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Recommended Citation

J. S. Ott, *Qui Tam Actions for Citizen Enforcement of the Refuse Act of 1899 against Polluters*, 21 Clev. St. L. Rev. 182 (1972)
available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol21/iss1/20>

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Qui Tam Actions for Citizen Enforcement of the Refuse Act of 1899 Against Polluters

J. S. Ott*

IT MAY BE POSSIBLE for private citizens to enforce the Refuse Act of 1899¹ when prosecutors refuse to act.² This is possible, proponents suggest, by applying the ancient theory of *qui tam* to criminal sanctions in the Refuse Act. So far, the scheme has met with no reported judicial approval.

History

A *qui tam* action is defined as:

. . . A civil action brought by an informer, *under a statute which establishes a penalty for the commission or omission of a certain act, and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such action and the remainder to the state or some other institution; and is so called because the plaintiff states that he sues as well for the state as for himself. A qui tam action is civil action.*³ (emphasis added)

Three sections of the Refuse Act⁴ are applicable to the question of whether a *qui tam* action lies. Section 407 defines the unlawful act: It is unlawful to throw, discharge, or deposit from any ship, barge, or floating craft or from the shore, "any refuse matter of any kind or description whatever" into any navigable water or into any tributary of any navigable water; neither is it lawful to place material on the bank of a navigable water or tributary where it may be washed into the water. "Refuse" includes all foreign substances and pollutants apart from those "flowing from streets and sewers and passing therefrom into a liquid state into the water course."⁵

Section 411 establishes the penalty for violation of Section 407:

Every person and every corporation that shall violate, or that shall knowingly aid, abet, authorize, or instigate a violation of the provisions . . . shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$2,500 nor less than \$500, or by imprisonment . . . for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court, *one half of said fine to be paid to the persons giving information which shall lead to conviction.*⁶ (emphasis added)

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¹ Section 13 of the Rivers and Harbors Act of 1899 (30 Stat. 1151) is commonly called the Refuse Act.

² BRECHER AND NESTLE, ENVIRONMENTAL LAW HANDBOOK 228 (1970).

³ 1 C.J.S. *Actions* § 23; BLACK'S LAW DICTIONARY 1414 (4th ed., 1951).

⁴ 33 U.S.C. §§ 407, 411, 413 (1964).

⁵ U.S. v. Standard Oil Co., 384 U.S. 224, 230 (1966).

⁶ 33 U.S.C. § 411 (1964).

Section 413 establishes the procedure for prosecuting alleged offenders:

The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions . . . ; and it shall be the duty of the United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army⁷

In attempting to perfect a *qui tam* action under the above provisions, proponents rely in part on English history. English governments as far back as the Dark Ages, the 14th and 15th centuries, relied upon citizen participation in law enforcement by authorizing *qui tam* actions. This was due to the absence of adequate professional police forces and an adequate prosecutorial administration, and often because of Parliament's lack of confidence in the Crown's intention to enforce the law.⁸ In this country, Mr. Justice Black noted in 1942, *qui tam* suits have been "frequently permitted by legislative action, and have not been without defense by the courts."⁹ The Supreme Court observed in 1905:

Statutes providing for actions by a common informer, who himself had no interest whatever in the controversy other than that given by statute, have been in existence . . . in this country ever since the foundation of our government.¹⁰

The court again recognized in 1943 that "*qui tam* suits have been frequently permitted by legislative action"¹¹ A number of Federal statutes authorize *qui tam* action by the common informer.¹² As late as 1970, the Hudson River Fisherman's Association was granted \$2,000, under the 1899 Rivers and Harbors Act, for exposing polluters of the Hudson River.^{12a}

The question is: Did Congress, by allowing the payment of one half of the fine in Section 411, give citizens the right to bring *qui tam* actions to enforce the Refuse Act?

