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Here's how to get started in representing individuals—or whistleblowers—who want to hold companies accountable for defrauding the government.

The ABCs of QUI TAM ACTIONS

By || **Renée Brooker and Jaclyn Tayabji**

Every day, employees and other insiders come across evidence that companies are defrauding the U.S. government—including through government health insurance, contract and procurement, tax, securities, COVID relief, and cyber fraud.[1] Those individuals must decide whether to "blow the whistle" and bring the corporate wrongdoing to the attention of the government through a "qui tam," or whistleblower, False Claims Act (FCA) lawsuit.[2]

The FCA is a tool to remedy corporate wrongdoing, fraud, and other unlawful business practices that come at the taxpayers' expense.[3] The FCA prohibits any person from knowingly filing (or causing the filing of) a false claim, using a false or fraudulent statement to obtain payment from the government, or knowingly retaining overpayment from the government.[4]

Relators

The whistleblower who brings a qui tam action is known as a relator and files suit on the federal government's behalf.[5] Collectively, in fiscal year 2021, whistleblowers filed 598 qui tam suits and helped the government recoup more than $1.6 billion in FCA settlements and judgments.[6]

The purpose behind the FCA's qui tam provisions is to "set up incentives to supplement government enforcement of the Act by encourag[ing] insiders privy to a fraud on the government to blow the whistle on the crime."[7] This purpose underlies the procedures and remedies available under the FCA.

The relator must file the qui tam action under seal to allow the government an opportunity to investigate the allegations and determine whether it wants to intervene and take the case on as its own or decline intervention and permit the relator to continue litigating on the government's behalf.[8] The government at its discretion may also begin a parallel criminal investigation. The initial seal period is 60 days, but the court may grant extensions allowing the government more time to make an intervention decision—the seal will be lifted after the government intervenes or declines to intervene.[9]

However, the FCA's "first-to-file" rule permits only the initial qui tam to proceed, prohibiting any subsequent relator from filing a qui tam "based on the facts underlying the pending action."[10] Similarly, if "substantially the same allegations or transactions" are already publicly disclosed in certain court or administrative hearings in which the government is a party, a government report or investigation, or the news before the qui tam action is filed, the court likely will dismiss the qui tam action unless the relator is an "original source" of the alleged information.[11]

A relator is considered an "original source" if either they voluntarily disclose to the government information about the fraud before the public disclosure, *or* if they have knowledge that is "independent of and materially adds" to the publicly disclosed information and voluntarily provide that information to the government before filing the qui tam complaint.[12] The meaning of "public disclosure" and "original source" has been litigated, so you must understand these potential risks and barriers before bringing a qui tam action.[13]

Evidence

What is required for a relator to bring a qui tam action? Although the FCA does not require a relator to have specific types of evidence—or any evidence at all—to support the qui tam action, evidence is paramount. It both informs the government about the nuances of a defendant's fraudulent scheme and aids the government's initial investigation. The government also can consider the quality and scope of the relator's evidence in determining a relator's share when the litigation is resolved. Further, evidence will help the relator satisfy the heightened pleading standards for allegations of fraud if the government declines to intervene.

When filing the qui tam complaint, the relator must provide to the government "substantially all material evidence and information" in the relator's possession—including any documents they have obtained.[14] Providing documentary evidence makes it more likely that the government will further investigate the relator's claim.

The specific types of documentary evidence that will best support a qui tam action vary by the type of fraud at issue. But a few types of evidence can address foundational questions about the nuances, scope, and impact of the defendant's fraud. These types of evidence include internal company communications such as emails, Slack or Teams messaging, PowerPoint presentations, calendars, organizational charts, billing records, contract documents, patient medical records, internal reports, investigations, or audits—any documents that help inform the government about the allegations. While these and other categories of documents may add value to a relator's qui tam action, you must consider the risks involved in obtaining evidence.

Risks

On a case-by-case basis, consider the risks involved in your client filing a qui tam action and collecting evidence. And do so expeditiously; time is of the essence. Several areas of risk and potential liability can arise—discuss these with your client before they obtain or provide documents to you.

