

Lincoln's law contained *qui tam* provisions to encourage citizens to act as private attorneys general in the fight against fraud. The concept of *qui tam* was not unique to the FCA. *QUI tam* provisions were common in the Middle Ages because there was no organized police force or system of government inspectors to maintain law and order. The words "*qui tam*" are used as an abbreviation for a longer Latin phrase that means "he who brings an action for the king as well as for himself." *QUI tam* encourages the public to police wrongdoing through financial incentives. The First Continental Congress adopted the *qui tam* concept from Anglo-Saxon jurisprudence and enacted several statutes containing *qui tam* provisions.

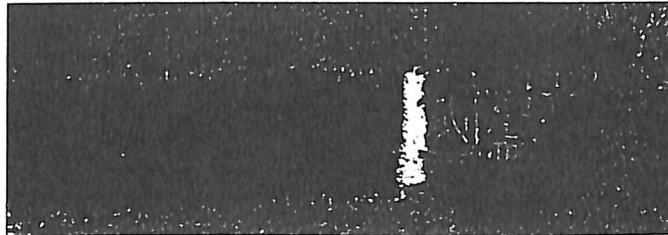
The original Act's *qui tam* provisions entitled citizens whose lawsuits returned money to the Treasury to receive 50 percent of that recovery. The Act assessed double damages against the wrongdoer, plus a \$2,000 civil fine for every false claim submitted. The FCA's original provisions remained unchanged well into the twentieth century.

In 1943, however, Congress radically altered the Act's *qui tam* provisions. It eliminated the *qui tam* relator's guaranteed 50 percent share of recovered proceeds. In its place, Congress gave the court discretion to award the relator as little as nothing and a maximum of 25 percent of the recovery. Further, a *qui tam* case was barred "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." As a result, even when someone, somewhere in the government, possessed the requisite information about the alleged misconduct but was not acting on it, a *qui tam* case could not go forward. Thus, the death knell for *qui tam* litigation was sounded.

In *United States ex rel. State of Wisconsin v. Dean*, for example, a state was barred from serving as a *qui tam* relator in a Medicaid fraud action because it had previously disclosed the fraud to the Department of Health and Human Services (HHS) as required by law. In that case, the federal government declined to intervene in the case, stating that its interests

would be served by the state's controlling the action. Nevertheless, the court dismissed the case, concluding that only Congress could create a "special exemption" from the bar.⁴

While successful FCA *qui tam* litigation declined after the 1943 amendments, fraud against the federal government did not. In 1980 DOJ estimated that fraud drained up to 10 percent of the entire federal budget.⁵ In 1985 forty-five of the one hundred largest defense contractors, including nine of the top ten, were under investigation for multiple fraud offenses. Several of the largest defense contractors had already been convicted of criminal offenses. Moreover, fraudulent misconduct was not limited to defense contractors. HHS nearly tripled the number of entitle-



"Worse than traitors
in arms are the men
who pretend loyalty
to the flag, feast
and fatten on the
misfortunes of the
Nation while
patriotic blood
is crimsoning the
plains of the South..."

Abraham Lincoln

ment program fraud cases it referred for prosecution in the mid-1980s. Despite the increased government resources directed at the problem, Justice Department records indicated that most fraud referrals remained unprosecuted.

The 1986 Amendments. It was in the context of rampant, unremedied fraud that Senator Charles Grassley (R-IA) and Representative Howard Berman (D-CA) sponsored the 1986 FCA Amendments. The legislation received bipartisan support and became law on October 27, 1986, with the signature of President Reagan. The legislative history of the Amendments reported that "the purpose...[of the legislation] is to enhance the Govern-

ment's ability to recover losses sustained as a result of fraud against the Government."⁶ Congress determined that "[i]n the face of sophisticated and widespread fraud,...only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds."⁷ As such, the Amendments addressed both the general provisions of the Act and the *qui tam* provisions. With these changes, the law has become, once again, the catalyst for a vital public-private partnership and a most powerful weapon in the fight against fraud.

The changes made by the 1986 Amendments fall into two categories: changes to the general provisions of the statute and changes to the *qui tam* provisions. The effect of both categories' changes has been to facilitate *qui tam* actions under the Act.

