A Quick Guide to Qui Tams

BY JESSICA PERLICK, ESQ.

During the Civil War resources were scarce, so suppliers of necessary items, such as munitions, enjoyed a booming business with the War Department of the federal government. While some vendors were contracting in an above-board and ethical manner, in 1861, a congressional committee discovered rampant abuse of those contractual obligations by many others.[1] As with any arena in which there is money to be made, bad actors took steps to increase their bottom lines, whether by promising goods to the government but never delivering, or by delivering goods that were ultimately worthless.

To combat the abuse by wrongdoers against the government, in 1863, Congress passed the False Claims Act (FCA). Under the FCA, anyone who knowingly submits, or causes to submit, false claims to the government, is liable for treble damages plus a penalty assessed for each false claim, as well as the government's costs incurred bringing the civil action.[2] Most states, including Nevada, have a state-specific version of the FCA that substantially mirrors the federal statute.[3]

What makes the FCA and its state corollaries unique is the mechanism by which cases are brought. Obviously, the government can, on its own initiative, investigate wrongdoing and file a case against the offender. But what happens when the government is unaware of the fraud taking place? Enter the qui tam action.

What is Qui Tam?

Derived from a Latin phrase,[4] a qui tam action refers to a type of civil case in which a private, non-governmental party files a complaint in the name of the government. The private party, or relator,

is typically a whistleblower – an internal employee with personal knowledge of fraudulent wrongdoing by an entity that receives financial compensation from the government. To initiate a qui tam action, the relator files the qui tam complaint under seal for 60 days, serves it on the government, and, in a major departure from standard civil practice, does *not* serve the complaint on the defendant.

For practitioners, I'm sure the omission of service to the defendant appears antithetical to the procedure in a civil case, but there are some practical reasons for it. First, because many relators are whistleblowers, the sealed complaint maintains their anonymity and protects against possible retaliation. Second, because a relator files the qui tam in the name of the government, the government must have an opportunity to investigate the allegations in the complaint. Keeping the case under seal helps protect the integrity of the government's investigation and ensures that critical information is not released on the public docket until the appropriate time. Finally, some qui tam complaints will not progress to litigation, even after the court lifts the seal, because the action is dismissed following the government investigation.

Government's Role in Qui Tams

To understand the role of the government in qui tam litigation, it may be useful to consider the process involved in a healthcare fraud case. Relator files a sealed qui tam in the names of the U.S. and individual states[5] alleging that a healthcare provider is defrauding government health programs, including Medicare, Tricare, and Medicaid. Relator serves the sealed complaint on the U.S. and the individual states. Relator will provide the U.S. and named states with a set of disclosures with the complaint, which contains documentary evidence that relator believes will support the allegations.

The government must now take steps to determine whether there is evidence to prove that the provider's conduct meets the elements of the FCA: falsity, knowledge, and materiality. This requires the government to consider multiple facets of the alleged conduct. For example, regarding falsity, did the provider violate policy restrictions? If so, what were they? Is the policy clear on its face? For knowledge, what did the provider know? Is it actual knowledge or deliberate indifference? What about a reckless disregard for the truth or falsity of the submitted claim? And finally, regarding materiality, would the government healthcare program have paid for the claim if it knew about the alleged misconduct?

All these considerations require the government to conduct its own independent investigation. For a healthcare fraud case, the named states will work with a centralized organization, the National Association of Medicaid Fraud Control Units, to identify attorney representatives for an intake team. The intake team will be the point of contact between the named states and the federal team. The federal team will usually have someone from the U.S. Attorney's Office for the relevant district, as well as an attorney from the Department of Justice and an investigator from the Office of the Inspector General. Together, the intake and federal teams will map out an investigative strategy for the case. Usually, the first task on the agenda is interviewing the relator to allow the government to fully flesh out the allegations.

"Despite what may, at a glance, seem like a complicated process, there are a few significant benefits of qui tam actions. For the government, a qui tam can shed light on fraudulent conduct that the government would not otherwise know about."

Thereafter, any number of actions can occur. The federal and intake teams will often go back to their respective agencies, e.g., Centers for Medicare and Medicaid Services and the individual state Medicaid programs, to clarify any relevant policies and applicable rules. Investigators may reach out to former employees or other potential witnesses to the fraudulent conduct. Federal and state data analysts will create damage models. The federal and intake teams may serve a Civil Investigative Demand (CID) on the provider, seeking specific documentary evidence to support the allegations.[6] While this all goes on, the government will ask the court to extend the seal to allow the confidential investigation to continue.

During the investigation, the government may determine that there is sufficient evidence to support the allegations. The government can request a partial lift of the seal to notify the defendant of the existence of the qui tam, while still maintaining the anonymity of the relator. After partially lifting the seal, the parties may exchange presentations in which each side provides its respective position on the evidence, working toward a possible settlement.

