

# Supreme Court Raises Critical Qui Tam Issues in Surprise Move

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The Supreme Court, not known for last minute surprises, threw out a big one in November. It was hearing (on November 29) a case involving whether a state is a proper defendant in a *qui tam* suit under the federal False Claims Act. The case, *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, although quite relevant to the affected state and other potential state defendants, had little significance beyond this well-defined issue.

On November 19, just ten days before the argument, the Court issued a cryptic, one paragraph order, asking the parties to address the question of whether a *qui tam* relator (otherwise known as a whistleblower) has standing to pursue a *qui tam* complaint at all. The Court did not change the oral argument date, and asked for briefs on the issue to be submitted the day **after** the argument.

The Court's action raises a critical question: is the *qui tam* provision of the False Claims Act constitutional? Speculation has run rampant since the Court's Order. One school of thought has held that the Court issued its order in response to a ruling the week before, from the Fifth Circuit in *Riley v. St. Luke's Hospital*, that a *qui tam* relator could not proceed with a False Claims action if the government declined to intervene. (The Fifth Circuit then immediately vacated its own decision, pending en banc review).

Another school of thought asserts that the Court wanted to visit this fundamental issue, knowing that it would get a case on the question eventually, to address the question promptly. This school also posits that the order reflects efforts by parts of the Court, led by Justice Scalia, to overturn Congressional action (largely in the environmental area) enabling citizens to do the work of government.

The *qui tam* provisions of the False Claims Act have been in existence since the Civil War, and earlier versions were in effect at the time of the drafting of the Constitution. In the last ten years, since the passage of False Claim Act amendments in 1986, designed specifically to invigorate the *qui tam* provisions, the statute has been an enormous tool in the battle against fraud. In the late 1980s, the focus of attention was on the defense contractor industry. Now, health care defendants are the primary recipients of *qui tam* allegations. The government has recovered approximately \$2 billion in actions filed by *qui tam* relators since the 1986 amendments.

The Supreme Court oral argument did not do much to illuminate the rationale behind the Court's Order. A decision is expected this spring. If the Court rejects the constitutionality of the *qui tam* provisions, expect a vigorous debate on how Congress can redesign this mechanism to allow whistleblowers to bring allegations to the attention of the government.