Rationale Favoring Qui Tam Actions

The Conservation and Natural Resources Subcommittee report¹³ encourages citizens to initiate *qui tam* actions. Such encouragement followed a public exchange between the United States Justice Department and Congressman Henry S. Reuss (D-Wis.), chairman of the subcommittee. The dispute erupted in June, 1970, when Congressman Reuss queried the Justice Department about its policy for enforce-

⁷ 33 U.S.C. § 413 (1964).

⁸ U.S. House of Representatives, Conservation and Natural Resources Subcommittee of the Committee on Government Operations, *Qui Tam* Actions and the 1899 Refuse Act: Citizen Lawsuits Against Polluters of the Nation's Waterways 2 (1970).

⁹ *Marcus v. Hess*, 317 U.S. 537, 541 (1942).

¹⁰ *Marvin v. Trout*, 199 U.S. 212, 225 (1905).

¹¹ *Marcus v. Hess*, 317 U.S. 537, 541 (1942).

¹² *Supra* note 8, at 3.

^{12a} N. LANDAU & P. RHEINGOLD, *THE ENVIRONMENTAL LAW HANDBOOK* 55 (1971).

¹³ *Supra* note 8, at 3.

ment of the Refuse Act.¹⁴ In reply, Assistant Attorney General Shiro Kashiwa wrote that it would not be in the "genuine interest" of the federal government to prosecute a company which is discharging refuse into a river but which also is spending large sums to secure abatement of that pollution under a federal agency's program. Mr. Kashiwa wrote:

It is patent that the Refuse Act is not and cannot be the weapon of choice in the armament of antipollution law in all instances; thus, prosecutive discretion is always essential and must take into account the possible effects which the use of the Refuse Act might have upon the programs of other agencies concerned with the broad program.¹⁵

Congressman Reuss replied:

If the Justice Department winks at the industrial polluter who violates . . . the Act, there will be no incentive to get a Corps (of Engineers of the United States Army) permit and comply with water quality standards as the law requires. . . . It is folly to allow the polluter regardless of the sums of money he may be spending now for pollution abatement, to disregard the prohibition against such discharges under the Refuse Act.¹⁶

In July, 1970, the Justice Department solidified the position enunciated by Mr. Kashiwa. The department disclosed "guidelines" limiting antipollution suits United States Attorneys may bring under the 1899 Refuse Act. The guidelines encourage United States Attorneys "to punish or prevent significant discharges, which are either accidental or infrequent," but they may not on their own use the act to punish or prevent significant discharges which are "of a continuing nature resulting from the ordinary operations of a manufacturing plant."¹⁷ The guidelines assert that the latter type of discharges are "precisely the type that Congress intended the Federal Water Quality Administration should handle." The guidelines further state the Justice Department policy is "not to attempt to use the (Refuse) Act as a pollution abatement statute in competition with the Federal Water Pollution Control Act."¹⁸

Conservation forces reacted vigorously. Among the most vocal was Congressman Richard L. Ottinger (D-NY), who threatened a suit to compel the United States Attorney General to enforce the 1899 Refuse Act against industrial polluters. He called the Department of Justice guidelines¹⁹ a "double standard of law enforcement."²⁰

¹⁴ 1 BNA ENVIRONMENT REPORTER: CURRENT DEVELOPMENTS 157 (1970).

¹⁵ *Id.* at 158.

¹⁶ *Id.* at 138.

¹⁷ *Id.* at 288.

¹⁸ *Id.*

¹⁹ The following provisions of the guidelines relate directly to citizen actions:

8.A. Since citizens who supply information relating to violations of the Refuse Act may be entitled to be paid one half of the fine collected upon conviction for such violation, United States Attorneys will keep records of all actions initiated pursuant to information supplied by citizens keeping in mind that they may be called upon to recommend to the court for or against payment of bounties.

