

NECESSARY EVILS: HOW TO STOP WORRYING AND LOVE QUI TAM

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In a world of rising government spending, the False Claims Act is becoming an increasingly important enforcement statute for deterring and punishing companies that defraud the government. The False Claims Act's power lies in the qui tam provision, which allows private citizens to sue on behalf of the government in exchange for a portion of the reward. This provision gives the government expensive information at low cost. However, the qui tam provision and the private citizens who utilize it have been viewed suspiciously by various actors in the regulatory scheme.

This Note examines the economic value provided by the qui tam provision, the role that Congress envisioned it would play, its implementation by the Department of Justice, and its perception in the eyes of the courts. It uses the current circuit split between the Sixth and D.C. Circuits as a case study to illustrate the conflict between economic principles, congressional intent, utilization by the Department of Justice, and judicial treatment. The qui tam provision is at its best when used not as a way for the government to gather information but as a way for the government to outsource prosecutorial and investigative duties. The courts and the Department of Justice, however, have not adhered to this principle and have thus limited the qui tam provision's potential. At a time when government spending seems bound to increase, all players need to learn to embrace qui tam.

I. INTRODUCTION

The federal government is the biggest single consumer in the country, running up extraordinary costs in defense and healthcare, among other programs.¹ Because of the sheer volume of money expended, the amount of fraud committed against the government is similarly vast. The False Claims Act (“FCA”)² was enacted during the Civil War to counteract this problem by imposing civil penalties covering a range of “false claims” made against the government.³ Its main innovation, however, is the qui tam provision, short for “*qui tam pro domino rege quam pro se ipso in hac parte sequitur*,” literally meaning “who as well for the king as for himself sues in this matter.”⁴ This provision allows private citizens, also called relators, to bring suits against entities on behalf of the government and, if successful, to receive a share of the reward.⁵ Today, qui tam actions account for ninety-two percent of total recoveries, demonstrating

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¹ From the second half of 2011 through the first half of 2012, government spending accounted for 41.7% of U.S. gross domestic product. *2013 Index of Economic Freedom*, THE HERITAGE FOUNDATION, <http://www.heritage.org/index/explore?view=by-variables> (last visited May 16, 2013).

² False Claims Act, 31 U.S.C. §§ 3729–3733 (2011).

³ This may include requests for payment as well as requests to decrease an obligation to pay. *See id.* § 3729(a)(1)(G).

⁴ BLACK’S LAW DICTIONARY 1368 (9th ed. 2009).

⁵ 31 U.S.C. § 3730(b) (2011). This share has ranged from fifty percent in 1864, to ten percent in 1943, to thirty percent more recently. James B. Helmer, Jr. & Robert Clark Neff, Jr., *War Stories: A History of the Qui Tam*

their key role in the enforcement framework.⁶ Yet, policing fraudulent activities against the government remains a problem. False claims continue to cost the government \$50 to \$100 billion annually, of which only a very small percentage is recovered.⁷

This Note aims to strengthen this recovery effort by attempting to resolve the current circuit split over the interpretation of the first-to-file bar, which provides: “When a person brings [a qui tam action], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.”⁸ Courts differ on whether this first-to-file-bar applies even when the first-filed complaint does not meet Federal Rule of Civil Procedure 9(b)’s heightened pleading standard.⁹ While this question focuses on a small corner of the qui tam universe, it encapsulates the essential conflict at the heart of the debate around qui tam—whether the value of private informers to the recovery of damages in these types of cases is worth the nuisance of allowing sometimes unmeritorious claims. At bottom, the question is whether the work done by qui tam complaints, particularly those in which the government does not intervene, is valuable enough to loosen the gates of entry.

In order to fully deconstruct the tensions underlying the circuit split, this Note examines both the role that qui tam would play in an economically efficient world and the role envisioned by Congress, as compared to how it is implemented by the Department of Justice (“DOJ”) and how it is treated by the courts. Part II explores the economic theory behind the qui tam provision of the FCA. Part III traces the statutory evolution of the Act in order to demonstrate congressional intent. Part IV analyzes enforcement data to illustrate how the DOJ has utilized the qui tam provision in FCA enforcement. Part V appraises the courts’ attitude towards the qui tam provision by examining in detail the current circuit split over the interpretation of the first-filed rule and the applicability of Rule 9(b). Part VI offers recommendations on how the circuit split should be resolved, and ultimately how the qui tam provision can be utilized more efficiently by the DOJ.

