



# Qui Tam: An Abbreviated Look at the False Claims Act and Related Federal Statutes

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## Summary

Qui tam enlists the public in the recovery of civil penalties and forfeitures. It rewards those who sue in the government's name with a portion of the recovered proceeds. A creature of antiquity, once common, today qui tam lives on in federal law only in the False Claims Act and in two minor examples found in patent and Indian protection laws.

The False Claims Act, expanded by the Fraud Enforcement and Recovery Act of 2009, P.L. 111-21 (S. 386), 123 Stat. 1617 (2009), now proscribes: (1) presenting a false claim; (2) making or using a false record or statement material to a false claim; (3) possessing property or money of the U.S. and delivering less than all of it; (4) delivering a certified receipt with intent to defraud the U.S.; (5) buying public property from a federal officer or employee, who may not lawfully sell it; (6) using a false record or statement material to an obligation to pay or transmit money or property to the U.S., or concealing or improperly avoiding or decreasing an obligation to pay or transmit money or property to the U.S.; (7) conspiring to commit any such offense. Additional liability may also flow from any retaliatory action taken against whistleblowers under the False Claims Act. Offenders may be sued for triple damages, costs, expenses, and attorneys fees in a civil action brought either by the United States or by a relator (whistleblower or other private party) in the name of the United States.

If the government initiates the suit, others may not join. If the government has not brought suit, a relator may do so, but must give the government notice and afford it 60 days to decide whether to take over the litigation. If the government declines to intervene, a prevailing relator's share of any recovery is capped at 30%; if the government intervenes, the caps are lower and depend upon the circumstances. Relators in patent and Indian protection qui tam cases are entitled to half of the recovery.

Federal qui tam statutes have survived two types of constitutional challenges—those based on defendants' rights in criminal cases and those based on the doctrine of separation of powers. The courts have found the rights required in criminal cases inapplicable, because qui tam actions are civil matters. They have generally rejected standing arguments, because relators stand in the shoes of the United States in whose name qui tam actions are brought. They have rejected appointments clause arguments, because relators hold no appointed office. They have rejected take care clause arguments, because the residue of governmental control over qui tam actions is considered constitutionally sufficient.

This is an abridged version of CRS Report R40785, *Qui Tam: The False Claims Act and Related Federal Statutes*, by Charles Doyle, stripped of the footnotes, quotations, appendix, and most of the citations found in the longer report.

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## **Introduction**

Qui tam is the process whereby an individual sues or prosecutes in the name of the government and shares in the proceeds of any successful litigation or settlement. Although frequently punitive, it is generally a civil procedure. Unlike anti-trust, RICO, and other federal punitive damage, private attorney general provisions, the individual need not have been a victim of the misconduct giving rise to the litigation. The name qui tam is the shortened version of an oft abbreviated Latin phrase which roughly translates to “he who prosecutes for himself as well as for the King.” Qui tam comes to us from before the dawn of the common law. Reviled at various times throughout the ages as a breeding ground for viperous vermin and parasites, legislative bodies have authorized it when they consider the enforcement of some law beyond the unaided capacity or interest of authorized law enforcement officials. Best known of the contemporary members of the line is the federal False Claims Act (31 U.S.C. 3729-3733), recently amended in the Fraud Enforcement and Recovery Act of 2009, P.L. 111-21 (S. 386), 123 Stat. 1617 (2009). Since 1986, False Claims Act recoveries have totaled an amount in excess of \$20 billion.

This is a brief discussion of the constitutional questions raised by qui tam provisions; of the history of such provisions; and of the three existing, active federal qui tam statutes—the False Claims Act, 31 U.S.C. 3729-3733; the false marking patent statute, 35 U.S.C. 292; and the Indian protection provisions of 25 U.S.C. 201.

## **Contemporary Federal Qui Tam Statutes**

In *Stevens*, 529 U.S. 765 (2000), the Supreme Court identified four contemporary federal qui tam statutes: the False Claims Act, the Patent Act, and two Indian protection laws. One of the Indian protection statutes, 25 U.S.C. 81, has since been amended so that it is no longer authorizes a qui tam action. Of the others, the False Claims provision is by far the most often invoked.

## **False Claims Act**

### **Persons Who May Be Liable**

The False Claims Act declares that any “person” who violates its prohibitions may incur liability. Federal law ordinarily understands the term to include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals. Local governments are considered persons for purposes of False Claims Act suits brought by private parties, but States and Indian tribes are not. Finally, the False Claims Act explicitly denies federal court jurisdiction over certain False Claims Act suits brought by private parties against Members of Congress, members of the federal judiciary, senior federal officials, or members of the armed forces.