When there is sufficient evidence, whether the government engages with the defendant before the seal expires, at the end of the seal period, the U.S. and named states will intervene in the action and take over responsibility to litigate the case. If the federal and intake teams determine that there is insufficient evidence, then the government will decline to intervene. At that point, the relator can attempt to proceed on their own but must keep the government informed on the progression of the case. Additionally, the government maintains the right to move for dismissal of the action, so long as it intervenes to do so at some point during the litigation.[7]

Benefits and Challenges of Qui tams

Despite what may, at a glance, seem like a complicated process, there are a few significant benefits of qui tam actions. For the government, a qui tam can shed light on fraudulent conduct that the government would not otherwise know about. Although the case may only involve allegations against a single entity, often the investigation will allow the government to address loopholes within existing policies or possibly initiate related investigations into other similar entities who it determines to be engaged in the same misconduct. Additionally, the recovery is substantial;

CONTINUED ON PAGE 24

CONTINUED FROM PAGE 23

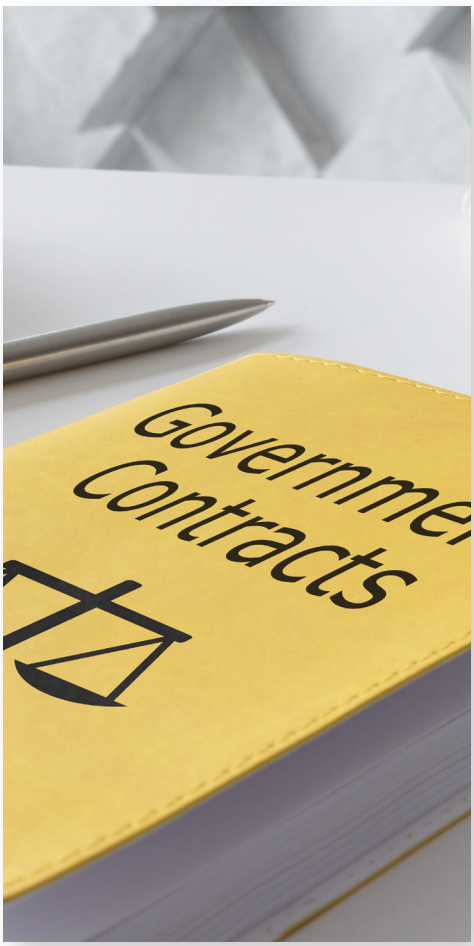
A Quick Guide to Qui Tams

as noted above, the FCA calls for the recovery of treble damages, plus costs of investigation, plus significant penalties. For the relator, a successful case will result in an award based on total recovery: not less than 15 percent and not more than 25 percent for a case resulting in settlement, and not less than 25 percent and not more than 30 percent for a case that succeeds at trial.[8]

But these cases are not without their challenges. Relators must be willing to not only come forward with their information, but must also retain counsel to represent their interests, and continue to work with the government throughout the case. Due to the complexity of the cases and the difficulty in proving fraud, investigations can take years to complete, with relators remaining on standby all the while.

For the government, multiple interested parties must come together to agree not only on investigative strategy, but settlement strategy, trial strategy, and delegation of responsibilities at every stage of the case. Additionally, because the defendants are often highly sophisticated, national corporations, the risk of high litigation costs only increases throughout the process. And the risks do not end with recovery; there are a significant number of active appeals across the country that continue to shape the way qui tam cases progress, from challenges to evidentiary burdens to arguments regarding the constitutionality of qui tams as a whole.[9]

Despite all these concerns, qui tams remain an invaluable tool for the government to combat fraud, resulting in billions of dollars of recovery every year.[10]



ENDNOTES:

1. *U.S. ex rel. Polansky v. Executive Health Resources, Inc.*, 599 U.S. 419, 424 (2023).
2. 31 U.S.C. § 3729(a). The per claim penalty is adjusted for inflation and currently set at not less than $5,000 and not more than $11,000.
3. The Nevada False Claims Act (NVFCA) can be found at Nev. Rev. Stat. 357.040. In addition to the states, the territories of Guam, U.S. Virgin Islands, and Puerto Rico also have FCAs.
4. "*Qui tam pro domino rege quam pro se ipso in hac parte sequitur*," or "he who brings an action for the king as well as for himself."
5. Not every state-FCA allows a relator to initiate a case. Nevada is part of the majority of states and territories that do have a qui tam provision. *See* NRS 357.080.
6. In the case of entities who contract with government healthcare programs, the provider contract includes a provision agreeing to furnish documents in support of a claim for reimbursement. In other words, there does not have to be an active court case to justify the government's request, so the service of a CID does not necessarily confirm the existence of a qui tam.
7. *Polansky*, 599 U.S. at 430.
8. 31 U.S.C. § 3730(d)(1-2). The relator is also entitled to recover reasonable attorneys' fees and costs.
9. *U.S. ex rel. Schutte v. SuperValu Inc.*, 598 U.S. 739 (2023) (holding that the scienter element of the FCA refers to the defendant's knowledge and subjective beliefs); *U.S. ex rel. Zafirov v. Florida Medical Associates, LLC*, 751 F.Supp.3d 1293 (M.D. Fla. 2024) (holding that a relator is subject to the Appointments Clause under Article II).
10. *The False Claims Act*, U.S. Department of Justice, http://www.justice.gov/civil/false-claims-act (last visited on 5/5/2025).

JESSICA PERLICK is a Senior Deputy Attorney General in the Medicaid Fraud Control Unit of the Office of the Nevada Attorney General, where she represents the state of Nevada in national qui tam cases involving allegations of Medicaid fraud. She also handles civil litigation involving Medicaid provider fraud and cases involving abuse and neglect of elderly and/or vulnerable adults.