Is the Writing on the Wall for False Claims Act Qui Tam Suits?, *New Jersey Law Journal*

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The False Claims Act (FCA), enacted during the Civil War to combat widespread fraud by Union Army suppliers, prohibits knowingly submitting "false claims" for payment to the government. FCA claims can be initiated by the government or private citizens—qui tam relators—on the government's behalf, based on new, non-public information. The government can intervene in the case, or allow relators to proceed alone; in successful suits, FCA provides for triple damages and per-claim penalties, and successful relators receive a share of the recovery. That financial incentive is key: as one sponsor of the original FCA explained, the government was "holding out a temptation and setting a rogue to catch a rogue, which is the safest and most expeditious way I have ever discovered of bringing rogues to justice."

Justice Department statistics reflect the expansion of modern qui tam FCA enforcement. Between 1987 and 2024, the government recovered $78 billion in FCA settlements and judgments, including $55 billion in qui tam suits. The proliferation of qui tam suits has escalated; in 1987, qui tam recoveries were outnumbered 10-to-1 by those in government-initiated suits, but since 1995, qui tam actions account for an increasingly large majority of recoveries. In 2024 alone, recoveries in FCA qui tam suits exceeded $2.4 billion.

Does the volume of qui tam FCA enforcement mean the system is working, or prove that the "rogues" have gone rogue? Critics have long questioned the system's constitutionality. In 1989, Assistant Attorney General William Barr argued that qui tam relators violate the Appointments Clause, lack Article III standing, and infringe separation of powers by exercising executive authority. He recommended eliminating what he viewed as a "corps of private bounty hunters," warning that, using such a mechanism, "Congress effectively could 'privatize' all civil law enforcement," to the nation's detriment. See 13 Op. O.L.C. 207.

Since then, while qui tam suits have continued to multiply, these constitutional challenges have repeatedly resurfaced. In *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765 (1999), the Supreme Court resolved the question of Article III standing, opining that "[t]he FCA can reasonably be regarded as effecting a partial assignment of the government's damages claim," and that relators therefore possess "representational" standing based upon "the United States' injury in fact."

Recent cases have revived Article II challenges to qui tam. Several Circuits have held that relators are not "Officers of the United States," and thus are not subject to the Appointments Clause. See *United States ex rel. Stone v. Rockwell Int'l*, 282 F.3d 787, 804-807 (10th Cir. 2002); *Riley v. St. Luke's Episcopal Hosp.*, 252 F.3d 749, 753-758 (5th Cir. 2001) (en banc); U*nited States ex rel. Taxpayers Against Fraud v. General Elec.,* 41 F.3d 1032, 1040-1042 (6th Cir. 1994); *United States ex rel. Kelly v. Boeing*, 9 F.3d 743, 749-759 (9th Cir. 1993). However, in a pending 11th Circuit appeal, DOJ challenges a decision in which a Florida District Court came to the opposite conclusion, holding that FCA relators do require Article II

appointment as “Officers of the United States.” See *U.S. ex rel. Zafirov v. Fla. Med. Assocs*., 2024 WL 4349242 (M.D. Fla. Sept. 30, 2024).

The separation of powers question remains unresolved. In *United States ex rel. Polansky v. Executive Health Resources*, 599 U.S. 419, 437-38 (2023), the Court held that FCA permits the government to intervene in qui tam suits at any stage to take over and even dismiss the action, regardless of the relator's objections. Nevertheless, Justices Thomas, Kavanaugh, and Barrett expressed concerns that “[t]he FCA's qui tam provisions have long inhabited something of a constitutional twilight zone,” in that “there is good reason to suspect that Article II does not permit private relators to represent the United States' interests in FCA suits.” The justices stated that constitutionality of FCA's qui tam provisions should be considered in an appropriate case.

