S. district judge for E.D. Cal. Attendees will receive 1.5 California MCLE credits.

For more details and to register, go to http://www.fedbar.org/fcasacramento.aspx

If you'd like to bring the FCA Today seminar to your district, contact Mr. Oswald at soswald@employmentlawgroup.com.