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# IS UNCLE SAM JUDGMENT-PROOFING YOUR *QUI TAM*?

*by JESSE GESSIN*

Whistle blowing is big business. The Department of Justice obtained more than $4.7 billion in settlements and judgments from civil cases involving fraud and false claims against the government in fiscal year 2016 alone.[1] Of the $4.7 billion, $2.9 billion related to lawsuits filed under the *qui tam* provisions of the False Claims Act (FCA).[2] The government paid out $519 million to individuals who uncovered fraud and false claims by filing a *qui tam* complaint.[3] With all that money sloshing around, it should be no surprise the government is looking to keep more for Uncle Sam. Whistle blowers, also known as relators, and *qui tam* practitioners, must be wary of the government cutting them out of the recovery pie. This article discusses the trend and what to do about it.

### What is a *Qui Tam* Lawsuit?

*Qui tam* comes from the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which translates to "who pursues this action on our Lord the King's behalf as well as his own."[4] The idea is relatively simple: turn every employee into a snoop by incentivizing whistle blowing. When a private citizen files a *qui tam* action, the government has a statutory right to intervene in the action, but it need not exercise that right. If the government elects to intervene, the relator is entitled to fifteen to twenty-five percent of the recovered proceeds.[5] If the government declines to intervene, the relator is entitled to twenty-five to thirty percent of the proceeds.[6] Where the government pursues a claim to funds through an "alternate remedy," the relator is entitled to fifteen to twenty-five percent of the recovered proceeds.[7]

### *United States v. Van Dyck* and the Trend of Judgment-Proofing Relators

The government's new *modus operandi* is to elect not to intervene and then drain all of the target company or individual's funds through criminal forfeiture, leaving the company or individual judgment proof to a *qui tam* action.[8] That is what happened in *United States v. Van Dyck*, a 2017 Ninth Circuit decision.[9]

Neil Van Dyck was a licensed podiatrist who owned and operated his own podiatry practice. Wendy Johnson and Nancy Smith worked for the podiatry practice as medical assistants. Dr. Van Dyck's unusual billing patterns for surgical nail avulsion (removing the toe nail from the nail bed), skin graft, and ultrasound procedures prompted an investigation by a Medicare contractor who investigates potential fraud and refers cases to law enforcement.

> Leaving the question for another day is an invitation to the government to cut relators out of the restitution pool, thereby chilling *qui tam* actions.

After receiving an inquiry from the contractor, Ms. Johnson and Ms. Smith blew the whistle on Dr. Van Dyck. They filed an under seal *qui tam* suit on July 6, 2012, and the government kept the case under seal until January 2016. In the meantime, the government investigated the case and filed a criminal information on September 28, 2015. At one point, the government attempted to negotiate a settlement for the *qui tam* suit, but those negotiations fell through in November 2015. On October 23, 2015, just one month after the information was filed, Dr. Van Dyck pled guilty pursuant to a plea agreement. As part of his plea agreement, Dr. Van Dyck would immediately forfeit $1.23 million from his retirement account. Three days later, the district court entered a forfeiture judgment for $1.23 million. On February 18, 2016, the government declined to intervene in the civil *qui tam* action.

The government had gone around the relators to contract directly with the defendant for the forfeiture judgment. While the government and the defendant got what they wanted, the relators did not at all; they were left with potentially litigating an expensive *qui tam* suit with a judgment-proof Dr. Van Dyck.

The relators moved to intervene in the criminal proceeding, arguing that the criminal action was an "alternate remedy" under the FCA. The Ninth Circuit disagreed, and affirmed the lower court's dismissal of the intervention action.

The central issue raised by the *qui tam* litigants in *Van Dyck* is whether a criminal proceeding is an "alternate remedy" entitling a whistle blower to fifteen to twenty-five percent of the recovered proceeds. Those looking for a clear answer in *Van Dyck* will not find one.

The Ninth Circuit punted on this key issue noting that while "it is an open question" as to whether a criminal proceeding is an "alternate remedy" under the FCA, the sole issue on appeal was whether the relators had standing to intervene in the criminal proceeding.[10] And, the answer to that question is the relators do not have standing.[11] The result of *Van*

*Dyck* is that relators' "sole statutory remedy is to commence a civil action" and litigate the "alternate remedy" in the civil action.[12] The Ninth Circuit was not sympathetic to the relators' concern about Dr. Van Dyck's being rendered judgment proof.[13]

Precluding relators from intervening in a criminal proceeding may make pragmatic sense. After all, the opposite result would have potentially converted criminal proceedings into civil proceedings that would require massive expenditures of judicial resources on cases that are already being handled as *qui tam* suits. Nonetheless, refusing to opine in dicta that a criminal proceeding is an alternate remedy seems conservative given a previous ruling by the Ninth Circuit.

In *United States ex rel. Barajas v. United States*, the Ninth Circuit held that "a suspension or debarment proceeding is an 'alternate remedy' within the meaning of the FCA" in certain circumstances.[14] *Barajas* dealt with allegations that Northrop Corporation had breached contracts with the Air Force by delivering flight data transmitters that contained damping fluid that did not comply with contractual specifications. The alternate remedy at issue was suspension or disbarment proceedings related to contracts with the Air Force. The reasoning turned on the fact that "the government obtained a remedy from Northrop for the defective damping fluid that substantially replicated the remedy it could have obtained if it had intervened" in the *qui tam* action.[15] By this reasoning, the Ninth Circuit should have had no trouble recognizing the criminal proceeding in *Van Dyck* as an alternate remedy to the *qui tam* action. Leaving the question for another day is an invitation to the government to cut relators out of the restitution pool, thereby chilling *qui tam* actions. In other words, it contravenes the policy reasons for *qui tam* actions.