(Continued on next page)

In September, 1970, Congressman Reuss' subcommittee reported on *qui tam* actions as a means of citizen enforcement of the Refuse Act:

In this country today, when the Justice Department is apparently reluctant to vigorously enforce the Refuse Act, the citizen informer who brings a civil *qui tam* suit under the Act performs a very useful and essential function.²¹ The report adds that the Corps of Engineers, which investigates alleged violations, and the Department of Justice, which prosecutes them, do not have funds or personnel "to do battle in court with the thousands of industries in this country which are unlawfully discharging wastes into our navigable waters . . ."²² The report also notes, referring to the English Dark Age heritage, that *qui tam* statutes were first passed "in circumstances such as this."²³

Judicial Response to Attempted Enforcement of the Refuse Act Through Citizen Lawsuits

Since October, 1970, there have been four *qui tam* actions reported. Each has been dismissed.

*Durning v. ITT Rayonier, Inc.*²⁴ was a suit by a Seattle attorney and his wife on behalf of the United States against a paper company under the criminal provisions of the Refuse Act. Plaintiff contended that the last clause of Section 411 granted him the right to sue, claiming the Congressional enactment implied that a civil action by an informant is permissible if the informant seeks to receive his "bounty." In a brief opinion, Judge Goodwin held:

This court concludes that Congress in enacting this criminal statute intended to reward an informant leading to the conviction of the wrongdoer and not to provide a means by which an informant may proceed to recover against the violator of the criminal statute the amount he might otherwise receive from a fine which "might" be imposed after conviction of the defendant in a criminal proceeding. If plaintiff's contention is correct, the court would be in the awkward position of determining priority between a criminal prosecution by the United States through the United States Attorney and a civil suit under the same action by an informant. It would

(Continued from preceding page)

8.B. Where a United States Attorney is advised by a citizen of an alleged violation of which he already has notice, he shall promptly so advise the citizen.

8.C. Citizens who in general terms inform the United States Attorney of Refuse Act violations should be advised that they can be eligible to receive the bounty provided for under the Act only upon their supplying specific information concerning the alleged violations, which information is either used as the basis for a criminal complaint or in the trial of the case, and results in a conviction and the levying of a fine.

9. United States Attorneys should take no position with respect to, or seek to intervene or appear as *amicus curiae* in any *qui tam* action which may be brought under the supposed authority of the Refuse Act.

1 BNA ENVIRONMENT REPORTER: CURRENT DEVELOPMENTS 157 (1970).

²⁰ *Id.* at 157.

²¹ *Supra* note 8, at 11.

²² *Id.*

²³ *Id.*

²⁴ 2 BNA ENVIRONMENT REPORTER: DECISIONS 1170 (W.D. Wash. 1970).

be unreasonable to conclude that a court would entertain both actions simultaneously and consecutively.²⁵ (emphasis added)

The court in *Bass Anglers v. U. S. Steel*²⁶ used a great deal more legal analysis in arriving at its decision that there was an absence of any right in the plaintiff to maintain the action under Sections 407 and 411 of the Refuse Act. "Plaintiff relies solely upon the last phrase of Section 411 allowing a person furnishing information leading to conviction to share in any fine imposed as a basis for implying some private right of enforcement," the court wrote. "Such an implication runs counter to the clear import of the statute which establishes a reward but not a right of private enforcement."²⁷

In a per curiam decision, the three-judge court held: (a) Criminal statutes cannot be enforced by civil actions. The court cited *United States v. Clafin*,^{27a} which dealt with violation of an importation statute, and the government brought an action of debt against the defendant. The court held, "That Act contemplated a criminal proceeding, and not a civil action of debt. It imposed a penalty. . . . It is obvious, therefore, that its provisions cannot be enforced by any civil action. . . ."²⁸ Any attempt to impose criminal sanctions by way of civil procedures raises serious constitutional problems dealing with double jeopardy, the court in *Bass Anglers v. United States Steel* noted.