General release. Your client may be concerned about their ability to bring a qui tam action if they signed a general release of claims with their previous employer. A release of claims is generally unenforceable to bar subsequent FCA claims—under the U.S. Supreme Court's balancing framework in *Town of Newton v. Rumery*,[15] "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."[16] Courts have applied this framework to hold that the public policy interest in notifying the federal government about fraud generally outweighs the public policy interest in private settlement via a release of claims.[17]

Your client also may have the option to sign a release of claims after filing the qui tam action. There is less case law on the enforceability of a release signed after the qui tam is filed—enforceability likely will turn on the relevant circuit court's interpretation of the FCA provision requiring consent of the court and the U.S. Attorney General to dismiss

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the complaint.[18] Whereas most circuits to decide this question, including the Fourth, Fifth, and Sixth Circuits, have construed the FCA to prohibit a relator from voluntarily dismissing a qui tam action without the U.S. Attorney General's consent at *any time* during the qui tam action, the Ninth Circuit has held this consent requirement no longer applies once the government declines to intervene.[19]

Acquiring documents. Your client should acquire only company documents (copies, not originals, although most documents are stored electronically now) that they have access to in the ordinary course of their job duties and that are relevant to the FCA allegations. If your client still works at the company, they may be concerned about raising red flags by downloading and saving documents—this is particularly true with employers increasingly using tracking software. If this is a concern, your client should consider whether emailing documents, saving them to a USB, printing them to PDF, or other means of acquiring documents will raise any suspicion.

Once your client obtains documents, certain exceptions allow for the disclosure of sensitive information to attorneys and the government for purposes of reporting unlawful conduct—for example, the whistleblower exception to the HIPAA privacy rule.[20] Your client should not share or discuss evidence with anyone besides their counsel and in their disclosures to the government.

Also review relevant state wiretap laws and consider whether your client may lawfully record conversations without the consent of all parties to the recording. Further, if your client exceeds their authorization and acquires documents they are prohibited from accessing (for example, by using another employee's login credentials), they may face liability under the Computer Fraud and Abuse Act.[21] Your client should not provide—even to you—classified documents if you or members of your legal team lack the requisite government security clearance.

On a case-by-case basis, consider the risks involved in your client filing a qui tam action and collecting evidence.

It is critical for your client to understand that after the qui tam is filed, they should cease all investigative activity without the express permission of the government.

Breach of contract. Further, if your client signed a confidentiality agreement or takes confidential company documents, consider whether your client may face counterclaims for breach of contract. Courts have noted that "nothing in the FCA addresses confidentiality agreements, nor the potential liability relators may incur by virtue of their obligations of confidentiality to former employers."[22] Thus, by necessity, this inquiry must be client specific.

In general, your client is less likely to face liability if their search for documents is reasonable and limited to documents relevant to the FCA allegations. Some courts have adopted a public policy exception when defendants bring breach of contract counterclaims. These courts have applied the *Rumery* balancing framework to ascertain whether the public interest related to the disclosure of fraud to the government outweighs the public interest in enforcing confidentiality agreements—ultimately deciding that it does.[23]

Even if the jurisdiction has adopted a public policy exception, your client should be judicious in deciding which documents to obtain. Only those categories of documents that are relevant to the FCA allegations will be protected. That is precisely what happened in *Siebert v. Gene Security Network, Inc.*: The Northern District of California adopted a public policy exception but did not dismiss the defendant's breach of contract counterclaim in its entirety "because it is possible that [relator] also took confidential documents that bore no relation to his False Claims Act claim. . . . As to those documents, if there are any, [defendant] has adequately pleaded a counterclaim."[24]

To that end, your client is most likely to face counterclaim liability if they engage in a "vast and indiscriminate" search.[25] For example, in *United States ex rel. Cafasso v. General Dynamics C4 Systems, Inc.*, the Ninth Circuit affirmed

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summary judgment in favor of the defendant for its counterclaim alleging breach of a confidentiality agreement against a relator who collected thousands of documents (11 gigabytes of data) without reviewing any for relevance.[26] The Ninth Circuit viewed the relator's document collection as a "wholesale stripping" of the company's documents.[27]

Speak with your client about any confidentiality obligations, their employer's monitoring practices, and where and how they will access documents as early as possible to best advise them on how to proceed.

Attorney-client privilege. Also ascertain whether your client has collected evidence that violates the attorney-client privilege of the company. It may help to identify names of corporate counsel during your initial client consultations and perform electronic searches to identify documents containing the names of counsel.

Then segregate any potentially privileged documents and remove them from document review or case development. When the time comes to produce documents to the government, withhold potentially privileged documents to avoid tainting the government investigation or disqualifying you from involvement in the case.

Retaliation

Whistleblowers play a crucial role in deterring and exposing fraudulent conduct. The FCA recognizes this by protecting individuals from retaliation for standing up against and reporting fraudulent conduct. Retaliation claims under the FCA are known as "Section H claims."[28]

Section H claims typically arise in the context of an employer-employee relationship, but the FCA allows such claims to be brought by "any employee, contractor, or agent" and is concerned primarily with the type of conduct underlying the dispute.[29] To prove a Section H claim, your client must demonstrate they engaged in a protected activity and were discriminated against because of that protected activity.[30]

A plaintiff need not actually file a qui tam action or demonstrate success as to the underlying claims of fraud to state a valid retaliation claim.