The 1986 Amendments enhanced the general provisions of the FCA in several ways. Three of the most important changes related to damages, the requisite level of intent, and the standard of proof. First, the 1986 Amendments increased the consequences of violating the law to treble damages and civil fines of between \$5,000 and \$10,000 for each false claim.⁸ Second, they expressly stated that specific intent is not an element of a FCA violation and that defendants' actions in "deliberate ignorance" or "reckless disregard" of the truth violate the law.⁹ Third, the Amendments specifically provided that the "preponderance of the evidence" standard of proof applies to FCA cases. This clarification ended the confusion

engendered by inconsistent prior case law on the subject.¹⁰

The 1986 Amendments also revitalized the *qui tam* provisions of the Act. Five changes are particularly noteworthy. First, the Amendments removed the overly restrictive "government possession of information" bar on *qui tam* suits. Second, the Amendments reintroduced guaranteed court awards for successful relators and set out specific percentage ranges for different case scenarios. Now, section 3730(d) of the Act directs the court to award at least 15 percent and up to 25 percent to successful relators in whose cases the government has intervened, and not less than 25 percent and up to 30 percent to successful relators in whose cases the govern-

ment has not intervened. If the court determines that the relator's case is based primarily on information already publicly disclosed, it may not award more than 10 percent of the proceeds to the relator.

Third, the 1986 changes required a defendant to pay a successful relator's reasonable expenses "necessarily incurred" plus reasonable attorney's fees and costs.¹¹ This provision is in the tradition of other statutes that seek to enlist private enforcement and deter white-collar crime.

Fourth, the Amendments permitted relators to remain as represented parties in the cases in which the government intervenes.¹² In fact, the more involved relators are in helping achieve successful resolutions of their cases, the greater their court-awarded share of the proceeds is likely to be. Section 3730(d)(1) of the FCA specifies that the percentage share the court shall award a relator when the government intervenes depends upon "the extent to which the person substantially contributed to the prosecution of the action."

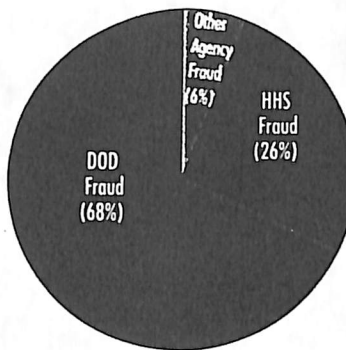
Fifth, the Amendments enacted protections against employer retaliation for employees who act in furtherance of an FCA case. Section 3730(h) of the FCA specifies that employee whistleblowers are "entitled to all relief necessary to make the employee whole" including reinstatement with the same seniority status, two times the amount of back pay, interest on back pay, and compensation for any special damages sustained as a result of discrimination in the terms and conditions of employment.

Together with the other changes contained in the 1986 Amendments, the provisions relating to *qui tam* litigation have successfully enlisted citizen involvement in recapturing funds for the federal government.

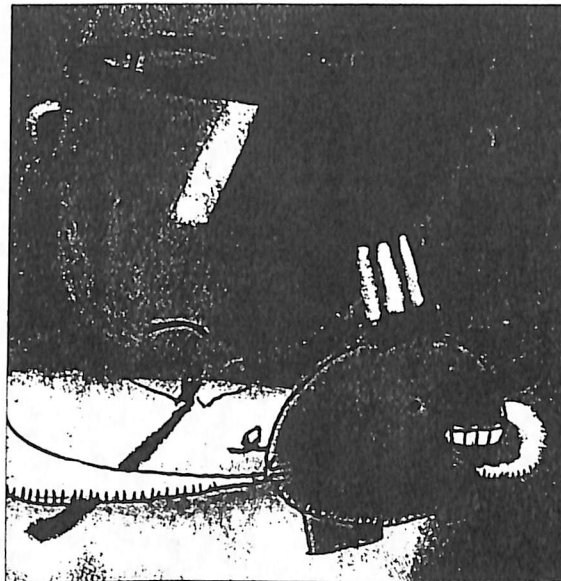
Civil Fraud Recoveries. The Amendments' first ten years have lived up to congressional expectations. Since the 1986 Amendments became law, the federal government has realized over \$3 billion in total civil fraud recoveries. About one-third of that amount, \$1.13 billion, is attributable to *qui tam* litigation. The relators who have made this possible have received, on average, 18 percent of the recoveries their cases produced.