Making sure that the FCA is enforced efficiently is more critical now than ever. As Figures 1 and 2 illustrate, while defense spending accounted for most fraud against the government in the first hundred years of FCA enforcement, healthcare spending has far outpaced defense spending in recent years. In turn, in 2011, total FCA settlements and judgments related to Health and Human Services reached \$2.3 billion, whereas total settlements and judgments related to the Department of Defense amounted to only \$160 million.¹⁰ With more regulation to come with the implementation of the Affordable Care Act, healthcare fraud is likely to increase.¹¹ Therefore, it is important for all involved—Congress, the DOJ, and the courts—to stop fearing and to start embracing the qui tam provision.

Provisions of the False Claims Act, the 1986 Amendments to the False Claims Act, and Their Application in the United States ex rel. Gravitt v. General Electric Co. Litigation, 18 OHIO N.U. L. REV. 35, 36, 39, 48 (1991).

⁶ U.S. DEP’T OF CIVIL JUSTICE DIV., FRAUD STATISTICS 2 (2012) [hereinafter FRAUD STATISTICS], available at http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf (using 2011 data).

⁷ Ben Depoorter & Jef De Mot, *Whistle Blowing: An Economic Analysis of the False Claims Act*, 14 SUP. CT. ECON. REV. 135, 137 (2006).

⁸ 31 U.S.C. § 3730(b)(5) (2011).

⁹ Compare *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966 (6th Cir. 2005) (holding that first-filed complaints that fail the heightened pleading standard of Rule 9(b) should not block subsequently filed claims), with *Batiste v. SLM Corp.*, 659 F.3d 1204 (D.C. Cir. 2011) (holding that first-filed complaints bar subsequently filed claims regardless of whether they meet Rule 9(b) standard).

¹⁰ FRAUD STATISTICS, *supra* note 6, at 4, 6.

¹¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

FIGURE 1: TOTAL SETTLEMENT REWARDS FROM QUI TAM LITIGATION, ADJUSTED FOR INFLATION¹²

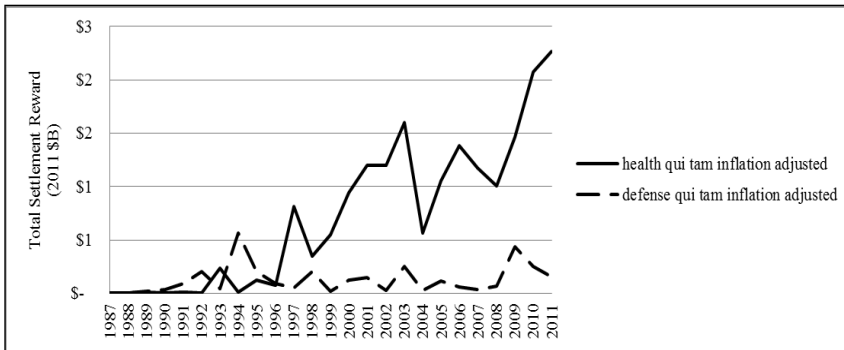
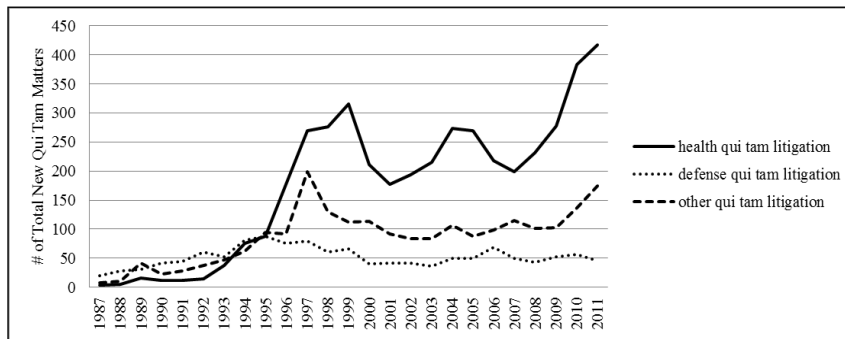


FIGURE 2: NUMBER OF QUI TAM MATTERS INITIATED BY YEAR¹³



¹² For the data underlying this Figure, see FRAUD STATISTICS, *supra* note 6. The inflation adjustment calculated using data from the Bureau of Labor Statistics. See *Consumer Price Index: All Urban Consumer (CPI-U)*, BUREAU OF LABOR STAT., U.S. DEP'T OF LABOR, [ftp://ftp.bls.gov/pub/special_requests/cpi/cpai.txt](http://ftp.bls.gov/pub/special_requests/cpi/cpai.txt) (last visited May 16, 2013).

¹³ For the data underlying this Figure, see FRAUD STATISTICS, *supra* note 6.