A plaintiff need not actually file a qui tam action or demonstrate success as to the underlying claims of fraud to state a valid retaliation claim. Protected conduct includes all acts in furtherance of an FCA action (such as addressing, opposing, investigating, obtaining documents related to, or reporting the unlawful conduct) when the plaintiff had an objectively reasonable basis to believe the defendant is or soon will violate the FCA. This, coupled with the defendant's discriminatory conduct—such as harassing, demoting, marginalizing, or terminating an employee or filing retaliatory counterclaims because of the protected conduct—may give rise to Section H liability.

Section H claims are brought in the same action as qui tam allegations unless your client is not filing a qui tam action. Regardless of how they are brought, there are some differences between Section H claims and qui tam claims. Section H claims are filed on behalf of the plaintiff, not the government. Accordingly, a general release of claims typically is enforceable as to a Section H claim, even if the release would be unenforceable as to the qui tam claims.[31]

Additionally, remedies under a Section H claim are aimed at making the plaintiff, not the government, whole. Remedies under a Section H claim include reinstatement; double back pay plus interest; and special damages, including litigation costs, attorney fees, emotional distress damages, and compensation for other noneconomic harm from the retaliation—without any cap on compensatory damages.[32]

Wending your way through FCA qui tam case issues can be complex.[33] Understanding the unique procedures that a whistleblower must follow is key to holding companies accountable for defrauding the government.

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Notes

1. If "substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed" before the qui tam was filed, the whistleblower must be considered "an original source of the information." 31 U.S.C. §3730(e)(4)(A). Whistleblowers are most frequently employees or other individuals who have access to the corporate conduct occurring behind closed doors.
2. *Id.* at §3730(b)(1).
3. 31 U.S.C. §§3729–30.
4. *Id.* at §3729(a)(1)(A), (B), (G).
5. *Id.* at §3730(b)(1).
6. U.S. Dep't of Justice, *Justice Department's False Claims Act Settlements and Judgments Exceed $5.6 Billion in Fiscal Year 2021*, Feb. 1, 2022, https://www.justice.gov/opa/pr/justice-department-s-false-claims-act-settlements-and-judgments-exceed-56-billion-fiscal-year.
7. *United States ex rel. Green v. Northrop Corp.*, 59 F.3d 953, 963 (9th Cir. 1995) (internal quotations and citations omitted) (alteration in original). The FCA permits a financial reward to the relator known as the "relator's share," which is between 15–25% of the proceeds (if the government intervenes) or 25–30% (if the government does not intervene). *See* 31 U.S.C. §3730(d)(1), (2).
8. 31 U.S.C. §3730(b)(4).
9. *Id.* at §3730(b)(2)–(4).
10. *Id.* at §3730(b)(5).
11. *Id.* at §3730(e)(4)(A). The court need not dismiss the qui tam on public disclosure grounds if the government opposes dismissal.
12. *Id.* at §3730(e)(4)(B).
13. *See generally United States ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 298–99 (3d Cir. 2016); Joel D. Hesch, *Restating the "Original Source Exception" To the False Claims Act's "Public Disclosure Bar" In Light of the 2010 Amendments*, 51 U. Rich. L. Rev. 991 (2017).
14. 31 U.S.C. §3730(b)(2).
15. *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987).
16. *Id.*
17. *See United States ex rel. Ladas v. Exelis, Inc.*, 824 F.3d 16, 24 (2d Cir. 2016); *Northrop Corp.*, 59 F.3d at 963, 969. Although the balance of the interests generally skews in favor of allowing relators to proceed with qui tam actions, if the government was already aware of the fraud, the interest in notifying the government is reduced and the balance of interests skews in favor of enforcing the release of claims. *See United States ex rel. Radcliffe v. Purdue Pharma L.P.*, 600 F.3d 319, 329, 333 (4th Cir. 2010); *United States ex rel. Ritchie v. Lockheed Martin Corp.*, 558 F.3d 1161, 1168–70 (10th Cir. 2009); *United States ex rel. Hall v. Teledyne Wah Chang Albany*, 104 F.3d 230, 233 (9th Cir. 1997), *as amended on denial of reh'g and reh'g en banc* (Mar. 19, 1997). This exception is known as the "government knowledge test." Talk to your client about whether the government already knows about the fraud such that the general release may be enforceable.
18. 31 U.S.C. §3730(b)(1) ("The [qui tam] action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting."); *see United States ex rel. Longhi v. Lithium Power Techs., Inc.*, 481 F. Supp. 2d 815, 822–23 (S.D. Tex. 2007) (because "the basic effect of a settlement and a release are the same insofar as they relate to the position of the parties to the action," the holdings of cases interpreting the scope of the FCA's consent provision "can be applied to releases as well").
19. There is a circuit split regarding the interpretation of the FCA's consent provision, 31 U.S.C. §3730(b)(1). *Compare United States ex rel. Michaels v. Agape Senior Cmty., Inc.*, 848 F.3d 330, 339 (4th Cir. 2017); *United States ex rel. Longhi v. United States*, 575 F.3d 458, 474 (5th Cir. 2009); *United States ex rel. Doyle v. Health Possibilities, P.S.C.*, 207 F.3d 335, 339 (6th Cir. 2000); and *Searcy v. Philips Elecs. N. Am. Corp.*, 117 F.3d 154, 158 (5th Cir. 1997) *with United States ex rel. Killingsworth v. Northrop Corp.*, 25 F.3d 715, 722 (9th Cir. 1994).
20. 45 C.F.R. §164.502(j)(1).
21. 18 U.S.C. §1030(e)(6) (2020). *See Van Buren v. United States*, 141 S. Ct. 1648, 1662 (2021) (interpreting Computer Fraud and Abuse Act to refer to information that a person is not entitled to obtain).
22. *Siebert v. Gene Sec. Network, Inc.*, 2013 WL 5645309, at *7 (N.D. Cal. Oct. 16, 2013).
23. *See id.* "Several courts, some relying on the Ninth Circuit's openness to the public policy exception [relator] proposes here, have adopted just such an exception." (citing *United States ex rel. Ruhe v. Masimo Corp.*, 929 F. Supp. 2d 1033, 1039 (C.D. Cal. 2012); *United States ex rel. Head v. Kane Co.*, 668 F. Supp. 2d 146, 152 (D.D.C. 2009);