This overwhelming success is most likely owing to the design of the Amendments. They encourage a public-private partnership by offering guaranteed mon-

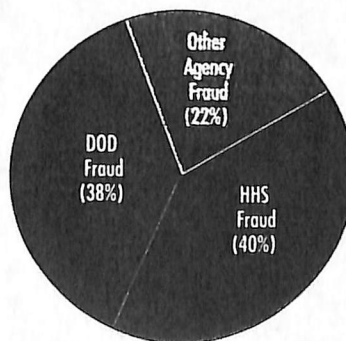
Qui Tam Recoveries Since the 1986 Amendments by Type of Fraud



Source: U.S. Department of Justice



Currently Pending Qui Tam Cases by Type of Fraud



Source: U.S. Department of Justice

etary recoveries, providing broad whistleblower protections, and enabling relators and their attorneys to maintain an active role in the litigation even after government intervention. Thus, bringing anti-fraud litigation is a more attractive and less risky prospect than before. Indeed, the number of *qui tam* cases filed has grown from 33 in fiscal 1987 to 278 in fiscal 1995. The amount of funds recovered by the *qui tam* provisions has increased one hundredfold in seven years—from about \$2 million in fiscal 1988 to more than \$200 million in fiscal 1995.

In the time immediately after enactment of the 1986 Amendments, Department of Defense (DOD) fraud was the main subject of *qui tam* litigation. The next major area to be addressed was health care fraud.

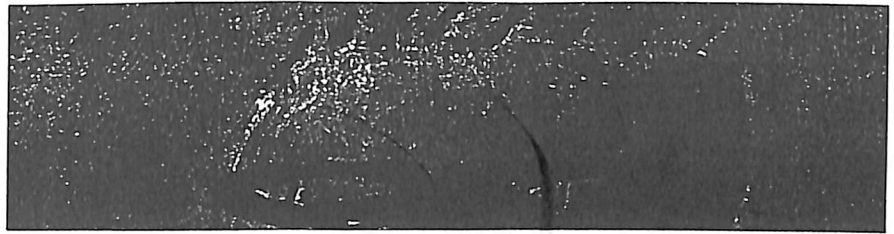
Now, as use of the FCA's *qui tam* provisions expands, DOD fraud no longer dominates *qui tam* cases. Instead, a more diverse array of fraud is being addressed. DOD fraud (38 percent) now holds second place to HHS fraud (40 percent), with a wide variety of other agency fraud (22 percent) also being targeted.

Within these program areas are a broad variety of FCA violations. For example, fraud is committed against the government through overbilling, false certification of qualifications, delivery of substandard products, provision of unnecessary health care or of an inadequate quality of health care, failure to perform required quality control tests, and the like. This misconduct occurs in a wide array of federal government programs including defense procurement, Medicare, Medicaid, Civilian Health and Medical Program for Uniformed Services (CHAMPUS), Department of Agriculture, Department of Housing and Urban Development (HUD), Federal Emergency Management Agency (FEMA), child welfare, Social Security Disability Insurance, Department of Transportation (DOT), and scientific research funded by the National Institutes of Health. The wrongdoing seems limitless, but the FCA covers it all.

The largest *qui tam* recovery to date came in *United States ex rel. Keeth v. United Technologies Corp.* In that case, the Sikorsky Aircraft Division of United Technologies Corporation (UTC) was sued for prematurely billing the government for work not yet performed on a helicopter contract. The company was also accused of inflating material inventories used as a basis for progress bills on its fixed-price contracts.

In DOJ's view, inflated progress payments constituted interest-free loans from the government and resulted in additional debt service costs even if the company did not receive more money in total than permitted under the contract. The complaint further accused UTC officials of attempting to suppress disclosure of the alleged practices even though UTC joined the Department of Defense's Voluntary Disclosure Program. The relator, Douglas Keeth, was vice president of finance for UTC and a member of UTC's voluntary disclosure team. The company agreed to settle the suit in March 1994 for \$150 million. The relator received about 15 percent of the recovery.

The largest health care fraud recovery to date in a *qui tam* case came in *United States ex rel. Dowden v. National Health Laboratories Inc., MetPath & MetWest*.



The person who brings a *qui tam* case is suing on behalf of the government. That person is called a "relator" and the case name is usually styled "The United States ex rel. Relator v. Alleged Wrongdoer."