(b) Criminal statutes can only be enforced by the proper authorities and a private party has no right to enforce these sanctions. *Keenan v. McGrath*,^{28a} explains:

Not only are we unaware of any authority for permitting a private individual to initiate a criminal prosecution in his own name in a United States District Court, but also to sanction such a procedure would be to provide a means to circumvent the legal safeguards provided by persons accused of a crime, such as arrest by an officer on probable cause or pursuant to a warrant, prompt presentment for preliminary examination by a U. S. Commissioner or other officer empowered to commit persons charged with offenses against the United States. . . .²⁹

(c) Plaintiff's denomination of the suit as a *qui tam* action does not give him a right to enforce a criminal statute. The court noted that plaintiff cited many cases but none approved a *qui tam* action to collect a criminal fine. All involved civil penalties or forfeitures. The right of *qui tam* action originates in statute, rather than from a statutory right to share in the penalty. It arises from "the express or implied statutory grant of authority to maintain the action."³⁰

²⁵ *Id.* at 1171.

²⁶ *Bass Angler v. U. S. Steel*, 2 BNA ENVIRONMENT REPORTER: DECISIONS 1204 (D. Ala. 1971).

²⁷ *Id.* at 1205.

^{27a} 97 U.S. 546 (1878).

²⁸ *Id.* at 547.

^{28a} 328 F. 2d 610 (1st Cir. 1964).

²⁹ *Id.* at 611.

³⁰ *Bass Anglers v. U. S. Steel*, 2 BNA ENVIRONMENT REPORTER: DECISIONS 1204, 1206 (D. Ala. 1971).

(d) Even where some statutory language seems to grant a private right of action, if the same or a related statute also clearly places enforcement in the hands of governmental authorities, the right of action is exclusively vested in such government authority.³¹ Of course, Section 413 vests the authority for enforcement in the United States Department of Justice.

*Bass Anglers v. U. S. Plywood*³² analyzed the factual-legal relationship much as the Alabama court did in the previous case, and it discounted an additional argument advanced by plaintiff. Although Section 411 does not specifically authorize the *qui tam* action, plaintiffs argued that it does not specifically deny the action either and under these circumstances should be construed to impliedly authorize such a suit. Plaintiffs cited Justice Black's dictum in *United States v. Hess*:³³

Statutes providing for a reward to informers which do not specifically either authorize or forbid the informer to institute the (*qui tam*) action are construed to authorize him to sue.

"Justice Black's dictum would appear to state the law too broadly," Judge Seals wrote. He held that *qui tam* action depends entirely upon statutory authorization, as it has never found its way into the common law. Furthermore, he wrote that Justice Black's construction "obviously is inappropriate," unless the statute is silent as to whether the *qui tam* action is authorized, and nothing can be gleaned concerning congressional intent from the circumstances surrounding the passage of the statute.³⁴ Judge Seals held that the language of Section 411 of the Refuse Act indeed rules out the *qui tam* proceeding, for the statute provides that the informer is entitled to part of the fine only upon the conviction of the person violating Section 407:

The informer's rights depend upon (1) a criminal proceeding being brought under Section 411; (2) a conviction being obtained in the criminal proceeding; and, (3) the convicting court imposing the fine as punishment for the offense. The informer's rights therefore are entirely dependent upon and inseparable from the criminal proceeding brought by the Department of Justice, the party authorized to institute such suit. Clearly, then, the *qui tam* civil action is not authorized.³⁵

Congressman Reuss' personal lawsuit to institute a *qui tam* action, *Reuss v. Moss-American*,³⁶ also was dismissed for failure by plaintiff to show standing to sue. The court relied upon analyses in *Durning v. ITT Rayonier, Inc.* and the two *Bass Anglers* cases in arriving at its decision.

³¹ *Id.*

³² 2 BNA ENVIRONMENT REPORTER: DECISIONS 1298 (S.D. Tex. 1971).

³³ *Marcus v. Hess*, 317 U.S. 537, 541 at n. 4.

³⁴ *Bass Anglers v. U. S. Plywood*, 2 BNA ENVIRONMENT REPORTER: DECISIONS 1298, 1301 (S.D. Tex. 1971).