That opportunity could arise from the pending Third Circuit appeal in *United States ex rel. Penelow v. Janssen*, No. 3:12-cv-07758. Janssen, a division of pharmaceutical heavyweight Johnson & Johnson, is appealing a $1.64B FCA judgment based on alleged off-label promotion of two of its HIV drugs. The case was initiated by two former sales representatives and the government declined to intervene during the initial litigation. On appeal, J&J challenges the constitutionality of the FCA's qui tam provisions, arguing that the case “presents a particularly egregious example of how the FCA's qui tam device offends Article II,” in that “[b]y declining to intervene, the government has allowed self-appointed, financially motivated Relators to wield significant executive power,” and to “prevail[] on a legal theory with which DOJ disagrees.” App. Br. at 51-52.

Several amicus briefs portray the qui tam system as a broken relic of the Civil War era that hinders, rather than advances, the government's interest in combating fraud and waste. The amici describe relators as “unaccountable bounty hunters,” who are “motivated primarily by prospects of monetary reward rather than the public good.” They argue that the regime infringes on the Executive's authority to enforce the law, directly or through duly-appointed subordinates, asserting that “[t]o uphold a redelegation of that power to private entities would dash the constitutional scheme” enshrined in Article II. They also emphasize that the “sheer volume” of qui tam litigation, much of which they describe as “meritless or contrary to the public interest,” makes it impossible for DOJ to adequately supervise FCA enforcement, creating a risk of inconsistent or unfair positions being taken on behalf of the government by rogue relators.

The government intervened on appeal to file a brief in which it pushes back, arguing that the Third Circuit should follow each of the other Circuits that have considered the issue to date and rule that FCA's qui tam provisions are consistent with Article II. The brief highlights key differences between relators and “Officers of the United States.” For instance, unlike a special prosecutor, whose office continues even if he steps down, “[i]f a particular relator who has blown the whistle on a fraud by filing a qui tam action decides she is no longer interested in pursuing the action,” she cannot be replaced with a different relator, and only the government maintains the suit. DOJ's brief also stresses that in creating a financial incentive for relators, the FCA employs “one of the least expensive and most effective means of preventing fraud on the treasury.” According to DOJ, that incentive is cabined and the Executive's authority to enforce the law is preserved, by the government's upfront and continuing ability to intervene in FCA qui tam suits to take over or end the action.

Perhaps the Supreme Court will resolve these constitutional questions about FCA's qui tam provisions, in Penelow or another case. Meanwhile, debate continues as to whether qui tam FCA enforcement is a good idea from a policy perspective. The government describes the system as efficient and effective, while critics view it as improperly incentivizing relators to undertake meritless shakedowns. Which is it?

The FCA's qui tam provisions are not unique in using private incentives to advance government enforcement goals. For instance, SEC's whistleblower program rewards individuals who report securities law violations, with awards that can reach millions of dollars for successful enforcement actions. More broadly, DOJ encourages companies to self-police and self-report using incentives like non-prosecution agreements or reduced penalties and monitoring obligations.

Beyond simply providing information to the government, relators use private resources to advance claims that the government might not choose to pursue. When they succeed, even in non-intervened cases, the Treasury benefits alongside the relator. In a post-qui tam world, the government would have to use its own resources to investigate whistleblower tips and identify viable enforcement actions. Thus, eliminating qui tam would almost certainly reduce FCA enforcement activity. Yet it is not immediately apparent whether *fewer* cases would mean *fairer* FCA enforcement. Fewer enforcements mean less information for companies seeking to respond to enforcement trends. And that smaller number of enforcements may inequitably focus on a handful of companies or industries.

The future of qui tam is uncertain, but what remains clear is the importance, both to the government and to the public, of getting it right. A recent DOJ memorandum identified as the Criminal Division's highest priority combatting "[w]aste, fraud, and abuse, including health care fraud and federal program and procurement fraud that harm the public fisc." A functioning enforcement environment must prevent fraud without unduly hindering good business. While the future of FCA enforcement unfolds, all companies can proactively limit their risk by continuing to maintain robust compliance programs to detect and prevent misconduct.