

Part III. The Qui Tam Procedure

A) THE FILING OF A CIVIL QUI TAM COMPLAINT

The False Claims Act in §3730 provides that the Attorney General may commence the Government civil action under the Statute against such a person who is liable for making such a false claim. Most importantly though it provides that private persons, called “Relators” in the statute may bring a civil action for a violation of § 3729 for that Relator and for the United States Government and in the name of the Government.

- §3730(B)(1) provides for such filing but in order to forestall any actions detrimental to the Government’s interests the action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.
- §3730 (B)(2) states that the complaint shall be served on the Government but not upon the defendant and the complaint shall be filed in camera and under seal for at least 60 days. The defendant does not have to respond until 20 days after the complaint is unsealed and served upon the defendant.

B) THE GOVERNMENT INVESTIGATION

The Government for good cause can ask the court for extensions of time beyond the initial 60 days to keep the complaint under seal for months or years after the initial disclosure in order to investigate frauds which may involve thousands of claims, millions of documents and sometimes hundreds of millions of dollars of damages to the Government. The Government after it has completed its investigation can then either elect to intervene and proceed with the privately filed action or decline to take over the action. If the Government does decline then the private party has the right to conduct the action for the Government. The Government also may elect to pursue its claim through any alternate remedy available to the Government including any administrative proceeding to determine a civil money penalty.

C) THE ROLE OF THE RELATOR IN THE GOVERNMENT INTERVENED CASE

When the Government intervenes and prosecutes the action filed by the Relator the Government has the primary responsibility for prosecuting the action. The Government may file its own complaint or amend the complaint of the Relator to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled

to relief. The Relator has the right to continue as a party to the action subject to a number of limitations specified in §3730 (c) (1) to (5). These limitations also apply if the Government chooses an alternative remedy such as an administrative proceeding or if after declining to intervene the Government changes its mind and with court approval intervenes at a later date upon a showing of good cause:

- The Government may dismiss the action even if the Relator objects as long as the Relator receives notice and has an opportunity for a hearing on the motion of dismissal.
- The Government may settle the action with the defendant notwithstanding the objections of the Relator if the court determines after a hearing that the proposed settlement is fair, adequate and reasonable under all the circumstances.
- The Government may ask the court to impose limitations on the person's participation if such person is interfering or unduly delaying in the Government's prosecution of the case or is causing harassment. Such limitations could include limiting the number of witness or their testimony or their cross examination.
- The Government may ask the court to limit certain actions of discovery by the Relator if it would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out the same facts.

D) THE ROLE OF THE RELATOR WHEN THE GOVERNMENT DECLINES

When the Government declines to intervene and prosecute the case, the Relator has the right to continue and to conduct the action. The Government can upon request be served with copies of all pleadings filed in the continuing action and be supplied with copies of all deposition transcripts.

The Relator however does have to bring meritorious claims because if the defendant prevails and the court finds that the claim of the Relator was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment then the court can award reasonable attorney fees and expenses to the defendant.

E) THE AWARD TO QUI TAM PLAINTIFF

The False Claims Act basic premise is to both give the Relator and his attorney a monetary incentive to bring such private actions upon behalf of the Government where that individual has original source information about the fraud and to protect the individual in his employment when he takes such action. The amount of such awards varies depending upon the role the Government plays, the contribution of the Relator to the prosecution of the action and his conduct.

- If the Government intervenes and proceeds with the action (or an alternative remedy including any administrative proceeding to determine a civil money penalty) the Relator receives at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim payable from the proceeds the Government receives. The case law has made it clear that following the clear legislative history, the 15 percent is a reward for the mere act of bringing the case. This amount can be reduced to not more than 10 percent of the proceeds, where the action is based primarily on disclosures of specific information in a publicly disclosed document, investigation or news media report.
- If the Government does not intervene and the Relator proceeds with the action or settling the claim then the court sets an amount which is reasonable for collecting the civil penalty and damages which shall not be less than 25 percent and not more than 30 percent of the proceeds and shall be paid out of such proceeds.
- In either situation the person (the Relator) shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorney's fees and costs. These expenses, fees and costs are awarded against the defendant in the case brought by the Relator.
- While the determination of the Relator's share percentage may seem straightforward, in practice the Government often has developed legal theories at the very end of the case as to why the Relator may not be entitled to a share of the entire proceeds received by the Government. These have varied by case but have included arguments that the pleading was not made with sufficient clarity under Rule 9(b), the use of information to which there was public disclosure and arguments that the Government settled a different claim than that described in the Relator's Complaint.
- Even when the Government acknowledges that the Relator is entitled to a share, the Government and the Relator often cannot reach agreement on the proper percentage within the statutory range of 15-25 percent. The matter is then settled by the court. In these situations, the judges have analyzed a number of factors concerning the Relator's role. These include whether the Government intervenes, the contribution of the Relator to the prosecution of the case, the level of the cooperation and the Relator's personal, financial and professional expense to undertake the action.

F) LIMITATIONS ON AWARDS TO THE RELATOR

The FCA specifically limits awards to the Relator based on his own dishonest conduct:

- If the FCA action is brought by a person who planned and initiated the false claim upon which the action was brought then the court may reduce the share of the proceeds of the action taking into account the role of that person in advancing the case to litigation.
- If the person is convicted of criminal conduct arising from his or her role in the false claim that person shall be dismissed from the civil action and shall not receive any share of the proceeds.

The FCA specifically bars actions where the allegations or transaction are already the subject of a False Claims Action. Thus the first Relator to file a Qui Tam action based on a particular set of false claims will prevail over a second filer. (The first-to-file bar).

In addition the FCA bars actions where the Government has already filed a civil suit or an administrative civil money penalty proceeding. (The Government filing bar).

Finally the FCA specifically bars actions which are merely based on public information available to all. They must be actions brought on the basis of the Relator's original sources of the information on which allegations or transaction in a claim. (The public disclosure bar).

G) THE RELATOR-ATTORNEY RELATIONSHIP

The attorney for the Relator enters into an engagement with the Relator to represent him in the False Claims Act case. While such representation can be secured for an hourly rate, the typical Relator often does not have financial resources for what may be a lengthy representation. Accordingly, the attorney frequently enters into a contingent representation engagement contract with the Relator wherein the law firm absorbs any costs of the litigation and supplies its legal acumen and hours of service. In return the law firm contracts for the legal fees and costs awarded to the Relator and for a percentage of the Relator's Share in a successfully concluded case.

H) IMPLEMENTING THE PUBLIC-PRIVATE PARTNERSHIP

The False Claims Act in making the private citizen and the Government co-parties to the case establishes the mechanism for a public-private prosecutorial partnership. This partnership has, as we shall see below, led to a very successful tool to deal with and deter fraud. That said, in each individual case the shaping of the partnership is fraught with potential conflicts as well as opportunities.