What is a *Qui Tam* (Whistleblower) Lawsuit?

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A *qui tam* lawsuit is one that is filed pursuant to the Federal False Claims Act and/or various state False Claims Acts against an individual or entity that is alleged to have perpetrated fraud upon the United States government or various state governments. The term "qui tam" is an abbreviation from the Latin phrase, "*qui tam pro domino rege quam pro se ipso in hac parte sequitur,"* which means "he who brings a base on behalf of our lord the King, as well as for himself." The Federal False Claims Act ("FCA") was enacted by Congress in 1863 at the behest of President Abraham Lincoln to redress fraud being perpetrated against the Union Army during the Civil War. The FCA was enacted so the Government could recover monies from contractors who sold the Union Army decrepit horses and mules in ill health, faulty rifles and ammunition, and rancid rations and provisions.

Today, a private citizen, often times referred to as a whistleblower, can file a *qui tam* lawsuit against an individual or entity that is defrauding the government and recover funds on behalf of the government. If the whistleblower's *qui tam* is successful, he or she is entitled to an award up to 30% of the judgment or settlement, plus costs and attorney's fees. A typical *qui tam* lawsuit focuses on an individual or entity's submission of a claim to the government that contains false or fraudulent information. In general terms, a "claim" is any request or demand for money or property that is made or presented to the United States government. Other *qui tam* lawsuits involve an individual or entity using a false document in order to get a fraudulent claim paid or misrepresenting the value of government property in order to avoid a payment obligation to the government. Common examples of *qui tam* lawsuits include upcoding or unbundling of Medicare/Medicaid charges, lack of medical necessity, fraudulent cost reports, off-label marketing, and improper kickbacks.

In a typical *qui tam* lawsuit, a whistleblower will file his or her *qui tam* lawsuit "under seal," which allows *only* the Department of Justice ("DOJ"), who is responsible for prosecuting these types of claims on behalf of the government, and the applicable state government investigatory agency to be notified of the whistleblower's allegations. During the time in which the lawsuit is under seal, which the statute states is for 60-days but it often times much longer, DOJ investigates the whistleblower's allegations and determines whether it will take over the prosecution of the lawsuit. During its investigation, DOJ will typically partially lift the seal to advise the defendant for the first time that a *qui tam* lawsuit has been filed against them, to discover additional facts from the defendant relevant to the lawsuit, and to broach the prospect of settlement.

The FCA also protects whistleblowers that encounter retaliation as a result of their assistance, initiation, or participation in a *qui tam* lawsuit. The FCA protects whistleblowers from discharge, demotion, harassment, or any other form of discrimination against the terms of his or her employment or independent contractor relationship. A whistleblower who encounters such discrimination is entitled to reinstatement with the same seniority status the employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay plus interest, and litigation costs and attorney's fees.

Who is at risk?

Any individual or entity that contracts, directly or indirectly, with the United States government or state governments and, by virtue of their contract, submits claims to and is reimbursed by the government. Examples include banking institutions, defense contractors, hospitals, medical device companies, pharmaceutical manufacturers, pharmacies, physicians, and physician groups.

What damages can be expected?

According to the FCA, the government is entitled to three times the amount of its actual damages, civil penalties between $5,500 and $11,000 for each false claim, and attorney's fees and costs associated with the *qui tam* lawsuit. Thus, for example, a healthcare provider that allegedly submitted 100 false claims could face civil penalties of $1.1 million.

The FCA is touted by its supporters as the primary vehicle used for recouping government losses suffered through fraud. In fact, in 2014, the Department of Justice collected a record $5.69 billion in judgments and settlements involving the FCA, which brings the amount collected by the Department to $22.75 billion since 2009. Of the $5.69 billion, $2.3 billion was related to alleged healthcare fraud against federal healthcare programs such as Medicare, Medicaid, and TRICARE. The influx of FCA recovery has come by way of recent congressional amendments that have strengthened FCA enforcement actions and by the formation of the Health Care Fraud Prevention and Enforcement Action Team (HEAT). A combination of Medicare Fraud Strike Force Teams spread throughout the United States, HEAT was created in 2009 by United States Attorney General Eric Holder and Health and Human Services Secretary Kathleen Sebelius for purposes of improving coordination of FCA enforcement. Since the creation of HEAT, DOJ has collected $14.5 billion in federal healthcare cases.

***Qui Tam* Defense**

Defending *Qui Tam* actions requires a special combination of trial skills including experience dealing with government authorities and a detailed knowledge of the client's business. Our experienced attorneys have represented clients through every phase of *qui tam* proceedings under the False Claims Act. Heyl Royster's proactive approach starts with the internal investigation and is focused on obtaining a successful result as soon as possible. Our knowledge of the intricacies that exist within the False Claims Act provides us with the background that is necessary to develop an effective defense. Our extensive experience working with federal government officials throughout the *qui tam* process gives our attorneys a unique insight into the framework that underlies False Claims Act investigations and intervention decisions.

Examples of our recent *Qui Tam* representations include:

- After engaging federal government officials and responding to civil investigative demands, obtained a notice of declination of intervention in a *qui tam* lawsuit arising out of alleged hospital upcoding.
- Obtained a dismissal of a *qui tam* lawsuit and retaliatory discharge claim arising out of a hospital allegedly submitting claims for Medicare reimbursement that were not medically necessary.
- Prepared and represented physicians for interviews with United States Department of Justice.
- Defended retaliatory discharge claim of alleged whistleblower.
- Defended hospital against whistleblower's claim of inflated billings in violation of False Claims Act.
- Counseled hospital regarding handling of physician threatening a False Claims Act case.
- Counseled hospital through the OIG Self-Disclosure Protocol.

Our *Qui Tam* Practice Group also has extensive experience in Medicare and Illinois Medicaid billing and reporting requirements, including an intimate knowledge of a hospital's obligations under the amended False Claims Act. In addition, our attorneys have experience navigating the interplay between the Anti-Kickback Statute, Civil Monetary Penalty Statute, and Stark Law. When an entity or individual is subject to a False Claims Act investigation, our depth and experience become an immediate factor in addressing and engaging the federal government and relator's counsel at an early stage.

For more information on *Qui Tam* (Whistleblower) litigation, please contact Tyler Robinson (217.522.8822 or trobinson@heylroyster.com).