³⁵ *Id.*

³⁶ 2 BNA ENVIRONMENT REPORTER: DECISIONS 1259 (E.D. Wis. 1971).

Conclusion

Americans have recognized in the last few years a general environmental crisis. As Judge Seals noted in *Bass Anglers v. U. S. Plywood*,³⁷ there is a growing realization that the ecological scales are in danger of being so uncontrollably tipped, if they have not already been so disturbed, that all life forms, including man, will perish. There is a popular demand that the accelerating trend of environmental degradation be abated and where feasible, reversed. President Nixon has repeatedly urged that we must "act now."³⁸ From 1968 to 1970 some 500 bills and amendments dealing with environment issues were introduced in Congress. One commentator wrote that this is without doubt the highest concentration of Congressional fire on a single issue ever experienced within such a short period of time.³⁹

Against this groundswell of popular and political support, zealous proponents of environmental programs have turned for satisfaction to the judicial system when various legislative and administrative agencies have failed to react either favorably or with apparent urgency. This would seem to be the situation regarding the theory of instituting *qui tam* actions to enforce criminal sanctions of the Refuse Act. The United States Department of Justice, charged with prosecuting alleged offenders of the Refuse Act, was not prosecuting with enough vigor to satisfy some persons anxious to end industrial pollution of navigable waters. Neither was the Corps of Engineers, which is charged with gathering evidence to prosecute, moving expeditiously enough. The Justice Department had indicated a reluctance to transgress into an area of enforcement it felt Congress had reserved for the Federal Water Quality Administration. Proponents turned to the courts for a speedy remedy in the form of *qui tam* actions.

The courts, singularly unimpressed by political theatrics (i.e., "do battle in court with thousands of industries"⁴⁰), have applied sound legal reasoning in rejecting the *qui tam* theory as it was being related to Refuse Act enforcement. Criminal statutes cannot be enforced by civil actions; criminal statutes can only be enforced by the proper authorities and a private party has no right to enforce these sanctions; the right of *qui tam* action originates in statute, rather than from a statutory right to share in the penalty; if the statute clearly places enforcement in the hands of government authorities, the right of action vests exclusively in that authority.⁴¹ This writer found no authority which would diminish the viability of these legal doctrines.

³⁷ 2 BNA ENVIRONMENT REPORTER: DECISIONS 1298, 1299 (S.D. Tex. 1971).

³⁸ State of the Union Message, January 22, 1970; remarks in St. Louis, Missouri, June 25, 1970, before United States Junior Chamber of Commerce.

³⁹ Farrell, *Let the Polluter Beware*, 75 CASE AND COMMENT 3 (1970).

⁴⁰ *Supra* note 8, at 11.

⁴¹ *Bass Anglers v. U. S. Steel*, 2 BNA ENVIRONMENT REPORTER: DECISIONS 1204 (D. Ala. 1971).

Notwithstanding the need for halting or reversing pollution of the nation's waters, the position of the courts is highly desirable as public policy. The possible consequences of allowing private citizens, in effect, to become public prosecutors by enforcing criminal statutes through civil lawsuits could be extremely prejudicial to the defendant's rights,⁴² and could raise serious constitutional questions.⁴³ The proper avenue for enforcement is through administrative officers, and if these officers or their organizations fail to perform their duty to the satisfaction of citizens there is proper legal and legislative remedy available. It would be folly for the judicial system to support weak legal authority, as has been advanced in favor of *qui tam* actions to enforce the Refuse Act of 1899, in view of the strong legal authority to the contrary, and the fact there is appropriate remedy available, albeit less expeditious.

⁴² Keenan v. McGrath, 328 F. 2d 610 (1st Cir. 1964).

⁴³ Bass Anglers v. U. S. Steel, 2 BNA ENVIRONMENT REPORTOR: DECISIONS 1204 (D. Ala. 1971).