NOTICE OF PROPOSED AAJ LEADERS FORUM MEMBERSHIP DUES INCREASE

Pursuant to Article IX; Section 1 of the Association Bylaws, notice is hereby provided that there is a proposed membership dues increase for the Patron level of Leaders Forum. The proposed dues increase will be considered for approval by a two-thirds vote of the Board of Governors present at the Board's meeting at the 2023 Winter Convention.

A vote on the proposed dues increase will take place at the Board of Governors meeting on Tues., Feb. 7, 2023, in Phoenix, Ariz.

AAJ Leaders Forum Patron Level Increase Proposal: $12,000 annually to $13,500 annually.

United States v. Cancer Treatment Ctrs. of Am., 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004)).

24. *Siebert*, 2013 WL 5645309, at *8.

25. *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1062 (9th Cir. 2011).

26. *Id.* While the Ninth Circuit in *Cafasso* did not adopt a public policy exception, it noted that, if it did, "those asserting [the exception's] protection would need to justify why removal of the documents was reasonably necessary to pursue an FCA claim."

27. *Id.*

28. 31 U.S.C. §3730(h).

29. *Id.* at §3730(h)(1).

30. *See, e.g.*, *Singletary v. Howard Univ.*, 939 F.3d 287, 293 (D.C. Cir. 2019) (citing *United States ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 736 (D.C. Cir. 1998)).

31. *See, e.g.*, *United States ex rel. Higgins v. HealthSouth Corp.*, 2019 WL 4060176, at *4–5 (M.D. Fla. Aug. 28, 2019).

32. 31 U.S.C. §3730(h)(2).

33. AAJ's Qui Tam Litigation Group offers a chance to network and discuss strategies with more experienced attorneys—as well as a document library where you can search for court documents, briefs, depositions, and more. For more, visit https://www.justice.org/community/litigation-groups/qui-tam-litigation-group.

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5. Not initiate press contact following a disaster or incident that resulted in injury or death for the sole purpose of attracting cases.

6. Not knowingly accept referral of a case that has been the subject of conduct that violates the provisions of this Code or other applicable rule.

7. Disclose and explain the fee to be charged to the client and how it is calculated; the handling of costs while the case is pending and on resolution; and, if contingent upon recovery, memorialize the fee clearly in a written fee agreement.

8. To the extent consistent with state law or Rules of Professional Conduct, ensure that all decisions to arbitrate disputes arising from contracts with clients are voluntary and that a client's judicial rights and remedies are not waived under coercion; include no pre-dispute mandatory binding arbitration clauses in agreements with clients.

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