THE 1986 AMENDMENTS: KEY PROVISIONS

The 1986 Amendments rejuvenated the False Claims Act by encouraging a powerful public-private partnership against those who defraud the federal government. The key provisions of the 1986 Amendments:

- Increased the cost of violating the law to treble damages and civil penalties of between \$5,000 and \$10,000 for each false claim;
- Entitled successful *qui tam* relators to at least 15 percent and up to 30 percent of the money they help recover for the federal government;
- Provided that the defendant pay for the successful relator's reasonable expenses, attorney's fees, and costs;
- Protected employee whistleblowers from employer retaliation;
- Allowed relators to remain as parties in the suits that the government joins;
- Eliminated the overly restrictive "government possession of information" bar against *qui tam* suits;
- Made defendants liable for acting in "deliberate ignorance" or "reckless disregard" of the truth and eliminated the need to prove specific intent; and
- Restored the "preponderance of the evidence" standard of proof in FCA actions.

The complaint in that case accused three blood testing laboratories of manipulating doctors into ordering unnecessary and expensive blood tests in a package with a common, less expensive "SMAC" blood test. The SMAC test could not be ordered independently of the expensive tests. Medicare and Medicaid officials paid for all of the tests, assuming that the doctors had ordered them for sound medical reasons.

The relator, Jack Dowden, a sales manager at MetWest, was puzzled at how his competitor, National Health Laboratories (NHL), could afford to offer the additional blood tests without charge. He identified the practice alleged in the case when he had a sample of his own blood sent to NHL for testing and was billed for one of the additional tests.

All three labs settled the litigation: NHL paid \$111.4 million and MetPath and MetWest paid \$39.8 million. The relator received about 15 percent of the settlement.

The largest *qui tam* recovery to date obtained from a state for allegedly committing fraud in a federally funded, state-administered social welfare program occurred in *United States ex rel. Denocourt v. State of New York*. In that case, the state of New York, several state universities, and five state employees were accused of overbilling the federal government for the training of social service workers. The social service workers were supposed to implement social welfare programs like Medicaid and Aid to Families with Dependent Children. The relator, George Denocourt, was a New York State Department of Social Services employee. The state de-

fendants settled the case in December 1994 for about \$27 million. The relator received about 15 percent of that amount.

The first scientific research fraud FCA case pursued by the government was originally filed by a *qui tam* relator who had worked as a research assistant at the lab in question. That case, *United States ex rel. Condie v. University of Utah, Dr. John Ninnemann & the Board of Regents of the University of California*, challenged the work of Dr. Ninnemann on the causes of immune system suppression after burn injury. Ninnemann received funding from the National Institutes of Health for almost a decade for his research but, according to the case, had falsified his research results to obtain it. The litigation further alleged that the University of Utah, where Ninnemann initially worked, was aware of the falsifications because of an internal investigation, but characterized the problem as sloppy research rather than intentional falsifications. The University of California, where Ninnemann subsequently worked, was accused of not monitoring him as it had promised. The universities settled the case in July 1994 for \$1.575 million. The relator received about 20 percent of the settlement.

Recent Settlements. Other recent FCA settlements illustrate the broad variety of federal government programs whose integrity the statute has defended.

In *United States v. Metro Construction Co. et al.* a contracting company and its owner were accused of submitting false invoices for hauling sanitary landfill to a San Juan dump. The invoices were submitted to San Juan's Community Development

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THE FALSE CLAIMS ACT

The False Claims Act is violated when a person or entity deceives the federal government to obtain money improperly or to be relieved improperly from paying money to the government. Section 3729(a) of the FCA lists the specific situations in which the Act comes into play. In short, the Act prohibits, among other things:

- Knowingly presenting (or causing to be presented) to the federal government a false or fraudulent claim for payment;
- Knowingly using (or causing to be used) a false record or statement to get a claim paid by the federal government;
- Conspiring with others to get a false or fraudulent claim paid by the federal government; and
- Knowingly using (or causing to be used) a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the federal government.

The Act does not cover tax fraud.

Block Grant Program (a HUD program). The complaint claimed that the invoices contained false or nonexistent vehicle license plate numbers and driver names, and that they billed for deliveries that were never made. In November 1995 the defendants agreed to pay \$1.4 million to settle the allegations.

The allegations in *United States v. First Union Mortgage Corp.* were that a mortgage company falsely certified the eligibility of borrowers for federally insured mortgages. In some instances, the alleged violation occurred because downpayments required from the borrowers were canceled or refunded at closing. In others, the Department of Justice claimed that the borrowers were only "straw buyers." The resulting defaults caused a \$4.3 million loss to HUD. The case settled in June 1996 for \$7 million.