## **Who May Bring an Action**

The False Claims Act is designed to allow private individuals to sue on behalf of the government, but any False Claims Act litigation takes place in the shadow of the government's prerogatives. The action is brought in the name of the United States. The Attorney General may bring an action for a violation of section 3729. Although a private party may also bring such an action, the government may elect to assume primary responsibility for the litigation from the beginning. If it initially chooses not to do so, the government is nevertheless free to intervene later in the proceedings upon a showing of cause. The government is likewise free to move to dismiss or settle the litigation over the objections of the relator, as long as the relator is given an opportunity to be heard. The government may also petition the court to limit the relator's participation in the litigation in the interest of a more effective presentation of the action.

A relator may not bring a False Claims Act action based on public information or information from official proceedings, unless the relator is the original source of the information. In addition, the False Claims Act features a first-to-file bar which precludes a second relator from bringing a later copycat action. The bar extends to any claims that allege the same material or essential elements of the same underlying fraud. Furthermore, a member of the armed forces may not bring an action against another member based on the defendant's service. On the other hand, even though relators are often referred to as private parties, government employees may bring a False Claims Act qui tam action as long as one of the statutory bars does not apply.

## **Basis for Liability**

Eight forms of misconduct give rise to civil liability under the False Claims Act. They occur when anyone:

- (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
- (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
- (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
- (D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;
- (E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
- (F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or
- (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or

knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, 31 U.S.C. 3729.

Moreover, any retaliatory action taken against a whistleblower under the False Claims Act may result in civil liability, 31 U.S.C. 3730(h).

## **Penalties and Awards**

If a court finds a defendant liable under section 3729, it may award treble damages; a statutory penalty ranging from \$5,000 to \$10,000; the government's litigation costs; and a relator's expenses, attorneys' fees, and costs. The court may reduce its damage award to no less than double damages, if it finds that a defendant made prompt disclosure and provided full cooperation before judicial or administrative proceedings began. If a court finds an individual has been the victim of retaliation in violation of section 3730(h), it may order the defendant to pay the individual's attorneys' fees, litigation costs, and twice the amount of "back pay, interest on back pay, and compensation for special damages sustained as a consequence" of the retaliation, 31 U.S.C. 3730(h)(2).

If the False Claims Act action succeeds, relators are entitled to a share in the proceeds of up to 30%. If the government has not participated in the litigation, they are entitled to an award of from 25% to 30%. If the government has participated in the litigation, they are entitled to an award of from 15% to 25%, reduced to no more than 10% when their claim was based primarily on public information. In any case, they are also entitled to attorneys' fees, expenses, and costs, but may be denied any award if they participated in the underlying fraud.

If the defendant prevails in a False Claims Act action in which only a private relator has taken part, the court may award the defendant attorneys' fees and expenses should it conclude that the action was clearly frivolous, vexatious, or brought to harass. The test for whether attorneys' fees and expenses are appropriate is said to be analogous to that used for prevailing defendants under 42 U.S.C. 1988. Such awards are thought to be appropriate only under "rare and special circumstances," when the relator's action is meritless, groundless, or without foundation; when allegations are bereft of factual support or when there is no reasonable chance of success; or when brought or pursued for an improper motive.

## **Procedure**

The False Claims Act states that prosecution of a violation of section 3729 must begin within 6 years, although there is an exception for undiscovered fraud which extends the deadline to 10 years as long as the action is brought within three years of discovery. The courts are divided over the question of whether this extension is available to private parties or only in cases initiated by the government. In the case of litigation for retaliatory misconduct under section 3730(h) (rather than one of section 3729's proscriptions), parties must look to the most closely analogous statute of limitations under state law, since the sole explicit False Claims Act provision applies only to causes of action under section 3729.

Until recently, some courts had held that the statute of limitations in cases where the government elected to intervene did not relate back to the time of the relator's original complaint. The 2009 Act added a new subsection to section 3731 to afford the government the advantage of the date of the relator's complaint as a cut-off date for statute of limitations purposes. Thus, a complaint,

which would be time barred as of the date of the government's intervention, survives, if it would not be time barred on the date of the relator's earlier original complaint.

For private litigants, the process begins with a complaint filed under seal with the federal court in the district in which a violation occurred or in which any of the defendants are found, resides, or does business, 31 U.S.C. 3730(b)(2), 3732(a). Thereafter, relators must deliver all their material evidence and information to the government, 31 U.S.C. 3730(b)(2). The government has 60 days, or until the end of a longer period of any extensions granted by the court for cause, in which to decide whether intervene, 31 U.S.C. 3730(b)(2), (3), (4). The government has at its disposal civil investigative demand authority which allows it to compel the production of material and testimony in its investigations, 31 U.S.C. 3733.