### Practice Pointers After *Van Dyck*

A problem for practitioners is that the case law and scholarship on this issue is relatively thin.[16] Unfortunately, the Ninth Circuit's hair-splitting holding narrowly avoids a split with the Sixth Circuit.[17] With a circuit split, there is a chance the Supreme Court would weigh in on the issue sometime in the near future.

In the absence of uniform circuit law, practitioners should work prophylactically. The defendant from the alternate proceeding should be named[18] in the *qui tam* complaint and the complaint must be pled with particularity.[19] So there is no confusion about sourcing, the complaint should be amended and disclosure made early and often so the complaint and disclosure are detailed and up-to-date.[20] While unfruitful in *Van Dyck*, seeking a working relationship with the government early on in the proceedings may lead to a global settlement of the criminal and *qui tam* actions. Presently, the only remedy for spurned relators may be to seek a "claw back" from the government in the *qui tam* action.[21]

ENDNOTES

(1) *Justice Department Recovers Over $4.7 Billion From False Claims Act Cases in Fiscal Year 2016*, U.S. Dept. of Justice (Dec. 14, 2016), https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016. From 2009 to 2016, the total recovery is $31.3 billion. *Id.*

(2) *Id.*

(3) *Id.*

(4) *Rockwell Int'l Corp. v. United States*, 549 U.S. 457, 463 n.2 (2007).

(5) 31 U.S.C. § 3730(d)(1).

(6) 31 U.S.C. § 3730(d)(2).

(7) 31 U.S.C. § 3730(c)(5).

(8) Relators in 2015 recovered $1.174 billion where the government declined to intervene. *Fraud Statistics - Overview*, U.S. Dept.

of Justice (Dec. 13, 2016), https://www.justice.gov/opa/press-release/file/918361/download. In 2016, relators recovered approximately $105 million in Government declined *qui tam* cases. This is a 91% decrease. The share of the relator awards also declined from $336 million in 2015 to $28 million in 2016, a 92% decrease. *Id.*

(9) *United States v. Van Dyck*, 866 F.3d 1130 (9th Cir. 2017).

(10) *Id*. at 1135.

(11) *Id*. at 1134.

(12) *Id.* at 1136.

(13) *Id.* at *1135* ("Relators argue that Van Dyck may be judgment proof by that time. That may well be a practical concern, but it does not provide Relators with the right to intervene in a criminal action. Rather, they must establish their right to the proceeds through an authorized legal proceeding. The question of collection on a judgment is separate from an intervention right.").

(14) *United States ex rel. Barajas v. United States*, 258 F.3d 1004, 1006 (9th Cir. 2001).

(15) *Id. at* 1011. The *qui tam* action at the center of *Barajas* was actually a second *qui tam* action filed by the relator against Northrup. The government intervened in the first *qui tam* action, which alleged a different fraud arising from the same set of facts.

(16) Thomas L. Harris, *Alternate Remedies & the False Claims Act: Protecting Qui Tam Relators in Light of Government Intervention and Criminal Prosecution Decisions*, 94 Cornell L. Rev. 1293 (July 2009) (discussing the issue and the few cases on point); *United States v. Couch*, 2017 U.S. Dist. LEXIS 109466, *4 (S.D. Ala. July 13, 2017) (noting that the "Eleventh Circuit has not addressed whether a criminal action can qualify as an 'alternate remedy' under the FCA and a review of the [cases] that have addressed the issue provides no consensus or clarity").

(17) *United States ex rel. Bledsoe v. Cmty. Health Sys.*, 342 F.3d 634, 647 (6th Cir. 2003) ("We hold that 'alternate remedy' refers to the government's pursuit of any alternative to intervening in a relator's qui tam action.").

(18) *United States v. Bisig*, 2005 U.S. Dist. LEXIS 38316, *21 (S.D. Ind. Dec. 21, 2005) (United States argued that failure to name the defendant in the *qui tam* complaint was fatal to recovery); *Bledsoe*, 342 F.3d at 643 (failure to properly plead where complaint "did not specify the names of any individuals involved in the improper billing, save" one person and complaint "often states that 'Defendants' engaged in certain practices, without ever specifying the defendants to which it was referring.").

(19) *Bledsoe*, 342 F.3d at 643 (insufficient particularity found where "complaint failed to set forth dates as to the various FCA violations or any particulars as to the incidents of improper billing Relator supposedly witnessed first-hand").

(20) *See, e.g., United States ex rel. Hefner v. Hackensack Univ. Med. Ctr.*, 495 F.3d 103, 111-12 (3d Cir. 2007) (denying an alternate remedy claim because the complaint and disclosure contained insufficient facts).

(21) *See United States v. Van Dyck*, 866 F.3d 1130, 1135 fn.3 (9th Cir. 2017) ("[T]here is nothing that necessarily prohibits Relators from asserting in their qui tam action that they are entitled to a portion of the forfeited funds to the extent that Van Dyck is entitled to a damage credit in that action.").

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