In *United States ex rel. Nelson v. CSX Transportation, Inc.* the defendant was sued for overcharging the government for railroad crossing signals installed under the Department of Transportation's Rail Highways Crossing Program. The relator claimed that CSX inflated labor hours for wiring signal houses, failed to obtain the lowest price possible for parts from third-party vendors, and overcharged for certain

parts by selling them at a profit to third-party vendors, then repurchasing them and charging the government a higher repurchase price. The company settled the case in September 1995 for \$5.9 million. The relator's share was 20 percent of the settlement.

United States ex rel. Davis & Dennison v. M/G Transport Services, Inc. et al. involved a towboat company that delivered coal by barge to the Tennessee Valley Authority under a government contract requiring compliance with the Clean Water Act (CWA). The relators alleged that the company pumped oily bilge, trash, and sewage into the river in violation of the CWA. They accused the defendants of failing to report the discharges and concealing them in company documents. The defendants settled the case with the relators for \$4.6 million in June 1996. The relators received 29.5 percent of the settlement. The government did not intervene in the *qui tam* action, but successfully sued M/G Transport Services and individual defendants for violating the CWA.

In *United States v. Harris Corp.* the Justice Department sued a company for improperly obtaining confidential information to win a communications system contract from FEMA. The inside information allegedly concerned the agency's criteria for evaluating bids and gave the company an unfair competitive advantage over the other bidders. The company settled the case in June 1995 by agreeing to forgo contract payments worth \$1.6 million.

In *United States v. GMS Management-Tucker, Inc. et al.* a Pennsylvania nursing home was sued for certifying that its care met government standards, although it was providing inadequate nutrition and wound care to elderly residents. The case settled in February 1996 for \$600,000 plus an agreement by defendants to institute a strict corporate compliance program aimed at ensuring adequate care for patients, and an agreement to implement a nutrition monitoring and quality assurance program.

Billions in Return. These are only a few examples of the wide variety of successful FCA cases that have returned billions of dollars to the U.S. Treasury. The frontiers of the False Claims Act are as wide as the number of defrauded federal government programs is large. As time goes on and more attorneys find that FCA *qui tam* litigation is an excellent way to contribute to the public good while working in the private sector, we can expect to see even more successes in the fight against fraud under the Act.

Notes

¹ James B. Helmer Jr., Ann Lugbill & Robert Clark Neff Jr. *False Claims Act: Whistleblower Litigation* xiii (1994).

² *Hearings on the Departments of State, Justice, and Commerce before the Subcommittee on the Departments of State, Justice and Commerce, the Judiciary and Related Agencies of the House Committee on Appropriations*, 96th Cong., 2d Sess. (1980), as cited in S. Rep. No. 345, 99th Cong., 2d Sess. at n.6; reprinted in 1986 U.S.C.C.A.N. 5266 [hereinafter *Hearings*].

³ 31 U.S.C. §§ 3729-3733.

⁴ 729 F.2d 1100 (7th Cir. 1984).

⁵ *Hearings*, supra note 2.

⁶ S. Rep. No. 99-345 at 1; reprinted in 1986 U.S.C.C.A.N. 5266.

⁷ *Id.* at 2; reprinted in 1986 U.S.C.C.A.N. 5266-67.

⁸ 31 U.S.C. § 3729(a).

⁹ *Id.* § 3729(b).

¹⁰ *Id.* § 3731(c).

¹¹ *Id.* § 3730(d).

¹² *Id.* § 3730(c).

TAXPAYERS AGAINST FRAUD, THE FALSE CLAIMS ACT LEGAL CENTER

Taxpayers Against Fraud, The False Claims Act Legal Center is a nonprofit public interest organization dedicated to combating fraud against the federal government through the promotion and use of the *qui tam* provisions of the False Claims Act. TAF is based in Washington, D.C., where a staff of lawyers and other professionals is available to assist anyone interested in the False Claims Act and *qui tam*.

Among the resources TAF offers are:

- *False Claims Act and Qui Tam Quarterly Review*;
- A comprehensive False Claims Act library;
- A *qui tam* attorney network;
- *Qui tam* case support;
- A *qui tam* plaintiff loan program; and
- *Amicus* brief submissions.

For more information about the False Claims Act or TAF, call 202-296-4826 or 1-800-US-FALSE (1-800-873-2573). TAF can also be reached on the World Wide Web at <http://www.taf.org>.

Note: TAF has extensive expertise in the False Claims Act and qui tam, but it is not a law firm and does not represent outside clients or provide legal advice.