After the government has made its initial determination of whether to intervene, the defendants are served and have 20 days in which to respond, 31 U.S.C. 3730(b)(3). The government, or in its absence the relator, must prove damages and all of the elements of the asserted violation by a preponderance of the evidence. A defendant, however, may not contest the presence of any elements of any violation which has been established or conceded against him in parallel criminal proceedings. Although they sue in the name of the United States, relators are bound by the 30-day deadline for appellate review rather than the 60-day deadline available to the government.

## **Patent Act (35 U.S.C. 292)**

Section 292 is a qui tam statute. The party bringing the action need not be a victim; it may be prosecuted by anyone who can satisfy constitutional standing requirements. In order to prevail under the most commonly prosecuted prongs of the statute, the relator must establish by a preponderance of the evidence that: "(1) an article was falsely marked or advertised with the word 'patent' or any word or number that imports that the article is patented, (2) the article so marked or advertised was an unpatented article, and (3) the marking or advertisement was made with the intent to deceive the public." The first element (falsely marked) may include conditional statements or marks, *e.g.*, "may be covered by one or more U.S. or foreign pending or issued patents." Proof the first and third elements (falsely marked and intent to deceive) are frequently intertwined. Thus, "the fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity is enough to warrant drawing the inference that there was a fraudulent intent." On the other hand, "an intent to deceive the public will not be inferred if the facts show no more than that the erroneous patent marking was the result of mistake," inadvertence, or innocent oversight. As for the second element, a product is "unpatented" when no patent, foreign or domestic, is pending or has been issued for it or for a portion of it; or when any of the patents asserted on its behalf do not in fact cover it; or when any patent which once covered it has expired.

Unlike qui tam actions under the False Claims Act, actions to enforce section 292 are subject to the general five-year statute of limitations found in 28 U.S.C. 2462. Section 292 qui tam actions differ from those brought under the False Claims Act with respect to the recovery of attorneys' fees as well. Section 292 makes no mention of attorneys' fees, although they may be available to either party in exceptional cases under the general remedies provisions of 35 U.S.C. 285.



## Indian Protection (25 U.S.C. 201)

Section 201 dates from 1834 and authorizes qui tam actions for violations of five separate statutes: (1) unlawful purchase of land from an Indian nation or tribe, 25 U.S.C. 177 (Rev. Stat. §2116); (2) driving livestock to feed on Indian land, 25 U.S.C. 179 (Rev. Stat. §2117); (3) settling on or surveying Indian land, 25 U.S.C. 180 (Rev. Stat. §2118); (4) setting up a distillery in Indian country, 25 U.S.C. 251 (Rev. Stat. §2141); and (5) trading in Indian country without a license, 25 U.S.C. 264 (Rev. Stat. §2133).

Qui tam actions under section 201 are relatively rare and appear to have arisen most often under sections 264 (unlicensed trading) and 179 (grazing). In *Hall*, the section 264 relators' action survived a standing challenge, but was dismissed for failure to join an indispensable party—the tribe which had contracted for gambling equipment and services from an unlicensed supplier. In *Keith*, the relator's action was dismissed after the court concluded that “bureaucratic nonfeasance” made it impossible to obtain the required trader's license. Relators were somewhat more successful in *Hornell*, where the court upheld recovery of the monetary penalty, although it declined to affirm confiscation of the station wagon that was the object of the unlicensed sale.

Section 179 prohibits grazing horses, mules, or cattle on Indian land without permission and sets the penalty at \$1 per head. The circuits are divided over the question of whether the Secretary of the Interior may by regulation set the penalty at \$1 per head for each day of violation. Federal district courts have jurisdiction exclusive of the states for enforcement of the penalties under section 179, but they may abstain from exercising jurisdiction in favor of enforcement in a tribal court of jurisdiction.

There may be some question whether the monetary penalty established in section 177 (tribal real estate contracts) may be enforced by a qui tam action under section 201. Section 201 applies to “penalties which shall accrue under Title 28 of the Revised Statutes,” (*i.e.*, Rev. Stat. §§2039-2157). Section 177 appears in Title 28 of the Revised Statutes as section 2116. Thus, on its face, section 201 permits a qui tam action to recover the penalties accruing under section 177.

