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Are Courts Still the Best Place to Litigate a Qui Tam Action?

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The Typical *Qui Tam* Case Life Cycle

In a typical *qui tam* case, the sequence and life cycle follow a similar trajectory. The relator files a sealed *qui tam* complaint in a federal courthouse in the United States. While COVID has disrupted litigation, particularly complex False Claims Act (FCA) litigation, the basic case path still remains. Although the statute provides for a 60-day investigation period, cases may—and very often do—remain under seal for years. The defendant may or may not know about the sealed case. A Civil Investigative Demand (CID), or Health Insurance Portability and Accountability Act (HIPAA) subpoena, search warrant, or grand jury subpoena may place the defendant on constructive notice of an active civil and/or criminal investigation. The government often requests partial unsealing orders to engage the defendant in resolution discussions. Early resolution is not always successful. Fewer than 25% of the time, the government intervenes in some or all of the relator's allegations.[1] *Qui Tam* complaints often contain both federal and state allegations that typically involve federal and state prosecutors along with myriad

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investigative agencies. These complaints often contain a 31 U.S.C. § 3730(h) retaliation claim, as well as other private causes of action. Sometimes the government takes no position. Other times the government declines to intervene in some or all of the allegations. Of significance to this article, the number of cases moving forward on a non-intervened basis has increased considerably over the last decade.[2]

The Unsealing of a *Qui Tam* Complaint

Once the government makes its intervention decision in the *qui tam* case, the case is unsealed by a court. The usual procedural banter between the government, defense counsel, and the relator and their counsel depending on the specific posture of the case then occurs. At times, media coverage follows the unsealing, which can complicate matters for certain types of defendants. For publicly traded companies, there may be Securities and Exchange Commission reporting requirements. In the last decade, more non-intervened or partially intervened cases are moving forward, often with skilled relators' counsel leading the prosecutorial efforts. The government then assumes a "monitoring role," weighing in with filed "statements of interest" intended to shape the law in a way the Department of Justice thinks most appropriate, at times moving to dismiss an action it feels may be problematic.

Most defense counsel file a comprehensive motion to dismiss in response to a *qui tam* complaint. After the motion to dismiss is decided, the case may proceed or have certain claims eliminated or trimmed. Courts usually allow relators one or more opportunities to amend their complaint. At times, this process can extend for well over a year. The short-lived jubilance that comes from succeeding past that initial portion of the case can evaporate as the case proceeds through discovery to summary judgment, *Daubert* proceedings, and in an increasing number of cases, an expensive jury or bench trial.

The Long, Winding, and Costly Discovery Road

Before COVID, the district courts had been placing greater pressure to move cases along. This pre-COVID alacrity has slowed in many jurisdictions due to the continuing uncertainties associated with the virus. Since FCA cases typically stay under seal for long periods of time, they appear on aged cases lists, which can be very frustrating for courts and the litigants. False claim litigation, however, is complex, multi-faceted, and time consuming and in the main is unlike other litigation. Discovery can take years, with considerable motion practice. Scores of depositions are often taken throughout the country sometimes on multiple tracks. Third-party discovery often plays a crucial role and requires considerable time-consuming follow up. *Touhy* subpoenas are often served on the government, which often result in critical materials for the defense. Even when the government has declined to intervene, it remains the real party in interest and will receive 70% of the total recovery if the case is successful. The government may

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decide to take a more active role into a case after a more fulsome record is developed by relators. Finally, no case can be dismissed or settled without the government's express consent.

The Pivotal and Expensive Summary Judgment Process

Due to the complexity of these cases and the dynamic case law, highlighted by several circuit splits and increasing Supreme Court involvement on significant legal issues, defendants, and at times, plaintiffs, become considerably committed to the summary judgment process. It is not unusual for a party to spend hundreds of thousands of dollars in fees preparing for and/or responding to summary judgment motions. The parties may also experience a very long delay as busy trial judges wade through thick binders filled with evidence, testimony, expert reports, exhibits, and affidavits.

Could a Creative Litigation Path Be More Fruitful for All Stakeholders?

Once the litigants are beyond summary judgment, it remains a long, contentious, and expensive process to a final resolution. Many litigants become polarized in a battle-hardened posture to the detriment of the overall settlement process. The federal and state false claims statutes have robust fee-shifting provisions that can also deter resolution. Both sides may spend millions of dollars hiring experts and preparing for war.

Many courts urge, in one way or the other, the parties to settle. Sometimes courts impose their own procedures on the process. Not all parties like the selected mediators, and at times, for good reason. Many mediators may not be equipped to resolve a complex False Claims Act case. A case may involve state and federal prosecutors, multiple defendants, the relator and counsel, and subject matter expertise, including a working understanding of multiple substantive issues germane to the state and federal False Claims Acts.

What if litigants embraced an alternative and creative way to resolve appropriate FCA cases at the very outset of litigation? Plaintiffs often have an overly enthusiastic view of their fraud theory. Defendants want to test their legal theories or engage in further discovery to see if their claims or defenses work. Discovery and motion practice often propel the parties away from settlement and onto hard core litigation. Once the litigation train begins, it is difficult to stop, slow down, or even get off.

The longer the case is active, the larger the potential legal fee lodestar and costs. It is not unusual for Circuit Court of Appeals or even Supreme Court litigation to occur in a

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growing number of cases. Inertia takes over fueled by numerous increasing deadlines imposed by courts. Court-imposed deadlines may apply a litigation fatigue to the parties in the hopes a settlement will ensue. This approach does not always work. But what if all the litigants and stakeholders chartered their own course right at the outset of litigation? Could this approach lead to a more efficient and effective process for all parties?

A Different and Creative Path to Consider for Resolving Complex *Qui Tam* Cases

What if the parties, at the very outset of litigation, sat in a room, or on a Zoom in today's COVID world, and chartered their own course tailored to a more efficient and perhaps equitable resolution? Granted this type of approach is very different. It requires both parties and their counsel to have experience, confidence, skill and, not insignificantly, mutual trust on all sides. This type of alchemy among litigants does not always exist, but if it does, it should be utilized to its full extent. Each litigant must be confident enough to abandon the traditional litigation path and try a new approach that may actually serve everyone's interests in the long run. It will not be easy for most litigants, particularly if they have never gone through all the paces of a conventional *qui tam* case.

However, true finality may be achievable at a fraction of the cost in a more controlled and permanent environment. The parties could do so without a skilled mediator, but frankly, it will be extremely difficult to settle a case of such complexity alone. If an intermediary is needed, and one typically is essential, that person should be jointly selected by the parties. The intermediary must be highly familiar with the unique aspects of *qui tam* litigation and the tripartite nature of the relationship: government—plaintiff-relator—defendant. The intermediary must be willing to treat all parties equally, despite their very different, and at times changing, roles in this unique litigation.

Every *qui tam* case is different and there is no one-size-fits-all approach. But in the right case, parties should consider a creative approach to bring the parties together early on for a potentially more efficient, less costly, and more timely resolution that will serve all the stakeholders' interests.

About the Authors

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[1] U.S. Dep't of Justice, False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits (2012); *see also* Memorandum from Michael D. Granston, Dir., Comm. Litig. Branch, Fraud Section, U.S. Dep't of Justice, to Attorneys, Comm. Litig. Branch, Fraud Section, U.S. Dep't of Justice on Factors for Evaluating Dismissal Pursuant to 31 U.S.C. 3730(c)(2)(A) (Jan. 10, 2018) ("Although the number of filings as increased substantially over time, the rate of intervention has remained relatively static").

[2] *See* Granston, *supra*.

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