In *Harlan*, however, the Eighth Circuit stated in dicta that “25 U.S.C. §177 appears to deal directly with cases where, as here, a person attempts to lease tribal lands without express approval of the federal government.... The statute makes violators subject to a fine of \$1,000, *but has no provision entitling relators to bring actions under it.* See *James v. Watt*, 716 F.2d 71 (1<sup>st</sup> Cir. 1983).” The issue in *Harlan* was whether the qui tam provisions then found in 25 U.S.C. 81, relating to contracts for services which required government approval, extended to sharecrop agreements. The court referred to section 177 “simply ... to demonstrate that a broad and general policy to oversee all contracts by Indians need not be accomplished though 25 U.S.C. §81 alone.” The *James* case, which the court cites, held that an individual tribal member, suing as a victim of a violation of 177, may only do so as a representative of his tribe and not on his own behalf. It says nothing of whether he may do so on behalf of the United States qui tam.

The application of section 201 to the penalties under section 177 seems clear on its face, but the contrary statement in *Harlan* seems equally clear.



## Constitutional Concerns

Qui tam evokes constitutional issues of two classes. First, to what extent may qui tam defendants claim the constitutional protections available to defendants in criminal cases? Second, is qui tam compatible with the Constitution's allocation of powers among the three branches of government? At first glance, the first question seems the least troubling. The rights available in criminal proceedings exist precisely because the proceedings are criminal. The Sixth Amendment rights—the right to counsel; to call and confront witnesses; to be informed of the nature of the charges against him; to trial in the place where the offense occurred; and to a speedy and public trial before an impartial jury—apply only to “the accused” in criminal proceedings. Thus, they are inapplicable to federal qui tam proceedings which are civil in nature. Rights found elsewhere in the Constitution, however, often turn upon whether the government's action may be or must be considered punitive. Here the answers are bit less clear.

## Double Jeopardy

For double jeopardy purposes, the Supreme Court in *Hudson* said the question is: “Whether Congress, in establishing the penalizing mechanism, indicate[] either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, [was] the statutory scheme ... so punitive either in purpose or effect as to negate that intention. In regard to this latter inquiry, we have noted that only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground.” The Court has looked to the due process standards listed in *Kennedy v. Mendoza-Martinez* when defendants seek to satisfy the daunting “clearest proof” test. Although *Hudson* was not a qui tam case, later lower federal court qui tam cases consider it dispositive.

## Excessive Fines

The Eighth Amendment states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,” U.S. Const. Amend. VIII. In other contexts, the Supreme Court has determined that the excessive fines clause “does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.” The clause does apply to “the government's power to extract payments ... as punishment for some offense.” The critical question is not whether the procedure for extracting the payment is classified as civil or criminal or whether it serves some additional remedial purposes; if the payment constitutes punishment, it is a “fine” and as a general matter may not be excessive. A fine is excessive, in the eyes of the Court, if it is grossly disproportionate to the gravity of the defendant's offense. In the qui tam context, lower court cases ordinarily treat False Claims Act qui tam penalties as punishment and consequently subject to excessive fines clause analysis. They have generally concluded, however, that the fines imposed in the cases before them were not excessive for Eighth Amendment purposes.

## Due Process

In *Young v. United States ex rel. Vuitton et Fils S.A.*, Young and Vuitton were engaged in trademark litigation which had resulted in the issuance of an order enjoining Young from

manufacturing or distributing counterfeit versions of Vuitton’s product line. Upon a showing of probable cause to believe that Young had violated the injunction, the court appointed Vuitton’s lawyers to prosecute the criminal contempt. Five members of the Supreme Court agreed that Young’s subsequent conviction should be overturned because, “counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order.” Four members of the Court felt this was so because the appointment of an interested prosecutor constituted error which undermined confidence in the integrity of the criminal proceeding. One of the four went so far as to assert that the failure to appoint a disinterested prosecutor constituted a due process violation. A fifth Justice merely concurred in the result, because he felt that the lower court’s appointment of a prosecutor—disinterested or not—was invalid on separation of powers grounds. Lower federal courts thereafter confronted with due process challenges to qui tam have rejected them based on the fact that relators press their claims as private civil litigants and thus do not exercise government power subject to due process clause restrictions on criminal prosecutions.

## **Separation of Powers**

Is qui tam legislation compatible with the Constitution’s allocation of powers among the three branches? The Constitution allocates federal governmental authority among three coordinated branches. It vests all legislative powers in Congress, executive power in the President, and the judicial power of the United States in the federal courts. The Supreme Court has said that this “system of separation of powers and checks and balances ... was regarded by the Framers as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other[s].” Yet, in this interwoven fabric of governmental authority, the Framers realized that “[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”

Commentators and litigants have questioned whether the qui tam is at odds with these basic constitutional principles. More specifically, they question whether qui tam invokes the judicial power of the court in the absence of a case or controversy and whether it impermissibly intrudes upon the President’s constitutional prerogatives under the appointments clause and under the take care clause. Their concerns are three. First, the Constitution grants the federal courts the judicial power over “cases and controversies.” This is thought to require at least two parties with conflicting interests, presented in a context suitable for judicial resolution, *i.e.*, standing in a case or controversy. Yet, relators come to court with no interest of their own, only a contingent personal interest. Second, the Constitution instructs the President to see that the laws are faithfully executed. Yet, without his approval or unrestricted control, relators may initiate and prosecute litigation. Third, the President is vested with the authority to appoint officers of the United States and, with the courts and heads of departments, to appoint inferior officers. Yet, relators, who engage in activities otherwise reserved to officers and inferior officers of the United States, are appointed neither by the President, the courts, nor by the head of any department.

## **Standing**

Standing requires (1) a concrete injury to the plaintiff’s interest, (2) attributable to the defendant, (3) and amenable to judicial relief. When it put standing challenges to rest in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the Supreme Court observed, “[T]he long tradition of *qui tam* actions in England and the American colonies ... is particularly relevant to the

constitutional standing inquiry since ... Article III's restriction of the judicial power to 'Cases' and 'Controversies' is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'"

On the more perplexing matter of the relator's injury, the *Stevens* Court found the injury to the United States sufficient to establish False Claims Act relator standing. With respect to the government's share of the fruits of successful litigation, the Court found standing in the relator as an agent of the defrauded United States. With respect to the relator's share, it considered him the assignee of that portion of the interest of the United States.

Relator standing is in greater doubt in cases where tangible injury to the United States is less obvious. In the case of the false marking section of the Patent Act, at least one court has held that the relator must show either an injury to himself or an injury to the United States for which he might be the agent/assignee, i.e., "an actual or imminent injury in fact to competition, to the United States economy, or [to] the public that could be assigned to him as a qui tam plaintiff or be vindicated through this litigation."

The *Stevens* Court resolved the issue of qui tam relator standing, but it "express[ed] no view on the question of whether *qui tam* suits violate Article II, in particular the Appointments Clause of §2 and the 'take Care' Clause of §3," *Id.* at 778 n.8.

## **Appointments clause**

The appointments clause issue in qui tam cases flows from apparently contradictory language in two Supreme Court cases. In the more recent, *Buckley v. Valeo*, the Court seemed to conclude that only officers appointed under Article II could be vested with conducting civil litigation on behalf of the United States: "We hold that these provisions of the act, vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Art. II, §2, cl. 2, of the Constitution. Such functions may be discharged only by persons who are 'Officers of the United States' within the language of that section."

Yet, earlier Court decisions suggested that the appointments clause applied only to those purported to hold an "office of the United States," and that Congress might authorize the performance of services in the name of the United States by those who did so without the attributes of office, selected other than under Article II. The Court later affirmed the *Buckley* assertion that only officers appointed in conformity with Article II could "exercis[e] significant authority pursuant to the laws of the United States." In *Freytag*, however, it acknowledged the existence of various classes empowered other than by Article II appointment who performed services in the name of the United States. Although the Court has thus far "express[ed] no view on the question of whether *qui tam* suits violate Article II, in particular the Appointments Clause of §2," the lower federal courts generally see no appointments clause impediments because they do not consider qui tam relators officers of the United States.

## **Take care**

Unlike the appointments clause, the take care clause does not vest authority in the President. Instead, it imposes a responsibility upon him. The Framers, however, allocated powers among the branches so as to prevent Congress or the courts from undermining or unduly interfering with the President's ability to perform his constitutional duties, including the duty to take care to see that

the laws are faithfully executed. *Morrison v. Olson* presents a question perhaps most closely analogous to the one of whether qui tam statutes undermine or unduly interfere with the President's ability to fulfill his responsibilities under the take care clause. It was suggested there that the independent prosecutor statute impermissibly "reduc[ed] the President's ability to control the prosecutorial powers wielded by the independent counsel." The Court disagreed. Lower court False Claims Act qui tam cases decided in *Morrison's* shadow generally reached the same conclusion—the False Claims Act affords the Executive Branch sufficient control to turn aside a take care clause challenge—although they often concede that the control factors of the two were not the same.

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